





1 MR. HARNESS: Okay. On the record, please.

2 Good morning, everybody. Welcome to today's  
3 Public Comment Forum. My name is Doug Harness. I'm an  
4 attorney with the Western Area Power Administration in  
5 our corporate services offices in Lakewood, Colorado.

6 This Public Comment Forum has been scheduled to  
7 give interested parties the opportunity to make oral  
8 presentations or to submit written comments for the  
9 record on the marketing criteria proposed by Western to  
10 allocate federal power from the resource pool (identified  
11 as Schedule E) established by the Hoover Power Allocation  
12 Act of 2011 for the Boulder Canyon Project.

13 The proposed criteria were published in the  
14 Federal Register on February 20th, 2012.

15 In addition to today's forum, written comments  
16 may be submitted by mail to Mr. Darrick Moe, Regional  
17 Manager, Desert Southwest Region, Western Area Power  
18 Administration, P.O. Box 6457, Phoenix, Arizona,  
19 85005-6457.

20 You may also fax comments to Western at area  
21 code 602-605-2490 or e-mail them to [post2017BCP@wapa.gov](mailto:post2017BCP@wapa.gov).  
22 Western will accept written comments received on or  
23 before January 11th, 2013. Western reserves the right to  
24 not consider any comments received after this date.

25 A verbatim transcript of today's forum is being

1 prepared by our court reporter. Everything said while  
2 we're in session today, together with all exhibits, will  
3 be part of the official record.

4 The transcript of today's forum will also be  
5 available for review on-line at [www.wapa.gov/dsw/pwrmtk](http://www.wapa.gov/dsw/pwrmtk)  
6 under the Boulder Canyon Project Remarketing effort link.

7 The transcript and the complete record of this  
8 public process will also be available at Western's Desert  
9 Southwest Regional office and Western's corporate office.

10 Additionally, a copy of the transcript will be  
11 available upon payment of the required fee to the court  
12 reporter. The court reporter's contact information is  
13 available upon request.

14 All comments made today should be relevant to  
15 the proposed marketing criteria. Any relevant materials  
16 to be introduced into the record should be given to the  
17 court reporter, and she will assign it an exhibit number.

18 After the close of the comment period, Western  
19 representatives will review all the information,  
20 comments, and exhibits that have been received with  
21 regard to the proposed criteria.

22 Western will then announce a decision in the  
23 Federal Register. Comments made during this public  
24 process will be discussed in this announcement.

25 I'll open the floor in just a minute. I would

1 ask once you've been recognized, if you would, please,  
2 give your name and the name of any organization that you  
3 represent, and for the convenience of the court reporter,  
4 please spell your name, your last name.

5           In addition, if you have a copy of your  
6 presentation, please give it to the court reporter. And  
7 if you would, let's use the microphone today, since we're  
8 in a fairly big room, and so everybody can hear,  
9 including our court reporter.

10           Finally, please keep in mind that Western has  
11 no presentation this morning and will not be answering  
12 questions. The sole purpose of this forum is to take  
13 your comments.

14           So the floor is open. And who would like to  
15 provide comments?

16           Mr. Fant?

17           MR. FANT: Doug Fant, F-a-n-t, for the Arizona  
18 Power Authority.

19           We are a federal contractor at Hoover Dam. We  
20 also participated in the negotiations which culminated in  
21 the passage of the Hoover Power Plant -- Hoover Power  
22 Allocation Act of 2011.

23           Just some short comments; no written materials.

24           I believe the standards proposed by Western in  
25 the Federal Register notice are not the proper standards

1 for the allocation of power at Hoover Dam.

2           The Boulder Canyon Project Act of 1928 is a  
3 unique -- unique act, and it has a statutory allocation  
4 scheme that's contained in section five of the -- of the  
5 act.

6           Section five states the various parties who can  
7 apply for power at Hoover Dam. First, I believe section  
8 five says the states have a super -- super priority and  
9 can apply directly for the power.

10           But if the states don't apply for the power,  
11 then the priority drops to a series of parties which are  
12 named in the -- in section five.

13           In negotiations, Native Americans -- or I  
14 should say federally-recognized tribes is the proper  
15 language -- were included in the Power Plant Act of 2011.  
16 It was Arizona who brought up that concept.

17           California would not go along with the  
18 inclusion of federally-recognized tribes in the Boulder  
19 Canyon Project Act of 1928 unless they came in as equals.  
20 And they said that as a matter of California law, from  
21 their perspective, they wouldn't agree.

22           I can't remember honestly about this position.  
23 I think they were neutral on this issue. But in order  
24 for California to -- to agree to the inclusion of the  
25 federally-recognized tribes, they had to come into

1 section five as equals with the other parties.

2           So I just wanted to mention that. And I'll put  
3 this in my written comments, which we'll -- we'll provide  
4 by January 11th.

5           Thank you.

6           MR. HARNESS: Thank you.

7           MR. LYNCH: Good morning. My name is Bob  
8 Lynch, L-y-n-c-h. And I am appearing here today on  
9 behalf of the Irrigation and Electrical Districts  
10 Association of Arizona, emeritus and associate members  
11 who contract for power from Hoover Dam under the Hoover  
12 Plant Allocation Act for the past few years and the Power  
13 Authority. So obviously, we have a rather significant  
14 interest in this process.

15           I have given the court reporter a copy of the  
16 questions and the responses that were provided to us by  
17 Mike Simonton by e-mail on the 14th of this month, and  
18 asked that they be inserted in the record as an exhibit  
19 and testimony.

20           Let me start off by saying that I think that  
21 you have to be planning to get sued. Somewhere in this  
22 marketing area, somebody is going to be -- well, people  
23 are already mad, but people are going to be unhappy  
24 enough to grab a lawyer and file a complaint in Federal  
25 District Court.

1           And perhaps before you were born, I used to be  
2 your lawyer in the Justice Department, but -- and if I  
3 were your lawyer, I would be telling you that the record  
4 which you compiled so far is inadequate under the facts  
5 of the Arizona Procedure Act, and that the strategy that  
6 I perceive that you have taken, which is to not answer as  
7 many questions as possible, and be in a position to try  
8 to be flexible and sort of placate whomever you need to  
9 to keep peace in the family as you go along, isn't going  
10 to work.

11           Unfortunately, the law of untenanted  
12 consequences has hit the 2011 act squarely in the face.  
13 If I understand your criteria correctly, it only violates  
14 who can get Hoover D is in the Fort Mohave Indian  
15 reservation.

16           To the best of my knowledge, anybody who gets  
17 anything approaching utility authority within southern  
18 Nevada is already a COC customer, and I presume a person  
19 listening to the song being played heretofore.

20           But that's just an example of the problems I  
21 see that you face. And I'm not here to tell you how the  
22 cows eat cabbage. But I am here to tell you that if you  
23 are the cow you think who's got the cabbage, you may  
24 never get to it in the time frame that's allotted to you.

25           You've got 24 months. You've projected that

1 you will be finished with this allocation process in 18  
2 months. Litigation plans is not called that, as you well  
3 know. And so if I were your lawyer, I'd be saying to  
4 you, you need to beef up this record.

5           If you're going to go into the Federal District  
6 Court and try to stop a plaintiff from getting a  
7 temporary restraining order or preliminary injunction,  
8 you're going to have to have a pretty big record for that  
9 judge to see. The judge is going to be talking about  
10 something he or she has never heard of perhaps. And, you  
11 know, for whoever the poor U.S. attorney is who's going  
12 to have to defend you, it isn't going to be pretty.

13           So I would suggest that you take a real hard  
14 look at how you expand your record, and in doing so,  
15 answer some of the questions you have sort of answered,  
16 but not really answered.

17           And I must say I do appreciate the effort that  
18 you all made to try to answer the questions that were  
19 postulated, at least at the Phoenix Public Information  
20 Forum. I don't know about the others. In Tempe rather.  
21 But those answers just beget more questions.

22           So let me start at the top and go through these  
23 real briefly. Your first answer was to the question what  
24 is independently governed and financed? You answered the  
25 finance part, not the governing part.

1           What does independently governed mean when  
2 you're talking about a municipal water system? Does it  
3 mean it has to have a water board and not just a director  
4 that answers to the City Council? And which basically,  
5 you're saying that the utility is an enterprise fund.  
6 That's how the municipal governments talk about that.

7           And most water and sewer utilities in most  
8 cities and towns that are public utilities are enterprise  
9 funds; that is, that they survive on their feet. I  
10 frankly don't know what that does to the pool of folks  
11 who might apply, but I still think that you need to  
12 further sort this by addressing the governing part of  
13 this, since that is a standard that you are taking on it.

14           Later down on the first page, you're talking  
15 about the less than the whole megawatt and partial over  
16 allocation above the megawatt and uneven partial megawatt  
17 allocation of some kind.

18           And if I understand it, you're basically saying  
19 forget less than a whole megawatt because if we cut you  
20 back at all, it will be at zero. And if that's true,  
21 then you're basically saying to any potential allottee,  
22 if you get less than a megawatt in allocation, you're  
23 going to have to have some sort of pool, some sort of  
24 combination. It goes without saying that you will have  
25 to do that.

1           So when you're sorting out who might get those,  
2 it seems to me you ought to be looking at whether or not  
3 they can have friends. Are they stuck somewhere where  
4 there just isn't anybody else to deal with? Or are there  
5 others that due to transmission and the balancing area  
6 and other factors, they can affect the value so that you  
7 know what you're doing to these people before you do it.

8           You also say that the administrative burden for  
9 coordinating the schedule will be visited upon all the  
10 contractors. In other words, it will be a subsidy.

11           I'm not quite sure why that is true. Why  
12 aren't the administrative costs that Western has related  
13 to this particular problem allocated to the beneficiary,  
14 the beneficiaries that pays? If that can't happen for  
15 some reason, then I think it requires further  
16 explanation. And I would hope you would try to do that.

17           Moving along, to page two. We get the first  
18 iteration of what is an allottee. And allocations to  
19 existing customers to the APA and CRC are not expanding  
20 the availability of Hoover power to a described New  
21 Allottee.

22           Well, that isn't necessarily so. As you I'm  
23 sure know, CRC's customers went to the legislature and  
24 got their allocation and their right to renew under the  
25 statute. They're safe. No one in Arizona is safe.

1           The APA process puts every single current  
2 allottee under the APA for post-2017 allocation. So what  
3 if the APA says the heck with these people. We're going  
4 to line up a whole bunch of new folk. Then you've got 29  
5 entities, or maybe some of them, not all of them, who  
6 have no Hoover power in 2017.

7           And you have these other folk who have come  
8 into the APA process. The expansion you use as the  
9 yardstick for this answer has occurred in terms of what  
10 the APA has done, and would occur if you accepted  
11 applications from the current APA customers.

12           There would, in fact, be an expansion of -- of  
13 the process, just as A and B. We're not talking about D  
14 one or D two yet. There's absolutely no way that this  
15 ultimate process will not expand the number of people who  
16 have Hoover contracts, either directly through you or  
17 through the Arizona Power Authority and depending on  
18 whether the CRC is successful at their legislature of  
19 Nevada. So the parameters or views does not compute.

20           Moreover, if you were concerned that you gave  
21 an allocation, say, to the Central Arizona Project, and  
22 then they turned around and got an allocation from the  
23 Power Authority, you could make a withdrawal.

24           The original CRC allocations were parts of  
25 withdrawal under the CRC revision. The current and

1 former Parker-Davis allocations are partially  
2 withdrawable in favor of priority use power designated as  
3 per the project in the Parker-Davis Project in view of  
4 this.

5           So the concept works. You don't have to  
6 disenfranchise current APA customers. You put them at  
7 risk of being disenfranchised in 2017 totally from Hoover  
8 power. I would ask you to consider that.

9           Look as the precedent that you've established  
10 in other projects for using the withdrawability concept,  
11 and not leave 29 Power Authority contractors in Arizona  
12 in limbo.

13           On page three of the comments, the question was  
14 asked can Western provide a precedence example of  
15 aggregation used for Firm Electric Service? The answer  
16 was Eastern Arizona Preference Pooling Association.

17           We've got a problem with that. That was done  
18 with the authority of the 1939 Reclamation Project Act.  
19 Section 18 of that act. And you know that act is the  
20 culmination of your Arizona allocation authority that  
21 started pulling other parts of reclamation law together  
22 and established in section 89(C), the overall authority  
23 to allocate.

24           But section 18 of that act says that it does  
25 not apply to both. So that is not a proper example.

1           And the reason this is important, because  
2 you're basically telling anyone who gets less than a  
3 megawatt or a partial megawatt, better gather up friends  
4 or several friends, joint action agency, pooling  
5 association, something. But it has to be cognizable  
6 under the Boulder Canyon Project Act, the Adjustment Act,  
7 the '84 act and the 2011 act. Those are the laws that  
8 apply.

9           And you need to give us a better explanation of  
10 what your authority under those laws allows us to do in  
11 working together for such constructs as the joint action  
12 agency or a pooling association or some other construct.

13           Frankly, a lot of people are going to need your  
14 help on this and your guidance, and they're going to need  
15 it going in. Because the timeline is short, and people  
16 are going to be scrambling around trying to work together  
17 where they need to.

18           And then -- and they aren't going to have the  
19 time to propose something, to try to put it together,  
20 negotiate, sign contracts, go to you, and then be told  
21 well, we can't really do that. So I'm asking you to take  
22 a hard look at that issue.

23           Then we get back to the New Allottee thing.  
24 And I'm not an allottee myself. But in the answer on  
25 page three, you said that you looked at the legislative

1 history and the language contained within the 2011 act.

2           But you don't say what legislative history or  
3 what language. And I'm a little confused. Are you  
4 relying on the planned meeting doctrine in the language  
5 of the statute or are you relying on the legislative  
6 history? Because the statute is vague in this regard.  
7 And it's got to be one or the other. I mean, that's the  
8 law. And you know that.

9           And if you've got something more, which you  
10 obviously must have, I think you need to put it in the  
11 record. You need to let us know what it is. We all have  
12 a stake in this process being completed two years from  
13 now. And to the extent that we can analyze your thinking  
14 and decide whether we agree, frankly without guessing,  
15 all of us would be better off.

16           Over on page four. You begin talking -- you  
17 were trying to answer questions about new allottees, and  
18 Western's discretion to establish priorities.

19           I suppose somebody could say that your answer  
20 is they didn't tell us we couldn't do it; therefore, we  
21 can. But if the '39 act does not apply, and it doesn't  
22 by its own terms, then your discretion to create  
23 allocation criteria has to stem from the laws relating to  
24 the Boulder Canyon Project.

25           I do not believe that it is the general law

1 that you can act without direction from Congress. I  
2 don't think there's any inherent discretion in the agency  
3 with regard to the Boulder Canyon Project Act.

4           If there is -- I mean, and as I read this  
5 answer -- and I may be reading it incorrectly -- it  
6 doesn't say anything where we can't. And that would  
7 imply that there is some inherent discretion in the  
8 agency emanating from somewhere: Either the act itself  
9 or the 2011 act or otherwise.

10           And I think this is tends to be a target area.  
11 And I think that you would do yourselves a service by  
12 further explaining the rationale for the agency having  
13 discretion to establish the priorities that it has  
14 established and the criteria applicable to those  
15 priorities.

16           I asked a question in Phoenix about the  
17 difference between the 2016 deadline and the 2014  
18 deadline. And your response, in part, was you don't seem  
19 confident. But if you have to have a distribution system  
20 you own or lease by 2014, how can you not be ready,  
21 willing, and able, that is, having transmission and  
22 distribution arranged by 2016?

23           I don't get it. I still don't get it. And  
24 some further explanation is needed here, at least to help  
25 me. It might help some other people.

1           One of the things that has come out of this  
2 that, frankly, I didn't consider at the Public  
3 Information Forum, is whether or not a wholesale utility  
4 can be an applicant for D. It would appear that the  
5 question -- the answer to that question is no.

6           Now, where that gets to a point where you need  
7 some more clarification is if you form a joint action  
8 agency, and you're saying that if you have your combine,  
9 and the members of the combine have to meet eligibility  
10 criteria, what criteria does the combine itself have to  
11 meet?

12           If you're -- are you going to allocate to the  
13 combine? Are you going to allocate overall to the joint  
14 action agency as a wholesale entity that supplies power  
15 to the utility providers?

16           So is there a difference whether it's a  
17 political subdivision or a non-profit corporation? Or  
18 for that matter, a for-profit corporation? I suppose  
19 that would make a difference because it would be a  
20 preference entity listed at the top tier in all the three  
21 tiers you've established.

22           So, again -- and this is going to be important  
23 where partial megawatt allocations above or below one  
24 are -- are involved. I think we all need some better  
25 guidance from you about -- about what sort of

1 organization we need to think about that we're going to  
2 put together, and whether or not it can accept what  
3 amounts to a wholesale allocation to be redistributed to  
4 its members and that sort of thing.

5           So I would ask you to provide -- provide us a  
6 little more guidance on that.

7           Then to the issue of the one-year history. We  
8 talked about that at the Public Information Forum here in  
9 Tempe. As it relates to agriculture, it has a direct and  
10 obvious demonstrable impact.

11           If you use 2012, you're going to get lower  
12 figures than if you'd use 2011 when it didn't rain. Now,  
13 that's not the fault of the district supplying the  
14 electricity to farmers or the water. It's an act of God,  
15 if you will. It's nature. And yet, you have distorted  
16 figures.

17           Now, I understand you went through a process  
18 under the -- I forget the name of the law about  
19 simplifying paperwork, but -- and you've got a forum, and  
20 you got it approved, and it's a process.

21           But someone might say that since you did that,  
22 you just don't want to go back and have to do it again,  
23 even though there are obvious inequities. I mean, you  
24 don't have to be an agriculture supplier to have one year  
25 have an anomaly.

1           And I rather suspect that some of your other  
2 potential allottees for this have experienced those also.  
3 So it's two -- you know, if you have 2012 use parameters,  
4 you're going to have some folks saying this isn't fair.

5           Now, there's a way around that. You can ask  
6 for one year of data. You can agree that any potential  
7 allottee can supply other data for other years to make  
8 the case that there is some anomaly for the reference  
9 year, and that you would consider it.

10           Under the -- I guess it's the Paperwork  
11 Reduction Act. You're not saying they have to do  
12 something. They're not violating the act. But if they  
13 want to do it, they can. And you don't have to go back  
14 and change your forum. You don't have to go back and go  
15 through a bureaucratic process under the Paperwork  
16 Reduction Act.

17           All you have to do is give everybody an  
18 opportunity to tell you more if they want to. And I hope  
19 you will consider that as a possible fix to this  
20 inequity.

21           On the last page, there's more discussion about  
22 aggregations, and we've already talked about that. And  
23 I've already asked you for the guidance, I think, that  
24 potential allottees need.

25           So I will stop here, and hope that you will

1 take a hard look at these and other comments that you  
2 have received here, in California and Nevada, and the  
3 final criteria that comes out will give us some more help  
4 on what we have to do next.

5 Thank you.

6 MR. HARNESS: Thank you. More comments?

7 No more comments? Everybody's flinching, and  
8 I'm spinning around trying to see if that's an indication  
9 of anything or just a flinch.

10 All right. Last -- last call. Last chance.

11 Okay. Well, thank you. Seeing that no one  
12 else has indicated the desire to make any comments this  
13 morning, we're prepared to go off the record.

14 However, before doing so -- excuse me. I guess  
15 I should get over here.

16 Before doing so, I would ask that if you  
17 haven't already done so, to please sign the attendance  
18 roster that's on the tables outside the door, so we have  
19 an accurate attendance of today's attendance.

20 With that, again, we appreciate your coming  
21 today, and your participation and your interest in this  
22 process. So thank you very much, and Happy Holidays.

23 We'll go off the record.

24 (The proceedings terminated at 10:33 a.m.)

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I, DONNA FORD TERRELL, Certified Reporter  
#50250, having been first duly sworn and appointed as  
Official Court Reporter herein, do hereby certify that  
the foregoing pages constitute a full, true and accurate  
transcript of all the proceedings had in the above  
matter, all done to the best of my skill and ability.

DATED this 27th day of December, 2012.

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DONNA FORD TERRELL, RPR, RMR, RDR, CRR  
CERTIFIED REPORTER #50250