COMMENTS OF THE COLORADO RIVER COMMISSION OF NEVADA ON THE BOULDER CANYON PROJECT – POST 2017 RESOURCE POOL NOTICE OF PROPOSED MARKETING CRITERIA

PRESENTED BY

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LAS VEGAS, NEVADA

The Colorado River Commission of Nevada ("CRC"), speaking on behalf of the State of Nevada, appreciates this opportunity to submit oral comments to Western on its Notice of Proposed Marketing Criteria dated October 30, 2012. While the CRC plans to submit more extensive and detailed written comments next month, we offer the following, limited comments for the record in this proceeding.

Hoover is distinct from other federal projects; Hoover has been primarily allocated by Congress, not by administrative processes of Western or its predecessor. The adoption of the HPAA of 2011 by Congress did not give Western a green light to apply to Hoover power allocations its administratively established marketing criteria for other projects when those criteria are inconsistent with the directives of Congress. Nevada objects strongly to provisions of Western's October 30, 2012 FRN that attempt to apply to Hoover power the same marketing criteria that Western apply to other federal hydropower projects. Hoover power is unique among federal hydropower projects because its allocation has been made directly by Act of Congress. Western does not have the legal authority to apply to Hoover power the same set of priorities that it applies to other hydropower projects. Provisions of the FRN raising particular concerns for Nevada include:

1. Nevada objects to Western's proposal to apply priorities that give federally recognized Native American Tribes and cooperatives a higher priority than BCPA Section 5 entities. Nevada urges Western to change these priorities so all Section 5 eligible entities, including tribes, are treated with the same priority <u>status</u>, and cooperatives receive a lower priority:
    a. Since enactment of the Boulder Canyon Project Act in 1928, Section 5 entities have been uniquely eligible for Hoover power allocations. The Hoover Power Allocation Act of 2011 added tribes to the list of Section 5 entities eligible to receive Hoover power, BUT DID NOT give tribes any higher priority to receive Hoover power than other section 5 entities.
    b. The 2011 Act did not identify cooperatives as eligible to receive Hoover power allocations from Western.

2. Nevada objects to the omission of the word "States" in any priority designed to include municipalities and local political subdivisions. The Boulder Canyon Project Act (1928) states, in relevant part, that allocations must be made "to **States**, municipal corporations (or) political subdivisions,. . .." (Emphasis Supplied). It is impermissible for Western to carve out "States" for a lower priority than *their own* municipal corporations or political subdivisions. Municipal corporations and local political subdivisions are entities of the States; not the other way around. Congress has spoken; it is not within Western's prerogatives to establish sub-priorities which Congress chose not to establish.
3. Western should not apply an "electric utility status" requirement to Hoover allocations:
    a. An electric utility status requirement would deny access to Hoover power to Nevada applicants as new allotees because virtually all of Nevada's public entities in the BCP marketing area with electric utility status already receive Hoover power, and hence would not be eligible to apply as new allottees if the "electric utility status" requirement is retained. The "electric utility status" requirement, coupled with the Section 5 limitations, would effectively block Nevada entities from becoming a "new allotee" which is not consistent with Congressional intent in the HPAA of 2011. Nothing in the language or history of HPAA of 2011 suggests Congress intended to leave Nevada entities out of consideration as potential new allottees.
    b. Congress did not authorize application of any requirement other than that the new allottees must be "new" allottees (thus not currently receiving allocations of Hoover power) who are either Section 5 entities or tribes. Any further shrinking of the pool of potential Nevada-based new allottees by Western is not permissible.
    c. Congress certainly did not authorize Western to apply a discriminatory utility status requirement such as Western has proposed, under which tribes are not required to have utility status, while other Section 5 applicants are required to have utility status.

4. In addition, Nevada raises two procedural requests:
    a. Informal commenters have asked Western to include definitions of all key terms, otherwise undefined, in the FRN, e.g. "new allottee, and "other eligible applicants." Nevada supports this request.
    b. In view of the fact that the marketing criteria approved in this proceeding are designed to be applied for up to the next 50 years, we request that when they are re-issued they include the entire conformed criteria in a single federal register notice so that future Hoover customers and other interested parties need not look to more than one federal register notice to determine the full scope of applicable criteria.

GENERAL CONCLUSIONS:

Western must amend its proposed priorities and marketing criteria to reflect the Hoover-specific, unique statutory requirements. Western's administrative procedures cannot contravene or be inconsistent with a direct mandate of Congress - -- Western does not have the authority to exercise discretion when Congress gives Western an explicit direction regarding how an allocation should be performed. The Section 5 Congressional directive to allocate " . . . to States, municipal corporations (or) political subdivisions, . . ." and, since December 2011, to federally recognized Native American Tribes , is binding on Western. Western cannot properly and should not split the Section 5 entities into separate levels of priority.

Western should also reconsider the selective imposition of an "electric utility status" requirement for new allottees. That requirement is not mandated by Congress and is not applied to tribal and perhaps some other potential new allottees under the proposed marketing criteria. Nevada further believes the disparate impact on Nevada, noted earlier, makes this selective application of an "electric utility status" requirement both unsupportable and discriminatory toward Nevada, neither of which can be reasonably viewed as consistent with the intent of Congress in the 2011 HPAA.

Thank you, again, for this opportunity to submit oral comments on behalf of the CRC and the State of Nevada in this important proceeding.

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