Testimony Before The

Subcommittee on Water and Power,

Committee on Natural Resources

House Bill HR 4349

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Presented By

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on behalf of the

Inter Tribal Council of Arizona

1. Introduction

My name is Louis Manuel. I am Chairman of the Ak-Chin Indian Community ("Ak-Chin"). Ak-Chin is a member of the Inter Tribal Council of Arizona ("ITCA"). ITCA was established in 1952 to provide a unified voice for tribes in Arizona on common issues and concerns. The organization established a corporation in 1975 with twenty member tribes to provide a unified effort to promote Indian self-reliance through public policy at all levels. ITCA provides an independent capacity to obtain, analyze and disseminate information vital to Indian community self-development.

ITCA is comprised of 20 tribal governments in Arizona, including: Ak-Chin Indian Community, Cocopah Tribe, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Tribe, Gila River Indian Community, Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab-Paiute Tribe, Pascua Yaqui Tribe, Pueblo of Zuni, Quechan Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai Prescott Indian Tribe.

On behalf of ITCA and Ak-Chin, I thank the Committee for allowing us to come before you and share our concerns with respect to HR4349. This is the first formal opportunity for tribes to be involved in a discussion regarding the proposed solution presented in this legislation for addressing the remarketing of Boulder Canyon Project ("BCP" or "Hoover") power. Tribal governments appreciate the Committee's recognition that all parties affected by the remarketing of BCP power should have a place at the table and that their concerns should be heard. The tribes understand that existing BCP customers felt that a legislative solution to the remarketing of BCP power was appropriate. However, existing customers did not seek to include tribes in the development of the legislation.

I am submitting this written statement on behalf of ITCA and its members, including Ak-Chin, to address certain concerns that we have with respect to HR4349. My written comments will address the following specific sections of HR4349:

- Sec. 2. ALLOCATION OF CONTRACTS FOR POWER., (c) Schedule C Power (pages 3 – 4)

- Sec. 2. ALLOCATION OF CONTRACTS FOR POWER., (d) Schedule D Power (pages 4 - 6)

In addition, I will provide comments addressing issues relating to the allocation process and procedures that have not been addressed in HR4349. These issues are listed below:

- “Utility Responsibility” requirement
- Kilowatt allocations
- Tribes’ ability to receive the benefit of an allocation of Boulder Canyon Project power

ITCA has been working with a number of tribes in Arizona, California and Nevada regarding the remarketing of BCP. We have been unable to determine the exact number of tribes that fall within the BCP marketing area from the map that has been provided by the Western Area Power Administration (“Western”) (*See* Attachment A). We have requested from Western the list of tribes that are within the BCP marketing area but to date Western is still developing that list. In lieu of something more definitive from Western, we estimate that there are approximately 60 tribes located within the boundaries of Arizona and California as well as in southern Nevada and western New Mexico.

2. Federal-Tribal Government-to-Government Relationship

2.1. Law and Policy Background

The United States has a long history of government-to-government relations with Native American sovereigns dating from the founding of the nation. Among the United States’ first government-to-government acts was the signing of the Hopewell Treaties with the Cherokee Nation in1785 and the Choctaw and Chickasaw Nations in1786.

The Federal-tribal government-to-government relationship was affirmed by the United States Congress in the passage of the Indian Intercourse Act of1790 and the Indian Trade and Intercourse Acts from 1790 to1847, as well as the United States Supreme Court affirmation of the political relationship among the

United States and Indian governments in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). The Federal/tribal government-to-government relationship remains the bedrock principle underlying Federal/tribal interactions to this day.

In 1970, President Nixon set out a "national policy of self-determination for Indian tribes." In 1975, this policy became Federal law in the form of the Indian Self-Determination and Education Assistance Act.

In 1983, President Reagan announced an American Indian policy "reaffirming" the government-to-government relationship between tribes and the United States.

The Federal-tribal government-to-government relationship was again reaffirmed through the Presidential memorandum of President Clinton on April 29, 1994. On May 14, 1998 the President executed Executive Order 13084, formalizing policies for consultation and coordination with Indian tribal governments. President Clinton last acted on the issue by Executive Order 13175 on November 6, 2000.

On September 23, 2004, President George W. Bush issued the Executive Memorandum on *Government-to-Government Relationship with Tribal Governments* recommitting the Federal government to work with Federally-recognized Native American tribal governments on a government-to-government basis and strongly supporting and respecting tribal sovereignty and self-determination.

On November 5, 2009, President Obama signed a *Memorandum on Tribal Consultations* directing each Federal agency to submit an action plan detailing how the agency will meet the consultation requirements set out in Executive Order 13175.

Federal agencies including the Department of Energy have implemented their own policies in compliance with these directives. On January 20, 2006, Energy Secretary Bodman issued a memorandum to all DOE division heads establishing the agency's government-to-government policy directing its dealings with the nation's tribes. Section II of that policy specifically provides:

"The DOE recognizes Tribal governments as sovereign entities with primary authority and responsibility for the protection of the health, safety and welfare of their citizens. The Department will recognize the right of each Indian nation to set its own priorities and goals in developing, protecting, and managing its natural and cultural resources. This recognition includes separate and distinct authorities that are independent of state governments."

2.2. Issues with Legislation

HR 4349 provides that federally-recognized tribes, if they receive any Hoover output, must receive that power in Arizona and Nevada through two state entities instead of directly from Western.

Section 2(d)(2)(C) provides that:

"(ii) In the case of Arizona and Nevada, Schedule D contingent capacity and firm energy for new allottees shall be offered through the Arizona Power Authority and the Colorado River Commission of Nevada, respectively.

(iii) In performing its allocation of Schedule D power provided for in this subparagraph, Western shall apply criteria developed in consultation with the States of Arizona, Nevada and California."

2.3. Recommended Language Changes

These provisions must be redrafted to allow tribal governments to contract directly with Western for any power they receive and to also develop any "criteria" in direct consultation with Western. We suggest that the section be modified to read as follows:

"(ii) In the case of Arizona and Nevada, Schedule D contingent capacity and firm energy for new allottees, **except federally-recognized Indian tribes which shall be allocated directly through Western,** shall be offered through the Arizona Power Authority and the Colorado River Commission of Nevada, respectively.

(iii) In performing its allocation of Schedule D power provided for in this subparagraph, **except with respect to federally-recognized Indian**

tribes, Western shall apply criteria developed in consultation with the States of Arizona, Nevada and California. **For federally-recognized Indian tribes, Western will apply criteria developed in direct consultation with the federally-recognized Indian tribes.**"

3. Tribal-Only Pool

3.1. Precedent for Tribal Pool

Assuring Native American governments opportunities to contract for hydroelectric power output from Hoover is consistent with each Federal hydroelectric power project for which contracts have been offered since 1995. Western has specifically recognized the specific need to provide public power project output to tribes in its most recent reallocations of the Pick-Sloan and Colorado River Storage Projects in 2001 and 2004, respectively.

Furthermore, tribes inhabited the lands utilized by and contiguous to the Boulder Canyon Project long before it was even conceptualized.

No tribes currently receive Hoover power and only two have ever historically received this power; even these deliveries were small-scale and for a brief period. On this additional basis, tribes in the BCP service area are long overdue to receive a share of Hoover power output.

Finally, tribes operating their own utilities have load-serving obligations, creating the same resource planning and management demands as exist for any current BCP contractor. In the absence of a tribal-only pool, tribal utilities and tribes within the BCP service area will remain at a disadvantage to other entities historically receiving BCP power.

3.2. Issues with Legislation: No Tribal Set Aside

Although Section 2(d)(2)(C)(i) of the proposed legislation provides for allocations to "new [customers] located within the marketing area," the definition set out for those to be considered potential "new" customers does not ensure allocations to federally-recognized tribes. It instead provides for new allocations to:

> "new allottees located within the marketing area for the Boulder [Canyon] Project and that are --
>
> (I) eligible to enter into contracts under section 5 of the Boulder Canyon Project Act (43 U.S.C. 617d); *OR*
>
> (II) "federally recognized Indian tribes" (emphasis added).

Section 5 of the Boulder Canyon Project Act references

> "States, municipal corporations, political subdivisions and private corporations of electrical energy generated . . ."

3.3. <u>Recommended Language Changes</u>

These provisions must be redrafted to specifically establish a tribal pool that would direct BCP power output to new tribal customers through a contract solely with Western. We propose that the section be modified to read as follows:

> (I) ~~eligible to enter into contracts under section 5 of the Boulder Canyon Project Act (43 U.S.C. 617d); *OR*~~
> ~~(II)~~ "**federally recognized Indian tribes**".~~.~~

4. <u>Size of Tribal Pool</u>

4.1. <u>Need for Larger Tribal Pool</u>

To allow tribes to truly benefit from Hoover after so many years of being denied that opportunity in any meaningful way, we seek a dedicated 10 percent BCP power set aside for tribes, which is an increase of 6.67 percent over the 3.33 percent proposed in the legislation. This percentage is within range of percentages made available by Western in other public power projects in the last decade. On this basis and given that there could be as many as 60 tribes within the BCP marketing area, a 10 percent Hoover set aside for new tribal customers is warranted.

Attachment B displays the allocations and the percent changes from the 1984 allocations to existing customers and new allottees based upon the tribal proposal. The size of the pool based upon the proposed language in the

legislation is approximately 69 MWs. Assuming, only for example, that this was fully directed to tribes without regard to load, each tribe would receive on average only approximately 1 MW of capacity. This 1 MW average allocation is much too small to adequately address the future economic needs of tribes. In comparison, there are currently about 56 entities that receive BCP power either directly or through the Arizona Power Authority ("APA") or the Colorado River Commission ("CRC"). Of these 56 entities approximately 50 receive a capacity allocation greater than 1 MW; in fact, the average capacity allocation to each entity is about 35 MWs.

4.2. Issues with Legislation: Tribal Share Very Small

Section 2(d)(2)(A) of the proposed legislation provides for a "…resource pool equal to 5 percent of the full rated capacity.. ." Of this 5 percent, in Section 2(d)(2)(C) "…66.7 percent of Schedule D…" would be allocated to "new allottees located within the marketing area…" We have addressed the issue of "new allottees" in Item 3 above; here we are only addressing the size of the pool.

Table 1 below compares the Schedule D capacity of the tribal pool to the legislation. It should be noted that under the proposed legislation, existing customers see about a 1 percent increase in capacity and a 5 percent reduction in energy.

Table 1
Comparison of Schedule D Capacity Pool Size Per Legislation and Per Tribal Proposal

	Legislation	Tribal Proposal	Tribal Proposal Compared To Legislation - Increase / (Decrease)
Schedule D - Capacity	103,700 kW	241,930 kW	138, 230 kW
New Entities (Tribes Only) Allocated by the Secretary of Energy	3.33 % or 69,170 kW	10.00 % or 207,400 kW	6.67 % or 138,230 kW
New Entities Allocated by the States of Arizona, California and Nevada	1.67 % or 34,530 kW	1.67 % or 34,530 kW	0.00 % or 0 kW
Total Pool Percentage or Capacity	5.00 % or 103,700 kW	11.67 % or 241,930 kW	6.67 % or 138,230 kW

We are recommending that in addition to creating a 10 percent "tribal pool," the language contained in HR4349 establishing a 1.67 percent non-tribal pool be retained. The impact to existing customers would be a capacity reduction of approximately 6 percent and an energy reduction of approximately 11.7 percent. The capacity for the "tribal pool" would be about 207 MWs or, averaged across

every tribe equally, approximately 3.3 MWs for each. The existing customers' average would then reduce from 35 MWs to about 32 MWs.

4.3. Recommended Language Changes

This provision must be redrafted to create a more equitable "tribal pool." We suggest that the sections noted below within Section 2(d) should be modified to read as follows:

> (2)(A) "… Schedule A and Schedule B, as modified by the Hoover Power Allocation Act of 2009, a resource pool equal to ~~5~~ **11.67** percent of the full capacity of 2,074,000 kilowatts and associated firm energy…."
>
> and
>
> (C)(i) "…for delivery commencing October 1, 2017, for use in the marketing area for the Boulder City Area Projects ~~66.7~~ **10.0** percent of the **total** ~~Schedule D contingent~~ **BCP** capacity and firm energy to **federally-recognized Indian tribes** ~~new allottees~~…"

5. Tribal Allocation Procedure

5.1. Relationship with Western

As addressed in Item 2, tribal governments must have the opportunity to participate directly with Western in criteria formulation in accordance with DOE's tribal policy and to ensure that the allocations are managed consistent with tribal authority and Reservation circumstances such as the presence or lack of a utility, tribe-only power pooling, etc. Western has honored these considerations in all prior Federal hydropower reallocations and no deviation from such an approach is justified in the present instance.

5.2. Allocation Procedure Guidelines

Tribal governments suggest that the legislation incorporate specific guidelines for Western to follow as part of the process for contracting with tribes for an allocation of BCP power. The tribes have enjoyed a good relationship with Western and would expect that it would continue. As such, the tribes look forward to working with Western to address any process issues that may arise

during the allocating and contracting process. The tribes suggest the following guidelines be incorporated into HR4349:

- Follow the "Colorado River Storage Project (CRSP) approach" that no "utility responsibility" is required of tribes to receive a BCP allocation.
- Allocate based upon energy sold at the customer meter for tribal and/or Electric Tribal Utility Authority (ETUA) (referred to as "Tribal Load") with no tribe's percent of the total Tribal Load exceeding 10.0 percent, irrespective of other Federal resources contracted for by a Tribe and/or ETUA.
- Establish a Tribal Benefit Credit Pool (Tribal Pool) comprised of ETUA's. Tribes without an ETUA will enter into a Tribal Benefit Credit Agreement (TBCA) with the Tribal Pool to ensure that the BCP benefits remain within the tribal community.
- Any tribe that creates an ETUA automatically becomes a member of the Tribal Pool and becomes a participant in the TBCA.
- Allocate in kilowatts and not whole megawatts to allow tribes with smaller loads to participate

6. Schedule C - Excess Energy

6.1. Tribes Left Out of Sharing in Excess

In HR4349 on pages 3 and 4, Section 2(c)(2) addresses how excess energy will be allocated. However, it fails to explicitly address tribes. Excess energy is made available to the states of Arizona, California and Nevada. Tribal governments believe that the language should be modified to specifically address tribal participation in obtaining excess energy when it becomes available. It is difficult to identify any rationale for excluding tribes from excess power allocations.

If the assumption is that tribal governments would fall under the "state authority umbrella", then the error of that assumption is clearly established in law and precedent (See, Item 1 above). If the assumption is that the tribes are not eligible for excess power because they are not paying for such power, then the requirements of Sections 2(d)(E) and 2(g)(4) contradict such an assumption.

Section 2(d)(E) requires each "new allottee" to pay: "…a proportionate share of its State's respective contribution . . .to the cost of the Lower Colorado River Multi-Species Conservation Program . . . and to execute the Boulder Canyon Project Implementation Contract No. 95-PAO-10616. . ."

Section (2)(g)(4) of HR4349 requires that new customers pay a "pro rata share of . . . repayable advances paid for by contractors prior to October 1, 2017."

If tribal contractors are required to pay proportionate shares of the wildlife conservation costs identified under Section 2(d)(E), and to pay a pro rata of Hoover Dam repayable advances under Section 2(g)(4), then the tribes should receive a proportionate share of any excess energy available through Hoover. No prior rights in time should be awarded to current contractors, as tribes have not previously had the opportunity to receive Hoover power and would only continue to be penalized by such a grandfather privilege.

6.2. Recommended Language Change

We recommend that the existing language found in the chart on page 4 titled Schedule C, Excess Energy, be amended as shown below. This language change will ensure that tribes are treated fairly and equitably:

First: … . . [no change proposed]

Second: [no change proposed]

Third: Meeting the energy requirements of the three States and **the federally-recognized Indian tribes,** such available energy to be divided **proportionately** ~~equally~~ among the States and **the federally recognized Indian tribes**."

7. Non-Contracted Tribal Pool Allocations

7.1. Tribes Not Include In Non-Contracted Tribal Pool Allocation

As addressed in Item 3, we have recommended a tribal only pool. Should the Committee adopt this recommendation, the language found in Section 2(d)(2)(F) (page 8) would need to be modified to maintain the integrity of the tribal pool.

Any legislation adopted must provide that any non-contracted tribal pool allocation remain within the tribal pool and be distributed proportionately to the remaining tribal contractors.

7.2. Recommended Language Change

We recommend that the language be amended to specify that non-contracted tribal pool resources remain in the tribal pool and be allocated proportionately to the remaining tribal pool contractors. Below is the suggested change to the language:

> "(F) Any of the ~~66.7~~ **the tribal only pool of** Schedule D contingent capacity and firm energy that is to be allocated by Western that is not allocated and placed under contract by October 1, 2017 shall **remain in the tribal only pool and shall be allocated proportionately to the remaining tribal contractors, such that any tribe that did not execute a contract by October 1, 2017 will be allowed to recapture its allocation by executing a contract with Western with at least one year's notice**. ~~be returned to those contractors shown in Schedule A and Schedule B in this same proportion as those contractors' allocations of Schedule A and Schedule B contingent capacity ad firm energy~~…."

8. Conclusion

On behalf of ITCA and its members, including Ak-Chin, I again thank the Committee for allowing tribal governments to have a role in this dialogue and to share our concerns. Tribes are seeking a fair and equitable allocation of BCP power. Tribes have not been beneficiaries of BCP power although its generation has impacted many tribal lands. Allocations of BCP power will help to address the disparately impacted economic interests of new tribal customers and their members while also affording tribal governments a new opportunity to become energy sector participants, truly honoring principles of self-determination and allowing younger tribal members important future professional opportunities. Providing an equitable allocation of BCP power should accordingly take priority over the desire of the existing customers to almost completely insulate themselves in the reallocation process.