



BEFORE THE ARIZONA CORPORATION C

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AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE COMPLAINT OF
BUREAU OF INDIAN AFFAIRS, UNITED
STATES OF AMERICA, AGAINST MOHAVE
ELECTRIC COOPERATIVE, INC. AS TO
SERVICES TO THE HAVASUPAI AND
HUALAPAI INDIAN RESERVATIONS.

DOCKET NO. E-01750A-05-0579

MOHAVE ELECTRIC COOPERATIVE
INC.'S ANSWER AND MOTION TO
DISMISS BIA'S COMPLAINT

Mohave Electric Cooperative, Inc. ("Mohave" or "MEC") files its Answer and Motion to Dismiss, pursuant to A.A.C. R14-3-101(A), A.A.C. R14-3-106(H), Rule 12 (b)(6) of the Arizona Rules of Civil Procedure and the ruling of the Administrative Law Judge, respectfully moves the Commission to summarily dismiss the Bureau of Indian Affairs' ("BIA") Complaint for the reasons that the Commission lacks jurisdiction, BIA has failed to join necessary parties, BIA has selected an improper forum to hear this dispute and the Complaint fails to state a claim upon which relief can be granted. Mohave's Motion to Dismiss is supported by the attached Statement of Facts and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND BACKGROUND

This is not a case about a tariff. This is not a case about an existing contract because the contract that is the subject of this dispute has long since expired, terminated under its own terms and has never been renewed or replaced. This is not a case about inadequate or non-delivery of electricity to the Hualapai and Havasupai Tribes; the Tribes are

1 still enjoying service. This is not a case about adequacy of facilities to deliver service. This
2 is not a case about whether facilities are kept in repair – they are. Arizona Public Service
3 (“APS”), Unisource Electric (“UNS”) and Mohave if reimbursed have already agreed to
4 respond to the BIA’s or the Tribes’ requests for emergency repairs. This is not a case about
5 Mohave’s certificated service area. Mohave never applied for a Certificate of Convenience
6 and Necessity to serve the Reservations and neither the Commission nor the Tribes ever
7 granted one. Mohave instead provided wholesale electric service pursuant to a now-expired
8 contract as the BIA’s agent. BIA’s inherent authority in turn allowed Mohave to provide
9 power to Tribal and BIA accounts within the sovereign Indian Nations. This is also not a
10 case about a power line that was used or useful to Mohave’s members. With a full
11 understanding of the BIA Contract, and pursuant to a 1982 rate case, this Commission
12 decided long ago that the line was not used or useful and was never intended to be useful to
13 Mohave’s ratepayers.

14 This is a case about an unfunded federal mandate. It is a case about an
15 improper effort by the BIA to pass the funding of that federal mandate on to the members of
16 Mohave. This is a case about the BIA trying to breathe life into a dead wholesale electric
17 service contract which the BIA allowed to terminate some 13 years ago. It is a case
18 consistent with its *modus operandi* in recent decades¹ -- the BIA seeking to avoid its fiduciary
19 duty and trust responsibility to protect the health, safety and welfare of this nation’s Native
20 American peoples. This case is about the BIA failing to fulfill those trust responsibilities and
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23 ¹ See, Respondent’s Exhibit A. Because of the United States’ contentious nature, Mohave expects the United States will
24 object to Mohave’s submittal of factual evidence to support its Motion to Dismiss. However, Arizona case law holds that
25 where a motion to dismiss alleges a court is without subject matter jurisdiction to grant the relief requested, the court may
take evidence and resolve factual disputes essential to its disposition of the motion. See, *Gatecliff v. Great Republic Life
Insurance Co.*, 154 Ariz. 502, 506, 744 P.2d 29, 33 (Ariz. App. 1987).

1 its fiduciary duties to the Hualapai and Havasupai Tribes. This is a case of the BIA trying to
2 force expansion of a 700 square mile territorial obligation to the economic detriment of
3 Mohave, by requiring Mohave to deliver service to those who were never intended to be part
4 of its cooperative. It is lastly a case about shifting the duty to serve and the expense of
5 operation, maintenance and repair a Transmission Line that the federal government had
6 already agreed to operate, maintain, repair and replace onto the backs of Mohave's ratepayers.
7 Mohave, in this Answer, will show that the BIA's Complaint is not only without merit, but
8 that the Complaint raises issues beyond the jurisdiction of this Commission and claims for
9 which no relief can be granted. The legal arguments and case law that support Mohave's
10 request for dismissal are discussed *infra*.

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13 **A. Availability of Power is Not at Issue**

14 The BIA's claim that "Mohave is attempting to leave the BIA and the Indians in
15 Havasupai Village and retail customers [on the Havasupai Reservation] without service and to
16 require the BIA to provide service to Mohave's retail customers" (Complaint at ¶36) is false
17 and baseless. The continued availability of power and energy to the BIA, including the
18 handful of BIA and Tribal accounts currently interconnected to the 70-mile transmission line
19 (the "Transmission Line"), is not at issue in this case.
20

21 Mohave continues to make wholesale power and energy sufficient to meet the
22 loads available to the BIA inside Mohave's CC&N at the Nelson Substation. Mohave will
23 continue to do so even though the BIA's failure to renew the expired Contract or enter into a
24 new one, despite Mohave's efforts for 10 years to reach agreement, relieves Mohave of any
25 legal obligation to the BIA. Moreover, Mohave, the Western Area Power Administration

1 ("WAPA"), APS and UNS have all made it clear that they would provide power and/or
2 maintenance, repair and replacement services to the BIA, provided the BIA will pay the fair
3 and reasonable cost for such services.

4
5 **B. The Commission Rejected the Premise of the BIA's Complaint by
Decision No. 53174**

6 The BIA, having failed in an earlier attempts (lasting 10 years) to renegotiate a
7 contract on more favorable terms and to force Mohave to agree to onerous service terms with
8 an unwarranted audit, is now attempting to use the resources and good offices of the
9 Corporation Commission to foist upon Mohave and its ratepayers a permanent obligation to
10 operate, maintain, repair and replace the Transmission Line. The Transmission Line was
11 constructed in 1981, pursuant to the contract with the BIA, for the purpose of enabling the
12 BIA to fulfill its fiduciary duties and trust responsibility of supplying wholesale electric
13 energy to serve the health, safety and welfare needs of existing and future residential and
14 commercial installations on the Hualapai and Havasupai Indian Reservations. Distilled to its
15 essence, the BIA's Complaint contends that Mohave by: (1) accepting and performing a
16 contractual obligation to serve at wholesale in accordance with the April 1, 1982 Negotiated
17 Electric Utility Contract ("the Contract"); (2) having then not terminated service in 1992
18 immediately upon BIA's failure to timely exercise its option to extend the expired Contract;
19 and (3) having spent the last 10 years trying to negotiate a solution, Mohave is now somehow
20 saddled with an unconditional obligation to operate, maintain, repair and replace the
21 Transmission Line forever. The BIA's position has no support in law or equity.
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1 The BIA's position directly contravenes the Commission's prior holding in
2 Decision No. 53174, dated August 11, 1982. [Respondent's Exhibit B.] In expressly refusing
3 to encumber Mohave's ratepayers with any of the financial burdens associated with the
4 Transmission Line, the Commission expressly recognized the underlying intent of the now-
5 expired Contract with the BIA – that "transmission line [was] dedicated to serving the
6 Hualapai Indian Reservation." The decision correctly concluded that "asking MEC's
7 ratepayers to pay for plant which is not used and useful, will not be used and useful and was
8 never intended to be used and useful in the provision of electric service to such ratepayers"
9 was wrong. (Emphasis in original) p.8, lines 24-27. Asking the Mohave ratepayers to pay for
10 BIA's obligations was wrong then and is wrong now. The Commission properly classified
11 the Transmission Line as a "transmission line," as opposed to part of Mohave's distribution
12 facilities, and expressly rejected placing even an indirect burden (related to the interest costs
13 of the Transmission Line) on the Mohave ratepayers. This same conclusion should be
14 reached today.

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18 **C. The Commission Continued a Separate Tariffed Rate for the**
19 **BIA Service by Decision No. 57172**

20 In 1990, the Commission reaffirmed treating the BIA service separately by
21 approving a special Large Contract – BIA rate tariff in Decision No. 57172. [Respondent's
22 Exhibit C.] Mohave provided a cost-of-service study that separately allocated the costs,
23 revenues and plant associated with the BIA Contract. While the Commission ultimately
24 rejected Mohave's cost-of-service study because the portions unrelated to the BIA contract
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1 were based upon estimates, nowhere in Decision No. 57172 does the Commission reject the
2 express findings in Decision No. 53174. [Respondent's Exhibit C.]

3 The Commission's 1990 Decision likewise does not overrule its prior
4 determination that Mohave's ratepayers should not be burdened with the cost of providing
5 service to the BIA. In fact, by approving a 2.34% across-the-board increase in revenues, the
6 Commission required the BIA service to support the cost of providing service to Mohave's
7 general ratepayers.

8
9 **D. Under the BIA Contract, Mohave Made Only a Limited Commitment**
10 **to Serve**

11 It is indisputable that without: (a) the consents of the Havasupai and the
12 Hualapai Indian Nations; (b) the Contract; (c) the grants of rights of way through the
13 Havasupai and the Hualapai Indian Nations provided by the BIA; and (d) the receipt of a
14 License from the Boquillas Cattle Company, Mohave could never have built the Transmission
15 Line. Mohave had no obligation, right or ability to extend electric facilities or provide service
16 anywhere along the Transmission Line's corridor (except for the short distance between the
17 Nelson substation and the boundary of its certificated area).²

18
19 Frustrated in its efforts to get UNS or APS to build the Transmission Line and in
20 its effort to obtain a Congressional appropriation to do so itself, the BIA turned to Mohave for
21 assistance. Based on the BIA's authority to serve the Tribes, Mohave agreed to provide
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24 ² A map showing the location of the certificated areas of electric utilities is attached hereto as Respondent's Exhibit D.
25 Separate maps showing the location of the Line and the Reservations and Mohave's certificated area are attached as Respondent's Exhibits E and F.

1 wholesale electric service outside its certificated area. Mohave and BIA then negotiated the
2 wholesale electric power Contract. Under the Contract, Mohave agreed only "to Contract
3 with the . . . Government, to supply electric energy to serve existing and future residential and
4 commercial installations on the Hualapai and Havasupai Indian Reservations." (Addendum
5 No. 1 at p. 1). Mohave limited the potential burden on its members to a maximum demand of
6 1500 kW. *Id.* at p. 3. In order to build the Transmission Line and meet its contractual
7 obligations, Mohave secured an REA loan and constructed a seventy-mile line from its
8 existing facilities at the Nelson substation to the Long Mesa substation. To recover the costs
9 of constructing, maintaining, replacing and operating the Transmission Line from the
10 Government, the Contract also expressly provided that Mohave would receive "Facilities
11 Charges." *Id.* at pp.6-7. The Facilities Charge was "an amount equal to the sum of:

- 14 (1) 4.44% (percent) of the lesser of the cost of construction or \$1,600,000
15 and/or other amount(s) concurred in by the Government Contracting
16 Officer;
- 17 (2) All state and local property taxes assessed against the facilities that
18 Mohave constructs because of this contract;
- 19 (3) The (a) operation and maintenance expenses, (b) cost of replacements
20 less original book value of replaced facilities and (c) cost of system
21 improvements that Mohave constructs as a result of this Contract." *Id.*

22 Under the Contract, the Government agreed to "pay Mohave the monthly
23 Facility Charge and, in addition, shall pay Mohave power rates according to Mohave's Rate
24 Schedule 'L' (Large Power) marked Exhibit '2', attached." (Emphasis added.) *Id.* at p. 8.
25 The Contract further provided: "Billings pertaining to both the Facility Charge and Exhibit 2
may be increased by an amount equal to the sum of applicable taxes, fess, assessments or
other charges not provided for in either the Facility Charge or Exhibit 2." (Emphasis added.)

1 *Id.* In short, the BIA service was not to burden Mohave's ratepayers. Nothing in the Contract
2 provided the BIA's obligation to pay the Facility Charge would cease or be reduced after the
3 initial ten-year term of the Contract or after the costs of the Transmission Line had been
4 recouped. So long as the Contract remained in effect, the full amount of the Facility Charge
5 was payable to Mohave.
6

7 The Contract also defined the "Use of Service:"

8 The Government shall utilize the electric energy supplied under this
9 Contract only in connection with the needs of the respective Indian
10 tribes or their customers or for such other uses as may be required
11 by the diversification or expansion of the needs related thereto.

12 The Government agrees that Mohave may elect to serve the
13 Hualapai Indian Reservation upon its own arrangement from the
14 utility plant proposed to be constructed provided that contemplated
15 system capacities are not unreasonably exceeded. Mohave agrees
16 that for any extension from facilities provided by Mohave, Mohave
17 shall credit a one-time charge of \$50.00 per connected kVA
18 installed capacity, but not less than \$5,000.00 to the Government
19 and shall deduct this amount from its next monthly billing. The
20 Government shall have the option to waive all or any portion of any
21 such fees."

22 (Emphasis added). *Id.* at pp. 8-9.

23 Subsequent to entering into the now-expired Contract and under the authority to
24 act as BIA's agent as provided therein, Mohave, with BIA's knowledge and acquiescence,
25 permitted twelve residential and commercial installations on the Hualapai and Havasupai
Indian Reservations to interconnect to the Transmission Line.³ These twelve services are the
very third party beneficiaries for whose existing and future use the BIA negotiated the

1 Contract. By electing to initially bill these entities directly rather than through the BIA,
2 Mohave did not extend its CC&N service obligations beyond the limited scope of the
3 Contract. To the contrary, such service was encompassed by the Contract, whether billed by
4 the BIA or directly by Mohave.

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6 **E. The Contract Has Terminated**

7 The initial term of the Contract was “for a period of 10 year(s) from the date
8 that Contractor makes electricity available and the Government is ready to receive electricity
9 from the Contractor at the Service Location.” [Complainant’s Exhibit 1 at p.1.] The Contract
10 required Mohave to make every reasonable effort to commence to deliver electricity “not later
11 than April, 1982.” *Id.* The BIA admits Mohave commenced providing electric service under
12 the Contract in 1982. [Complaint at ¶ 36.]

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14 Under the Addendum, which was required by the federal government’s General
15 Services Administration, Mohave consented “to the Government’s right and option to renew
16 . . . for two (2) additional ten (10) year periods.” Addendum to Contract at p. 7. The BIA
17 submits, as Exhibit 4 to its Complaint, a letter stamped April 19, 1993 (a year after the
18 Contract expired) that provides: “The Government hereby notifies Mohave Electric of its
19 intent to exercise this option.” However, the letter continues: “Prior to exercising our option,
20 we need to re-negotiate and amend the existing contract.” (Emphasis added). The BIA also
21 conditioned and delayed a “negotiation meeting with Mohave” until the Government obtained
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25 ³ The only connection to the line located off the Hualapai and Havasupai Indian Reservations is a well service at the Diamond A Ranch. The owners of the Diamond A Ranch provided a license required for construction of the portion of the 70-mile line located off the reservations. The license, however, recently, terminated.

1 results of an anticipated audit. Internal memos reflect the BIA was using the audit "as a way
2 to put pressure on MEC to work with us [the BIA] on a service contract."⁴ BIA then points
3 to a letter and unilateral amendment dated August 2002 (Complainant's Exhibits 18 and 19)
4 as effectuating a second extension.
5

6 The above facts are compelling evidence that the BIA never exercised its
7 option. Instead, it made a counter offer which Mohave has repeatedly rejected. Since there
8 has never been a waive of the now-expired Contract's option renew term and no meeting of
9 the minds on a new contract, no express or implied wholesale electric power contract can be
10 said to exist.
11

12 **F. BIA, Through Its Subsequent Conduct, Accepted the Dominion and**
13 **Control over the Line and the Tribal Accounts**

14 By conduct subsequent to the abandonment of the Transmission Line, BIA has
15 accepted dominion and control over the Transmission Line and the service accounts of
16 customers on the reservations. The BIA is now the owner of the Transmission Line and has
17 assumed the duty to serve the individuals on the Hualapai and Havasupai Reservations. In
18 July 2003, Mohave abandoned and transferred the Line to the BIA and the Tribes as these
19 parties may decide. The BIA's actions since abandonment are totally inconsistent with its
20 objection to accepting the Transmission Line. Instead, the BIA has in fact accepted the
21 benefits of the Line, by interconnecting an approximately 11-mile line to an Indian Health
22 Service facility on the Hualapai Reservation. Once the BIA asserted dominion and control
23 over the Transmission Line, and began using it for its own purposes, its objection to
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⁴ See, E-mail from Robert McNichols to Chester Mills, Jeanette Hanna, Bud Brown and Stan Borella, attached hereto as

1 accepting the Transmission Line is waived. Further, BIA admitted, after initially having
2 misled the Commission and its staff, in a conference with Commission Spitzer, that it took on
3 this interconnection to the IHS facility. The BIA hid this fact from the Commission and
4 Commissioner Spitzer to foist yet another of its responsibilities onto Mohave. The BIA
5 cannot now repudiate the transfer.
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7 **II. THE COMPLAINT FAILS TO STATE A CLAIM FOR WHICH**
8 **RELIEF CAN BE GRANTED**

9 The BIA sets forth its requested relief in Paragraph 40 of its Complaint. None
10 of the relief requested can be granted by the Commission and therefore the Complaint must be
11 dismissed.

12 First, the BIA requests an order declaring that Mohave not transfer or abandon
13 the Transmission Line or any easement or right-of-way. However, Paragraphs 24 -26 of the
14 Complaint, together with Complainant's Exhibits 12 and 13 attached thereto, reflect the
15 abandonment has already occurred. The abandonment occurred after the Contract expired
16 and after the Commission ruled the Line was not used or useful to Mohave. Moreover, the
17 Commission lacks jurisdiction to order Mohave to conduct business outside its CC&N or
18 within the external boundaries of two sovereign Indian Nations.
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20 Next, the BIA requests the Commission declare that the Transmission Line is
21 part of Mohave's service territory. The Commission's records demonstrate that Mohave has
22 never requested and the Commission has never ordered that the Transmission Line be
23 encompassed within Mohave's certificated area. Service was rendered outside Mohave's
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Respondent's Exhibit G.

1 certificated area only pursuant to the Contract. By Decision 53174, the Commission
2 recognized the "transmission line [was] dedicated to serving the Hualapai Indian Reservation"
3 and concluded that "asking MEC's ratepayers to pay for plant which is not used and useful,
4 will not be used and useful and was never intended to be used and useful in the provision of
5 electric service to such ratepayers."
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7 Third, the BIA requests an order declaring the BIA to be a retail customer of
8 Mohave. Such a declaration is unsupported by the terms of the Contract. The Contract's
9 terms reflect the arrangement that BIA takes delivery for resale (or at least delivery) to other
10 entities and end-users. BIA has its own separate, Commission-approved wholesale rate in
11 Mohave's rate cases. The Commission's own Decision No. 53174 also properly characterizes
12 the 70-mile line as a "transmission" line. Moreover, in March 1993, the Hualapai Tribes'
13 own Contracting Officer affirmed the Commission's characterization of the Transmission
14 Line as a "transmission" line in Paragraph 2 of His Findings of Fact regarding the imposition
15 of a possessory tax on the Transmission Line. [Respondent's Exhibit H.] All of these
16 findings make it clear that Mohave was providing wholesale, not retail, service on the
17 Reservations. This relief lastly cannot be granted because the Commission has no jurisdiction
18 to construe contracts or require retail service be rendered within sovereign Indian Nations.
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21 The BIA also seeks a Commission declaration that Mohave's point of delivery
22 is the line side of the Long Mesa transformer and requests the Commission to order Mohave
23 to replace a meter at the Long Mesa transformer. The Complaint, however, clearly reflects
24 that factually, the wholesale power needs of the BIA and its customers are now delivered and
25 metered at the Nelson substation, inside Mohave's CC&N. See, Exhibits 10 and 11 to the

1 Complaint. The BIA requested action cannot be granted because Long Mesa is outside
2 Mohave's certificated service area and within the external boundaries of a sovereign Indian
3 nation. The Commission has no jurisdiction to construe contracts or require retail service be
4 rendered within sovereign Indian Nations.

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6 In its fifth prayer for relief, the BIA asks that the Commission order Mohave to
7 cease charging the BIA for electricity for the entities receiving power and energy through
8 interconnections to the Transmission Line prior to the Long Mesa Transformer. It further
9 asks that Mohave reimburse the BIA for any sums the BIA has paid for electricity delivered
10 to those customers. However, the BIA's request ignores the express provisions of the
11 Contract that recognized that the BIA could utilize the electric energy supplied by Mohave to
12 meet the needs of the respective Indian tribes or their customers or for such other uses as may
13 be required by the diversification or expansion of the needs related thereto. While the
14 Contract also permitted Mohave to elect to bill the Hualapai Indian Reservation directly,
15 nothing requires Mohave to undertake such responsibility or to retain it, once initiated. This
16 relief cannot be granted because the Commission has no jurisdiction to construe contracts or
17 require retail service be rendered within sovereign Indian Nations.

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19 The BIA next requests that the Commission order Mohave to continue to
20 provide electricity to the BIA under the Contract. The Contract has terminated by its own
21 terms, and has not been replaced by any express or implied contract for service. Again, this
22 relief cannot be granted because the Commission has no jurisdiction to construe contracts or
23 require retail service be rendered within sovereign Indian Nations.
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1 motion to dismiss must be granted.^{6,7} If a complaint does not state a claim against a
2 defendant, the only motion available to a defendant is a motion to dismiss.⁸

3 **I. THE COMMISSION HAS NO JURISDICTION OVER THIS CASE**

4 **1. The Commission Has No Authority Over Tribal Lands**

5 Numerous federal and state courts, including this Commission, have recognized
6 the sovereign jurisdiction of Indian tribes to regulate activities occurring on their reservations.
7 In a line of cases, including *Montana v. United States*,⁹ *Strate v. A-1 Contractors*,¹⁰
8 *Burlington Northern R.R. Co. v. Red Wolf*,¹¹ and *Big Horn County Electric Coop., Inc. v.*
9 *Adams*,¹² the U.S. Supreme Court and the Ninth Circuit Court of Appeals examined whether
10 the courts of the Indian tribes or the various states have jurisdiction over certain claims that
11 arose on lands within the external boundaries of the tribal reservations. Crucial to the Courts'
12 analyses was whether the lands were considered non-Indian fee land or Indian trust lands
13 retained by the United States. Determining the ownership of these lands was important
14 because non-Indian lands, even if they sat within the reservations' borders, could be regulated
15 under state law; Indian lands remained within the sovereign jurisdiction of the tribes. To
16 determine the land's status, the Supreme Court considered whether: (1) legislation created
17 the right-of-way; (2) the right-of-way was acquired with the consent of the tribe; (3) the tribe
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22 ⁶ *Lasagna, Inc. v. Foster*, 609 F.2d 392 (9th Cir. 1979) citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102,
L.Ed.2d 80 (1957).

23 ⁷ *San Manuel Copper Corp. v. Redmond*, 8 Ariz.App. 214, 445 P.2d 162 (App. 1968).

24 ⁸ *See, Williams v. Williams*, 23 Ariz.App. 191, 534 P.2d 924 (1975), *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 591
P.2d 1005 (App. 1979), *Appeal after remand*, 134 Ariz. 495, 657 P.2d 908 and *Olsen v. Macy*, 86 Ariz. 72, 340 P.2d 985
(1959).

25 ⁹ 450 U.S. 544, 101 S.Ct. 1245, 67 L.ed.2d 493 (1981).

¹⁰ 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 611 (1997).

¹¹ 196 F.3d 1059 (9th Cir. 1999).

1 had reserved the right to exercise dominion and control over the right-of-way; (4) the land
2 was open to the public; and (5) the right-of-way was under state control.¹³

3 The matter the BIA attempts to put before this Commission involves lands
4 within the Havasupai and Hualapai Reservations. As evidenced by Complainant's Exhibits 2
5 and 3, these lands are within the ownership of the Havasupai and Hualapai tribes. The Tribes
6 granted easements for use of these rights-of-way to Mohave for a 30 year period. [See,
7 Complaint ¶ 15.] Mohave was granted these rights-of-way with the consent of the Tribe,
8 consistent with the terms and conditions of the now-expired Contract. [See, Complainant's
9 Exhibit 1, Addendum No. 1 at p.5.] The Tribes have and continue to assert dominion and
10 control over these lands. Mohave is at the mercy of the Tribes to renew these rights-of-way
11 when they expire in 2012 because, unlike the Contract with BIA, Mohave has no automatic
12 right or option to renew these easements. The Hualapai Tribes imposed a possessory tax on
13 the Transmission Line. Thus, as evidenced by these facts and Complainant's Exhibits 2 and
14 3, these lands are not now, nor have they ever been, controlled by the State of Arizona. They
15 have always been controlled by the federal government, under the authority of the
16 Department of the Interior and her delegee, the BIA. The public's right to access these tribal
17 lands is limited. According to federal case law, non-tribal members cannot hunt, fish,
18 sightsee, hike or engage in any business venture without the express approval and under
19 permit from the tribes. The now-expired Contract makes it clear that the only other party
20 with a legal right to access these rights-of-way is the Arizona Telephone Company, for the
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¹² 219 F.3d 944 (9th Cir. 2000).

¹³ See, *Strate* at 520 U.S. 454-56.

1 limited purpose of providing telephone service in coordination with Mohave's activities.
2 [See, Complainant's Exhibit 1, Addendum No. 1 at p.6.] It is therefore clear that the lands
3 involved in the current dispute over the Transmission Line are and have always been Indian
4 lands, subject to the sovereign jurisdiction of the Tribes, not state courts or administrative
5 agencies.
6

7 The Tribes right to exert jurisdiction over these lands exists even if the persons
8 conducting the activities are not tribal members. This right was discussed recently in *Nevada*
9 *v. Hicks*¹⁴

10 *Montana's* principles bear repeating. In *Montana*, the Court
11 announced the "general proposition that the inherent sovereign
12 powers of an Indian tribe do not extend to the activities of
13 nonmembers of the tribe." 450 U.S., at 565, 101 S.Ct. 1245. The
14 Court further explained, however, that tribes do retain some
15 attributes of sovereignty:

16 "To be sure, Indian tribes retain inherent sovereign power to
17 exercise some forms of civil jurisdiction over non-Indians on their
18 reservations, even on non-Indian fee lands. A tribe may regulate,
19 through taxation, licensing, or other means, the activities of
20 nonmembers who enter consensual relationships with the tribe or
21 its members, through commercial dealing, contracts, leases, or
22 other arrangements. A tribe may also retain inherent power to
23 exercise civil authority over the conduct of non-Indians on fee
24 lands within its reservation when that conduct threatens or has
25 some direct effect on the political integrity, the economic security,
or the health or welfare of the tribe." *Id.*, at 565-566, 101 S.Ct.
1245 (citations omitted).

In the case now before the Commission, the BIA asks the Commission to
regulate the conduct of a non-Indian (Mohave) that owned and operated, as an agent to the

¹⁴ 533 U.S. 353, 389, 121 S.Ct. 2304, 2326 (2001).

1 BIA, a wholesale power line located on tribal lands. The Transmission Line provides electric
2 service to members of the Tribes. The availability of electricity has a direct effect on the
3 economic security and health and welfare of the Tribes. Pursuant to the authority granted to
4 Mohave by the BIA (not the State) in the Contract, Mohave was providing this wholesale
5 electric service to twelve BIA accounts, as an agent of the BIA. The Tribes, therefore,
6 clearly have sovereign authority to regulate Mohave's retail activities within their
7 reservations.
8

9 The situation in the present case is similar to a series of cases decided by the
10 state and federal courts in North Dakota in the 1990's. These cases, involving the Devil's
11 Lake Sioux Indian Tribe, North Dakota Public Service Commission and the Otter Tail Power
12 Company, all dealt with buying, selling and regulating electric services on the Devil's Lake
13 Sioux Indian Reservation.¹⁵ After an appeal to the Eighth Circuit Court of Appeals, on
14 remand the U.S. District Court for the District of North Dakota, citing *Montana*, specifically
15 ordered that Otter Tail (the electric utility) was entitled to summary judgment to the effect
16 that the Tribe may, by resolution or contract, determine who (among competitors) is chosen
17 to supply electrical service to Tribal owned businesses located upon Indian owned or trust
18 lands, without regard to the rate structure or other regulations of the North Dakota Public
19 Service Commission.¹⁶
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24 ¹⁵ See, *In the Matter of the Application of Otter Tail Power Co.*, 451 N.W.2d 95 (1990); *Baker v. Chaske*, 28 F.3d 1466
(1994) and *Devils Lake Sioux Tribe v. North Dakota Pub. Serv. Comm'n*, 896 F. Supp. 955 (D.N.D. 1995).

25 ¹⁶ See *Devil's Lake/Sioux*, 896 F. Supp. at 961. The Court also held that the North Dakota Public Service Commission
can regulate electric utilities within the exterior borders of tribal lands "where the service sought is to a Tribal business
located upon Trust land, the necessary nexus between Tribal Interests and inherent sovereignty is present."

1 The only question remaining, then, is whether the State of Arizona shares some
2 jurisdiction over these same activities of Mohave. The answer to this question is no. In
3 *Williams v. Lee*,¹⁷ the Supreme Court held that a state court did not have jurisdiction over a
4 civil suit by a non-Indian against an Indian where the cause of action arose on the reservation.
5 While State governments may enter into consensual relationships with tribes, such as
6 contracts for services or shared authority over public services,¹⁸ no such contract or
7 agreement has been entered into here granting the Commission authority to regulate
8 electricity service on tribal lands. Nor have the Tribes affirmatively waived their authorities,
9 as sovereigns, to regulate activities on their tribal lands. "Because the Tribe retains all
10 inherent attributes of sovereignty that have not been divested by the Federal Government, the
11 proper inference for silence . . . is that the sovereign power . . . remains intact."¹⁹ And the
12 Hualapai Tribe has repeatedly asserted this authority by imposing a possessory tax on the
13 Transmission Line.

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16 Lastly, and perhaps most importantly, the Commission's own prior rulings have
17 decided that it does not have jurisdiction over electrical utilities on Indian reservations. In its
18 Opinion and Order In the Matter of the Application of Trico Electric Cooperative, Inc., An
19 Arizona Non-Profit Corporation For Approval of Sale of Electric Facilities to the Papago
20 Tribe of Arizona, Docket No. U-1461, Decision No. 47107 (July 6, 1976), the Commission
21 found that

22 Among the assets owned by TRICO are certain electrical facilities
23 located on the Papago Indian Reservation, under the jurisdiction

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25 ¹⁷ 358 U.S. 217, 223, 79 S.Ct. 269, 272, 3 L.Ed2d 251 (1959).

¹⁸ *Nevada v. Hicks*, 533 U.S. at 392, 121 S.Ct. 2328 (concurring opinion of O'CONNOR, J.)

¹⁹ *Merrion v. Jicarilla Apache Tribe*, 445 U.S.130, 149 n.14, 96 S.Ct.901, 907 n. 14, 71 L.Ed.2d 21 (1982).

1 of the Papago Indian Tribe of Arizona and not subject to the
2 jurisdiction of the Arizona Corporation Commission.

3 [Emphasis added. See, Respondent's Exhibit I.]

4 In the case at bar before this Commission, the twelve customers and lands along
5 the Transmission Line Mohave serves as the agent of the BIA are within the exterior
6 boundaries of two sovereign Indian nations. Service was provided by Mohave, as an agent of
7 the United States Government, under the Contract with the BIA. The retail customers served,
8 as listed in Complainant's Exhibit 13, were being served pursuant to the same Contract and,
9 with the possible exception of the Diamond A Ranch, were either Tribal members, Tribal
10 businesses. All were on Tribal lands. Mohave's right to serve was clarified in the rights-of-
11 way granted by the United States Department of Interior Bureau of Indian Affairs, on behalf
12 of the Hualapai and Havasupai Tribes. Mohave and the Tribes enacted Resolutions to
13 recognize and approve the rights-of-way needed to construct the Line cross Indian lands to
14 fulfill the Contract. [See, Complainant's Exhibits 3 and 4.] Once the Tribes granted
15 permission to Mohave to construct and operate the Transmission Line, they never
16 relinquished their rights to control the distribution of electricity on their tribal lands to the
17 Commission. The Tribes' authority is subject only to the authority of the BIA over retail
18 transactions. The Commission, therefore, has no authority to regulate Mohave's activities on
19 the Indian lands, particularly since it is the sovereign territory of two independent nations and
20 since the Commission has never granted or extended Mohave's right, through its CC&N, to
21 do so.
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1 **2. Tribes Are Indispensable Parties That Must Be Joined**

2 Both the Federal and Arizona Rules of Civil Procedure require the joinder of
3 persons needed for adjudication, if joining such parties is feasible. *See*, F.R.C.P. 19 and
4 A.R.C.P. 19. When the joinder of such parties is not feasible, because a court either has no
5 personal or subject matter jurisdiction over the party needed to be joined, the courts should
6 dismiss the lawsuit. An indispensable party under Rule 19, “is one who has such an interest
7 in the subject matter that a final decree cannot be made without either affecting his interest or
8 leaving the controversy in such condition that a final determination may be wholly
9 inconsistent with equity and good conscience. The test of indispensability in Arizona is
10 whether the absent person's interest in the controversy is such that no final judgment or decree
11 could be entered, doing justice between the parties actually before the court and without
12 injuriously affecting the rights of others not brought into the action.”²⁰

13 Courts have examined whether Indian Tribes are indeed indispensable parties
14 when electric service is provided to Tribal, BIA and other users on an Indian reservation with
15 the permission of the Tribes. In the case most directly on point, *Niagara Mohawk Power v.*
16 *Anderson*,²¹ the New York Supreme Court’s Fourth Appellate Division held that “[b]ecause
17 resolution of this controversy involves a determination of the rights and powers of the Indian
18 Nation to consent to [electrical] service on its reservation, complete relief cannot be accorded
19 . . . without the Indian Nation as a party. Furthermore, because a judgment in the [defendant

20 ²⁰ *See, Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 585, 490 P.2d 551 (1971); *Bolin v. Superior Court*, 85
Ariz. 131, 333 P.2d 295 (1958); and *Siler v. Superior Court*, 83 Ariz. 49, 316 P.2d 296 (1957).

21 ²¹ 258 A.D.2d 958, 685 N.Y.S.2d 502 (1999).

1 and intervenor's] favor would challenge the power of the Indian Nation, the Indian Nation
2 might be 'inequitably affected' by the litigation."²²

3 Similar to the facts in *Niagara Mohawk*, through the Contract and the rights-of-
4 way, the Hualapai and Havasupai Tribes granted permission for Mohave to serve tribal
5 members and business located within the reservations. Mohave, as the agent of the BIA, has
6 provided service directly to facilities owned or operated by the Tribal Councils. It is also
7 important that BIA entered into the wholesale electrical service Contract on the Tribes' behalf
8 "to supply electric energy to serve existing and future residential and commercial installations
9 on the Hualapai and Havasupai Indian Reservations." [Complainant's Exhibit 1, Addendum
10 No. 1, at p. 1.] The Tribes' rights – both to receive electric service and to assert their own
11 sovereignty – are clearly implicated by this lawsuit and to rule without joining the Tribes as
12 parties would be unjust.
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15 **3. The Commission is Not Empowered to Hear Simple Contract Disputes**

16 Article XV, § 9 of the Arizona Constitution "establishes the Commission as a
17 separate, popularly-elected branch of the state government."²³ Section 3 of Article XV
18 specifies the powers and duties of the Commission. Section 6 of Article XV permits the
19 legislature to "enlarge the powers and extend the duties of the Corporation Commission, and
20 [authorize it to] prescribe rules and regulations to govern proceedings instituted by and before
21 it." While the Commission has some judicial, executive and legislative powers,²⁴ the
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25 ²² *Id.*, at 258 A.D.2d at 959, 685 N.Y.S.2d at 503.

²³ *State ex rel. Woods*, 171 Ariz. at 290, 830 P.2d at 811.

²⁴ *See, State ex rel. Woods*, 171 Ariz. at 291, 830 P.2d at 812.

1 Commission's statutory authority yields no jurisdiction over purely contractual disputes such
2 as the BIA alleges in its Complaint.

3 The Arizona Supreme Court, in the seminal case of *Trico Electric Cooperative,*
4 *Inc. v. Ralston*,²⁵ presented an in-depth analysis on the separation of powers found in the
5 Arizona Constitution. In that case, customers of Eloy Light, Power and Utility Company
6 ("Eloy") sued for declaratory relief that the consideration Eloy received for granting an option
7 to Trico Electric to purchase of all of Eloy's assets for \$200,000 was inadequate. In resolving
8 one of the major issues of the appeal, the Arizona Supreme Court stated:
9

10 "Clearly the construction of a contract is a judicial function and the
11 court, not the corporation commission, have [sic] the jurisdiction to
12 determine the validity of said option agreement, although eventually
13 the contract of sale, if valid, must have the sanction and approval of
14 the latter before it becomes effective."

15 The Arizona Court of Appeals has also examined the issue of jurisdiction of
16 public service companies that are, for the most part, subject to the Arizona Corporation
17 Commission on most regulatory matters. Addressing contractual matters, Division One of the
18 Court of Appeals²⁶ reversed a trial court's grant of a motion to dismiss on jurisdictional
19 grounds, holding that traditional claims in tort or contract fall within the general jurisdiction
20 of trial courts, rather than the primary, exclusive jurisdiction of the Commission. The Court
21 of Appeals reached this conclusion even though some of the claims may involve a regulated
22 body or enterprise. The *Campbell* opinion also noted that even though the plaintiff's claims
23 in *Campbell* involved the adequacy and method of telephone service, those issues were not
24

25

²⁵ 67 Ariz. 358 (1948).

²⁶ See, *Campbell v. Mountain States Telephone & Telegraph Co.*, 120 Ariz. 426, 586 P.2d 987 (App. 1978).

1 predominant. The Court found that the plaintiff raised “relatively simple tort and contact
2 issues revolving around a central inquiry: whether, under traditional judicial principles,
3 appellees committed a civil wrong against appellant.”²⁷

4
5 *General Cable Corporation v. Citizens Utilities Company*²⁸ involved facts
6 similar to the present case. In *General Cable*, a prospective customer enticed the electric
7 utility to construct new facilities and to furnish minimum levels of power and energy needed
8 to meet projected demands. The prospective customer subsequently decided not to proceed
9 with its plans. The issue was whether the customer, General Cable, must continue to pay for
10 electricity it will never use. One of the many actions filed by General Cable filed was a
11 Commission complaint seeking an order declaring the contract rates charged by Citizens to be
12 unjust, unreasonable and discriminatory and seeking reparations for overpayments. The
13 Commission dismissed the complaint on the grounds it was “without jurisdiction to determine
14 the legality of the subject contract.” The sole issue presented in this cause of action was the
15 Commission’s jurisdiction to adjudicate the contract. In affirming the decision of the
16 Commission and the Superior Court, the Court of Appeals, relying on *Trico v. Ralston*, held
17 “the construction and interpretation to be given to legal rights under a contract reside solely
18 with the courts and not with the Corporation Commission.”²⁹ (Emphasis added). The BIA’s
19 Complaint is grounded on one overriding allegation: that the now-expired Contract remains
20 in effect. Because BIA’s claims sound in contract, the Commission lacks jurisdiction over the
21 BIA’s Complaint.
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²⁷ *Id.* at p.432.

²⁸ 27 Ariz. App. 381, 555 P.2d 350 (1976).

1 **II. DISMISSAL IS APPROPRIATE UNDER A.R.C.P. 12(B)(6)**

2 Even if the Commission has jurisdiction to hear this matter, the BIA's
3 Complaint must be dismissed if there is no set of facts that can substantiate or support the
4 allegations of BIA's Complaint. If the facts are not susceptible to proof, BIA's request for
5 relief cannot be granted.
6

7 **1. There Is No Contract Between the Parties As A Matter of Law**

8 The relief requested by the BIA cannot be granted because there is no contract
9 between the parties as a matter of law. It is well-settled in Arizona that "where parties bind
10 themselves to a lawful contract, in absence of fraud, a court must give effect to the contract as
11 written, and the terms and provisions of the contract, where clear and unambiguous, are
12 conclusive It is not within the province or power of the court to alter, revise, modify,
13 extend, rewrite or remake an agreement. Its duty is confined to the construction of
14 interpretation of one which the parties have made for themselves."³⁰
15

16 The BIA has admitted that the Contract expired in 1992 and Mohave concurs.
17 [See, Complainant's Exhibit 4.] Notwithstanding its admission that the Contract expired, the
18 BIA claims its right to renew the Contract survived the Contract's expiration. The BIA
19 claims to have exercised its renewal option in an April 19, 1993 letter, with the following
20 language: that "[p]rior to exercising our option, we need to re-negotiate and amend the
21 existing contract." [Emphasis added. See, Complainant's Exhibit 4.] Because this language
22 was not an unequivocal, valid exercise of a pre-existing contractual right, Mohave rightfully
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²⁹ 555 P.2d at 354.

³⁰ See, *Goodman v. Newzona Investment Co.*, 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966).

1 treats the BIA's purported exercise of its option to renew as an offer to negotiate a new
2 contract.³¹

3 The Arizona Court of Appeals has applied the general, black-letter concepts of
4 contract law enunciated by Professors Corbin and Williston to option contracts in *Rogers v.*
5 *Jones*.³² In its holding, the Arizona Court of Appeals found that "our research leads us to the
6 conclusion that the law is crystal clear that an option agreement must be strictly construed, in
7 that it must be exercised in exact accord with its terms and conditions." Further, in the recent
8 case of *Andrews v. Blake*,³³ the Arizona Supreme Court made it clear that it would apply the
9 three prong test of the "Corbin rule" to an option contract. In a comprehensive examination
10 of the option contract at issue, the Court noted:
11

12
13 a court may intervene and equitably excuse an optionee's untimely
14 notice of intent to exercise an option when (1) the delay in giving
15 notice is short or slight, (2) the delay does not prejudice the optionor
16 by a change of position, and (3) because of the lessee's valuable
17 improvements to the property, refusal to permit exercise of the
18 option would result in such hardship as to make strict, literal
19 enforcement of the option provision unconscionable. That rule
20 apparently stems from *F.B. Fountain Co. v. Stein*, 97 Conn. 619, 118
21 A. 47 (1922). The court there excluded from equitable relief an
22 optionee's failure to timely exercise an option due to willful or gross
23 negligence. But, the court stated, [I]n cases of mere neglect in
24 fulfilling a condition precedent of a lease [for exercising a lease
25 renewal option], which do not fall within accident or mistake, equity
will relieve when the delay has been slight, the loss to the lessor
small, and when not to grant relief would result in such hardship to
the tenant as to make it unconscionable to enforce literally the
condition precedent [the option] of the lease. *Id.* at 50.

25 ³¹ See, *Williston on Contracts* (4th Ed.) §6:10.

³² See, *Rogers v. Jones*, 126 Ariz. 180, 182, 613 P.2d 844, 846 (Ariz. App., 1980).

³³ 205 Ariz. 236, 69 P.3d 7, 400 Ariz. Adv. Rep. 25 (2003).

1 In the eighty-plus years since the *F.B. Fountain* case, courts across the
2 country have split fairly evenly on the issue of whether equitable relief
3 potentially is available to an optionee who negligently failed to timely or
4 properly exercise an option to renew a lease or to purchase the leased
5 property. [*Citations omitted.*] Some courts permit equitable relief even
6 in cases of negligence. [*Citations omitted.*]

7 After noting the split in the courts nationally, the Arizona Supreme Court held
8 that “a rule that would equitably excuse an optionee’s negligent failure to timely and properly
9 exercise an option to purchase leased property is inconsistent with Arizona’s jurisprudence.”
10 The only conditions the Court found that would excuse a lessee’s failure to strictly comply
11 with the terms of a lease’s option to renew are incapacity, fraud, misrepresentation, duress,
12 undue influence, mistake, estoppel or the lessor’s waiver of its right to receive notice. The
13 Court noted that once one of these conditions was found to be at work in a case, the option to
14 renew a lease is only excused if the three prerequisites of the Corbin rule are met, namely: (1)
15 the delay is short, (2) the delay did not prejudice the lessor/optionor; and (3) the lessee/
16 optionee would suffer a forfeiture or other substantial hardship if equitable relief is not
17 granted.

18 It cannot be said that any incapacity, fraud, misrepresentation, duress, undue
19 influence, mistake, or waiver are at work in the BIA’s failure to timely exercise its option to
20 renew the wholesale electricity contract with Mohave. Clearly, BIA knew that it had a right
21 to exercise its option to renew the Contract, especially after Mohave provided it with a
22 courtesy notice in March 1992 that the option was about to expire. For whatever reason, the
23 BIA chose not to renew its option.
24
25

1 The delay also was not short. The BIA made its first, ineffective attempt to
2 exercise its option to renew some 13 months after the Contract expired. The language of this
3 purported renewal, however, was ambiguous and not adequate to exercise the option. A
4 second written, signed statement exercising the BIA's purported right to renew did not follow
5 for some ten years. [See, Complainant's Exhibit 10.] Again, the statement purporting to
6 exercise the option to renew was equivocal. It amounted to a counter offer, which Mohave
7 then rejected. In the intervening 10-year period, Mohave made clear its position that the
8 Contract had expired, but that it was willing to negotiate a new one, despite contentious
9 litigation spurred by BIA intransigence in the Federal Court of Claims. [Respondent's
10 Exhibit J]
11

12 The BIA did not suffer forfeiture or substantial hardship from its failure to
13 exercise the option to renew. BIA was not substantially harmed by Mohave's transfer or
14 abandonment of the Transmission Line to the BIA or the Tribes. *Andrews v. Baker* suggests
15 that in order for the third prong of the Corbin test to be satisfied, the harm suffered should be
16 akin to "a complete loss of the business operation."³⁴ In any event, the hardship must be so
17 severe that it makes literal enforcement of the option provision against the BIA
18 unconscionable. Since BIA and any third party retail customer beneficiaries would suffer no
19 forfeiture of the Transmission Line (it belonged to them) or undue hardship from the contract
20 renewal not being granted (the rate being paid is favorable and unchanged), the option would
21 not be equitably extended. Moreover, the Tribes, who are the third party beneficiaries of the
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³⁴ See, 205 Ariz., at 251, 69 P.3d 22.

1 Contract, were not harmed because they now received electric service from the BIA, which is
2 supplied at wholesale by Mohave. BIA can continue to provide such service without
3 interruption by contracting for wholesale power with a new supplier. Failing to meet any
4 prong of the Corbin test as enunciated in *Andrews v. Baker*, there is no contract or valid
5 exercise of the option to renew the Contract, at law.
6

7 One last contractual argument must be addressed. Mohave's provision of
8 electric service without a valid, legally enforceable contract may give rise to the implication
9 that a contract between the parties on the same terms as the now-expired 1982 Contract exists.
10 Such argument, however, is without merit. Implied contracts are valid and effective only
11 when there is a meeting of the minds and consent to enter into such a contract can be inferred
12 from the conduct of the parties.³⁵ A new, implied contract is not found to exist if one party
13 objects or expressly disavows the existence of the new contract in a letter to the other party.³⁶
14 Because Mohave has repeatedly informed BIA that it does not agree to a new contract, and
15 because the parties disagree on what terms such a contract would have, there can be no
16 implied contract between the parties. [See, Complainant's Exhibits 10 and 11 and ¶¶ 13 and
17 14, *infra*.] These same facts also dispel any contention that Mohave has waived the BIA's
18 obligation to timely and properly exercise its option to extend the Contract.
19
20

21 **2. There Are No Facts – Even When Taken in the Light Most Favorable to**
22 **BIA – That Support BIA's Claim that Mohave Violated the Statute**

23 Here, the only violation of law over which the Commission may have
24
25

³⁵ Williston on Contracts (4th ed.) § 1:5 and 17 A Am.Jur. 2d Contracts §589.

³⁶ See e.g., *Sancap Abrasives Corp. v. Swiss Indus. Abrasives*, 19 Fed. Appx. 181 (6th Cir. 2001).

1 jurisdiction is the allegation that Mohave has violated A.R.S. § 40-285(A). This provision
2 states:

3 A public service corporation shall not sell, lease, assign, mortgage or
4 otherwise dispose of or encumber the whole or any part of its ...
5 plant, or system necessary or useful in the performance of its duties
6 to the public . . . without first having secured from the commission
an order authorizing it so to do.

7 The key questions to answer regarding whether a violation of this provision
8 occurred are: (a) were the disposed of assets necessary or useful in Mohave's performance of
9 its duties to the public; and (b) was the approval of the Commission required before Mohave
10 sold, transferred or otherwise abandoned the subject asset?

11 The public policy behind A.R.S. § 40-285(A) is explained in *American Cable*
12 *Television, Inc. v. Arizona Public Service, Co.*³⁷ In its holding, the Arizona Court of Appeals
13 opined that "[w]e believe that the legislature intended in § 40-285 to prevent a utility from
14 disposing of resources devoted to providing its utility service, thereby 'looting' its facilities
15 and impairing its service to the public."³⁸ We note the Court's repeated use of the word "its."
16 We think it important that the Court did not suggest the public service corporation had a duty
17 to the public at large; rather it had a duty to not to allow looting of *its* facilities that would
18 disadvantage *its* customers.
19
20

21 **A. Necessary and Useful**

22 The most compelling evidence Mohave has that the Transmission Line is not
23 useful, nor was it ever intended to be useful to its members, is the Commission's own words.
24
25

³⁷ 143 Ariz. 273, 693 P.2d 928 (App. Div.1 1983).

³⁸ *Id.* at. 143 Ariz. 277.

1 Indeed, in the Commission's prior holding in Decision No. 53174, dated August 11, 1982, the
2 Commission expressly refused to burden Mohave's ratepayers with any of the Transmission
3 Line's financial burdens. [Respondent's Exhibit B.] This Decision recognized that the
4 "transmission line [was] dedicated to serving the Hualapai Indian Reservation" and concluded
5 that "asking MEC's ratepayers to pay for plant which is not used and useful, will not be used
6 and useful and was never intended to be used and useful in the provision of electric service to
7 such ratepayers" was repugnant. (Emphasis in original) p. 8, lines 24-27. The Commission
8 thus properly classified the Transmission Line as a "transmission line," as opposed to part of
9 Mohave's distribution facilities, and expressly rejected placing even an indirect burden
10 (related to the interest costs of the Line) on the Mohave ratepayers.
11

12
13 After the Contract expired and renegotiation of acceptable terms for a new
14 wholesale service contract repeatedly failed, Mohave's Board of Directors passed a resolution
15 determining that the Transmission Line was no longer "necessary or useful" in the
16 performance of Mohave's duties to the public it serves. The Resolution, passed on April 17,
17 2003, (Respondent's Exhibit K) found that the Transmission Line "ha[d] no value to the
18 Cooperative or its members" and authorized the officers and management of Mohave to "take
19 such action as may be required to quit claim, sell, relinquish or abandon any and all property
20 rights" Mohave had in the Transmission Line. Mohave's management complied with this
21 directive from its Board.
22

23 Mohave then submitted a request to the United State Department of
24 Agriculture's Rural Utilities Services, asking that RUS release a partial lien it had on the
25 Transmission Line. [Respondent's Exhibit L]. This request was made on February 4, 2005,

1 pursuant to Mohave's Mortgage Documents with RUS and 7 C.F.R. § 1717.616. In support
2 of its request, Mohave noted that the Transmission Line, which was outside its certificated
3 area, was unneeded surplus, that elimination of liability for the Transmission Line was in the
4 best interests of Mohave's members and that Mohave had deposited the funds necessary to
5 pay its remaining indebtedness to RUS into a trustee account. RUS released the partial lien it
6 held on the Line in response to Mohave's request, finding the transfer met all requirements of
7 7 C.F.R. §1717.616. [Respondent's Exhibit M]. The USDA further did nothing to refute
8 Mohave's determination that the Transmission Line is no longer "necessary and useful," and
9 indeed told Mohave that RUS's approval was not required for the transfer of the Transmission
10 Line.
11
12

13 **B. Performance of Duties to the Public**

14 The duty of a public service corporation to provide utility services to the public
15 is premised on the corporation having been granted a franchise, rather than providing service
16 under a contract. It is also premised on the Complainant making a clear showing that it has a
17 right to the service demanded, that there is no other adequate remedy for providing such
18 service and that the reasonable rules and regulations of the corporation have been complied
19 with by the party seeking the electric service.³⁹ It is also a well established rule that a public
20 utility may not be held liable for a negligent failure to supply service absent a contractual
21 relationship between Complainant and the utility.⁴⁰ Moreover, courts have also ruled that, as
22 a matter of law, a utility has no absolute duty on to serve the public by extending its lines
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³⁹ See, 52 Am. Jur. 2d Mandamus §80 (2005).

⁴⁰ See, *Grosshans v. Rochester Gas & Electric Corp.*, 103 A.D.2d 1038, 478 N.Y.S.2d 402 (NY App. 1984).

1 even over short distances in order to serve customers who are not otherwise entitled to
2 service.⁴¹ Courts instead have looked at balancing the equities in requiring electric utility
3 companies to extend service to proposed customers.⁴²

4
5 The Arizona courts have adopted a similar test in deciding whether a utility it
6 required to continue or extend service. Although the most analogous case comes from the
7 railroad utility context, it is instructive on the rights of a service provider to decide when and
8 how to provide service to those with whom it contracts.

9
10 In weighing the public convenience of the one hand, and the expense to
11 the railroad of the maintenance of the service, on the other hand, to
12 determine the prevailing balance, the Commission should consider the
13 following factors: the financial condition of the entire railroad system,
14 the financial loss, if any, sustained in the maintenance of the agency, the
15 fact of substitute services providing the same essential, although less
16 convenient service, the volume of business to be affected and the saving
17 in time and expense to the shipper, the character and population of the
18 territory served, and the proximity to other agency stations. The crucial
19 point, however, is that it is unreasonable to require the maintenance of an
20 agency station where the cost of the service is out of proportion to the
21 revenue derived from the portion of the public benefited thereby.
22 Finally, the maintaining of an uneconomic service resulting in an
23 economic waste cannot be justified or excused by a showing that the
24 service has been in the convenience and necessity of some individual.
25 The convenience and necessity required are those of the public and not of
an individual or individuals.⁴³

20 In overturning the Commission's order that the railroad continue service in Tombstone, the
21 Arizona Supreme Court cautioned that "it is to be remembered that, under our system of
22 public control of rates and service, the general public, speaking broadly, loses in cost what it

25 ⁴¹ See, *Jordan v. Clarke-Washington Electric Membership Corp.*, 262 Ala. 581, 80 So.2d 527 (S.Ct. Ala. 1955).

⁴² *Id.*, at 262 Ala. 584, 80 So.2d at 529.

1 gains in service. So the railroad, in resisting demands for uneconomic service, really
2 represents the true interests of the general public.”⁴⁴ The upshot of this decision, then, is that
3 continuance of utility service may be required where reasonable necessity is shown, but is not
4 justified where the necessity is that of individuals rather than of the public.⁴⁵

5
6 A public service corporation also owes no duty to the “public” to continue
7 providing service when it transfers its public utility property. With the transfer, the new
8 owner assumes the duty of carrying on the public utility service to which property had been
9 dedicated.⁴⁶

10
11 Given this applicable case law, Mohave clearly has no continuing duty to serve
12 the “public” to provide electricity service within the Tribal lands. It has no duty, pursuant to a
13 franchise or CC&N, to serve parties who are not its ratepayers and are not within to
14 certificated service area. At most, the customers being served by Mohave pursuant to the
15 now-expired Contract and a right to demand service while the Contract was in effect, but no
16 longer. Once the Contract expired, so did Mohave’s obligation to provide service to these
17 individuals.

18
19 There is also another adequate remedy for providing such service to the
20 individuals previously served under the Contract. Mohave has and will continue to provide
21 electric service to the BIA and the Tribes at the Nelson substation, which the BIA and the
22

23 ⁴³ See, *Arizona Corp. Comm’n. v. Southern Pacific Co.*, 87 Ariz. 310, 314-315, 350 P.2d 765, 768-769 (1960)(internal
24 citations omitted).

⁴⁴ *Id.*, 87 Ariz. at 317, 350 P.2d at 771.

⁴⁵ See also, 73B C.J.S. Public Utilities § 8 (2005) and *State ex rel. Utilities Comm’n. v. Southern Ry. Co.*, 254 N.C. 73,
25 118 S.E.2d 21 (1961).

1 Tribes can then distribute to individuals on the Reservations. The Western Area Power
2 Administration can also step in as a service provider.

3 Moreover, BIA is now the owner of the Line and has assumed the duty to serve
4 the individuals on the Hualapai and Havasupai Reservations. In July 2003, Mohave
5 abandoned and transferred the Line to BIA. Although the BIA objected to this abandonment
6 and transfer in a timely manner, its actions since that time belie its protestation. BIA has
7 accepted the benefits of the Line, by allowing the interconnecting of an approximately 11-
8 mile line to an Indian Health Service facility on the Hualapai Reservation. By exercising
9 such dominion and control over the Transmission Line, BIA cannot now repudiate the
10 transfer.⁴⁷

11
12
13 For all these reasons, it is ludicrous for the BIA to contend that Mohave's
14 transfer or abandonment of the Transmission Line has impaired Mohave's service to the
15 "public." Mohave's duty to serve the BIA and the individual customers on the tribal lands
16 expired in 1992 with the expiration of the Contract. Mohave's duty instead is to serve its
17 ratepayers – those customers within its ACC-approved CC&N. To the extent BIA tries to
18 place an undue burden on Mohave's cooperative members to maintain, repair and replace
19 BIA's Line, case law makes it clear that Mohave's ratepayers need not suffer such economic
20 waste. Further, BIA's assertion of dominion and control over a Line it repudiated owning,
21 but from which BIA has no qualms about siphoning off an electric load, cannot be tolerated.
22
23

24 ⁴⁶ See, *North Little Rock Water Co. v. Waterworks Comm'n. of the City of Little Rock*, 199 Ark. 773, 136 S.W.2d 194
25 (1940) and *State v. Bullock*, 78 Fla. 321, 82 So. 866, 8 A.L.R. 232 (1919, *aff'd*, 254 U.S. 513, 41 S. Ct. 193, 65 L. Ed. 380
(1921).

⁴⁷ See, *Tway v. Southern Methodist Hospital*, 48 Ariz. 490, 62 P.2d 1318 (1936).

1 Mohave had every right to abandon a power line that the Commission had already determined
2 was not used or useful to Mohave's ratepayers – Mohave's true "public" – and continues to
3 be ready, willing and able to provide electric service at a point within its certificated area for
4 further distribution by the BIA, the Tribes or WAPA to those parties' individual customers.

5
6 **C. Approval Was Unnecessary**

7 The Arizona legislature did not intend to require Commission approval every
8 time a public service corporation disposes of property. It required Commission approval for
9 the sale or transfer of only those assets that are necessary and useful to a utility's operations.
10 The legislature enacted A.R.S. § 40-285 to prevent the "looting" of utilities' assets and
11 impairment of their service.⁴⁸ The statutory language anticipates that, as an initial matter, the
12 public service corporation, not the Commission, will make a determination whether a facility
13 used in providing service to the public is "necessary and useful." Parties challenging such a
14 determination must present evidence to disprove the utility's own finding.
15

16 Mohave admits it obtained no order from the Commission prior to disposing of
17 or abandoning the Transmission Line. However, the Commission's pronouncement about the
18 usefulness of the Transmission Line from its 1982 Decision cannot be more clear. Mohave
19 was not obligated to obtain the Commission's permission to dispose of the Transmission Line,
20 once it determined that the Transmission Line was not necessary or useful for Mohave to meet
21 its obligations to the public. Moreover, the United States offers no evidence to show that the
22 Transmission Line was necessary and useful for Mohave to meet its obligations to the public.
23
24

25

⁴⁸ See, *American Cable Television v. Ariz. Pub. Serv.*, 143 Ariz. 273, 277, 639 P.2d 928, 932 (Ariz. App. 1993) and *Babe Investments v. Arizona Corp. Comm.*, 189 Ariz. 147, 939 P. 2d 425 (Ariz. App. 1997).

1 Rather, the Line at issue is necessary and useful for BIA to meet its trust obligations to the
2 Tribes. BIA's need to serve its customers, however, does not bring Mohave's conduct within
3 the Commission's jurisdiction, especially in light of the plain language of the statute, the
4 Commission's prior rulings⁴⁹ and the relevant case law.
5

6 **ANSWER**

7 Rule 14-3-106(H) of the Arizona Administrative Code provides that:

8 Answers to complaints are required and must be filed within 20
9 days after the date on which the complaint is served by the
10 Commission, unless otherwise ordered by the Commission. All
11 answers shall be full and complete and shall admit or deny
12 specifically and in detail each allegation of the complaint to which
13 such answer is directed. The answer shall include a motion to
14 dismiss if a party desires a challenge the sufficiency of the
15 complaint.

16 To comply with this Rule, and expressly subject to the jurisdictional and joinder
17 issues raised in its Motion to Dismiss, Mohave provides the following Answer to BIA's
18 Complaint:

- 19 1. Mohave admits the allegation in Paragraph 1 of the Complaint that it is an
20 Arizona public service corporation regulated by the Arizona Corporation Commission
21 ("ACC").
- 22 2. Mohave denies the allegations in Paragraphs 2 and 3 of the Complaint that the
23 ACC has jurisdiction over this dispute and the matters alleged in this Complaint.
- 24 3. Mohave admits that the parties to this dispute, as alleged in this Complaint, are
25 Mohave and the United States of America, on behalf of the Bureau of Indian Affairs ("BIA"),
Department of the Interior.

⁴⁹ See, Decision No. 53174.

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4. Mohave denies the allegations in Paragraph 5 of the Complaint.

5. Mohave denies the allegations in Paragraph 6 of the Complaint and affirmatively alleges that:

(A) By wholesale power contract, which terminated in 1992, Mohave provided to BIA, which has a fiduciary responsibility to the Havasupai and Hualapai Tribes ("the Tribes"), electricity for resale beyond and outside of areas lawfully certificated to Mohave;

(B) Mohave continues to provide, at wholesale, and within its certificated area, the electrical demand BIA, itself and to those to whom BIA has a fiduciary duty, as their agent, to provide electricity;

(C) Mohave is without lawful authority from the ACC or the Tribes to conduct business at retail beyond its certificated area. Upon information and belief, the area for which BIA seeks service in this Complaint, according to the map of ACC, is certificated to UNS or APS;

(D) The IHS has not received electricity from Mohave, but only from BIA and is not and never has been a Mohave customer;

(E) The Havasupai Tribe and its members at its village have never received electricity from Mohave, but only BIA and are not and never have been Mohave customers; and

(F) The Transmission Line is a paid for contractual facility for which the wholesale Contract has expired and terminated. The Transmission Line has

1 been abandoned to the BIA and the Tribes and they may determine their
2 respective interests in the Transmission Line among themselves.

3 6. Mohave denies the allegations in Paragraph 7 of the Complaint and
4 affirmatively alleges that prior to and subsequent to executing the wholesale power and
5 facility contract ("the Contract") in 1982 with BIA, BIA operates as a retail utility and
6 constructed and maintained, and continues to construct and maintain, distribution facilities
7 while receiving transmission of purchased wholesale power from Mohave.
8

9 7. Mohave admits that BIA attempted to fulfill its fiduciary, governmental duty by
10 constructing and operating retail electric facilities identified in Paragraph 8 of the Complaint.
11 Mohave affirmatively alleges that BIA's fiduciary duty to provide electricity to retail
12 customers on tribal lands has not lapsed, terminated, ceased or been transferred to other
13 parties or governmental agencies.
14

15 8. Mohave is without knowledge or information as to the other allegations in
16 Paragraph 9 of the Complaint. Therefore, Mohave does not admit or deny the allegations in
17 Paragraph 9 of the Complaint.
18

19 9. Mohave admits that the now-expired Contract referred to in Paragraph 10 of the
20 Complaint was a wholesale power contract, the terms of which speak for themselves.
21 Mohave further admits that BIA had retail electric service duties and responsibilities to its
22 public and that Mohave delivered wholesale electric service to the Nelson substation, a point
23 within the Mohave certificated area. Mohave was not lawfully permitted to make retail
24 electricity available on the Reservations. Mohave could lawfully provided electricity on the
25 reservations under the authority of the BIA or the Tribes or if a tribal certificate, franchise,

1 license or permit to operate at retail had been issued. Mohave never sought or was granted an
2 expansion of its certificated area or a tribal certificate, franchise, license or permit to operate
3 at retail, but provided this electricity service through the contract with BIA. The Contract
4 obligated BIA to purchase and receive electricity and pay overhead maintenance, repair and
5 replacement costs. The Contract terminated by its own terms in 1992.
6

7 10. Mohave admits the allegation of Paragraph 11 of the Complaint and
8 affirmatively alleges that BIA, in fulfillment of its fiduciary duty, is required to act to meet, at
9 retail, the present and future electricity needs, as limited by the Contract, of its customers.
10 Mohave further affirmatively alleges that the BIA, not Mohave, was lawfully authorized to
11 act at retail on the Tribes' Reservations, to meet BIA's fiduciary duty to provide for the
12 health, safety and welfare of the tribal members.
13

14 11. Mohave admits the now-expired Contract speaks for itself on the matter alleged
15 in Paragraphs 12 and 13 of the Complaint.
16

17 12. Mohave admits the initial term of the Contract was for 10 years, beginning on
18 April 1, 1982. Mohave also admits that the Contract contained an option for BIA to renew
19 the Contract, but denies that the option to renew was undefined or indefinite. Mohave
20 affirmatively alleges that at law an option in a contract must be exercised before the contract
21 expires, during the original term of the contract. At law, the option does not survive the
22 expiration of the contract and cannot be exercised after the contract, by its terms, terminates
23 unless the parties mutually agree, with consideration, to extend the option right. No such
24 agreement was entered into by the parties in this case and no consideration received. Absent
25 a prior exercise of its right to renew, the Contract, and its option for two additional 10 year

1 periods, terminated on March 31, 1992. BIA has already admitted the Contract expired prior
2 to its purported exercise of the option. [See, Complainant's Exhibit 4.] Mohave therefore
3 denies that a Contract existed after March 31, 1992 and denies that the option to renew the
4 expired Contract survived after that date.

5
6 13. Mohave admits the allegations in Paragraph 15 of the Complaint. Mohave
7 affirmatively alleges that upon BIA's failure to timely exercise its option to renew and the
8 expiration of the Contract, and in accordance with the Commission's 1982 Decision, the
9 Transmission Line and right-of-ways granted to Mohave were not used or useful to Mohave,
10 became surplus, and were no longer necessary or useful in the performance of Mohave's
11 duties to Mohave's public, as provided in A.R.S. §40-285(C). Mohave further affirmatively
12 alleges that although it may have had such right-of-ways described in Paragraph 15 of the
13 Complaint, once the Contract with BIA expired, Mohave was without lawful authority under
14 A.R.S. §40-281(C) to operate on these right-of-ways, because the rights-of-way were outside
15 the service area certificated to Mohave by the ACC and Mohave had no retail authority to
16 serve.
17

18
19 14. Mohave, as the agent of the BIA, admits it served the parties listed in
20 Complainant's Exhibit 13, at the request of and as a courtesy to BIA. Mohave denies,
21 however, that these accounts are "retail customers" of Mohave as alleged in Paragraph 16 of
22 the Complaint. Instead, Mohave affirmatively alleges these are accounts of the BIA and BIA
23 has the lawful authority to serve these accounts at retail.

24
25 15. Mohave admits that over 1 year subsequent to the expiration of the Contract,
BIA sent it a letter dated April 19, 1993, purporting to notify Mohave of its "intent to exercise

1 the renewal option in the Contract.” Mohave affirmatively alleges that, pursuant to the “black
2 letter,” well-settled principles of contract law, this letter was a unilateral offer by BIA to
3 negotiate a new Contract for wholesale electric service, particularly since BIA’s offer sought
4 to amend and delete certain terms of the expired Contract.
5

6 16. Mohave denies the allegations in Paragraph 18 of the Complaint and
7 affirmatively alleges that BIA refused to negotiate a new wholesale electric service contract
8 in good faith. Mohave also affirmatively alleges that although it had no duty to do so under
9 the terms of the 1982 Contract, in March 1992, it informed BIA of the Contract’s impending
10 expiration and asked BIA whether it intended to exercise its option to renew. Mohave
11 received no response from BIA until 13 months later.
12

13 17. Mohave denies the allegations of Paragraph 19 of the Complaint and
14 affirmatively alleges that Mohave could not acknowledge Long Mesa was in its service area
15 because Long Mesa was in the service area of UNS or APS. Indeed, the document referenced
16 by BIA in Paragraph 19 of the Complaint was a descriptive newsletter sent to Mohave’s
17 members, not a filing with ACC. As a mass informational mailing, the newsletter had no
18 legal or binding effect. Mohave further affirmatively alleges that it had no CC&N or similar
19 certificate, franchise, license or permit from the Tribes to provide service at Long Mesa. But
20 for the authority from the BIA under the Contract, providing this service would have been
21 illegal.
22

23 18. Mohave denies the allegations in Paragraph 20 of the Complaint.
24

25 19. Mohave denies the allegations in Paragraphs 21 and 22 of the Complaint and
affirmatively alleges that Mohave’s actions and inactions were nothing more than an

1 accommodation to BIA and a good faith effort to reach an agreement on the terms and
2 conditions of a new wholesale electricity service agreement.

3 20. Mohave admits the factual allegations in Paragraphs 23, 24, and 25 of the
4 Complaint and affirmatively alleges that it is ready, willing and able to negotiate a new
5 wholesale electricity service agreement with BIA for delivery at the Nelson substation.
6 Mohave further affirmatively alleges that the accounts referred to in these paragraphs were
7 created as an accommodation and courtesy to BIA, which has the fiduciary duty and trust
8 responsibility to serve the Tribes and has the only lawful authority to deliver retail electricity
9 to customers on tribal lands. Mohave moreover affirmatively alleges that without the
10 wholesale electric service contract that expired in 1992, Mohave could not lawfully provide
11 service on behalf of BIA.
12

13
14 21. Mohave denies the allegations in Paragraph 26 of the Complaint that it quit
15 claimed the property to BIA. Instead, Mohave affirmatively alleges that it quitclaimed and
16 abandoned the real and/or personal property, including unexpired rights-of-way and a "Pole
17 Line License Agreement" (this License is now expired) described in Paragraph 26.
18

19 22. Mohave denies the allegations in Paragraph 27 of the Complaint and
20 affirmatively alleges that upon abandonment of real and personal property, including fixtures
21 upon land, the property reverts to its fee simple owner, which in this instance is either BIA, as
22 trustee of federally-recognized Indian tribes, or the Tribes themselves. Further, Mohave
23 affirmatively alleges that because it has no legal right to provide electric service in the
24 certificated area, the rights-of-way and contracts were entered into in furtherance of the 1982
25 BIA wholesale electric services contract, and the 1982 Contract is now expired, the real and

1 personal property interests referred to in Paragraph 27 became unnecessary and useless
2 surplus. Mohave's bylaws, in Article VIII, allow its Board to dispose of "insubstantial"
3 properties of the Cooperative. In accordance with this bylaw, the Arizona Court of Appeals'
4 holding in *Babe Investments v. Arizona Corp. Comm.*⁵⁰ And consistent with the Commission's
5 1982 Decision, Mohave made a proper finding that the Transmission Line was surplus and
6 without the Contract, no longer "necessary and useful" in the performance of its duties to
7 Mohave's public. Mohave affirmatively alleges that, according to A.R.S. § 40-285(C), the
8 sale, lease or other disposition of property that is not necessary or useful to Mohave in its
9 performance of its duties to the public cannot be prevented. Mohave moreover affirmatively
10 alleges that, based on the Commission's 1982 Decision, it did not need to obtain the
11 Commission's permission or authorization to sell, lease or otherwise dispose of property that
12 is no longer necessary or useful.

15 23. Mohave admits BIA sent a letter to Mohave dated September 12, 2003, as
16 alleged in Paragraph 28 of the Complaint but affirmatively alleges that the line was
17 abandoned and BIA (or the Tribes), not Mohave, had the only lawful retail authority and
18 fiduciary duty to continue the electricity service provided to BIA and the Tribes accounts on
19 the Tribes' reservation which Mohave had provided as a courtesy and accommodation to BIA.

21 24. Mohave admits, as alleged in Paragraph 29 of the Complaint, that it sent a letter
22 to BIA dated September 2, 2003, which letter speaks for itself. Mohave admits, as a courtesy,
23 it gave BIA a 2-month service credit and affirmatively alleges that BIA has the authority,
24

25 ⁵⁰ 189 Ariz. 147, 939 P.2d 425 (Ariz. App. 1997).

1 experience and ability to read meters and calculate bills in order to confirm Mohave's
2 charges.

3 25. Mohave admits the allegations in Paragraph 30 of the Complaint and
4 affirmatively alleges that rates to be provided to BIA retail customers are a matter for BIA to
5 determine and within BIA's authority to set, as established by BIA's operations at the San
6 Carlos Irrigation Project. Mohave further affirmatively alleges that it has furnished electricity
7 to BIA at the Commission wholesale rate approved in Mohave's 1990 rate case.
8

9 26. Mohave denies the allegations in Paragraph 31 of the Complaint and
10 affirmatively alleges that it has provided an accounting to BIA every month since April 1,
11 1982. Further, Mohave affirmatively alleges that such accountings are within the control of
12 BIA and the tribes.
13

14 27. Mohave denies the allegations in Paragraph 32 of the Complaint and
15 affirmatively alleges that BIA, in fulfillment of fiduciary duty and trust responsibility to
16 preserve and protect the health, safety and welfare of members of the Tribes, the IHS and all
17 customers to which it is now providing and has authority to provide retail electric service,
18 continues to pay Mohave for wholesale electricity delivered to it at the Nelson substation for
19 resale. Mohave, together with APS and UNS continue to agree to provide emergency
20 overhead maintenance and repair services on a compensation-for-services basis to assist BIA
21 in meeting its fiduciary duties and trust obligations.
22

23 28. Mohave denies the allegations in Paragraph 33 of the Complaint and
24 affirmatively alleges that all twelve electric users on the Tribes' reservations continue to
25 receive electrical service and further that the expense of such service is the financial

1 responsibility of the United States. Mohave affirmatively alleges that BIA has the lawful
2 authority to continue such service.

3 29. Mohave denies the allegations in Paragraph 34 of the Complaint and
4 affirmatively alleges that, in fulfillment of BIA's fiduciary duties and trust responsibilities, the
5 United States, not the members of Mohave, should incur the costs associated with continuing
6 to provide retail electrical service to the twelve accounts located on the tribal lands and the
7 IHS. Mohave further alleges that it is inappropriate, inequitable and creates a windfall to the
8 federal government to have Mohave, rather than the United States, meet the United States'
9 fiduciary and trust obligations to its Tribal beneficiaries and to be required to add
10 approximately 700 square miles to its service territory.
11

12 30. In response to Paragraph 35 of the Complaint, Mohave admits that, despite
13 being given two months of electrical service, BIA's own ability to read meters and to prepare
14 billings to its retail customers, the United States appears here to have failed to fulfill its
15 fiduciary duty to provide electrical service to members of the Tribes or to make any
16 arrangements to reasonably and in good faith negotiate a new contract for electric services to
17 replace the expired 1982 agreement with Mohave. Mohave affirmatively alleges that the BIA,
18 rather than comply with its fiduciary obligations and trust responsibilities, instead attempted
19 to shift the economic burden of Reservation retail service on Mohave's cooperative members
20 and have Mohave's members improperly pay the United States' indebtedness.
21

22 31. Mohave denies the allegations in Paragraph 36 of the Complaint.
23

24 32. Mohave denies the allegations contained in Paragraph 37 of the Complaint and
25 affirmatively alleges it has complied with A.R.S. §40-285(A).

1 33. Mohave denies the allegations contained in Paragraph 38 of the Complaint and
2 affirmatively alleges it has properly disposed of the Transmission Line and right-of-ways in
3 accordance with A.R.S. §40-285(C).

4 34. Mohave denies the allegations contained in Paragraph 39 and affirmatively
5 alleges that Mohave continues to offer to maintain, repair and replace the Transmission Line,
6 at the expense of the United States.

7 35. Mohave denies that the prayer for relief contained in Paragraph 40 of the
8 Complaint is proper and avers that it should be denied by the ACC. In the alternative,
9 Mohave requests the ACC to enter an Order as follows:
10

11 (A) Mohave's certificated area of service is the area identified in the CC&N
12 on file and as set forth in the records of the ACC;

13 (B) Mohave's service under the now-expired 1982 Contract was at wholesale
14 to BIA, under the lawful authority of BIA to be present on the Havasupai and
15 Hualapai reservations;

16 (C) Services provided at retail to twelve accounts on tribal lands, provided at
17 the request of, as an agent of, and as a courtesy to;

18 (D) Mohave's obligation is to provide BIA wholesale electrical service for
19 resale at the Nelson substation under its ACC-approved large commercial/
20 industrial tariff and BIA, not Mohave, is required to pay any costs associated
21 with upgrading facilities to meet local growth demands attributable to it;

22 (E) Consistent with the prior commitments of APS, UNS and Mohave, upon
23 being compensated by the BIA, APS, UNS and Mohave will assist the BIA in
24
25

1 the maintenance, repair and replacement of components of the Transmission
2 Line; and

3 (F) The twelve customers in the service area are the "public" and retail
4 customers of BIA.
5

6 36. Mohave also denies any and all allegations of the Complainant not specifically
7 denied, admitted or otherwise addressed in this Answer.

8 **AFFIRMATIVE DEFENSES**

9 37. As provided in A.R.S. §40-101, *et. seq.*, Mohave affirmatively alleges that the
10 ACC is without jurisdiction to hear and decide the claims alleged in Complainant's
11 Complaint.
12

13 38. Mohave affirmatively alleges that Complainant's Complaint fails to state a
14 claim upon which relief may be granted pursuant to the rules and procedures of the ACC and
15 Rule 12(b)(6), Arizona Rules of Civil Procedure.

16 39. Mohave has not concluded all of its research and discovery and therefore
17 reserves the right, in accordance with A.R.C.P 8(c), to add affirmative defenses as may later
18 be discovered to be applicable.
19

20 40. Mohave reserves any right, defense, claim or other matter it may have which
21 may constitute an affirmative defense, set-off, counterclaim or similar action, including those
22 set forth in the rules and procedures of the ACC and Rule 8(c), Arizona Rules of Civil
23 Procedure which may be revealed during or as a result of discovery or other proceedings in
24 this matter.
25

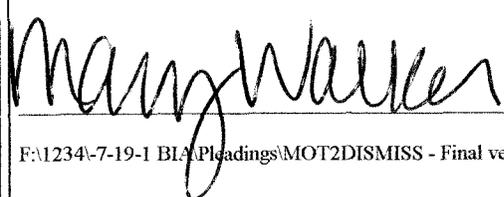
1 Copies of the foregoing hand delivered/mailed
2 this 5th day of October, 2005 to:

3 Dwight Nodes, Esq.
4 Administrative Law Judge, Hearing Division
5 ARIZONA CORPORATION COMMISSION
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7 Phoenix, Arizona 85007

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23 
24 _____
25

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1 BEFORE THE ARIZONA CORPORATION COMMISSION

2 COMMISSIONERS
3 JEFF HATCH-MILLER, CHAIRMAN
4 WILLIAM A. MUNDELL
5 MARC SPITZER
6 MIKE GLEASON
7 KRISTIN K. MAYES

8 IN THE MATTER OF THE COMPLAINT OF
9 BUREAU OF INDIAN AFFAIRS, UNITED
10 STATES OF AMERICA, AGAINST MOHAVE
11 ELECTRIC COOPERATIVE, INC. AS TO
12 SERVICES TO THE HAVASUPAI AND
13 HUALAPAI INDIAN RESERVATIONS.

DOCKET NO. E-01750A-05-0579

MOHAVE ELECTRIC COOPERATIVE
INC.'S STATEMENT OF FACTS

14 There is no dispute between Mohave and BIA regarding the facts material to
15 this matter. Even if such a dispute existed, for a Motion to Dismiss, facts most favorable to
16 the non-moving party are deemed true. These relevant facts follow.

17 1. On October 1, 1981, the BIA and Mohave entered into a ten (10) year electric
18 utility contract (the "Contract") for the construction and provision of electricity on a seventy
19 (70) mile electrical power line ("Transmission Line") from the Nelson substation (just inside
20 Mohave's certificated area) to the BIA at Long Mesa on the Hualapai Indian tribal lands.
21 Practically all (except a half mile) of the electrical power line is outside of Mohave's
22 certificated area. [See, Complainant's Exhibit 1.]

23 2. The Contract had an option for the renewal of the Contract for two additional
24 ten (10) periods. [See, Complainant's Exhibit 1.]

25 3. The ten (10) year period of the Contract commenced on April 1, 1982. [See,
Complainant's Exhibit 4.]

1 4. Under the terms of the Contract, Mohave was required to provide all funds
2 necessary for the construction costs of the Transmission Line and owned the Transmission
3 Line once it was built. [See, Complainant's Exhibit 1, Addendum No. 1, p. 6.] Mohave
4 obtained these construction funds through a loan from the United States Department of
5 Agriculture's Rural Utilities Services.
6

7 5. The Contract provided that the BIA would pay a wholesale rate for electricity,
8 plus an annual amount as "FACILITIES CHARGES," which included, in part: (1) operation
9 and maintenance expenses; (2) the cost of replacements less original book value of the
10 replaced facilities; and (c) cost of system improvements that Mohave constructs as a result of
11 this Contract. [See, Complainant's Exhibit 1, Addendum No. 1, p. 6-8.]
12

13 6. The Contract further provided that "the Government shall utilize the electric
14 energy supplied under this Contract only in connection with the needs of the respective Indian
15 tribes or their customers or for such other uses as may be required by diversification or
16 expansion of the needs related thereto." [See, Complainant's Exhibit 1, Addendum No. 1, p.
17 8-9.]
18

19 7. Electric service over this Line commenced in February 1982. BIA was sent its
20 first bill requesting payment for the wholesale energy provided by Mohave in March 1982.
21 [Respondent's Exhibit N.]

22 8. In a letter dated March 8, 1993, the BIA Contracting Officer confirmed the
23 Hualapai Tribe's imposition of a possessory tax on the Transmission Line, specifically
24 finding that the Line was a "transmission" line rather than a "distribution" line.
25

1 9. Neither party renewed the Contract before the expiration of the Contract on
2 March 31, 1992.

3 10. Over a year after the expiration of the Contract, in a letter dated April 19, 1993,
4 BIA admitted the Contract had expired. [See, Complainant's Exhibit 4.]
5

6 11. Notwithstanding BIA's admission that "the term of this contract was for ten
7 years and has since expired," BIA further informed Mohave that it was notifying Mohave
8 Electric of its intent to exercise its option to renew the Contract, provided that:

9 Prior to exercising this option, we need to re-negotiate and amend the
10 existing contract. The contract makes reference to construction of overhead
11 transmission and/or distribution lines. Construction was completed and the
12 Government reimbursed Mohave all costs associated with the construction.
Therefore, some of this language needs to be deleted.

13 [See, Complainant's Exhibit 4.]

14 12. Mohave advised the BIA, through correspondence dated June 15, 1995, that the
15 Contract had expired in 1992. [See, Complainant's Exhibit 6.]

16 13. Mohave advised the BIA on June, 6, 1996 that it intended to quit-claim and
17 abandon its interest in the Transmission Line. Mohave also informed BIA that it had
18 relocated its metering equipment to Mohave's Nelson substation, which was within Mohave's
19 certificated area. [See, Complainant's Exhibit 8.]

20 14. On March 6, 2002, BIA forwarded a letter to Mohave, purporting to "exercise
21 its option to extend the [previously expired] contract for a ten year period from April 1, 2002
22 through March 31, 2012." Supporting documentation, including an "Amendment of
23 Solicitation/Modification of Contract" form, described this purported renewal as a "Unilateral
24 Modification IAW Contract Terms and Conditions." The Government unilaterally amended
25 the Contract terms by:

1 1. [D]eleting the charge contained in the contract at
2 Addendum No. 1, p. 6, paragraph "FACILITIES CHARGES,"
3 subparagraph "(1),"

4 2. No payment is owed by the Government to MEC for the
5 charge described in the Contract at Addendum No. 1, p. 6,
6 paragraph "FACILITIES CHARGES," subparagraph "(2)," until
7 MEC provides the Government with properly supported invoice
8 [sic] documenting those charges; and

9 3. No payment is owed by the Government to MEC for the
10 charge described in the Contract at Addendum No. 1, p. 6,
11 paragraph "FACILITIES CHARGES," subparagraph "(3)," until
12 MEC provides the Government with properly supported invoice
13 documenting those charges.

14 [See, Complainant's Exhibit 10.]

15 15. While BIA unilaterally made its own changes to the Contract, it objected to
16 what it characterized as Mohave's "unilateral change in the point of metering and billing from
17 Nelson substation" and certain billing practices related to Mohave's monthly charges. [See,
18 Complainant's Exhibit 10.]

19 16. On March 20, 2002, Mohave responded to BIA's attempt to unilaterally
20 resurrect and amend the long-expired Contract and offered to negotiate a new one. [See,
21 Complainant's Exhibit 11.]

22 17. On January 21, 2003, Mohave and BIA executed a Settlement Agreement in the
23 United States Court of Claims. In this Settlement Agreement, BIA relinquishes all actual and
24 potential monetary claims that could be brought for past (*i.e.*, incurred on or before January
25 15, 2003) payments, including payments made to Mohave for "Facilities Charges," except
26 those claims based on fraud or overpayment of ACC approved tariffs.

1 18. On April 17, 2003, Mohave's Board of Director's passed a resolution
2 determining that the Transmission Line was no longer "necessary or useful" in the
3 performance of Mohave's duties to the public it serves. The Resolution is attached as
4 Respondent's Exhibit K.

5
6 19. On July 23, 2003, Mohave informed BIA that it had issued and recorded a
7 "Notice of Quit Claim, Conveyance and Assignment of Interest and Abandonment of
8 Property," transferring the Transmission Line to the BIA and the Tribes "to be shared in such
9 proportions and relationships as you may establish among yourselves." Mohave also
10 reminded BIA that the transferred facilities are not within Mohave's certificated service area
11 and that no Tribe has authorized Mohave to serve it. [See, Complainant's Exhibits 12.] The
12 quit claim deed is Complainant's Exhibit 13.

13
14 20. On February 4, 2005, Mohave submitted a request to the United States
15 Department of Agriculture's Rural Utilities Services, asking that RUS release a partial lien it
16 had on the Transmission Line. [See, Respondent's Exhibit L]. This request was made
17 pursuant to Mohave's Mortgage Documents with RUS and 7 C.F.R. § 1717.616. RUS
18 released the partial lien it held on the Transmission Line in response to Mohave's request,
19 finding the transfer met all requirements of 7 C.F.R. §1717.616. [See, Respondent's Exhibit
20 M].

21
22 21. On September 15, 2005, the License granted Mohave by the Boquillas Cattle
23 Company related to the Transmission Line terminated by its express terms.

24 22. By operation of their 30 year terms, the rights-of-way granted to Mohave by the
25 Tribes expire in 2012.

1 23. The Commission may take judicial notice, based on its own records and
2 decisions, that the Tribal lands are outside the service area certificated to Mohave. In fact, a
3 significant portion of the lands along the Transmission Line are served by Arizona Public
4 Service ("APS"). *See*, Respondent's Exhibit D.
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EXHIBIT

A

Plaintiff in Indians' suit brings case to Valley

By Judy Nichols
THE ARIZONA REPUBLIC

Indians from the Gila River Indian Community listened Tuesday as lawyers recounted the words of Mary Johnson, a Navajo who recently testified at a court hearing in Washington, D.C.

Johnson spoke in Navajo, and her testimony was translated for the court.

She told how oil wells on her property have been running 24 hours a day, seven days a week since the 1930s. Only recently did her monthly check for the leases top \$100.

She also told the court that when the government came to put in a pipeline for the oil, they dug up her mother's grave and moved it away.

Elouise Cobell, a Blackfeet Indian suing to make the federal government account for billions of dollars collected for leases but never given to the individuals, met with Arizona



MARK HENLE/THE ARIZONA REPUBLIC
Elouise Cobell talks to Gila River Indian Community members.

tribal members on Tuesday and urged them to get involved in the issue.

Cobell, a rancher and banker from Montana, is the lead plaintiff in *Cobell vs. Norton*, the longest and largest class-action lawsuit brought against the government.

The issue goes back to 1887, when the government allotted lands to individual Indians, then leased the land for oil drilling, farming, grazing,

Indians' case brought to Valley

mining and other activity.

More than 500,000 individuals are affected, and estimates are that more than \$100 billion has been lost.

Cobell and attorneys in the case visited the Gila River Indian Community on Tuesday morning and the Salt River Pima-Maricopa Indian Community and the Tohono O'odham Nation later in the day. On Thursday, they will visit the Navajo Nation.

"The goal is to update all the individual Indians about where we are and tell them about the dirty tricks the government is playing," she said.

Lawyers say the government has lied to the courts and been sanctioned for destroying documents.

"No other race of people would have to sue for this," Co-

bell said.

Cobell urged Arizona Indians to write to their representatives, particularly Republican Sen. John McCain.

Earlier this year, Cobell met with McCain to discuss a way for Congress to settle the case.

"He sat across the table and told me he would work as hard as I had to get justice," Cobell said.

But Cobell, who has always admired McCain, was disappointed with the legislation he crafted.

"It did not recognize the victories we had won in court," she said.

Cobell hopes McCain will rewrite the bill.

"He understands this issue, and he has got to do the right thing," she said.

In June, tribes offered to settle for \$27.5 billion, but McCain, chairman of the Senate Indian Affairs Committee, called the figure "out of sight" and said Congress would never approve it.

"He has to get real," Cobell said. "There's \$176 billion due, and it keeps going ka-ching, ka-ching every day. That's just common trust law.

"But we realize we might all die before that is paid, so we offered to settle at a tremendous bargain to the government."

Keith Harper, one of the attorneys working on the case, said the lawsuit has the power to transform the way the government deals with Indians.

"Where someone's getting ripped off, someone else is getting rich," he said. "There's a great resistance to change."



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Feds want Indian royalties judge removed

Judge described Justice Department as 'disgracefully racist'

WASHINGTON (AP) – The Justice Department took the unusual step of asking that a new judge be assigned to a 9-year-old lawsuit by American Indians seeking a century's worth of unpaid oil and gas royalties.

U.S. District Judge Royce Lamberth has been highly critical of the Interior Department for failing to identify how much money Indian tribes are owed. Last year the judge held Interior Secretary Gale Norton in contempt of court.

Lamberth's "legal errors and unconventional case management" are impeding an accounting of the royalties, the Justice Department said Monday in a 20-page filing asking a federal appeals court to order a change in judges.

The Justice Department said that a July 12, 2005, ruling by Lamberth "is unlike any other judicial opinion that we have ever seen."

The department criticized Lamberth for making a "gratuitous reference" to murder, dispossession, forced marches and other incidents of cultural genocide against the Indians.

Lamberth's ruling, the Justice Department complained, described the Interior Department to be a "dinosaur – the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind."

The government's problem is not the judge, said Dennis Gingold, lead attorney for the Indians suing the government.

Gingold said the government's problem is the district court calling it to account for "100 plus years of bad facts, its pattern of unethical behavior, and its persistent strategy of diversion, delay and obstruction."

In 1994, Congress found problems with the Interior Department's administration of 260,000 Indian trust accounts containing \$400 million.

The Indians allege the department mismanaged oil, gas, grazing, timber and other royalties from their lands dating to 1887. Elouise Cobell of the Blackfeet Indian tribe and others sued in 1996 to force the government to account for billions of dollars belonging to about 500,000 Indians.

The Indians say they are willing to settle for \$27.5 billion.

Sen. John McCain, R-Arizona, has criticized the government for having "never really even made any serious attempt at keeping track of the revenues" it owed the Indians. McCain says, however, that the \$27.5 billion figure is "just way out of sight."

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INDIAN TRUST; COBELL v. NORTON

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Friday, September 02 2005

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Appearances

Tuesday February 5, 2002

Testimony. Elouise Cobell testifies before the House Resources

Testimony by Elouise Cobell
 IIM Trust Beneficiary
 Before the House Committee on Resources
 February 6, 2002

Thank you, Mr. Chairman, for this opportunity to address the Committee on the issue of reform of the Individual Indian Moni
 The history of mismanagement of the IIM trust is long and tortured, but it boils down to three "must-do's":

- The IIM trust system must be fixed. The Secretary of the Interior has ignored the will of Congress and misled Congress for
 Since December 1996, the Interior Secretary has ignored orders entered by Judge Royce C. Lamberth of the U.S. District C
 District of Columbia. Nothing has changed. Since the Interior Secretary continues to breach the trust duties owed by the Un
 government to individual Indian trust beneficiaries and Congress clearly is unable to compel an obdurate member of the Pre
 Cabinet to obey the law and discharge the trust duties conferred on her by Congress, it is time for Judge Lamberth, with the
 Congress, to place the IIM trust in receivership.

- The IIM beneficiaries must be provided an accounting. Reportedly, at least \$500 million a year in trust revenues is general
 individual Indian-owned lands. Where is the money? The Interior Secretary has demonstrated through the fraud she has pe
 the United States District Court and the United States Court of Appeals that she no longer should be trusted to manage or a
 Individual Indian Trust funds.

- Restitution must be made. True trust reform will require a re-statement of the Individual Indian Trust. More than \$100 billio
 deposits, interest and accruals remains unaccounted for. We hope that this year, Judge Lamberth will set a trial date to dete
 amount due to the individual Indian trust beneficiaries.

Mr. Chairman, the IIM trust is supposed to be the mechanism by which revenues from Indian-owned lands throughout the V
 are collected and distributed to approximately 500,000 current individual Indian trust beneficiaries. This trust is a vital lifeline
 Americans, many of whom are among the poorest people in this country. Where I live, in Glacier County, Montana, the horr
 Blackfeet Nation and one of the 25 poorest counties in the United States, I can tell you that many people depend on these p
 the bare necessities of life. These trust checks are not a luxury. Trust funds are not a handout or an entitlement program. It
 important to keep in mind that this is our money - revenue from leases for oil and gas drilling, grazing, logging and mineral e
 Indian lands. This Individual Indian Trust was devised by the United States government and imposed on Indian peoples mo
 century ago. As trustee, the United States and each branch of the federal government has the highest legal and fiduciary re
 manage the Individual Indian Trust in a scrupulously professional manner, exclusively for the benefit of Individual Indian Tru
 beneficiaries.

Unfortunately - as you and many of the members of this Committee are well aware, Mr. Chairman - this has been, and rema
 broken trust. The mismanagement of the Individual Indian Trust by the United States government for more than 120 years i
 disgrace. The refusal of the Executive Branch to fix it is appalling. The failure of Congress to act decisively to hold the Interi
 accountable for her malfeasance is disturbing and indefensible. Since we initiated class action litigation in 1996 to enforce t
 obligations owed by the United States to individual Indian trust beneficiaries, I have said many times to our legal team that t
 government's bad faith and misconduct simply cannot get any worse. And each time I've been wrong. It gets worse and wor
 in spite of humiliating courtroom defeats, in spite of scathing reports by court-appointed watchdogs and the government's ov
 and experts, in spite of shameful news coverage and editorials in the media, and in spite of repeated warnings and admonit
 Congress. The Interior and Treasury Secretaries' malfeasance strains the limits of our language. The courts and Congress
 some of the strongest rhetoric I have ever seen to describe the injustice being done to the individual Indian trust beneficiari
 Secretary of the Interior, the Secretary of the Treasury and the Attorney General fight on against us and defend the legally
 indefensible. Why? Where has Congress been while this mugging has gone on for nearly six years a few blocks away from
 room? Where is the outrage from this body? Why has Congress turned its back on Indian people again?

Mr. Chairman, I would like to make this clear at the outset to the members of the Committee: Hundreds of thousands of Am
 the individual Indian trust beneficiaries - have won decisively at every stage of this litigation. More than two years ago - in D
 we won a landmark decision at the U.S. District Court. The Justice Department appealed that decision, and we won unanim
 appellate level a year ago - in February 2001. Two members of President Clinton's Cabinet - Messrs. Rubin and Babbitt --
 contempt of court in February 1999 for violating court orders and covering up their violations, and the taxpayers paid their \$

Now we are in the middle of a contempt trial for Secretary Norton and Assistant Secretary for Indian Affairs Neal McCaleb for court orders and for perpetrating a fraud on the court, and I have no doubt that they, too, will be held in contempt. Tens of millions of dollars have been appropriated by this Congress to defend the fraud, deceit and malfeasance of the Interior Secretary and Assistant Secretary.

Judge Lamberth already has ruled that the Secretary's abject failure to provide even minimal computer security protection for Indian trust data and trust funds is contemptible on its face. She also faces charges of failing to begin to provide an historical accounting of the individual Indian trust beneficiaries (more than seven years after Congress ordered them to do so and more than two years after Judge Lamberth ordered them to do so), and submitting false reports to the court. Despite being ordered by Congress and the courts to reform the trust and provide the historical accounting, testimony in the contempt trial going on now shows that the Interior has done nothing - nothing - to comply. The Administration's mindless battle to prolong this case - in the face of the fact that it is an indefensible waste of judicial resources and an insult to both Native Americans, taxpayers and anyone with integrity.

Mr. Chairman, the individual Indian trust beneficiaries have asked Judge Lamberth to strip control of the trust away from the Interior and place it temporarily in the hands of a receiver. If Judge Lamberth finds Secretary Norton in contempt, as we will clear the way for the judge to do just that. The judge has said in court recently that he is proceeding carefully in this case, giving the government all the rope it wants - because no court has put an agency of the Executive Branch into receivership in this nation. But that is exactly where we are headed. And it will be a fine day when it happens, too. I would like to return to this moment to explain why we have asked for receivership, why a receiver is immensely preferable to Secretary Norton's ill-considered reorganization plan for the BIA, and why the support of Congress for receivership is important.

If the Secretary is found in contempt and the Individual Indian Trust is placed, at last, in the competent hands of a receiver, we can move to trial on the final issue - a restatement or correction of the Individual Indian Trust balances - before the end of the year (or, at the court's discretion and schedule). In 1999, Judge Lamberth and the U.S. Court of Appeals ordered the Secretary and Treasury to provide individual Indian trust beneficiaries with an historical accounting of "all" trust revenues, withdrawals and distributions. However, Mr. Chairman, Interior has done nothing. A senior trust official testified last month that Interior "is not yet at the stage of providing an accounting. In fact, he testified that Interior officials are still debating internally what the term "historical accounting" means. Norton's most recent Quarterly Report to the court acknowledges that her department's trust reform master plan has been superseded by a million consultant's report to Interior advises starting over. Even if Interior and Treasury were acting in good faith, they are unable to provide an accounting because they have destroyed, and continue to destroy, the individual Indian trust records (making this debacle seem to be trivial in comparison). They also have spent \$36 million "so far" on a new trust accounting computer system that does not work and will have to be scrapped.

The bottom line is that the Bush Administration is under court order to account for more than \$100 billion in Individual Indian Trust funds and has utterly refused to do so. Judge Lamberth will decide in the upcoming trial how much of those funds must be restored to the stated IIM trust balances. That figure is yet to be determined finally, but if we go to trial it likely will be much more than \$100 billion. This impending financial train wreck and continuing legal humiliation - despite the oaths that the government's lawyers take in court - the Interior Secretary, the Treasury Secretary and the Attorney General march on, too arrogant to enter into good faith settlement discussions that could cut this fiasco short, spare the court's time and energy and somewhat soften the Executive Branch's dishonor.

Mr. Chairman, I believe it would be helpful at this point to summarize very briefly the history of the Individual Indian Trust as the Executive Branch has arrived at this state of disgrace while Congress has turned its back on Indian people.

The IIM trust derives from the 1887 General Allotment Act (the "Dawes Act"), which, as Judge Lamberth has noted, was "drafted for the land holdings of the tribes." [Judge Lamberth's Dec. 21, 1999 decision in the Cobell case contains a concise history of the trust, posted on the Cobell plaintiffs' web site at www.indiantrust.com, under Court Rulings.] Under Dawes, tribes were paid for the land they held, and each head of household was allotted property, usually 40-, 80- or 160-acre parcels. The land left over was opened to "non-Indian" settlement. The allotted lands were held in trust by the United States for the individual Indians. For more than 120 years, the Department of the Interior, and specifically the Bureau of Indian Affairs, has overseen the leasing of these allotted lands on behalf of the tribes and their heirs. Revenues from these leases have been collected by Interior and supposedly held, invested and disbursed to the trust beneficiaries by the Treasury Department.

From the beginning, this system has fallen prey to abuse, corruption, neglect and incompetence. As the U.S. Court of Appeals for the District of Columbia Circuit said in its Feb. 23, 2001 decision upholding Judge Lamberth, "The trusts at issue here were created over a hundred years ago... and have been mismanaged nearly as long." Incredibly, since 1887 the management of the IIM trust has gotten steadily better, but steadily worse. It is worse today than it was in 1996, when we filed our lawsuit. Just to quote one brief paragraph from Judge Lamberth's 136-page opinion:

"It would be difficult to find a more historically mismanaged federal program than the [IIM] trust.... The court knows of no other federal program in which federal officials are allowed to write checks - some of which are known to be written in excess of the amounts - from unreconciled accounts - some of which are known to have incorrect balances. Such behavior certainly would not be tolerated from private sector trustees. It is fiscal and governmental irresponsibility in its purest form."

The glaring mismanagement of the IIM trust was exposed (not for the first time, or the last) by the House Committee on Government Operations, in its landmark 1992 report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Individual Indian Trusts."

which was spearheaded by the late Rep. Mike Synar (D-OK). Citing the trust's "appalling mismanagement," Mr. Synar likened it to "a bank that doesn't know how much money it has."

The Synar Report led to passage by the Congress in 1994 of the Indian Trust Reform Act. In an attempt to end Interior's incompetence in running the IIM trust, the act established a Special Trustee for American Indians to oversee reform. A Level filled by a presidential appointee who is subject to Senate confirmation, the Office of Special Trustee was expected to provide leadership and accountability that trust reform had been lacking. Sadly, that has not been the case.

On June 10, 1996 - after years of runarounds from Interior and the BIA, and convinced that they would have to be forced to IIM trust - we filed our class action lawsuit against the Secretaries of the Interior and Treasury. Judge Lamberth split our case into two issues - reform of the trust, and a re-statement of the accounts. On Nov. 27, 1996, the judge also ordered Interior and Treasury to produce all existing IIM trust documents and to produce relevant documents and records to the plaintiffs. In fact, destruction of records and documents, including e-mails written by government lawyers in this case, has continued throughout the life of the litigation. Babbitt and Rubin were held in contempt by Judge Lamberth in February 1999 for ignoring the document order, and the judge subsequently appointed a Special Master, Alan Balaran, to oversee the government's compliance. Unknown to all of us at the time, Treasury had destroyed an additional 162 boxes of trust records during the contempt trial. Treasury and Justice Department waited 13 weeks to inform the court.

After a nine-week trial on the first issue - how to fix the system - Judge Lamberth ruled on Dec. 21, 1999 that the United States provide an historical accounting for "all" IIM funds. He ordered Interior and Treasury to reform the trust, and required quarterly reports on its progress.

Testimony in the Norton-McCaleb contempt trial has shown that for more than a year after Lamberth's decision, officials at Interior and Justice did nothing about an accounting and little about trust reform. They believed that Lamberth had exceeded his authority and hoped he would be overturned by the appeals court. What actions Interior and Justice did take were driven by their litigation and in support of their appeal, with no regard for the IIM trust beneficiaries. A senior trust official, Principal Deputy Special Trustee Thompson, testified that today - more than two years after Lamberth's decision - not a single IIM account has been certified ("It really makes you wonder why I'm sitting here, doesn't it?" said Judge Lamberth.)

On Feb. 23, 2001, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld Judge Lamberth's decision. In the meantime, a senior Interior Department official sent a memo to the Special Trustee exposing the department's trust reform efforts. In the memo, he wrote, was based on "rosy projections" and "wishful thinking." "Posturing for the court...is the primary influence on objectives and guidelines." Eventual disclosure of the memo by the Justice Department led Judge Lamberth to appoint a Court Monitor to assess Interior's true progress on trust reform and the veracity of its quarterly reports to the court.

Four scathing reports by the Court Monitor, Joseph S. Kieffer III, since his appointment in May 2001 form the basis of four criminal charges against Norton and McCaleb. (Court-ordered trust reform, said Kieffer, "is a chimera. The trust reform ship has been sunk. A cynical observer would go so far as to say it never left dry-dock, rotting there.") A separate report by Special Master Balaran on lack of computer security for IIM accounting data led to a fifth count of contempt. (It is Balaran's report that Judge Lamberth certified prima facie case for contempt.) This past Friday, Mr. Kieffer issued two more reports. They only add to the searing indictment against Norton, Secretary O'Neill and Attorney General Ashcroft in this matter. The Kieffer reports document a shocking pattern of omissions, statements and outright lies to the court in the quarterly reports submitted by the Interior Secretary. Starting with the 3rd Quarterly Report in late summer of 2000, the Special Trustee, Thomas N. Slonaker, began to include his own independent comments, suspecting that project managers in the field were painting a false picture of their trust reform progress. By the 7th Quarterly Report last fall, he refused to verify the accuracy of the contents. Pressured by Interior lawyers to verify the report, other senior trust officials agreed because, they said, "certifying the 7th Quarterly Report would border on the foolhardy."

"No senior DOI official would touch that report with a 10-foot pole," said Kieffer, who found that Norton had submitted to the court an "untruthful, inaccurate and incomplete" report. Judge Lamberth has since ordered Secretary Norton to sign all future quarterly reports personally. (In her 8th Quarterly Report, submitted last month, Norton says her signature "reflects my belief that my personal comments in the Report are true...")

Balaran's report on the lack of computer security is equally disturbing. With court permission, he hired experts who easily hacked into the IIM trust accounting system and created a phony account without being detected. Balaran has recommended that the IIM trust system be placed in receivership.

With her credibility in tatters and faced with the virtual certainty of contempt, Secretary Norton and her inner circle of senior officials now proposed a drastic reorganization of trust responsibilities into a new Bureau of Indian Trust Asset Management. Because she has done this so late in the day and so suddenly - and without proper consultation with tribes, as required by law - her actions are a desperate attempt to stave off contempt. The proposal has met with very strong opposition throughout Indian Country. Americans would merge the tribal trust with the IIM trust under one entity, ignoring the trusts' two distinctly different functions, constitutive histories. This plan will undermine - not protect - tribal sovereignty. It will violate the IIM account holders' own direct relationship with the federal government, established by law.

Ironically, Norton already has hired former Assistant Secretary for Indian Affairs Ross Swimmer to head this effort. She ignores the fact that Swimmer was sharply criticized in the Synar Report for management failures involving the IIM trust. She ignores the fact that Swimmer - at best - has a "checkered" personal financial history. His BIA management included leading a misguided attempt to privatize

trust, spending \$1 million on the project and getting nothing in return. "BIA eventually paid Security Pacific [the bank intended the trust] \$934,512, but according to the Assistant Secretary for Indian Affairs [Swimmer], did not obtain any benefits for the government....Far from 'excusing' the waste of almost \$1 million in tax dollars, the Bureau's inept handling of the Security P simply underscores the reasons why it should not have been awarded in the first place," the report concluded.

Swimmer's hiring points up the most critical defect in the Secretary's proposal: It would leave the trust in Interior's control, at the same inept managers. It is crystal clear from the long record of IIM trust mismanagement that it is time - past time - to remove the trust from Interior's grasp and place it temporarily in the hands of a receiver. The IIM beneficiaries deeply deserve a trust run by experienced professionals, with commercial standards of accountability. Fixing the system is a crucial component of trust reform and becomes even more so as we draw closer to Trial Two and the issue of re-stating the accounts. The two must go hand-in-hand.

Mr. Chairman, it is our hope that this Committee and the Congress will terminate all appropriations needed by the Interior Secretary and the Attorney General to continue their bad faith legal defense. Instead, we ask that you support the Indian trust beneficiaries' request for appointment of a receiver under the supervision of the judiciary as the only rational solution for the government to fix the Individual Indian Trust. Congress has appropriated more than \$614 million for trust reform since 1996 and gotten virtually nothing in return - no accounting of Individual Indian Trust monies, no rehabilitation of the woeful system, no investment in information technology. The court and the Congress have not even gotten the truth from the Interior Secretary, in part because her advisors do not know the truth and lack the qualifications and skill to learn the truth before they inflict more irreparable harm on individual Indian trust beneficiaries.

The Court Monitor's 6th Report to Judge Lamberth, which was made public last week, captures the lack of accountability and arrogance that the individual Indian trust beneficiaries have experienced for decades from their government. Kieffer said:

The Secretary's candor in the Eighth Quarterly Report is refreshing. But the exacerbation of the "ordinary human inclination to ignore good news and ignore the bad was in the context of carrying out the highest fiduciary trust duties imaginable owed to the American people by the United States government. Compare this comment on the human fallibility of DOI and BIA officials with the realization that the reports were at the direction of and for the consideration of a United States District Court. A District Court that had previous Cabinet-level Secretaries and one Assistant Secretary in civil contempt for their and their subordinates' failure to overcome human inclination to lie or dissemble when bad news as well as good was required by Court order to be reported by Defense attorneys.

The Secretary's admission that activities had been designated completed when "little material progress is evident" is the most concerning comment in the entire Eighth Quarterly Report. The Secretary, in attempting to prepare an accurate and complete quarterly report, now found what the Court Monitor has reported in every single Report to this Court - the reports have been untruthful. The Court Monitor has nowhere can be found any indication that those who have committed or permitted these actions constituting contempt of Court have been or will be held accountable. No indication whatsoever that they will be forbidden to continue in supervisory or principal roles in the proposed BITAM and their conduct reviewed for disciplinary action and possible dismissal from their present positions within DOI will hold these officials accountable for the past and present harm caused to the IIM account holders by their untruthful conduct and misleading reports that covered up and hid the most serious of their failures? Apparently no one, because they remain in leadership positions involved with trust operations and related management and legal activities or have moved on to equivalent positions within DOI.

Where also can be found the expressions of apology and remorse by these same executives, managers and attorneys that substituted in the Eighth Quarterly Report for the repeated arrogant stances taken by the Defendants in the past seven false and incomplete quarterly reports and their legal defenses of them before this Court?

These Indian Trust duties were no ordinary responsibilities or obligations of the United States; no APA administrative functions, no harm, no foul" badminton game or walk in the park. The Secretary's understanding of these human failings of her subordinate staff is deaf hears in Indian Country where the effect of these unreported failures has been and is so severely felt.

Reference need only be made to the present IT Security failure and Court-ordered shutdown. The resultant loss of the income to the most needy IIM account holders and Indian Tribes is a perfect example of the result of these ordinary human inclination to ignore good news and ignore the bad. Held accountable for the TAAMS' failures or the failure to even address the IT Security lapses? Failures made aware to the public in the months if not years ago by their own paid consultants, the GAO, and the Special Master.

What also will be the human inclination of Senators and Representatives on oversight committees regarding the appropriation of monies for the Defendants to try to correct this morass? And who will end up being harmed if the Congress might - understandably reluctant to trust the Defendants to perform any better in the future, further delaying trust reform until a new agency can be staffed? None other than those same IIM account holders who have suffered so much for so many years at the hands and feet of the Defendants.

Candor about your subordinates' human failings is one thing, demonstrating how you will hold people accountable for their nonfeasance, misfeasance or malfeasance is quite another. This Court and Congress should require no less.

Now is the time for the Congress to send a clear signal that waste, fraud and malfeasance are unacceptable and that it war

fit, experienced managers in charge of fixing this badly broken mechanism. This is a chance for all of us to stand up for financial professional accountability. I believe strongly that further appropriations for trust reform should be fenced in, to be used by and not the failed programs of the past or defense of the indefensible litigation. The Individual Indian Trust should be put in the hands of a receiver supervised by Judge Lamberth until it has been rehabilitated fully and restored to health.

After the Court-appointed receiver rehabilitates the Individual Indian Trust, it is crucial that the Individual Indian Trust remain in conformity with the duties of a true fiduciary and, therefore, is, above all, free of politics and bureaucratic fumbling. The Individual Indian Trust already is one of the very few permanently and indefinitely appropriated funds of the United States, similar to the FDIC Reserve Board and the Comptroller of the Currency. Therefore, like the Office of the Comptroller of the Currency vis--vis the Interior Department, the Individual Indian Trust - after rehabilitation by crisis managers appointed by the Court - could be recast as a bureau within the Interior Department. Independence within Treasury is reinforced because the Comptroller is appointed by the President for a fixed five-year term, and the Comptroller reports to the President, not the Treasury Secretary. And there is little doubt that the Comptroller of the Currency model has worked well under difficult circumstances since 1863. Instead of underwriting non-reform, a skilled Trustee for the Individual Indian Trust - protected from politics and funded with permanent and indefinite appropriations - could hire the proficient managers desperately needed to ensure prudent management of this multi-billion dollar trust. The solution is simple: stop playing politics with our money and our people.

Our litigation has exposed an ugly story about arrogance and ineptness. But, with the help of this Committee, we can begin a new chapter. I appreciate this chance to testify and I would be happy to answer any questions.

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Pipeline firm skirts tribe

Operator appeals to U.S. as Navajo talks drag

Firm sidesteps tribe in talks

By Ken Alltucker
THE ARIZONA REPUBLIC

Frustrated by the pace of talks to continue operating hundreds of miles of pipeline across tribal land in Arizona and New Mexico, El Paso Natural Gas on Thursday sought to bypass Navajo officials by appealing directly to the federal government.

El Paso wants the U.S. Department of the Interior's approval of a pipeline right-of-way easement that would allow the Houston-based company to continue shipping natural gas throughout the Southwest. The move is unusual because El Paso has yet to strike a financial deal with the tribe, typically acquired step before the feds consider such an application.

"We're basically going (directly) to the Department of Interior," said "El Paso simply wants to return the Navajo Nation to the earlier times."

Louis Denetsosie

Navajo Nation attorney general
in a written statement released
Wednesday

Bruce Connerly, spokesman for El Paso,

El Paso claims that the tribe's demands have been unreasonable and could result in higher bills for customers such as Southwest Gas, which supplies natural gas to a half-million Valley homes.

The pipeline operator said Navajo negotiators have rejected the company's offer of cash and other consideration worth over \$200 million and instead asked for \$440 million over the two-decade lease to continue operating 900 miles of pipeline across the Navajo Reservation. El Paso would not say how much it pays for the existing 20-year lease, which expires Oct. 17.

Rights of way

Navajo Nation Attorney General Louis Denetsosie did not return a call Thursday but said in a written statement released Wednesday that the tribe's demands would be "utterly insignificant from the consumers' perspective."

He added that El Paso's competitors have accepted similar terms and that the operator resorted to scare tactics to sway public opinion.

"El Paso simply wants to return the Navajo Nation to the earlier times," he wrote, "when rights of way over Native American lands were granted by the United States for nominal consideration, thus gaining a competitive advantage over other gas pipeline companies."

It's unclear what the Department of Interior will do with El Paso's request. The agency had yet to review a copy of the application as of Thursday,

day, said Tina Kreisher, director of communications.

El Paso said the feds have an obligation to renew a right-of-way agreement for the following reasons:

■ The tribe agreed to permit utility construction in exchange for payment under the tribe's 1868 treaty with the United States.

■ "Unreasonable terms" demanded by the tribe amount to an unlawful exercise of regulatory authority over non-Indians.

■ Andrenewal of the right-of-way lease is needed to avoid conflict with another federal agency, the Federal Energy Regulatory Commission.

El Paso wants Interior's assistant secretary for Indian affairs to rule on the company's request and any appeal to avoid disruption of the flow of natural gas to hundreds of thousands of homes in the West.

Yet some observers question whether the federal government would be willing to intercede on behalf of El Paso.

Keith Harper, attorney at the non-profit Native American Rights Fund, said the tribe has a right to cut its own deal and doubts the feds will be willing to tinker with demands.

"I think if the Interior gets involved in undermining the decision-making right of a sovereign nation, they are treading on very shaky ground," Harper said.

Playing hardball

Furthermore, he said studies have shown that Native Americans historically have been short-changed in right-of-way negotiations with utilities and oil companies.

A 2003 study of such transactions showed individual Native American property owners were reimbursed an average of \$25 for every 3 yards of pipeline, compared with the non-Native rate of \$135 and up for a similar stretch of pipeline.

Yet El Paso said it's the Navajo tribe that is playing hardball over talks to extend the lease. The Navajos' demand equates to about \$50,000 per acre while fair-market value for comparable off-reservation land would fetch \$100 to \$500 per acre.

El Paso has asked the Federal Energy Regulatory Commission to approve a rate hike that would, in part, track the extra amount it pays the Navajos based on the lease negotiations.

If approved by FERC, those extra delivery charges would be passed along to Southwest Gas and other customers — utilities that would likely ultimately seek reimbursement from consumers.

Denetsosie suggested that El Paso may have another motivation in its public battle over the pipeline renewal.

He noted that El Paso agreed in a March 2003 deal with federal regulators to pay more than \$1.7 billion to California customers to settle market-manipulation lawsuits.

"If anyone is profiting at the expense of customers, it's El Paso," Denetsosie said. "El Paso is currently seeking higher tariffs from FERC over its western pipeline system and, in lieu of settlement payments, is offering favorable rates to California customers, placing the burden of the higher rate adjustment on east-of-California customers."

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U.S. Seeks New Judge in Indian Trust Case

- By PETE YOST, Associated Press Writer
Monday, August 15, 2005

(08-15) 13:24 PDT WASHINGTON (AP) --

The Justice Department took the unusual step Monday of asking that a new judge be assigned to a 9-year-old lawsuit by American Indians seeking a century's worth of unpaid oil and gas royalties.

U.S. District Judge Royce Lamberth has been highly critical of the Interior Department for failing to identify how much money Indian tribes are owed. Last year the judge held Interior Secretary Gale Norton in contempt of court.

Lamberth's "legal errors and unconventional case management" are impeding an accounting of the royalties, the Justice Department said in a 20-page filing asking a federal appeals court to order a change in judges.

The Justice Department said that a July 12, 2005, ruling by Lamberth "is unlike any other judicial opinion that we have ever seen."

The department criticized Lamberth for making a "gratuitous reference" to murder, dispossession, forced marches and other incidents of cultural genocide against the Indians.

Lamberth's ruling, the Justice Department complained, described the Interior Department to be a "dinosaur — the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind."

In 1994, Congress found problems with the Interior Department's administration of 260,000 Indian trust accounts containing \$400 million.

The Indians allege the department mismanaged oil, gas, grazing, timber and other royalties from their lands dating to 1887. Elouise Cobell of the Blackfeet Indian tribe and others sued in 1996 to force the government to account for billions of dollars belonging to about 500,000 Indians.

The Indians say they are willing to settle for \$27.5 billion.

Sen. John McCain, R-Ariz., has criticized the government for having "never really even made any serious attempt at keeping track of the revenues" it owed the Indians. McCain says, however, that the \$27.5 billion figure is "just way out of sight."

URL: <http://sfgate.com/cgi-bin/article.cgi?file=/n/a/2005/08/15/national/w132402D08.DTL>

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Indians Continue Wait for Accounts' Resolution

Nine-Year-Old Lawsuit Against Interior Department on Trust Funds Appears Far From Settlement

By Evelyn Nieves
Washington Post Staff Writer
Friday, August 5, 2005; A13

BROWNING, Mont. -- Nine years have ticked away since Elouise Cobell sued the government on behalf of as many as 500,000 Native Americans whose land the United States was supposed to manage. But the end of what has become the longest, largest class action lawsuit against the federal government remains nowhere in sight.

Sometimes, when Cobell returns home here to the Blackfeet Indian Reservation in northwest Montana from Washington, where the case is being heard in U.S. District Court, she feels buoyed by a development she thinks might help settle the case once and for all. But the feeling is fleeting.

Last week, a major court victory was still fresh; Judge Royce C. Lamberth had issued his most scathing critique of the Interior Department's handling of the Indians and the case. Lamberth cited Interior's "mismanagement, falsification, spite and obstinate litigiousness," among other failings, and his disgust was palpable.

"Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable," he wrote in the extraordinary, 34-page July 12 ruling, which agreed with the plaintiffs' claim that the department's information was unreliable.

But Cobell was preoccupied by a bill to settle the case that was introduced July 20 by Sens. John McCain (R-Ariz.) and Byron L. Dorgan (N.D.), chairman and ranking Democrat, respectively, of the Indian Affairs Committee. The bill, which the senators called "a starting point," was far from the remedy Indian leaders had hoped for, Cobell said. And she testified to that point.

"This bill proposes a formula for accounting that looks at the trust records from 1980 to 2005," Cobell said when she returned here from testifying. "The judge has already ruled that Interior has to make an accounting going back to the beginning."

Cobell v. Norton (for Interior Secretary Gale A. Norton) dates to 1996, but the complicated debacle some members of Congress have likened to a "Federal Enron" traces its origins back more than a hundred years.

Under a forced arrangement, in 1887 the government divided much tribal land across the country, which it had not already taken, into separate, private allotments for Indians. It then leased individuals' land, which ranged from 40 to 160 acres, usually to oil, gas, timber, grazing or coal interests. The Treasury Department placed the fees into a trust and was -- and remains -- responsible for doling out checks to the

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individual Indian trust beneficiaries.

But from the beginning, the plaintiffs say -- and the government has conceded until recently -- the basic recordkeeping for these lands was botched.

In 1994, six years after Congress began oversight hearings into the mismanagement of Indian trusts going back for decades, it passed a law ordering a special trustee to monitor the accounting of the trusts and creating a plan for reforming the system. The 1996 lawsuit followed after the first special trustee resigned in protest of what he said were attempts to obstruct his efforts to reconcile accounts.

Norton and her predecessor, Bruce Babbitt, have said it is impossible to provide a full historical accounting of the trusts -- there are said to be about 300,000 accounts, incorporating perhaps 500,000 individual beneficiaries, with combined balances in the trust of \$500 million to \$800 million.

But Interior officials say that as they perform a historical accounting of the trusts ordered by Lamberth -- an effort costing \$100 million so far -- their research, performed by using statistical sampling, has shown that the trust holders are owed little for their land. "If you use the facts that we have found so far in the accounting process, the number would be very, very low," James E. Cason, the associate deputy secretary for the Interior, told the Indian Affairs Committee last month.

"In court, the plaintiffs seek a historical accounting but are now working hard to prevent that accounting from occurring," Cason added. "In Congress, they argue against providing funding for that accounting; in court, they argue that the accounting is impossible. . . . Instead of an accounting, they want lots of money."

This stance, fairly new in the history of the lawsuit, infuriates the plaintiffs. What they object to, they say, is the Interior Department's taking money from already underfunded Indian health and education programs to fund its defense against the lawsuit. And they say Interior is basing its accounting on records that date only since 1985.

Interior officials say the Indians keep shifting their figures on the amount of money the government owes them -- from more than \$100 billion at one point to, most recently, \$27.5 billion (the figure the plaintiffs announced in June as acceptable to settle the case). But the plaintiffs say their figure has changed because as court testimony from Interior officials and court findings have shown, no one can be sure what is owed to trust holders.

Last week the plaintiffs pleaded with the judge to keep computers holding trust data shut down. They argued that the information remained as vulnerable to hackers as it was four years ago, when Lamberth ordered a shutdown of all computers in the Interior Department after an Inspector General's report showed that a computer hacker could move or change trust account balances with ease. The judge has not yet ruled on the matter.

From the start of the Indian trusts, accounting has been a problem. Allotment holders would receive Treasury checks with no additional paperwork. They were not told who leased their land, what it was used for, how much was used, or the price the company paid for obtaining the land's oil, timber or other resource. Allottees complained that they received checks -- sometimes for as little as 2 cents -- that the government did not explain. Many say that practice continues.

Recent history has also revealed problems.

In 1999, Treasury's financial management office destroyed 162 boxes of trust documents as Interior officials were telling the court they were searching for the records. A court-appointed master assigned to oversee the preservation production of documents found that Treasury violated ethical rules for not reporting the documents' destruction for 16 months. He called the trust system "clearly out of control."

In a ruling in 1999 ordering Interior to make a full accounting of the trust, Lamberth declared that "it would be difficult to find a more historically mismanaged federal program."

In 2001, after a 19-month investigation, a federal monitor assigned to provide the judge with assessments of Interior's representations called the department's efforts to provide an accounting in compliance with his order a sham marked by unrealistic responses and evasion.

Last month, when McCain and Dorgan introduced their bill on the Senate floor, Dorgan said: "The Cobell litigation has brought to light a very disturbing problem: The federal government may not know the proper balances of these accounts nor have sufficient documentation to determine the value of these accounts."

The government acknowledges one failure of recordkeeping. As original allotment holders died and their land was inherited by more and more heirs, the paperwork involved in keeping track of beneficiaries proved onerous. Nearly 50,000 active accounts, with a balance of nearly \$74 million, languish because, the government says, the beneficiaries' "whereabouts are unknown."

Cobell, a banker and accountant, said her husband began receiving trust checks a year ago with no documentation. "He doesn't know what they're for," she said, "but he was told they go back from three years ago. He was one of those 'whereabouts unknown,' though we've lived here forever."

Interior has appealed every major ruling in the case. Last week, it appealed Lamberth's July 12 order, in which he ordered Interior to include notices in its correspondence with Indians whose land the government holds in trust, warning them that the government's information may not be credible. Interior was issued a stay pending a ruling next month.

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Indian suing feds to speak in Arizona

Blackfoot seeks billions U.S. kept

Judy Nichols
The Arizona Republic
Aug. 29, 2005 12:00 AM

The Blackfoot woman who has led a nine-year battle to make the federal government show an accounting of Indian trust funds will visit Arizona on Tuesday to discuss the case and answer questions from tribal members.

Elouise Cobell, the lead plaintiff in *Cobell vs. Norton*, will discuss recent hearings, efforts to settle the lawsuit and the U.S. Department of Interior's efforts to oust the judge hearing the case.

Cobell, a rancher and banker from Montana, filed the class-action lawsuit in 1996 to force the federal government to account for billions of dollars held in trust for 500,000 American Indians and their heirs.

The case, the longest and largest class-action suit brought against the government, involves royalties for farming, grazing, mining, logging and other economic activities on tribal lands.

Its seeds date back to the 1880s, when the government, trying to break up reservations, "allotted" some Indian lands, giving 40 to 160 acres to some individual Native Americans.

The government then leased the lands for oil, gas, timber, grazing and coal, and collected the fees to put into trust funds.

The government was supposed to distribute the money to individuals but has been unable to account for the funds, blaming lost records, poor computer systems and incompetent administrators.

Estimates are that more than \$100 billion have been lost.

In June, tribes offered to settle the case for \$27.5 billion, but Sen. John McCain, R-Ariz., chairman of the Senate Indian Affairs Committee, called the figure "out of sight" and said Congress would never approve it.

Although Arizona tribes are less affected than some Eastern tribes with oil leases, there were allotted lands on the Gila River Reservation, the Salt River Reservation and the Tohono O'odham Reservation.

Hundreds of Arizona tribal members may be owed money, although no one knows how much.

Interior Secretary Gale Norton and her predecessor Bruce Babbitt say it is impossible to provide an accurate accounting.

Last month, Judge Royce C. Lamberth issued a scathing ruling saying information from the Department of the Interior is unreliable.

"Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable," he wrote.

The Interior Department has asked for him to be removed.

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Plaintiff in Indians' suit brings case to Valley

Judy Nichols
The Arizona Republic
Aug. 31, 2005 12:00 AM

Indians from the Gila River Indian Community listened Tuesday as lawyers recounted the words of Mary Johnson, a Navajo who recently testified at a court hearing in Washington, D.C.

Johnson spoke in Navajo, and her testimony was translated for the court.

She told how oil wells on her property have been running 24 hours a day, seven days a week since the 1930s. Only recently did her monthly check for the leases top \$100.

She also told the court that when the government came to put in a pipeline for the oil, they dug up her mother's grave and moved it away.

Elouise Cobell, a Blackfeet Indian suing to make the federal government account for billions of dollars collected for leases but never given to the individuals, met with Arizona tribal members on Tuesday and urged them to get involved in the issue.

Cobell, a rancher and banker from Montana, is the lead plaintiff in *Cobell vs. Norton*, the longest and largest class-action lawsuit brought against the government.

The issue goes back to 1887, when the government allotted lands to individual Indians, then leased the land for oil drilling, farming, grazing, mining and other activity.

More than 500,000 individuals are affected, and estimates are that more than \$100 billion has been lost.

Cobell and attorneys in the case visited the Gila River Indian Community on Tuesday morning and the Salt River Pima-Maricopa Indian Community and the Tohono O'odham Nation later in the day. On Thursday, they will visit the Navajo Nation.

"The goal is to update all the individual Indians about where we are and tell them about the dirty tricks the government is playing," she said.

Lawyers say the government has lied to the courts and been sanctioned for destroying documents.

"No other race of people would have to sue for this," Cobell said.

Cobell urged Arizona Indians to write to their representatives, particularly Republican Sen. John McCain.

Earlier this year, Cobell met with McCain to discuss a way for Congress to settle the case.

"He sat across the table and told me he would work as hard as I had to get justice," Cobell said.

But Cobell, who has always admired McCain, was disappointed with the legislation he crafted.

"It did not recognize the victories we had won in court," she said.

Cobell hopes McCain will rewrite the bill.

"He understands this issue, and he has got to do the right thing," she said.

In June, tribes offered to settle for \$27.5 billion, but McCain, chairman of the Senate Indian Affairs Committee, called the figure "out of sight" and said Congress would never approve it.

"He has to get real," Cobell said. "There's \$176 billion due, and it keeps going ka-ching, ka-ching every day. That's just common trust law.

"But we realize we might all die before that is paid, so we offered to settle at a tremendous bargain to the government."

Keith Harper, one of the attorneys working on the case, said the lawsuit has the power to transform the way the government deals with Indians.

"Where someone's getting ripped off, someone else is getting rich," he said. "There's a great resistance to change."

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Energy Act Provision May Offer 'False Sovereignty'

by Christopher Getzan (bio)

A controversial provision of the Energy Policy Act of 2003 has Native American activists worried that their lands will become even more vulnerable to exploitation from large energy corporations.

Jan 18, 2004 - Depending on who you talk to, a provision in the Energy Policy Act of 2003 will either make it increasingly easy for large corporations to treat Native American reservations like "batteries for large cities," or it will help ensure tribal sovereignty.

The provision causing controversy – the Indian Tribal Energy Development and Self Determination Act, or Title V – places tribal governments, rather than the U.S. Department of the Interior, at the center of the decision making process concerning reservations' energy development. The act also provides subsidies for increased oil and gas extraction in general and encourages nuclear power plant construction and research. Though the bill stalled in the Senate last December, it is expected to be reintroduced in the coming session, possibly as soon as the end of this month.

As it stands now, the federal government – usually the Department of the Interior – has a "trust responsibility" with the majority of American Indian tribes. Title V, save initial impact reviews, allows a tribal government the choice to once and for all opt out of involving the Department of the Interior in energy development projects.

Opponents of the bill, including the advocacy group Native Movement, the Black Mesa Water Coalition, and the Indigenous Environmental Network, say that persistent problems facing many American Indian communities cloud assurances that tribal governments alone, rather than stronger oversight all around, will lead to cleaner and less bureaucratic energy extraction on reservations.

However, David Lester, a citizen of the Muscogee Nation and the executive director of the Council of Energy Resource Tribes – a group that promotes tribal independence through capitalizing on resource development – and other advocates of the bill say that it will enable tribes to bargain as an "equal partner" with companies looking to mine or withdraw oil from their lands without "the stumbling blocks" of federal interference.

"The [impact] review period has killed most of the deals" of tribes looking to utilize their resources, Lester said. "It's the hassle factor of doing business with the Department of the Interior as [an] interference every step of the way."

"If they could control their own resources," he added, "they could advance their own economic, social, political goals."

Opponents of Title V, on the other hand, say that though this may seem like an opportunity for American Indians to get out from under an outdated and repressive federal scheme, there are flaws in both the resolution's intent and function.

"Well-developed tribes may be ready to take on the responsibility of their own lands," said Evon Peter, director of the Native Movement and former chief of the Neetsaii Gwich'in of Alaska. "Those with money can have a say in how things work. Major corporations are going to come in, with a lot more money, with a lot more lawyers. Now, these corporations are going to be able to do what they want with these tribal governments . . . Basically, it's the federal government stepping back from its responsibility and saying, 'Go for it, corporations.'"

Consumer advocate groups say that in the last decade, mining and dumping have had an adverse effect on many American Indian lands. For example, the Skull Valley Goshute reservation in Utah is planned as a pit stop for what the Department of Energy estimates will be a 100,000-shipment, thirty-year caravan of traveling nuclear waste. According to the Indigenous Environmental Network, just one component of the irradiated fuel that will be stored at Skull Valley, Plutonium 235, will remain toxic for the next 24,000 years, creating the possibility of an accident at the Goshute reservation that would quite literally poison the land forever.

Besides the environmental impact of resource extraction and nuclear waste, poor oversight has often led to Native Americans seeing little or no financial gain for resources removed from their land. For example, in 1995, an article in *American Indian Quarterly* noted that as much as \$180 million had been paid by oil companies in royalty fees to the Utah Navajo Trust Fund for operations near Aneth Montezuma Creek. Still, third-world conditions persisted over the forty plus years of extraction on Navajo lands. Seventy five percent of Utah Navajos still had no electricity or running water, and the fund was practically bankrupt due to mismanagement and fraud. By the end of the 1990s, Utah Navajos were left broke and stuck with nearly 600 oil wells drilled into their lands.

However, according to advocates of the bill, the argument that Native American tribes are not yet ready to bargain with companies without the federal government's intervention ignores Native Americans' historical ability to set high environmental standards. Lester said the record shows that native communities, when given the chance to act independently, have made sound environmental decisions. He gives the example of the Northern Cheyenne in Montana who rejected a proposed coalmine outright, or the Pueblos of New Mexico, who are located downstream from Albuquerque and managed to turn around water quality for the whole region by setting high standards of their own.

Lester said tribal activists and Democrats opposing Title V have been whipped up by activists in the environmental movement. "We can substitute the environmental movement for the BIA (Bureau of Indian Affairs). We can't accept federal paternalism, and we can't accept [environmental groups] maternalism."

"We've had a number of different eras in relations with the tribes," says Paul Moorehead, Staff Director and Chief Legislative Counsel for the Committee on Indian Affairs. "But the clear trend [is moving] away from the massive federalization of tribal government." Moorehead says that Title V represents a first step in an "analog" of trust liberalization that would extend into other fields on the reservation handled by the US government such as health care and law-enforcement.

However, to many Native American ears, arguments such as those of Lester and Moorehead, which present Title V as a mechanism for self-determination and economic freedom, ring hollow. Many such promises have been made in the past – like the Dawes Act, which at the time was hailed as a kind of "Magna Carta" for American Indians, but in reality functioned only as a colonial land grant system. "It's put forward as a tool for sovereignty, but really, it's just disguised as sovereignty," said Enei Begaye, the director of the Black Mesa Water Coalition and an Arizona Navajo. "Really, our tribes aren't given any real enforcement power. They're not equipped right now to take over [their] own environmental protection."

Other critics of the bill, like Tom Goldtooth, the executive director of the Indigenous Environmental Network, say that another problem with the bill is that large scale energy resource extraction stands in direct contradiction to native cultural traditions. "It is at the detriment of something we hold sacred," Goldtooth said. "These corporations have no interests in the rights of indigenous people. It is a form of environmental racism."

The Energy Act of 2003 stalled before it reached the House-Senate conference phase, but both sides interviewed for this article concede the bill will not live or die come the next Senate session because of Title V.

Activists like Evon Peter and Tom Goldtooth say they are holding out for improvement of Title V. Peter said that a Clinton-era executive order puts the onus on the federal government to consult directly with tribes when there are changes to be made to tribes' status, something senators debating the bill have apparently not done.

"Some tribes have had the money and the resources to [give their] input [to the government]," Peter said, "but I've never received any correspondence." At any rate, Peter said, "What we're hoping for is that if it goes back some place in the [legislative process], that the trust responsibility will be reinstated."

Enei Begaye said her interest in the energy bill does not begin and end with Title V. "What we do with this energy bill, on a national level," she said, "will be reflected back locally."

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Democrats set policy for Indian country

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Posted: August 05, 2005

by: **David Melmer** / Indian Country Today

WASHINGTON - Senate Democrats conferred with more than 150 tribal leaders for nearly six months to come up with policy recommendations on Indian country issues.

The senators and tribal leaders touched on most subjects that affect Indian country: justice, housing, trust reform, land and natural resources, education, economic development, and more.

"Senate Democrats initiated this process because we wanted to hear directly from Indian country about the issues of greatest concern," said Sen. Byron Dorgan, D-N.D.

The list of priorities were developed last fall through discussions among Senate Democrats and tribal leaders at the first-ever Senate Democratic Native American Forum. Increased funding and more hearings were familiar recommendations.

The top five priorities and their accompanying policy recommendations will be turned into legislative initiatives in Congress, Dorgan said.

Trust reform

The number one priority was found to be the need to reform the trust process. The report stated: "Congress should clarify the manner in which it carries out the fiduciary duties owed to Indian tribes and individual Indians." It also said the United States should work to improve its spotty record as trustee of lands, resources and funds, and consult with tribes on decisions that impact their land and natural resources.

Education

A recommendation was made to amend the No Child Left Behind Act to address problems unique to Indian country, such as its implementation and the development of a culturally based education curriculum. It was recommended that Congress recognize tribal authority and sovereignty, and mandate and authorize funding to study the value and importance of culturally specific education programs.

The Adequate Yearly Progress requirements should be amended, the group stated, to account for issues specific to communities and to include individual progress.

At the higher grades, American Indian schools frequently report low attendance rates. NCLB requires attendance be considered when determining the AYP; it does not authorize any consideration for cultural teaching methods or conditions unique to American Indian schools.

The senators and tribal leaders set action steps for the Senate. Joint hearings on Indian country's education challenges under NCLB are to be held, and assurance given that any bill addressing education issues will address culturally appropriate American Indian education needs.

Justice

Congress should provide funding to support a sufficient number of tribal police officers in American Indian communities and make sure the offices have adequate equipment for safety and communication and establish databases for relevant information. It is necessary to fund construction, repair for detention facilities, the group stated.

To that end, the steps taken by Congress may include more funding for the tribal Community Oriented Policing Services program and extension of the program beyond the five year period.

Funding for facility maintenance and construction was also recommended.

Homeland security is a heavily discussed topic among tribal officials. The Senate and tribal leaders group recommended the recognition of sovereign status with a correction in the definitions in the Homeland Security Act of 2002. American Indian tribes should be considered separate and distinct from local governments so that federal first responder funding would go directly to the tribes.

Health care

The federal government is failing in its obligation to provide adequate health care in Indian country. The per capita health care spending for the general population is \$5,000 per year; federal prisoners receive nearly \$4,000 per year in health care. For Indian country, that annual per capita spending is \$2,000.

A substantial increase in health care funding for the IHS to meet the federal government's responsibility of health care for American Indians and Alaska Natives was recommended. Elimination of the shortfall should be a commitment of the federal government over the next 10 years.

A flexible grant program to supplement existing preventive care funded by the IHS was recommended to promote and prevent disease.

Administration of health care programs should be more flexible so the tribes can provide for the health care needs of the community and to enhance representation on Department of Health and Human Services work groups and committees.

The Indian Self-Determination and Education Assistance Act of 1973 authorized tribes to manage all or some of their health care through contracts. Only 50 percent of the IHS budget is administered by tribes.

Housing and infrastructure

One of the largest inadequacies in Indian country is housing. At present 200,000 housing units are needed immediately. It is estimated that 90,000 American Indian families are homeless or underhoused. Nearly 15 percent of all homes are overcrowded, compared with 6 percent for the general population, and 12 percent of American Indians lack adequate plumbing, compared to 1 percent of the general population.

The group recommended that Congress support increased funding and enactment of legislation that would improve federal housing programs. Also, the Senate should take an active role to ensure that the Department of Housing and Urban Development fully implements the existing consultation policy. Expansion of the homebuyer education programs, streamlining of the BIA mortgage approval and title process were also recommended.

Safe water and waste systems are problematic on some reservations. An estimated 35 percent of homes in some areas lack adequate, safe water and waste systems. The group recommended Congress increase funding to the IHS, the Environmental Protection Agency and the Department of Agriculture to provide management and building of tribal systems.

Economic development is a much-repeated subject on many reservations, where high unemployment and lack of work skills is prevalent. Congress is encouraged to create parity in the tax code and support existing business assistance programs with a proven track record in Indian country. The Community Development Financial Institution Program, the Tribal Business Information Center and the Financial Literacy Program were cited as needing additional funding. Also, the Section 8(a) minority-owned small business program and any other small and disadvantaged business program should receive attention from Congress and additional funding.

"This body of work represents months of collaborative effort by many leaders from across Indian country. On behalf of the Democratic Caucus, I want to express my gratitude for this work which will inform our efforts in the 109th Congress and beyond," Dorgan said.



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DOCKET NO. U-1750-82-002
DECISION NO. 53174
OPINION AND ORDER

DATE OF HEARING: May 26 and 27, 1982
PLACE OF HEARING: Phoenix, Arizona
HEARING OFFICER: Thomas L. Mumaw
APPEARANCES: Robert K. Corbin, The Attorney General, by Lynwood J. Evans, Assistant Attorney General, on behalf of the Arizona Corporation Commission Staff

Ronald L. Kozoman, Chief Rate Analyst, Utilities Division, on behalf of the Arizona Corporation Commission

James K. Dinger, Financial Analyst, Utilities Division, on behalf of the Arizona Corporation Commission

Charles D. Wahl, Attorney at Law, on behalf of the Applicant

Jennings, Strouss & Salmon, by Thomas J. Trimble, on behalf of Genstar Cement and Lime Company

Joseph B. Beckford, Business Manager, on behalf of Bullhead City School District No. 15

Rowland R. King, Ph.D., Superintendent, on behalf of Mohave Valley School District No. 16

BY THE COMMISSION

On January 7, 1982, Mohave Electric Cooperative, Inc. ("MEC"), filed an application with the Arizona Corporation Commission ("Commission") requesting a permanent increase in its rates and charges for electric service. MEC further requested that the Commission determine the "fair value" of its property devoted to public service and set a fair and reasonable return thereon.

MEC notified its customers of the application in accordance with ACC R14-2-105 by

1 First Class U.S. Mail and filed a certification of notice with the Commission. Applications
2 requesting leave to intervene were thereafter filed by Mohave Valley Elementary School
3 District No. 16 ("MVSD"), Genstar Cement & Lime Company ("Genstar"), and Bullhead City
4 Elementary School District No. 15 ("BCSD"). These applications were granted by procedural
5 entry prior to hearing.

6 Pursuant to the above notice, this matter came on for hearing before a duly authorized
7 Hearing Officer of the Commission at its offices in Phoenix, Arizona, on May 26 and 27,
8 1982. MEC, Genstar, and representatives of the Commission's Staff ("Staff") appeared and
9 were represented by counsel. MVSD and BCSD appeared by duly authorized officials thereof.
10 Oral and documentary evidence was adduced by MEC, Staff, Genstar, and MVSD. Public
11 statements taken in Bullhead City, Arizona, on May 24, 1982, were also transcribed and
12 made a part of the official record as were those written statements which had been sub-
13 mitted by consumers to the Commission.

14 NATURE OF MEC'S OPERATIONS

15 MEC is an Arizona nonprofit cooperative corporation engaged in providing electric
16 service to some 14,000 customers in Mohave County, Arizona, pursuant to Certificates of
17 Public Convenience and Necessity ("Certificates") granted by this Commission. MEC's
18 service territory encompasses two separate portions of Mohave County. The larger of the
19 service areas lies east of Kingman, Arizona, and is sparsely populated. The second area
20 consists of a strip of land along the Colorado River, including the communities of Riviera
21 and Bullhead City, Arizona. MEC has experienced very rapid growth in the past few years.
22 Customer growth has been at a compound rate of 10% per year. While peak load and kWh
23 sales growth have been less than the customer growth, they are still substantially above the
24 national average.

25 MEC owns no generating facilities of its own. It buys all of its power from the Arizona
26 Electric Power Cooperative ("AEPSCO"), a "G & T" electric cooperative owned, in part, by
27 MEC. The rates charged MEC by AEPSCO are also regulated by this Commission and were
28 recently established in Decision No. 53034 (May 21, 1982).

PROPOSED INCREASE

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2 MEC has proposed tariffs which would increase revenues by some \$1,839,473 (based on
3 1980-81 usage) or 14.3%. The increase would be non-uniform with residential, small com-
4 mercial, and street lighting customers receiving higher percentage increases than would
5 large commercial, large power, and the newly segregated large irrigation customers.
6 Within these customer groups, the proposed increase is greatest for the smaller customers,
7 although this result is somewhat ameliorated by MEC's proposed "small user" residential
8 rate.

9 In addition to overall general rate level increases, MEC proposes to institute explicit
10 charges for various items such as service establishment, meter rereading, shop meter test-
11 ing, "NSF" checks, deferred payment plans, and "service availability." Increases in existing
12 miscellaneous tariffs such as service re-establishment and reconnection, and certain meter
13 tests are also being sought by MEC. On the other hand, MEC has proposed to begin paying
14 6% interest on customer deposits.

15 MEC's proposed tariffs contain several changes in rate design. As was noted previously,
16 MEC has suggested a "small user" rate for those residential customers who use less than
17 700 kWh during each of four designated summer months. MEC has also filed tariffs for an
18 experimental demand metered rate for large residential customers. Both tariffs would
19 remove any kWh allowance from the increased customer charge. As proposed, this tariff
20 would be limited to 500 customers. MEC has separated its largest irrigation customers
21 from the present Large Power rate and has created a Large Irrigation schedule. This
22 schedule would contain both seasonal and diurnal time-of-use features.

23 MEC's last rate proceeding was in 1980 (Decision No. 50900). That Docket merely
24 restructured the existing rates and did not provide any additional base revenue to MEC.
25 Previous to the instant application, MEC received an increase in base rates in Decision
26 No. 47419 (October 25, 1976). Any increase in the rates charged by MEC since 1976 has been
27 the direct result of purchased power pass-throughs and has not inured to the benefit of MEC.

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Mohave Electric Cooperative, Inc.Operating Income Statement for the Test Year
(000's)

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4	Operating Revenue:	<u>\$14,142</u>
5	Operating Expense:	
6	Purchased Power	\$11,327
7	O & M	1,645
8	Property Taxes	542
9	Other Taxes	60
10	Depreciation	<u>481</u>
11	Total Operating Expense	<u>\$14,055</u>
12	Operating Income	<u>87</u>
13	Non-Operating Income	<u>7</u>
14	TOTAL INCOME	<u>\$ 94</u>

RATE BASE

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16 Both Staff and MEC offered exhibits on the original cost of MEC's property devoted

17 to public service. Moreover, for purposes of this proceeding, MEC agreed that its original

18 cost rate base is a reasonable proxy for "fair value." No party herein has suggested that

19 the "fair value" of MEC's property devoted to public service would be less than original

20 cost.

21 As presented in Schedule FM-2 of Staff Ex. 6 (Revised), the positions of MEC and

22 Staff relative to the determination of rate base are:

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Mohave Electric Cooperative, Inc.

Summary of Fair Value Rate Base
(000's)

	<u>MEC Requested</u>	<u>Staff Adjustments</u>	<u>Staff Recommendations</u>
Gross Utility Plant in Service	\$14,014	\$3,402	\$17,417
Less: Accum Dep.	<u>3,583</u>	<u>569</u>	<u>4,152</u>
Net Utility Plant in Service	10,431	2,834	13,265
Plus:			
CWIP	1,688	(1,688)	0
Capital Term Certificates	0	530	530
Working Capital	1,292	(1,162)	130
Less:			
Customer Advances for Construction	<u>798</u>	<u>0</u>	<u>798</u>
TOTAL RATE BASE	<u>\$12,613</u>	<u>\$ 514</u>	<u>\$13,127</u>

The difference between Staff's net plant figures and that of MEC is attributable to the former's incorporation of 1982 net property additions. Since this adjustment included most if not all of the dollars contained in MEC's CWIP account as of September 30, 1981, Staff properly eliminated CWIP from its rate base computation.

Staff further adjusted rate base by adding MEC's investment in Capital Term Certificates. These Certificates are analogous to compensating bank balances and could be accounted for either by inclusion in rate base or by increasing the effective cost of long-term debt. There has been no objection to Staff's proposed treatment of these Certificates, and it will be adopted for purposes of this proceeding.

The most significant rate base issue between Staff and MEC involves working capital. MEC has utilized the "formula" method previously accepted by this Commission. This formula, like many other such "formulas" in use throughout the country, is a variation of the old "45 day" cash working capital formula developed over 40 years ago by the Federal

1 Power Commission. Staff conducted an analysis of MEC's balance sheet as well as the
2 actual "leads" and "lags" in the receipt of revenues and the payment of expenses. The
3 "balance sheet" method and lead-lag study are generally considered to be more accurate
4 than the "formula" method, although problems in their uniform application from case to
5 case often mitigate against use of these methods and in favor of the simpler "formula."
6 In this instance, the Commission is satisfied that Staff has properly determined working
7 capital.

8 RATE OF RETURN

9 A fair and reasonable rate of return for a cooperative such as MEC does not involve
10 the same considerations as would a similar determination involving an investor owned
11 utility. All the expert witnesses agreed that return on equity (also referred to as "margins")
12 and even the nominal rate of return on rate base have little independent significance. MEC
13 requires access to the credit markets on a regular basis. This is necessary to finance both
14 projected system expansion and to refinance prior obligations as they mature. MEC's two
15 most economical sources of capital are the Rural Electrification Administration ("REA")
16 and the National Rural Utility Finance Corporation ("CFC"). REA and CFC condition these
17 loans on the attainment by the borrower of specified interest coverage ratios or TIERs.
18 The present minimum TIER requirement of REA and CFC is 1.5. However, the rate of
19 return witnesses of MEC and Staff testified that MEC should achieve more than the minimum
20 necessary level of TIER. Staff recommended that a TIER of 2.0 would be sufficient at the
21 present time, although it conceded that MEC's long-run TIER should be improved from that
22 level. MEC presented testimony that a fast-growing company such as MEC should set
23 rates based on a TIER of 3.0. A representative from CFC concluded that cooperatives
24 would face increasing competition for funds in the private market, and that their financial
25 fitness would be judged by the same criteria as investor owned utilities. In the case of MEC,
26 this would require a TIER of 2.5 to 3.0. The witness also noted that in the future, members
27 of CFC (which will be the major source of new credit for cooperative utilities) could be
28 ranked by their relative contribution to the collective TIER of CFC, and the interest rate

1 on member loans determined accordingly. At present, CFC's financial condition is such
2 that it can no longer be lenient to those members in default of their TIER requirements.

3 MEC's TIER is the lowest of the six major cooperatives in Arizona. Its TIER for 1981
4 was 1.2, and in 1980 it was only .857. Although the restructuring of rates in 1980 appeared
5 to temporarily improve MEC's financial situation, TIER for 1982 will, in the absence of rate
6 relief, be less than 1.0. Since MEC's relatively strong 1979 year could no longer be considered
7 in REA's and CFC's calculations (the average of the best two out of the three most recent
8 fiscal years), MEC would no longer be eligible for these loans. With funds barely able to
9 cover its current interest charges, any other financing would be out of the question. System
10 expansion would come to a halt and lawful obligations could not be paid when due. Notably,
11 even should MEC receive the full amount of the requested increase, TIER will not sufficiently
12 improve in 1982 to prevent a technical default by MEC with REA and CFC.

13 Under the circumstances set forth above, it is clear that MEC is in critical need of
14 rate relief. Staff has recommended rates which, in our opinion, would result in MEC
15 keeping its head barely above water for a few months before filing for the additional relief
16 which will be required. Since MEC will also be in technical default of its REA and CFC
17 obligations by the end of this year, it is necessary for MEC to convince these organizations
18 that it is on the path to long-term financial solvency. The minimum long-term TIER
19 recommended by any witness herein was 2.3. The Commission believes that this minimum
20 long-term goal can be achieved without placing an excessive burden on MEC's ratepayers.

21 One further point is relevant in this regard. MEC has included \$32,000 in interest
22 associated with a transmission line dedicated to serving the Hualapai Indian Reservation, a
23 line which presently produces no revenue. Staff has likewise included this interest in its
24 calculations of TIER. The Commission believes that both parties erred in effectively
25 asking MEC's ratepayers to pay for plant which is not used and useful, will not be used and
26 useful, and was never intended to be used and useful in the provision of electric service to
27 such ratepayers. MEC has recognized this inequity by excluding the transmission line from
28 rate base and proposing to segregate all expenses and revenues associated with the line.

1 These gestures are meaningless if ratepayers must still provide TIER coverage for this
2 investment. Therefore, the Commission will eliminate the \$32,000 interest expense from
3 the calculation of TIER and rate of return.

4 With the above adjustments, the fair and reasonable rate of return on the "fair value"
5 of MEC's property is 9.6%. This return will permit MEC to achieve a TIER slightly above
6 2.3 for the remainder of 1982 (although probably not 1.5 for the entire year) and close to 2.3
7 for 1983, based on current projections of sales, expenses, and interest. As MEC's construc-
8 tion outlays lessen in the mid 1980's, TIER should improve further or at least not signifi-
9 cantly deteriorate. Thus, MEC would achieve some stability in base rates while increasing
10 its TIER and margins to acceptable levels consistent with projected long-term growth
11 within its service territory.

12 RATE DESIGN

13 MEC has proposed several innovative rate changes in the instant proceeding. The
14 "small user" residential rate and separate large irrigation schedule are opposed by Staff.
15 Likewise, Staff has taken exception to certain aspects of MEC's commercial and large
16 power tariffs. On the other hand, Staff supports the increase in the residential customer
17 charge to \$12.00 and the elimination of all kWh from that charge. Staff also agreed with
18 the experimental demand rate for large residential customers. However, Staff did include
19 the higher customer related metering costs in the customer charge for that experimental
20 rate.

21 Both Staff and MEC based their respective rate designs on the results of a cost of
22 service ("COS") study. While these analyses differed on various details, the differences
23 were not significant. Costs are functionalized and attributed to customer (weighted and
24 unweighted), demand (coincident and non-coincident), and energy components. The trans-
25 lation of the resulting figures into electric rates is yet another matter.

26 MEC did no separate analysis to cost justify its "small user" rate. The 700 kWh limita-
27 tion applied only to summer usage even though there was no significant seasonal variation
28 in COS. MEC assumed that such small customers had higher load factors than residential

1 customers as a whole but based that assumption on data developed by Arizona Public Service
2 Company ("APS"). There is little comparison between MEC and APS. Their seasonal cost
3 variations, differing service territories, and customer demography are greatly different.
4 Under MEC's proposal, the summer weekend resident of Bullhead City or Riviera would
5 receive a discount on his usage even though he might well be contributing to the system or
6 class peak and evidence a low load factor. In the absence of a more detailed study of this
7 subgroup, the Commission will not adopt the proposed "small user" rate.

8 The same conclusion applies to the proposed large irrigation rate. The seasonal differ-
9 ential does not appear to be cost justified. Moreover, the Commission is hesitant to create
10 yet another category of end use pricing. The introduction of an incentive for shifting
11 demand to off-peak periods on a diurnal basis is more properly grounded in COS principles.
12 Although MEC believes that the greatest potential for shifting is in the agricultural sector,
13 the testimony of the intervenors herein would appear to indicate the opposite. Consequently,
14 the Commission will reject the proposal to create a separate irrigation rate. However, the
15 Commission will require that MEC develop and propose an off-peak rate applicable to all
16 its large power customers within twelve months of the effective date of this Decision.

17 Staff's rate design is superior to that proposed by MEC in three major respects. Staff
18 has proposed a customer charge for every rate schedule. Staff has translated its COS study
19 directly into its rate design without significant subjective modification. Staff has utilized
20 voltage level variations while avoiding seasonal distinctions. For these reasons, the Com-
21 mission will accept Staff's rates except as necessarily modified to reflect the greater reve-
22 nue requirement found appropriate herein. Staff's rates generally favor high load factor
23 customers because Staff has included all margin requirements in the customer and demand
24 charges. While this does tend to promote earnings stability, MEC has warned that some
25 margin should also be included in the energy charge. Since most of MEC's customers are
26 not demand metered, the point is somewhat academic. However, the Commission will adjust
27 the Staff proposed rates by placing the incremental margin (above that recommended by
28 Staff) in the energy charge.

1 Although Staff did not particularly indorse MEC's miscellaneous charges (both new and
2 increased), Staff did agree that these items had a cost to MEC and should be charged to
3 those customers creating that cost. The implementation of these charges is consistent with
4 the Commission's policy of unbundling utility rates and will be approved herein.

5 Staff has also advocated a new method of calculating MEC's purchased power adjust-
6 ment charge. Rather than charging the same amount month after month and accumulating
7 the overcollections (undercollections) in a suspense account, Staff's recommendation would
8 institute a monthly adjustment formula which would be self-correcting in the succeeding
9 month. Staff's proposed adjustment clause would also tract actual purchased power costs
10 better than MEC's present procedure. The Commission has previously approved a similar
11 monthly adjustment for AEP's O, and so it is logical to adopt such a mechanism at the retail
12 distribution level. In recognition that this new type of purchased power adjuster may
13 require some careful rewording of MEC's present tariff language and the development of
14 necessary monthly estimation procedures, implementation of the Staff recommendation will
15 be delayed until MEC's January, 1983 billing cycles. At that time, any balance (deficit) in
16 MEC's purchased power "bank" will be amortized through the new purchased power adjust-
17 ment clause over the succeeding twelve month period.

18 AUTHORIZED INCREASE

19 The application of a 9.6% rate of return to MEC's "fair value" rate base produces
20 operating income of \$1,260,000. This is \$1,166,000 more than MEC's test year income.
21 Multiplying this deficiency by the agreed upon conversion factor of 1.042 results in a re-
22 quired increase of \$1,215,000 or approximately 8.6%. Since both the requested dollar and
23 percentage increase previously described were based on a different data set than the
24 revenue increase authorized herein, direct comparisons can be misleading. However, on an
25 adjusted per kWh basis, the authorized increase is approximately 60% of MEC's request.

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27 The Commission, having considered the entire record herein and being fully advised in
28 the premises, finds, concludes and orders that:

FINDINGS OF FACT

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1. MEC is an Arizona non-profit corporation engaged in providing electric service to the public within portions of Mohave County, Arizona, pursuant to Certificates granted by this Commission.

2. On January 7, 1982, MEC filed an application with the Commission requesting a permanent increase in its rates and charges for electric service, and that the Commission determine the "fair value" of its property devoted to public service and set a fair and reasonable rate of return thereon.

3. Pursuant to notice, a public hearing on the application was held at the Commission's offices in Phoenix, Arizona, on May 26 and 27, 1982.

4. For 1982, MEC's adjusted operating revenue is \$14,142,000; its adjusted operating expense is \$14,055,000; and its net income before interest expense is \$94,000.

5. The "fair value" of MEC's property devoted to public service as of December 31, 1982, is \$13,127,000.

6. A fair and reasonable rate of return on the "fair value" of MEC's property devoted to public service is 9.6%.

7. An increase in operating revenue of \$1,215,000 (based on projected 1982 sales) is necessary in order to permit MEC the opportunity to earn a 9.6% rate of return on the "fair value" of its property devoted to public service.

8. The rates and charges for electric service proposed by MEC would produce a rate of return on the "fair value" of MEC's property devoted to public service in excess of 9.6%.

9. The rates and charges for electric service proposed by Staff and as modified herein are properly based on the cost of providing such service.

10. The rates and charges proposed by MEC for establishment of service, re-establishment of service, reconnection of service, meter rereads, meter tests, NSF checks, deferred payment balances, and service availability (as set forth in Schedule H-3 of MEC Ex. 2) and the proposal to pay 6% interest on customer deposits will properly attribute cost (savings) responsibility (benefits) to those customers who cause such costs (savings).

Decision No. 52174

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IT IS FURTHER ORDERED that Mohave Electric Cooperative, Inc., shall file an "off-peak" tariff schedule applicable to all customers served under the Large Power rate within twelve months of the effective date of this Opinion and Order.

IT IS FURTHER ORDERED that this Opinion and Order shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

[Signature]
CHAIRMAN

[Signature]
COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, TIMOTHY A. BARROW, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 17th day of August, 1982.

[Signature]
TIMOTHY A. BARROW
Executive Secretary

EXHIBIT

C

BEFORE THE ARIZONA CORPORATION COMMISSION
 Arizona Corporation Commission

MARCIA WEEKS
 CHAIRMAN
 RENZ D. JENNINGS
 COMMISSIONER
 DALE H. MORGAN
 COMMISSIONER

DOCKETED

NOV 29 1990

DOCKETED BY	<i>[Signature]</i>
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IN THE MATTER OF THE APPLICATION OF) DOCKET NO. U-1750-89-231
 MOHAVE ELECTRIC COOPERATIVE, INC., AN)
 ARIZONA NON-PROFIT CORPORATION, FOR A) DECISION NO. 57172
 PERMANENT RATE INCREASE.)
 _____) OPINION AND ORDER

DATES OF HEARING: July 11, 1990 (Public Comments)
 July 25, 1990 (Hearing)

PLACES OF HEARING: Bullhead City, Arizona (Public Comments)
 Phoenix, Arizona (Hearing)

PRESIDING OFFICER: Beth Ann Burns

IN ATTENDANCE: Marcia Weeks, Chairman
 Renz D. Jennings, Commissioner

APPEARANCES: Mr. Charles D. Wahl, Attorney at Law, on behalf
 of Mohave Electric Cooperative, Inc.;

Mr. K. Justine Reidhead, Staff Attorney, on
 behalf of the Residential Utility Consumer
 Office;

JENNINGS, STROUSS & SALMON, by Mr. Glenn J.
 Carter, on behalf of Chemstar, Inc.; and

Ms. Elizabeth A. Kushibab, Staff Attorney,
 Legal Division, on behalf of the Arizona
 Corporation Commission Staff.

BY THE COMMISSION:

Mohave Electric Cooperative, Inc. ("MEC", "Applicant", or
 "Company") is an Arizona non-profit cooperative corporation engaged
 in the business of providing electric service to the public in

1 various portions of Mohave County, Arizona, pursuant to authority
2 granted by the Arizona Corporation Commission ("Commission").

3 On September 9, 1989, MEC filed with the Commission an
4 application for a permanent increase in its rates and charges. The
5 application was revised by filings dated November 8, 1989, April 9,
6 1990, and May 9, 1990.

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8 By Procedural Order dated November 9, 1989, intervention in
9 this matter was granted to the Residential Utility Consumer Office
10 ("RUCO") and Chemstar, Inc.

11
12 By Procedural Order dated May 29, 1990, the hearing in this
13 matter was scheduled to commence on July 25, 1990. The hearing was
14 held as scheduled.

15 Following the conclusion of the hearing, MEC and RUCO submitted
16 late-filed exhibits on July 27, 1990 to reflect a consensus reached
17 on certain issues. Staff submitted revised exhibits on August 1,
18 1990, August 7, 1990 and September 14, 1990. The late-filed
19 exhibits should be marked and admitted into evidence as follows:
20 Ex. MEC-10 (proposed rates revised) and Ex. MEC-11 (TIER forecasts);
21 Ex. S-3 (revised Staff Report); and Ex. R-5 (revised schedules).
22

23 DISCUSSION

24 Applicant provides electric utility service to approximately
25 22,000 customers located in two separate portions of Mohave County,
26 Arizona: a large, sparsely populated area east of Kingman, Arizona
27 and a rapidly growing area encompassing Bullhead City and Riviera,
28

1 Arizona. As an electric cooperative, MEC purchases all of its power
2 requirements from Arizona Electric Power Cooperative, Inc. MEC's
3 current rates and charges for electric service were approved by the
4 Commission in Decision No. 53174 (August 11, 1982).
5

6 This case comes before the Commission upon application of MEC
7 for authority to permanently increase its rates and charges. Based
8 upon its analysis of operating data for the test year ended July 31,
9 1989, MEC initially requested approval of rate schedules which would
10 yield \$1,803,775 in additional gross annual revenues, a 7% increase.
11 As revised to reflect the settled issues, discussed below, MEC is
12 now requesting a revenue increase of \$1,497,840, or 5.62%.
13

14 Staff conducted an investigation of the application and, in the
15 Staff Report filed July 3, 1990, recommended a revenue increase of
16 \$460,699, or 1.73%. Taking into account the settled matters, Staff
17 currently supports a \$585,762 increase, or 2.2%.
18

19 RUCO has presented a range within which it believes the revenue
20 increase should be determined. Initially, the range provided for an
21 increase from \$1,118,858 to \$1,199,330, or 4.2% to 4.8%. Upon
22 revision to incorporate the settled issues, the range became
23 \$686,690 to \$767,162, or 2.6% to 2.88%.
24

25 The settled issues referenced above result from a consensus
26 reached by the parties just prior to the hearing in this matter.
27 The consensus essentially represents acceptance of the Staff Report
28 and covers a substantial portion of the case.

1 With regard to determining the revenue requirement, no issue
2 remain in dispute as to the quantification of rate base. Applicant
3 has accepted Staff's proposed original cost rate base valuation of
4 \$26,742,431. Since MEC has elected not to submit a reconstruction
5 cost new rate base, the original cost rate base of \$26,742,431 will
6 be used as the fair value rate base for ratemaking purposes.
7

8 Applicant and RUCO have accepted Staff's adjustments to the
9 test year income statement, including the adjustments to reflect the
10 effects of customer growth. The adjustments subject to the
11 consensus are reasonable and should be adopted.
12

13 The parties have further reached agreement that: MEC's base
14 rate for purchased power should be \$0.065798 per KWH; MEC's share of
15 the Arizona Electric Power Cooperative, Inc. ("AEPCO") refund
16 approved by the Commission in Decision No. 56803 (January 31, 1990)
17 should be passed on to the Company's customers through a 3 mill
18 credit per KWH; and MEC should include an addendum to its monthly
19 purchased power adjustor filing to report for each month the amount
20 refunded, the balance of the refund, and the amount of interest
21 earned on the unrefunded balance. The Commission finds that the
22 agreement is reasonable and should be adopted.
23

24 The only unresolved issue affecting the calculation of the
25 revenue requirement is the level of revenues necessary for MEC to
26 maintain an appropriate times interest earned ratio ("TIER") and
27 equity ratio.
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1 With regard to rates and tariffs matters, one issue remains in
2 dispute. Staff has accepted Applicant's proposed distribution of
3 the revenue increase among the customer classes, whereas RUCO favors
4 an alternative allocation. The parties have agreed upon Applicant's
5 proposed rate design, which includes the following changes:
6

- 7 • reduction of the residential monthly service charge from
8 \$12.00 to \$9.50 per month;
- 9 • revision of the optional demand rate for residential and
10 small commercial customers;
- 11 • expansion of the small commercial tariff to include
12 customers with demands up to 100 KW;
- 13 • establishing a new rate for irrigation customers; and
- 14 • establishing separate rates for MEC's three large contract
15 customers.

16 The rate structure supported by the parties is reasonable and should
17 be adopted.

18 THE TIER AND EQUITY RATIOS

19 At July 31, 1989, Applicant's actual capitalization consisted
20 of 68.26% debt and 31.74% equity. The ten-year equity management
21 plan Applicant submitted for the Commission's consideration in this
22 proceeding contemplates raising the Company's equity ratio to 45%
23 within four to five years. The objective of raising the equity
24 ratio would be to improve the capital structure and thereby enable
25 the Company to attract financing for its construction program from
26 sources other than the Rural Electrification Administration ("REA")
27 and the National Rural Utilities Cooperative Financial Corporation
28

1 ("CFC"). Applicant is concerned that the REA and CFC may reduce
2 available funding or increase the interest rates.

3 According to Applicant, an integral step in the equity
4 management plan is achieving a net TIER of at least 2.69.¹ The
5 Company believes that a 2.69 TIER would provide sufficient earnings
6 to maintain its sound financial condition, provide reliable service,
7 respond to rapid system growth, stabilize rates at the lowest
8 overall long-term costs to its member-customers, improve its equity
9 ratio, and rotate capital credits to its member-customers in a
10 meaningful cycle.² As revised, Applicant's \$1,497,840 rate request
11 would produce the earnings required to achieve the targeted interest
12 coverage ratio in the late-1990's.
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15 RUCO disagrees with Applicant's plan to reach a 45% equity
16 ratio within a four to five-year period. It is RUCO's position that
17 the equity component should instead be raised to between 35% and 40%
18 of total capitalization, with some consideration given to adopting
19 a flexible capital credit rotation policy so that the correct equity
20
21

22 ¹ An interest coverage ratio, or TIER, is a common financial
23 measure of a company's earnings capability. The net TIER is
24 calculated by adding the total margin and the interest expense on
25 long-term debt, and then dividing by the amount of the interest
expense. The operating TIER is calculated by dividing operating

26 ² Under the capital credit system, a cooperative's margin is
27 allocated or credited back to its members in proportion to each
28 member's patronage or revenues. The credits are maintained on the
cooperative's books until its financial condition allows the refunds
to be made.

1 ratio can be maintained when the Company's margin fluctuates. RUCO
2 contends that moving toward a ratio of 35% to 40% would comport with
3 the principles of continuity and gradualism. The upper end of the
4 range RUCO sponsored for the rate increase is intended to produce a
5 2.14 net TIER and a 37.5% equity ratio in about five years.
6

7 The revenue increase recommended by Staff is calculated to
8 allow MEC to maintain a net TIER of 2.00, with a net debt service
9 coverage ratio ("DSC") of 2.09. Staff contends that a 2.00 net TIER
10 is appropriate for the Company. In support of its position, Staff
11 has observed that the long-term debt financing provided by the REA
12 and CFC only requires a cooperative to maintain a 1.5 net TIER and
13 a 1.25 DSC, as an average of the best two of the last three calendar
14 years of operations. In Staff's opinion, little incentive exists to
15 pursue coverage ratios significantly higher than the minimums since
16 neither the CFC nor the REA reward financially strong cooperatives
17 with lower interest rates than those charged other companies.
18
19

20 The issue before the Commission is the extent to which the rate
21 relief granted in this proceeding should include revenues intended
22 to augment MEC's earnings and thereby increase its TIER ratio and
23 equity capitalization. The Commission finds that the weight of the
24 evidence fails to substantiate the reasonableness of or need for a
25 revenue allowance in the magnitude suggested by either MEC or RUCO.
26

27 The primary objective underlying Applicant's proposed move
28 toward a higher coverage ratio and equity component is enhancement

1 of its financial posture and ability to attract capital from sources
2 other than REA and CFC. However, the record evidence does not
3 establish a need for MEC to actually seek alternative financing. At
4 the time of hearing, Applicant's witnesses anticipated that MEC
5 would in the next month submit a request to REA and CFC for
6 financing its 2-year construction program. The Company's testimony
7 has suggested no obstructions to procuring that financing and
8 expresses hope that the funds will be obtained without having to
9 approach another source. There is no indication in the record that
10 the Company will be unable to secure REA and CFC financing unless
11 its proposed 2.69 TIER is attained. There is also no certainty that
12 REA and CFC will drive cooperatives into the capital market by
13 increasing interest rates or restricting the availability of debt.
14 Absent evidence establishing more than a remote possibility that it
15 will be necessary for MEC to obtain alternative financing in the
16 near future, the record fails to convince the Commission that a
17 revenue allowance in excess of Staff's recommendation is warranted.
18
19
20

21 The \$585,762 increase recommended by Staff is the level of rate
22 relief necessary for Applicant to meet its operating costs, provide
23 reliable electric utility service, and accrue sufficient earnings to
24 maintain its financial integrity while cycling capital credits to
25 its member-customers. It produces a 2.00 net TIER for the adjusted
26
27
28

1 test year,³ which is slightly higher than the coverage ratios MEC
2 has recently experienced.⁴ It will provide a reasonable return on
3 fair value rate base and should be approved.
4

5 REVENUE DISTRIBUTION

6 The remaining issue for the Commission's determination is the
7 appropriate distribution of the authorized revenue requirement among
8 the customer classes. Traditionally, the most widely accepted
9 measure of reasonable utility rates and rate relationships is cost
10 of service. Through a cost of service study, allocation ratios are
11 developed to identify the proportionate responsibility of the
12 various customer classifications for the utility's investment,
13 revenues, and expenses. The realized rate of return under present
14 rates is then calculated for each class and its relative rate of
15 return performance is considered, along with other intangible
16 factors, in distributing the revenue requirement.
17
18

19 Applicant performed a class cost of service study using a
20 functionalization, classification, and allocation approach. The
21 study is a product of load data for other utilities and the judgment
22 of its expert witness because Company-specific information is
23

24 ³ On rebuttal, the Company presented a forecast which
25 estimates that for the 12 months ended June 30, 1991, the revenue
26 increase recommended by Staff would produce a net TIER of 1.85. The
2.00 net TIER calculated based upon adjusted test year results,
however, is the relevant number.

27 ⁴ At the end of the test year, the Company's net TIER was
28 approximately 1.80 (Ex. A-2, Sch. 3). At year-end 1989, it was 1.77
(Ex. A-8, p. 3).

1 unavailable. Under the revenue distribution resulting from the
2 study, a higher than average percentage increase would be allocated
3 to the residential, small commercial, and lighting classes. Staff
4 has accepted this revenue distribution, but recommends that MEC be
5 directed to implement a load research program for its system.
6

7 RUCO has criticized that portion of Applicant's cost of service
8 study which allocates demand-related costs to the customer classes.⁵
9 In RUCO's opinion, the demand allocation factors used in the study
10 were improperly derived from load characteristics which had been
11 estimated by Company witness Neidlinger based in part upon judgment
12 and in part upon actual information he had in the past reviewed for
13 the Arizona Public Service Company ("APS"), Tucson Electric Power
14 Company, and Texas Electric Utilities Company. RUCO contends that
15 the use of actual data for APS alone would be more appropriate, but
16 that load data specific to MEC would most closely reflect the actual
17 cost responsibility of the Company's customer classes. It is,
18 therefore, RUCO's proposal that Applicant's cost of service study be
19 modified to reflect the APS demand-related data and that Applicant
20 be directed to implement a load research program to develop MEC-
21 specific data for future rate cases. Under RUCO's revision to the
22 Company's cost of service study, the small commercial, large
23
24
25
26
27

28 ⁵ The demand-related portion of the purchased power costs is
the single largest expense item incurred by MEC.

1 commercial and industrial, irrigation, and lighting classes would
2 sustain an above-average percentage increase.

3 The Commission agrees with Staff and RUCO that actual load data
4 for MEC's own system would be the preferable basis for determining
5 the revenue responsibility of each customer class. The rapid growth
6 in the Bullhead City vicinity of the Company's service territory has
7 produced a customer base of sufficient size to warrant the
8 performance of load research. We will direct MEC to implement a
9 load research program and base its class cost of service study in
10 the next case on the resultant data.
11

12 For purposes of this proceeding, the Commission will reject the
13 Company's cost of service study as being suspect and not susceptible
14 to an evaluation for reasonableness. While surrogate data and the
15 exercise of judgment can be appropriate elements in a study,
16 Applicant has completely failed to document, support, or explain the
17 combination of judgment and data for other utilities which it relied
18 upon for cost of service purposes.
19

20 We will also reject the revenue distribution proposed by RUCO.
21 While its treatment of demand-related costs is better founded,
22 RUCO's proposal in other areas adopts the Company's rather nebulous
23 study and contemplates greater overall shifts in the revenue
24 responsibility of the customer classes. We are not persuaded that
25 any such shifts should be effectuated until actual, MEC-specific
26
27
28

1 load data becomes available in the next case to provide guidance on
2 the direction and magnitude of any needed realignment.

3 The Commission, therefore, finds it appropriate in this case to
4 maintain the proportionate revenue responsibility which currently
5 exists between the classes. We will approve a revenue distribution
6 which allocates an average percentage increase of 2.34% to the
7 customer classes.⁶

8 From a billing perspective, the 2.34% revenue increase
9 allocated to the residential class will be offset by the reduction
10 in the monthly service charge from \$12.00 to \$9.50 per month. As a
11 result, approximately 82% of the residential class (those customers
12 using up to approximately 1,000 KWH per month) will experience a
13 overall decrease in their monthly bills.

14 * * * * *

15 Having considered the entire record herein and being fully
16 advised in the premises, the Commission finds, concludes, and orders
17 that:
18
19
20

21 FINDINGS OF FACT

22 1. Applicant is an Arizona non-profit cooperative corporation
23 engaged in the business of providing electric service to the public
24
25
26

27 ⁶ The 2.20% authorized increase in gross annual revenues,
28 when distributed to the customer classes exclusive of the "other
revenue" category, equates to an average rate increase of 2.34%.

1 in various portions of Mohave County, Arizona, pursuant to authority
2 granted by the Commission.

3 2. On September 9, 1989, as revised by filings dated November
4 8, 1989, April 9, 1990, and May 9, 1990, MEC submitted to the
5 Commission an application for a permanent increase in its rates and
6 charges.
7

8 3. Notice of the hearing in this matter was duly provided to
9 Applicant's customers.

10 4. The hearing in this matter was held on the dates indicated
11 above.
12

13 5. The following late-filed exhibits should be admitted into
14 evidence: Ex. MEC-10 (proposed rates revised) and Ex. MEC-11 (TIER
15 forecasts); Ex. S-3 (revised Staff Report); and Ex. R-5 (revised
16 schedules).
17

18 6. The consensus reached by the parties, as reflected in Ex.
19 S-3, is reasonable and should be adopted.

20 7. Applicant's fair value rate base is determined to be
21 \$26,742,431, which is the same as its original cost rate base.

22 8. The weight of the evidence fails to substantiate the
23 reasonableness of or need for granting a revenue allowance in the
24 magnitude suggested by either MEC or RUCO to augment the Company's
25 earnings and thereby increase its TIER ratio and equity
26 capitalization.
27
28

1 9. The record evidence does not establish a need for MEC to
2 actually seek financing from sources other than the REA and CFC.

3 10. Absent evidence establishing more than a remote
4 possibility that it will be necessary for MEC to obtain alternative
5 financing in the near future, the record fails to convince the
6 Commission that a revenue allowance in excess of Staff's
7 recommendation is warranted.
8

9 11. The \$585,762 increase recommended by Staff is the level of
10 rate relief necessary for Applicant to meet its operating costs,
11 provide reliable electric utility service, and accrue sufficient
12 earnings to maintain its financial integrity while cycling capital
13 credits to its member-customers.
14

15 12. The rates and charges approved herein will produce a net
16 operating income of \$2,297,218, for a return of 8.59% which is a
17 fair and reasonable return on fair value rate base, and a net TIER
18 of 2.00 which is reasonable for MEC at this time.
19

20 13. The authorized increase in gross annual revenues is
21 \$585,762, or 2.20%.

22 14. Actual load data for the Company's system is the
23 preferable basis for determining the revenue responsibility of each
24 customer class.

25 15. Applicant's cost of service study is suspect and not
26 susceptible to an evaluation for reasonableness because the Company
27 has completely failed to document, support or explain the
28

1 combination of judgment and data for other utilities which it relied
2 upon for cost of service purposes.

3 16. The revenue distribution proposed by RUCO adopts, in part,
4 the Company's rather nebulous study and contemplates greater overall
5 shifts in the revenue responsibility of the customer classes.
6

7 17. No significant shifts in the proportionate revenue
8 responsibility of the classes should be effectuated until actual,
9 MEC-specific load data becomes available to provide guidance on the
10 direction and magnitude of any needed realignment.
11

12 18. It is appropriate in this case to maintain the
13 proportionate revenue responsibility which currently exists between
14 the classes.

15 19. A revenue distribution which allocates an average
16 percentage increase of 2.34% to the customer classes is reasonable.
17

18 CONCLUSIONS OF LAW

19 1. Applicant is a public service corporation within the
20 meaning of Article XV of the Arizona Constitution and A.R.S.
21 Sections 40-250 and 40-251.

22 2. The Commission has jurisdiction over Applicant and of the
23 subject matter of the application.
24

25 3. Notice of the application was provided in the manner
26 prescribed by law.

27 4. The rates and charges proposed by Applicant are not just
28 and reasonable.

1 IT IS FURTHER ORDERED that MEC shall notify its customers of
2 the rates and charges authorized herein and the effective date of
3 same by means of an insert in its next regular monthly billing.
4

5 IT IS FURTHER ORDERED that MEC's base rate for purchased power
6 is hereby established at \$0.065798 per KWH.

7 IT IS FURTHER ORDERED that a credit of \$0.003 per KWH shall be
8 applied to customer bills until MEC has refunded its share of the
9 AEPCO refund and the interest earned on the unrefunded balance.
10

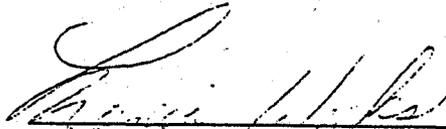
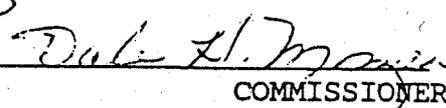
11 IT IS FURTHER ORDERED that MEC is hereby directed to include an
12 addendum to its monthly purchased power adjustor filing to report
13 for each month the amount of the AEPCO refund passed on to
14 customers, the remaining balance of the refund, and the amount of
15 interest earned on the unrefunded balance.

16 IT IS FURTHER ORDERED that MEC is hereby directed to implement
17 a load research program for its system, develop and submit for Staff
18 approval its plan for the program within six months from the
19 effective date of this Decision, and base its class cost of service
20 study in the next rate case on the resultant data.
21

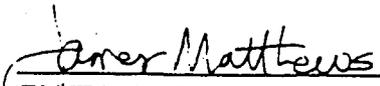
22 IT IS FURTHER ORDERED that the following late-filed exhibits
23 are hereby admitted into the record for this proceeding: Ex. MEC-10
24 (proposed rates revised) and Ex. MEC-11 (TIER forecasts); Ex. S-3
25 (revised Staff Report); and Ex. R-5 (revised schedules).
26
27
28

1 IT IS FURTHER ORDERED that this Decision shall become effective
2 immediately.

3 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
4

5   
6 CHAIRMAN COMMISSIONER COMMISSIONER
7

8
9 IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive
10 Secretary of the Arizona Corporation Commission, have
11 hereunto set my hand and caused the official seal of
12 the Commission to be affixed at the Capitol, in the
13 City of Phoenix, this 29 day of November, 1990.

14 
15 JAMES MATTHEWS
16 EXECUTIVE SECRETARY

17 DISSENT _____
18 babs

BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED

DEC 20 1990

MARCIA WEEKS
CHAIRMAN
RENZ D. JENNINGS
COMMISSIONER
DALE H. MORGAN
COMMISSIONER

DOCKETED BY 

IN THE MATTER OF THE APPLICATION OF) DOCKET NO. U-1750-89-231
MOHAVE ELECTRIC COOPERATIVE, INC., AN)
ARIZONA NON-PROFIT CORPORATION, FOR A) DECISION NO. 57184
PERMANENT RATE INCREASE.)
) ORDER AMENDING DECISION
) NO. 57172

BY THE COMMISSION:

By Decision No. 57172 dated November 29, 1990, the Arizona Corporation Commission ("Commission") approved new rates and charges for Mohave Electric Cooperative, Inc. ("MEC"), to "be effective for all service provided on and after January 1, 1991."

On December 5, 1990, MEC filed an application requesting that the Decision be modified so that the authorized rates and charges become "effective for all billings on and after January 1, 1991." In support of its request, MEC claims that complying with the Decision as written would cause a severe hardship by requiring the proration of 23,000 bills.

No opposition to MEC's request has been expressed by the other parties to this proceeding.

IT IS THEREFORE ORDERED that the second ordering paragraph of Decision No. 57172 is hereby amended to read as follows:

IT IS FURTHER ORDERED that the above rates and charges shall be effective for all billings rendered on and after January 1, 1991.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

M E M O R A N D U M

TO: RENE NICASTRO, TARIFF SPECIALIST

THRU: _____

FROM: JAYNE CARBONE

DATE: JAN. 18, 1991

RE: COMPLIANCE TARIFFS

Applicant: MOHAVE ELECTRIC COOPERATIVE

Docket No.: U-1750-89-231

Date tariff filed: JAN. 17, 1991

Compliance per Dec. 57172

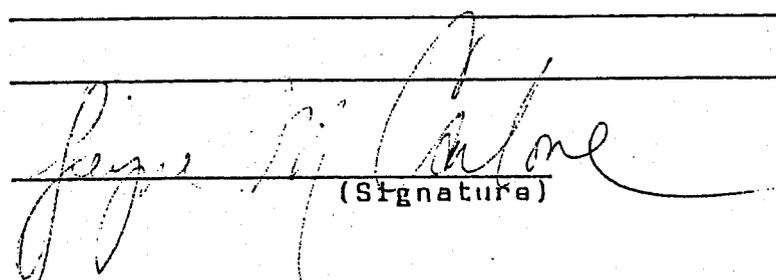
The following information is submitted regarding the attached tariff.

CHECK ONE:

Tariff is in compliance.

Tariff is not in compliance.

REMARKS:



(Signature)

cc: Basil Coffman
Compliance Officer

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

1
2
3
4
5

Kevin Weeks
CHAIRMAN

[Signature]
COMMISSIONER

Dale N. Morgan
COMMISSIONER

6
7
8

IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 20 day of December, 1990.

9
10
11

James Matthews
JAMES MATTHEWS
EXECUTIVE SECRETARY

12
13

DISSENT _____
babs

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M E M O R A N D U M

TO: RENE NICASTRO, TARIFF SPECIALIST

THRU: _____

FROM: JAYNE CARBONE

DATE: DEC. 19, 1990

RE: COMPLIANCE TARIFFS

Applicant: MOHAVE ELECTRIC COOPERATIVE, INC

Docket No.: U-1750-89-231

Date tariff filed: DEC. 5, 1990

Compliance per Dao. 57172

The following information is submitted regarding the attached tariff.

CHECK ONE:

Tariff is in compliance.

Tariff is not in compliance.

REMARKS:

Jayne M Carbone
(Signature)

cc:

Basil Coffman
Compliance Officer

	TEST YEAR <u>REVENUES</u>	<u>MOHAVE</u> PERCENTAGE INCREASE AMOUNT INCREASED			% of <u>TOTAL</u>
		<u>MOHAVE</u>	<u>RUCO</u>	<u>APPROVED</u>	
RESIDENTIAL (% of TOTAL)	\$15,421,961 57.89%	2.39% \$15,790,546	1.79% \$15,698,014	2.34% \$15,782,835	57.97%
SMALL COMM'L.	5,997,009 22.51%	2.94% 6,173,321	3.56% 6,210,503	2.34% \$6,137,339	22.54%
LRG COMM. & IND.	2,123,873 7.97%	2.01% 2,166,563	3.47% 2,197,571	2.34% 2,173,572	7.98%
IRRIGATION	437,797 1.64%	-1.62% 430,705	3.40% 452,682	2.34% 448,041	1.65%
BIA	115,718 0.43%	0.00% 115,718	0.42% 116,204	2.34% 118,426	0.43%
CHEMSTAR	1,340,694 5.03%	0.00% 1,340,694	0.00% 1,340,694	0.00% 1,340,694	4.92%
CYPRUS BAGDAD	832,471 3.12%	-0.97% 824,396	-0.71% 826,560	2.34% 851,951	3.13%
LIGHTING	100,044 0.38%	12.99% 113,040	12.99% 113,040	2.34% 102,385	0.38%
OTHER REVENUE	269,904 <u>1.01%</u>	0.00% <u>269,904</u>	0.00% <u>269,904</u>	0.00% <u>269,904</u>	0.99%
AVG INCREASE	\$26,639,471 100.00%	2.20% <u>\$27,224,886</u>	2.20% <u>\$27,225,172</u>	2.20% <u>\$27,225,147</u>	100.00%

MOHAVE
SUMMARY
CURRENT AND APPROVED
RATE COMPARISONS

<u>RESIDENTIAL</u>	<u>CURRENT RATES</u>	<u>APPROVED RATES</u>
<u>Small General Service</u>		
<u>Residential-SGS</u>		
Monthly Service Charge	\$12.00	\$9.50
Energy-kWH	\$0.08100	\$0.08319
 <u>Optional-TOD Rates</u>		
<u>Residential-RTOD</u>		
Monthly Service Charge	\$15.00	\$15.00
On-Peak Energy Charge	0.11600	0.14950
Off-Peak Energy Charge	0.05200	0.05200
 <u>Optional Demand Rate</u>		
<u>Residential-RD</u>		
<u>Oct.-April</u>		
Monthly Service Charge	\$13.50	
Energy-kWH	0.08100	
<u>May-Sept.</u>		
Monthly Service Charge	\$13.50	
Demand Charge-kW	\$6.50	
Energy-kWH	0.05100	
<u>All Months</u>		
Monthly Service Charge		\$13.50
Demand Charge-kW		\$7.50
Energy-kWH		0.04800

SMALL COMMERCIAL

Small Commercial Service

SCS-Less than 100kW

Non-Demand Metered

Monthly Service Charge	\$17.50	\$12.00
Energy Charge-kWH	0.07350	0.08160

Demand Metered

Monthly Service Charge	\$19.00	\$25.00
Demand Charge-kW (>3kW)	\$7.20	\$8.25
Energy-kWH	0.05750	0.05374

Optional TOD Rate

Small Comm. & Ind.

(Less than 100kW-SCTOD)

Monthly Service Charge	\$25.00	\$30.00
On Peak Demand Charge-kW	\$13.50	\$12.50
Energy-kWH	0.05950	0.05040

LARGE COMM. & INDUSTRIAL

Large Comm. & Ind.

(Greater than 100 kW)

Monthly Service Charge	\$62.00	\$70.00
Demand Charge-kW	\$9.00	\$9.75
Energy-kWH	0.04850	0.04558

Optional TOD Rate

Large Comm. & Ind.

Monthly Service Charge	\$62.00	\$70.00
On Peak Demand Charge-kW	\$13.50	\$13.50
Energy-kWH	0.04100	0.04100

IRRIGATION

Large Irrig. Pumping
Monthly Service Charge
Demand Charge-kW
Energy-kWH

\$62.00
\$9.00
0.04850

\$60.00
\$7.00
0.05800

Optional TOD Rate

Large Irrig. Pumping
Monthly Service Charge
On Peak Demand Charge-kW
Energy-kWH

\$62.00
\$13.50
0.06333

\$60.00
\$13.50
0.05000

LIGHTING

Lighting Service-LS

Utility Owned:

Mercury Vapor-175 Watt
HP Sodium-100 Watt
LP Sodium-100 Watt

\$6.70
7.70
10.20

\$6.85
\$7.88
\$10.43

Consumer Owned

Mercury Vapor-175 Watt
HP Sodium-100 Watt
LP Sodium-100 Watt

\$5.00
5.00
5.00

\$5.11
\$5.11
\$5.11

LARGE CONTRACT

Large Contract- BIA

Monthly Service Charge	\$62.00	\$70.00
Demand Charge-kW	\$9.00	\$9.00
Energy Charge-kWH	0.04850	0.04579

Large Contract-Cyprus Baghdad

Monthly Service Charge	\$62.00	(1)
Demand Charge-kW	\$13.50	
Energy Charge-kWH	0.04100	

Large Contract-Chemstar

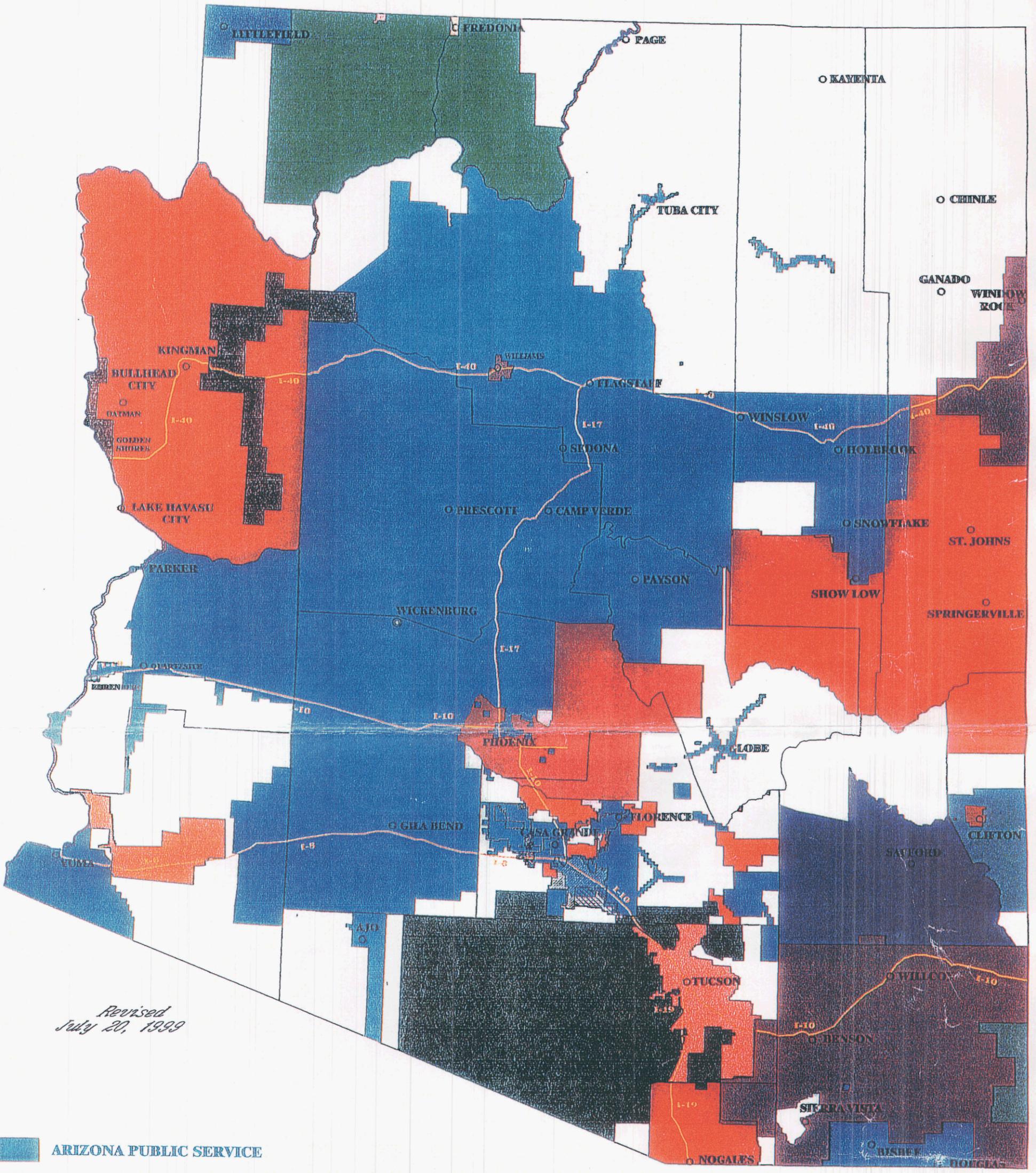
Monthly Service Charge	\$62.00	(1)
Demand Charge-kW	\$9.00	
Energy Charge-kWH	0.04850	

(1) Current contract rates apply.

Any back-up service provided outside of the contract will be subject to the Large Commercial and Industrial general rate or the Optional Time-of-Day rate.

EXHIBIT

D



Revised July 20, 1999

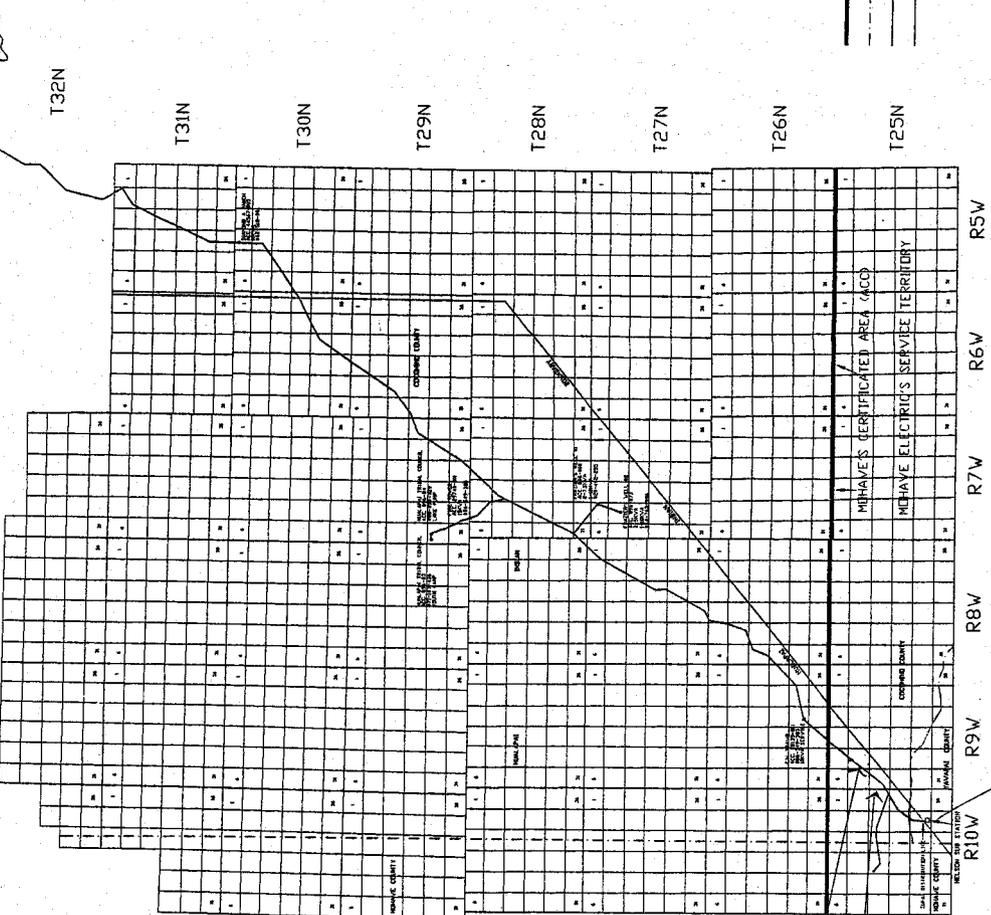
- | | | | | | |
|--|---|---|--|---|---|
|  | ARIZONA PUBLIC SERVICE |  | ELECTRIC DISTRICT NO. 1 |  | MORENCI WATER & ELECTRIC |
|  | CITIZENS UTILITIES |  | ELECTRIC DISTRICT NO. 2 |  | NAVOPACHE ELECTRIC CO-OP |
|  | CITY OF WILLIAMS |  | ELECTRIC DISTRICT NO. 3 |  | SALT RIVER PROJECT |
|  | CITY OF WILLIAMS |  | ELECTRIC DISTRICT NO. 4 |  | SAN CARLOS IRRIGATION |
|  | COLUMBUS ELECTRIC CO-OP |  | ELECTRIC DISTRICT NO. 5 |  | SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE, INC. |
|  | COLUMBUS ELECTRIC CO-OP |  | GARKANE POWER ASSOCIATION |  | TRICO ELECTRIC COOPERATIVE |
|  | CONTINENTAL DIVIDE ELECTRIC COOPERATIVE, INC. |  | GRAHAM COUNTY ELECTRIC COOPERATIVE, INC. |  | TUCSON ELECTRIC POWER |
|  | DIXIE ESCALANTE RURAL ELECTRIC ASSOCIATION |  | MOHAVE ELECTRIC COOPERATIVE |  | WELLTON MOHAWK |
|  | DUNCAN VALLEY ELECTRIC COOPERATIVE, INC. | | | | |

STATE OF ARIZONA - ELECTRIC

EXHIBIT

E

R4W
T33N
T32N



LEGEND

- MOHAVE'S CERTIFICATED AREA (ACC)
- COUNTY LINE
- POWER LINE
- HUALAPAI INDIAN BOUNDARY

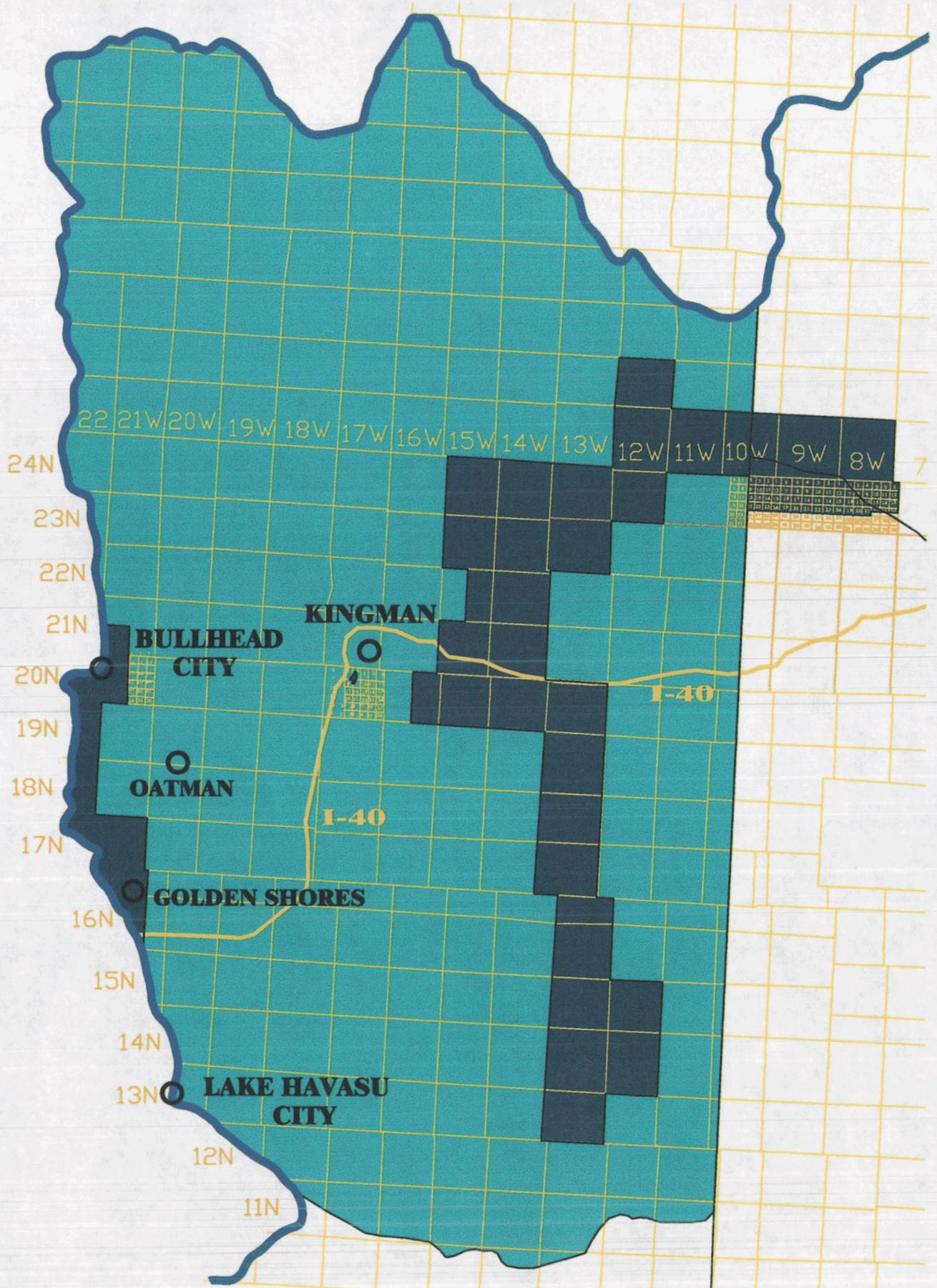
Hualapai Tribe
840-21
840-6
Cochise P.

Nelson Substation
Wholesale power delivery point

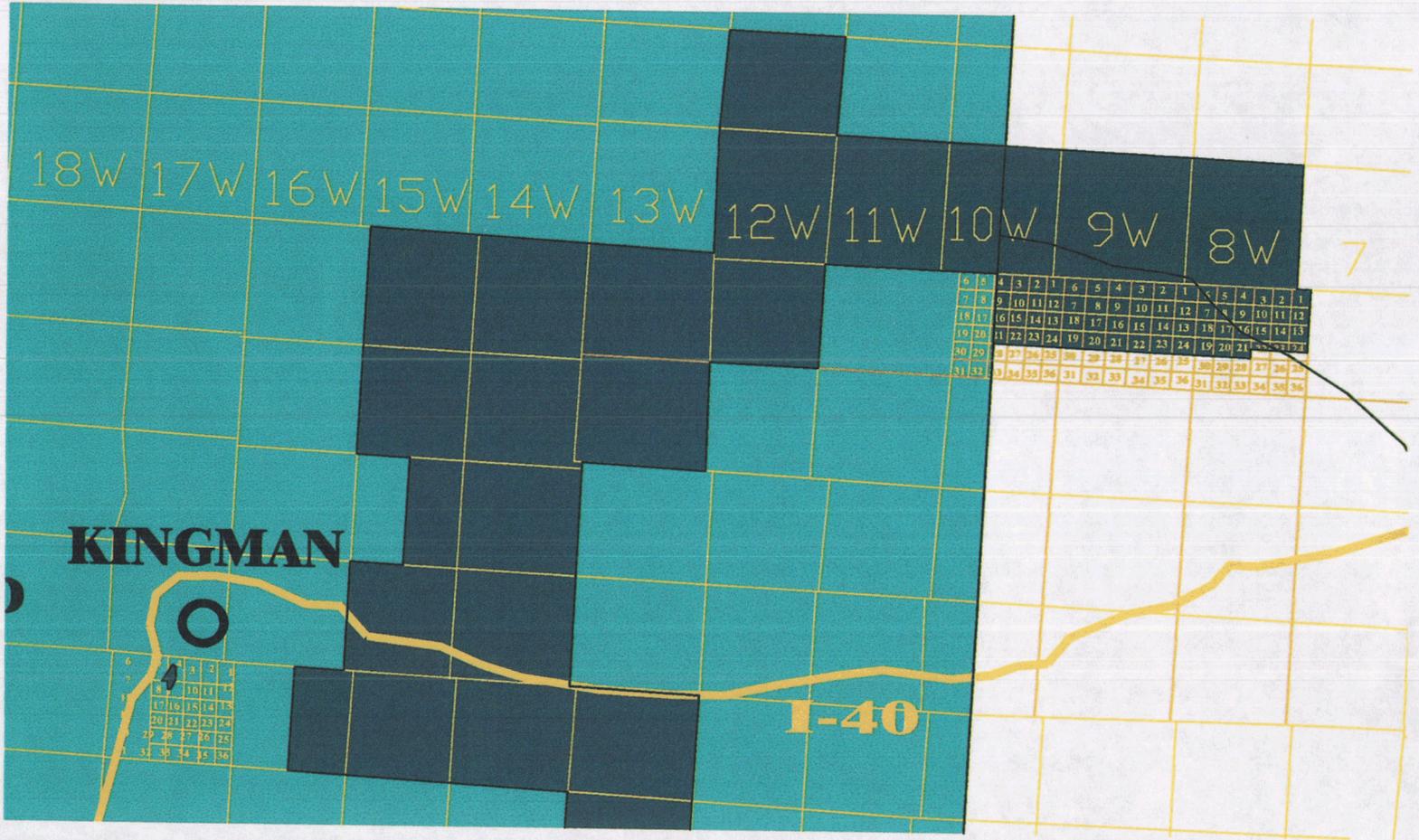
SCALE 1" = 1 MILE		DATE		REVISIONS AND PURPOSE		DATE		REVISION AND PURPOSE		MOHAVE ELECTRIC COOPERATIVE INC. ARIZONA 22 ARIZONA MOHAVE	
										SHEET NO. 1 OF 2 DATE 1-1-2010	

EXHIBIT

F



- UNISOURCE ENERGY SERVICES
- MOHAVE ELECTRIC COOPERATIVE



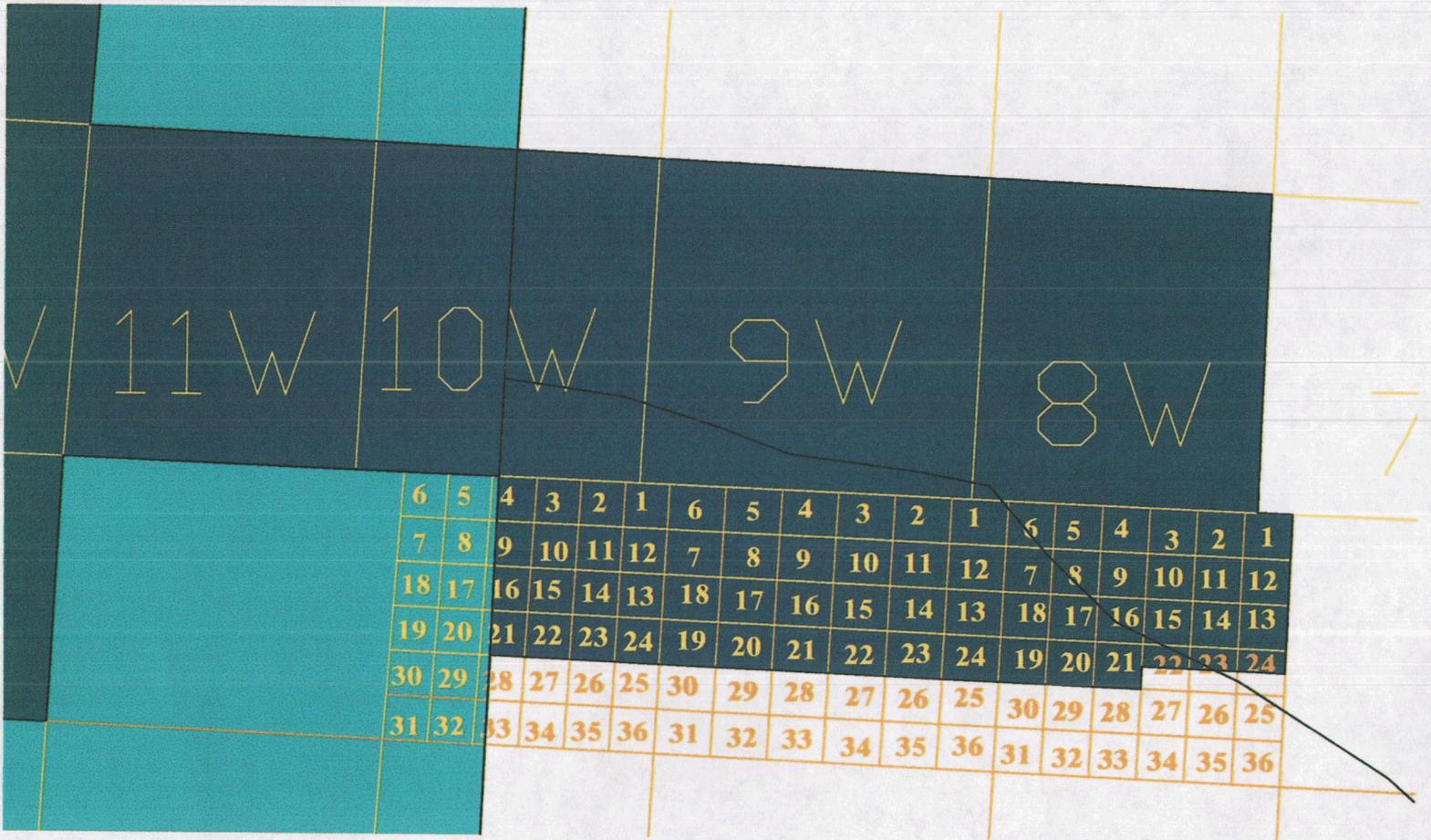
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EXHIBIT

G

Author: Robert McNichols at -IIATCANON

Date: 7/3/97 11:14 AM

Priority: Normal

TO: Chester Mills at -IIAPHXAO

TO: Jeanette Hanna at -IIAPHXAO

TO: Bud Brown at -IIAPHXAO

TO: Stan Borella at -IIAPHXAO

Subject: Re[2]: Mohave Electric

----- Message Contents -----

Chet, I agree we need to coordinate this better. We have several people involved who may be going in different directions. Bud Brown has been the one in the lead on this for quite a while. He is currently working through the MEC attorney to try to confirm a meeting date and location. Stan Burella called a day or two ago and said he was planning to send MEC a Bill for Collection based on my last memo to the AD, Attention Bud Brown. I asked Stan to run it by Bud before sending it out. We need to all be in agreement on how we want to pursue it. We should probably meet among ourselves to strategize.

Me

Then, I think a meeting is needed with MEC to insist they provide a response to the Audit Findings. We should use the audit as a way to put pressure on MEC to work with us on a service contract. MEC wants BIA to produce our records. We want MEC to respond to the audit based on their records, I think. If MEC refuses to respond, then we should, I think, issue a Bill for Collections. We need to come to some type of agreement with MEC for electric service. We want a rate which is competitive and make sure we are no longer paying construction charges on the Supai line. It is not feasible for us to pay our electric bills in 30 days with the system we follow so need to get some allowance for up to 90 days without being disconnected.

→

----- Reply Separator -----

Subject: Re: Mohave Electric

Author: Chester Mills at -IIAPHXAO

Date: 7/3/97 9:48 AM

Bob,

Received a cc: of your letter to Mohave Electric. Perhaps I did not explain myself clearly as to whom the letter should be addressed too.

I highly recommend that you submit a letter to the AD requesting the Area Office to setup a meeting with Mohave Electric. Also, for justification purposes, please state why the meeting is necessary.

At least this way, the AD can hold the Area staff responsible for setting up the meeting. If I recall, either Barry Welch or Bud Brown set-up the last meeting. As I stated before, we need to get Mohave Electric back to the negotiation table ASAP. As you know, to date the PAO has not followed up on the situation.

If I can be of further help, please contact me. ...cdm

Nordwell

EXHIBIT #38	
Janice G. Fuller CCR #0055	9-4-97 DATE

memorandum

DATE: MAY 30 1997

REPLY TO
ATTN OF: Superintendent, Truxton Canon Agency

SUBJECT: Mohave Electric Cooperative, Office of Inspector General,
Audit Report No. 95-E-1045 of June, 1995

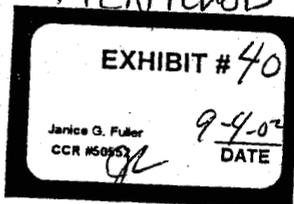
TO: Area Director, Phoenix Area Office
Attention: Contracting Officer - MS 211

Mohave Electric Cooperative has not responded to the subject audit which was conducted for Calendar Year 1994. They have also cancelled their meeting with us to discuss the audit findings and have failed to reschedule.

I recommend that a Bill of Collection be issued for the questioned costs and referred to the Solicitor for collection. I further recommend that the Office of the Inspector General be notified and that we request similar audits be conducted for Calendar Years 1995 and 1996.

We need to get this issued resolved, but it seems Mohave Electric's objective is to force us off their system.

McNichols



Robert R. McNichols

6/3/97

Spoke to Bob -

Promised to call Mohave Elec. to try and reschedule meeting.

7/2

Stephen ^{McArthur} - Out of town next week - said Michael Curtis is supposed to be trying to set another meeting.

RECEIVED
HIA - P10
CONFIDENTIAL & GRANHTS
JUN 2 10 30 AM '97

7/8/97

TELEFAX (7 pages total)

To: Chet Mills

From: Kay Keely

Subject: Mohave Electric Audit Report No. 95-E-1045

The first thing to remember is that the audit was requested by Bud Brown in April 1993. The audit was issued in June 1995, exactly two years ago!

One of Bud's staff wrote a proposed response, but Bud did not agree with it. Reportedly he had written to Mohave at least twice asking them to provide answers and documentation. Mohave opened their records to OIG already and BIA apparently has no documentation to refute or support our figures.

Dolan from the OIG told Lisa of my staff that there is no chance of collecting from Mohave electric unless BIA can come up with documentation. She also talked to the Solicitor and they agree.

The next page of this telefax is the memo I drafted in September 1996 after talking to Jeannette. To my knowledge the information included in my draft is accurate and I believe it is a realistic summary of where we are as an agency. She tasked Bud with providing her a written document with his "side of the story". Apparently she and Ted accepted Bud's version and subsequently sent the attached memo (dated 10/10/96) to the OIG as a status report on the audit. That is the last piece of paper we have seen on this audit.

I attempted to reconcile the figures from the OIG audit report (3 pages of tabular material) but was unsuccessful. If Bud has information about what payments were made or what was billed by Mohave, he has never provided it to us.

Good luck.

Let me know if I can be of any assistance. It was good to talk to you!

Ray

DRAFT
9/27/96

Memorandum

To: Director of External Audits
Office of Inspector General
Attention: William Dolan

From: Deputy Director
Office of Audit and Evaluation

Subject: Review of Mohave Electric Cooperative, Inc., Calendar Year 1994 Charges
Under Bureau of Indian Affairs Contract No. GS-00S-67021 (Audit Report No.
95-E-1045)

The subject audit report, issued June 23, 1995, in response to a request from the Bureau of Indian Affairs Phoenix Area Director, contained \$63,516 in cost exceptions and \$1,211,053 in unsupported costs for the Bureau of Indian Affairs to resolve.

It is our understanding that most of the financial data used by the OIG in conducting the audit was provided by Mohave Electric. The Phoenix Area Office has conducted extensive research in an attempt to either support or refute the OIG findings in the audit report but has found no supporting financial information. Repeated letters to Mohave Electric have resulted in no additional information since Mohave's records were made available to the OIG auditors during the audit work.

The OIG found no records at Mohave to "support" the construction cost of \$1,145,652; however, the power line does exist, the BIA accepted the project, and the contract allowed a not-to-exceed construction cost of \$1.6 million. The OIG further found that BIA paid Mohave Electric \$1,404,078 for construction costs though they were only invoiced \$1,145,652. This does raise questions, but BIA is unable to provide documentation as to whether they paid the \$1.4 million or why they paid more than invoiced or whether Mohave incorrectly credited other payments against construction. Mohave informed the OIG that the other costs in question were based on verbal agreements at the time the contract was initially signed in 1982. This cannot be confirmed or denied by BIA.

Without further documentation, BIA cannot initiate any collection action against Mohave; and the Solicitor's office has stated they could not pursue collection action without documentation to refute the Mohave documents.

I have discussed this issue with the current Acting Phoenix Area Director and he has authorized me to recommend that the questioned costs be reinstated and that the subject audit be closed.

EXHIBIT

H

4. By letter dated April 27, 1992, the Hualapai Tribe and Mohave Electric Cooperative entered into a settlement agreement regarding the protest. The terms of the settlement are that Mohave Electric would dismiss, with prejudice, its protest of 1990 and 1991 possessory interest taxes assessed against it by the Hualapai Tribe, in consideration of the Hualapai Tribe's agreement to apply 17.5% of the amounts paid under protest by Mohave Electric for both tax years 1990 and 1991 against Mohave Electric's 1992 possessory interest tax obligation, which has yet to be assessed.
5. By letter dated July 27, 1992, the Hualapai Tribe billed Mohave Electric \$30,848.73 for tax year 1992.
6. By letter of September 8, 1992, Mohave Electric wrote to Mr. Barber submitting a revised invoice for reimbursement of possessory taxes paid to the Hualapai Tribe and related expenses, plus interest on the past due amounts. The amount of the invoice totaled to \$152,007.27.
7. By letter dated September 23, 1992, Mohave Electric through its attorneys, Martinez and Curtis, P.C., wrote to Mr. Wilson Barber referring to its previously submitted invoice and requesting payment.
8. By letter of December 23, 1992, Mohave Electric via their attorney, Ms. Susan D. Goodwin, wrote to Ms. Rose Velarde, Contracting Officer, providing an explanation to other charges included as part of the invoice, namely \$10,552.96 and \$22,397.75 for delinquent penalty assessment.
9. By letter dated January 8, 1993, Ms. Goodwin wrote to Ms. Velarde regarding BIA personnel who were contacted regarding payment.

DISCUSSION:

It is unfortunate that the Contracting Officer was not advised of this matter in a more timely fashion since this is a contractual matter under Contract No. GS-OOS-67021. Not until November 1992 was this issue referred to the Contracting Officer for resolution.

The primary question is whether BIA is liable for the payment of the tax. In reading Contract No. GS-OOS-67021 the Contracting Officer finds this contract was entered into as a procurement contract to buy electric energy to serve existing and future residential and commercial installations on the Hualapai and Havasupai Indian Reservation. To provide this service, Mohave Electric constructed a power line from its existing facility, a distance of approximately 70 miles, to a point of termination at the line side at the Long Mesa Power transformer, which is the point of delivery.

There has been some discussion on who owns the lines, and the argument made that since the BIA ordered the lines to be built, and since the lines serve only Indians, the tax is in effect a tax on the United States. I find that Mohave Electric Cooperative owns the lines based on Addendum No. 1, referring to ownership of facilities, wherein it clearly states all facilities to be provided by or on behalf of Mohave shall be and remain its sole property.

It is also evident the contract was entered into to procure electricity, a utility service, following procedures under FAR Part 8.3, Acquisition of Utility Services. Under these regulations, GSA has statutory authority to enter into long term contracts for utility services not to exceed 10 years. This contract is a GSA contract which has a ten-year term. The language of the contract states to "furnish the Government all electric energy..." In furtherance of the contract, Mohave Electric constructed the lines. The Government did not procure construction of the line, otherwise the contract would have contained the specifications, provisions and clauses for this type of contract. Clearly inspection and acceptance would have occurred once performance was completed. A ten-year performance time is not likely.

The Hualapai Tribe assessed a possessory tax on Mohave Electric in 1989. Under the terms of the contract, Addendum No. 1, identified as "Facilities Charges" for Mohave to recover costs associated with the construction and operation of facilities to make electric service available to the Government, the Government, upon verification of Mohave's cost of construction agrees to pay Mohave as a Facility Charge an annual amount equal to the sum of ... (2) All state and local property taxes assessed against the facilities that Mohave constructs because of this contract.

The Contract provides reimbursement for all State and Local tax. The Hualapai Tribe is clearly a local governing entity and it is the BIA's policy to foster and encourage local self-government. The Contracting Officer finds that under the contract, the Government is liable for all state and local property taxes assessed against the facilities, in this case the amount of \$119,056.56. The delinquent penalty assessment from December 28, 1991 through November 30, 1992, in the amount of \$12,388.78 plus 1% accruing until the tax is paid is also due to Mohave.

The other charges included in the invoice, namely "Contract Allowed Other Costs" is explained by letter dated December 23, 1992, from Ms. Susan D. Goodwin, as cost association with Mohave's protest of possessory taxes imposed by the Hualapai Tribe. The Contracting Officer finds that Mohave has not provided sufficient proof that under the contract these cost are allowable. Mohave will be provided an opportunity to provide this information.

DETERMINATION

Based on the above findings, I hereby determine that it is in the best interest of the Government to reimburse Mohave Electric Cooperative for local possessory taxes assessed by the Hualapai Tribe in the amount of \$119,056.56.

For late penalty charges of \$12,388.78 from December 28, 1991 through November 30, 1992, plus 1% accruing until the tax is paid by the Government, and for "Contract Allowed Other Cost", Mohave Electric is hereby provided an opportunity to identify and support where under the contract this is an allowable cost.

By copy of this letter, the Director, Facilities Management and Construction Center, is requested to provide to the Phoenix Area Facility Management Office the necessary funds to pay \$119,056.56 and \$12,388.78 plus 1% penalty charge until the tax is paid.

Any questions you have regarding this letter, please call Ms. Rose Velarde at (602) 379-6760.

Sincerely,

(Sgd) Carl Houdboe

Contracting Officer

cc: Director, Facilities Management and Construction Center
Attention: Mr. Richard Crissler
PAO/Facility Manager/MS-220
Facilities Management, Truxton Canon Agency

RVELARDE:Retyped:if:3/03/93

EXHIBIT

I

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
DOCKETED

JUL - 6 1975

1 ERNEST GARFIELD
Chairman
2 AL. FARON
Commissioner
3 BUD TIMS
Commissioner

DOCKETED BY	
<i>[Signature]</i>	

4 IN THE MATTER OF THE APPLICATION)
OF TRICO ELECTRIC COOPERATIVE,)
5 INC., AN ARIZONA NON-PROFIT)
CORPORATION, FOR APPROVAL OF)
6 SALE OF ELECTRIC FACILITIES TO)
THE PAPAGO TRIBE OF ARIZONA)

DOCKET NO. U-1461

DECISION NO. 41157

OPINION AND ORDER

7 Date of Hearing: January 29, 1976

8 Place of Hearing: Tucson, Arizona

9 Hearing Officer: David C. Kennedy

10 Appearances:

Russell E. Jones of the law firm of Robertson, Molloy, Fickett & Jones, P.C. appeared on behalf of the petitioner.

11 Charles S. Pearson, Assistant Attorney General appeared as counsel on
12 behalf of the Arizona Corporation Commission.

13 Robert G. Fircher, Director, Utilities Division, appeared on behalf of the
14 Arizona Corporation Commission.

FINDINGS OF FACT

15 1. TRICO ELECTRIC COOPERATIVE, INC., is an Arizona non-profit corporation
16 which owns and operates an electrical utilities system as a public service corpora-
17 tion pursuant to certificates of convenience and necessity issued by the Arizona
18 Corporation Commission and certain franchises issued by Pima, Pinal and Santa
19 Cruz Counties, Arizona.

20 2. Among the assets owned by TRICO are certain electrical facilities located
21 on the Papago Indian Reservation, under the jurisdiction of the Papago Indian Tribe
22 of Arizona and not subject to the jurisdiction of the Arizona Corporation Commission.

23 3. The Papago Tribal Utility Authority (PTUA) is an entity established and
24 empowered by the Papago Tribe in 1970 to provide utility services on the Papago
25 Indian Reservation.

26 4. TRICO entered into an agreement with the Papago Indian Tribe by and
27 through PTUA for the sale of certain assets located on the Papago Indian Reserva-
28 tion. The agreement was dated September 28, 1972.

29 5. The electrical facilities being sold by TRICO to the Papago Tribe consist
30 of distribution facilities used by TRICO to sell electricity on the Papago
31 Indian Reservation.

6. Subsequent to the agreement of sale in 1972, TRICO and PTUA entered into

1 an "Operating Agreement" dated July 22, 1974 which provides for the continued
2 operation and maintenance of the facilities by TRICO. Under the agreement TRICO
3 will continue to sell and deliver power, operating the facilities sold to the
4 Papago Tribe until such time as responsibilities can be transferred to PTUA smoothly
5 without interruption of service.

6 7. All of the electrical facilities subject to the Agreement of Sale are
7 subject to mortgages in favor of the United States of America which has from time to
8 time lent money to TRICO. In order to sell the facilities to the Papago Tribe,
9 approval from the Rural Electrification Administration (REA) as to such sale, was
10 obtained by TRICO.

11 8. The PTUA, on behalf of the Papago Tribe, agreed to pay TRICO the purchase
12 price in the sum of \$1,150,000.00 payable by PTUA's assumption of a corresponding
13 amount of Trico's indebtedness to the United States.

14 9. As to the area served by the electrical facilities and the consumers
15 formerly served by TRICO by the use of said facilities, there are no refunds due
16 from TRICO in connection with any line extension agreement and there are no refund-
17 able deposits due from TRICO to any consumer or former consumer.

18 10. Pursuant to the aforementioned agreements, TRICO has reserved ownership
19 of any and all facilities used and useful in the supplying of electric energy to
20 points and places within TRICO's certificated area outside the boundaries of the
21 Papago Indian Reservation.

22 CONCLUSIONS OF LAW

23 1. The facilities to be transferred are not used and useful to TRICO and
24 their transfer will not impair TRICO's ability to provide service to customers
25 within TRICO's certificated area.

26 2. The transaction is not detrimental to the interests of the customers of
27 TRICO nor is it detrimental to TRICO's financial integrity.

28 3. The proposed transfer of assets and facilities is in the public interest.

29 ORDER

30 WHEREFORE IT IS ORDERED; approving the sale of assets and transfer of
31 facilities from TRICO to the Papago Indian Tribe of Arizona and the Papago Tribal
32 Utility Authority pursuant to the terms and conditions set forth in application
filed herein.

The facilities transferred are described as follows:

1 Circuit #1

2 A three phase powerline starting at the southwest corner of Section 19, Township
3 11 South, Range 6 East; thence in a northwesterly direction a distance of approxi-
4 mately 11 miles to a point on the west side of the Casa Grande Highway; thence in
5 a southwesterly direction and approximately parallel to the highway for approximately
6 16 miles to the end of the three phase line at a point south of Santa Rosa
7 Village, from this point a single phase powerline continues in a southwesterly
8 direction a distance of approximately 12 miles to the intersection of Arizona
9 Highway 86; thence, in a westerly direction for a distance of approximately 17
10 miles to the end of powerline at San Simon. (Tracy).

11 Circuit #1-A

12 A single phase powerline starting at a point approximately 3 miles east of San
13 Simon (Tracy) and going in a northerly direction a distance of approximately 12
14 miles to the end of powerline at Vaya Chin.

15 Circuit #1-B

16 A single phase powerline starting approximately 7 miles east of San Simon (Tracy)
17 and going in a southwesterly direction a distance of approximately 11 miles to the
18 village of Pisinimo; thence in a westerly direction for a distance of approximately
19 17 miles to end a powerline approximately 2 miles west of the village of Gu Vo.

20 Circuit #1-C

21 A single phase powerline starting at a point approximately 1 1/2 miles west of the
22 intersection of Arizona Highway 86 and Casa Grande Highway and going in a south-
23 westerly direction a distance of approximately 3 1/2 miles to the end of powerline.

24 Circuit #1-D

25 A three phase powerline starting at a point between the village of Santa Rosa and
26 the village of Anagem and going in a northwesterly direction a distance of approxi-
27 mately 2 miles ending at the Santa Rosa School.

28 Circuit #35

29 A three phase powerline starting at the southwest corner of Section 2, Township
30 16 South, Range 9 East; thence, in a southwesterly direction for a distance of
31 approximately 36 miles to the end of the three phase powerline at a point approxi-
32 5 miles west of the village of Sells; thence, from this point, a single phase
line continuing west for a distance of approximately 5 miles to the village of Gu

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Oldak.

Circuit #35-A

A single phase powerline starting at a point approximately 3 miles east of the village of Gu Oldak and going in a northerly direction for a distance of approximately 1 1/2 miles.

Circuit #35-B

The village of Sells has approximately 5 miles of single phase powerline and approximately 1 1/2 miles of V-phase powerline.

Circuit #35-C

A single phase powerline starting at a point on Arizona Highway 86, a distance of approximately 3 1/2 miles east of the Indian Oasis School in Sells, Arizona and going in a southerly direction for a distance of approximately 28 miles through the village of Topawa and ending at the village of San Miguel.

Circuit #35-D

A single phase powerline starting at a point approximately 3 miles south of the village of Topawa and going in a southwesterly direction for a distance of approximately 5 miles to the village of Vamori.

Circuit #35-E

A single phase powerline starting at a point on Arizona Highway 86 a distance of approximately 11 miles east of the Indian Oasis School in Sells, Arizona and going in a northwesterly direction for a distance of approximately 2 miles to serve the village of Halvana Naxya (Crowhang).

Circuit #35-F

A single phase powerline starting at a point on Arizona Highway 86 a distance of approximately 16 miles east of the Indian Oasis School in Sells, Arizona and going in a northwesterly direction for a distance of approximately 8 miles to serve the Santa Rosa Ranch School (Schuck).

Circuit #36 (Garcia's Ranch)

A single phase powerline entering the Reservation approximately 500 ft. north and 1300 ft. west of the southeast corner of Section 23, Township 14 South, Range 10 East; thence west for a distance of approximately 1/3 mile to serve a rancher.

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Kitt Peak

Approximately 1 1/2 miles of three phase power line located on Kitt Peak in Sections 11 and 12, Township 17 South, Range 7 East.

(SAN XAVIER SECTION)

Taps off Circuit #21

A single phase powerline starting at a point of beginning located on the west side of Mission Road at the intersection of San Xavier Road in Section 21, Township 15 South, Range 13 East; thence, going in an easterly direction for a distance of approximately 1 mile; thence in a southerly direction for a distance of approximately 1 1/2 mile; thence in an easterly direction for a distance of approximately 1 mile.

Other taps off Circuit #21

There are approximately 2 miles of additional taps off circuit #21 located in Sections, 16, 21, 22, 27, 28, and 24, Township 15 South, Range 13 East.

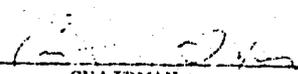
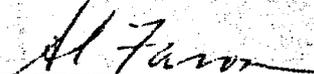
All of the above located in the Gila and Salt River Base and Meridian, Pima County, Arizona.

All of the above described power lines are 14.4/24.9 kV GND WYE. The above described facilities are intended to include all metering, transformers, voltage regulators, oil circuit reclosers, and other apputances attached thereto.

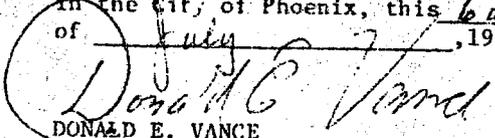
The above described facilities include numerous short tap lines not specifically delineated above.

IT IS FURTHER ORDERED: that the for-going Order shall be effective 30 days following its entry.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION

		
CHAIRMAN	COMMISSIONER	COMMISSIONER

IN WITNESS WHEREOF, I, DONALD E. VANCE, Secretary of the Corporation Commission have hereunto set my hand and caused the official seal of the Arizona Corporation Commission to be affixed at the Capitol, in the City of Phoenix, this 6th day of July, 1976.


DONALD E. VANCE
Secretary

EXHIBIT

J

KJS

In the United States Court of Federal Claims
No. 99-242 C

FILED
APR 26 1999
U.S. COURT OF
FEDERAL CLAIMS

MOHAVE ELECTRIC COOPERATIVE,
an Arizona Electric Cooperative, Nonprofit
Membership Corporation,

v.

NOTICE OF ASSIGNMENT TO:

THE UNITED STATES

Judge Robert H. Hodges, Jr.

Pursuant to Rule 77(f) this case has been assigned to the above Judge for the conduct of proceedings pursuant to the rules of this court. Careful consideration and observance by counsel of the rules of the court and the orders of the judge applicable to the various steps required for the prosecution of the case will enable the judge and the clerk of court to assist counsel in the expeditious disposition of the case with a minimum of time and expense. Counsel's attention is called to Appendix G to the Rules, which govern proceedings before trial, and has application in every case unless an order is entered providing otherwise. As to the duplication, form and size requirements and number of copies of papers to be filed, see Rules 82 and 83. As to service, see Rule 5. All matters are to be brought to the attention of a judge unless specifically requested.

Also, counsels' attention is called to Amended General Order #13 that implements three methods of Alternative Dispute Resolution: Settlement Judges, Mini-Trials, and Third-Party Neutrals. The methods are both voluntary (i.e. both parties must agree to use the procedures) and flexible, and should be employed early in the litigation process.

The United States is requested to promptly file written notification of the name, address and telephone number of assigned counsel in accordance with Rule 81(d)(3).

Pursuant to General Order 32: "In pleadings and papers other than the complaint, the name of the judge assigned to the case shall appear under the docket number."

Margaret M. Earnest

Margaret M. Earnest, Clerk

KTS

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MOHAVE ELECTRIC COOPERATIVE, an)
Arizona Electric Cooperative, Nonprofit)
Membership Corporation,)

Plaintiff,)

v.)

THE UNITED STATES OF AMERICA,)

Defendant.)

99-242 C

No. _____

FILED APR 26 1999

due April 30 - 54
May 31 - 31
June 23

COMPLAINT

Plaintiff, by its attorneys undersigned, respectfully shows and alleges:

FACTUAL BACKGROUND

I.

Plaintiff is, and at all times pertinent hereto was, a customer owned, not for profit, membership corporation duly organized and existing under the laws of the State of Arizona, with its principal office and place of business located at Bullhead City, Arizona. Plaintiff is engaged in business as an electric utility.

II.

Defendant is the United States of America.

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III.

This action arises out of a contract between Plaintiff and Defendant, as more fully appears hereinafter. This Court has jurisdiction of this action under the provisions of the Contract Disputes Act of 1978, 41 USC §601, et seq.

IV.

On April 1, 1982, Plaintiff entered into a contract with Defendant, acting through the Administrator of the General Services Administration on behalf of the U.S. Bureau of Indian Affairs, Department of the Interior, to construct and operate a 70 mile power line and to supply electric energy to a Bureau of Indian Affairs facility, which provides power to the Haulapai and Havasupai Indian Reservations in Coconino County, Arizona. A copy of the contract the ("Mohave Electric/BIA Contract" or the "Contract") is attached hereto, marked Exhibit "A", and made a part hereof.

V.

The term of the Mohave Electric/BIA Contract was for a period of ten years ending in April 1992 with an option for the Defendant to renew for two (2) additional ten-year periods. The option was not exercised and no renewal has been consummated.

VI.

From April 1, 1982 to April 1, 1992, Plaintiff fully performed pursuant to the Contract in conformity with the requirements thereof, and according to the understanding of the parties and Defendant paid all invoiced charges in full.

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VII.

Commencing April 1, 1992 and continuing to date, Plaintiff has continued to provide services and Defendant has paid all invoiced charges in full.

VIII.

On April 19, 1993 the Contracting Officer, requested the Office of the Inspector General, United States Department of Interior to conduct a review of electric utility invoices submitted to and paid by the Defendant for calendar year 1994.

IX.

On June 23, 1995 the Office of Inspector General submitted it's audit report 95-E-1045 ("Report 95-E-1045" or the "Report"), questioning the propriety of certain costs incurred by and paid for by the Defendant for services rendered under the contract. A copy of the Report attached hereto as Exhibit "B".

X.

On November 25, 1997, the contracting officer issued a purported final written decision determining Plaintiff allegedly owed Defendant \$418,362.

XI.

On May 4, 1998, the contracting officer issued a new final written decision (the "Final Decision" or "Final Opinion") amending the amount allegedly owed by the Plaintiff to \$387,343 and extending the time for Appeal. A copy of the Final Decision is attached hereto as Exhibit "C".

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XII.

In his Final Decision, the Contracting Officer found as follows:

DETERMINATION

Whereas, Mohave Electric has failed to respond to the audit report and simply refutes the audit's findings without explaining their difference with the OIG findings, I hereby determine that Mohave Electric Cooperative owes \$387,343 to the Bureau of Indian Affairs.

COUNT I

XIII.

By its terms, the Report made no definitive findings of inappropriate charges or payments made under the Contract for calendar year for 1994. Rather, the Report merely itemized those costs about which posed questions and classified those costs as either cost exceptions or unsupported costs.

XIV.

The Report was submitted to the BIA to determine if the questioned costs were appropriate and report the disposition of those costs.

XV.

The Bureau was unable or unwilling to either validate or reject the questioned costs itemized in the Report and thereupon the Contracting Officer issued his opinion unilaterally holding the Plaintiff liable for certain of those questioned costs.

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XVI.

Plaintiff was deprived of its Constitutional protections and denied its Constitutional rights to due process by virtue of the procedures employed by the Defendant in arriving at the Final Decision of the contracting officer.

COUNT II

XVII.

As reflected in his Final Opinion, the Contracting Officer's sole reason for assessing damages against the Plaintiff was the claimed failure of the Plaintiff to respond to the audit.

XVIII.

The alleged failure to respond to the Report is not an adequate basis to find liability.

XIX.

The Contracting Officer's determination that the Plaintiff failed to respond to the Report is unfounded and incorrect. Plaintiff did, in fact, respond to the best of its ability through numerous meetings and correspondence.

XX.

By its terms, the Final Decision of the Contracting Officer, impermissibly adopted and incorporated the Report as his own decision.

XXI.

By adoption of the Report, the Contracting Officer failed to make an independent determination as required under the Contract Disputes Act, 41 USC 601, et seq.

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XXII.

The Report relied upon by the Contracting Officer in arriving at his Final Opinion is flawed and in error in the following respects.

1. The Report does not meet the applicable government auditing standards issued by the Comptroller General of the United States.

2. It is undisputed that no records of contract negotiations were retained by either the Bureau of Indian Affairs or the Plaintiff and therefore the audit is based on speculation and conjecture

3. The Report divides questioned costs into cost exceptions and unsupported costs.

a. Justification for unsupported costs is based on the absence of records and cannot be sustained.

b. Justification for cost exceptions is based on erroneous assumptions and cannot be sustained.

4. There is no foundation for the Report's conclusion that the Bureau of Indian Affairs may have overpaid \$258,426 for construction costs and the charge cannot be sustained.

XXIII.

As the Report fails, so must the Contracting Officer's Final Decision fail and the Final Decision must be overturned.

XXIV.

Commencing April 8, 1982 and for each month thereafter, Plaintiff has duly

1 submitted its invoice to the Defendant for services and performance rendered under the
2 Contract. The invoices specified and defined the respective charges. Every invoice was
3 approved as correct and paid by the Bureau of Indian Affairs.
4

5 XV.

6 All charges having been set forth fully in the invoices submitted by the Plaintiff, and
7 said invoices having been approved and paid by the Bureau of Indian Affairs as correct, there is
8 a presumption of regularity which overcomes the Report's unfounded assumptions and negates
9 the contracting officers' Final Opinion.

10 WHEREFORE, Plaintiff requests this Court enter and award judgment in favor of
11 the Plaintiff on this Claim for Relief, award the Defendant nothing as damages or otherwise,
12 reverse the Final Decision, and award the Plaintiff reasonable attorney fees under the Equal
13 Access to Justice Act, and award to the Plaintiff such other relief as the Court finds just and
14 appropriate in the premises.
15

16 DATED this 21st day of April, 1999.

17
18
19 By 

20 
21 Richard S. Allemann

22 
23 2712 North Seventh Street
24 Phoenix, Arizona 85006-1090
25 Attorney for Plaintiff Mohave Electric Cooperative
26

EXHIBIT "B"

REPORT 95-E-1045 ("REPORT")

EIA - PAC
CONTRACT & GRANTS

JUL 5 11 07 AM '95



U.S. Department of the Interior
Office of Inspector General

AUDIT REPORT

REVIEW OF MOHAVE ELECTRIC
COOPERATIVE, INC.,
CALENDAR YEAR 1994 CHARGES
UNDER THE BUREAU OF INDIAN AFFAIRS
CONTRACT NO. GS-00S-67021

REPORT NO. 95-E-1045
JUNE 1995

This report may not be disclosed to anyone other than
the auditee except by the Assistant Inspector General
for Administration, Office of Inspector General,
U.S. Department of the Interior,
Washington, D.C. 20240

FOR OFFICIAL USE ONLY



United States Department of the Interior

OFFICE OF INSPECTOR GENERAL

External Audits
1550 Wilson Boulevard
Suite 725
Arlington, VA 22209

JUN 23 1995

MEMORANDUM AUDIT REPORT

To: Contracting Officer, Phoenix Area Office,
Bureau of Indian Affairs

From: Charlotte Olson *Charlotte Olson*
Director of External Audits

Subject: Review of Mohave Electric Cooperative, Inc., Calendar Year 1994 Charges
Under Bureau of Indian Affairs Contract No. GS-00S-67021
(Report No. 95-E-1045)

RECEIVED
 DIA - FNO
 CONTRACT & ACQUISITION
 JUN 5 11 07 AM '95

INTRODUCTION

In response to your request of April 19, 1993, this report presents the results of our review of Mohave Electric Cooperative, Inc., calendar year 1994 electric utility charges invoiced under Bureau of Indian Affairs Contract No. GS-00S-67021.

BACKGROUND

The Bureau of Indian Affairs awarded electric utility contract No. GS-00S-67021 to Mohave Electric Cooperative, Inc., on April 1, 1982. The purpose of the contract was to construct a power line 70 miles from the contractor's existing facilities, crossing the Hualapai Indian Reservation, and to supply electric energy to a Bureau-owned electrical transformer. The transformer provides power to the Havasupai Indian Reservation in Arizona. The period of performance of the contract was a 10-year term with options for two additional 10-year terms. The original 10-year term ended on March 31, 1992. However, the Bureau continues to receive electric services under the terms and conditions of the contract.

OBJECTIVE AND SCOPE

The objective of our audit was to determine whether electric utility costs charged by the contractor were reasonable, allowable, allocable, and supported in accordance with the terms of the contract and the applicable provisions of the Federal Acquisition Regulation as promulgated in Title 48 of the Code of Federal Regulations. We reviewed the charges invoiced to the Bureau for calendar year 1994 and the amount billed to the Bureau for the construction of the power line.

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Our audit was performed in accordance with the applicable "Government Auditing Standards," issued by the Comptroller General of the United States. Accordingly, we included such tests of records and other auditing procedures that were considered necessary under the circumstances. We did not evaluate the economy, efficiency, and effectiveness of the contractor's operations. The audit, conducted at the contractor's offices in Bullhead City, Arizona, was completed in March 1995.

RESULTS OF AUDIT

Of the \$288,853 costs invoiced by the contractor in 1994, we classified \$128,917 as questioned costs, which consist of cost exceptions of \$63,516 and unsupported costs of \$65,401. We also classified as unsupported \$1,145,652 for the construction of the power line. In addition, the Bureau may have overpaid the contractor \$258,426 for the power line. The results of our audit are summarized in the Appendix.

In accordance with the Departmental Manual (360 DM 5.3), please provide us with your written response by September 25, 1995, regarding disposition of the questioned costs. Your report should indicate how the questioned costs were settled. Copies of documentation related to the final disposition of the questioned costs should be provided with your response. If final disposition of the questioned costs is not obtained by the requested date, please provide information on actions taken or planned, including target dates and titles of officials responsible for implementation. The legislation, as amended, creating the Office of Inspector General requires semiannual reporting to the Congress on all audit reports issued, actions taken to implement audit recommendations and resolve questioned costs, and identification of each significant recommendation and questioned cost on which corrective action has not been taken.

If further information is needed, please contact Mr. William J. Dolan, Jr., at (703) 235-3061.

cc: Audit Liaison Officer, Bureau of Indian Affairs

Audit of Calendar Year 1994 Monthly Charges by
Mohave Electric Cooperative, Inc.
Under Contract No. GS-00S-67021

Results of Audit

<u>Description</u>	<u>Contractor Invoiced Costs</u>	<u>Questioned Costs</u>		<u>Balance</u>	<u>Notes</u>
		<u>Cost Exceptions</u>	<u>Unsupported Costs</u>		
Service Charge	\$840			\$840	1
Energy Charge	91,983			91,983	1
Demand Charge	48,816			48,816	1
Late Fee	12,956	\$5,336		7,620	2
Refund	(18,205)		(\$18,205)		3
Property Tax	57,283		57,283		4
Maintenance	22,913		22,913		4
Depreciation	54,991	54,991			4
Hualapai Tax	2,893	156		2,737	5
State Sales Tax	<u>14,383</u>	<u>3,033</u>	<u>3,410</u>	<u>7,940</u>	6
Total	<u>\$288,853</u>	<u>\$63,516</u>	<u>\$65,401</u>	<u>\$159,936</u>	
Construction	<u>\$1,145,652</u>		<u>\$1,145,652</u>		7

EXPLANATORY NOTES:

1. Service, Energy, and Demand Charges: The contractor billed the Bureau for these items based on rates that were approved by the Arizona Corporation Commission as required by the terms of the contract. In addition, the rates billed were either similar to or lower than the rates charged by the contractor to its large commercial and industrial customers.

2. Late Fee: Cost Exception - \$5,336. During calendar year 1994, the contractor billed the Bureau \$12,956 in installment charges relating to the \$141,946 in back possessory taxes imposed by the Hualapai Tribe for calendar years 1990, 1991, and 1992 (\$119,057); legal fees related to collecting the back taxes (\$10,553); delinquent penalties through November 30, 1992 (\$12,337); and a 1 percent late fee on the outstanding balance. In March 1993, the Contracting Officer approved the payment of \$119,057 in back taxes, the \$12,337 in penalties, and the 1 percent late fee on the outstanding balance. The Contracting Officer did not approve the \$10,553 in legal fees and requested that the contractor provide additional support for these fees. According to the contractor, the supporting documents were provided to the Bureau. However, the Bureau could not provide us with any documents indicating that the legal fees were approved for payment by the Contracting Officer. In September 1993, the Bureau paid the contractor a lump sum amount of \$119,057 for the back taxes. After the payment of the \$119,057, the Bureau still owed the contractor \$12,337 for the delinquent penalties and the 1 percent late fee on the outstanding balance. The contractor billed the Bureau a total of \$31,447 for the late fees from December 1992 through September 1994. We determined that the Bureau should have paid only \$13,774 in late fees based on the provisions of the Contracting Officer's Finding of Facts, dated March 1993. The late fee should have been calculated on only \$131,393 (\$141,946 minus \$10,553 in legal fees) until September 1993 when the \$119,051 was paid. After this payment was made, the late fee should have been based on the outstanding balance of \$12,337. We therefore take exception to the \$5,336 difference between the \$31,447 billed and the \$26,111 (\$13,774 plus \$12,337) that was actually owed.

3. Refund: Unsupported Costs - (\$18,205). We classified the entire refund amount of \$18,205 as unsupported. The contractor refunded customers a portion of the fuel surcharge invoiced in prior periods. The refund was based on \$0.007 per kilowatt hour of usage. The contractor stated that the refund rate was arbitrary and that it was not based on a review of fuel costs or any other adjustment factor.

4. Property Tax, Maintenance, and Depreciation: Cost Exceptions - \$54,991 Unsupported - \$80,196. The contractor billed \$135,187 for property taxes (\$57,283), maintenance (\$22,913), and depreciation (\$54,991). According to the contractor, the charges were based on rates applied to the \$1,145,652 associated with building the power line. These rates for property tax (5 percent), maintenance (2 percent), and depreciation (4.8 percent) were not specified in the contract, nor were they based on the actual costs incurred for these items. According to the contractor, the rates were established based on an oral agreement between the contractor and the Bureau at the time the contract was signed. The contractor could not provide us with any documentation concerning this agreement. Therefore, we classified the \$80,196 billed

APPENDIX

Page 3 of 3

for property tax and maintenance as unsupported. We took exception to the \$54,991 billed for depreciation because the Bureau reimbursed the contractor for the full cost of constructing the power line.

5. Hualapai Tax: Cost Exception - \$156. We classified \$156 as a cost exception because it was interest that the contractor billed the Bureau while awaiting reimbursement for taxes paid by the contractor to the Hualapai Tribe. Interest costs are unallowable under Federal Acquisition Regulation 31-205.20.

6. Arizona Sales Tax: Cost Exceptions - \$3,033; Unsupported Costs - \$3,410. We classified \$3,033 as a cost exception and \$3,410 as unsupported costs for the amount associated with the 5.5 percent Arizona sales tax applicable to the cost exceptions of \$55,147 and unsupported costs of \$61,991.

7. Construction Costs: Unsupported Costs - \$1,145,652. The contractor was to construct a power line from its existing facility for 70 miles to the Bureau's Long Mesa power transformer. The contract stated that the contractor could recover the costs associated with the construction from the Bureau based on the cost of the construction, not to exceed \$1.6 million. The costs were to be reimbursed based on a monthly charge of 4.44 percent of the total cost. The contractor determined that the cost of constructing the power line was \$1,145,652. We classified the entire \$1,145,652 billed for constructing the power line as unsupported because the contractor did not provide us with any supporting documentation.

In addition the Bureau may have overpaid the contractor \$258,426 for construction of the power line. Based on the contractor's records, the Bureau was billed and paid \$1,404,078¹. The \$258,426 overpayment was determined by subtracting the \$1,145,652 construction costs from the \$1,404,078 billed. The Bureau could not provide us with the actual amount paid for the power line.

¹ Includes a lump sum payment of \$923,244.

ILLEGAL OR WASTEFUL ACTIVITIES
SHOULD BE REPORTED TO
THE OFFICE OF INSPECTOR GENERAL BY:

Sending written documents to:

Calling:

Within the Continental United States

U.S. Department of the Interior
Office of Inspector General
P.O. Box 1593
Arlington, Virginia 22210

Our 24-hour
Telephone HOTLINE
1-800-424-5081 or
(703) 255-9599

TDD for the hearing impaired
(703) 255-9403 or
1-800-354-0996

Outside the Continental United States

Caribbean Area

U.S. Department of the Interior
Office of Inspector General
Caribbean Region
Federal Building & Courthouse
Veterans Drive, Room 207
St. Thomas, Virgin Islands 00802

(809) 774-8300

North Pacific Region

U.S. Department of the Interior
Office of Inspector General
North Pacific Region
238 Archbishop F.C. Flores Street
Suite 807, PDN Building
Agana, Guam 96910

(700) 550-7279 or
COMM 9-011-671-472-7279

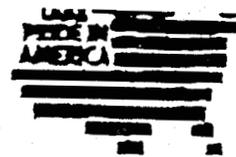
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EXHIBIT "C"

FINAL DECISION



United States Department of the Interior



BUREAU OF INDIAN AFFAIRS

PHOENIX AREA OFFICE

P.O. BOX 10

PHOENIX, ARIZONA 85001

(602) 379-6760

FAX: 379-6763

NO APPLY
SUPER 10

Branch of Acquisition and Federal
Assistance, MS-210

MAY 04 1998

Mohave Electric Corporation
P. O. Box 1045
Bullhead City, Arizona 86430

Attention: Stephen McArthur

Dear Mr. McArthur:

On November 25, 1997, I issued a final decision regarding your lack of response to the Office of Inspector General, Audit report No. 95-E-1045, dated June 1995. Subsequently, it was brought to my attention that I made an error in the total amount of the costs cited in the final decision. Therefore, I am reissuing a correct final decision including a revised determination and findings. I am also providing additional time for you to appeal the decision.

This is in the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to the agency board of contract appeals, you solely at your election, proceed under the board's small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 803, regarding Maritime Contracts) within 12 months of the date you receive this decision.

Sincerely,

Janice Brown
Contracting Officer

Enclosure

**REVISED
DETERMINATION AND FINDINGS
MOHAVE ELECTRIC COOPERATIVE
CONTRACT NO. GS-00S-67021**

Findings

1. On April 1, 1982, the Bureau of Indian Affairs (BIA) entered into Contract No. GS-00S-67021 for the construction of power line and the furnishing of electric power. Delivery of electric power commenced after the construction of the power line was complete. The construction costs were reimbursed to Mohave Electric Cooperative based on vouchers presented to the Bureau of Indian Affairs. The cost of electric power was also based on the invoices presented to the Bureau for payment. The basis for the invoices is governed by the contract provision titled, "Facilities Charges."
2. The term of the contract was ten years with an option to renew for "...two additional ten year periods." The Government decided to exercise the option to extend the contract for the delivery of electric power. The Contracting Officer notified Mohave Electric Cooperative on April 19, 1993, of its intention to exercise its right under the contract to verify and audit all construction costs and monthly facility charges.
3. Whereas the contract contains a provision titled, "Facilities Charges," for which the Contracting Officer questioned the continued payment under the exercise of the option, the Office of Inspector General (OIG) was requested to conduct an audit of the facilities charges to assist the Contracting Officer in the exercise of the option.
4. The audit report of June 23, 1995, reflects the findings of the review. The objective of the audit was to determine whether electric utility costs charged by the contractor were reasonable, allowable, allocable, and supported in accordance with the terms of the contract and the applicable provisions of the Federal Acquisition Regulation. In addition to reviewing invoiced charges for 1994, the OIG also reviewed invoiced construction charges.
5. Since the release of the audit report on June 23, 1995, the Contracting Officer has been attempting to get Mohave Electric Cooperative to respond to the audit. Numerous meetings have been held between the Contracting Officer, other Bureau representatives, and Mohave Electric Cooperative and their attorneys to get an explanation of the findings by the OIG of the invoiced costs.
6. All attempts to obtain a response to the specific findings of the audit have proven unsuccessful. Although Mohave Electric Cooperative has agreed to respond,

provided they could review records contained in the Bureau's disbursement office in Albuquerque, that effort has also failed. In their correspondence of October 21, 1997, Mohave Electric has concluded "...a review of the BIA documentation that is at Mohave Electric does not sustain the findings of the audit that conclude Mohave Electric owes the United States, or the BIA any money." Furthermore, the letter states, "Mohave believes, that unless there is some documented evidence to the contrary, it must be assumed the responsible Federal officials and officials at the BIA acted in accordance with and pursuant to all relevant and applicable Federal law, policy and practice and all payments were lawfully made."

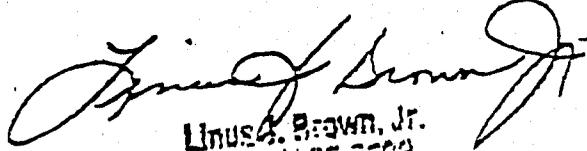
7. Mohave Electric Cooperative has invoiced and received from the Bureau of Indian Affairs for construction in excess of actual cost by \$258,426.00. For calendar year 1994, Mohave Electric Cooperative has invoiced and received from the Bureau of Indian Affairs questioned costs in the amount of \$128,917.00.

TOTAL P.41

**REVISED
DETERMINATION AND FINDINGS
MOHAVE ELECTRIC COOPERATIVE
CONTRACT NO. GS-005-87021**

Determination

Whereas Mohave Electric has failed to respond to the audit report and simply refutes the audit findings without explaining their difference with OIG findings, I hereby determine that Mohave Electric Cooperative owes \$387,343.00 to the Bureau of Indian Affairs.


Linus A. Brown, Jr.
1425-4105-3593

Chester Mills
10/06/98 01:40 PM

To: Wayne Nordwall
cc: Bryan Bowker
Subject: Fwd: Mohave Electric

If you recall ... we need to close this out and move on. Plus the fact, I believe it will help Bob in his negotiations with Mohave. Both sides can not provide the documentation to verify "records", therefore, the unsupported costs noted by the OIG. To the best of my knowledge, a Bill of Collection was never issued to Mohave Electric.

I would recommend that you "instruct" Mr. Brown to close out this audit Lisa is correct, it took the Bureau way to long to even respond to the audit. Also, Kaye Keely informed me last year that the Department was no longer tracking this audit. If I can be of any further assistance, please let me know. cdm

Forward Header

Subject: Mohave Electric
Author: <lisa_connell@ios.doi.gov >
Date: 10/6/98 1:16 PM

Wayne,

In June 1995, the OIG issued an internal audit report on costs billed to the BIA by Mohave Electric for the cost of building 70 miles of power line (built well over 10 years ago) and power charges.

The OIG concluded that the BIA was overcharged for both construction and power. HOWEVER, this determination was made based on a review of Mohave Electric's records because although BIA had a contract file, there was almost no financial information in it. FFS did not contain any detailed information because the contract work was all performed under the old accounting system and only summary information was transferred to FFS during the conversion because the contract was closed.

The payment file has never been located in order to verify that Mohave Electric was paid what their records indicate. It is my understanding that costs were questioned by the OIG not because there was proof of overcharges, but because of incomplete documentation on the part of the contractor.

More important, it took BIA more than 2 1/2 years after the issuance of the audit to issue a management decision (November, 1997) and a revised decision was issued in June, 1998. Would the Papago decision that costs must be disallowed within one year of being questioned apply here?

I am double-checking with DAM to see if they have issued a bill for collection, but I don't believe they have because it's not showing up on my list of outstanding debt. The Department needs to know by Friday what action we have taken or plan to take. If we don't have a legal basis for pursuing the debt, we need to reinstate the costs. It would be a phenomenal waste of time and money to pursue an uncollectible debt.

Let me know as soon as you get additional information.

Thanks

Lisa

7/8/97

T E L E F A X (7 pages total)

To: Chet Mills

From: Kay Keely

Subject: Mohave Electric Audit Report No. 95-E-1045

The first thing to remember is that the audit was requested by Bud Brown in April 1993. The audit was issued in June 1995, exactly two years ago!

One of Bud's staff wrote a proposed response, but Bud did not agree with it. Reportedly he had written to Mohave at least twice asking them to provide answers and documentation. Mohave opened their records to OIG already and BIA apparently has no documentation to refute or support our figures.

Dolan from the OIG told Lisa of my staff that there is no chance of collecting from Mohave electric unless BIA can come up with documentation. She also talked to the Solicitor and they agree.

The next page of this telefax is the memo I drafted in September 1996 after talking to Jeannette. To my knowledge the information included in my draft is accurate and I believe it is a realistic summary of where we are as an agency. She tasked Bud with providing her a written document with his "side of the story". Apparently she and Ted accepted Bud's version and subsequently sent the attached memo (dated 10/10/96) to the OIG as a status report on the audit. That is the last piece of paper we have seen on this audit.

I attempted to reconcile the figures from the OIG audit report (3 pages of tabular material) but was unsuccessful. If Bud has information about what payments were made or what was billed by Mohave, he has never provided it to us.

Good luck.

Let me know if I can be of any assistance. It was good to talk to you!

Ray

DRAFT
9/27/96

Memorandum

To: Director of External Audits
Office of Inspector General
Attention: William Dolan

From: Deputy Director
Office of Audit and Evaluation

Subject: Review of Mohave Electric Cooperative, Inc., Calendar Year 1994 Charges
Under Bureau of Indian Affairs Contract No. GS-00S-67021 (Audit Report No.
95-E-1045)

The subject audit report, issued June 23, 1995, in response to a request from the Bureau of Indian Affairs Phoenix Area Director, contained \$63,516 in cost exceptions and \$1,211,053 in unsupported costs for the Bureau of Indian Affairs to resolve.

It is our understanding that most of the financial data used by the OIG in conducting the audit was provided by Mohave Electric. The Phoenix Area Office has conducted extensive research in an attempt to either support or refute the OIG findings in the audit report but has found no supporting financial information. Repeated letters to Mohave Electric have resulted in no additional information since Mohave's records were made available to the OIG auditors during the audit work.

The OIG found no records at Mohave to "support" the construction cost of \$1,145,652; however, the power line does exist, the BIA accepted the project, and the contract allowed a not-to-exceed construction cost of \$1.6 million. The OIG further found that BIA paid Mohave Electric \$1,404,078 for construction costs though they were only invoiced \$1,145,652. This does raise questions, but BIA is unable to provide documentation as to whether they paid the \$1.4 million or why they paid more than invoiced or whether Mohave incorrectly credited other payments against construction. Mohave informed the OIG that the other costs in question were based on verbal agreements at the time the contract was initially signed in 1982. This cannot be confirmed or denied by BIA.

Without further documentation, BIA cannot initiate any collection action against Mohave; and the Solicitor's office has stated they could not pursue collection action without documentation to refute the Mohave documents.

I have discussed this issue with the current Acting Phoenix Area Director and he has authorized me to recommend that the questioned costs be reinstated and that the subject audit be closed.

Mohave Electric
Ted Quasula

9/20/96

I hesitate to call about this one because we've gotten cross with Bud on it too many times ^{on June 2 talk} to ~~that~~ ^{sorry} when he was acting + he

audit req'd by Bud in 4/93
OIG issued June 1995 - 15 months ago
response is one year late

Leonardine wrote a proposed response but Bud does not agree with it. - he has written to Mohave at least twice asking them to provide answers + documentation - they opened their records to OIG already + BIA apparently has no documentation to refute or support.

Dolan (OIG) says no chance of collecting unless BIA comes up with doc.
Sol agrees.

if we close + don't send a copy to Mohave, Bud can

Janet is acting asst. a.d. for admin.

we accepted the project

Telephone Conversation Record

To: Mr. Bill Dolan, Office of Inspector General
From: Lisa Connell, Audit and Evaluation
Phone: 703-235-9231
Subject: Mohave Electric Audit, No. 95-E-1045
Date: March 12, 1996

Explained to Mr. Dolan that the Phoenix Area was having difficulty reconciling the amounts in the audit with their files. Mr. Dolan said this did not surprise him because most of the numbers in the audit came from Mohave Electric. When I asked if we could have copies of the audit workpapers, he said he did not think that was necessary if BIA was unable to substantiate the amounts actually paid. Mohave Electric is more than willing to go to court over the matter and BIA would likely lose. He recommended that we confirm this with the Solicitor and close the audit. He also recommended that we address how the future contract will be negotiated.

To: Mr. Wayne Nordwall
Phone: 602-379-4523, 4418-personal line
From: Lisa Connell
Subject: Mohave Electric Audit, No. 95-E-1045
Date: March 21, 1996

Mr. Nordwall agreed with Mr. Dolan's conclusions. Without supporting documentation, it would be a "hard case to press." He also said that since Mohave owns the utility lines, BIA did not have a lot of leverage because Mohave could choose to stop delivering power.

EXHIBIT

K

NOW, THEREFORE, BE IT RESOLVED, having found that the property under A.R.S. Section 40-285 is not necessary or useful to the Cooperative in the performance of its duties to the public and has no value to the Cooperative or its members, authorizing the Board of Directors of the Cooperative through its officers and management to take such action as may be required to quit claim, sell or relinquish or abandon any and all property rights of the Cooperative in and to the approximately 70 mile electric line facilities or rights-of-way known as the Hualapai BIA line from Nelson Substation to its termination point; and

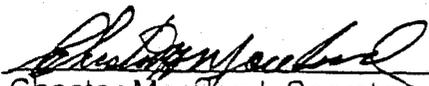
FURTHER RESOLVED, authorizing and directing the officers and management to execute any and all documents necessary to quit claim, sell or relinquish or abandon the rights of Mohave upon, in or to said line and facilities and rights-of-way and further to negotiate any possible overhead, maintenance and repair contract or agreement which Management deems in the best interests of the members; and

FURTHER RESOLVED, that as to any existing retail customer served on said line that the same be transferred to the BIA which is authorized to operate on Indian nation lands and that notice of said transfer be given to the less than twelve customers; and

FURTHER RESOLVED, that Management communicate to the Arizona Corporation Commission the fact first that this wholesale service is for the BIA re-delivery outside the service area of the Cooperative, and that second, the 30,000 members of the Cooperative are threatened with imposition of an unfair economic burden and shift of expense by the Federal Government of a trust responsibility owed by the BIA to the Indians and that the BIA intends to impose this Federal expense burden on the backs of the 30,000 members of the Cooperative.

CERTIFICATION

I, Chester Moreland, certify that I am the Secretary of the Mohave Electric Cooperative, Inc. Board of Directors. I further certify that the above is a true excerpt from the minutes of a board meeting of this Board of Directors on the 17th day of April, 2003, at which a quorum was present and that the above portion of the minutes has not been modified or rescinded.


Chester Moreland, Secretary

EXHIBIT

L

The Law Offices of
**CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.**

2712 North Seventh Street
Phoenix, Arizona 85006-1090
Telephone (602) 393-1700
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Michael A. Curtis
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William P. Sullivan
Larry K. Udall
Anja K. Wendel
K. Russell Romney
Ellen M. Van Riper

Of Counsel
Joseph F. Abate
Thomas A. Hine

REFER TO FILE NO. 1234
1234 Drop

February 4, 2005

Robert O. Ellinger,
Director, U.S.D.A
Rural Utilities Services/Southern Regional Division
Mail Stop 1567
1400 Independence Avenue, S.W.
Washington, D.C. 20250

RE: Mohave Electric Cooperative Inc. Partial Release of Lien

Dear Mr. Ellinger:

Enclosed is the Mohave Electric Cooperative, Inc. ("Mohave") request for partial release of an RUS lien on a small portion of the Mohave facilities located outside its official service territory. The Bureau of Indian Affairs (BIA) 1982 contract with Mohave for delivery over the described facilities of power at wholesale for resale expired and was terminated. Upon the BIA failure to renew its Contract for delivery of wholesale electricity across the sovereign lands of the Hualapai and Havasupai Tribes ("Tribes") to the BIA (for retail delivery by the BIA to the Tribes. The facilities, a 70-mile electric line (See, Exhibit A, sketch map of power line) pursuant to law, were subsequently found to be and declared by the Board surplus to the electric system and service area of Mohave and no longer "necessary or useful" in its business. The facilities were transferred to the BIA and the Tribes pursuant to A.R.S. 40-285(C) (Attached Exhibits A, B, C, D & E).

The original cost of the facilities was \$1,028,277.37. The present value is \$114,253.04. The \$114,253.04 has been deposited to the Mohave RUS Trustee Account concurrent with this filing in anticipation of receipt of the release of lien.

Please consider this Mohave's request for a partial release of all RUS liens on a small portion of the Mohave facilities outside its certificated area. This request is made pursuant to § 3.10 of the Mortgage Documents (7 CFR Pt. 1718, Sub Pt. B App. A) and CFR § 1717.616. In support of this request, and in order to maintain compliance with RUS policies and goals, Mohave submits the following information:

1. **Transfer Price:** None. The BIA wholesale power contract, which included an agreement to provide payment of the expense of overhead, maintenance, repairs and taxes, was for delivery in a location outside the Mohave certificated service area. The BIA terminated.

The 70-mile power line, created outside the certificated area solely for the delivery of wholesale power is not being sold. The line has been transferred. At no expense to the BIA, Hualapai and Havasupai Tribes, as their interests may be determined amongst them for whatever use they wish to make. The line has no value to Mohave and its member ratepayers. It is in an area Mohave cannot serve. The depreciated value (as determined by RUS), is \$114,253.04. In accordance with the RUS directive received on December 6, 2004, Mohave deposited those funds in a Trustee Account contemplated by Account Number 131.2 of the Uniform System of Accounts prescribed by RUS for its electric borrowers pursuant to 7 CFR § 1767.18. Mohave will apply those funds as a pro rata pre-payment on the notes secured by the mortgages "according to the aggregate unpaid principal amount of the note to such installments thereof as may be designated by the respective note holders at the time of the pre-payment" (RUS letter dated December 6, 2004);

2. **Best Interest:** The transfer of this 70-mile line located outside the certificated area of Mohave and the elimination of liability is in the best interests of Mohave, its members, and all of the mortgagees as well as in the best interests of the Hualapai and Havasupai Tribes and the BIA (rather than removing the facilities);
3. **Statutory and Corporate Approvals:** Mohave has secured all of the necessary approvals required by law (See, Exhibits A, B, C, D & E) to effect the transfer to the BIA and Indian Tribes;
4. **Exchanges/Trades of Plant in Place:** The transfer of the 70-mile line did not involve any kind of exchange;
5. **Satisfactory Operating Units/Jeopardy of Repayment of RUS Loans:** Transfer of the line will not jeopardize Mohave's ability to meet its obligations under any current RUS loans. On the contrary, Mohave's divestiture of this surplus line relieves a burden of liability upon its thirty thousand plus members. Mohave will no longer be required to maintain or repair this line in an area it has no legal authority to serve. The transfer of this 70-mile line located outside the electric service area of Mohave to the BIA

and Tribes will not cause any disruption in Mohave's ability to serve its members. The line facilitated a now terminated wholesale power transaction outside the certificated area;

6. Date of Request: February 4, 2005;

7. USDA/RUS Designation of Transferor: A 22 Mohave;

8. Name and Address of Transferor: Mohave Electric Cooperative Inc.,
Post Office Box 1045
1999 Arena Drive
Bullhead City, Arizona 86442

9. Names and Addresses of Transferees:

The Hualapai Tribe
Loretta Jackson, Chairperson
878 West Route 66
Post Office Box 310
Peach Springs, Arizona 86434

The Havasupai Tribe
Linda Mahone, Chairperson
Post Office Box 10
Supai, Arizona 86435

Bureau of Indian Affairs
400 North Fifth Street, 14th Floor
Post Office Box 10
Phoenix, Arizona 85004

10. Approximate Original Cost: \$1,082,770.37;

11. Condition of Property: The power line facility is in good repair and condition and can be and is used for delivery by BIA of electricity by the BIA to the Tribes and BIA for their own purposes. The line is in constant daily use by the BIA and the Tribes. Other utilities, including Mohave, provide repairs when requested;

12. Type of Transfer: Transfer by Deed;

13. Transfer Costs: Mohave deposited \$114,215.04 into a Trustee Account as required by RUS pursuant to 7 CFR § 1767.18. Subsequently, Mohave will apply these funds as a pro rata prepayment of its respective mortgages;

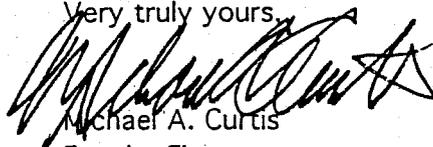
14. **Description of Property:** Two-pole, three-phase 14.4/24.9 KV line, consisting of 40'-60' poles with cross arms together with three-pole structures as necessary for "dead-end" or angle structures, beginning at the Nelson substation and ending at the rim of the Grand Canyon at the BIA Long Mesa substation. See attached Exhibit F for a description of the location of the line, and Exhibit A for a sketch of the line;
15. **Reason for Transfer:** Expiration and termination of the 1982 contract for wholesale power supply, o m & r and depreciation between Mohave and the BIA for the delivery to the BIA substation of wholesale electricity outside the Mohave certificated service area across the lands of the Hualapai and Havasupai Tribes for retail sale by the BIA to the Tribes at the election of the BIA makes the facility unneeded and surplus property. Wholesale electric service to the BIA continues to be delivered to the BIA for resale at a point of delivery inside the Mohave certificated service area at Mohave's Nelson substation at Mohave's lowest filed tariff rate. The line is "no longer necessary or useful in the performance of its duties to the public" pursuant to A.R.S. § 40-285(C). This transfer of this property outside of its service area and its potential liability is in the best interests of Mohave's rate-paying members;
16. **Borrower Status with RUS:** Mohave is not in default on any of its loans with RUS; in the most recent year for which data is available, Mohave achieved a TIER of at least 1.25, a DSC of at least 1.25, and OTIER of at least 1.1 and ODSC of at least 1.1 in each case based on the average or the best two out of three most recent years;
17. **Effect on Existing or Future Power Requirements and Pledged Security:** None. The Transfer of these assets will not reduce Mohave's existing or future requirements for energy or capacity. The transfer will not affect any of Mohave's assets pledged as security to the Government;
18. **Market Value:** Because the transferred line is within the boundaries of two (2) sovereign tribal nations and because of the circumstances surrounding this particular asset, Mohave determined the facilities have zero market value to Mohave, but were a liability;
19. **Aggregate Values:** The aggregate value of the transferred property is less than 10% of Mohave's net utility plant prior to this transaction;
20. **Proceeds of Transfer:** As previously indicated, Mohave shall concurrent herewith deposit \$114,253.04 in a Trustee Construction account then apply those funds as a pro rata prepayment to Mohave's respective notes secured by mortgages;

Mr. Robert O. Ellinger
February 4, 2005
Page 5

21. **Partial Release Documents:** Three originals and a copy of the Partial Release of Liens document have been included with this transmittal letter. See attached Exhibit G, with a request RUS forward them to CFC and CoBank for execution.

We trust that all of the above information will be useful and helpful in acquiring a partial lease of all the liens contained on the attached documents. Should you have any questions regarding these matters please do not hesitate to give us a call.

Very truly yours,



Michael A. Curtis

For the Firm

Attorneys for Mohave Cooperative Inc.

MAC/sdc

cc: Robert E. Broz, MEC
Stephen McArthur, MEC
Larry McGraw, RUS

EXHIBIT

M



United States Department of Agriculture
Rural Development

MAR 3 2005

Mr. Robert F. Broz
General Manager/CEO
Mohave Electric Cooperative, Inc.
P.O. Box 1045
Bullhead City, Arizona 86430

Dear Mr. Broz:

The Rural Utilities Service (RUS) has executed the Partial Release of Lien (Release) in connection with the transfer of:

The facilities, a 70 mile electric line as well as rights-of-ways known, as the Hualapai BIA line beginning at the Nelson Substation and ending at the rim of the Grand Canyon at the BIA Long Mesa Substation.

The sale meets all the requirements in 7 CFR 1717.616. Prior RUS approval is not required for this sale. Your attention is called to RUS Bulletin 26-1, *Budgetary Control of Advance of Electric Loan Funds, Part III.D*, which describes the necessary adjustments that need to be made to your consolidated loan budget to record this sale. If the sale requires a deposit into the Construction Fund Trustee Account, please inform RUS of the Amount upon deposit so that the necessary adjustments can be made on the consolidated loan budget records.

The Release was forwarded to the National Rural Utilities Cooperative Finance Corporation (CFC) for consideration. Once executed, CFC will forward the Release to CoBank, ACB for consideration. CoBank, ACB will return the Release to Mohave Electric Cooperative, Inc., (Mohave) once everything has been executed. If you have any questions regarding the status of the Release, please contact Mr. Robert Stephens of CFC at (703) 709-6700.

RUS makes no representation as to the legal sufficiency of the Release and reminds you that it is the responsibility of the purchaser's attorney and Mohave to assure the accuracy and legal effectiveness of the Release.

1400 Independence Ave, SW - Washington, DC 20250-0700
Web: <http://www.rurdev.usda.gov>

Committed to the future of rural communities.

"USDA is an equal opportunity provider, employer and lender"

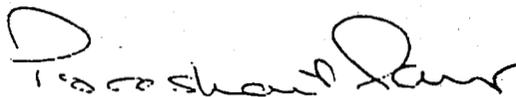
To file a complaint of discrimination write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice or TDD).

Mr. Robert E. Broz

2

We are sending a copy of this letter to CFC and CoBank, ACB.

Sincerely,



PRASHANT V. PATEL
Chief, Operations Branch
Southern Regional Division
Rural Utilities Service

Enclosures

EXHIBIT

N

MOHAVE ELECTRIC COOPERATIVE, INC.



March 9, 1982

Dept. of Interior
 Bureau of Indian Affairs
 P.O. Box 7007
 Phoenix, Az. 85011

RE: Account #29740-00, D-8

February 1982 Electric Billing
 February 1, 1982 to March 1, 1982

	PRESENT	PREVIOUS	DIFF	MULTI	USAGE
KWH	65	0	65	1200	78,000
KW	.42		.42	1200	504
PREVIOUS BALANCE					\$45,038.24
LESS ADJ. FOR DEC. & JAN.					(12,788.92)
MINIMUM MONTHLY CHG. FOR FEB.					15,504.48
ARIZONA SALES TAX @ .04					620.18
TOTAL					<u>\$48,373.98</u>

The monthly minimum charge has been reduced from \$21,653.00 to \$15,504.48. The adjustment for the two previous months billings are reflected on this billing.

The minimum charge is being billed this month because the charges for the usage did not exceed the minimum charge.

MOHAVE ELECTRIC COOPERATIVE, INC.

A. H. Carpenter

Mr. A. H. Carpenter
 Manager

AHC/ek



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
TRUXTON CANON AGENCY
VALENTINE, ARIZONA 86437*Steve
file*

IN REPLY REFER TO:

Office of the Superintendent
(602) 769-2241

March 26, 1982

Mr. James Uqualla, Chairman
Havasupai Tribal Council
P. O. Box 70
Supai, Arizona 86434

Dear Mr. Uqualla,

By memorandum to you from Mr. Curtis Geiogamah, Acting Area Director, dated February 11, 1982, and my letter to you dated February 17, 1982, you were advised that, because of generator failure at Long Mesa, it was necessary to energize the commercial power line to Supai.

As you requested, the following information is being provided, which was the basis for our decision to energize that line.

On the evening of February 10, 1982, we were advised by the dispatcher at the Hualapai Police Department, Peach Springs, Arizona, that a power blackout was being experienced at Supai.

In order to determine what caused the power failure, it was learned that one of the large generators at Long Mesa (Generator No. 5) had broken down. At about the same time as Generator No. 5 went out, a fuse on one of the three phases into the canyon also burned out. It was later learned that the failure of Generator No. 5 was caused by a short in the control wires in conduit and concrete, which apparently caused an overload into the phase which burned out.

To compound the problem, Generator No. 6 was consuming about 5-6 gallons of engine oil daily, which meant that that generator was also about to fail. In addition, Generator No. 1, a small unit, had blown a head gasket on February 8, 1982 and, although it had been repaired, it was still leaking water and was emitting steam out of the exhaust system. Generator No. 2, also a small unit, had been down since August, 1981, due to a broken crankshaft. While Generators No. 3 & 4 appeared to be operating properly, it was very doubtful if the Plant could continue to function much longer under these conditions.

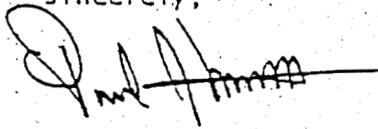
And finally, since the new school had just been inspected and occupancy of the school was imminent, it was doubtful if the Long Mesa Plant could stand the additional load increase.

With all of these factors in mind, along with the fact that the failure of Generator No. 5 came during an extremely cold period, it was felt, that for the welfare of the Havasupai Tribal members living in Supai, a more reliable power source was needed immediately. Therefore the decision to energize the commercial power line was made.

When that decision was made, the Bureau was aware that the rate structure and right-of-way was still an unresolved issue; however, resolution of these issues can still be pursued by the Tribe. A critical factor in our decision at that time was the safety and well being of the Tribal members in Supai.

I hope the above information will answer any questions you might have; however, let me know if I can assist further.

Sincerely,



Superintendent