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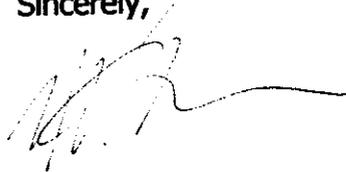
David P. Boergers
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: RTO1-35-000

Dear Mr. Boergers,

Please find enclosed an original and 14 copies of a Motion to Intervene of the Affiliated Tribes of Northwest Indians-Economic Development Corporation in the above referenced docket.

Sincerely,



Margaret M. Schaff

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Avista Corporation, Bonneville Power Administration,)
 Idaho Power Company, Montana Power Company,)
 Nevada Power Company, PacifiCorp,) Docket No. RTO1-35-000
 Portland General Electric Company, Puget Sound)
 Energy, Inc., Sierra Pacific Power Company)

Motion to Intervene
Of the
Affiliated Tribes of Northwest Indians Economic Development Corporation

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1. Introduction

Pursuant to 18 C.F.R. 385.214, and pursuant to the Commission's Order No 2000, 65 Fed. Reg. 809 (January 6, 2000), *order on reh'g*, Order No 2000-A, 65 Fed Reg. 12,088 (March 8, 2000), the Affiliated Tribes of Northwest Indians Economic Development Corporation (ATNI-EDC) hereby moves to intervene in the "Alternative Filing Pursuant to Order No. 2000" and the "Supplemental Compliance Filing and Request for Declaratory Order Pursuant to Order 2000" (the "Filing") of Avista Corporation, Bonneville Power Administration, Idaho Power Company, Montana Power Company, Nevada Power Company, Pacificorp, Portland General Electric Company, Puget Sound Energy, Inc., and Sierra Pacific Power Company (the "Filing Utilities").

All Pleadings, correspondence and other communications concerning these dockets should be sent to:

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ATNI-EDC's members comprise the 54 Native American Indian Tribes in the states of Washington, Oregon, Idaho and Western Montana. ATNI-EDC represents issues relevant to its membership including issues related to energy matters. ATNI-EDC has participated as part of the Regional Representatives Group during the consensus

building process for development of RTO-West. ATNI-EDC's voting member tribes will be directly affected by formation of RTO West as consumers of electricity, customers of the Filing Utilities, and as regulators of certain electrical commerce on Indian lands and reservations.

The participation of ATNI-EDC is also in the public interest as the issues represented by ATNI-EDC may also be relevant to tribal interests in geographical regions outside of that covered by ATNI-EDC's membership. ATNI-EDC does not claim to represent the interests or issues of tribes in British Columbia, Alberta, Eastern Montana, Nevada, Utah, or Wyoming. ATNI-EDC does not claim to address the particular interest of any sovereign tribe planning to submit separate comments specific to their situation. However, some issues represented by ATNI-EDC may be similar to these interests.

2. Participation of ATNI-EDC in Regional Consensus Building Efforts

Under a grant from the Bonneville Power Administration (Bonneville), ATNI-EDC has participated in the regional collaborative process for formation of RTO West. We have held a seat on the Regional Representatives Group (RRG). While we have some reservations about whether the formation of RTO West is in the overall public interest, we are very pleased with our participation and the welcome we have received by the region as well as the consideration of tribal issues by the Filing Utilities during the decision-making process. Many of the comments and concerns we expressed have been incorporated into the governance and legal documents filed by the Filing Utilities.

As part of the effort to generate the Consensus Issues List (See Attachment G of the Filing), ATNI-EDC spoke with each of its member tribes. We developed a set of Principles for RTO formation as well as a list of tribal issues and concerns that were approved by all member tribes. They are distinct from and in addition to the RTO Filing Utilities' RTO Principles (Attachment B of the Filing) and Consensus Issues List. The Principles and Tribal Issues on RTO Formation List are attached hereto as Exhibit 1. Our Principles and Issues lists were presented to the RRG and are the basis for each and every concern raised by ATNI-EDC during this process and in this Motion to Intervene.

ATNI-EDC is pleased with and supports the RTO West filing as it recognizes and incorporates Tribal Issue No. 1, The Sovereign Status of Tribes, in all filing documents. As examples, tribes, where appropriate, are given the same acknowledgement as states when recognizing their local regulatory and legal jurisdictions¹. Tribal regulators are acknowledged as potential members of RTO West, and have a vote in electing the trustees selection committee². Tribal utilities are included in the definition of "Electric Utility"³. Bonneville is in the process of addressing issues of cultural resources protection that may arise from formation of RTO West.

ATNI-EDC is pleased with and supports the RTO West filing as it recognizes and incorporates Tribal Issue No 2, Land Based Right of Ways, in its filing documents. In its Articles, RTO West is prevented from owning transmission facilities, which protects tribal right-of-ways from being potentially transferred to RTO West⁴. Bonneville has

¹ For example, Attachment S, Section 4.2.1.

² Attachment J, Bylaws, Section 3(b)(v)(B).

³ Attachment S, Exhibit A.

⁴ Attachment R, Articles, Article III, Section 1.

also determined during the collaborative process that they would not transfer any of its right-of-ways out of federal control.

ATNI-EDC participated in the lively discussions surrounding Tribal Issue No. 3, protection of tribes as electrical customers. The majority of our member tribes are rural, and impoverished. Many of the tribes are served by the public power sector. In this respect we are concerned with many of the same issues addressed by the public power community. We seek protection from changes that will create additional administrative and financial burdens for the small rural utility sector. A few tribes have ongoing utilities or are in the process of forming tribally owned utilities to service reservation customers. Tribes in the region are eligible preference customers of the Bonneville, and/or the Western Area Power Administration (Western). All tribes within Western's service territory will receive allocations of low-cost federal power beginning in either 2001 or 2004. Within the RTO West geographical area, this will include tribes in Montana, Utah, Nevada and Northwestern Wyoming. These power allocations and the preference customer status, along with tribes' authority and jurisdiction to regulate electric power within reservation boundaries encourages tribes to form utilities and compete for better or less expensive electric service. In this respect we are concerned with many of the same issues addressed by the independent power community. We seek true access to the transmission system and competition in the electrical markets. We will address these issues in our general policy comments and specific commentary on the Filing.

ATNI-EDC is addressing Tribal Issue No. 4, Fish and Wildlife Restoration, directly to Bonneville. Most of these issues arise because transmission changes naturally bring changes to hydroelectric generation, which is a large proportion of the generation in

the region. The issues of concern to ATNI-EDC and Bonneville include the provision of assurances that spill at dams to improve fish migration will not be hampered by RTO formation or policies, and the availability of transmission rights when generation is needed for the purpose of avoiding gas super-saturation at dam sites. We are also working to develop appropriate accounting mechanisms to assure that costs are not shifted between Bonneville's Power Business Line and Transmission Business Line and that costs are appropriately counted against the correct Bonneville funds for Fish and Wildlife mitigation. ATNI-EDC withholds its support for formation of the RTO until there is full adequate resolution of Bonneville fish and wildlife related issues.

While many of our fish and wildlife issues are specific to Bonneville, ATNI-EDC urges the Filing Utilities and the Commission to recognize that all utilities operating hydroelectric generation will be bound by operational parameters within their licenses and agreements relating to fish and wildlife protection and mitigation and in federal and local laws. RTO West has no authority to supersede any such parameters and all parties' Transmission Operating Agreements should contain language prohibiting RTO West from attempting to supersede environmentally based generation constraints.

ATNI-EDC participated in the lively discussions surrounding Tribal Issue No. 5, Renewable and Other Energy Development. Both the United States Department of Energy and United States Department of Commerce have actively encouraged Indian Tribes to develop renewable energy projects through grants and government programs. Many tribes are now in the process of developing renewable energy programs and are seeking to market the output of the generation. ATNI-EDC encourages the use of interconnection standards that recognize and encourage these unconventional generating

resources. We oppose outdated standards that can be used to hinder the development of renewable energy.

Additionally, tribal lands are being targeted for new gas fired generation projects due to tax and other incentives and tribal governments are seeking energy and utility generation joint ventures to allay high levels of unemployment on reservations and bring economic development. Tribes are interested in the ability to interconnect to the high voltage grid, and to do so for their often small and rural renewable projects in a manner that does not provide a disincentive for the sale of this power.

ATNI-EDC is pleased with and supports the RTO West collaborative process as it recognized and incorporated Tribal Issue No. 6, the adequate opportunity to review and comment on RTO proposals. We have been a part of the decision making process during the formation of RTO West and we hope to continue to play a constructive part in the future.

3. General Policy Comments and Concerns of ATNI-EDC

A. RTO Cost/Benefit Issues

ATNI-EDC appreciates its ability to participate in the policy decisions related to formation of RTO West. In our opinion, the greatest policy decision to be made is whether RTO West will result in added costs that exceed the system benefits. The financial costs are projected to be \$82 million for start-up then up to \$89 million annually. Other operational RTOs have noted that their financial costs were underestimated. A number of other qualitative costs are listed in the October 23, 2000

Cost Benefits Final Draft⁵ (hereinafter Cost Benefit Analysis). It should be noted that the costs will be borne by *all consumers* of electricity in the RTO region as part of the RTO “uplift” charges passed to each user of the transmission system.

Aside from a \$28 million annual saving on regulating reserves, and a “modest fuel savings (on the order of \$30 million annually)” no reliable conclusions can be drawn showing RTO West’s benefit for removal of pancaked rates, increased trading, appropriate market signals, reliability, or for use of one open access same time information system (OASIS). Because the facilities proposed to be included in RTO West are the highest voltage grid facilities, they will benefit only the large utilities connected to these RTO facilities. This will create a cost shift from small mostly public power utilities to large investor owned utilities.

The situation will also likely result in a sub-regional cost shift. ATNI-EDC’s members are all within Bonneville’s service territory. Bonneville owns 75-80% of the transmission capacity in its region and uses it for all its public power customers. Bonneville also has signed General Transfer Agreements for service of its load to parties not on its system, and has signed numerous transmission contracts for use of its system by other customers within its region. Bonneville therefore already acts as de facto RTO for Washington, Oregon, Idaho, and Western Montana. Because the Bonneville system is a publicly owned, non profit system there should be equal access and cost for its use, subject to its statutory and operational mandates. This de facto RTO acts without any “uplift” charge. Adding the new costs of RTO West to those using the Bonneville system will add a cost without new benefit to those parties. It is also likely that Bonneville customers will pay additional amounts for ancillary services when ancillary services are

⁵ Available on the RTO West website. (www.rto west.org)

charged at market rates rather than at Bonneville's cost⁶. Bonneville's mostly small customers may also now have the obligations to acquire FTRs in the secondary FTR market to serve load under many circumstances. They will also be required to retain a scheduling coordinator to access the transmission grid⁷.

ATNI-EDC is also concerned that RTO West maintains so much of the status quo that there can be no real benefit. According to Filing Utility analysis, approximately 99% of the transmission service on facilities that will become part of the RTO West is provided to parties that are within the control area boundaries of the RTO West⁸. These are likely to be utilities that already have long term transmission contracts with each other. All these existing transmission rights are grandfathered in for use after RTO West is operational. Companies will each continue to set their own rates. The Filing Utilities will include only certain facilities in RTO West requiring all small users and rural users not on the grid to continue to pay the local facility costs of the Filing Utility, in addition to the RTO uplift charges. The planning function will stay with the Filing Utilities for local facilities and to an unknown extent for RTO Facilities. Therefore, the facilities are limited, the costs are the same, planning is the same, and congested paths remain congested.

To be effective, the RTO must truly make some changes to the status quo. However, ATNI-EDC does not support making changes that will threaten service to loads or which would increase the burden on small public customers which often do not carry large financial reserves. As we set forth below, we believe there is more work to be done to clarify the congestion management scheme to provide for true liquid markets while

⁶ See page 21 of Cost Benefit Analysis.

⁷ See page 3 id.

protecting service to small and rural loads. The planning proposal gives no true authority to RTO West. Too few facilities are included in RTO West's purview.

As an alternative to RTO formation, would the region be better off to spend the annual costs of RTO West on upgrades to the transmission system? Would the region be better off to find better ways of regulating utilities' anti-competitive use of their existing transmission capacity? Would the region be better off implementing existing North American Reliability Council (NERC) standards to capture the projected savings on regulating reserves that may come from RTO West? Would the region be better off with a better coordinating planning system which allows the consideration and weighing of non-transmission solutions? None of these changes require formation of an RTO.

In forming RTO West, we are taking a high cost risk that benefits will follow. Our ability to establish the correct structure and give the right market signals will determine our success at making this exercise beneficial. ATNI-EDC would support alternatives to the RTO as described above which do not carry this risk and which will not shift costs to the ATNI-EDC member region.

B. Importance of BPA Operational Standards to Protect Tribal Treaty Assets and to Honor BPA's Trust Responsibility to Tribes

Bonneville has multiple statutory, treaty, and other responsibilities applicable to the operation of the Federal Columbia River Transmission System⁹. In addition Bonneville shares a trust responsibility to tribes to protect tribal treaty assets and to honor all fish and wildlife obligations. See the Bonneville Tribal Policy and U.S. Department of Energy American Indian & Alaska Native Tribal Government Policy, October 30,

⁸ See Page 61 Supplemental Compliance Filing and Request for Declaratory Order Pursuant to Order 2000.

2000, (DOE Order) and the Executive Order of November 6, 2000, "Consultation and Coordination with Indian Tribal Governments, attached as Exhibits 2, 3, and 4¹⁰). It is the responsibility of the United States "to protect tribal sovereignty and self-determination, tribal lands, assets, resources, and treaty and other federally recognized and reserved rights¹¹. Protected tribal assets include fish in the Federal Columbia River Transmission System and cultural resources such as burial sites, sacred sites, and similar sites along rivers and lakes. These protected assets are threatened when hydroelectric generation causes inappropriate changes to the river systems.

ATNI-EDC supports the Filing Utilities' efforts to address these responsibilities and to implement RTO West to ensure that no directive from RTO West or provision of the TOA can require Bonneville to violate any of its obligations under applicable statutes, or regulations¹². ATNI-EDC points out that under federal law, RTO West, a private corporation, is not authorized to require Bonneville to violate *any* of its operational parameters, even if those operational parameters are not contained in statute or regulation but are the subject of agreements, federal policies, rules, biological opinions, or similar appropriate federal decisions. Nor can Bonneville agree to allow a private corporation's decisions to supersede federal decision-making. The language of the TOA should be altered to clarify this point. We are currently working with Bonneville to clarify the methodologies Bonneville will use to assure that their policies and operational parameters

⁹ Page 46 of the Filing.

¹⁰ It should be noted that the Commission, as a Federal entity also has a trust responsibility to Indian Tribes as is established in treaties, statute, and case law. While the orders and policies do not directly apply to the Commission, as an independent agency, Section 8 of the Executive Order states, "Independent regulatory agencies are encouraged to comply with the provisions of this order".

¹¹ Page 1 DOE Order.

¹² Page 47 of the Filing.

are clear and that there are appropriate mechanisms in place so that Bonneville will exercise the rights they maintain under the TOA when necessary.

C. Vertical Pancaking

ATNI-EDC is concerned that RTO West trades horizontal pancaking of prices for vertical pancaking of prices. At this time, non-utility entities have access to the grid under open access tariffs. After inception of RTO West, there should be "one stop shopping" for transmission services, but only for services on facilities that are included by choice of the Filing Utility¹³. Other lower voltage or even higher voltage loads radial to the grid will still pay two rates, be subject to two planning processes, and be subject to the operational control of an entity other than RTO West. In addition, those interconnected to non-RTO facilities will remain governed only by Order 888 open access tariffs and be subject to the same potential abuses Order 2000 was intended to resolve.

ATNI-EDC supports the proposed policy¹⁴ that allows RTO West to control access to all facilities serving wholesale loads and generation resources¹⁵. However this policy does not go far enough. The requirement that a wholesale load or generator pay two rates to transmit power thwarts access to service as effectively, if not more effectively, as requiring a utility or generator to deal with more than one entity. All facilities that serve wholesale loads or generation should be included as RTO Facilities¹⁶.

¹³ At this time we have not seen a list of facilities that will be included as RTO West facilities.

¹⁴ See Attachment S, TOA, Section 5.5.

¹⁵ Due to the definitions used in this section, Section 5.5 fails to even provide access to RTO facilities for loads that have been granted direct access rights under state or tribal law.

¹⁶ In its discussion of scope and configuration at page 259 of Order 2000, the Commission states "To be most effective, that operator should have control over all transmission facilities within a large geographic area..."

Limiting RTO West facilities to main bulk grid facilities creates an RTO that benefits large urban utilities at the expense of smaller and rural utilities. The policy will inhibit the ability of new utilities to form and for competition in rural areas to flourish. It will inhibit the construction of smaller generation resources in favor of large resources for which it is less expensive and burdensome to obtain grid access.

We have an additional concern that renewable generators will be required to pay two tariffs due to its small, low voltage nature. Because the capital costs of renewable energy generation are at this time higher than traditional generation and renewables are usually interconnected at lower voltages, a vertical pancaking of rates for renewable generation will make these projects even harder to be built and financed. This is contrary to federal and other public policies encouraging renewable energy development.

It also is proposed that RTO West will have the ability to set a minimum generating amount before RTO West may even control access to transmission¹⁷. If lower voltage facilities serving generation are to be excluded, we propose that no limit be permitted for renewable generation projects, or that the limit be set so that even smaller renewable projects that are meant to be sold to the wholesale market be allowed access to RTO facilities.

D. Planning and Expansion

We request that the Commission provide additional direction to the Filing Utilities as is suggested to improve the planning and expansion proposal. Regional planning is one clear benefit of an RTO and we should give the RTO the authority to plan, decide and implement its decisions, including the authority to require construction

¹⁷ Attachment J, Bylaws of RTO West, Section 1(n), definition of "Generator" Page 2.

of facilities and assessment of the value of the facilities to the various Filing Utilities. We support the notion of the RTO West Board having *authority* to make decisions that are in the best interest of the transmission system and that are designed to provide reliable service to all transmission customers. We are not suggesting that RTO West should have the full *obligation* to plan and expand the transmission system. We believe the RTO West Board will fairly exercise its authority to determine what is best for the system and will have enough checks and balances to avoid overstepping its appropriate reach. The checks and balances include internal trustee obligations but also the federal environmental planning and siting processes, and those processes in each state. Those governmental planning and siting processes effectively have the right to “veto” environmentally unsound or unnecessary projects.

RTO West should also have *authority* to require that generation facilities be built. However, the authority to require generation should be limited by strict criteria. Such criteria should include that the generation is the least cost or least environmentally intrusive alternative to a critical transmission condition.

RTO West should have planning *authority* over *all* transmission facilities. The existing system proposes to provide for “system reliability”, but the “system” is too limited to provide reliable service for all transmission dependent users, including rural users on lower voltage facilities.

We do not feel that RTO West must do all studies in house, but may request the transmission owners to do specific studies and share the information with RTO West.

The current proposal keeps the bulk of the planning authority with the transmission owners. A true “backstop” authority is unclear in the documents. We

encourage the authority necessary to solve and allocate payment for system problems, even if those system problems are not market driven. Rural areas commonly have more reliability problems due to the higher cost of serving fewer customers per mile. These system problems will not be corrected with only a market driven planning approach.

RTO West must have the right and authority to require construction of facilities and to allocate the benefit of new transmission capacity. This right is critical to a properly functioning RTO and to a well-planned system of this breadth. Without the authority to provide central planning and the authority to improve the system when it is needed, much of the effectiveness of the RTO is wasted.

4. Support for Filing

Even though ATNI-EDC has reservations about whether formation of an RTO in this region is in the public interest, we have made comments and expressed concerns that are designed to make the Filing and formation of RTO West likely to produce the desired benefits. In that light, we support much of the Filing as follows.

ATNI-EDC supports the governance structure in the Filing. We believe it meets the Commission's independence requirements and gives voice and vote where appropriate. The open stakeholder advisory committee will provide a voice for diverse regional interests and expertise. We also support the proposed membership class structure as it provides a balanced structure for the selection of trustees. We appreciate and support the Tribal Utility Regulatory Authority vote for a member of the Trustees Selection Committee and the ability of tribal utilities and energy companies to become members of the RTO just as other such companies.

We support the scope and configuration of RTO West and we believe it meets the Commission's requirements, except as described above in "Vertical Pancaking". If the RTO is successful, with appropriate market incentives and structures, the large geographic scope will encourage widespread competition and a very large potential market. We support the efforts to encourage the Canadian entities to join RTO West.

We support the general form of the Transmission Operating Agreement (TOA); and its general precedence over the tariff, largely based on protection of Bonneville's federal discretion in operations of its systems. We support the pricing structure embodied in the TOA and its ten-year proposed duration. With exceptions described below, we support the use of a flow-based physical rights congestion management system. We believe that unscheduled FTRs can be sold in the secondary market to create better market liquidity than currently exists, while protecting a utility's ability to serve load without scrambling for FTRs. We support and appreciate the definitions that were crafted in such a way as to include tribal utilities as "Electric Utilities" and other such accommodations for tribal status.

We also support the existence and proposed structure of the Market Monitoring Unit, and would like to see it fully described in the bylaws.

5. Specific Commentary on Filed Documents

A. Attachments J Bylaws of RTO West

ATNI-EDC generally supports the purposes of RTO West as set forth in Article II of the Bylaws of RTO West¹⁸. We are pleased that a limitation against the RTO owning

¹⁸ Page 8 of Attachment J of the Filing.

transmission or distribution systems or generation or its output and a limitation against the RTO operating or having a financial interest in a power exchange are included in the Bylaws. The current purposes are left in large part open to the "requirements of FERC". We propose that the Commission impose a requirement that RTO West act in the financial interest of the public as a whole and in a manner that protects the natural environment of the region. Such a requirement would provide needed criteria for RTO West decision-making.

Article IV, Section 3 Qualification and Admission of Members establishes a fee of \$1000 each year for membership in RTO West¹⁹. That section also waives fees for States and Provincial Energy Authorities and Tribal Utility Regulatory Authorities. We appreciate and support that waiver. We also understand the importance of a fee for membership in order to keep membership to a serious and committed group. We suggest, however that the \$1000 fee be payable the first year and a \$200-\$300 fee be required thereafter so it is a significant initial investment without unduly limiting membership. Additionally, the Board should maintain the *authority* to waive fees for public interest participants.

Article XI, Section 5, authorizes full reimbursement of expenses for monies reasonably and necessarily expended on behalf of the Corporation by its Trustees, officers and employees²⁰. We support the *authority* of the Board to reimburse expenses of the Trustees Selection Committee and Board Advisory Committees. While not all expenses of every member need be reimbursed, there will certainly be some expenses that it will be appropriate for RTO West to assume.

¹⁹ Page 9, id.

²⁰ Page 54, id.

The Market Monitoring Unit is not mentioned in the Bylaws. ATNI-EDC supports a section describing this function and a description of its authorities as consistent with Attachment O.

B. Attachment S Transmission Operation Agreement

ATNI-EDC would also support a flexible approach to moving issues now included Attachment S to the Filing, the RTO West Transmission Operating Agreement (TOA) into the tariff if those issues may need to be amended over time to better serve the region and to meet the requirements of Order 2000. However, our flexibility does not extend to protecting Bonneville's ability to make operational decisions regarding the hydro system without regard to the requests of RTO West. Additional direction from the Commission consistent with the issues described herein is needed for Phase 2 of the Filing. We therefore feel it is inappropriate for the Commission to approve the TOA at this time.

We have the following specific suggestions regarding the TOA. Items are listed in the order they appear in the document.

Section 4.2.1 describes the Executing Transmission Owner's (ETO's) Obligation to Permit New Physical Interconnections. This section will govern integration of generation and load with RTO controlled facilities and with lower voltage facilities. This section will also govern the interconnection of renewable energy generation. Because these interconnection provisions are not enforceable by third party generators or loads, we are concerned that access to the RTO West facilities will be limited for these users. Many demand side measures can offer cost-effective market solutions to meeting customer needs. These resources include conservation and distributed resources, both

active and passive, many of which are renewable. Outdated interconnection standards can be used to hinder the development of unconventional generating resources. Not all utilities are inclined to help resolve interconnections for distributed generation or to help with development of renewables at distribution voltages even though during peak periods those resources can create a great savings.

Section 4.2.2, which addresses the right of RTO West to compel expedited dispute resolution in cases of delay or impasse to an ETO's permission of a new physical interconnection does not relieve our concerns regarding the potential difficulties in interconnecting to the RTO system. We do not support instructions to the arbitrator which require the arbitrator to accept the ETO's proposed terms for interconnection if such terms meet certain standards. Surely the ETOs would object if the arbitrator were required to accept the applicant's proposed terms if they met these same terms. We suggest instead that the arbitrator determine the terms based consistent with the criteria listed in that section. We would also support an additional criteria which encourages the interconnection of distributed or renewable generation resources.

Section 5.5 and other parts of Section 5²¹ contain italicized language to be used for Bonneville and is a result of the Operating Standards Bonneville proposed during the TOA drafting process. First, we believe similar terms, without reference to federal obligations, should be included in all TOAs. All ETOs will be subject to various laws, constraints and licenses for operation of their generation and transmission systems, especially when the ETO has hydroelectric generation that if not properly operated, can damage fish and wildlife and their habitat if allowed to operated outside licensing parameters. Secondly, this language and other language implementing Bonneville's

Operating Standards must encompass not only Bonneville obligations under “law” and “treaty”²², but obligations required by federal agreement, biological opinions, rules, regulations, orders, and federal decisions derived therefrom. RTO West should have no authority to undermine or thwart properly authorized federal decision-making. This language must be clarified to encompass not just the letter of the law, but the duly authorized federal decisions derived from those laws.

Section 5.6 authorizes RTO West to modify the thermal and other operating parameters established by the ETO for its Transmission Facilities through dispute resolution. This language is unacceptable if it applies to all operating standards. As set forth above, RTO West should have no authority to undermine or thwart properly authorized federal decision-making. This language should be clarified.

In general, Section 12 should be amended to provide more authority of RTO West to plan and implement needed changes to the system in line with our policy comments above. Section 12.1.1 should be amended to provide that any member be allowed to request that RTO West consider proposals or additions or modifications to the transmission system. This right should not be limited to ETOs. Section 12.1.2 should contain a requirement that ETOs accept RTO West’s requirement to construct facilities, subject to state and federal planning processes. The TOA requires the RTO give substantial deference to expansion proposals put forward by an independent transmission company. We believe an independent transmission company will have no incentive to put forth any solution but a transmission solution in their best commercial interests. Therefore these proposals should be given no greater deference than other proposals.

²¹ 5.5, 5.7.6, 5.7.7, 5.7.9, and 5.11.

²² See also Section 10.1

Section 15 describes the process for allocating FTRs. In the introduction and in Section 15.1, the TOA states that FTRs are granted to “the Existing Transmission Owner”. Each TOA should contain the obligation of the ETO to transfer, upon reasonable request, the FTRs to any load for their use and benefit. (See discussion below in comments addressing Attachment M).

ATNI-EDC opposes inclusion of Section 22, “Open Architecture”. We believe this section leaves an open door to piecemeal restructuring of an RTO structure that has been build by consensus and cooperation. Many entities, including ATNI-EDC will likely not have funds or staff available to intervene in every FERC filing affecting the RTO structure. Smaller entities with fewer resources will be closed out of this decision-making process. Additionally, the RTO should be given the opportunity to perform new or altered functions. These functions will not automatically be taken by a third party ETO.

The following comments apply to Exhibit A, Schedule of Definitions: As a matter of editing, the section numbers cited in the definition of “Access Charge” appear incorrect. As a matter of editing, the definition of “Congestion Zones” likely should contain the word “shall be required” instead of “shall not be required”. The definition of “RTO West Controlled Transmission Facilities” is generally too narrow. All facilities used to serve wholesale loads or used for generation interconnection should be included as RTO West facilities. Facilities radial to load should be included regardless of voltage.

C. Attachment M Congestion Management Model

ATNI-EDC supports the Congestion Management Model with two exceptions. We would also like to comment on the importance of reserving transmission rights for obligations not covered by pre-existing transmission agreements. Such obligations include the use of the transmission system to support generation for fish or cultural resources protection²³ on beaches and at reservoir sites. These issues affect both federal and non-federal hydroelectric generation. No existing contracts for these types of obligations exist, and at this time in RTO development no clear methodologies are available for dealing with these obligations. We are working on their development and will appreciate the support of the Commission and all Filing Utilities when the methods are clarified.

As our first exception, we would support a greater length of time for parties to acquire Recallable Transmission Rights (RTRs). RTRs are associated with FTRs that were not scheduled during the day-ahead scheduling process²⁴. It is proposed that RTRs be auctioned daily and recalled up to some point (perhaps 120 minutes before delivery hour). We believe a more liquid market in transmission rights would be created if there were a week ahead scheduling process which reserved FTRs and allowed RTRs to be sold, and then recalled on a day ahead basis.

As our second exception, it was made clear during the RRG process that the rights were to "go with" the load, and not, as is the proposal, to be the "property" of the ETO. This is extremely important for implementation of state and tribal direct access programs.

²³ This protection includes protection of archeological sites, sacred sites, human remains and graves and other culturally significant areas that are often found on the edges of rivers and lakes affected by hydrogeneration.

²⁴ Page 2 Attachment M of Filing Description of RTO West Congestion management Model.

If loads that wish to find new suppliers, or new utilities that wish to form in existing ETO service territories do not have the right to use the FTRs the ETO received on their behalf, ETOs will have a veto over all direct access programs and new utility formation. Each TOA should contain the obligation of the ETO to transfer, upon reasonable request, the FTRs to any load for their use and benefit.

D. Attachment N Ancillary Services

We support the Ancillary Services proposal with one exception. The Initial RTO West Operations section describes procedures during a six month period when no competitive market for Ancillary Services is expected. We feel this time limit is too restrictive and more flexibility should be extended in the event the market takes longer than six months to develop.

E. Attachment W Form of Agreement Among RTO West and Transmission Owners to Use Paying Agent and Form of Paying Agent agreement

As an editorial matter, "Northwest Transmission Revenue Account" is a defined term and it is referred to throughout the Paying Agent Agreement as the "Northwest Transmission Account".

F. Attachment Y Form of Agreement Limiting Liability Among RTO

West Participants

ATNI-EDC is unclear why RTO West should assume liability for Contract Claims arising from “the system design”²⁵. The system has been designed by the ETOs and liability should remain there for these types of claims. Decreasing the assumed liability of RTO West should decrease our insurance costs and therefore overall costs.

As an editorial matter, Paragraph 5.2.1 refers to “any other party”. This reference should be to “any other Party”. The waiver of liability is not to any other person or entity but to any other party to the agreement.

6. Conclusion

ATNI-EDC appreciates the participation of the Commission staff in attending RRG meetings and other regional meetings for the formation of RTO West. We sincerely hope that some of the comments, Principles, and Issues of ATNI-EDC made in this proceeding can be helpful to understanding tribal issues that affect other RTO processes in which there was no funding or staff available for tribal participation.

Wherefore, ATNI-EDC respectfully submits this Motion to Intervene and the accompanying comments and concerns. We request that the Commission approve the

²⁵ See Paragraph 4.3, Page 7, Attachment Y.

Bylaws with the exceptions described here and provide further direction to the Filing Utilities for completion of the other documents.

Respectfully Submitted,



Margaret Schaff
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FOR: The Affiliated Tribes of Northwest
Indians -Economic Development
Corporation

CERTIFICATE OF SERVICE

I certify that a copy of this document was sent by regular mail to the list attached hereto on November 17, 2000.

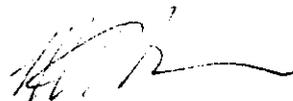


Exhibit 1



Affiliated Tribes of Northwest Indians
Economic Development Corporation

TRIBAL ISSUES ON RTO FORMATION June 5, 2000

The Affiliated Tribes of Northwest Indians have identified the following additional issues that should be addressed in creating RTO West:

1. Sovereign Status of Tribes: The sovereign status of Indian Tribes may not be compromised by the RTO.

Explanation: All RTO documents should be drafted in such a manner that acknowledges this sovereignty. Where and when Indian Tribes have jurisdiction to tax or regulate electric power issues on reservation lands, a tribal utility law or regulation will be treated the same as a state law or regulation.

2. Land Based Right of Ways: The RTO will comply with all tribal and/or federal regulations for all activities on rights of ways on reservation lands. Leases of rights across Indian lands will only be transferred pursuant to existing applicable Federal and/or Tribal regulations.

Explanation: Certain federal regulations apply to tribal rights of ways. In addition, certain tribal laws and regulations exist which govern the acquisition of rights of ways and the operation of land rights on tribal lands. Many rights of ways currently may not comply with federal law. At times when incongruities are found to exist, these incongruities will be resolved. Agreements outside the scope of right of way documents have been entered into between entities entering reservations and tribal leadership. These agreements will continue to be enforced. Maintenance of transmission lines and other land based rights must be accomplished with due consideration of tribal cultural places and resources such as archaeological sites, cultural plants, and traditional hunting, gathering and fishing areas where such areas are known to exist. Any assignment of Rights of Ways across reservation lands requires approval of all affected Tribes. It would be a concern if Bonneville Power Administration

transferred any easements or other made other agreements related to Tribal Lands.

3. Tribal Consumers: The RTO should eliminate pancaking transmission costs for these tribal utilities. The RTO should also ensure that costs are not shifted to tribal utilities. The RTO should ensure that rural communities, especially those with a substantial percentage of low-income households, are not adversely affected by any changes in transmission. Reliability in remote areas will be a high priority.

Explanation: Several Northwest tribes are in the process of establishing electric utilities, and all others are already transmission customers. Tribes are also located in remote, less populated areas.

4. Fish and Wildlife Restoration: There are several issues associated with the role of the transmission system in the restoration of fish and wildlife.

4.1 *Spill to improve fish migration*: Fishery managers are seeking 24 hour spill at a number of hydroelectric projects as part of the regional effort to restore salmon and steelhead. Some parties have raised concerns that such spill operations would affect the reliability of the power and transmission system. The RTO should have the necessary planning and funding mechanisms to identify any issues associated with fish and wildlife operations and implement a plan to adequately address power and/or transmission reliability issues. This function should be addressed immediately so fish and wildlife measures can be implemented as quickly as possible.

4.2 *Avoiding excessive spill*: There are times when fishery managers want to limit spill levels to control gas-supersaturation at dams. BPA currently has a right to transmit power generated to avoid excessive spill. The RTO needs to have a mechanism that would continue to allow BPA access to transmission so it can avoid excessive gas-supersaturation levels. Any added costs associated with this access would be part of the FCRPS operations and not counted as fish and wildlife costs for purposes of accounting.

4.3 *Emergency operations*: Power system operators currently draw down storage reservoirs to meet emergency electricity needs during extreme cold snaps. These operations can reduce the amount of water available later in the water year to improve salmon and steelhead migration. These so called emergency operations have an adverse affect on fish and wildlife, yet there appears to be little incentive in the current generation and transmission system to develop alternatives to deal with these emergencies that do not have an adverse affect on fish and wildlife. The RTO should have the planning and implementation resources necessary to avoid such operations in the future.

4.4 *Fish and wildlife funding:* BPA provides a significant amount of the funding for fish and wildlife restoration in the Columbia River Basin. Under current law, the BPA fund is composed of revenues from its power business and transmission business. In addition, BPA has assured Northwest tribes that it has the authority and intends to implement a transmission fee if necessary to fund fish and wildlife and assure repayment to the U.S. Treasury. The RTO and any associated legislation should not diminish in any way the ability of BPA to collect revenue to meet its fish and wildlife and other legal obligations from both the sale of power and related services and the sale of transmission services. The RTO must also avoid shifting costs to BPA. Cost shifting would reduce the margin between BPA's costs and market costs. This would reduce BPA's ability to fully fund fish and wildlife restoration.

5. Renewable and Other Energy Development: The RTO will devote transmission resources to renewable resources. Transmission rates will encourage and not discourage renewable resource development.

Explanation: Tribal lands have the highest levels of poverty and unemployment in the country. Tribes are being encouraged, through grants and other federal programs, and governmental policies, to develop renewable energy and other energy projects. Tribes are also being encouraged, and have internal policies supporting economic development on reservation lands. Because reservations are usually located in remote and unpopulated areas, transmission is often limited and is the determining factor to the success of a renewable energy project. The RTO's policies and procedures should encourage the use of transmission to further these policies.

6. Procedures: The Tribes will have adequate opportunity to review and comment on any proposal before any final decision is made.

Explanation: ATNI-EDC is a coalition of tribal governments in Washington, Oregon, Idaho, and Montana. The right to negotiate tribal matters lies only with the tribal governments, not with ATNI-EDC. ATNI-EDC has taken on the role of gathering information about the RTO, participating in RTO meetings, and providing information between tribal leadership and the RRG and workgroups. ATNI-EDC will attempt to identify issues on both sides and provide information in a manner that will be helpful in resolving the issues.

7. RTO Tribal Policy: The RTO, in cooperation with tribes, will formulate a policy to address the communication and resolution of issues between the RTO and the Tribes for ongoing RTO activities.

Explanation: The ongoing activities of the RTO may impact tribal matters as described above. The RTO should have a method for communicating with affected tribes if, for example, a cultural resource is discovered on a traditional tribal area, or to determine the tribal issues when transmission line maintenance will be done on reservation lands. Likewise, Tribes should understand how best to communicate with the RTO if issues arise.



Affiliated Tribes of Northwest Indians Economic Development Corporation

ATNI-EDC PRINCIPLES

The RTO will:

Preserve the trust obligations of the United States Government agency (BPA) to the Tribes within the RTO region. The RTO will not impair any agreements between BPA and Tribes.

Ensure that the Sovereign Status of Tribes within the RTO will not be compromised by their actions.

Eliminate pancaking rates and provide non-discriminatory open access.

Establish, maintain and enhance reliability, adequacy, availability and efficiency of the transmission system.

Ensure Independence from market participants.

Maintain a cooperative working relationship with all Tribes within the RTO region.

Promote the restoration of fish and wildlife.

Encourage the development of renewable energy projects.

In addition, Tribes would like to see the RTO established as a Federal Corporation or Organization.

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When Bonneville Power Administrator Randy Hardy signed the BPA Tribal Policy in April 1996, he reaffirmed the trust relationship between BPA as a federal agency and the 13 federally recognized tribes in the Columbia River Basin, as well as the other Northwest Indian tribes.

BPA's Tribal Policy responds to a memorandum issued by President Clinton to the heads of the executive department. In that memorandum, the President made trust responsibility and tribal relations the responsibility of all federal departments and all federal employees. Following is the full text of BPA's Tribal Policy.

BPA Tribal Policy

April 29, 1996

It is the entire government, not simply the Department of Interior, that has a trust responsibility with Tribal governments. And it is time the entire government recognized and honored that responsibility.

President Bill Clinton, in the Memorandum to the Heads of Executive Departments and Agencies, April 29, 1994

We must: Respect the values, religions and identity of Native Americans; improve the Federal government's relationship with the Tribes and become full partners with the Tribal nations; and position American Indians and Alaska Natives to compete economically as we move into the 21st century.

Former Energy Secretary Hazel R. O'Leary, in her remarks to Tribal leaders at the National Congress of American Indians Executive Council Winter Session, February 27, 1996.

BPA will develop a format for a government-to-government relationship with the Tribes.

Administrator Randy Hardy, to thirteen Indian Tribes, October 13, 1993

Purpose and Objectives

The purpose of this policy is to outline the foundation of BPA's Trust responsibility as a Federal agency and to provide a framework for a government-to-government relationship with the thirteen Federally recognized Columbia Basin Tribes (Tribes).

General Principles

The principles set forth below follow the Department of Energy's American Indian Policy (DOE Order No. 1230.2—Apr. 8, 1992) and serves as guidelines to BPA and the Tribes throughout the development of their government-to-government relationships:

I. BPA recognizes that a trust responsibility derives from the historical relationship between the Federal government and the Tribes as expressed in Treaties, statutes, Executive Orders, and Federal Indian case law. Using these legal underpinnings, BPA and the Tribes will work cooperatively to arrive at an understanding of how the trust responsibility applies to a government-to-government relationship.

II. BPA commits to a government-to-government relationship with the Tribal governments and recognizes the unique character of each Tribe. Tribal governments have the primary authority and responsibility for many reservation affairs, and may be co-managers of natural resources within their respective ceded, treaty, or usual and accustomed areas.

A. BPA fully respects Tribal law and recognizes Tribal governments as sovereigns.

B. In keeping with the principle of self-government, BPA recognizes, where appropriate, the legal authority of Tribal governments for making Tribal decisions which may affect Indian and non-Indian peoples and Tribal cultural and natural resources both on and off-reservation.

C. BPA will consult with the Tribal governments to assure that Tribal rights and concerns are considered prior to BPA taking actions, making decisions, or implementing programs that may affect Tribal resources.

III. The objectives outlined below define BPA's policy regarding the requirement for consultation with Tribal governments and are intended to assure that Tribal rights and interests are protected in all BPA decisions.

A. The objectives of consultation include:

1. Assure that Tribal policy makers and elected officials understand the technical and legal issues necessary to make informed decisions;

2. Improve policy-level decision making of both the Tribes and BPA;
 3. Encourage Tribal implementation of fish and wildlife measures BPA funds;
 4. Protect Tribal lifestyles, culture, religion, economy;
 5. Encourage compliance with Tribal laws;
 6. Comply with Federal Indian law, statutes, and policy;
 7. Improve the integrity and longevity of decisions;
 8. Strive to develop and achieve mutually agreeable decisions reflecting a consensus.
- B. BPA will consult with Tribal governments by deliberating, discussing, or seeking the opinion of the Tribes when a proposed BPA action may affect the Tribes or their resources. BPA will solicit Tribal opinions and study them before taking an action that may affect the Tribes or their resources.
- C. BPA will strive to differentiate between technical and policy issued, allowing for proper technical level and then policy level consultation. Technical level consultations should generally include the development, analysis, and review of information and the preparation of technical reports and recommendations. Consultation should result in a common understanding of the technical and legal issues that affect or are affected by a decision. BPA will strive to resolve such issues and arrive at a decision that responds to the Tribal concerns expressed.
- D. Where BPA and one or more of the Tribes address issues of common concern, BPA will endeavor to use consultation to try and reach decisions that are compatible and mutually agreeable with the Tribal interests.
- IV. BPA will seek mutually beneficial business partnerships with the Tribal governments through its various programs, pursuant to its authorities.
- V. BPA recognizes it has mutual concerns and goals with the Tribes regarding the long term quality of life and natural resources in the Pacific Northwest and that both BPA and the Tribes have decisions to make regarding those resources. BPA will respect the authority of the Tribes to manage natural resources and respect their decisions regarding those resources. BPA will involve the Tribes in the beginning of its planning and management activities of water resources, fish and wildlife resources and other natural resources to achieve mutually beneficial results.

BPA Tribal Policy: It's about trust



VI. BPA recognizes mutual respect between governments must be rooted in the individual working relationships of its members. BPA will enhance cultural awareness among its staff and will seek other opportunities to establish consistent individual working relationships between BPA and Tribal staff at all levels.

VII. BPA recognizes the importance of cultural resources to Native Americans and will respect Tribal values. BPA recognizes that the Tribes include as cultural resources such things as distinctive shapes in the landscape, natural habitats for subsistence or medicinal plants, traditional fisheries and wildlife, sacred religious sites, and places of spiritual renewal. BPA will work with the Tribes to identify important cultural resources for the purposes of inventory, protection, and mitigation where appropriate.

VIII. BPA will protect cultural resources by fulfilling its obligations as a Federal trustee, as required under terms of a treaty, and as required by the American Indian Religious Freedom Act (as amended), the Native American Graves Protection and Repatriation Act, the Native American Free Exercise of Religion Act, the National Historic Preservation Act, the Archaeological Resources Protection Act and other applicable laws and regulations. Prior to taking actions that may have an impact on cultural resources, BPA will consult with potentially affected Tribes.

IX. To facilitate a government-to-government relationship, BPA will work cooperatively with each Tribe to develop points of contact and specific lines of communication.

- A. Within the limits of its legal authority, BPA will not change this policy without advance notice and consultation with the Tribes.
- B. BPA will make its best efforts to ensure that if future changes in its organization nullify any part of the policy, then BPA will promptly consult with the Tribes and revise the policy accordingly.
- C. Successful implementation of this policy requires commitment throughout BPA's chain of command. BPA managers and staff will be accountable for creating and maintaining a mutually beneficial government-to-government relationship with the Tribes.

Signed:



4/30/90
Date

Randall W. Hardy
Chief Executive Officer/Administrator
Bonneville Power Administration

Tribal Communication Team

Darrell Eastman - Burns-Paiute Tribe; Shoshone-Paiute Tribe; Shoshone-Bannock Tribes; and Salish-Kootenai Tribes of the Flathead Indian Reservation. Darrell is located in Portland and can be reached at 503-230-3869.

Patricia Tawney - Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes of the Warm Springs Reservation; Yakama Indian Nation; and Nez Perce Tribe. Patricia is located in Portland and can be reached at 503-230-4315.

Katherine Cheney - Confederated Tribes of the Colville Reservation; Spokane Tribe of Indians; Kootenai Tribe of Idaho; Coeur d'Alene Tribe; and Kalispel Tribe. Katherine is located in Spokane and can be reached at 509-358-7470.

John Smith - Policy level consultation with all thirteen tribes, 509-358-7446

List of Possible Internal Services

- Help identify potentially interested/affected Tribes and assist in making appropriate contacts within the Tribes
- Provide assistance in establishing mutually-acceptable expectations for consultation with each Tribe
- Make initial contacts for project staff and set up opportunities for long term relationships
- Provide guidance on Tribal protocol
- Help develop Tribal communications strategies
- Help BPA include Tribes early in decisions
- Provide a central location for information on Tribal contracts, MOAs, etc.

The 13 federally recognized tribes in the Columbia River Basin

Burns - Paiute	Nez Perce	Umatilla
Coeur D'Alene	Salish andKootenai	Yakama
Colville	Shoshone - Bannock	Warm Springs
Kalispell	Shoshone - Paiute	
Kootenai	Spokane	

Exhibit 3

U.S. Department of Energy American Indian & Alaska Native Tribal Government Policy

PURPOSE

This Policy sets forth the principles to be followed by the Department of Energy (DOE) to ensure an effective implementation of a government to government relationship with American Indian and Alaska Native tribal governments. This Policy is based on the United States Constitution, treaties, Supreme Court decisions, Executive Orders, statutes, existing federal policies, tribal laws, and the dynamic political relationship between Indian nations and the Federal Government¹. The most important doctrine derive from this relationship is the trust responsibility of the United States to protect tribal sovereignty and self-determination, tribal lands, assets, resources, and treaty and other federally recognized and reserved rights. This Policy provides direction to all Departmental officials, staff, and contractors regarding fulfillment of trust obligations and other responsibilities arising from Departmental actions which may potentially impact American Indian and Alaska native traditional, cultural and religious values and practices; natural resources; treaty and other federally recognized and reserved rights.

BACKGROUND

Indian nations are sovereign with unique political and legal standing derived from a longstanding relationship as stated in the Purpose section of this document. The Indian nations retain an inherent right to self-governmental authority, and, therefore, Federal activities affecting self-governance rights and impacting upon trust resources require policy implementation in a knowledgeable and sensitive manner protective of tribal sovereignty and trust resources. The DOE released its Indian Policy in 1992 and subsequently issued DOE Order 1230.2 that established the responsibilities and roles of the DOE management in carrying out its policy. At the request of Indian nations in 1998, the Secretary of Energy agreed to revise the 1992 American Indian Policy and effect comprehensive implementation. This revision was based in part on comments from Indian nations and their leadership and replaces the 1992 Policy that is part of the 1992 Order.

DEFINITIONS

Indian Nation means any American Indian or Alaska native Tribe, Band nation, Pueblo, or other organized group or community, including any Alaska Native village [as defined or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)], which is acknowledged by the Federal government to constitute a tribe with a government to government relationship with the United States and eligible for the programs, services, and other relationships established by the United States for indigenous peoples because of their status as American Indian and Alaska Native tribes, Bands, Nations, Pueblos or communities.

¹ This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights. Nothing herein shall be interpreted as amending or changing current DOE orders and guidance regarding classified information, including need to know.

American Indian and Alaska Native Tribal Government means the recognized government of an Indian nation and any affiliated or component band government of such nation that has been determined eligible for specific service by Congress or officially recognized in 25 CFR Part 83, "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," as printed in the Federal Register.

Trust Responsibility includes, but is not limited to: promotion and protection of tribal treaty rights, federally recognized reserved rights, and other Federally recognized interests of the beneficiary American Indian and Alaska Native nations; determining, documenting, notifying, and interacting with tribal governments with regard to the impact of Departmental programs, policies, and regulations to protect American Indian and Alaska native traditional and cultural lifeways, natural resources, treaty and other federally recognized and reserved rights.

Consultation includes, but is not limited to: prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship.

Cultural Resources include, but are not limited to: archaeological materials (artifacts) and sites dating to the prehistoric, historic, and ethnohistoric periods that are located on the ground surface or are buried beneath it; natural resources, sacred objects and sacred sites that have importance for American Indian and Alaska Native peoples; resources that the American Indian and Alaska Native nations regard as supportive to their cultural and traditional lifeways.

Treaty and trust Resources and Resource Interests include, but are not limited to: natural and other resources specified and implicit in treaties, statutes, and agreements, or lands or other resources held in trust by the United States for the benefit of tribes or individual Indian beneficiaries, including land, water, timber, fish, plants, animals, and minerals. In many instances, Indian nations retain hunting, fishing, and gathering rights, and access to these areas and resources on lands or waters that are outside of tribally-owned lands.

POLICY PRINCIPLES

I. DOE RECOGNIZES THE FEDERAL TRUST RELATIONSHIP AND WILL FULFILL ITS TRUST RESPONSIBILITIES TO AMERICAN INDIAN AND ALASKA NATIVE NATIONS.

The DOE will be diligent in fulfilling its federal trust obligations to American Indian and Alaska Native governments in policy implementation and program management activities. The DOE will pursue actions that uphold treaty and other federally recognized and reserved rights of the Indian nations and peoples. The Department recognizes that some tribes have treaty-protected and other federally recognized rights to resources and resource interests located within reservation boundaries, aboriginal territories, and outside reservation and jurisdictional boundaries, and will to the extent of its authority, protect and promote these treaty and trust resources and resource interests, and related concerns in these areas.

When Internal policies, regulations, and statutes, or other barriers prohibit or hinder the DOE trust protection actions or participation in eligible program initiatives, the Secretary will direct the agency to seek corrective protection measures, and tribal government program inclusion.

The DOE is committed to protecting treaty compliance and trust interests of Indian nations during interactions with state and local governments and other stakeholders with regard to DOE actions impacting upon American Indian and Alaska Native governments and peoples. The Department will inform and educate state and local governmental entities and other stakeholders about the DOE's role and responsibilities regarding its trust relationship with Indian nations.

The DOE will seek to determine the impacts of Departmental-proposed legislation upon Indian nations, in extensive consultation and collaboration with tribes. The Secretary will implement this notice and consultation effort consistent with the intent and purpose of this Policy.

II THE DEPARTMENT RECOGNIZES AND COMMITS TO A GOVERNMENT TO GOVERNMENT RELATIONSHIP AND WILL INSTITUTE APPROPRIATE PROTOCOLS AND PROCEDURES FOR PROGRAM AND POLICY IMPLEMENTATION.

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

The Department, in keeping with the principle of self-governance, recognizes American Indian and Alaska Native governments as necessary and appropriate non-Federal parties in the federal decision-making process regarding actions potentially impacting Indian country energy resources, environments, and the health and welfare of the citizens of Indian nations. The DOE will establish protocols for communication between tribal leaders, the Secretary, and federal officials. The DOE will ensure consistent application of program and policy implementation with Indian nations through periodic review, assessment, and collaboration with tribal representatives to audit protocol systems. Principles of consistent policy implementation will be tempered with consideration of the diverse cultures and ideals of Indian nations.

III THE DEPARTMENT WILL ESTABLISH MECHANISMS FOR OUTREACH, NOTICE, AND CONSULTATION, AND ENSURE INTEGRATION OF INDIAN NATIONS INTO DECISION-MAKING PROCESSES.

To ensure protection and exercise of tribal treaty and other federally recognized rights, the DOE will implement a proactive outreach effort of notice and consultation regarding current and proposed actions affecting tribes, including appropriate fiscal year budget matters. This effort will include timely notice to all potentially impacted Indian nations in the early planning states of the decision-making process, including predraft consultation, in the development of regulatory policies on matter that significantly or uniquely affect their communities. As appropriate, the DOE will provide delivery of technical and financial assistance related to DOE-initiated regulatory policy, identifying programmatic impacts, and determining the significance of the impact. The DOE will continue to conduct a dialogue with Indian nations for long and short term decision-making when DOE actions impact Indian nations. The DOE will comply with the Consultation and Coordination with Indian Tribal Governments Executive Order 13084, May 14, 1998, and the Government to Government Relations with Native American Tribal Governments Executive Memorandum, April 29, 1994.

The DOE will implement permanent workshops and programs for field and headquarters staff on American Indian and Alaska Native cultural awareness and tribal governance.

Due to the nature of the trust responsibility to tribal governments, performance reviews of consultation activities will be conducted, in collaboration with tribal governments.

IV DEPARTMENT-WIDE COMPLIANCE WITH APPLICABLE FEDERAL CULTURAL RESOURCE PROTECTION AND OTHER LAWS AND EXECUTIVE ORDERS WILL ASSIST IN PRESERVATION AND PROTECTION OF HISTORIC AND CULTURAL SITES AND TRADITIONAL RELIGIOUS PRACTICES.

The Department will consult with any American Indian or Alaska Native tribal government with regard to any property to which that tribes attaches religious or cultural importance which might be affected by a DOE action. With regard to actions by DOE in

areas not under DOE control or when an action of another federal agency takes place on DOE land, DOE will consult with tribes in accordance with this Policy. Such consultation will include tribal involvement in identifying and evaluating cultural resources including traditional cultural properties; facilitating tribal involvement in determining and managing adverse effects; collaboration in the development and signing of memoranda of understanding with DOE, when appropriate.

Departmental consultation will include the prompt exchange of information regarding identification, evaluation and protection of cultural resources. To the extent allowed by law, consultation will defer to tribal policies on confidentiality and management of cultural resources. Consultation will include matters regarding location and management methodology; repatriation and other disposition of objects and human remains; access to sacred areas and traditional resources located on DOE lands, consistent with safety and national security consideration; and cultural resources impact assessment of potential loss to tribal communities.

The DOE will comply with current and forthcoming cultural resource protection laws and Executive Orders including Native American Graves Protection and Repatriation Act; Archaeological Resources Protection Act; American Indian Religious Freedom Act; National Historic Preservation Act; National environmental Policy Act; Freedom of Information Act; Privacy Act; Indian sacred Sites Executive Order 13007, May 24, 1996; Consultation and Coordination With Indian Tribal Governments Executive order 13084, May 14, 1998; Government to Government Relations with Native American Tribal Governments Executive Memorandum, April 29, 1994; Tribal Colleges and Universities Executive Order 13021; Executive Order 12898 on Environmental Justice.

V. THE DEPARTMENT WILL INITIATE A COORDINATED DEPARTMENT-WIDE EFFORT FOR TECHNICAL ASSISTANCE, BUSINESS AND ECONOMIC SELF-DETERMINATION DEVELOPMENT OPPORTUNITIES, EDUCATION, AND TRAINING PROGRAMS.

The Department will implement a consistent national outreach and communication effort to inform tribal leaders and tribal program officials about access to internships and scholarships; availability of technical assistance and training opportunities; conventional and renewable energy development programs; related tribal business and individual member business enterprise, service-provider, and contracting opportunities.

The DOE recognizes the need for direct funding and technical assistance from applicable DOE-sponsored programs with the Department and the National Laboratories which deal with regulation, energy planning, and development of energy resources on tribal lands and Alaska Native site-controlled and trust lands.

The Department will provide information and outreach programs to tribal and individual member businesses on opportunities to participate, compete, and participate in renewable and conventional energy generation, transmission, distribution, marketing and energy

services, grants and contracts. The Department will assist in development of balanced, sustainable, and viable American Indian and Alaska Native communities by continuing to implement Title XXVI, Indian Energy Resources, of the National Energy Policy Act that provide for the promotion of resource development and energy integration.

VI THE SECRETARY OF ENERGY WILL CONDUCT AN ANNUAL TRIBAL LEADERS SUMMIT FOR PERFORMANCE REVIEW OF POLICY IMPLEMENTATION AND ISSUE RESOLUTION.

The Secretary will engage tribal leaders in an annual dialogue, to discuss the Department's implementation of the American Indian and Alaska Native Policy. The dialogue will provide an opportunity for tribal leaders to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

VII THE DEPARTMENT WILL WORK WITH OTHER FEDERAL AGENCIES, AND STATE AGENCIES, THAT HAVE RELATED RESPONSIBILITIES AND RELATIONSHIPS TO OUR RESPECTIVE ORGANIZATIONS AS THEY RELATE TO TRIBAL MATTERS.

The DOE will seek and promote cooperation with other agencies that have related responsibilities. The Department's mission encompasses many complex issues where cooperation and mutual consideration among governments (Federal, state, tribal and local) are essential. The DOE will encourage early communication and cooperation among all governmental and non-federal parties regarding actions potentially affecting Indian nations. The DOE will promote interagency and interdepartmental coordination and cooperation to assist tribal governments in resolving issues requiring mutual effort.

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Exhibit 4

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release
6, 2000

November

EXECUTIVE ORDER

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CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and

authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a

meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

WILLIAM J. CLINTON

THE WHITE HOUSE,
November 6, 2000.

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