

Hualapai Tribal Utility Authority (HTUA) Meeting Minutes

December 1, 2014, 9:00 AM to 12:30 PM, Hualapai Cultural Resources Department

Attendees:

Charles Vaughn, Rory Majenty, Joe Montana, Jamie Navenma, Steve Malin, Kevin Davidson, Lou Schmitt (via telephone), Patrick Black, Fennemore-Craig, P.C. and David Francis, Fennemore-Craig, P.C.

1) Welcome and Introductions (Planning Department) Mr. Davidson provided each Board member with a customized binder containing the meeting agenda, flow charts for funding and construction of a power line to Grand Canyon West (GCW), a draft of the standard contract clause prepared by Fennemore-Craig and the Hualapai Tribal Utility Authority (HTUA) ordinance.

2) Overview of the HTUA's Mission (Planning and Fennemore-Craig, P.C.) Mr. Davidson reviewed the history of the formation of the HTUA from presentation to Council in June of 2014 at which time Council directed staff and consultants to begin work on a draft ordinance which was adopted on September 24th. Following the adoption of the ordinance, the Board positions were advertised with selection of members by Council occurring on November 24th. Mr. Francis of Fennemore-Craig provided additional background as follows: The initial goal of the HTUA is to construct a power line along Diamond Bar Road to connect GCW to the electric grid, in order to, 1) Reduce electricity costs over the long term, 2) Reduce reliance on diesel generation, 3) Improve reliability of electricity service, and 4) Self-determination for the Tribe. To achieve these goals, the creation of a HTUA is required so the Tribe can purchase wholesale electricity in order to secure USDA Rural Utility Service financing for the power line's construction. An HTUA must also be established if the Tribe would like to purchase wholesale electricity from UniSource Electric or other electrical providers (Arizona Public Service, Western Area Power Authority). The advantages of the HTUA include: 1) Lower-interest financing for line construction from RUS, 2) HTUA serves as a platform for later expansion to Peach Springs or other utility services (e.g. water, wastewater), 3) Facilitates Tribal access to Boulder Canyon Project (Hoover Dam) and Colorado River Storage Project (CRSP) allocations, and 4) Set retail electric rates without regulatory oversight. As noted in No. 3, the HTUA is set up to establish and maintain electric power service for GCW and eventually provide electric power elsewhere within reservation at the direction of the Tribal Council. In addition, the HTUA may eventually provide comprehensive utilities services to the entire Hualapai Nation.

In 2011, the Tribe began considering connecting GCW to the electric grid. Unisource Electric (“UNSE”) operates a substation near the reservation boundary and GCW. One hundred thousand dollars has already been deposited with UNSE for the study and preliminary engineering. Based on the study, the electrical interconnection will require construction of a 20.8kV distribution line connecting the substation to the GCW on-site distribution system. Estimated cost: \$12 million (+ tax gross-up of \$2-5 million if line is owned by UNSE). The Tribe is currently upgrading the on-site distribution system. The mini-grid will be powered by diesel generators until the interconnection is complete.

Mr. Vaughn asked if the \$12 million power line cost also took into account the cost of purchasing a right-of-way to cross a private landowner’s property. It may be advantageous for the Tribe to purchase this land outright rather than have to pay for a protracted negotiation for the new right-of-way.

Mr. Vaughn also asked if Article V, Section N of the Hualapai Constitution regarding the \$50,000 ceiling on leases for natural resources could be interpreted to apply to such a contract that the HTUA may be entering into. Leases greater than \$50,000 in value requires the approval of the Hualapai people via a referendum vote. Mr. Black of Fennemore-Craig suggested that the existing language in Article V, Section N be narrowed to specifically apply to land leases of natural resources, for example cattle ranching, timber harvesting, as well as wind farms and solar farms.

Mr. Francis continued the presentation on the HTUA by quoting Section 107 of the Ordinance as follows:

“Plan for, provide, and furnish utility services to GCW. Such utility services shall include electric power service, water service, and sewage service. Such services may include other energy-related services, including energy conservation and the use of renewable energy technologies.”

“Promote the use of HTUA’s services where available in order to improve the health and welfare of residents of the Reservation and to facilitate economic development.”

“To acquire, construct, operate, maintain, promote, and expand electric power service, water service, and sewage service at GCW and on such other locations within the Hualapai Reservation and on other Tribal lands under the jurisdiction of the Hualapai Tribe as the Tribal Council may deem appropriate . . .”

“To operate utility services so as to provide revenue sufficient to service debt on particular component projects as may be required by creditors on such component projects.”

“To do everything necessary, proper, and advisable, or convenient for the accomplishment of the mission set forth in this section, and to do all things incidental to or connected with such mission, which are not forbidden by law, this Ordinance, or the Hualapai Constitution.”

In conclusion, Section 108 of the Ordinance states, “the Tribal Council may enlarge or otherwise modify the mission(s) of HTUA as it deems appropriate in the future. This authority includes, but is not limited to, the authority to provide for additional utility services (e.g., garbage, telecommunications, etc.) and the authority to provide service to locations other than GCW, all as the Tribal Council may deem appropriate in the future.”

3) Selection of Officers (Planning) Mr. Davidson asked for nominations for Chairman of the HTUA. Mr. Vaughn was nominated from the floor and confirmed in a 4-0 vote. Mr. Davidson turned the meeting over to the new chairman. Mr. Vaughn asked for nominations for the Vice-Chairman. Mr. Majenty was nominated from the floor and confirmed in a 4-0 vote. Mr. Vaughn asked for nominations for the Secretary. Mr. Montana was nominated from the floor and confirmed in a 4-0 vote. Mr. Vaughn asked for nominations for the Treasurer. Mr. Malin was nominated from the floor and confirmed in a 4-0 vote.

4) Discussion of bylaws – The chairman asked that the creation of bylaws be tabled to a future meeting. Mr. Black said they may be developed with the Operational Manual noted in Section 301 of the Ordinance.

5) Update on the recently submitted USDA/RUS grant and future USDA loan application for the Diamond Bar Road power line to GCW (Planning and TTG, Inc.) Mr. Davidson said the \$1.88 million grant application was submitted in August and USDA is beginning the process of evaluating the grant application. The USDA should announce its decision in the spring of 2015. The grant is designed to serve only the residential portion of the overall electrical usage at GCW or some 16% of the total electric load. The balance of the funding will be derived from a loan (USDA) which will fund the balance of the power line’s costs which total over \$12 million. The USDA will need tangible assets to back up the loan.

Mr. Black said the new mini-grid and diesel generator system, with a value of some \$8 million should be transferred to the HTUA to secure the loan, since the HTUA will be the loan applicant. Mr. Malin noted that GCRC paid for the mini-grid and associated generators. Mr. Black said the transfer could be done with a sale-lease back where the Grand Canyon Resort Corporation (GCRC) sells the mini-grid system to the Tribe/HTUA and then GCRC leases it back so as not to show a loss to the corporation. Mr. Malin said the Tribe could transfer ownership of the Skywalk building to GCRC in exchange for the mini-grid and diesel generators which the Tribe would turn over to the HTUA.

6) Update on UniSource negotiations (Fennemore-Craig, P.C.) Mr. Black reviewed the Tribe's November 3, 2014, meeting with UniSource. The parties met to discuss the construction, operation and maintenance of a 20.8kv electric line designed to connect the GCW facility with Unisource Electric's transmission facilities in northern Arizona. The parties began discussions in 2011 under the assumption that GCW would purchase retail electricity from UNSE once the interconnection was finalized. Mr. Vaughn asked if this was an adequately sized power line. Mr. Schmitt said it was adequate. The Tribe provided a deposit of \$100,000 to UNSE so that the company could do the preliminary engineering and design work that would result in enough capacity on the line to service GCW at full build-out (approximately 5-7MW load). The final cost estimate for the electric line was approximately \$14 million dollars. This line matches the existing UniSource line along Pierce Ferry Road.

Mr. Black recounted that in order to fund the project, the Tribe looked at several financing options and finally settled on securing a low-interest loan from the Rural Utilities Service (RUS), which is a division of the USDA. However, in order to move forward with an application for the funds, RUS required the Tribe to form a tribal utility authority ("TUA"). The Tribe formed the Hualapai TUA (HTUA) in September 2014, and is now working towards securing the agreements necessary to: (i) finalize and submit its loan application with RUS, (ii) secure longer term wholesale generation resources for the HTUA at prices lower than the current costs of providing power to GCW, and (iii) acquire and utilize its allotment of federal power generated along the Colorado River.

In order to achieve the goals highlighted above, the HTUA will need to enter into at least 3 separate agreements with UNSE; interconnection agreement, wholesale power agreement and wheeling agreement.

The interconnection agreement between HTUA and UNSE will allow the interconnection of the electric line to UNSE's system via a new switchyard located at the beginning of Diamond Bar Road. These are fairly standard agreements, and govern the way power will flow from the UNSE system to the electric line, and finally to GCW. This basic agreement will also address any system upgrades needed for the interconnection, and the cost allocation of these improvements. Finally, the interconnection agreement is required in order to facilitate both the wholesale power purchase agreement and wheeling agreement the HTUA will seek to procure once RUS funding is authorized.

UNSE brought up an issue concerning the nature of the line. At 20.8kV, the line is more like a distribution line in terms of size and load carried. However, because it involves a utility to utility interconnection for the delivery of wholesale power, one might argue it is a transmission line subject to the Federal Energy Regulatory Commission's (FERC) jurisdiction, and rules concerning open access. This distinction is important because if the line is merely a customer-owned distribution line, no other party has any right to interconnect. However, if the line is deemed to be transmission, then any party – including third party generators (such as solar) – has a legal right to require interconnection.

UNSE indicated it was premature to enter into a wholesale power agreement, which the Tribe agrees is the case. However, the Tribe indicated to UNSE that in order to finalize the RUS application, the Tribe needs to calculate what power costs would be – and demonstrate that the HTUA has a willing provider. UNSE indicated that it would provide a copy of a sample wholesale agreement. Furthermore, the parties agreed that a memorandum of understanding or letter of intent would suffice for the RUS application at this time.

UNSE was very open to entering into a wheeling agreement to move the Tribe's allotment of federal power from the Colorado River. UNSE does not anticipate that line capacity (on its system) will be a factor, and suggested that once the allotment(s) are finalized, that the Tribe and HTUA work with the Western Area Power Administration ("WAPA") to identify a beneficial delivery point to the UNSE system, so that it can be then passed onto the HTUA at GCW. This might also eventually involve the Tribe's current federal allotment which is being sold to the Navajo TUA. Mr. Davidson added that the Tribe is set to receive 381 KW of Post-2017 Boulder Canyon Project Schedule D hydro power at the end of 2014 that may be delivered to UniSource at their McConnico or Griffith Substations and then wheeled

to GCW. Mr. Davidson also noted that he has submitted a preliminary application to Arizona Power Authority for additional Post-2017 Boulder Canyon Project Schedule B hydro power.

There was also some discussion with UNSE about how a wheeling arrangement might assist the Tribe in securing the right-of-way needed across certain private property so that UNSE could provide the land owner electricity directly. As indicated earlier, the line might be considered a transmission facility subject to FERC's open access rules. This property is located within UNSE's service territory, so the HTUA cannot provide service unless it enters into a borderline agreement with UNSE, which must subsequently be approved by the Arizona Corporation Commission. Another alternative would be to allow UNSE to use the HTUA's line up to the private property – via a wheeling agreement – so that it may service the private property directly. Mr. Vaughn asked what the cost would be to go around the private land. Mr. Schmitt estimated the construction cost to be \$250,000. This does not include the creation of the Environmental Assessment or the legal costs.

7) Review of Standard Clause for contracts and ideas on how to approach and advocate for the referendum vote to activate Sections 208 and 209 of the Ordinance (Fennemore-Craig). Mr. Francis introduced the draft standard contracting clause as follows:

Whereas the Hualapai Tribal Utility Authority and _____ entered into that agreement dated _____ (hereinafter the "Contract"), said parties hereby agree that the Contract shall in no way be considered as a waiver, expressed or implied, of the sovereign immunity of the Hualapai Tribe, its officers, agencies, enterprises and corporations, except to the limited extent described as follows for the Hualapai Tribal Utility Authority:

Claims or disputes arising out of or relating to the Contract, or the breach thereof, shall be brought in and may be enforced by the courts of the Hualapai Tribe or by the federal courts of the United States. This limited waiver shall not be construed as a consent to the jurisdiction of any other court.

This limited waiver of immunity shall not be construed to waive any immunity of the Hualapai Tribe, its officers, agencies, enterprises and corporations, nor to extend any liability to any assets, revenues, or incomes other than those of the Hualapai Tribal Utility Authority.

This limited waiver of immunity shall be strictly limited to claims or disputes arising out of the Contract. The sole manner of relief awarded on such claims or in such disputes litigated pursuant to this limited waiver shall be the award of monetary damages as would ordinarily be recoverable in such claim or dispute; however, neither injunctive relief nor punitive or consequential damages shall be awarded.

This limited waiver of immunity shall extend to or be used for or to the benefit of only that party signatory to this Agreement with the Hualapai Tribal Utility Authority. This limited waiver of immunity shall not extend to or be used for or to the benefit of any other person or entity of any kind or description whatsoever, including any assignee, contractor, employee, or other affiliate of that party signatory to this Agreement with the Hualapai Tribal Utility Authority.

To the extent that the above terms of this limited waiver conflict with terms and/or provisions of the Contract, the terms and provisions of this limited waiver shall control in lieu of the conflicting Contract terms and provisions.

The purpose of the clause is to waive the sovereign immunity otherwise enjoyed by the HTUA so that vendors with whom the HTUA contracts will be comfortable that they can enforce their contracts with the HTUA.

Since this will be the default waiver for the HTUA's day-to-day contracts with vendors, it is packaged as an addendum to be separately executed as a counterpart to the particular contract at issue. The goal is to have a waiver that is unobjectionable to both the HTUA and the parties with which it is contracting. Therefore, in preparing the clause we have sought to strike a balance between retaining some immunity for the HTUA while ceding enough immunity so that vendors are comfortable enough to deal with the HTUA.

To that end, please note that this waiver does not use certain language that the Board could choose to insert. For example, the waiver as written does not prohibit the prevailing party from obtaining an award of its attorney's fees in the event of a lawsuit. Typically, parties who are successful in certain types of lawsuits are entitled to petition the court to require the losing party to pay the attorneys' fees incurred by the winning party.

Also, the waiver does not include a choice-of-law provision. Often times a contract between HTUA and a vendor may indicate that the parties have decided that any dispute as to the contract will be decided under the law of a particular state. This waiver as written does not include such a provision of its own, meaning that a choice-of-law provision contained in any contract with a vendor will control. Still, though, this waiver will limit the venue for hearing such a lawsuit to the Hualapai and/or federal courts.

The waiver does not place a limit on the amount of money that may be awarded in a judgment. That is, although the waiver says that no consequential or punitive damages may be awarded, it does not place a limit on the total amount of money that can be awarded.

Finally, the contract does not contain a time limitation for lawsuits to be brought, e.g., it does not say, e.g., "this limited waiver shall be enforceable only for _____ [duration] following the termination of this Agreement." There are separate statutes of limitation on claims, and those will control, but this waiver itself does not add any additional or more restrictive time limitations.

For larger contracts with more at stake (and where the contracting party may want more concessions from the HTUA), Fennemore-Craig may draft a more restrictive waiver clause that HTUA could use as an initial position when negotiating, and then allow the other party to negotiate the HTUA down as HTUA sees fit. However, the draft language presented above is what Fennemore-Craig advises the HTUA adopt as far as the standard clause to be passed by tribal referendum.

Mr. Majenty recommended that the language in the standard clause explicitly confine itself to electricity. Any inference to water management, which is part of the HTUA's mission, would likely be defeated given the community concern of the current rights negotiation. This clarity of language will aid the referendum's success at the voting pole.

Mr. Vaughn said a list of pros and cons should be developed and placed into a fact sheet to educate the voters. The fact sheet should be placed on the web site and provide for public comments. Mr. Navenma said a history of this effort to bring electrical grid power to GCW should be part of the public outreach effort. Lowering the cost that GCRC pays for electricity should help the Tribe as a whole. This lowering of GCRC operating expenses needs to be explained to show the direct benefit to Tribal members and help break the disconnect between Tribal members and GCRC. Mr. Montana noted he did not see a direct benefit to Tribal members as GCRC's revenue grows and GCW increases its number of attractions and volume of tourists. Many of the jobs at GCW are filled by non-Tribal members, most living off the reservation.

Mr. Majenty made a motion to "limit the language in the standard clause for the development of electricity only." Mr. Navenma seconded the motion. Motion passed 5-0.

Mr. Vaughn asked if the BIA must approve the language of the referendum. This question will be researched. The Hualapai Election board will be contacted on how to proceed and time lines to meet for launching the referendum. Mr. Vaughn also noted the need to diagram the electric grid to show power flows through the Reservation and how UniSource will provide power to GCW (map).

8) 2015 Tentative Budget (Planning) Mr. Davidson said he had requested on behalf of the yet appointed HTUA a \$100,000 budget for 2015. This amount should cover basic operations, including compensation to Board members for travel, training and attending meetings. The budget also anticipates hiring a general manager some time in 2015. This position may be part time at first. The Council will hear this request at the December budget meeting. Mr. Davidson encouraged the Chairman and other officers to lobby for this amount.

9) Create job description for General Manager - full or part-time, duties, salary (Chairman). Mr. Vaughn directed staff to do research on other Tribal Utility Authority general manager positions and develop a resume to justify the general manager's salary.

10) Upcoming BIA grant-funded training (Planning) Mr. Davidson mentioned that several RFPs from the BIA's Indian Energy and Economic Development (IEED), Tribal Energy Development Capacity (TEDC)

grant award to Hualapai in 2014, one of which includes training for the new HTUA board in daily operations of a Tribal Utility Authority, will be released for publication in the next week to 10 days.

11) Other Matters (Chairman) Mr. Schmitt gave an update on the mini-grid and diesel generators at GCW. The new fuel supply system should be completed shortly. The final design for the power line between the Western Town and the Reservation boundary and the final design of the power line between the reservation boundary and the UniSource substation, as well as contract negotiations and environmental assessment work requires a contract amendment. The Board voted to recommend approval to Tribal Council for the \$198,000 contract amendment requested by Mr. Schmitt of TTG to continue on with the engineering design. The amendment also covers the electrical requirements forecast and comprehensive construction work program by SGS Engineering. These documents will then be synthesized by Cobb Consulting to create the project loan package and long-range financial forecast (electric rate setting). The rate must be set at a sufficient level to ensure adequate revenue to the HTUA and ensure that the loan needed to construct the power line is able to be repaid.

12) Set time and location of first quarterly meeting in 2015 (Chairman). The next meeting of the HTUA Board will be held at 9:00 AM on January 12th at the Cultural Center. Mr. Vaughn asked for the referendum process to be discussed at the next board meeting as well as project updates.

13) Adjourned at 12:30 PM

Prepared: Kevin Davidson, 12/12/2014, amended 1/12/2015