

May 26, 2015

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
Washington, D.C.

Dear Secretary Bose:

This letter responds to the Commission's April 28 notice seeking intervention, comments and protests regarding the partial license transfer from the Confederated Salish and Kootenai Tribes (CSKT) to its subsidiary, Energy Keepers, Inc. (EKI), Docket P-5-098. We respectfully seek intervention status in the partial license transfer for the reasons set forth in the attached Motion to Intervene.

Thank you for the opportunity to intervene in these proceedings.

Sincerely,

/s/ Verdell Jackson

Verdell Jackson, Flathead Conservation District Supervisor

/s/ Bob Keenan

Senator Bob Keenan

Enclosure

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

**Confederated Salish and Kootenai Tribes
Energy Keepers, Incorporated**

Docket No. P-5-098

MOTION TO INTERVENE

May 26, 2015

Conservation District Supervisor Verdell Jackson and Senator Bob Keenan respectfully submit this Motion to intervene in response to the April 28, 2015, Federal Energy Regulatory Commission (Commission) notice of the application for partial transfer of the Kerr Project license and co-licensee status and soliciting comments, motions to intervene, and protests.

As long-term residents of northwestern Montana, and having represented over 22,000 people in years of service as legislators from Kalispell, Montana who are directly impacted by the proposed partial license transfer from the CSKT to Energy Keepers Inc (EKI), this Motion to Intervene seeks to clarify and verify statements made in *Kerr Hydroelectric Project, Project No. 5; Application for Approval of Partial Transfer of License and Co-Licensee Status (Application)*, submitted on April 14, 2015 by the CSKT through legal counsel. Supervisor Jackson currently serves on the Flathead Conservation District which approves projects that affect river and lake water levels in Flathead County. Also, as vice chair of the Flathead River Commission, he deals with flood control and is involved with the required coordinated operations between Kerr Dam and Hungry Horse Reservoir. He is knowledgeable about Montana water law, water rights, and hydropower operations. Senator Bob Keenan has similar experience. He termed out of the Senate after serving as minority leader and president of the Senate, but is now back serving Senate District 5 again.

This motion to intervene objects to the partial license transfer from the CSKT to EKI and respectfully requests the FERC license transfer proceedings in Project 5-098 provide for and verify:

1. Compliance with all conditions of the previous licensee as stated in Section II (3)¹ of the transfer, including what the Tribe considers “applicable state laws”, and its reconciliation of the EKI Mission Statement which reject state laws²
2. **Co-Licensee and Licensee transparency in Kerr Dam operations including operation of Flathead Lake levels**



¹ “EKI states for purposes of section 9(a)(2) of the FPA that to the best of its knowledge and belief, it is in compliance with all applicable state laws” **18 C.F.R. § 131.20(5).**

² *Application*, Article II, EKI Mission Statement

3. Resolution of liability issues involving dam operations and management as well as transparency regarding the source and expenditure of publically-derived and designated funds
4. Oversight and compliance by the Montana Public Service Commission, the Department of the Interior, and the FERC in license performance reviews

Further, this Motion to Intervene suggests that the Commission consider conducting a field hearing at a public facility in either Kalispell or Polson, or both, to gather and share information on the above.

I. Communication

Communication regarding this filing should be transmitted to:

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Senator Bob Keenan
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II. Background


Kerr Dam is the largest of the eleven dams purchased by NorthWestern, producing at least one third of the power generated by all the facilities combined. It stores the most amount of water of any of the facilities in Montana. Power produced by Kerr Dam serves the Flathead Irrigation Project, all residents of the Flathead Indian Reservation, Lake, Sanders and Ravalli Counties, as well as other customers. The EKI and CSKT intend to complete the purchase of Kerr Dam and jointly request in this application to become co-licensees upon the completion of the purchase.

The Kerr project was Congressionally authorized in 1928 by an appropriation that authorized the Federal Power Commission to issue licenses “for the development of power sites on the Flathead Reservation and of water rights reserved or appropriated [by the United States] for the irrigation projects”. The 1930 Flathead Power Development report for the Kerr Project contemplated that the water resources reserved or appropriated for irrigation would also be used to generate power and perfect the hydropower water right. Importantly, the Flathead Power Development report identified that four interests were to be served by the Kerr Project, including the Tribes, the general public, the irrigation project composed of Indians and settlers, and the company. These four interests have guided the management and operation of Kerr Dam since its inception. Importantly, the federal government reserved for itself the right to recapture the project at some future time for these continued purposes.

The Kerr project was built with public and private funding and its transmission facilities and part of their construction costs were repaid by the Flathead Irrigation Project and ratepayers. Although the Kerr Project has been owned by private companies, each of those companies has accepted the responsibility of providing power for use by the Montana Public. Certain of the revenues generated by the Kerr Project still flow back into the Reclamation Fund as repayment for the associated facilities and revenue generated from a publicly built and authorized hydropower facility. In short, Kerr Dam has been a public facility since its inception and FERC now plans to change the status of that facility to something quasi-federal which has no obligation to the Montana public.

Since the issuance of the first license by the Federal Power Commission, and despite expressed Tribal consent, the Tribes have continuously sought to undermine the historic, legal, and financial foundations of the Kerr Project. Numerous legal claims submitted before the Indians Claims Commission, the Court of Claims, and the FERC have failed on the merits, or lack of merit in the Tribes' arguments.³

For example, despite the Tribes consent to the terms and conditions of the first license for the Kerr Project in 1938 and a subsequent Congressional act in 1948, including the amount of the Indian rental and the furnishing of power at special rents to the irrigation project, the Tribes have continued to challenge and attempt to change these rulings in whatever forums it can up to the present day.⁴

In 1985, the FERC granted the CSKT co-licensee status with Montana Power Company (later PPL Montana and NorthWestern) as well as the sole right to purchase the Kerr Facility after a specified number of years, which it now intends to do in September 2015. **The CSKT, which never underwent the technical, financial, and managerial scrutiny required of all other licensees and hydropower facility owners upon being granted the co-licensee status, now seeks to partially transfer its license to a wholly-owned subsidiary of the Tribe, Energy Keepers, Incorporated (EKI).** 

III. Motion to Intervene

Supervisor Verdell Jackson and Senator Bob Keenan submit this motion to intervene **in protest of the partial license transfer of the Kerr Project from the CSKT to EKI.** We believe that such an intervention will facilitate the overall goal of FERC and the CSKT and will serve only to inform the public of key operational procedures for the Kerr facility.

³ Confederated Salish and Kootenai Tribes of the Flathead Reservation vs. United States, Court of Claims Docket 50233. The Tribes' objection to the low cost block of power offered to the irrigation project in exchange for the use of water rights to generate power has been consistently rejected by the Courts because the Tribes have failed to establish any loss suffered by the issuance of the low cost block of power to irrigators.

⁴ For example, in the recent legislative hearings on the water Compact, the CSKT inserted two provisions into the document, one of which has to do with specific matters that belong in FERC's jurisdictional purview and another is in the Bureau of Indian Affairs' purview, not in a water compact negotiated with the State of Montana. The final decisions on the Kerr Dam items contained in the Compact are not within the authority of the MT Legislature which further erodes the trustworthiness of the CSKT.

The objection to the partial license transfer is based on the need for the CSKT, EKI, and FERC to resolve the issues briefly described below, some of which may require intervention status in order to secure the right to review and request certain information subject to FERC rules governing interventions. Other issues could be resolved through license terms and conditions.

In addition, the intervention is designed to help secure the best possible license conditions that satisfy the public within the framework of state and federal law. Through this intervention, information needed to assure FERC's action on the partial license transfer from a broad geographic and public interests in the Kerr Facility can be accessed by the Commission in making the best possible license decision. Intervention status will ensure this information is formally available to the Commission.

Described briefly below are the major issues sustaining this request for intervener status.

We respectfully request:

1. **Information regarding how FERC is treating governmental status of EKI and CSKT with regard to this license.** This is important to the public and the State of Montana in order to effectively interact with them and FERC in terms of a number of items (a) financial transparency and disclosure and reporting (b) Montana Public Service Commission oversight, (c) ratepayers absent MPSC oversight, (d) payments in lieu of taxes (PILT), and (d) liability..
2. **Documentation of the Tribes' compliance with all conditions of the previous licensee as stated in Section II (3)⁵ of the transfer application, particularly what the EKI and the Tribes considers "applicable state laws".** This documentation must be reconciled with the EKI Mission Statement, an Attachment to the license transfer application which rejects state laws⁶
3. **License guarantee for transparency in certain financial transactions involving the disposition of Kerr Dam revenue to public funds (e.g., Reclamation Fund), operational features such as lake levels, contractual obligations (such as irrigation both on and off the reservation), coordination with Hungry Horse Reservoir releases (such as flood control) and emergency operations.**
4. Oversight and compliance by the Montana Public Service Commission, the Department of the Interior, and the FERC in license performance reviews. **With the status of EKI/Tribe unknown, it is difficult to know whether there will be or who will ensure oversight of license condition compliance and performance reviews.**
5. Participation in Emergencies or other Homeland Security Issues. We understand that there are several "black start" dams across the country that are activated in case of a national emergency, such as an EMP attack, and that Kerr Dam may be one of those facilities. To the extent possible, we request information regarding the participation of Kerr Dam in any such network and the EKI/CSKT participation



⁵ "EKI states for purposes of section 9(a)(2) of the FPA that to the best of its knowledge and belief, it is in compliance with all applicable state laws" 18 C.F.R. § 131.20(5).

⁶ *Application*, Article II, EKI Mission Statement

In addition to the request for intervener status, we emphatically suggest that FERC consider holding a field hearing at a public facility in Kalispell or Polson so the public has an opportunity to meet the new owners/licensees of the facility, to provide for disclosure of key information, and to fully comment on the application.

Granting our request for intervention in the license proceedings in protest to the partial license transfer will be an asset to the proceedings overall, as our intention is only to ensure that the license proceeding provides the transparent protection of and disclosure to the public who built Kerr Dam and have relied on its benefits for more than 80 years. We believe that all of the issues we have raised are legitimate and can be resolved quickly and easily so as to assure the timely license transfer and acquisition of Kerr Dam.

Respectfully Submitted

/s/ Verdell Jackson

Verdell Jackson, Flathead Conservation District Supervisor

/s/ Bob Keenan

Senator Bob Keenan