

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BOB KEENAN, et al.,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Civil Action No.: 15-cv-1440 (RCL)
)	
NORMAN BAY, Chairman, Federal Energy Regulatory Commission, et al.,)	
)	
<i>Defendants.</i>)	

**RESPONSE TO DEFENDANTS’ REQUEST FOR 7-DAY EXTENSION OF
TIME TO RESPOND TO MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Bob Keenan, *et al.* hereby consent to Defendants’ motion for a 7-day extension of time, through and including September 17, 2015, to respond to Plaintiffs’ motion for a preliminary injunction (See ECF No. 19). Plaintiffs also hereby clarify for the record statements made in Defendants’ Motion (9/8/15) and ERRATA (9/9/15).

1. Defendants filed their motion to extend time to oppose Plaintiffs’ motion for preliminary injunction filed on September 3, 2015. Defendants’ ERRATA creatively asserts in a correction to the motion for extension (ERRATA, p.1, par. 1), that Plaintiffs’ motion for preliminary injunction was effectively a challenge to a prior 1985 Federal Energy Regulatory Commission (“FERC”) order that had authorized the conveyance of a “future interest” in the Kerr Dam project to the Confederated Salish and Kootenai Tribes (“CSKT” or “Tribes”) of the Flathead Indian Reservation in northwestern Montana. (“[T]he 1985 FERC order transferred ownership to the CSKT on payment of the conveyance price” (emphasis in original)). Defendants have made this assertion in disregard of their ongoing procedural violations, in an effort to indirectly argue, as they directly did at the September 4, 2015 oral hearing, that this

Court lacks jurisdiction to hear this case, which should have instead been brought in the U.S. Court of Appeals of the District of Columbia Circuit. Defendants also made this assertion to persuade this Court that Plaintiff's motion for preliminary injunction is moot and without urgency (Motion p. 3, par. 4). To the contrary, Plaintiffs' motion for preliminary injunction remains viable and urgent, as Defendants had failed to convene open disclosure-based public hearings to address the conveyance of Kerr Dam to the Tribes, in 1985, and at any time thereafter, as described below.

2. This action arose, in part, as the result of ongoing violations by FERC and the Department of Interior ("DOI") and its Bureau of Indian Affairs ("BIA") and Fish and Wildlife Service ("FWS") of their procedural obligations under the Federal Power Act and Administrative Procedure Act to hold open disclosure-based public hearings in Montana before FERC had largely adopted, without question, numerous DOI-, BIA- and FWS-developed substantial fish, wildlife and environmental conditions that added more than 27 new articles to -- and substantially transformed the purpose and objectives of -- the 1985 Kerr Dam Settlement and License Agreement.

3. This action also arose as the result of FERC's and DOI's ongoing violation of their obligations under the U.S. Constitution to provide equal protection and due process under the law to all persons and entities that are not "federally recognized tribal entities," to ensure that those 27-plus license amendments did not racially discriminate against and otherwise cause procedural harm to Plaintiffs. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must

be granted at a meaningful time and in a meaningful manner. These essential constitutional promises may not be eroded." (internal citations and quotation marks omitted)).

4. Defendants incorrectly assert that, "Plaintiffs sought a TRO to prevent the transfer, arguing, inter alia, that it *would* cause economic harm to local farmers and businesses whose irrigation needs would not be respected after the transfer" (Motion, p.2, para. 2). o To the contrary, Plaintiffs *have already suffered and are continuing to suffer* substantial and irreparable economic harm as the direct result of the BIA's and CSKT's assumption of control over most of the water infrastructure of the Flathead Indian Reservation. As the result of the Tribes' exercise of such control, Plaintiffs *have already* been denied substantial access to waters necessary to conduct their farming, ranching and other businesses on and appurtenant to the reservation. Plaintiffs' economic condition has been severely worsened by the September 5, 2015 conveyance of the Kerr Dam to the CSKT.

5. As the direct result of the September 5, 2015 conveyance of Kerr Dam to the CKST and Energy Keepers, Inc. ("EKI"), the Tribes and the BIA together have since assumed *total* control over *all* water infrastructure resources on and above the Flathead Indian Reservation. Since the conveyance, Plaintiffs' economic and other interests have been placed entirely at the mercy of the Tribes and the BIA, upon which Plaintiffs must now detrimentally rely for their livelihoods. Exhibit 66 supporting Plaintiffs' Complaint establishes that the BIA has not been, is not currently, and will not be, an objective third party facilitator of equitably administered water infrastructure resources.

6. Each of these violations, plus other facts that Plaintiffs have set forth in their Complaint and accompanying Exhibits, accumulated and collectively gave rise to the serious present national security concerns Plaintiffs have identified. These additional facts include: FERC's

granting of exemptions to the CSKT and EKI from the regulatory obligations governing dam acquisitions and license transfers; the 2012 enactment of a Native American reservation leasing law enabling all federally recognized tribes, including the CSKT, to execute leases with foreign entities on reservation lands without BIA oversight; and the ongoing outreach activities by the Republic of Turkey targeting specific Native American reservations, including the Flathead Indian Reservation, based on their proximity to sensitive energy resources. In this regard, paragraph two of Defendant's Motion for Extension misleadingly suggests that Plaintiffs' "national security concerns" are limited to "allegedly - radical Islamist elements in Turkey." For the record, the Complaint includes 34 paragraphs addressing "National Security Implications" (paragraphs 69-103), which include national security concerns well beyond "radical Islamist elements in Turkey." *See generally* "Government Exhibit 003-0084," *United States v. Holy Land Foundation*, No. 3:04-CR-240-G (NDTX) (posted at <http://www.investigativeproject.org/documents/misc/20.pdf>, and explained at <https://www.centerforsecuritypolicy.org/2013/05/25/an-explanatory-memorandum-from-the-archives-of-the-muslim-brotherhood-in-america/>).

7. Defendants' motion asserts that, "[b]ecause the transfer sought to be enjoined has now taken place, and because the Tribes are operating the dam as envisioned in the 1985 FERC license, there is no emergent need to resolve plaintiff's motion for preliminary injunction to stop that transfer" (Motion, p.3, para. 4). Since, however, Defendants' added more than 27 new articles to that license in 1997, 1998 and 2000, it is not possible that the Tribes are operating the dam "as envisioned in the 1985 FERC license." In addition, Judge Contreras' September 4, 2015 order clearly recognized that the Tribes' operation of Kerr Dam subsequent to the conveyance could very well result in Plaintiffs' suffering irreparable harm sufficient to justify the reversal of

the conveyance. “[I]f these actions must be reversed on the merits” [because of] “harm purported to result from the Tribes’ operation of the dam [...] *such reversal will need to take place* regardless of whether an injunction is issued *today, or at some other point in the future*” (emphasis added).(ECF No. 20 (9/4/15), p. 4, fn 5). Consequently, Plaintiffs’ motion for a preliminary injunction remains as viable and urgent as it did before the Court denied the TRO.

Based on the foregoing clarifications, Plaintiffs consent to the Defendants request for a 7-day extension.

Dated: September 12, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, for notification of such filing to the following:

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