

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

**PPL Montana, LLC)
NorthWestern Corporation)**

Project No. P-5-094

MOTION TO INTERVENE

Pursuant to the rules of the Federal Energy Regulatory Commission (FERC), and the decision by FERC for a limited reopening of the comment period regarding the joint application of PPL Montana, LLC (“PPL Montana”) and NorthWestern Corporation d/b/a NorthWestern Energy’s (“NorthWestern”) Joint Application for Approval of Transfer of Licenses (“Transfer Application”), filed with the Commission on January 10, 2014, for the Kerr Project, Senator Verdell Jackson moves to intervene in the license proceedings in opposition to the Transfer Application as written and in opposition to the Motion and protest of the Confederated and Salish Kootenai Tribes (CSKT).

In a letter dated April 3, 2014, Senator Verdell Jackson advised the FERC that the February 3, 2014 notice of the Transfer Application public comment period had not been received by many interested parties including Flathead and Lake Counties, affected irrigation districts, interested individuals, individual irrigators above and below Flathead Lake, ratepayers, and business parties. Senator Jackson is an irrigator with direct flow rights out of the Flathead River. His letter was signed by several state representatives and senators representing the numerous counties and interests who will be affected by the Joint Transfer Application and ensuing FERC license and thus represents a broad range of public interests.

This motion to intervene opposes the immediate transfer of the license to the CSKT on the grounds that the Tribes cannot yet meet the specified conditions of the existing license that will be transferred. This intervention also opposes the transfer of the PPL license to NorthWestern so long as NorthWestern plans to act as a transfer agent of Kerr Dam and its license to the CSKT upon the latter’s purchase of Kerr Dam¹. The basis for this intervention is presented herein.

I. COMMUNICATION

Communication regarding this filing should be transmitted to:

Senator Verdell Jackson
555 Wagner Lane
Kalispell, Montana 59901
Email: vjack@centurytel.net Telephone (406) 756-8344

¹ Neither the Federal Energy Regulatory Commission nor NorthWestern Energy has the proper authority to convey the Kerr Project to a Tribal government as it is the equivalent of a P.L. 93-638 self-determination compact or self-governance compact that involves existing contracts, private and public entities, and funding derived from these sources.

II. BACKGROUND INFORMATION

Kerr Dam is the largest of the eleven dams being 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 and has a calculated purchase price of over \$275 million dollars based upon the power production ratio². 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 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”.³ The 1930 Flathead Power Development report⁴ 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.

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.⁵

For example, despite the Tribes consent to the terms and conditions of the first license for the Kerr Project 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,⁶ the Tribes have continued to challenge and change these rulings in whatever forums it can up to the present day.

Both the purchase of Kerr Dam and the seeking of sole licensing authority by the Tribes is a blatant attempt to change the foundation of and purpose for which Kerr Dam was constructed. In doing so the CSKT intends to change the management, operation, and benefits of this facility to serve only Tribal interests.⁷

² PPL-Montana and the CSKT recently negotiated a Tribal purchase price of \$18 million.

³ 45 Stats. L. 212-213

⁴ *Flathead Power Development: Memorandum on the Development of Flathead River Power Sites, Montana*, Senate Report 153, 71st Congress 2d Session, 1930.

⁵ For example, 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 consistently been rejected by the Courts because the Tribes failed to establish any loss, or that any loss which might have been anticipated would exceed the value of the water rights reserved for appropriated for the irrigation project which were to be obtained by the licensee in exchange for the power at special rates.

⁶ *Confederated Salish and Kootenai Tribes of the Flathead Reservation vs. United States*, Court of Claims Docket 50223

⁷ **Articles of Incorporation for the Tribes Energy Keepers Corporation: Article V: The purposes and objectives of the Corporation are to: (A) promote and facilitate the development and utilization of energy resources for the benefit of the members of the CSKT pursuant to agreements with the Shareholders. The Shareholders are the CSKT Tribal Council.**

III. MOTION TO INTERVENE

NorthWestern Energy proposes the purchase of eleven (11) dams in Montana from PPL, Montana, including the largest facility known as Kerr Dam. NorthWestern has applied to FERC to transfer the Kerr Dam FERC license from PPL Montana to itself.

The CSKT through its attorneys have moved to intervene in and protest the transfer of the PPL Montana license to NorthWestern because the transfer application does not name the CSKT as “co-licensee”.⁸ However, the Federal Energy Regulatory Commission (Commission) recognized the CSKT as ‘co-licensees’ only for the purpose of performing certain functions of the 1985 Kerr license allocated to them:

...references to the Tribes by name in Articles 63, 64, 65, 67, and 82 and in the terms and conditions incorporated by Article 82 [of the license], shall be construed to give the Tribes the status of a licensee responsible for performing the obligations allocated to the Tribes therein, and references to “licensees” in the terms and conditions incorporated by Article 82 shall be construed to include the Tribes as a co-licensee with joint responsibility for performing the obligations allocated to the licensees therein, and the Tribes shall be subject to the powers of the Commission for enforcing the performance of their obligations under the foregoing Articles and terms and conditions...(emphasis added)

Technically and pursuant to the 1985 FERC license, PPL Montana has the primary authority for operating and managing the Kerr Project, including joint responsibility with the Tribes for selected Articles of the license. The 1985 license refers to the CSKT as being the sole ‘Licensee’ only *after* the conveyance of the project to the CSKT, which has not yet occurred.

Further, the 1985 license stipulates that the Montana Power Company (MPC), now PPL Montana, operate the Kerr project for the first thirty years of the license, and that the CSKT operate the facility for the remaining twenty years of the project if the Tribe is successful in purchasing the Kerr facility⁹.

In 1985 the Commission found, in referring to the MPC and the CSKT, that

“Each applicant has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effectuate the purposes of a license for the project.”

However, this finding must be chiefly in reference to the MPC and not the Tribes who are not subject to State law, but was considered adequate inasmuch as the Tribes had responsibility for only a few sections of the entire license.

Section V (C) (1) of the 1985 license also specifically states that any successor licensee or the CSKT after conveyance will

...have all of the rights and obligations of the Licensee under this license...

However, if the license is conveyed to NorthWestern with the transfer provision to the CSKT in place or assumed as is, the CSKT will not be able to meet the obligations previously met by PPL Montana, or by NorthWestern Energy,

⁸...and because NorthWestern did not seek the Tribes’ concurrence in submitting for the transfer of the license. Further, the CSKT protest the license being granted to NorthWestern as unnecessary to and complicating of the Tribes’ imminent purchase of Kerr Dam.

⁹ The historic integrated power and irrigation operations were not considered in the 1985 license and have not yet been given proper consideration.

regarding major aspects of State and federal law pertaining to taxation, electric rates, water deliveries, water rights management, integrated power-agricultural operations, lakeshore management, lake level regulation, non-discrimination, and employment as described briefly below.

Taxation. Under the CSKT's planned operation of the Kerr Project it will be under no obligation to pay state taxes and thus cannot meet this obligation of previous licensees. All licensees for Kerr Dam have paid taxes to Lake County on the generation of hydroelectric power using state water resources. In 2013 alone, these revenues amounted to approximately \$1.2 million dollars and are used to fund schools, emergency services, and road maintenance in Lake County. If a federal agency had 'recaptured' the facility in 1985, its payments to Lake County would have continued in some form, such as payment in lieu of taxes. However, according to Article 10 (F) of the Tribes' charter for the corporation intended to operate Kerr Dam, "nothing in this charter...shall be construed as permitting, recognizing or granting the State of Montana, or any other state, any regulatory jurisdiction or taxing jurisdiction over the property or activities of the Corporation or its employees located within the boundaries of the CSKT's Indian Country." The Tribe will be able to issue bonds taxing non-Indians who have no representation in either the Tribal corporation or Tribal government.

Electric Rates. The Tribes have indicated that they will not provide the low cost block of power to the Flathead Irrigation Project once they are owners of the facility and sole licensee. Because the Tribes' corporation does not recognize state regulation, the state of Montana Public Service Commission will not be able to provide reasonable regulation of consumer electric rates. Since FERC does not regulate consumer power rates, the Tribe can choose to raise its rates at will with no obligation to consumers.

Water Deliveries. A number of related legal actions by the Tribes raise the serious prospect that the Tribes, once they are licensees and owners of Kerr Dam, will not honor historic water deliveries to irrigation and other uses despite the foundational tie between power, irrigation, and the development and construction of Kerr Dam. The first is the proposed water compact between the State of Montana, the CSKT, and the United States which purports to quantify the federal reserved water rights of the Tribes. Under the proposed Compact, the Tribes' propose to reduce historic water deliveries to the irrigation project by 80% under the theory that they own the state based water rights historically used by and appropriated for irrigation and currently filed in the Montana General Stream Adjudication¹⁰. This water is physically the same water that is stored behind Kerr Dam and was appropriated or reserved by the United States for the irrigation project. In the compact, the Tribes propose to convert most of the historically used irrigation water right to an instream flow right thus preventing its diversion into the irrigation project.

A related Compact item is the Tribes' claim to the ownership of all of Flathead Lake, even that part off-reservation, with a "time immemorial" priority date. The Compact, if passed by the Montana legislature, will restrict and certainly control water use and development above Flathead Lake as well as impact lake level management.

The second action undertaken by the Tribes is a recently-filed lawsuit against state of Montana judicial institutions, the United States, three irrigation districts, individuals, and "John Does" challenging the validity of land titles and state based water rights both on and off the open Flathead Indian Reservation. The lawsuit seeks to invalidate historical acts of Congress in opening the reservation to settlement, land patents and water rights issued to settlers, and the reservation's historic irrigation development.

¹⁰ The Compact proposes to transfer state based water rights to Tribal ownership.

Both of these actions have at their core the disruption of water deliveries historically honored by previous licensees and consistent with the development of the Kerr Project in the first place.

Water Rights Management. Both the proposed water compact and the recent CSKT lawsuit demonstrate disdain for and rejection of state water management and legal institutions. The compact seeks total control over water rights administration and management within the exterior boundaries of the reservation leaving no judicial or administrative recourse for residents affected by the Tribal government's actions.

Integrated Power and Agricultural Operations. As indicated in the Flathead Power Development Report, and by subsequent contracts between the United States and irrigation districts, power revenues, and agricultural operations are intricately interconnected and cannot be separated. By seeking to be the sole licensee and owner of the Kerr Project, and by taking aggressive water rights actions in the proposed Water Compact and lawsuit, the Tribes seek to undermine and fundamentally change the foundation of the reservation economy and surrounding eleven counties (population of 360,000) without public involvement.¹¹

Discrimination and Employment. The structure of the Tribes' corporation which will run Kerr Dam consists of the Corporation and one shareholder, the Tribal Council of the CSKT. Article II of the Tribes' charter prohibits the shareholder from acting in a "governmental capacity as the Tribal Council of the CSKT" involving matters of the corporation. Article III (D) states, in part, that "the Tribal Council of CSKT will have no authority to direct the business affairs of the Corporation". However, **recent newspaper-recorded events indicate that the Tribal Council is already violating the Corporation's charter by injecting CSKT Tribal Council goals and objectives into matters related solely to the business of the operation and management of Kerr Dam.**¹² Employment practices that favor tribal member employment over others for a facility that serves primarily non-Indian customers would violate federal employment law.

Not a Federal Recapture. As a final matter, the CSKT Motion to Intervene improperly states that it is 'recapturing' the Kerr Project by setting aside "recapture" funds. The 'recapture provision' is a right reserved solely to agencies of the United States which, upon recapture, would operate the facility in accordance with applicable state and federal law. The CSKT cannot 'recapture' the facility on behalf of the United States¹³ because it is not a federal agency but a Tribe with a federally chartered corporation that is not subject to state law.

Based on this information, issuance of a license to NorthWestern with anticipation of the transfer to the CSKT is not in the public interest. Further, **until the CSKT can demonstrate that it can meet the requirements of Section V(C)(1) of the 1985 license quoted above, or until the FERC license is conditioned, transfer of the Kerr Project to the CSKT is not in the public interest.**



For the above stated reasons affecting the public interest and additional information contained in the attached cover letter to the Commission, Senator Verdell Jackson respectfully requests the FERC to grant him intervener status.

¹¹ For example, in combination with a time immemorial water right to the Flathead River and Flathead lake proposed in the Compact, would the CSKT as owner of Kerr Dam make a call on the thousands of junior water users upstream when the dam is not receiving water commensurate with the maximum of their hydropower water right which is much more than the average flow of the Flathead River? PPL-Montana and Avista Corporation have not used their water right authority to make a call on junior water users as a matter of policy.

¹² See minutes of the Tribal Council meeting, Charkoosta, March 2014.

¹³ Tribes' Motion to intervene at paragraph II. See Flathead Power Development Report at footnote 3.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated below. Dated at Kalispell Montana this 29th day of May, 2014.

/s/ Verdell Jackson

Senator Verdell Jackson

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