UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMMISSION

Confederated Salish and Kootenai Tribes	)	Docket No. P-5-100
Energy Keepers, Incorporated	)	

MOTION OF TED HEIN, DEAN BROCKWAY, BUFFALO WALLOW LLC, WESTERN MONTANA WATER USERS ASSOCIATION LLC, GENE ERB, JR., PAUL A. and BARBARA GRIECO, MARY K. MATHEIDAS, R. ROY and SHEILA M. C. VALLEJO TO PERMIT APPEAL TO THE COMMISSION OF CHIEF ADMINISTRATIVE LAW JUDGE WAGNER'S ORDER DENYING MOTION TO INTERVENE OUT-OF-TIME

Movants, through their undersigned counsel, hereby file this Motion to Permit the Appeal to the Commission of the Chief Administrative Law Judge's interlocutory Denial of Movant's Motion to Intervene Out-of-Time (153 FERC ¶ 63,013), pursuant to Rule 715(b) of the FERC Rules of Practice and Procedure, 18 C.F.R. § 385.715(b). As Movants will show below, consistent with FRPP Rule 715(a) and 18 C.F.R. § 385.715(a), "extraordinary circumstances" exist which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to Movants and other District members.

1. Movants, through their undersigned counsel, acknowledge that, as a general rule, the "Commission does not favor interlocutory appeals because they may: 1) delay a proceeding, 2) require premature intervention by the Commission, and 3) result in fragmented, piecemeal litigation."[1] Nevertheless, the Commission has found "extraordinary circumstances" to exist and consequently granted interlocutory appeals in several limited instances that have direct application to Movants' efforts in these settlement conference proceedings. The Commission

[1] *See, e.g., Pacific Gas & Elec. Co.*, 12 FERC ¶ 61,226, at 61,553 (1980); *Tenn. Gas Pipeline Co.*, 23 FERC ¶ 63,023, at 65,043 (1983); *Southern Natural Gas. Co.*, 37 FERC ¶ 61,211, at 61,526 (1986).

has found "extraordinary circumstances" to exist justifying the grant of an interlocutory appeal where the denial of such an appeal "would have been detrimental to the affected parties such that it would have denied the affected parties an opportunity to litigate their case or severely constrained that right resulting in irreparable harm" (*See Entergy Services Inc.*, 135 FERC ¶63,008 (2011) at para. 6). For example, the Commission has granted interlocutory appeals to ensure it obtained a full record to evaluate the parties' respective claims, to ensure that a prospective party with interests that may be directly affected by the proceeding in question has a right to intervene, and to ensure that the scope of the presiding official's inquiry is not overly limited so that it results in undue discrimination or preferential treatment of a party. (*Id*.)

I. The Presiding Judge Should Grant an Interlocutory Appeal in this Case to Ensure the Commission Obtains a Full Record to Evaluate the Parties' Respective Claims

2. As noted above in paragraph 1, "the Commission has granted an interlocutory appeal and overturned the presiding judge's decision to strike testimony because it 'desire[d] to obtain a full record to evaluate' the respective claims" (*See Pacific Gas Transmission Co.*, 56 FERC ¶ 61,430, at 62,538 (1991). Similarly, in the present case, Movants have submitted extensive initial and additional information in the current proceedings to demonstrate *inter alia* that they have a right to intervene out-of-time because they have satisfied the conditions of FRPP Rule 214(d)(1)-(4) and 18 C.F.R. § 385.214(d)(1)-(4).[2]

3. The Chief Administrative Law Judge determined that "Remaining Petitioners' seek to have issues addressed in this proceeding that are beyond the scope of the Order Establishing Hearing and Settlement Judge Procedures, issued on September 17, 2015" (153 FERC ¶ 63,013

[2] These conditions require a movant establish that good cause to intervene late exists, the intervention would not result in a disruption of the proceeding, the movant's interests were not adequately represented by other parties in the proceedings, and that the granting of the intervention would not prejudice or impose additional burdens on the parties.

at para.7),[3] which he then used as the basis to reject Movant's November 10, 2015 Supplement as a "prohibited pleading." His determination, however was grounded upon representations contained in the FJBC/District's November 13, 2015 filing, which FJBC/Districts' D.C. counsel readily concedes is an "otherwise prohibited pleading" (20151113-5169 at pp. 2). While, as the FJBC/Districts alleged, the Commission possesses the discretion to consider an answer that is otherwise a prohibited pleading, as where it would "provide[] information helpful to the disposition of an issue,[] permit[] the issues to be narrowed or clarified,[] or aid[] the Commission in understanding and resolving issues" (20151113-5169 at pp. 2-3),[4] the Chief Administrative Law Judge, as a Commission officer, must, nevertheless, provide reasons substantiating (i.e., a "path [that] may be reasonably discerned") why he accepted the FJBC/Districts' otherwise "prohibited pleading" and rejected Movants' otherwise "prohibited "clarifying" pleading" (*See Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010), *supra*).

4. The Chief Administrative Law Judge determined that, "Remaining Petitioners' attempt to raise issues relating to (1) "whether the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation," and (2) irrigator water rights, are clearly outside the scope of the issues set for hearing in this case." However, the Judge disregarded how Movants' November 10, 2015 filing had raised these issues for purposes of clarifying the inadequacy of the FJBC/Districts' representation of Movants' interests in these settlement

[3] "Additionally, the Chief Judge finds that Remaining Petitioners' seek to have issues addressed in this proceeding that are beyond the scope of the Order Establishing Hearing and Settlement Judge Procedures, issued on September 17, 2015." *Id*., at para. 7.

[4] In support of this proposition, the FJBC/Districts' filing cites the following cases: *CNG Transmission Corp.*, 89 FERC ¶ 61,100, at n.11 (1999); *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224, at 62,078 (1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335, at n.1 (1998); *New York Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,188, at P 7 (2004); *Tennessee Gas Pipeline Co.*, 92 FERC ¶ 61,009, at 61,016 (2000); *New York Indep. Sys. Operator, Inc.*, 91 FERC ¶ 61,218, at 61,797 (2000); *Cent. Hudson Gas & Elec. Corp.*, 88 FERC ¶ 61,138, at 61,381 (1999).

conference proceedings, in satisfaction of its burden under FRPP Rule 214(d)(3) and 18 C.F.R. § 385.214(d)(3).

5. Movants alleged that the failure of the FBJC/Districts' public hearing request to include the issue of "whether the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation" (with respect to which the FJBC/Districts had a right to seek negotiations under Article 40(c)(ii) of the 1985 Kerr Dam license agreement[5]), and to explain that decision to all District members, directly demonstrated the FJBC's non-transparency and the inadequacy of the FJBC/Districts' representation of District members' interests (*See* 20151022-5038, at paras. 18 and 25). In effect, the FJBC/Districts' failure to raise the Article 40(c)(ii) issue potentially compromises the non-irrigation/residential interests of District members, as well as the interests of all other reservation non-irrigator residents, whose collective ability to secure continued U.S. government (Bonneville Power Administration ("BPA"))-provided electricity at discounted rates[6] is effectively determined by that provision.[7]

6. Movants' November 10, 2015 Supplement endeavored to clarify how the resolution of the Article 40(c)(ii) issue bears directly upon the significance of the low-cost block of power ("LCB") settlement conference negotiations and its impact upon the overall price charged per kWh by Mission Valley Power ("MVP") for electricity delivered to the Flathead Indian

[5] Articles 40(a) and (b) of the 1985 license agreement clearly indicate that, prior to the September 5, 2015 conveyance of Kerr Dam to the Tribes, the U.S. government (via BPA and MVP) had reserved to itself the exclusive right to sell power on the reservation for non-irrigation purposes (i.e., "up to 7.466 megawatts of capacity of up to 100% load factor") throughout the year.

[6] "BPA […has long been] the power marketer for abundant inexpensive hydroelectric power from the Columbia River and other river systems in the Pacific Northwest. […] BPA was able to use its cheap resource mix to achieve revenues that enabled it to pursue the ambitious mandates of the Pacific Northwest Power Planning and Conservation Act of 1980 (Northwest Power Act). Whatever their views of BPA's mandated programs, BPA's customers stayed because BPA was by a substantial margin the low-cost provider, with a reliable and stable bulk electric power system unequaled in the world. Indeed, low cost Federal hydroelectric power was the key assumption underpinning the Northwest Power Act. […] " *See* Senate Report 104-102, to accompany S.92 – *Bonneville Power Administration Appropriations Refinancing Act*, 104th Cong., 1st Sess. (July 11, 1995) at pp. 5-6, available at: https://www.congress.gov/104/crpt/srpt102/CRPT-104srpt102.pdf.

[7] *Id*.

Reservation ("FIR"). Movants disclosed that the 12MW of Kerr Dam-generated electricity guaranteed for the FIR under the 1985 license agreement and the recent EKI-NorthWestern Energy Transmission Agreement (which includes 3.734 MW for irrigation) currently comprises approximately 19% of the FIR energy mix. Movants' November 10, 2015 Supplement also disclosed that U.S. government-owned BPA (a non-reservation source) provides the non-Kerr Dam-generated electricity transmitted to the FIR for residential and other non-irrigation uses, which the U.S. government-owned Mission Valley Power ("MVP") then distributes on-reservation to all reservation customers (at discounted but higher than current LCB prices for residential and other purposes[8]). BPA-provided electricity comprises 80% of the FIR energy mix (*See* 20151110-5180, at paras. 6 and 9, Exhibits 10 and 12). In other words, the breakdown of total electricity charges paid by reservation customers, as reflected by MVP revenues,[9] shows that the relatively higher price charged per kWh for non-irrigation-related electricity (i.e., the 80% portion of the reservation's energy mix) more than offsets the relatively lower price charged per kWh for irrigation-related electricity (i.e., the 19% (LCB) portion of the reservation's energy mix) (*See* 20151110-5180, at paras. 6 and 9).

7. Movants recognize the importance of maintaining the availability of the LCB in line with historical kWh rates, considering that between 80%-90% of their annual electricity bills is attributable to irrigation-related energy usage. Movants also are aware, however, that irrigators as a reservation customer rate class represent only 5.6% of MVP's total annual revenues,[10] and that the maintenance of the discounted BPA prices that all FIR customers are charged for their

[8] The current MVP price for BPA-transmitted energy is approximately 6.6 cents (6.57 cents) per kWh, as compared to 5 cents (4.99 cents) per kWh. *See* Mission Valley Power, *Power Notes* (Sept./Oct. 2015), at p. 1, available at: http://missionvalleypower.org/power-notes-september-october-2015/.

[9] *See* Mission Valley Power, *FY2014 Annual Report - October 1, 2013 thru September 30, 2014* (Dec. 2014), at p. 14, available at: http://missionvalleypower.org/wp-content/uploads/2014/12/Annual-Report-FY2014-thru-sept-2014-copy.pdf. Reported irrigation-related electricity charges/revenues FY 2014 amounted to $1,533,698, or approximately 5.6% of total MVP electricity charges/revenues of $27,389,535 for that fiscal year.

[10] *Id.*

residential and other non-irrigation electricity uses is critical to preserving overall access to low-cost electricity on the FIR. The FJBC/Districts' failure to raise these issues in an understandable manner prompted Movants to file their November 10, 2015 Supplement. Had the FJBC/Districts discussed these issues openly with District members during regularly scheduled public meetings, and with non-irrigator FIR residents who are intended beneficiaries under Article 40(c)(ii) of the 1985 license agreement, irrigators, including Movants, would have been informed whether or not discounted BPA-distributed electricity should be properly included in the computation of LCB. In addition, they would have been informed whether the failure of settlement conference proceedings could result in irrigators paying an irrigation electricity charge per kWh equal to the higher but discounted BPA rate currently charged for non-irrigation water uses. The FJBC/Districts' failure to undertake any transparent discussion in this regard only further demonstrates the inadequacy of their representation of Movants' and other District members' interests.

8. Movants' November 10, 2015 Supplement, furthermore, alleged that the FJBC/Districts had intentionally failed to disclose to all District members the relationship between the LCB, Kerr Dam-generated electricity and Kerr Dam licensees' ongoing use of Flathead River/Lake waters the federal government alleges it had previously reserved or appropriated on its own behalf and/or on behalf of the Tribes. Movants submitted, through their undersigned counsel, that a close reading of the Act of March 7, 1928,[11] however, indicates that ownership of those waters had remained with the State of Montana for the benefit of its citizens, and consequently, that the exchange of the right to use those waters for the LCB should inure to the benefit of all FIR irrigators and fee patent-holding residents (*See* 20151022-5038, at paras. 10, 13, 18 and 23).

[11] *See* Act of March 7, 1928, 45 Stat. 200, 212, 45 Stat. 200, 212, *An Act Making appropriations for the Department of Interior for the fiscal year ending June 30, 1929, and for other purposes*.

Movant's November 10, 2015 Supplement thereafter clarified how the FJBC/Districts, during their regularly scheduled public meeting of November 2, 2015, had finally admitted what Movants had long suspected was the key presumption underlying the Board's participation in these proceedings with which Movants strongly disagree – namely, that the U.S. government directly or beneficially owns the Flathead Irrigation Project, Mission Valley Power, Kerr Dam and all water rights relating thereto (*See* 20151110-5180, at para. 12, Statement of Tim Orr).[12]

9. Contrary to the FJBC/Districts' allegations, Movants have never sought for FERC to adjudicate state water rights (*Id*., at para. 13). Rather, Movants have sought only for the FJBC/Districts to publicly admit and explain to all District members, and for the FERC to publicly acknowledge, the outstanding issue of federal- versus state-reserved water rights, including the precise scope and extent of the reserved water rights the federal government has claimed that far eclipse the value of the LCB granted to reservation irrigators in exchange. It is for this reason that Movants' October 21, 2015 Motion to Intervene had initially highlighted what the CSKT Water Compact had defined as the LCB in terms of acre-feet required to generate 3.734 MW of electricity per year (*See* 20151022-5038 at para. 23).[13] Movants surmise they have been excluded from these confidential FERC settlement conference proceedings to permit the negotiating parties, including the FJBC/Districts, to escape public discussion of this critically important issue.

[12] The U.S. government has reserved federal water rights both for itself and/or on behalf of the Confederated Salish and Kootenai Tribes ("CSKT" or "Tribes") pursuant to the special trust relationship the federal government has long claimed to have established with them.

[13] Whereas, irrigators previously had rights under Article 18 of the 1930 Kerr Hydroelectric Project license agreement and Article 41 of the 1985 Kerr Hydroelectric Project license agreement to receive after July 15 of any year up to 50,000 acre-feet, within any one calendar year, of waters from Flathead Lake and the Flathead River above the Kerr Dam for FIR irrigation purposes (with rights to an unlimited volume of water from January 1 to July 15), CSKT Water Compact Article IV.H.1 effectively limits the LCB to 46,000 acre-feet annually – i.e., the volume of water needed to generate 19,178,000 kWh of electricity per year. In other words, the CSKT Water Compact would limit the amount of water that FIR irrigators may call each year (from April-October) for irrigation purposes to 46,000 acre-feet.

10. During the FJBC's regularly scheduled public meeting of November 2, 2015, Commissioner Tim Orr had made a statement clearly indicating that the FJBC/Districts entered into the current FERC settlement conference proceedings accepting as true the U.S. government's claim of ownership and control of all the waters on and flowing into the FIR (*See* 20151110-5180 at paras. 12-13). He also made the following additional statement which further supports that key presumption:

> "We're trying to keep everything that the 1985 Board agreed on. We're not giving up nothing. As we said earlier, the former Board had a possibility to increase that, and it didn't happen. But, we're keeping everything. *The water right belongs to the USA folks*. *It's for you for Flathead irrigation*. *It's not going to change*. If we get thrown out of this hearing what are we going to do? We'll be just like before the Board had agreed to the license. You can't go back. They (FERC) got their rules. We follow them. We've tried to verbally tell you folks the best we can about what we are getting. We gotta be careful – that's the problem. But, we are not giving up anything" (emphasis added).[14]

Clearly, Movants' strident disagreement with this presumption, and the additional facts Movants have marshalled to demonstrate how the FJBC/District's failure to address it constitutes inadequate representation of Movants' and other District members' interests, has inappropriately resulted in the Chief Administrative Law Judge's denial of Movants' Motion to Intervene and its consequent exclusion from these proceedings.

11. Mr. Orr's statement is consistent with and apparently reaffirms the April 1985 prepared written testimony former FJBC Secretary, Ray Jensen had delivered to FERC in support of the FERC-approved Kerr Dam 1985 license agreement/settlement. Mr. Jensen's testimony has been attached hereto as ATTACHMENT 1. The following excerpts from that testimony are quite revealing:

[14] The quotations set forth in this filing were taken directly (transcribed) from a video recording of the November 2, 2015 FJBC public meeting.

"In brief, the Joint Board believes that, as evidenced by the Districts' repayment contracts and authorizing legislation discussed later. Congress has recognized that the Flathead Irrigation Project (the Project) is essential to the economic wellbeing of the Indian and non—Indian residents of the Reservation, and that in order to succeed the Project must have cheap power for irrigation pumping and for resale to generate power revenues to help pay the high construction and other costs of the Project. To this end, recognizing that rentals would be paid to the Tribes for the use of Tribal lands. *Congress long ago reserved and appropriated for the Project the water power rights at the site of the present Kerr Development on the Flathead River*, and authorized construction of a Project power development there."

When it was later decided that it would be better for all concerned to build a larger facility making use of Flathead Lake storage, and that it might be more advantageous to permit a private company to develop such a facility rather than the Project, Congress provided in the act authorizing such licensing, the Act of 1928, 45 Stat. 200, 212-13 (the 1928 Act), that the Federal Power Commission, with the approval of the Secretary of the Interior (the head of the Department which administers the Project), should see to it that *these water rights of the Project, which would necessarily be taken away from the Project for use by a private licensee, were compensated for by a block of low cost power*. (emphasis added).[15]

[…] On behalf of its constituent Districts, the Joint Board advocates a continuation of the low cost Project power provision, along lines similar to […] the current operating agreement between the Project and the Montana Power Company, at rates approximating the licensee's current cost of production at Kerr. […] *In the Joint Board's view, such a provision is as necessary now as it ever was in order to compensate the Project and its water users for continuing use of their water power rights* which were preempted by the Kerr Development, and in order to protect the vital public interest in securing the continued viability of the Project, which is the basis of the economy on the Reservation, and in securing the federal investment in the Project. Such a provision is necessary, we think, in order to carry out the will of Congress as expressed in the 1928 and 1948 legislation, referred to, and as embodied in solemn contracts between the Districts and the United States" (emphasis added).[16]

[15] *See* Attachment 1, at pp. 3-4.
[16] *Id*., at pp. 12-13.

Mr. Jensen's testimony clearly expressed both the FJBC/Districts' prior and current "understanding of the origin and reason for the low cost power provision in the original [Kerr Dam] License."[17]

12. Mr. Jensen's 1985 testimony also revealed both the FJBC's earlier and current understanding of the scope and extent of water rights the federal government had reserved and/or appropriated on its own behalf and/or on behalf of the CSKT:

> Q. How do you understand the Project's reserved and appropriated water power rights relate to Winters rights?
> A. Under the Supreme Court's Winters decision (Winters v. United States, 207 U.S. 564 (1908)), creation of the Reservation reserved, for the benefit of practicably irrigable Reservation lands, that portion of Reservation streams and other water sources necessary to achieve irrigation of such lands. When later, pursuant to the Act of April 23, 1904, 33 Stat. 302 (the 1904 Act), as amended, allotment of the best lands was made to individual Indians, and unallotted lands were opened for sale to settlers for payments credited or paid to the Tribes, *the Joint Board believes that ownership of appurtenant Winters irrigation water rights passed with the allotted and unallotted lands to the landowners and their successors in interest; that is, to the individual Indians and non-Indians who, in addition to the Tribes, now own the irrigable Reservation lands. The Joint Board understands that the remainder of the Reservation waters and water power rights in Reservation streams, including the water power rights in the navigable Flathead River at the site of the present Kerr Development (Kerr site), remained the unencumbered and absolute property of the United States, subject to control and disposition by Congress*. As stated, Congress exercised its power by reserving and appropriating water power rights at the Kerr site for the Project, and by authorizing the Secretary to contract 'with the Districts with respect thereto'" (underlined emphasis in original; italicized emphasis added).[18]

> "[…] Thus, it is the Joint Board's view that the Federal Government, by appropriations and expenditures for Irrigation Project power construction including construction at the Kerr site, by federal water filings pursuant to Montana statutes,[19] and by explicit legislation calling for the completion of the Project's own power development *reserved or appropriated the water power rights at the Kerr site* for the benefit of the Irrigation Project irrigators. *Then United States undertook by formal agreement with the irrigators to honor*

[17] *Id*., at p. 3.
[18] *Id*., at pp. 5-6.
[19] *See Id*., at pp. 6-9.

> *those reserved or appropriated water rights either by developing them for the irrigators' benefit, or by leasing them for low cost power*" (emphasis added).[20]

In effect, Mr. Jensen had acknowledged that he spoke for the same three Irrigation Districts (i.e., the Flathead, Mission and Jocko Valley Irrigation Districts) that had previously participated in FERC's written "public hearing" *as the sole intervenor*s[21] supporting the FERC's July 17, 1985 Order approving the 1985 Kerr Dam settlement agreement and license.[22]

13. Mr. Jensen's 1985 testimony, like the FJBC/Districts' public discussions, however, failed to explain how the low-cost block of power adequately compensates irrigators and other residents owning taxable fee patented land on the FIR for the federal government's and the Tribes' ongoing use of their share of Flathead Lake and River waters. Clearly, those waters flowed through Kerr Dam turbines to generate electricity that prior licensees previously sold to Bonneville Power Administration and other off-reservation wholesale customers, in much the same way that EKI now sells Kerr Dam electricity generated from use of those same waters to BPA. Similarly, the FJBC/Districts have failed to explain, before and after entering into these confidential settlement conference proceedings, why irrigators and non-irrigators should believe that their stated-based non-consumptive water rights in the Flathead Lake and River waters which EKI now uses to generate both on- and off-reservation electricity are being adequately compensated for.

14. Movants submit, through the undersigned counsel, that the 1985 Ray Jensen testimony reflects language and a level of technical legal knowledge and understanding that is highly unusual for a dairy farmer irrigator, notwithstanding his several years' part-time work on the

[20] *Id.*, at pp. 9-10.
[21] *Id.*, at pp. 2, 8 and 9. *See also* 32 FERC ¶ 161,070 (July 17, 1985), at p. 4.
[22] It is well known that the 1985 license conveyed Kerr Dam assets and license rights to the CSKT thirty years hence without imposing regulatory conditions to which private dam licensees otherwise would have been subject in connection with such a conveyance. *See* 32 FERC ¶ 161,070 (July 17, 1985), at Ordering Paragraph C.

FJBC and in the Montana legislature representing Montana citizens from District 53.[23] Given its language, tone and federal government-centric perspective, a close review of Mr. Jensen's written FERC testimony, furthermore, reveals that it most likely had been prepared *for* him rather than *by* him. This view was recently shared by Mr. Ray Swenson, a client of the undersigned counsel, during a November 30, 2015 phone discussion. And, this view is arguably supported by 1984 legislation evidencing what appears to be an advance on a governmental quid pro quo for the 1984-1985 Board's support of the 1985 settlement/license agreement. This legislation provided that,

> "[…] notwithstanding any other provision of law, within sixty days of enactment of this Act, the Secretary of the Interior *shall* employ in the Flathead Irrigation and Power Project of the Bureau of Indian Affairs twenty-eight employees of the Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts at appropriate rates of pay which shall not be less than their rates of pay as of September 27, 1984."[24]

Indeed, it is more than possible that Mr. Jensen's testimony was driven by Board consideration of federal government-provided employment incentives such as this, in light of the opposite possibility – the Bureau of Indian Affairs' ("BIA") subsequent firing in 2014 of almost as many non-tribal member ditch-riders following the BIA's takeback of the FIP.[25]

15. Movants also submit, through their undersigned counsel, that the FJBC/Districts have not been open and transparent with District members about other issues important to District member-irrigators, including Movants. For example, the affidavit of Elaine Willman, attached hereto as ATTACHMENT 2, clearly identifies documents signed by FJBC Commissioner Jerry Laskody indicating that the FJBC/Districts had requested BIA resumption of management and

[23] *See* Attachment 1, at pp. 2-3.
[24] *See* Public Law 98-473, 98 Stat 1850 (Oct. 12, 1984).
[25] *See* Vince Devlin, *Non-Tribal Flathead Irrigators Laid Off by BIA*, Missoulian (March 21, 2014), available at: http://missoulian.com/news/local/non-tribal-flathead-irrigation-project-workers-laid-off-by-bia/article_42ff041e-b08d-11e3-a0da-0019bb2963f4.html.

control of the FIP following the Board's dissolution on December 13, 2013. These documents included correspondences dated December 18, 2015, that were directed to Interior Secretary Sally Jewell, Montana Attorney General Timothy Fox, and to Montana State Records Manager, Patty Borsberry. As Ms. Willman's affidavit reveals, Mr. Laskody and the Board had apparently followed the advice dispensed by the Board's informal adviser, Catherine Vandemoer, a known expert in quantifying federal and tribal reserved water rights.

16. Movants, furthermore, submit, through the undersigned counsel, that Movants have learned about the FJBC/Districts current negotiations with the BIA, over the terms and conditions of FJBC/Districts' desired takeback of the FIP, which is being presided over by a Ninth Circuit Court of Appeals-appointed mediator. While this issue is of paramount interest to all irrigators and District members, the FJBC/Districts have, once again not been very open and transparent about the terms and conditions they are seeking. If one were to assess the possible outcome of these negotiations from prior congressional acts, one would arrive at the following conclusion: that whatever rights the Board acquires, they will be strictly limited to managing and operating the FIP, and will "not affect in any way the negotiation or adjudication of water rights, including those of the Confederated Salish and Kootenai Tribes of the Flathead Nation."[26]

17. Movants' November 10, 2015 Supplement provided further evidence of the presumption upon which the FJBC/Districts had entered into these settlement negotiations – i.e., the U.S.

[26] *See* House Report 105-812, *Flathead Irrigation Project, Montana, to accompany H.R. 3056--A bill to provide for the preservation and sustainability of the family farm through the transfer of responsibility of the Flathead Indian Irrigation Project, Montana*, 105th Cong., 2d Sess. (Oct. 12, 1998), available at: http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt812/html/CRPT-105hrpt812.htm (setting forth proposed legislation defining the terms and conditions of a contract that "the Secretary of the Interior […] shall offer to enter into […] with the irrigation district under which the irrigation district will operate and manage the Project, including all rights and powers exercised by the Secretary in the operation of the works, which include the right to use permanent easements purchased under the Act of May 25, 1948." Although pursuant to such contract, "the Secretary shall transfer to the irrigation district ownership of all equipment, machinery, office supplies, and other supplies and equipment paid for with operation and maintenance funds related to the project," "the Secretary shall not transfer to the irrigation district ownership of any real property right, whether to land, or an easement therein, *nor shall the Secretary transfer to the irrigation district the ownership of any water right*" (emphasis added)).

government owns and controls all of the waters on and flowing into the FIR. For example, the Supplement highlighted that the confidential settlement conference proceedings include previously undisclosed representatives from the U.S. Forest Service of the U.S. Department of Agriculture, Trout Unlimited and informal FJBC/Districts adviser, Catherine Vandemoer. It also emphasized how each of these parties and persons have been and remain concerned in some manner with the preservation of federal and tribal reserved water rights. These revelations clearly demonstrated the inadequacy of the FJBC/Districts' representation of Movants' and other District Members' interests in these settlement proceedings, within the meaning of FRPP Rule 214(d)(3) and 18 C.F.R. § 385.214(d)(3). (*See* 20151110-5180 at paras. 14-18).

18. Contrary to the Chief Administrative Law Judge's determination, the Commission should consider the additional information Movants previously provided and herein provide in order to obtain a full record with which to properly evaluate the parties' respective claims.

II. The Need to Ensure that a Prospective Party With Interests that May be Directly Affected by the Proceeding in Question has a Right to Intervene

19. As noted above in paragraph 1, the Commission has granted an interlocutory appeal "where the presiding judge denied a motion to intervene in the early stages of the proceeding" and the parties' interests could very well have been adversely affected if they had been prevented from participating in the proceeding (*See ANR Pipeline Co.*, 48 FERC 61,308, at 62,011 (1989)). Similarly, in the present case, the Chief Administrative Law Judge denied Movants' Motion to Intervene Out-of-Time even though the motion was filed during the early stages of the settlement conference proceedings with no likelihood of disrupting the proceedings.

20. The Chief Administrative Law Judge did not dispute Movants' allegations that they possess cognizable interests which may be adversely affected if they were denied the opportunity

to participate in the current settlement conference proceedings (*See* 20151022-5038, at paras. 9-10).[27] Yet, without explanation, he concluded that "granting Remaining Petitioners' Motion to Intervene Out of Time will disrupt the proceeding and will place additional burdens on other parties" (153 FERC ¶ 63,013 at para.7)[28] The Chief Administrative Law Judge also did not explain how Movants had failed to carry their negative burden – i.e., to demonstrate that the actions they had taken both before and after the filing of their Motion to Intervene Out-of-Time would not disrupt the proceedings or impose additional burdens on other parties. Indeed, he essentially ignored and chose not to reference Movants' pleadings on these points.

21. For purposes of further clarifying the administrative record, Movants provided the FJBC/Districts with sufficient time to consider, respond to or counter their assessment of the FJBC/Districts' draft negotiating position prior to the filing of Movant's October 22, 2015 motion and the convening of the first settlement conference meeting scheduled for October 26, 2015 (*See* 20151022-5038, at para. 15). In addition, Movants provided to the FJBC/Districts two conditional offers to withdraw their Motion for Intervention Out-of-Time, one prior to the first settlement conference meeting (i.e., on October 23, 2015), and the other following the first settlement conference meeting (i.e., on November 2, 2015) (*See* 20151110-5180 at para. 10). Each of these offers of withdrawal had been intended to avoid a disruption to the settlement conference proceedings, but both were overwhelmingly rejected by the FJBC at regular public meetings convened on November 2 and 9, 2015). Furthermore, on October 23, 2015, Movants filed their initial settlement conference proceeding negotiating position with Judge Michael

[27] In other words, the Chief Administrative Law Judge acknowledged that Movants established they have a valid right to intervene as a party, consistent with the requirements of Rule 214(b)(1)-(3), 18 C.F.R. § 385.214(b)(1)-(3) of the Federal Energy Regulatory Commission Rules of Practice and Procedure ("FRPP") (*See* 20151022-5038, at paras. 9-11). In other words, Movants established that: they have a right to participate conferred by rule or statute (*See* 20151022-5038, at para. 9); they have or represent an interest that may be directly affected by the outcome of the proceedings (*Id*., at para. 10); and that their participation is in the public interest (*Id*., at para. 11).

[28] "The Chief Judge further finds that granting Remaining Petitioners' Motion to Intervene Out of Time will disrupt the proceeding and will place additional burdens on other parties."

Haubner in a timely manner pursuant to his direction, and consistent with applicable FERC processes and procedures (*Id.,* at para. 3). Moreover, Movants sought to avoid disruption of the proceedings by meeting with Settlement Judge Haubner during the early morning of October 26, 2015, just prior to the first settlement conference meeting, to explain why Movants' interests should be represented through the participation of their undersigned counsel in these proceedings, with which Judge Haubner had agreed (*Id*.). Finally, Movants had taken appropriate action to prevent disruption of the settlement conference proceedings by ensuring that its discussion of the 40(c)(ii) issues as they related to the FJBC/Districts' negotiating position was treated as "privileged and confidential information" (*See* 20151022-5038, at paras. (18-23).

22. For purposes of further clarifying the administrative record, Movants also explained how permitting their intervention would not cause any prejudice to, or additional burden upon, any party. In particular, Movants emphasized, with the support of FERC precedent, how since the proceedings had just begun the parties were first exchanging preliminary negotiating positions at the time their motion was filed, and all parties, including the Interior Secretary and the Commission, were likely familiar with the 1985 license agreement Article 40(c)(ii) issues (inclusive of reserved water rights) that Movants sought to include within the scope of settlement conference discussions, the granting of its Motion to Intervene Out-of-Time would neither prolong the proceedings nor impose additional burdens upon the parties (*Id.*, at para. 25). Movants also emphasized, with the support of FERC precedent, that the absence of an admissible or discoverable hearing or trial record and a Commission order disposing of them strongly suggested that permitting Movants to intervene during the early stages of the settlement

conference proceedings would not prejudice the parties or subject them to additional burdens (*Id*.).

23. For purposes of further clarifying the administrative record, the Chief Administrative Law Judge selectively ignored facts Movants alleged which established how the FJBC's Chairman and several of its Commissioners had subtly harassed and intimidated several of the undersigned counsel's clients with likely knowledge of the FJBC/Districts' Montana and D.C. counsels. He also ignored facts Movants alleged which showed how, at least, one of the FJBC/Districts' Montana counsels had indirectly communicated with the undersigned counsel's clients in violation of New York and District of Columbia professional responsibility rules. Movants also had demonstrated that such conduct actually disrupted the undersigned counsel's attorney-client relationships. It also seriously interfered with the administration of justice (*See* 20151106-5020; 20151110-5180 at para. 3), insofar as it caused three (3) of the undersigned counsel's clients to withdraw from the underlying Motion to Intervene Out-of-Time and from the undersigned counsel's representation in these matters,[29] and consequently, to sacrifice their opportunity to be heard. In other words, as the direct result of Board officials' strong-arm tactics and counsel's unprofessional conduct, several of the undersigned counsel's former clients were denied the right to intervene and the opportunity to have their interests adequately represented in these settlement conference proceedings. The FJBC/District's Montana counsels were quite aware of the questionability of such conduct, and as part of the FJBC/Districts' November 13, FERC filing, had prepared and signed carefully crafted and self-serving affidavits intended to exculpate themselves from such behaviors and to impugn the professional credibility of the undersigned

[29] The former Movants/clients in this matter who sought to withdraw from the Motion to Intervene Out-of-Time and from the undersigned counsel's representation as the result of these tactics included Scott and Linda Ambo, Gary and Sandy Baertsch and. Charlie and Carol Lyons. While former Movants Robert and Erlene Robinson and Ray L. and E. Anne Swenson withdrew from the Motion to Intervene Out-of-Time, they have remained clients of the undersigned counsel (*See* 20151110-5157).

counsel (*See* 20151113-5169, at Attachments A and B). Unfortunately, the Chief Administrative Law Judge's Order accepted these affidavits at their face value without probing their veracity. Inexplicably, said Order also ignored how the affidavits the FJBC/Districts' Montana counsels had prepared and signed further subjected these persons to public harassment by listing their names, which are now part of the administrative record (*Id* at paras. 4) and arguably serve as a deterrent to future clients of the undersigned counsel becoming involved in these matters.

III. The Need to Ensure the Presiding Official's Scope of Inquiry is Not Overly Limited so as to Result in Undue Discriminatory or Preferential Treatment of a Party

24. As noted above in paragraph 1, the Commission has granted an interlocutory appeal where the presiding judge's limitation of the scope of issues for consideration was unduly discriminatory or preferential to a party (*See Consol. Edison Co. of N.Y.*, 68 FERC ¶ 61,332, at 62,334 (1994)). The Chief Administrative Law Judge determined that, Movants' "November 10, 2015 Supplement is in effect an answer to an answer, which is not permitted under the Commission's rules" (153 FERC ¶ 63,013 at para. 4), but failed to provide a sufficient explanation or reasoning to support his rejection of that pleading, stating simply, that he "will not consider the arguments made therein."[30] The Chief Administrative Law Judge's determination is not only contrary to D.C. Circuit Court precedent which requires the Commission to render a decision from which a "path may reasonably be discerned" (*See Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010) (a court will uphold an agency's decision as long as the agency's "path may reasonably be discerned" – a "point-by-point rebuttal is not necessarily required") (citations omitted)), but is also unduly discriminatory and prejudicial to Movants' interests.

[30] Without rationale or explanation, the Chief ALJ Wagner stated, "Accordingly, the Remaining Petitioners' Second Supplement is hereby rejected and the Chief Judge will not consider the arguments made therein." *Id*. As a result, Movants are left to search for a rationale or explanation to support the Chief Judge's conclusion.

25. Contrary to the FJBC/District's assertion and the Chief Judge's conclusion, Movants' November 10, 2015 Supplement did not constitute an "answer" to the FJBC's/District's November 6, 2015 Answer to its Motion to Intervene Out-of-Time. Indeed, the undersigned counsel was unable to review the FJBC/District Answer in its entirety for purposes of formulating an "answer to an answer," because the FJBC/Districts, through their D.C. counsel, had denied Movants access to review approximately one-third of that pleading - (i.e., the redacted portion of that pleading, spanned pages 11 through 15 of a 16-page pleading, excluding exhibits)! Movants' November 10, 2015 Supplement, therefore, could not have addressed, and did not, in fact, address the issues raised by the FJBC/District's November 6, 2015 Answer. Rather, Movant's November 10, 2015 Supplement raised significant additional points to supplement and clarify how and why Movants' interests in this matter were, are and remain divergent from those of the FJBC/Districts, and are not being adequately addressed by the FJBC/Districts or its D.C. counsel.

26. The Chief Administrative Law Judge, furthermore, concluded "that Remaining Petitioners' interests are *already* represented by FJBC/Districts and that they have failed to demonstrate any independent interests not *already* represented herein" (emphasis added) (153 FERC ¶ 63,013 at para.7).[31] This is <u>not</u> the correct or applicable statutory/regulatory standard, and apparently reflects the precise language used in the FJBC/District's November 13, 2015

[31] Apparently, the Chief Judge accepted and repeated the language contained in the FJBC's November 6, 2015 filing. "The Chief Judge agrees with FJBC/Districts' that Remaining Petitioners' interests are *already* represented by FJBC/Districts and that they have failed to demonstrate any independent interests not *already* represented herein. As pointed out by FJBC/Districts, the FJBC/Districts operate on a majority rule basis and the fact that a few members do not agree with an action taken by FJBC/Districts does not mean that the FJBC/Districts are not properly representing their members and the public interest" (emphasis added). *See Motion of the Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts for Leave to Answer and Answer* (Nov. 13, 2015) at p. 7.

Answer and Answer.[32] According to FRPP Rule 214(d)(3) and 18 C.F.R. § 385.214(d)(3), the correct and applicable legal standard is whether "[t]he movant's interest is not *adequately* represented by other parties in the proceeding." The Merriam-Webster Online Dictionary defines these distinct words as follows. It defines "already" as "prior to a specified or implied past, present, or future time: by this time: previously,"[33] whereas, it defines the word "adequately" as "sufficient for a specific requirement" and/or as "lawfully and reasonably sufficient."[34] As noted above, Movants' November 10, 2015 Supplement provided significant additional points identifying how and why Movants' interests in these settlement conference proceedings were and are not being *adequately* addressed by the FJBC/Districts or its D.C. counsel, consistent with the legal standard set forth in FRPP Rule 214(d)(3) and 18 C.F.R. § 385.214(d)(3). Since the Chief Administrative law Judge arbitrarily and without explanation failed to apply the correct and applicable legal standard to determine whether Movants had satisfied this portion of its statutory burden to justify the Commission's granting of its Motion to Intervene Out-of-Time, his determination is not only in contravention of D.C. Circuit Court precedent, but is also unduly discriminatory and prejudicial. Consequently, the Chief Administrative Judge's Order gives rise to extraordinary circumstances that make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to Movants' and other District members' interests, within the meaning of FRPP Rule 715(a) and 18 C.F.R. § 385.715(a) and (b).

[32] Similarly, the Chief Judge accepted and repeated the FJBC/District's statement regarding the applicable statutory/regulatory standard without checking the precise wording of the statute and regulations. *See Id.*, p. 4 ("The Out-of-Time Movants thus fail to have interests that are directly affected by the outcome of this proceeding which are not *already* represented by the FJBC/Districts" (emphasis added)) *Id*.

[33] *See* Merriam-Webster, *Already*, available at: http://www.merriam-webster.com/dictionary/already.

[34] *See* Merriam-Webster, *Adequate/Adequately*, available at: http://www.merriam-webster.com/dictionary/adequate.

27. The Chief Administrative Law Judge's failure to include within the scope of his review the information contained in Movants' November 10, 2015 Supplement, while including within his review the information contained in the FJBC/Districts' November 13, 2015 filing, is discriminatory and prejudicial to Movant's right to intervene in these settlement conference proceedings. Movants' November 10, 2015 Supplement contained evidentiary information concerning issues which the FJBC/Districts have poorly addressed that have a direct bearing and impact on the low-cost block of power determination and Movants' economic and legal interests relating thereto, as described in Section I above. In addition, the FJBC/Districts' November 13, 2015 filing contained affidavit-based information which Movants' have since demonstrated to be factually untrue, further demonstrating, consistent with FERC standards, how the FJBC/Districts continue to inadequately represent Movants' interests, and why the Chief Administrative Law Judge should have properly granted Movants' Motion to Intervene Out-of-Time.

28. The information contained in Movants' November 10, 2015 Supplement, plus the new information included in this Appeal are deserving of Commission review in order to preserve Movants' right to intervene without discrimination and prejudice. The FJBC/Districts' included in their November 13, 2015 FERC filing four affidavits prepared and signed under penalties of perjury by FJBC Chairman Boone Cole, FJBC Commissioner Tim Orr and FJBC/Districts' Montana counsels, Bruce A. Frederickson and Kristin Omvig (*See* 20151113-5169, at Attachments 1, 2 and 3). The truthfulness and veracity of these affidavits, however, has been recently contested by affidavits prepared and signed under penalties of perjury by Elaine Willman (*See* ATTACHMENT 2, *supra*), FJBC Jocko Valley Irrigation District Commissioner, Dean Brockway, and two FIP District members, Gene Erb, Jr. and R. Roy Vallejo. The affidavits of Messieurs Brockway, Erb and Vallejo are attached hereto, respectively, as

ATTACHMENTS 3, 4 and 5. The Commission should be interested in reviewing these attachments because they reveal the strong possibility that untrue statements have been made under oath by an FJBC Commissioner and by the FJBC/Districts' Montana attorneys.

29. In sum, Movants have shown, consistent with FRPP Rule 715(a) and 18 C.F.R. § 385.715(a), "extraordinary circumstances" exist which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to Movants and other District members.

IV. CONCLUSION

Wherefore, for the foregoing reasons, Movants respectfully request that the presiding judge grant this Motion to Permit the Appeal to the Commission of the Chief Administrative Law Judge's interlocutory Denial of Movant's Motion to Intervene Out-of-Time (153 FERC ¶ 63,013), pursuant to Rule 715(b) of the FERC Rules of Practice and Procedure, 18 C.F.R. § 385.715(b).

Respectfully submitted

November 30, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon the participants, to date, in this proceeding in accordance with the requirements of Rule 2010 (18 C.F.R. § 385.2010) of the Commission's Rules of Practice and Procedure.

New York, NY
November 30, 2015

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