

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PPL Montana, LLC)
NorthWestern Corporation)

Project No. 5-094

**REQUEST FOR REHEARING OF FERC ORDER TRANSFERRING LICENSE BY SENATOR VERDELL JACKSON
(August 22, 2014)**

Pursuant to § 313(a) of the Federal Power Act (16 U.S.C. § 825(2012)), and the Federal Energy Regulatory Commission (FERC) regulations at 18 C.F.R. § 385.713 (2014), intervener Senator Verdell Jackson respectfully submits this Request for Rehearing of FERC Order 148 FERC ¶ 62,072, which approved the transfer of the Kerr Dam license (Project 5-094) from PPL, Montana to NorthWestern Corporation. The application for rehearing described herein sets forth the grounds upon which the application is based. A separate Statement of Issues is attached which describes each issue raised in this application for rehearing, citing representative Commission and court precedent upon which intervener Senator Jackson relies on.

On July 24, 2014, FERC issued an Order Approving Transfer of License for the Kerr Hydroelectric Project, FERC Project 5, from PPL, Montana to NorthWestern Corporation.¹ The order was issued despite FERC's reopening of the comment period on the license transfer and the granting of Intervener status on to both Senator Verdell Jackson and the Board of Commissioners for Lake County, wherein the "substantial, relevant issues raised" by both parties on the *transfer of the license* was deemed important enough to grant intervener status.² Senator Jackson's Motion to Intervene was signed by several legislators and county commissioners and represents the broad public interest in and concern about specific provisions of the *transfer of the FERC license* from PPL, Montana to NorthWestern.³ Additionally, the Order was issued while the Montana Public Service Commission was conducting hearings on and deliberating NorthWestern Corporation's planned acquisition of Kerr Dam, wherein the economic and managerial viability of NorthWestern's purchase and **the embedded transfer to the CSKT was in dispute.⁴**

¹ Order Approving Transfer of License, Issued July 24, 2014, 148 FERC § 62,072

² FERC Letter granting intervention status to Senator Verdell Jackson and the Lake County Board of Commissioners, June 2, 2014

³ Senator Jackson Motion to Intervene, May 3, 2014.

⁴ Montana Public Service Commission, Hearings on Northwestern Corporation's Purchase of Kerr Dam, July 8-18, 2014, Helena, Montana. In a manner similar to the instant FERC Order, NorthWestern Corporation openly disputed the ability of the Montana Public Service Commission to have any input in or place conditions on NorthWestern Energy's purchase by requiring a public examination of the embedded license transfer to the Confederated Salish and Kootenai Tribes.

State Senator Jackson's Motion to intervene, and subsequent comments in response to PPL, Montana's objection to Senator Jackson's motion, objected to the *transfer of the license* from PPL Montana to NorthWestern Corporation with the Tribal transfer provision included.⁵ Senator Jackson's Motion to Intervene cited clear and compelling information demonstrating that the issuance of the FERC license to NorthWestern Corporation would have the substantive and immediate effect of eliminating the public's right to review and state agency input on the embedded license transfer to the CSKT, and would result in the inability of the state regulatory agency, the Montana Public Service Commission, to regulate the largest hydropower facility in Montana that serves the Montana public. Further, Senator Jackson's Motion to Intervene and subsequent submissions provided evidence that:

- a) the CSKT are not yet able to and do not plan to meet the conditions of previous licensees regarding taxes, water management, flood control, state regulation, lake level management, power deliveries, and other factors;⁶
- b) the CSKT were never considered by FERC to be a full licensee for the Kerr Project because of their limited responsibility for only a few items of the FERC license;⁷
- c) the CSKT would not be subject to state laws or regulation by the Montana Public Service Commission;
- d) if the license is transferred to the CSKT as the Order requires, the CSKT will escape the required and ordinary scrutiny by FERC and the public required of all other licensees; and
- e) Neither NorthWestern Corporation nor FERC have the authority to transfer the Kerr Project license to the CSKT without Congressional oversight.



Paragraph 6 of FERC's July 24, 2014 Order incorrectly states that the comments of numerous parties and Senator Jackson's motion to intervene raised concerns *only* about the conveyance of the Kerr Project to the Tribes, not about the transfer of the license from PPL, Montana to NorthWestern Corporation, stating that this proceeding is limited to the license transfer from PPL Montana to NorthWestern Corporation. However, as repeatedly stated in Senator Jackson's Motion to intervene and in comments submitted thereafter, Senator Jackson raised concerns about the *transfer of the license* from PPL, Montana to NorthWestern Corporation because of the *contents of the license* that would allow the simple transfer of that license to the CSKT without FERC or public scrutiny.⁸



⁵ Motion to Intervene, Senator Verdell Jackson, May 2, 2014. At the time the motion to intervene was filed, the CSKT had submitted an objection to the proposed license transfer on the basis that the CSKT should be the primary licensee, not NorthWestern (see March 5, 2014 CSKT Objection). Paragraph (3) on page 1 of Senator Jackson's Motion to Intervene opposed both the Tribes' motion *and* the transfer of the license from PPL, Montana to NorthWestern.

⁶ Motion to Intervene, May 2, 2014; pages 4-6

⁷ *Ibid*, page 3, ¶ 3

⁸ The Order cites the 1985 Settlement and Approval of License Transfer (32 FERC ¶61,070 (1985) at 61,177; 61,181) as authority for the maintenance of the transfer of the license to the CSKT. However, while that deliberation was open to the public, the settlement agreement and issuance of the license was not open to the public nor approved by Congress, and did not consider the CSKT to be full licensees to the Kerr Project. FERC did not perform due diligence in understanding the implications of transferring a license of a public facility, paid for by ratepayers and serving public needs, to a tribal government that is not subject to state regulation and has self-serving, non-public goals.



Then FERC contradicts itself in Paragraph 8 of July 24, 2014 Order which *orders NorthWestern to transfer the Kerr Project license to the CSKT*, precisely the issue that was raised in Senator Jackson's Motion to Intervene and subsequent submittals. FERC cites the 1985 Kerr Project settlement and order issuing the license to Montana Power Company and the transfer of the license to PPL, Montana in 1999 as its only authority without acknowledging that the CSKT are not currently full licensees⁹, that they have never undergone the scrutiny of FERC as is required by all other licensees, and that in both instances FERC did not have the information or authority to transfer the license blindly to the CSKT.

These two paragraphs of the FERC Order of July 24, 2014 are contradictory, internally inconsistent, and have deprived Senator Jackson, the Montana public, the Montana Public Service Commission, ratepayers, FERC, and Congress the opportunity to condition the FERC license transfer to protect the public interest when the license is transferred by PPL, Montana to NorthWestern with the embedded and unexamined provision to transfer it to the CSKT.

Moreover, FERC's Order of July 24, 2014 means that unlike every other FERC licensee, the transfer of license from PPL to NorthWestern and subsequent transfer CSKT will result in the CSKT escaping any FERC scrutiny as to the final operations plans, ability to meet the obligations of the previous license, and capability to operate the facility safely. In addition, the CSKT will escape any Congressional scrutiny as is required by law and Commission regulations.¹⁰ The reliability of electricity supply, its cost, flood control, recreational interests, tax revenue, water rights deliveries, the combined operation of Hungry Horse reservoir and Kerr Dam, a multi-billion dollar regional energy infrastructure, employment discrimination, and upstream flooding are key issues that hang in the balance with the Order transferring the license to NorthWestern with the embedded, non-scrutinized provision to transfer the license to the CSKT.¹¹

New information uncovered by Senator Jackson that was not available to FERC before issuing the current order includes:

- a) The CSKT plans to issue, on its own, either a co-license or full license to a new Tribal corporation for the operation of Kerr Dam. The license from PPL, Montana to NorthWestern Corporation provides for the transfer of the license to the CSKT. However, the CSKT have planned, without notification to FERC, to further transfer to or share the license with a newly-formed Corporation,

⁹ ...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*). Response of PPL, Montana and NorthWestern Corporation to CSKT Objection to license transfer, March 20,2014

¹⁰ 16 U.S. Code § 797(b); 16 U.S. Code § 803(a)2(A-C)

¹¹ Motion to Intervene, Senator Verdell Jackson, May 2, 2013; Senator Verdell Jackson's Comments on FERC Order Transferring License (148 FERC ¶ 62,072), August 5, 2014

Energy Keepers Incorporated.¹² If the CSKT is not a full licensee in the current license no matter who holds it, the CSKT cannot transfer a full license or co-license to a new corporation that has not undergone FERC review.

- b) The CSKT's recently filed a federal lawsuit challenging the legal foundation, operations and obligations of the Kerr Project. The lawsuit challenges the authority of the Secretary of the Interior and the President to develop land, water, and power resources on the Flathead Indian Reservation, and if successful, will change the operation of Kerr Dam in contravention to the original 1930 license and Congressional authorization.¹³
- c) The CSKT have asserted ownership over all the water in Flathead Lake in a current controversial water rights settlement proposal, with the intent of using the water for purposes other than the original authorization of the Kerr Project by Congress. The planned sale or lease of water across state boundaries and the and plans for increased interstate power marketing requires Congressional review and federal agency oversight and is not even contemplated as worth of review in the current FERC license transfer from PPL, Montana, to Northwestern Corporation and then blindly to the CSKT or other entity.



This new information, and the information provided in Senator Jackson's intervention and subsequent submittals requires that FERC reconsider its Order of July 24, 2014, or in the alternative, rehear the license transfer issue. The FERC could have responded to interveners' legitimate concerns by conditioning the license to require the evaluation of the CSKT and its new corporation as the full licensee prior to the transfer of the license from PPL Montana to NorthWestern or required that review at the time that NorthWestern transfers the license to the CSKT, or it could have required the removal of the license transfer provision to the CSKT entirely until the CSKT actually purchases Kerr Dam.

Senator Jackson, the Montana public, the Montana Public Service Commission, ratepayers, FERC and Congress must have the opportunity to condition the FERC license transfer to protect the public interest when the license is transferred by PPL, Montana to NorthWestern with the provision to transfer it to the CSKT. We assert that FERC's Order of July 24, 2014 is not in the public interest as FERC never considered the public's interest as described in the comments on and intervention of Senator Jackson and others.

Moreover, FERC's Order of July 24, 2014 means that unlike every other FERC licensee, the transfer of license from PPL to NorthWestern and subsequent transfer CSKT will result in the CSKT escaping any FERC scrutiny as to the final operations plans, ability to meet the obligations of the previous license, and capability to operate the facility safely. In addition, the CSKT will escape any Congressional scrutiny as is required by law and Commission regulations.

¹² The first reference to Energy Keepers, Inc. is as an entity that was copied on the Tribes' Motion in Opposition to the Transfer of the License on March 5, 2015. Tribal Council deliberations as recorded in the Tribal Council Minutes of the CSKT Newspaper, the Charkoosta, convey the CSKT's plan to either transfer the license to Energy Keepers, Inc., lease, or co-license the Kerr Project with Energy Keepers, Inc. Absent FERC oversight and approval, the CSKT do not have the independent authority to co-license or transfer its license to another party.

¹³ *Flathead Power Development: Memorandum on the Development of Flathead River Power Sites, Montana*, Senate Report 153, 71st Congress 2d Session, 1930

CONCLUSION

For the reasons provided above and in the attached Statement of Issues, and in the absence of any re-evaluation of the FERC license transfer application with consideration of the concerns timely raised by interveners, Senator Jackson respectfully requests a rehearing on the FERC for Order of July 24, 2014 approving the transfer of the Kerr Project license from PPL, Montana to NorthWestern Corporation. Moreover, Senator Jackson requests that a rehearing on this matter be conducted in the County Seat of Lake or Flathead County at a neutral location to be determined by the Counties with the goal of achieving the opportunity to condition the FERC license transfer to protect the public interest and to allow for the same scrutiny of the CSKT as is required for all other licensees.

Respectfully Submitted:

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STATEMENT OF ISSUES

1. In accordance with Order No. 663-A¹⁴ and Rule 713(c)(1)¹⁵, Senator Jackson provides the following specifications of error in the FERC Order of July 24, 2014 (148 FERC ¶ 62,072) regarding the license transfer for the Kerr Project (P-005):
 - a. The July 24, 2014 FERC Order (148 FERC ¶ 62,072) misstates the purpose, intent, and focus of Senator Jackson’s Motion to Intervene and subsequent comments submitted in the license proceedings. The FERC order states that Senator Jackson “raised concerns about the conveyance of the Kerr Project to the Tribes, not about PPL Montana’s conveyance of the project to Northwestern (FERC Order of July 24, 2014 at ¶ 6, page 2).” On the contrary, Senator Jackson’s comments and Motion to Intervene instead focused on and opposed specific provisions of the transfer of the Kerr Project license from PPL, Montana to NorthWestern Corporation (Jackson Motion to Intervene, May 2, 2014, at ¶3, page 1), not the conveyance of the project to the Confederated Salish and Kootenai Tribes (CSKT)
 - b. Based on the misstatement of Senator Jackson’s Motion to Intervene described in (a), the July 24, 2014 FERC Order summarily and erroneously dismisses the very issues upon which FERC granted Senator Jackson intervenor status (Order granting Senator Jackson’s Motion to Intervene, June 2, 2014). FERC acted arbitrarily by dismissing intervenor’s concerns and capriciously by refusing to even consider evaluating the viability of the embedded transfer of the license to the CSKT without further FERC scrutiny.
 - c. The FERC Order of July 24, 2014 (148 FERC ¶ 62,072) fails to provide any further justification for its decision to ignore the issues raised by Senator Jackson and cites only its 1985 Order Approving Settlement and Issuing License to Montana Power Company (MPC) (32 FERC ¶ 61,070) which provides for the transfer of an *annual* license¹⁶ to the CSKT upon the latter’s purchase of Kerr Dam.¹⁷
 - d. In spite of specific issues raised by intervenor Jackson regarding certain provisions of the transfer of the license from PPL, Montana to NorthWestern, the FERC Order of July 24, 2014 then specifically includes the CSKT license transfer provision (148 FERC ¶ 62,072 at ¶ 8).
 - e. In granting this license transfer, FERC violated 16 U.S. Code § 803 (a) 2 (A-C), 3, which requires it to, among other things, solicit and include comments from state agencies within the state in which the project is located for proposed terms and conditions for the Commission’s consideration for inclusion in the license.

¹⁴ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 2006-2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,211 (2006).

¹⁵ 18 C.F.R. § 385.713(c)(1)

¹⁶ Although an annual license implies some kind of review, FERC doesn’t appear to care about and has not stated that it will conduct any review of the CSKT.

¹⁷ The 1985 license was “backdated” because it, and the transfer to the CSKT, was not finally approved until the early 1990’s after the completion of a drought plan and ramping rate study.

- f. The FERC erred by issuing its Order approving the license transfer from PPL, Montana to Northwestern Corporation before the Montana Public Service Commission had completed its deliberations on whether to approve the purchase of Kerr Dam from PPL, Montana by NorthWestern Corporation¹⁸
2. In accordance with 18 CFR § 385.713 3 (c) (3), Senator Jackson requests a rehearing of the FERC Order of July 24, 2014 (148 FERC ¶ 62,072) based on matters and information not available to the Commission or ignored by the Commission at the time of the issuance of this order.
- a. The license transfer from PPL, Montana to NorthWestern Corporation includes the order to NorthWestern to transfer the license to the CSKT. However, the CSKT has planned to subsequently transfer the license to or share it with a newly-formed corporation that is a wholly-owned subsidiary of the CSKT without notification to FERC.¹⁹ Since the CSKT will remain only co-licensees for the current project when the license is transferred from PPL, Montana to Northwestern, they have no independent authority to further transfer the sole license to another corporation without the written review and approval of FERC (16 U.S. Code §808 (a) (2) (A-D); (3)). Further, neither PPL, Montana nor NorthWestern Corporation can guarantee, through a simple transfer of license without review, that the CSKT or its subsidiary will be able to meet the requirements of all previous licensees (18 U.S. Code §801; 18 CFR 1 B (39)). Once the Tribe receives the license, neither the public nor state agencies have proper recourse other than litigation to challenge the operation of Kerr and related use of water resources by the Tribes.²⁰
- i. The Articles of Incorporation, bylaws and mission statement of the new Tribal corporation to whom the CSKT will transfer the license convey evidence that the Corporation will not be subject to any state regulation or taxes²¹ (16 USC § 802).
- b. The FERC Order of July 24, 2014 which includes the transfer provision to the CSKT will render the state regulatory agency, the Montana Public Service Commission, unable to regulate the Kerr Project as is required by the Federal Power Act (16 USC Chapter 12) and Commission regulations (16 U.S. Code §802, §803, §812, §813, §821).
- c. The CSKT are currently in litigation in federal court against the state of Montana judicial institutions, the Department of the Interior, three irrigation districts in a federal irrigation project, named individuals, and an unnamed number of John Does all of whom utilize the power and water resources provided by the Kerr Project. The federal lawsuit, if successful, will undermine the federal laws establishing the Kerr Project and will render its original purposes moot. Combined with the planned purchase of the Kerr Project by the CSKT and the transfer of the license without scrutiny by NorthWestern Corporation to the CSKT, a new FERC license will be required to accommodate vastly different purposes than the original and subsequent licensees (16 U.S. Code § 803, §816

¹⁸ 18 U.S. Code §796 (15); 18 U.S. Code §808 2 (A)-(D)

¹⁹ *Ibid* note 12

²⁰ By the time legal challenges are presented, considerable economic damage may have already occurred.

²¹ Articles of Incorporation, Energy Keepers, Inc. Article V

[related to rights vested before June 10, 1920], §821 [no state water rights or irrigation affected])

- d. A potentially improper relationship between the CSKT and NorthWestern Corporation provides background as to NorthWestern and PPL, Montana's interest in simply transferring the FERC license to the Tribe without FERC scrutiny (18 CFR Part 1b.5). In 2010, NorthWestern Corporation quit claim deeded two water rights on the Flathead River below Kerr—which have not been adjudicated yet—totaling 52 million acre feet, which is considerably more than the average annual flow of the Flathead River.²² Previously, the Tribes negotiated with Montana Power Company for the development of Buffalo Rapids No. 2 and No. 4 which would utilize these rights. A joint application with Montana Power Company was filed as Project No. 2509 with the Federal Energy Regulatory Commission (Federal Power Commission), but the Tribes requested delay in granting of a license for development until the Kerr Dam settlement was finalized by the FERC 1985 Order settlement and license issuance.²³ Such a business and quid-pro-quo relationship must be scrutinized by FERC before allowing the transfer of the Kerr Project license from PPL, Montana to NorthWestern with the provision to simply transfer the license to the CSKT.
- e. The CSKT's aggressive approach toward water resources as illustrated by its posture in a controversial federal reserved rights quantification, the filing of a federal lawsuit against the state of Montana judicial institutions and water users, and the purchase of Kerr Dam and its license without undergoing licensing scrutiny is nothing more than an attempt to circumvent the adjudication process, on-going water rights settlement discussions, and standard FERC scrutiny of the CSKT's operation of the largest hydropower facility in Montana. Without FERC's conditioning of the license transfer with the embedded transfer provision, the CSKT will have succeeded in achieving its objectives for the control of all water and land in western Montana.
- f. Based upon the terms of the original license for Kerr Dam²⁴, its development as an irrigation and power project, and its relationship with federal contracts established in 1948²⁵, evidence suggests that the CSKT as co-licensee with PPL, Montana and now NorthWestern Corporation may have been collectively violating the terms of the original license and federal law.²⁶



²² These are water rights 76L 94412 00 and 76L94413 00 in the Montana Department of Natural Resources and Conservation water rights data base.

²³ 92nd Congress 1st Session Senate Report 92-334 July 30, 1971, Authorizing Disposition and Distribution of Judgments for Claims of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, page 18.

²⁴ *Flathead Power Development: Memorandum on the Development of Flathead River Power Sites, Montana*, Senate Report 153, 71st Congress 2d Session, 1930.

²⁵ 1948 Repayment contract 45 Stats. L. 212-213

²⁶ Under the terms of the first FERC license (1930), the irrigation and power project were to be operated together. A low cost block of power was offered to the Flathead Irrigation Project in exchange for the use of its valuable water rights to generate power. Under the terms of the 1948 repayment agreement between the United States and said irrigation districts, the net power revenues from the Kerr facility were to be used to repay irrigation

3. **Based upon 18 CFR 385.713 (c) (2), Senator Jackson requests a rehearing on FERC Order of July 24, 2013 (148 FERC ¶ 62,072) inasmuch as neither FERC, PPL, Montana or NorthWestern Corporation can authorize a FERC license transfer that in turn blindly transfers the license to a Tribal government engaged in interstate commerce involving water and power without Congressional notification, approval and oversight (16 USC § 797(b); 16 USC §803 (a)2(A-C); Article I, Section 8, U.S. Constitution).**
 - a. The transfer of the PPL, Montana license to NorthWestern Corporation will be the first of its kind in the Nation. As such, the Order of July 24, 2014 authorizing the license transfer to NorthWestern will allow the CSKT to avoid the customary scrutiny required of every other licensee in the United States.²⁷

project construction costs and to operate and maintain the project in perpetuity. The Bureau of Indian Affairs improperly separated the power and irrigation functions of the Kerr facility and improperly contracted the power division to the CSKT. The CSKT have improperly spent the net power revenues for purposes other than congressionally designed while they have been a co-licensee of the Kerr Project. Neither Montana Power Company, PPL Montana, NorthWestern or FERC appear to be aware of these on-going federal obligations.

²⁷ Motion to Intervene, Senator Verdell Jackson, May 2, 2014; Response of Senator Verdell Jackson to PPL, Montana Objection to Motion to Intervene

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document and attachment upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Kalispell Montana, this 22nd day of August, 2014.

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