

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

**Confederated Salish and Kootenai Tribes)
Energy Keepers, Inc.)**

Project No. 5-098

**RESPONSE OF SENATORS JACKSON AND KEENAN TO
THE CONFEDERATED SALISH AND KOOTENAI TRIBES AND ENERGY KEEPERS INC.
ANSWER TO MOTIONS TO INTERVENE AND COMMENT**

On behalf of the thousands of constituents who are impacted by the operations of Kerr Dam, Senators Jackson and Keenan respectfully submit our response to the answer of the Confederated Salish and Kootenai Tribes (CSKT) and Energy Keepers, Inc. (EKI) urging the Commission to dismiss our Motion to Intervene in the partial license transfer proceedings involving the Kerr Project.¹ For the reasons described below, we urge the Federal Energy Regulatory Commission (Commission) to accept our Motion to Intervene.

I. Background

On April 15, 2015, the CSKT, subsidiary Energy Keepers, Inc. (EKI), and NorthWestern Energy applied for a partial transfer of the license and co-licensee status for the Kerr Project, P-5-098. The Application proposes to partially transfer the license to and add EKI as a co-licensee to the Kerr Project as of the effective date of conveyance of Kerr Dam from NorthWestern to the CSKT, scheduled for September 5, 2015. On April 28, 2015, the Commission noticed the opportunity for intervention, protest, and comment on the Kerr Project partial license transfer proceeding. Senators Jackson and Keenan moved to intervene and protest the partial license transfer pending further public and Commission examination. The submission by Senators Jackson and Keenan (Jackson/Keenan motion) was one of four that were timely submitted to the Commission.

On June 9, 2015, the CSKT/EKI submitted an Answer to the Motions to Intervene including the Jackson/Keenan motion. The CSKT/EKI incorrectly alleges that all of the motions are the same in that they all seek to challenge the conveyance of Kerr Dam to the CSKT. Based on that

¹ Answer of the Confederated Salish and Kootenai Tribes and Energy Keepers Inc. to Motions to Intervene and Comment, June 9, 2015, herein *CSKT/EKI Answer*

erroneous viewpoint, and in the form of a motion instead of an answer,² the CSKT/EKI dismiss all the concerns raised by interveners, including the Jackson/Keenan motion, and request that the Commission deny the motions to intervene.

For the reasons stated herein, Senators Jackson and Keenan respectfully request that the Commission instead grant our Motion to Intervene.

II. Jackson/Keenan Response to CSKT/EKI Allegations

The *CSKT/EKI Answer* makes several allegations regarding the Jackson/Keenan Motion to Intervene, each of which dismiss the legitimate public concerns and issues represented by the Senators which have not been addressed by the CSKT and EKI, a new company with no track record. Each of these allegations is disputed below.

- a. The Jackson/Keenan Motion is the same as all the other Motions to Intervene. The Senators respectfully disagree with the CSKT/EKI assertion that all the Motions to intervene are the same. On the contrary, the Motions submitted by the Flathead Joint Board of Control, the Montana Public Service Commission, and the Montana Land and Water Alliance all have distinct purposes and represent different constituencies. Combined, they actually represent only a fraction of the many who are interested in the outcome of this specific proceeding.
- b. The Jackson/Keenan Motion is Intended to Derail the Conveyance of Kerr Dam to the CSKT. The CSKT/EKI allegation that the Jackson/Keenan Motion is designed to stop the conveyance of the Kerr Project to the CSKT is nonsense and designed to distract from the true purpose of the motion. Statements throughout the Jackson/Keenan Motion demonstrate the complete lack of merit in this CSKT/EKI argument. Simply stated, the Senators don't care who owns the facility but it must be operated as the public has grown to expect it to be and that ability has not been satisfactorily demonstrated by the EKI.
- c. The Jackson/Keenan Motion is based on evaluating the status of the EKI as fit for the license because of its status as a federally-recognized Tribe. To assume that the Senators' Motion is based on matters of race rather than the professional operation of the largest hydropower facility in Montana does a disservice to this proceeding and is unacceptable. If the CSKT through the EKI—as federal entities—want the benefits and profits of owning Kerr Dam—a public facility serving public needs—then EKI can also accept the awesome responsibility of being

² Footnote 1 of the Flathead Joint Board of Control (FJBC) Answer to the CSKT/EKI June 24 Answer highlights the reason why the CSKT/EKI Answer to the Jackson/Keenan Motion could also be viewed as a motion to dismiss, rather than answer.

responsive and accountable to the public, not just its own shareholder. They can also submit themselves to thorough public and Commission evaluation as every other potential licensee does. The determination of “fitness” to be a licensee in 1985 is insufficient and unrelated to ensuring that EKI, a brand new entity supposedly separate from the CSKT, has or will meet the conditions of all previous licensees.

- d. Senator Jackson’s earlier Kerr Dam/FERC activities were ruled by FERC to be untimely, meritless, and designed to stop the conveyance of Kerr Dam to the CSKT. The CSKT/EKI response to the Jackson/Keenan Motion erroneously claims that Senator Jackson’s intervention will be just a repeat of an earlier intervention granted to Senator Jackson by the Commission. In that action, Senator Jackson’s comments and actions were timely filed and the Commission simply denied Senator Jackson’s motions based on the 1985 license with no determination or comment. To Senator Jackson’s disappointment, the Commission did not address the issues raised nor provide a reason why they didn’t. While the Tribes take a considerable amount of time to ridicule Senator Jackson in their Answer, they fail to acknowledge that they avoided any responses to the questions Senator Jackson identified in that proceeding.³ The Tribes’ reaction in that proceeding just confirms that the Senator had timely raised critical issues that required the CSKT to produce a lengthy, but ultimately irrelevant document to the Commission’s decision on Senator Jackson’s pleadings.
- e. Jackson/Keenan Motion is beyond the scope of the proceeding, reflects a complete lack of understanding of federal, state, and tribal laws and regulations. Based on their erroneous view of the Jackson/Keenan motion that it is challenging the conveyance of Kerr Dam, the CSKT/EKI incorrectly state that the Senators’ motion is outside the scope of the instant proceeding. On the contrary, the Senators’ motion is both timely and relevant to partial license transfer proceeding because it focuses on the operational, managerial, disclosure, and financial conditions of the previous license and EKI’s ability to meet those requirements. As to the familiarity with federal, state, and Tribal laws the Senators—whose service in the state legislature spans more than 30 years collectively-- reject this CSKT/EKI assertion unequivocally. They represent more than 20,000 citizens who will be directly affected by Kerr Dam operations. When the interaction between federal, state, and Tribal law causes problems or shortfalls for state citizens, these Senators are going to likely have to craft legislation to address the deleterious effects of the CSKT/EKI licensed operation

³ Answer of the Confederated Salish and Kootenai Tribes of the Flathead Reservation to the Rehearing Request, Project No. 5-098 (filed Sept. 12, 2014).

of Kerr Dam. It is only proper that the citizens of Montana understand these effects and can prepare for them. The only way to identify the concerns so they can be addressed is if the EKI/CSKT submits themselves to the same review as every other licensee in the United States.

The form of the CSKT/EKI answer to the Jackson/Keenan Motion is not helpful to the Commission's resolution of issues presented in our Motion as well as others submitted for this proceeding. The CSKT/EKI provide no new information that would allow anyone, let alone sitting and former state Senators, to trust the Tribes' word that "nothing will change" with the addition of EKI to the Kerr Project license, especially when their own application indicates an inability to meet previous license conditions, and that they may not honor other commitments, including water deliveries, power allocations, flood control, and lake level management.⁴

III. Summary

Senators Jackson and Keenan respectfully request the Commission to grant our Motion to Intervene. Our motion is based simply on 16 U.S.C. §801:

...any successor or assign of the rights of such licensee...shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee...

Our Motion is also triggered by the stated objectives of the CSKT/EKI Application to enable EKI to

"begin entering into power purchase agreements, generation interconnection agreements, and coordination agreements necessary to generate and sell electricity from the Kerr Project"⁵

The EKI wants to move forward before completing the first basic requirements. Our advice is to comply with the license conditions or condition the license to meet the conditions required of every other hydroelectric facility in the Nation, and commit to maintaining all previous agreements of previous licensees. If the CSKT/EKI is going to operate the dam the same as in the past, there is no reason not to put our assurances in the terms and conditions of the CSKT/EKI license.

⁴ The EKI mission statement and organizational documents, attached to the CSKT/EKI Application discern the other purposes of operating Kerr Dam that extend beyond and may conflict with the previous license conditions. Both the CSKT and EKI reject major components of state law which will place it in a position of operating the largest hydropower facility in Montana that serves primarily public interests without state or public oversight, accountability, or transparency as would be required of any other federal, state, or private entity, agency, or corporation.

⁵ CSKT/EKI Application at page 1

Because of the complexities and interaction of federal, state, and tribal laws and regulations regarding the operation and management of the Kerr Project, and the fact that the Kerr Project serves primarily public interests, we believe that state legislation may be required to address known shortfalls to the public demonstrated in the CSKT/EKI Application. Thus our participation in this proceeding will be helpful to the Commission in resolving the issues presented in this proceeding.

We believe the federal government has a duty to ensure that the public is not financially harmed by the operation of Kerr Dam.⁶ We also believe that the proceedings would benefit from additional agency involvement and Congressional review.

Respectfully submitted,

/s/Verdell Jackson

Senator Verdell Jackson

/s/ Bob Keenan

Senator Bob Keenan

July 15, 2015

⁶ For example, western Montana is extremely dependent on tourism which relies on lake level management, water deliveries to sustain the agricultural production which is integrated with the local economy, and the landscape which is also part of the tourism industry in western Montana.

CERTIFICATE OF SERVICE