IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BOB KEENAN, et al., *Plaintiffs*, v. NORMAN C. BAY, in his capacity as Chairman of the Federal Energy Regulatory Commission, et al., *Defendants.*	)	Civil Action No. 1:15-cv-01440

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, by their undersigned counsel, submit the following memorandum of points and authorities in support of their motion for a temporary restraining order and preliminary injunction.[1]

[1] Pursuant to LCvR 65.1(a), prior to filing this motion, Plaintiffs provided Defendants actual notice of the filing, including copies of all pleadings and papers.

INTRODUCTION

This is an action for an emergency temporary restraining order ("TRO") temporarily prohibiting the Federal Regulatory Commission ("FERC" or "Commission") from authorizing, approving and facilitating the scheduled September 5, 2015 conveyance of the Kerr Hydroelectric Project, Project No. 5 ("Kerr Project") to the Confederated Salish Kootenai Tribes of the Flathead Reservation ("CSKT" or "Tribes"), and the partial transfer of the current joint FERC license held by the CSKT and NorthWestern Energy Corporation ("NorthWestern") to the CSKT's recently formed federally chartered wholly-owned subsidiary corporation, Energy Keepers, Inc. ("EKI") (collectively, "the conveyance"). If allowed, the conveyance will violate FERC's obligations under the Federal Power Act ("FPA") and the Administrative Procedure Act ("APA") to ensure compliance with said laws and regulations regarding project acquisition, license transfer, license amendment, public reporting, and public notice and comment (transparency).[2]

. This action also seeks to temporarily prohibit the U.S. Department of the Interior ("DOI") and the DOI's Bureau of Indian Affairs ("BIA") and Fish & Wildlife Service ("FWS") from unduly interfering with and/or otherwise influencing or biasing FERC's decision-making regarding the conveyance, as such DOI interventions will compromise the interests of the tribal and nontribal irrigators, businesses, recreationalists and residents of the Flathead Indian Reservation and surrounding area in favor of the interests of the CSKT Tribal Government. Said

[2] In addition to seeking injunctive relief, Plaintiffs' Complaint seeks a declaratory judgment that the conditions under which NorthWestern lawfully could sell the Kerr Project and transfer its license have not been met, and that DOI intervention in, interference with or influence of FERC's decision-making regarding the conveyance had violated and will violate applicable federal rules.

DOI interventions would violate the federal rules and regulations described below and Plaintiffs' constitutional rights to equal protection under the law.

LEGAL STANDARD

This Court has long held that the same factors apply in evaluating requests for preliminary injunctions and TROs under Federal Rules of Civil Procedure 65(a) and (b). *Al-Fayed v. CIA*, 254 F.3d 300, 311, n. 2 (D.C. Cir. 2001), citing *Al-Fayed v. CIA*, No. 00-cv-2092 (D.D.C. Dec. 11, 2000) at 4, n. 2. This Court more recently held that, in order for a preliminary injunction to issue the plaintiff "must establish: [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *R. I. L-R, et al v. Johnson*, Case No. 1:2015cv00011 (D.C.D.C. 2015) at 6, citing *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374 (2008). While the movant "bear[s] the burdens of production and persuasion" (*Id.*, citing *Qualls v. Rumsfeld*, 357 F. Supp. 2d 274, 281 (D.D.C. 2005)), "he may rely on 'evidence that is less complete than in a trial on the merits'" (*Id*., citing *NRDC v. Pena*, 147 F.3d 1012, 1022-23 (D.C. Cir. 1998)), as long as "the evidence he offers [is] 'credible'" (*Id*., citing *Qualls* at 357 F. Supp. 2d at 281). In effect, this Circuit has determined that such a standard requires a plaintiff "to independently demonstrate both a likelihood of success on the merits and irreparable harm" (*Id*., citing *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009)).

Plaintiffs can satisfy each of these four factors as discussed below.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits

1. *The BIA's Impending Appropriation of the Kerr Dam/Reservoir*

The case at bar is a prime example of ongoing abuse of process and arbitrary and capricious behavior committed by self-adulating federal agency officials at the expense of an unsophisticated and unsuspecting public audience with limited financial means and legal representation, for the sole reason that these officials believed that they could, and still believe that they can, continue to get away with such behavior without public detection and with impunity.

For approximately 30 years, Plaintiffs have endeavored, without success, to secure information from FERC concerning its legal and factual bases for approving in 1985 a litigation-induced license and settlement agreement reached between the Montana Power Company ("MPC"), the CSKT, the Flathead, Mission and Jocko Valley Irrigation Districts of the Flathead Irrigation Project ("the FIP"), the Montana Consumer Counsel, and the DOI ("the 1985 Agreement"). The 50-year term 1985 Agreement *inter alia* afforded the Tribes, as a joint licensee with MPC, the exclusive and unilateral option of acquiring outright the subject matter of the license – i.e., the Kerr Dam/Reservoir ("Kerr Project" or "Kerr Project No. 5") – between the 29th and 30th years of the license. The CSKT needed only to notify each of these parties of their decision to exercise this option, at least one year prior to the Tribes' selected acquisition/conveyance date, and to remit the full amount of the conveyance price on that date. In 2014, the Tribes formally exercised their option, provided timely notification of it to the proper parties, and selected their desired conveyance date of September 5, 2015. The FERC acknowledged and accepted these CSKT actions and conveyance date selection subject only to the Tribes' actual ability to remit full payment of the conveyance price in exchange for receiving on that date the relevant instruments of conveyance held by current joint licensee NorthWestern Corporation d/b/a NorthWestern Energy. The FERC has never undertaken any due diligence at

all, as is required in the case of a proposed sale/acquisition of an existing or new hydroelectric facility that is subject to FERC licensure.

The Kerr Project is partly situated on CSKT religious and spiritual reservation lands the U.S. government holds in trust for the benefit of the Tribes, and partly on federal reserve lands. It was constructed during the 1930s for the primary purpose of serving the agricultural needs of individual tribal and nontribal irrigators holding fee patented land (allotments) on the Flathead Indian Reservation located in northwestern Montana. These allotments had been originally purchased with free and clean title from either the U.S. government and/or prior fee patented allotment owners in detrimental reliance upon the federal government's continued western U.S. settlement, homestead and mining concession policies of the late nineteenth and early twentieth centuries. The ownership of these farm and ranch lands has remained in family hands for multiple generations to this day.

The Tribes' scheduled September 5, 2015 acquisition of the Kerr Project, however, is only part of the story. The Flathead Indian Reservation irrigation community receives its water partly from the Kerr Dam/Reservoir which the Tribes will soon control, manage and own outright, and partly from the spring runoff of waters from the mountains to the north, east and west of the reservation that is stored in reservoirs located throughout the reservation and released as determined via the dams adjacent to them. These 11 dams and reservoirs are each owned by the CSKT, and they are operated according to CSKT spiritual and cultural standards at the expense of reservation nontribal irrigators. In addition, the FIB manages and controls the intricate series of irrigation and lateral canals constructed by the U.S. Army Corps of Engineers between the 1950s and 1960s to pump and divert/direct the mountain water runoffs throughout each region of the reservation to the irrigable lands on the reservations. The FIB also manages

and controls the irrigation and lateral canals that pump/divert waters from the Flathead River that are released from the Kerr Dam/Reservoir which stores and maintains the waters of the Flathead Lake. The FIB has, for most of its existence, been operated by the Department of Interior's Bureau of Indian Affairs. The BIA is among the least publicly accountable of the federal agencies and has, without failure, long deferred to the cultural, spiritual and religious rights of the Tribes concerning the management and release of waters from all of the reservation dams and reservoirs the Tribes own and control throughout the reservation, except for the Kerr Project.

A recently unearthed 1973 memorandum from the Nixon administration's BIA (Ex. A) provides a much needed explanation for the BIA's lack of public accountability to-date, especially to persons who are not members of "federally recognized tribal entities." According to this memorandum's author, the source of this unaccountability is attributable to the BIA's and federal courts' interpretation of § 472 of the Indian Reorganization Act of 1934 (25 U.S.C. § 472), the purpose of which was to "give the right of self-government back to the Indian tribes." In reaching this conclusion, the memorandum's author looked first to the decision of the 10th Circuit Court of Appeals in the case of *Mescalaro Apache Tribe v. Hickel,* 432 F. 2d 956 (10th Cir. 1970):

> "Our examination of the legislative history relevant to the passage of § 472 supports appellants' contention that it was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian. Specific concern was directed to reforming the B.I.A., which exercise vast power over Indian lives but was staffed largely by non-Indians. Through the preference given to Indians by § 472, it was hoped that the B.I.A. would gradually become an Indian service predominantly in the hands of educated and competent Indians." *Id.*, at 960.

The memorandum's author next looked to this Court's decision in *Freeman v. Morton*, Civil Action No. 321-71 (D.C. D.C., Dec. 21, 1972):

> "The legislative history of the Indian Reorganization Act of 1934 reveals that the Congressional intent was that the B.I.A. become an agency staffed with Indians performing services for Indians. While the 'present employees' of the agency were not to be dismissed from their jobs because of the preference, it goes without saying that a choice was made between their future prospects and the Congressional purpose that the B.I.A. became an 'Indian' agency in the sense that it was to be staffed by Indians wherever possible." *Id*. at 6 (slip opinion).

Should this Court allow the scheduled conveyance of the Kerr Project to the CSKT to proceed as scheduled, without FERC having undertaken the vigilant due diligence review the statute and regulations require, the Tribes will assume full ownership, management and control of ALL of the waters flowing to, through and from the Flathead Indian Reservation, and the BIA will control all of the irrigation and lateral canals on the Reservation through which such waters may be diverted to thereby deny Plaintiffs access to such waters for irrigation purposes. Plaintiffs already have been irreparably injured by the Tribes' and the BIA's manipulation of reservoir levels, and river and canal diversion flows, and would be further harmed by this Court's failure to grant this TRO motion.

2. *FERC's Failure to Ensure Licensee Satisfaction of Federal Power Act Sale/Acquisition, License Transfer and Due Process Rules*

For nearly thirty years, the FERC has refused, at each and every occasion, to truthfully respond, if at all, to the multiple requests for interventions, and the convening of public hearings, conferences and/or meetings at convenient Montana locations that Plaintiffs and other similarly situated public stakeholders (i.e., the farmers, ranchers and small businesses) operating or residing on or appurtenant to the Flathead Indian Reservation have repeatedly lodged. The

FERC's standard response to these requests has been that the Tribes' right to acquire the Kerr Project had been decided in Washington in 1985 and that decision is not open to question. Indeed, in its recent October 29, 2014 response to Plaintiffs Jackson's September 2014 Motion for Clarification of the FERC's refusal to grant a rehearing on its denial of his prior request for information on this issue, the FERC responded as follows: "In the 1985 order, the Commission determined that the license issued - which included the provisions allowing for conveyance to the Tribes of Montana Power's interest in the project, *without further review* - was best adapted to a comprehensive plan for improving or developing the waters in question. No entity sought rehearing or judicial review of that order, which is now final." The FERC, however, neglected to mention that its prior Finding #3 on page 8 of the 1985 Agreement stated that *it had then granted only 3 requests to intervene*.

It is fundamental tenet of administrative procedure law that a federal agency's refusal to grant an opportunity for a public hearing to review federal agency actions on important matters that substantially affect public stakeholders constitutes a denial of their basic right to due process of law. In the present case, each time the FERC has refused to convene public hearings to reexamine its decision thirty years ago to grant the Tribes the exclusive and unilateral right to acquire the Kerr Project without the slightest bit of agency scrutiny, the FERC has denied Plaintiffs' due process rights accorded to them by the applicable FPA statutory provisions and corresponding FERC regulations and by the provisions of and applicable regulations implementing the APA. .

Furthermore, it is a fundamental tenet of administrative procedure law that federal agencies must comply with their own rules and regulations and demonstrate that any departure therefrom does not rise to the level of arbitrary and capricious conduct. By refusing to grant

Plaintiffs an opportunity for a public hearing to discuss this most important of public policy issues, the FERC also has violated particular obligations contained within the FPA and corresponding FERC regulations which require the agency to carefully consider the proposed sale/acquisition of a hydroelectric generating facility that is under current or proposed FERC licensure. Pursuant to these rules, the FERC must carefully and diligently review the project seller's information to determine whether the seller has satisfied all necessary statutory requirements before it can be authorized to convey the project. In addition, the FERC must carefully and diligently scrutinize the acquirer's information to determine whether it is financially and technically able to operate, manage and control the facility to be acquired and to fulfill all of the terms and conditions of accompanying FERC license to be transferred at the time of the project's conveyance by the seller. Based on its satisfactory determination that the acquirer has satisfied these preconditions, the FERC must then determine whether the proposed sale/acquisition of the hydroelectric generating facility is "in the public interest." The FERC, however, has not met its burden to undertake this evaluation and, thus, has utterly failed to meet such regulatory standard.

The FERC, unfortunately, has refused, since 1985, to conduct any meaningful due diligence that could/would lead reasonable and cognizant persons to conclude that the CSKT, in 2015, has the requisite financial, technical and other means and ability to competently and safely operate, manage and control the Kerr Project for and in the public interest. The FERC has effectively circumvented these rules by positively responding to a recent request filed with the FERC by the CSKT's counsel of record to have the CSKT and EKI, its federally chartered subsidiary corporation, treated as an "exempt public utility" and an "exempt holding company" under FPA Sec. 201(f) for purposes of the FPA and the Public Holding Company Act of 2005.

This designation not only affords the Tribes and their subsidiary exemptions from important books and records public reporting and accountability requirements under these statutes and their corresponding regulations, but also exempts these "federally recognized tribal entities" from the crucially important and legally indispensable hydroelectric generating facility ("project") sale/acquisition rules which FERC, relying solely upon the terms of the 1985 Agreement, had previously refused to enforce upon the Tribes. In other words, the Tribes' attorneys have figured out a new way to circumvent very clearly written FPA and FERC regulatory rules to deny Plaintiffs the due process they deserve and which is necessary to determine whether the scheduled September 15, 2015 conveyance of the Kerr Project to be approved by the FERC is for and in the public interest as the statute and applicable regulations otherwise require. Given Defendant FERC's failure to follow the dictates of its own rulebook, the FERC would be hard pressed to argue that all of the prerequisites of the sale/acquisition rules have been satisfied. Therefore, this Court should preclude Defendant NorthWestern from transferring its instruments of conveyance to the Tribes unless and until the FERC can ensure, as it is required to do by law, that the CSKT has satisfied its statutory and regulatory burden.

3. *FERC's, DOI's, BIA's, FWS's Failure to Exercise and/or Unlawful Exercise of Discretion in Developing and Adopting Substantial Amendments to the 1985 Agreement*

Moreover, the Tribes' ability to violate Plaintiffs' substantive and procedural rights with virtual impunity during the past thirty years has been facilitated by the coordinated misrepresentations and deceptions the FERC, the DOI, the BIA and the FWS have perpetrated largely at Plaintiffs' and the public's expense for the purpose of substantially transforming the purpose, terms and conditions of the 1985 Agreement. These changes—mostly fish, wildlife and environmental conditions imposed on the operation of the Kerr Project license—were

developed exclusively by the DOI, BIA and FWS and approved in rubberstamp fashion via the issuance of FERC orders as formal amendments to the 1985 Agreement. The public believed, based on FERC misrepresentations, that the FERC was the "official" agency of record for purposes of public recourse. And, the DOI, BIA and FWS actively engaged in their own form of misrepresentation and deception having remained silent and failing to publicly disclose their integral and indispensable role in these activities. Since these agencies had acted alone and together to achieve their mutual objective of imposing environmental preservation by promoting tribal self-governance, self-determination and regulatory sovereignty, they should be held individually and jointly responsible and publicly accountable for any and all statutory and regulatory violations they have committed to achieve it. The facts reveal that it was actually the DOI, BIA and FWS that drove all of the substantial changes which had transformed the original nature and purpose of the license during the past 30 years, consistent with the Tribes' cultural and religious fish, wildlife and environmental rights. Originally, the purpose of the Flathead Reservation was agriculture (farming and ranching), and this had been reflected in the terms and conditions of the 1985 Agreement, which primarily focused on ensuring free and unfettered interstate and foreign commerce, including agriculture, on U.S. navigable waters, the generation of hydroelectric power, and on facilitating other activities including recreation. However, by the time the DOI, BIA and FWS had finished deceiving the Montana public, the purpose and terms of the 1985 Agreement had been radically transformed in service to fish, wildlife and environmental concerns that were consistent with, and in furtherance of, the CSKT's well known cultural, religious/spiritual fish, wildlife and environmental rights.

Unfortunately for Plaintiffs and all similarly situated Montana public stakeholders, the DOI, BIA and FWS had developed and ensured the FERC's adoption of the amendments they

had made to the 1985 Agreement in 1997, 1998 and 2000, and again, in 2010 through the imposition of a long-gestating drought management plan they conceived that largely serves as the basis for Flathead Indian Reservation irrigators' economic suffering today. During this period, the DOI, BIA and FWS had added more than 25 new articles to the 1985 Agreement, which they also subsequently amended, many of which had imposed quite costly and complex obligations on the then current Kerr Project licensees MPA and PPL Montana, to ensure that their Kerr Project operations did not harm fish, wildlife or the environment. Although many such requirements had rendered the operation of Kerr Dam uneconomical, the FERC, nevertheless, approved them, stating that it lacked the administrative discretion to decide otherwise. From 2014 to the present, Defendant NorthWestern, which had acquired the Kerr Dam temporarily as part of a well-choreographed 11-dam acquisition from PPL Montana, had become subject to such conditions as well.

The DOI, BIA and FWS amendments to the 1985 Agreement were developed without public notice, input or an opportunity to be heard, in violation of applicable DOI and APA rules and regulations, and consequently constituted arbitrary and capricious agency behavior that is not entitled to judicial deference. The FERC's failure to apprise the Montana public about its mostly ministerial role in these endeavors is an abject lesson in failure to exercise administrative discretion, which also constitutes arbitrary and capricious agency behavior undeserving of judicial deference. It is both reprehensible and inexcusable that each of these federal agencies had continued to perpetrate and maintain this grand public deception at Montanans' expense over a period of more than twenty years. Yet, such behavior is now more egregious than it has ever been, given how these amendments have facilitated the Tribes' incremental assumption of control over most, and soon to be all, of the waters flowing to, through and from the Flathead

Reservation largely at Plaintiff's expense. This Court should intervene and immediately grant this TRO motion to temporarily suspend the CSKT's scheduled but unexamined September 5, 2015 takeover of the Kerr Project and license. Otherwise, it would essentially sanction these agencies' revision of a public contract that vanquishes the rights of its third-party beneficiaries – i.e., Plaintiffs and other similarly situated members of the Montana public – as a matter of broad federal policy. Plaintiffs have been irreparably harmed by Defendants' extreme misconduct, and depend upon this Court's sense of fairness, equity and justice to ensure that its rights and the rights of other similarly situated stakeholders/third-party beneficiaries living and working on or near the Flathead Indian Reservation and other Native American reservations around the country in detrimental reliance upon Washington's century-old policies are adequately protected.

4. *DOI-, BIA-, and FWS-Developed and FERC-Approved Fish, Wildlife & Environmental Amendments to the 1985 Agreement Were Racially Discriminatory and Unconstitutional*

Finally, the DOI, BIA and FWS amendments to the 1985 Agreement, as approved in rubberstamp fashion by the FERC, actually reflect a 40-year old 'enlightened' federal Indian policy that explicitly favors (pits) the interests of one designated race or bloodline at the expense of (against) the interests of another (i.e., Indians vs. non-Indians), without even the batting of an eyelash as to its racially discriminatory effects. At one level, these agencies had failed to exercise neutrality and objectivity before the public in developing and rendering final agency actions on fish, wildlife and environmental conditions favoring the preferences of the CSKT at Plaintiff's expense that they then directed the FERC to approve as essential reforms to the 1985 Agreement, no matter whether they contravened fundamental regulatory and due process standards. At another more insidious level, however, these agencies had craftily implemented otherwise facially neutral statutes such as the Endangered Species Act and Clean Water Act in a

manner that intentionally treated the cultural, religious and spiritual values and interests of one designated class or race of peoples more favorably than the cultural, religious and spiritual values and interests of another, in violation of the Fifth Amendment to the United States Constitution.

The Climate Change Strategy the CSKT adopted in 2013 reveals the special *cultural, spiritual and religious* meaning that fish, wildlife and the environment hold for the Tribes:

> "Our lands and resources are the basis of *our spiritual life*. That's been our way since time began. By preparing for further environmental changes, we can mitigate threats to our way of life. *Our traditions rely on abundant populations of native fish and wildlife, healthy plant communities, clean air, water, undisturbed spiritual sites, prehistoric and historic campsites, dwellings, burial grounds, and other cultural sites because these areas reaffirm the presence of our ancestors*. These resources also provide our future leaders with a connection to their ancestors and native traditions. *Our cultural committees* remind us that many of these foods, medicinal and *cultural resources* are non-renewable. Our survival is woven together with the land. This plan is the foundation that will support new strategic efforts to *preserve and protect the local environment*. These recent efforts are a continuation of the work our elders have done for years in observing and considering climate change on our lands. As is our practice, we look ahead to prepare for coming challenges and apply the *values taught by our ancestors*. This is how we've always survived, and how we will continue to thrive as a people" (emphasis added).[3]

These values and interests stand in stark contrast to the CSKT's more pedestrian political rights and interests as a "federally recognized tribal entity" which entitle the Tribes merely to secure direct federal government funding and subsidies to qualify for participation in a never ending expansion of federal government fish, wildlife and environmental programs.

The DOI, BIA and FWS would have this Court believe that their development of fish, wildlife and environmental conditions that the FERC approved as amendments to the 1985

[3] *See* Joe Durglo, *Tribal Chairman's Proclamation*, in Confederated Salish and Kootenai Tribes of the Flathead Reservation, "Climate Change Strategic Plan" (Sept. 2013), at 4, available at: http://www.cskt.org/CSKTClimatePlan.pdf.

Agreement in implementation of the Endangered Species Act, the Clean Water Act and other federal statutes furthering the CSKT's *cultural, religious and spiritual* rights and interests was consistent with a federal Indian policy that sanctions a "benign" type of justified racial discrimination that is worthy of only rational basis judicial review. In other words, it was effectively the position of these agencies, years ago, that not all racial classifications were unconstitutional, (*See* Nixon BIA Memorandum at Sec. III, p. 12), and that laws intended to be racially discriminatory and implementations of otherwise racially neutral laws in favor of tribal *political* rights derived from Congress' exercise of its war and treaty powers in dealing with Indian tribes need not be subject to either strict or intermediary constitutional scrutiny.

> "At the outset it must be recognized that all statutes dealing with Indians are necessarily based on a racial classification. *But not all racial classifications are unconstitutional*. *See* Contractors Ass'n. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971); cf. Katzenbach v. Morgan, 384 U.S. 641 (1966); see generally Note, Developments in the Law – Equal Protection, 82 Harv. L. Rev. 1065, 1109-20 (1969). In the case of the Indian Preference Statutes Congress has expressed the purpose of eventually having Indians take over operation of the Bureau of Indian Affairs" (emphasis added). *Id*., at 12.
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> "[…] In a case that should be determinative of this issue the United States Supreme Court affirmed per curiam a three judge court decision upholding a restriction on alienation of tribal property based solely on a racial criteria (percentage of Indian blood). Simmons v. Eagle Seelatsee, 384 U.S. 209 (1966) affirming per curiam 244 F. Supp. 808 (E.D. Wash. 1965). The three judge lower court catalogued various instances in which *Congress had dealt with Indians on a racial basis, granting or taking away benefits on a percentage of Indian blood, and concluded that there was a* ***rational basis*** *for such classification*. Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 809 (E.D. Wash. 1965) (emphasis added).
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> […] *Benign racial classifications are not given the strict review normally required of 'suspect' racial classifications*. In this instance the Indian Preference Statutes are intended to benefit a 'dependent people' whose very existence is controlled by the BIA. Clearly the Congressional purpose of eventual self-sufficiency and self-government was not an arbitrary or capricious one:
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> > '*In the exercise of the war and treaty powers*, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people,

> needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as Independent, qualified members of the modern body politic." Board of Commissioners v. Seber, 318 U.S. 705, 715 (1942).'" *Id*., at 13.

Arguably, this exploitative positivist interpretation of prior jurisprudence has culminated today in the federal government Indian policy that the *political* designation of Native American tribes as "federally recognized tribal entities" provides them the same result. In other words, it enables federal agencies to interpret otherwise racially neutral fish, wildlife and environmental statutes in a racially discriminatory manner in furtherance of tribal cultural, religious and spiritual rights, with the assurance that such legal implementations will be subject only to the barest level of constitutional scrutiny – i.e., the rational basis review. This is precisely the position that the DOI, BIA and FWS have taken with respect to the 1997, 1998 and 2000 amendments to the 1985 Agreement in the present case.

Plaintiffs submit, however, that this is not a proper interpretation in light of more recent jurisprudence. In *Morton v. Mancari*, 417 U.S. 535 (1974), the U.S. Supreme Court held that a BIA employment policy hiring preference in favor of Indians, "as applied, [w]as granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." 417 U.S. at 554. As at least one commentator has explained, the Court had interpreted the BIA's employment policy as not constitutionally discriminatory on the basis of race, but rather upon membership in federally recognized tribes. […] The Court reframed the issue to emphasize that the question was not about race discrimination but about the right of American Indian tribes to *political* sovereignty"

(emphasis added).[4] According to said commentator, the Court's focus on the blood quantum requirements that tribal entities had imposed on individuals to secure tribal membership, and consequently, that the federal government, in turn, had imposed on tribes before designating them as a federally recognized tribal entity, "*[t]ransform[ed] the issue away from race*."[5] Thus,

> "[t]he blood quantum policy only triggered rational basis review, a less exacting standard than the strict scrutiny review normally applied in questions of equal protection. Under this less exacting standard, the Court concluded that the special treatment was rationally tied to the fulfillment of Congress' unique obligation to ensuring that American Indian tribes attain "greater control over their own destinies."[6]

In *Rice v. Cayetano*, 528 U.S. 495 (2000), the U.S. Supreme Court focused on the political nature of the "federally recognized tribal entity" designation in contrasting the level of constitutional review required of an Hawaiian state constitutional provision "that limited the right to vote for the trustees of the Office of Hawaiian Affairs (OHA) to native Hawaiians."[7] It chided the state for the law's "obvious restriction of the right to vote on ancestry lines," which "demeaned the dignity and worth of a person by passing a judgment based on ancestral ties."[8] Having concluded that "ancestry was being *used as a proxy* for race" (emphasis added), the Court struck down the race-based voting rule as unconstitutional.[9] Most significantly, the Supreme Court justified its distinct treatment of the Hawaiian law in juxtaposition to the BIA employment policy in *Mancari* by emphasizing how the "federally recognized tribal entity"

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[4] *See* Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 Cal. L. Rev. 801 (2008) at 811, available at: http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1179&context=californialawreview.
[5] *Id.*
[6] *Id.*, at 811-812, citing *Mancari*, 417 U.S. at 553.
[7] *Id.*, at 803.
[8] *Id.*, at 813, citing *Rice*, 528 U.S. at 514, 517.
[9] *Id.*

designation had magically transformed what was clearly a racial preference into a political preference:

"The Court emphasized that the blood quantum preference in *Mancari* dealt only with members of federally recognized tribes and thus the preference was *political* rather than racial.[fn] By contrast, the blood quantum rule in *Rice*, which did not deal with a federally recognized tribe, lacked a political purpose and thus, constituted an impermissible racial classification."[10] In other words, the provision in *Rice* had not been based on the interests of the Hawaiian community as a *political* organization, but rather upon a particular value (i.e., "ancestry") held by the tribe's individual members.[11]

Similarly, the present case involved DOI, BIA and FWS imposition of agency-developed fish, wildlife and environmental conditions in implementation of otherwise racially neutral federal statutes (e.g., the Endangered Species Act, the Clean Water Act, etc.) that FERC had been directed to adopt as substantive amendments to the 1985 Agreement. These conditions had the effect of racially discriminating against all members of the public (including irrigators, businesspersons, recreationalists and residents living on or appurtenant to the Reservation) who were not members of and did not hold values similar to the members of the Tribes. DOI's development and FERC's adoption of these conditions which were implemented and enforced as new Kerr Project license articles had been intended to favor and protect the CSKT members' *cultural, religious and spiritual* rights, values and interests notwithstanding their harsh effects on non-tribal members of the Flathead Reservation's irrigator, business and recreational communities. Plaintiffs have been irreparably harmed as the result of these racially offensive and discriminatory preferences. Therefore, consistent with the Supreme Court's analyses in

[10] *Id*., at 814, citing 528 U.S. at 520.
[11]

Mancari and *Rice*, this Court should conclude that such racial preferences were and remain other than "benign" in intent and objective, and, consequently, that their constitutionality under the Fifth Amendment should be reviewed pursuant to the strict scrutiny or intermediate scrutiny tests which require a balancing of interests, rather than pursuant to the rational basis test which does not.

In sum, Plaintiffs have established that they are likely to succeed on the merits.

II. Plaintiffs are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

As the result of Defendants' regulatory, due process and constitutional violations as outlined above and in the accompanying complaint, Plaintiffs have already suffered irreparable injuries in the form of economic losses caused by the Tribes' severe restrictions of water flows and lake levels that have destroyed large portions of crops and grazing lands held by Plaintiffs and other similarly situated persons. These losses have occurred because the CSKT already owns 11 of the 12 dams and reservoirs located on the Flathead Indian Reservation and the BIA's local office which is operated mostly by regional Native Americans recently resumed management and control over the Flathead Irrigation Project ("FIP"). The FIP determines when and if mountain run-off waters are stored in CSKT-owned dams and adjacent reservoirs, released to the complex matrix of irrigation and lateral canals that serve the reservations' agricultural and ranching communities, or is permitted to run through to reservation streams and creeks in service to the fish, wildlife and environment, consistent with the CSKT's cultural, religious and spiritual values, rights and interests. The Tribes have managed these units of infrastructure pursuant to their own interests rather than the public interest, and contrary to the original purpose of the Flathead Indian Reservation. Should this Court also permit FERC to authorize the conveyance of the Kerr Project by NorthWestern to the CSKT on September 5, 2015, Plaintiffs will suffer

even greater economic harm and emotional distress considering that the Tribes would own, manage and control the last major piece, and consequently, ALL of the water infrastructure on the reservation – Kerr Dam/Reservoir. This would enable the CSKT to limit, as well, Flathead Lake water levels and Flathead River flows to other of the reservation's FIP-managed irrigation and lateral canals.

Furthermore, in their complaint, Plaintiffs have provided this Court newly synergized information not previously disclosed that identifies the potential for serious economic harm and safety risks befalling Plaintiffs and other stakeholders conducting business or residing on or near the Flathead Indian Reservation, and these have now risen to the level of a potential national security threat.

This possible threat arises, in part, because of the extensive outreach efforts undertaken by the Turkish Government ministries and U.S.-based Turkish nonprofit organizations and enterprises with respect to Native American tribes between 2008 and 2015. During that period, representatives from various U.S.-based Turkish American organizations and the Islamic Government of the Republic of Turkey have made considerable efforts to establish business and cultural exchange relationships with Native American tribes and their members, including students. These organizations have included the Washington, D.C.-based Turkish Coalition of America ("TCA"), Turkish Cultural Foundation ("TCF"), Turkik American Alliance ("TAA") and Turkish Heritage Organization ("THO"), and the Irvine, California-based West America Turkic Council. During this period, the Turkish Government agencies involved have included the Ankara, Turkey-based Ministries of Industry and Trade, Economic Affairs, Foreign Affairs, Environment and Urban Planning (formerly Public Works and Housing) and the Turkish International Cooperation and Coordination Agency ("TIKA").

These organizations and ministries have convened, attended or subsidized a number of important Native American events in the United States, including the annual Reservation Economic Summit ("RES") event hosted by the National Center for American Indian Development ("NAID"). For example, in March 2011 the "government of Turkey became the first foreign nation to ever send an official delegation to the RES - the premier Native American economic and business development conference." These Turkish organizations and ministries also have hosted all-expenses-paid trips, conferences and events that have taken place in the Islamic Republic of Turkey. During 2009, 2010 and 2011, for example, Native American delegates had met with government ministry officials, technical university professors and religious and cultural organization representatives to engage in cultural exchanges, and to discuss how to invest in and do business with Native American tribes and assist those communities' development needs while further strengthening economic ties between Turkey and the United States. (41).

Between 2009 and 2011, these U.S. and Turkey-based organizations and ministries had also apparently been lobbying members of the U.S. Congress regarding their ambitious agenda for creating economic development and trade opportunities between Turkey and members of the Native American community.

Such threat also arises, in part, from Congress' enactment of new reservation leasing rules extensively lobbied by the Republic of Turkey during 2009-2012. The HEARTH Act of 2012 now enables the CSKT and other "federally recognized tribal entities" to lease reservation lands to domestic or foreign third parties largely without inviting DOI scrutiny of the leases or the leasing activities engaged in. It also arises as the result of the specific Native American tribes and reservations with which the Turkish Government would prefer to begin business

relationships, including the CSKT and the Flathead Indian Reservation. Furthermore, it arises because of Middle Eastern and U.S. media reports since 2012 that have confirmed the Islamic Government of Turkey's ongoing affiliation with, sheltering of and support for terrorist organizations such as the Muslim Brotherhood and other similar groups. (Complaint, Ex. 44).

During June 2009 and January 2010, the Turkish Coalition of America ("TAC") had taken two different Turkish delegations on trips to the United States to visit, respectively, the Pine Ridge Indian Reservation of the Oglala Sioux Tribe of South Dakota and the reservations of the Hopi Tribe and the Navajo Nation of Arizona. During November 2010, TAC had sponsored an all-expenses-paid 8-day trip to Turkey attended by "federally recognized" tribes from 11 states, including: 1) the Bay Mills Indian Community of Michigan; 2) the Stockbridge-Munsee Band of Mohican Indians of Wisconsin; 3) the Navajo Nation of Arizona and New Mexico; 4) the Couer d'Alene Tribe of Idaho; 5) the Tunica-Biloxi Tribe of Louisiana; 6) the Seneca Nation of New York; 7) the Rosebud Sioux and Sicangu Oyate of South Dakota; 8) the Assiniboine-Sioux, Crow and Salish and Kootenai (CSKT) tribes of Montana; 9) the Cherokee, Cheyenne, Arapaho, Fort Sill Apache, Osage and Quapaw nations of Oklahoma; and 10) the Colville Reservation tribes and the Yakama Nation of Washington. The three Montana tribes that participated in such trip had been accompanied by two Montana state agencies (State Tribal Economic Development Commission and the State Tribal (Indian Country) Economic Development Program) and the Montana-based nonprofit, Native American Development Corporation. During November 2013, Turkish Prime Minister Erdoğan was reported to have personally supported the Turkish International Cooperation and Coordination Agency's offer to provide $200,000 of aid to the Confederated Tribes of Warm Springs Reservation in Oregon "to

assist in bringing water to the Warming Springs region where nearly 5,000 Native Americans currently reside."

The 2010 selection by Turkish groups and ministries of the 17 tribes from 11 states identified above, (including the CSKT), the Turkish Trade Minister's prior decision to visit the Hopi and Navajo Indian Reservations, and Prime Minister Erdogan's $200,000 gift to the Warm Springs Tribe of Oregon are certainly not unrelated or whimsical events. The reservations of most of these tribes are located within 100 miles of a nuclear power plant, registered nuclear fuel facility or registered uranium mine or deposit and also a water source (Complaint, Ex. 45). It is quite possible that the Turkish Government, sponsored business enterprises and affiliated groups and members seek access to the uranium deposits and bountiful water sources surrounding the Flathead Reservation for production of yellowcake capable of later conversion to a gaseous state for eventual use in incendiary devices. This "coincidence" should, at the very least, give this Court pause to require FERC and other federal agencies possessing concurrent jurisdiction over national security matters to undertake an in-depth review of the Kerr Project transaction before the scheduled September 5, 2015 conveyance is permitted to take place.

It also is quite possible that the Government of Turkey and those organizations with which it is affiliated, as described above, have sought to invest in Native American tribes because the activities of tribes, especially on their reservations, are now, due to the recent enactment into law of the HEARTH Act, largely off-limits to federal and state regulatory and law enforcement authorities due to federal policies intended to ensure greater tribal self-governance, self-determination and sovereignty. It would appear that this setting would provide Turkey and such organizations with the opportunity to more freely promote their brand of Islam on reservations and/or to pursue other potentially more dangerous activities.

Although Plaintiffs had sought documentation from FERC demonstrating that the Kerr Dam Project, inclusive of the CSKT and EKI, had participated in any Emergency or Department of Homeland Security ("DHS") exercises or in any network of "'black start' dams that are activated in case of a national emergency, such as an EMP attack."[12]

Presumably, Plaintiffs had been aware that public stakeholder use of the FERC website online "e-Library" yields little, if any, additional information from FERC than the agency has already provided in its inadequate and non-responses to Plaintiffs' formal interventions to-date. In particular, use of the e-Library yields little additional information about the Kerr Project conveyance, the CSKT's ability to fulfill its FERC co-licensee obligations under the 1985 settlement, or the CSKT's and NorthWestern's adoption of protocols to ensure the safety of the dam.

Even where relevant documents relating to Kerr Dam's maintenance and safety record and the CSKT's co-licensee performance have been located they have been given either an online "availability" designation of "CEII"[13] or a misleading designation as "public."[14] In both cases, they tend to be inaccessible given their actual designation as "CEII." A document's designation of "CEII" means that stakeholders "don't have permission to access this document" because its subject matter relates to "Critical Energy Infrastructure Information." As a result, stakeholders seeking access to such information have no choice but to "file a CEII request under

[12] *See* "Jackson-Keenan Response to Federal Register Notice of Partial License Transfer") (5/26/15) at 4.
[13] *See, e.g.*, Federal Energy Regulatory Commission, Docket No. P-5-000, Submittal 20150814-5078, *Kerr Transfer to CSKT Dam Safety Program Transition Plan Update under P-5*. Availability: CEII, Report/Form /Dam Safety Compliance Report (8/14/15).
[14] *See, e.g.*, Federal Energy Regulatory Commission, Docket No. P-5-000, Submittal 20150814-5077, *Kerr Transfer to CSKT Dam Safety Program Transition Plan Update under P-5*, Availability: Public, Report/Form /Dam Safety Compliance Report (8/14/15).

18 C.F.R. 388.113"[15] with the designated CEII Coordinator on a prescribed "Electronic CEII Request Form that incorporates a legally binding "Non-Disclosure Agreement,"[16] and entails not only a rather detailed and time-consuming mandatory procedure,[17] but also not insignificant (potentially cost-prohibitive) document search and duplication fees if a fee waiver requested pursuant to a separate involved procedure (not unlike a FOIA fee waiver procedure) is ultimately denied by FERC CEII Coordinator.[18]

FERC regulation 18 C.F.R. 388.113(c)(1) defines the term "critical energy infrastructure information" as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) Relates details about the production, generation, transportation, transmission or distribution of energy; (ii) *Could be useful to a person in planning an attack on critical infrastructure structure*; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and (iv) Does not simply give the general location of the critical infrastructure" (emphasis added).[19]

FERC regulation 18 C.F.R. 388.113(c)(2) defines the term "critical infrastructure" as existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which *would negatively affect security, economic security, public health or safety, or any combination of those matters*" (emphasis added).[20]

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[15] *Id*. (When a stakeholder tries to access the document the following message appears: "You don't have permission to access this document. This document (eLibrary accession no. 20150814-5078) is Critical Energy Infrastructure Information (CEII). The public may file a CEII request under 18 C.F.R. 388.113.")
[16] *See* 18 C.F.R. 388.113(a); 18 C.F.R. 388.112(b). *See also* Federal Energy Regulatory Commission, *File a CEII Request*, available at: http://www.ferc.gov/resources/guides/filing-guide/ceii-request.asp.
[17] *See* 18 C.F.R. 388.113(d)(4).
[18] *See* 18 C.F.R. 388.113(e); 18 CFR 388.109
[19] *See* 18 C.F.R. 388.113(c)(1).
[20] *See* 18 C.F.R. 388.113(c)(2).

Plaintiffs understood that the details concerning co-licensee CSKT's and NorthWestern's maintenance, operation and safety of the Kerr Dam Project, a major "black start" dam, and the facility's use of waters from Flathead Lake to generate hydroelectric energy for the tribal and nontribal irrigators holding fee patented lands and water rights on the Flathead Indian Reservation, are generally presumed to qualify as "classified" national security-related information that will not likely be publicly disclosed prior to or after the scheduled September 5, 2015 conveyance.

Plaintiffs also understood that the DHS hosts a "Dams Sector" website.[21] The term "Dams Sectors" is defined as comprising

> "the assets, systems, networks, and functions related to *dam proje*cts, navigation locks, levees, hurricane barriers, ***mine tailings impoundments***, or other similar water retention and/or control facilities. *Dam projects are complex facilities that typically include water impoundment or control structures, reservoirs, spillways, outlet works, powerhouses, and canals or aqueducts. In some cases, navigation locks are also part of the dam project*" (emphasis added).[22]

This website and accompanying literature reveals that the DHS has adopted a partnership (shared responsibility) approach involving Federal, State, regional, Territorial, local, or tribal government entities to address security issues related to dam security and critical dam sector assets. The partnership consists of private sector owners and operators and representative

[21] *See* Department of Homeland Security, *Dams Sector*, available at: http://www.dhs.gov/dams-sector.

[22] *See* Department of Homeland Security, *Dams Sector Security Awareness Guide: A Guide for Owners and Operators*, (2007) at Intro., p. 3, available at: http://www.dhs.gov/sites/default/files/publications/ip_dams_sector_securit_awareness_guide_508_0.pdf.

organizations, academic and professional entities, and certain not-for-profit and private volunteer organizations.[23]

Plaintiffs, perhaps, also were aware that this website contained a key document entitled, *Dams Sector-Specific Plan – An Annex to the National Infrastructure Protection Plan 2010*,[24] which explains why the FERC website did not disclose many documents relevant to the condition of the Kerr Project and the capabilities of the CSKT and EKI to protect it from possible criminal or terrorist attacks. It states in no uncertain terms that,

> "Technical details and engineering specifications regarding dams and appurtenant structures are regarded as sensitive and are given the designation 'For Official Use Only' (FOUO) and 'Critical Energy Infrastructure Information' by various Federal agencies. Such designations have protected sensitive information from Freedom of Information Act (FOIA) requests; nondisclosure agreements may be required prior to information release. The results of vulnerability assessments and security procedures and responses *may or may not be classified*, depending on the level of detail contained in those reports and the concerns of the asset owner. The sharing of sensitive information among Federal agencies is common, but has been less so across Federal and State boundaries because of concerns about the ability of the individual States to protect sensitive information in light of their own 'Sunshine Laws'" (emphasis added).[25]

More significantly, the Preface to this document makes clear that the *DHS, FERC and the national security agencies* have likely been coordinating in an effort to thwart possible threats of terrorist attacks on dams throughout the nation.

> "The Dams Sector-Specific Plan (DSSP) was developed to complement the NIPP in achieving a safer, more secure, and more resilient Dams Sector by reducing vulnerabilities, *deterring threats, and minimizing the consequences of terrorist*

[23] *Id*.
[24] *See* Department of Homeland Security, *Dams Sector-Specific Plan - An Annex to the National Infrastructure Protection Plan* (2010), available at: http://www.dhs.gov/sites/default/files/publications/nipp-ssp-dams-2010-508.pdf.
[25] *Id*., at 49.

> *attacks*, natural disasters, and other incidents. […] The National Infrastructure Protection Plan (NIPP) provides the unifying structure for the integration of critical infrastructure and key resources (CIKR) protection and resilience efforts as part of a coordinated national program" (emphasis added).

Plaintiffs are arguably excused for lacking extensive knowledge of the coordinated DHS/FERC national safety and national security rules, procedures, protocols and exercises to which the Kerr Project and the CSKT/EKI are and will be subject. This Court, however, is not. It must take judicial notice of the CSKT's and EKI's failure to tender any documentation confirming the Kerr Project's participation therein, and FERC's ongoing failure to respond to Plaintiffs' many objections and documentary requests concerning the Kerr Project's scheduled conveyance/transfer to the CSKT/EKI more generally.

In light of the serious harms that could befall Plaintiffs and other persons living on or near the Flathead Reservation if the scheduled September 5, 2015 conveyance of the Kerr Project to the CSKT is permitted to proceed without adequate review by FERC and the U.S. national security community, Plaintiffs are justified in calling for this Court to grant their request for an *emergency* temporary restraining order and preliminary injunction.

III. The Balance of the Equities is in Plaintiffs' Favor

The balance of the equities in the case at bar is overwhelmingly in Plaintiffs' favor, were this Court to temporarily suspend the scheduled Kerr Project conveyance until an adequate review can be undertaken of FERC, DOI and FWS regulatory, due process and constitutional violations that have resulted in a current potential national security threat.

On the one hand, the CSKT and EKI *may* have some energy contracts at issue if the conveyance is suspended. In their April 14, 2014 "Application for Approval of Partial Transfer of License and Co-Licensee Status," the CSKT indicated "NorthWestern and EKI [had been…]

in the process of developing contracts for the sale of electricity from the Kerr Project post-conveyance…" The Tribes' application also noted that, "In order to enter into power purchase agreements, generation interconnection agreements, and coordination agreements necessary for generation and sale of electricity from the Kerr Project, CSKT and EKI need assurance that EKI will be a Kerr Project co-licensee to satisfy EKI's legitimacy in the electric power marketplace and electric generation industry." (27). Whatever the extent of their contract interests, the CSKT will incur only minor economic injuries for so long as a temporary restraining order or a preliminary injunction issued by this Court is in place. The purpose of this lawsuit is not to permanently enjoin the scheduled conveyance.

On the other hand, Plaintiffs have already suffered serious irreparable economic injury due to the Tribes' and BIA's management and control of the water infrastructure of the Flathead Reservation and their failure to publicly account for their water use decisions. If the Kerr Project conveyance is permitted to proceed as scheduled, the amount of economic harm already suffered by individual farmers and ranchers will quickly multiply considering the crop and grazing land losses already suffered from severe water deprivation which has had an adverse impact on crop quality and yields, and the prices paid for ill-fed lighter weight cattle. As the result of the conveyance proceeding as scheduled, this additional irreparable economic harm will be transferred downstream throughout the state, regional and ultimately national agricultural and beef product supply-chains given northwestern Montana's key role in such markets.

Moreover, should the scheduled conveyance proceed without FERC, in conjunction with the Department of Homeland Security and other national security-focused agencies, first reviewing the potential national security threat posed by FERC's approval of the NorthWestern conveyance of the Kerr Project to the Tribes without FPA § 203 being fully applied to said

transaction, Plaintiffs and other similarly situated stakeholders operating farms, ranches, businesses and households both on and off the Flathead Reservation may suffer serious emotional distress, corporeal harm or even death. For all of the above reasons, the balance of the equities is in Plaintiffs' favor.

IV. The Injunction is in the Public Interest

FPA § 203 requires FERC to undertake an in-depth review of the information provided by a prospective acquirer of a hydroelectric generating facility that is subject to FERC licensure requirements. The CSKT is the acquirer in the case at bar, but it has *not* had to submit to this rigorous review because FERC had recently approved the Tribes' treatment as an exempt public utility under both FPA § 201(f) and the Commission's PUHCA regulation found at 18 C.F.R. § 366.2. Had the CSKT been subject to FPA § 203, FERC would have been required to convene public hearings to demonstrate that the acquisition is in the "public interest."

Since FERC will not, itself, empower the Montana public to know whether NorthWestern's scheduled conveyance of the Kerr Project to the Tribes is actually in the "public interest," Plaintiffs' motion for a TRO and a preliminary injunction serves as the only available remedy at law or equity to ensure that such a public evaluation ever takes place. As these pleadings have clearly shown, at no time during the past 30 years has FERC undertaken such a review. It has been FERC's standard legal response to say that the *political* decision to convey full ownership, control and management of the Kerr Dam/Reservoir had already been made when the 1985 Agreement had first been approved. That is a lot for the Montana public to swallow considering that former DOI Secretary James G. Watt could not then possibly have had

a crystal ball to predict the events of September 11, 2001, let alone the much less certain and secure world presently before us.

This Court, out of an abundance of precaution, should view the FERC's many regulatory failings and the constitutionality of the DOI's politically 'enlightened' federally recognized tribal entity designation in the context of this post-9/11 world in which we all live and work, where threats and isolated acts of terrorism are no longer uncommon occurrences, but are carefully considered, reviewed and assessed by federal agencies and law enforcement officials charged with protecting the public interest. The recent attacks in Paris[26] only remind us all, yet again, of the potential risks we now face each and every day upon leaving the security of our homes. This Court must consider these potential risks in order that it may render the kind of cognizant and considered decision that will most serve the public interest. Plaintiffs hereby submit that, only by granting a TRO and/or Preliminary Injunction in this case can the public interest of northwestern Montanans be served.

V. No Bond is Required

This Court, furthermore, has recognized that it possesses the discretion over whether to require the posting of security before granting a preliminary injunction. Indeed, this Court has decided to exempt certain litigants from the bond requirement of Federal Rule of Civil Procedure 65(c), where the "public interest" demands such a result, and in order to preserve access to the courts. For example, this Court, as a matter of policy, has waived or required nominal bonds for

[26] *See* Thomas Adamson and Angela Charlton, *European Trains to Increase Identity and Baggage Checks After Americans Foiled Attack*, Associated Press (Aug. 29, 2015), available at: http://www.usnews.com/news/business/articles/2015/08/29/europe-rethinks-train-security-after-americans-thwart-attack. *See also* Josh Lipowsky, *The Cost Of Terrorism: Victims Fight Back In Court*, Forbes.com (Aug. 31, 2015), available at: http://www.forbes.com/sites/realspin/2015/08/31/the-cost-of-terrorism-victims-fight-back-in-court/.

environmental public interest litigants in several cases, including: *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970) ($100 bond); *Environmental Defense Fund v. Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971) ($1 bond); *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971) ($1 bond).

And, other courts have recognized the need to expand this policy beyond public interest environmental organizations to private individuals who, representing themselves or securing legal representation on a collective or community basis, would be incapable of affording and enforcing their rights in court if trial courts were required to impose a security bond prior to granting the injunctive relief sought.

For example, in *Warner v. Ryobi Motor Products Corp.*,[27] a South Carolina District Court had imposed a bond of only $250, because the litigants, who were retirees with limited financial resources, had endeavored to preserve their retirement benefits. In deciding to impose such a nominal bond, the Court considered several factors, including the adverse effect on the public interest, the potentially irreversible consequences had injunctive relief been denied, plaintiffs' likelihood of success at trial, and their limited financial resources.

In the more recent case of *Cole v. ArvinMeritor, Inc.*,[28] a Michigan District Court had decided that no bond should be imposed on retirees and a surviving spouse with limited financial resources who had sought a preliminary injunction to preserve employer health benefits guaranteed under a series of collective bargaining agreements spanning five decades, some of which had been scheduled to be reduced and/or cancelled. The court reached its decision by considering the following factors: retirees' poor financial condition; the likelihood that plaintiff-retirees would suffer irreparable harm if forced to go without medical care or forced to choose

[27] *See, e.g., Warner v. Ryobi Motor Products Corp.*, 818 F. Supp. 907 (D.S.C. 1992).
[28] *See Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850 (E.D. Mich. 2005).

between basic necessities in order to pay premiums and deductibles; the degree of harm that would be suffered by retirees as compared to the economic harm that would be imposed via preliminary injunction upon the employer by requiring it to maintain health benefits; and the public interest served by enforcing through preliminary injunctions the rights of participants in employee benefit plans and their beneficiaries and the collectively-bargained rights of retirees and dependents to health insurance for the rest of their lives.[29] *See also Mamula v. Satralloy, Inc.*,[30] (no bond due to retirees' impecunious financial conditions and likelihood of success); *Winnett v. Caterpillar, Inc.* (no bond due to plaintiffs' age and limited financial means and showing of a strong likelihood of success on the merits).[31]

Similarly, Plaintiffs in the present case, each of whom are irrigators of farmland and cattle ranches located on the Flathead Indian Reservation, are of limited financial means and will suffer irreparable harm should this Court refuse to grant their motion for a TRO, but have, nevertheless, managed to secure legal representation to bring this suit on a collective, community basis. Although there are three named Plaintiffs, none of whom has paid more than $1,000 individually (and even less) to bring this action, there are more than three-to-four dozen other persons, some anonymous, residing on or near said reservation that have made financial contributions in support of this litigation effort ranging from $20 to $2,000 apiece. For this reason, and in light of the evidence set forth below demonstrating that the scheduled September 5, 2015 conveyance of the Kerr Project and transfer of associated FERC operating license is not in the public interest, this Court should decide to waive the bond requirement as a condition to granting the TRO Plaintiffs seek.

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[29] 516 F. Supp. 2d at 879-880.
[30] *See Mamula v. Satralloy, Inc.*, 578 F.Supp. 563, 579 (S.D. Ohio 1983).
[31] *See Winnett v. Caterpillar, Inc.*, 579 F. Supp. 2d 1008, 1043 (M.D. Tenn. 2008), *rev'd on other grounds, Winnett v. Caterpillar, Inc.*, 609 F.3d 404 (6th Cir.2010).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 3, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, and via email to the U.S. Attorney, Department of Justice, and the General Counsel's Office of the Federal Energy Regulatory Commission and Department of Interior for the named Defendants.

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