

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

Confederated Salish and Kootenai Tribes)
Energy Keepers, Incorporated)

Project No. 5-100

**MOTION OF THE FLATHEAD, MISSION AND JOCKO VALLEY
IRRIGATION DISTRICTS AND THE FLATHEAD JOINT BOARD OF
CONTROL OF THE FLATHEAD, MISSION AND
JOCKO IRRIGATION DISTRICTS
FOR LEAVE TO ANSWER AND ANSWER**

To: Chief Judge Curtis L. Wagner, Jr.

The Flathead, Mission and Jocko Valley Irrigation Districts (“the Districts”) and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (“FJBC” jointly, “FJBC/Districts”) intervenors herein, pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, hereby submit this Motion For Leave To Answer and Answer (“Answer”) along with supporting affidavits. On October 22, 2015, a number of individuals and several organizations (“Out-of-Time Movants”) filed a Motion to Intervene Out-of-Time, which they supplemented on November 6, 2015 (“November 6 Supplement”). On November 6, 2015, the FJBC/Districts filed an answer in opposition to the Motion to Intervene Out-of-Time and the November 6 Supplement.¹ Subsequently, on November 10, 2015, the Out-of-Time Movants filed a second

¹ Though the FJBC/Districts’ November 6 Answer addressed, in part, the November 6 Supplement, because that supplement was filed on the deadline for opposing the Out-of-Time Intervention, the FJBC/Districts were not afforded a complete opportunity in their November 6 Answer to respond to the allegations made in that supplement.

supplement to their Motion to Intervene Out-of-Time (“November 10 Supplement”). The FJBC/Districts’ instant Answer and supporting affidavits are filed for the limited purpose of responding to the November 6 and November 10 Supplements. As explained herein, the Chief Judge should reject the Motion to Intervene Out-of-Time.

I. MOTION FOR LEAVE TO ANSWER

Although the Commission’s procedural rules generally do not provide for answers to protests, answers, or similar filings,² the Commission may, for good cause shown, waive this prohibition and permit such answers.³ The Commission has exercised discretion and permitted answers when the answer provides information helpful to the disposition of an issue,⁴ permits the issues to be narrowed or clarified,⁵ or aids the Commission in understanding and resolving issues.⁶

Answers in opposition to the Motion to Intervene Out-of-Time were due on November 6, 2015. The November 6 Supplement was filed on that date, and the November 10 Supplement was filed after the opposition deadline. As such, the FJBC/Districts have not been afforded adequate time to respond fully to the new allegations raised in the November 6 and November 10 Supplements. Good cause exists to accept this Answer given the November 6 and November 10 Supplements and the need

² 18 C.F.R. § 385.213(a)(2) (2015).

³ *Id.* at § 385.101(e).

⁴ *See, e.g., CNG Transmission Corp.*, 89 FERC ¶ 61,100, at n.11 (1999).

⁵ *See, e.g., PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224, at 62,078 (1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335, at n.1 (1998).

⁶ *See, e.g., New York Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,188, at P 7 (2004) (accepting the NYISO’s answer to protests because it provided information that aided the Commission in better understanding the matters at issue in the proceeding); *Morgan Stanley Capital Group, Inc. v. New York Indep. Sys. Operator, Inc.*, 93 FERC ¶ 61,017, at 61,036 (2000) (accepting an answer that was “helpful in the development of the record”); *Tennessee Gas Pipeline Co.*, 92 FERC ¶ 61,009, at 61,016 (2000).

to ensure a complete record. In addition, the FJBC/Districts submit that this Answer will narrow the issues in this proceeding and assist the Chief Judge in understanding and addressing these issues.⁷

Accordingly, the FJBC/Districts respectfully request that the Chief Judge grant the FJBC/Districts' request for leave to answer and accept the following answer.

II. ANSWER

The supplements raise a number of issues that exceed the scope of this proceeding. Specifically, the November 6 and November 10 Supplements filed by the Out-of-Time Movants would have the Chief Judge, among other things, scrutinize the internal workings of the FJBC,⁸ assess FJBC's compliance with Montana law,⁹ and investigate the effectiveness¹⁰ and ethicalness of the FJBC/Districts' Chairman and counsel.¹¹ As explained in the FJBC/Districts' November 6 Answer, the Out-of-Time Movants have no basis for these allegations. Moreover, in acting on the Motion to Intervene Out-of-Time, the Chief Judge need not determine the validity of the allegations. Instead, the Chief Judge need only to determine whether the Out-of-Time Movants meet the Commission's Rule 214(d)(1) late intervention requirements.¹²

⁷ See, e.g., *New York Indep. Sys. Operator, Inc.*, 91 FERC ¶ 61,218, at 61,797 (2000) (allowing an answer deemed "useful in addressing the issues arising in these proceedings"); *Cent. Hudson Gas & Elec. Corp.*, 88 FERC ¶ 61,138, at 61,381 (1999) (accepting otherwise prohibited pleadings because they helped to clarify complex issues).

⁸ See e.g., November 10 Supplement at PP 2, 7-10, 12, 14, 17-18.

⁹ See *id.* at PP 9-10, 18.

¹⁰ See *id.* at PP 11, 13-16, 18-20.

¹¹ See November 6 Supplement at PP 2-3.

¹² Note that although the Out-of-Time Movants' November 10 Supplement included a request for expedited review of their Motion to Intervene Out-of-Time, the next settlement conference is not scheduled until January 12, 2016. November 10 Supplement at P 21. Therefore, the Chief Judge need not act on their Motion to Intervene Out-of-Time on an expedited basis.

The FJBC/Districts' November 6 Answer explains why the Out-of-Time Movants do not meet the Commission's late intervention requirements.¹³ Without restating those reasons, the FJBC/Districts submit that the November 10 Supplement itself acknowledges and explains why the Motion to Intervene Out-of-Time must be denied. In their November 10 Supplement, the Out-of-Time Movants admit that under Montana law, the FJBC serves as the governmental body that exists for the benefit of the irrigators and which is "responsible directly to irrigators to make decisions and take actions for the general benefit of all irrigators"¹⁴ The FJBC and the Districts are composed of the elected local officials who represent the interests of the irrigators.¹⁵ The Out-of-Time Movants thus fail to have interests that are directly affected by the outcome of this proceeding which are not already represented by the FJBC/Districts.¹⁶ To the extent the Movants do not agree with the actions of the FJBC/Districts, they should seek recourse within the FJBC and the Districts, and not with the Commission.

The FJBC/Districts attach to this Answer supporting affidavits that provide additional support for this Answer and their November 6, 2015 Answer. The affidavits are submitted by Bruce A. Fredrickson, Esq., Kristin L. Omgig, Esq., Tim Orr, and Boone Cole. The affidavits provide additional support that the improprieties alleged in the November 6 and November 10 Supplements by the Out-of-Time Movants are without basis. Answers to the November 6 Supplement are not due until November 23, 2015; answers to the November 10 Supplement are not due until November 25, 2015. As such,

¹³ FJBC/Districts' November 6 Answer at pp. 6-16.

¹⁴ November 10 Supplement at P 8 (citing *Operating Bylaws of the Flathead Joint Board of Control* (May 2014), at Art. II, Sec. 1).

¹⁵ FJBC/Districts' November 6, 2015 Answer at p. 7 (citing MONT. CODE ANN. Title 85, Chapter 7, Parts 1-22).

¹⁶ *Id.* at p. 9.

these affidavits should not disrupt this proceeding or otherwise cause any undue delay. The FJBC/Districts thus request the Chief Judge accept and consider this Answer and supporting affidavits when ruling on the Motion to Intervene Out-of-Time and its November 6 and November 10 Supplements. As explained in the answers submitted by the FJBC/Districts, the Motion to Intervene Out-of-Time should be rejected.

WHEREFORE, the Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts respectfully request the Commission grant and consider this Answer and consider the affidavits submitted herewith and deny the Motion to Intervene Out-of-Time.

Respectfully Submitted,

The Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts

/s/ Kathleen L. Mazure

Kathleen L. Mazure

Tyler E. Mansholt

Duncan, Weinberg, Genzer & Pembroke, P.C.

1615 M Street, NW Suite 800

Washington, D.C. 20036

(202) 467-6370

Date: November 13, 2015

Its Attorneys

Attachment 1

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Confederated Salish and Kootenai Tribes)	
Energy Keepers, Incorporated)	Project No. P-5-10
)	

AFFIDAVIT OF BRUCE A. FREDRICKSON, ESQ.

STATE OF MONTANA)
) ss:
County of Flathead)

Bruce A. Fredrickson, being first duly sworn upon oath, deposes and says:

1. I am a citizen of the United States, a resident of the State of Montana, of legal age and I am competent to be a witness. I am percipient and if called upon to testify could testify to the following, all of which are within my own personal knowledge.

2. I am an attorney duly licensed to practice law in the State of Montana, and have been so licensed since 1986. I am a partner with the Kalispell, Montana law firm, Rocky Mountain Law Partners, PLLP ("RMLP"). RMLP is general counsel for the Flathead Joint Board of Control, Flathead Irrigation District, Mission Irrigation District and Jocko Irrigation District (collectively "FJBC").

3. I am providing this Affidavit in response to the Supplemental pleading filed on November 6, 2015, by attorney, Lawrence A. Kogan's on behalf of TED HEIN, DEAN BROCKWAY, BUFFALO WALLOW LLC, WESTERN WATER USERS ASSOCIATION LLC, GENE ERB, JR., PAUL A. and BARBARA GRIECO, MARY K. MATHEIDAS, R. ROY and SHEILA M. C. VALLEJO.

4. By comparing the case caption on attorney Kogan's Supplemental pleading with the case caption on prior pleadings filed by Mr. Kogan, it appears that the following are the

“clients” that have severed their relationship with Mr. Kogan, at least with respect to the above captioned action:

- Linda Ambo;
- Gary and Sandy Baertsch;
- Charley and Carol Lyons;
- Robert and Erlene Robinson; and
- Ray L. and E. Anne Swenson.

5. I have had no direct contact regarding the above captioned action with any of the individuals referenced in the preceding paragraph. Whatever “indirect” contact I may have had with those individuals regarding the above captioned action would have come through comments I may have made in open, public FJBC Board meetings, and would only have been the result of those individuals attending the public sessions of those Board meetings. I believe that Ray Swenson was in attendance at one or more of those meetings. I do not know if any of the other individuals were or were not present at those meetings.

6. I have never requested, either directly or indirectly, that any of the individuals named in Paragraph 4, above, withdraw as intervenors in the above captioned action.

7. I have had direct contact with Mr. Hein during the course of executive board sessions and public board meetings with FJBC on matters involving the above captioned action. Mr. Hein is a Board member at large, and is a member of FJBC’s Executive Committee. He has attended, as he has a right to do, and spoken at those meetings. I have not spoken individually or privately with Mr. Hein regarding any matter related to these proceedings since he has become associated with attorney Kogan. I have certainly been critical of attorney Kogan’s positions and objectives during the course of those meetings, and have been forthcoming with my belief that attorney Kogan has misstated facts and law in the pleadings he has submitted in this and other

matters. At no time have I requested, or even suggested, that Mr. Hein dissociate himself from attorney Kogan.

8. I have had direct contact with Mr. Brockway during the course of FJBC public board meetings on matters involving the above captioned action. Mr. Brockway is a Board member. He has attended, as he has a right to do, and spoken at those meetings. I have not spoken individually or privately with Mr. Brockway regarding any matter related to these proceedings since he has become associated with attorney Kogan. I have certainly been critical of attorney Kogan's positions and objectives during the course of those meetings, and have been forthcoming with my belief that attorney Kogan has misstated facts and law in the pleadings he has submitted in this and other matters. At no time have I requested, or even suggested, that Mr. Brockway dissociate himself from attorney Kogan.

9. I have reviewed attorney Kogan's October 31, 2015 e-mail and attachments directed to my partner, Kristin L. Omgig and know his accusations to be wholly without merit. (Exhibits 1, 1A & 1B attached to Ms. Omgig's Affidavit)

10. In the interest of full disclosure, I met briefly on November 5, 2015 with Ray Swenson and Kristin Omgig prior to a meeting of a committee on which Mr. Swenson serves. I was unable to attend the meeting on that date, but I know the committee has nothing at all to do with the issues before FERC. Mr. Swenson is not a member of the FJBC Board. Ms. Omgig and Mr. Swenson met with me to obtain my opinion as to whether Mr. Swenson could participate in the meeting since Ms. Omgig would also be involved. Mr. Swenson informed me at that time that he placed a call to attorney Kogan on Friday, October 30, 2015, and requested that he and his wife be withdrawn as named parties to the action. Ms. Omgig and Mr. Swenson agreed that regardless of the Swensons' decision to extricate themselves from attorney Kogan and these

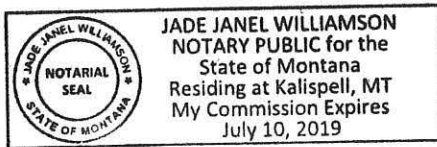
proceedings, Mr. Swenson and Ms. Omvig would not discuss anything regarding the FERC matter and would only discuss matters solely relating to Committee business. Ms. Omvig sought my advice since I had spent twelve years of my practice life serving on the Commission on Practice for the Supreme Court of Montana (Montana's lawyer disciplinary body) and have dealt extensively with ethical issues and with Montana's Rules of Professional Responsibility. Ms. Omvig and Mr. Swenson's agreement not to discuss the FERC proceedings was overly cautious considering Mr. Swenson's stated withdrawal from this action.


Further your affiant says not.



Bruce A. Fredrickson

SUBSCRIBED AND SWORN to before me this 12th day of November, 2015.




SIGNATURE
Jade Janel Williamson
PRINT OR TYPE NAME
Notary Public for the State of Montana.
Residing at Kalispell.
My commission expires:
July 10, 2019
MONTH, DAY, YEAR (201*)

Attachment 2

“clients” that have severed their relationship with Mr. Kogan, at least with respect to the above captioned action:

- Scott and Linda Ambo;
- Gary and Sandy Baertsch;
- Charley and Carol Lyons;
- Robert and Erlene Robinson; and
- Ray L. and E. Anne Swenson.

5. I have had no direct contact regarding the above captioned action with any of the individuals referenced in the preceding paragraph. Whatever “indirect” contact I may have had with those individuals regarding the above captioned action would have come through comments I may have made in open, public FJBC Board meetings, and would only have been the result of those individuals attending the public sessions of those Board meetings. I believe that Ray Swenson was in attendance at one or more of those meetings. I do not know if any of the other individuals were or were not present at those meetings.

6. I have never requested, either directly or indirectly, that any of the individuals named in Paragraph 4, above, withdraw as intervenors in the above captioned action.

7. I have had direct contact with Mr. Hein during the course of executive board sessions and public board meetings with FJBC on matters involving the above captioned action. Mr. Hein is a Board member at large, and is a member of FJBC’s Executive Committee. He has attended, as he has a right to do, and spoken at those meetings. I have not spoken individually or privately with Mr. Hein regarding any matter related to these proceedings since he has become associated with attorney Kogan. At no time have I requested, or even suggested, that Mr. Hein dissociate himself from attorney Kogan.

8. I have had direct contact with Mr. Brockway during the course of FJBC public board meetings on matters involving the above captioned action. Mr. Brockway is a Board member. He has attended, as he has a right to do, and spoken at those meetings. I have not spoken individually or privately with Mr. Brockway regarding any matter related to these proceedings since he has become associated with attorney Kogan. At no time have I requested, or even suggested, that Mr. Brockway dissociate himself from attorney Kogan.

9. On October 30, 2015, and again on October 31, 2015, I received an e-mail from attorney Kogan, a true and correct copy of which is attached as **EXHIBIT 1**. True and correct copies of the two attachments to that e-mail are attached as **EXHIBIT 1A and EXHIBIT 1B**.

10. The first page of **Exhibit 1B** is an e-mail that I sent to Tim Orr at Mr. Orr's request. The remaining pages of **Exhibit 1B** were distributed by Mr. Orr without my knowledge. Mr. Orr had meetings scheduled with some of the intervenors included in attorney Kogan's original filings in the above captioned action. Mr. Orr is a board member of FJBC and was duly concerned about attorney Kogan's filings, and planned to discuss the Board's position with those individuals with whom he intended to meet.

11. Mr. Orr and at least one other member of FJBC's Board of Directors had obtained information, either directly or indirectly, that at least some of the named intervenors was unaware of the actions attorney Kogan was taking in their name; had not received copies of any of the documents attorney Kogan had filed; and in at least one instance, had apparently expressly instructed attorney Kogan to *not* include that individual's name as an intervenor.

12. The information regarding the allegations leveled at attorney Kogan's conduct raised serious concerns regarding the attempted intervention.

13. Attorney Kogan also made allegations about Boone Cole, FJBC's Board Chair in communications with the Settlement Judge in these proceedings, that were disconcerting and which certainly did not reflect Mr. Cole's personality traits that I was familiar with. If attorney Kogan's assertions were accurate, it would have been appropriate to deal with Mr. Cole's actions. However, if those assertions were inaccurate, as I believed them to be, then attorney Kogan was making false statements as part of his attempts to participate in the settlement process at FERC.

14. Since the intervenors were purportedly all "clients" of attorney Kogan, I could not communicate directly with them. I suggested, however, that if Mr. Orr was going to visit with some of the named intervenors, he try to either confirm or dispel the information referenced in the preceding paragraph.

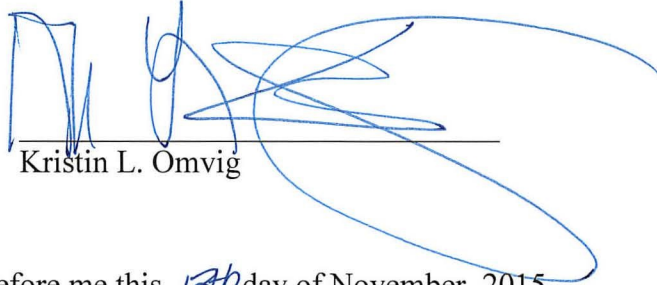
15. Mr. Orr reported to me that he met with Charley and Carol Lyons, Gene Erb, and Ray Swenson on October 25, 2015. He reported the nature of his discussions, the gist of which supported the information that we had previously received.

16. I responded to attorney Kogan on November 4, 2015. A true and correct copy of my letter to him is attached hereto as **EXHIBIT 2**.

17. In the interest of full disclosure, I did meet with Ray Swenson and members of a committee on which he serves, on November 5, 2015. That committee has nothing at all to do with the issues before FERC. Mr. Swenson is not a member of the FJBC Board. Prior to meeting, I informed Mr. Swenson that I could not communicate with him regarding any aspect of the FERC action. Mr. Swenson informed me at that time that he placed a call to attorney Kogan on Friday, October 30, 2015, and requested that he and his wife be withdrawn as named parties to the action. Mr. Swenson and I also discussed the issue of his presence at the meeting with my

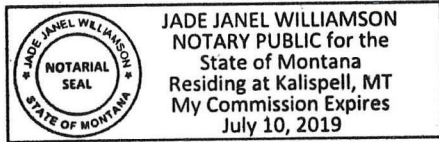
partner, Bruce A. Fredrickson. We ultimately decided we could go forward with the meeting with Mr. Swenson in attendance, however, we refrained from discussing anything regarding the FERC matter and discussed matters solely relating to Committee business.

Further your affiant says not.



Kristin L. Omvig

SUBSCRIBED AND SWORN to before me this 13th day of November, 2015.



Jade Janel Williamson
SIGNATURE

Jade Janel Williamson
PRINT OR TYPE NAME

Notary Public for the State of Montana.

Residing at Kalispell

My commission expires:

July 10, 2019
MONTH, DAY, YEAR (201*)

Kristin Omgig

From: lkogan@koganlawgroup.com
Sent: Saturday, October 31, 2015 10:22 AM
To: Kristin Omgig
Cc: Bruce Fredrickson
Subject: FWD: Your Email Communication & Handout Campaign
Attachments: KLG-Kristin Omgig Correspond - Re - Redacted Email & Handout Campaign (10-30-31-15)(corr).pdf; Kristin Omgig Email to Tim Orr (10-25-15).pdf

Importance: High

Dear Ms. Omgig,

Your prompt attention to the attached (corrected) would be most appreciated.

Sincerely,

Lawrence Kogan

Lawrence A. Kogan, Esq.
The Kogan Law Group, P.C.
100 United Nations Plaza
Suite #14F
New York, NY 10017
(o) (212) 644-9240
(c) (609) 658-7417
www.koganlawgroup.com

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----- Original Message -----

Subject: Your Email Communication & Handout Campaign
From: lkogan@koganlawgroup.com
Date: 10/30/15 8:31 pm
To: Kristin@rmtlawp.com

Dear Ms. Omgig,

Your prompt attention to the attached would be most appreciated.

Sincerely,

Lawrence Kogan



Lawrence A. Kogan, Esq.
The Kogan Law Group, P.C.
100 United Nations Plaza
Suite #14F
New York, NY 10017
(o) (212) 644-9240
(c) (609) 658-7417
www.koganlawgroup.com

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Lawrence Kogan, Esq. NY, NJ, DC
Of Counsel:
James Wagner, Esq. MA
Fred B. Wilcon, Esq. MA

October 30, 2015

Kristin L. Omgvig, Esq.
Rocky Mountain Law Partners, PLLP
1830 3rd Ave. East, Ste. 301
P.O. Box 1758
Kalispell, MT 59903-1758

Re: Your Redacted Email and Handout Campaign

Dear Ms. Omgvig,

It is my understanding that you are the author of the accompanying email communication bearing a redacted sender identity, dated October 25, 2015, dispatched to Mission District Commissioner, Tim Orr, a member of the Board of Commissioners of the Flathead Joint Board of Control, which Mr. Orr then handed to my clients on the same day.

If you are the author, your email evidently reflects an intentional effort to indirectly communicate with my clients and to interfere in the relationship my firm has with its clients.

While these attorney behaviors may not be prohibited by the Montana Rules of Professional Responsibility, they would be subject to disciplinary action by counsel subject to the District of Columbia and New York Rules of Professional Responsibility (e.g., D.C., NY Rules 4.2, 8.4).

Please bear in mind that, if you are the author of this redacted email and handout campaign your email communication and this correspondence could well be included in the FERC administrative record.

I strongly advise you to refrain from any further efforts to directly or indirectly single out my clients for communication without first going through me.

Very truly yours,

Lawrence A. Kogan

Lawrence A. Kogan
Managing Principal

Cc: Bruce Frederickson

100 United Nations Plaza ♦ Suite 14F ♦ New York ♦ NY ♦ 10017
♦ Ph (212)644-9240 ♦ Fax (646)219-1959
♦ www.koganlawgroup.com



orrfarm@blackfoot.net

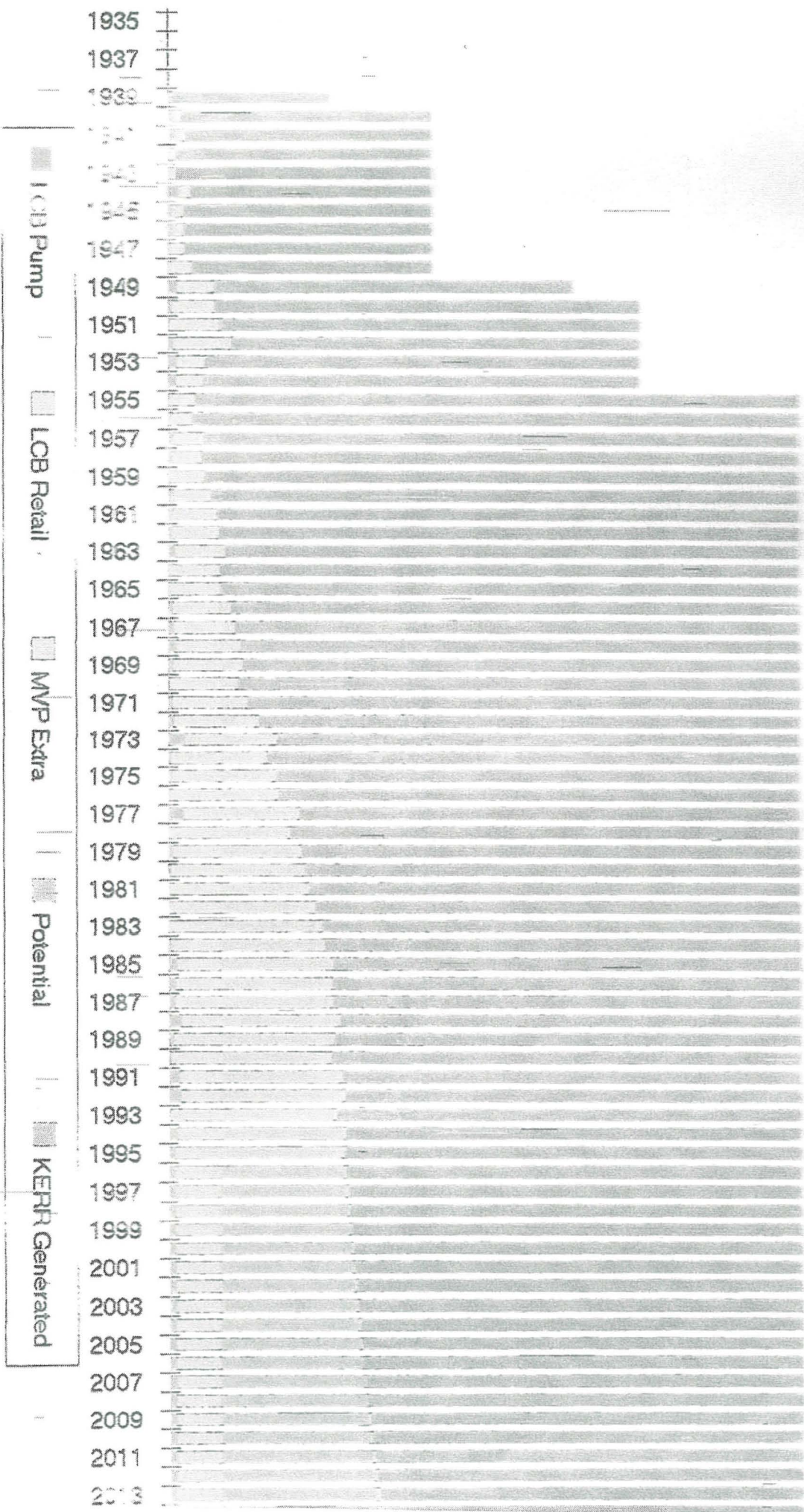
From: [REDACTED]
Date: Sunday, October 25, 2015 9:51 AM
To: "Tim Orr" <orrfarm@blackfoot.net>; [REDACTED]
Subject: Points and issues

1. Did they agree to be represented by Kogan in FERC proceedings?
2. Did they review and approve the FERC intervention pleading?
3. Has Kogan provided them with copies of pleadings, letters emails he's sent? Did they review and approve them being sent?
4. Nature of their interactions with Boone. Discussion vs. Intimidation.
5. Do they want intervention withdrawn or to be removed as intervenors?

Sent from my Verizon W [REDACTED]



POWER GENERATED BY KERR DAM
 POWER USED BY MISSION VALLEY POWER



when Kerr dam was licensed, built, and put into operation the Tribes were allocated a rental fee which they protested being too low. FERC opened a review process which ended an appeal to the Court of Appeals for District of Columbia in 1991. Shortly thereafter at FERC's direction the Power Company made an adjustment to the Tribes' fees, based on the Court's Finding.

The chart here summarizes the Finding as explained in the footnote:

The Court accepted the explanation that production of power at Kerr depended on two factors: Natural Development (Natural River flowing through a gorge with significant head loss); and Development of Storage in the Lake (controlled by the high dam (68.5% natural & 31.5% Developed)). The Natural factor was divided 50% 50% for Site and Flow with the Site owned by the Tribes and the Water (Flow) belonging to the State of Montana. The Storage Development was divided 50% 50% for water and ^{the} Land it impounded, again, the water belongs to the State, while the land that was covered lays half on the reservation and half on state land (north end). The chart combines the five ultimate allocations.

The significance of the Finding is that the second highest Court of the land accepted ^{the} State of Montana as sole owner of ^{all} the water within its borders (sic) and rejected the Tribes' claim to the river running through their Reservation.

Research of the Court docket listed here and the FERC hearing and subsequent Ruling is educational.

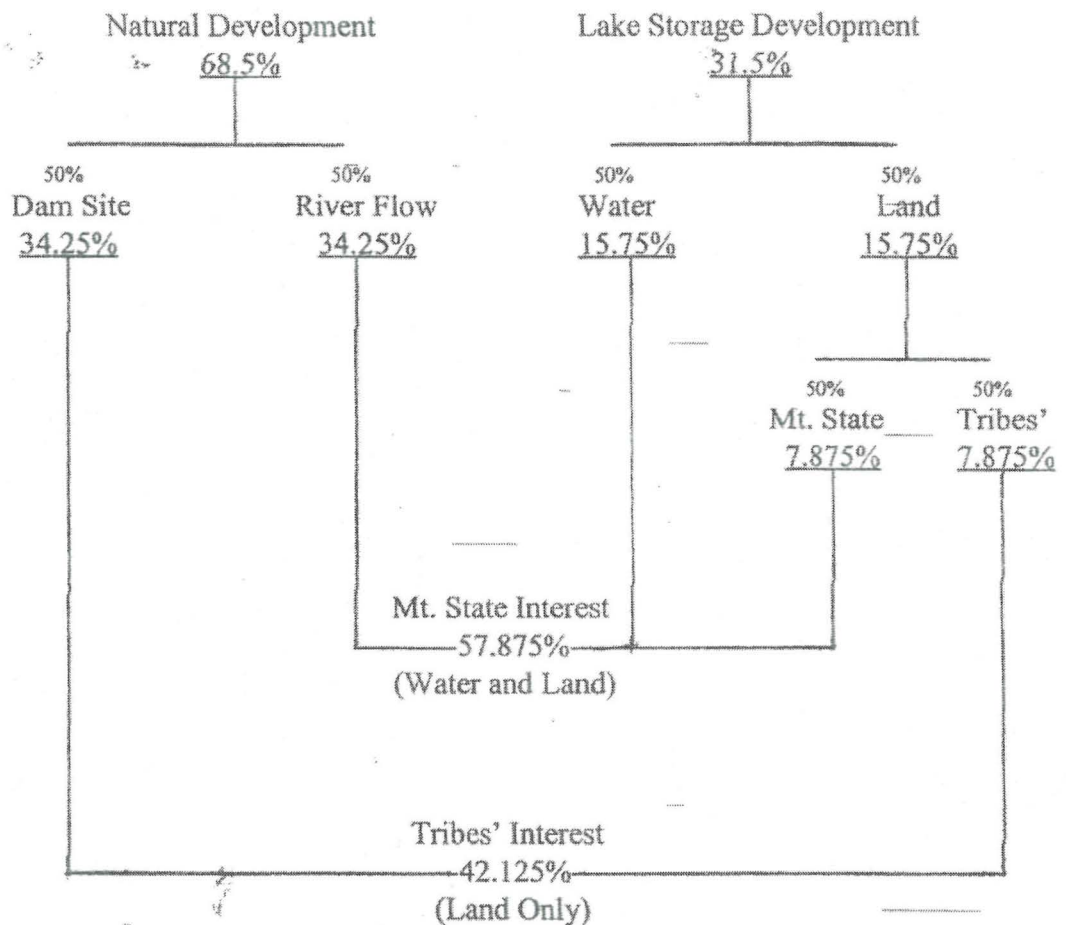
Bill L.

KERR DAM

PRODUCTION ALLOCATION

(By the Federal Energy Regulatory Commission - Finding # 26)

(After determination of Docket No. 50233 by Court of Appeals for District of Columbia, January 25, 1962.)



Finding No. 26, Footnote 4/p. "It is to be noted that the Federal Power Commission in this most recent decision relating to Flathead development did not credit the Tribes with any interest in the water of Flathead Lake and Flathead River. Mr. Scattergood and others at the time of the issuance of License No. 5 credited the Tribes with Winters Doctrine water rights consisting of some portion, considerably less than all, of the water power rights in the waters of the Flathead River and Flathead Lake; namely water power sufficient to supply pumping of irrigation water. See Scattergood Report, Plaintiff's exhibit 58, p.33. Failure by the Power Commission to attribute any water power to the Tribes as distinguished from land value attributable to the presence of water power, may account for the fact that the Federal Power Commission only attributed 42.13% of the natural resources to the Tribes, whereas Mr. Scattergood credited the Tribes with 50% of the natural resources involved in the development. Mr. Van Scoyoc also testified for the Tribes at the hearing on the Readjustment of Rentals. It will be noted that his attribution of land and natural water power at the dam site to the Tribes was specifically rejected by the Commission in favor of Sporseen's view that the Tribes owned only the land at the dam site. Sporseen and the Commission weighed the value of the land at the dam site heavily because of its critical location with relation to water, but the Tribes were not credited with ownership of the water or water power itself."



ROCKY MOUNTAIN LAW
PARTNERS, PLLP

P.O. Box 1758
1830 3rd Avenue East, Ste. 301
Kalispell, MT 59903
Phone: (406) 314-6011
Fax: (406) 314-6012
www.rockymountainlawpartners.com

Mark W. Buckwalter*
Bruce A. Fredrickson**
Kristin L. Omvig

John B. Dudis
(Of-Counsel)

Marshall Murray
(Retired)

All Lawyers Licensed in Montana
*Also Licensed in Idaho

November 4, 2015

Via E-Mail and 1st Class Mail

Mr. Lawrence A. Kogan
Kogan Law Group, P.C.
100 United Nations Plaza, Suite 14F
New York, NY 10017

Our Client: Flathead Joint Board of Control
Matter: *FERC Project No. 5-100*
Our File No.: 1318.010
Re: Your Letter of October 30, 2015

Dear Mr. Kogan:

I am writing in response to your letters of October 30, 2015 and October 31, 2015. First, there is nothing “unethical”, or otherwise improper, with opposing clients communicating with each other. Neither was there anything “unethical” or otherwise improper for me to talk with Tim Orr prior to his meeting with your “clients.” Any meetings among Tim Orr and your “clients” were voluntary among all parties to those conversations.

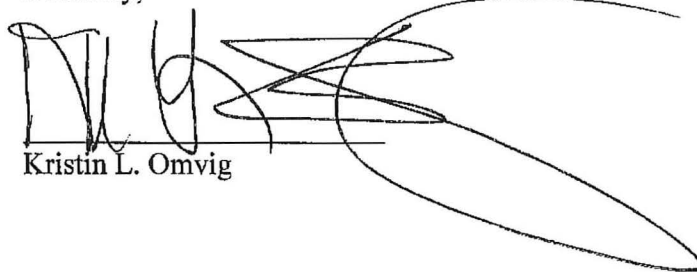
Second, there is certainly nothing “unethical” or improper with the questions posed by me to Tim Orr. Those questions arose as a result of communications purportedly received from your “clients” by members of the Joint Board during which your “clients” informed the Board members to whom they spoke that, among other things, you had neither obtained their approval to act on their behalf, nor had you provided them with copies of the various pleadings you filed under their names and your correspondence of October 24, 2015, “admonishing” and accusing Commissioner Boone Cole of “unacceptable intimidation-based Mafia style behavior” in his communications with your “clients”. All alleged disclosures were made voluntarily and were not the result of any questions suggested by me, any FJBC attorney or Board member. The questions posed by me to Mr. Orr were served to either validate or refute the information that was previously provided to us. Your “clients” were certainly under no obligation to speak with Tim Orr or any other Board member regarding the recent motion to intervene at FERC. Neither



Lawrence A. Kogan
November 4, 2015
Page 2

were they under any obligation to answer any of the questions Mr. Orr posed to them, including questions relating to your representational capacity. They could have simply declined Mr. Orr's invitation to meet and discuss. The other "handouts" provided by Mr. Orr were provided without my knowledge. The first I saw those was as attachments to your October 30 and 31 letters. Finally, if the information reported is accurate, I would suggest that you review the District of Columbia, Montana and New York Rules of Professional Responsibility.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Omvig', with a large, sweeping flourish extending to the right.

Kristin L. Omvig

c: FJBC
Kathleen L. Mazure
Bruce A. Fredrickson

Attachment 3

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Confederated Salish and Kootenai Tribes
Energy Keepers, Incorporated

)
)
)

Project No. P-5-100

AFFIDAVIT OF TIM ORR

STATE OF MONTANA

)

) ss:

County of Flathead

)

Tim Orr, being first duly sworn upon oath, deposes and says:

1. I am a citizen of the United States, a resident of the State of Montana, of legal age and I am competent to be a witness. I am percipient and if called upon to testify could testify to the following, all of which are within my own personal knowledge.

2. I am an individual residing on the Flathead Indian Reservation ("FIR"). I am a farmer and own fee land on the FIR; I am an irrigator, a member of the Mission Irrigation District, and a Board and Executive Committee member of the Flathead Joint Board of Control ("FJBC").

3. I make this affidavit of my own accord and do not speak for any other individual or entity, including the irrigation districts and FJBC.

4. For many years, I was directly involved with operations of the Flathead Irrigation Project ("Project"). I am very familiar with the Project's history and with the issues surrounding Project operations. I am also very familiar with the Low Cost Block of Power ("LCB") and Net Power Revenues ("NPR"), and their associated issues, including the issues involved in the above captioned action.

5. Both LCB and NPR are vital to the continued viability of the Project and the irrigators who make their living on farms and ranches served by the Project.

6. I am providing this Affidavit in response to the Supplemental pleading filed on October 5, 2015, by attorney, Lawrence A. Kogan's on behalf of TED HEIN, DEAN BROCKWAY, BUFFALO WALLOW LLC, WESTERN WATER USERS ASSOCIATION LLC, GENE ERB, JR., PAUL A. and BARBARA GRIECO, MARY K. MATHEIDAS, R. ROY and SHEILA M. C. VALLEJO.

7. I consider each of the individuals named in the preceding paragraph to be a friend.

8. By comparing the case caption on attorney Kogan's Supplemental pleading with the case caption on prior pleadings filed by Mr. Kogan, it appears that the following are the "clients" that have severed their relationship with Mr. Kogan, at least with respect to the above captioned action:

- Linda Ambo;
- Gary and Sandy Baertsch;
- Charley and Carol Lyons;
- Robert and Erlene Robinson; and
- Ray L. and E. Anne Swenson.

9. I am personally very concerned with the positions taken by attorney Kogan and have been outspoken regarding my concerns, both at FJBC Board meetings and in conversations that I have had with friends and other irrigators who will ultimately be impacted by these proceedings.

10. I was especially concerned when I saw the names of the individuals attorney Kogan named as intervenors in this action. I did not believe that those individuals understood

the positions that attorney Kogan was taking and did not understand what could and could not be addressed in these proceedings.

11. I took it upon myself, at no one's direction, to speak with some of the individuals named as intervenors. I was told by some that they had not received any of attorney Kogan's filings and was told by another that he expressly indicated to attorney Kogan or to Elaine Wellman, a consultant and advocate for attorney Kogan, that he was not to be included as a party to the intervention.

12. I informed FJBC's attorney, Kristin Omgvig, of the nature of those conversations.

13. Based on information I had been provided and based on my very real and personal concerns regarding what I believed to be the potential negative impact of the possible intervention to the irrigation districts and to individual irrigators, I e-mailed Ray Swenson and asked if he would schedule a meeting for 10:00 A.M., Sunday, October 25, 2015, with several of the intervenors. He followed through and did that.

14. I spoke with FJBC attorney, Kristin Omgvig, prior to that meeting and requested that she e-mail me a list of questions that would be useful to have answered based on the information that I previously passed on to her. That e-mail is attached hereto as **EXHIBIT 1**. I took it upon myself, with no direction from Ms. Omgvig or anyone else, to blackout certain portions of that e-mail, and rather than re-writing the questions (my handwriting is poor), I simply gave it to those in attendance at the meeting as something to ponder. I did not ask for responses to the questions at the time of the meeting.

15. The 10:00 o'clock meeting was held at Charley and Carol Lyons' home and those in attendance were Ray Swenson, Charley and Carol Lyons, Gene Erb and me. Ted Heins was also supposed to be in attendance at that meeting but could not make it. The meeting was not

contentious, was entirely voluntary and I again explained my very real concerns of what I perceived to be the potential negative impact that the intervention was likely to have on this proceeding. I also shared with those in attendance the graph that was prepared by one of the irrigators. That graph is attached hereto as **EXHIBIT 2**.

16. I was not directed by any of the Board's attorneys to do or say anything at that meeting. I did not believe that the intervenors had been provided with good information from attorney Kogan, and wanted to make sure that they each understood my concerns. I acted on my own scheduling and speaking at the meeting. I was not acting on behalf of the Board or the Board's attorneys, although I know that they share many of my same concerns.

17. I have reviewed attorney Kogan's October 31, 2015 e-mail and attachments directed to attorney, Kristin L. Omgvig and know his accusations to be wholly without merit. (Exhibits 1, 1A & 1B attached to Ms. Omgvig's Affidavit)

Further your affiant says not.

Tim Orr
Tim Orr

SUBSCRIBED AND SWORN to before me this 12th day of November, 2015.

Sarah Bird

SIGNATURE

Sarah Bird

PRINT OR TYPE NAME

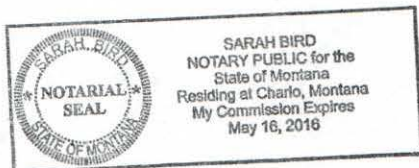
Notary Public for the State of Montana.

Residing at Charlo, MT

My commission expires:

05-16-2016

MONTH, DAY, YEAR (201*)



orrfarm@blackfoot.net

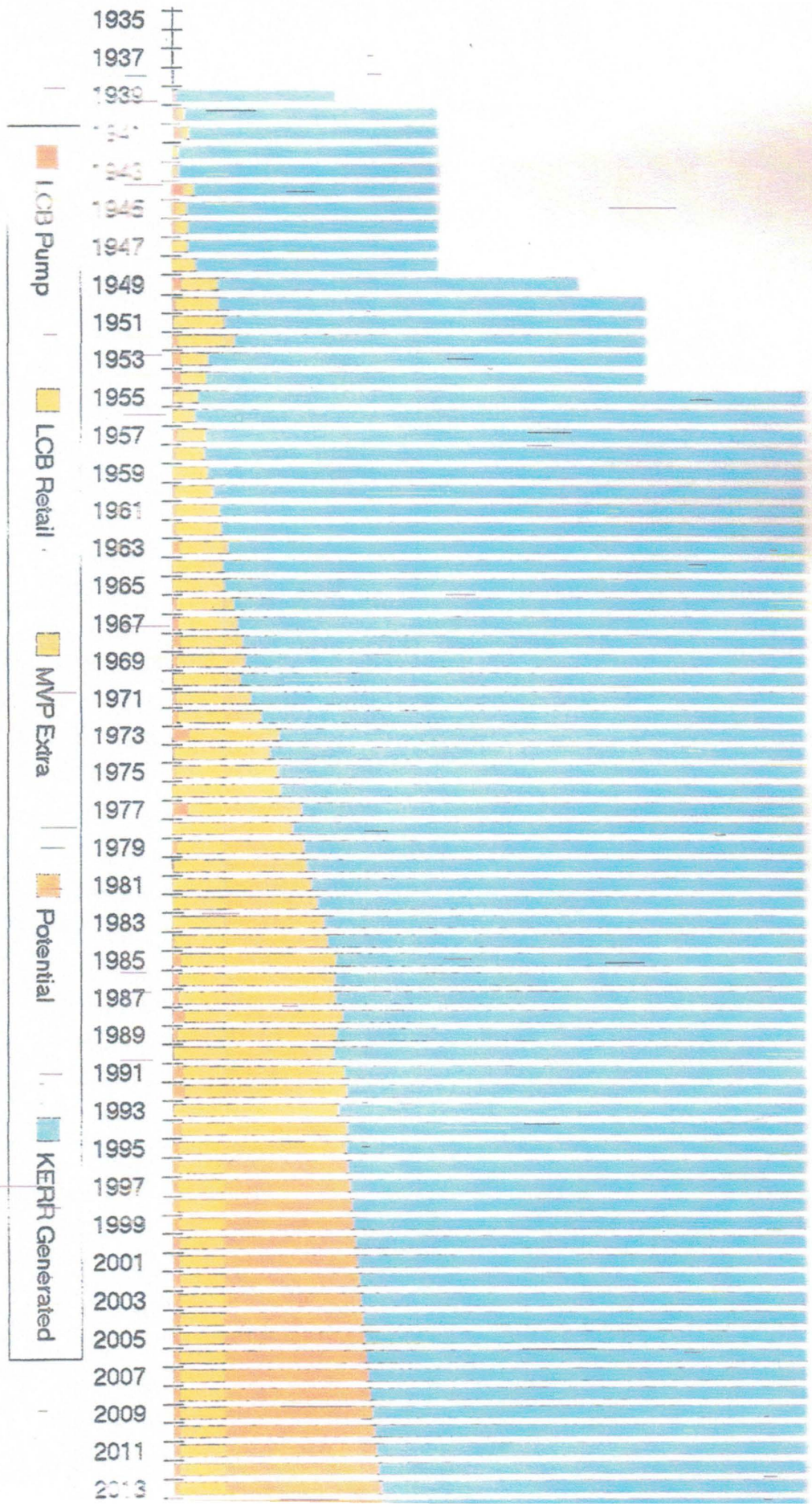
From: [REDACTED]
Date: Sunday, October 25, 2015 9:51 AM
To: "Tim Orr" <orrfarm@blackfoot.net>; [REDACTED]
Subject: Points and issues

1. Did they agree to be represented by Kogan in FERC proceedings?
2. Did they review and approve the FERC intervention pleading?
3. Has Kogan provided them with copies of pleadings, letters emails he's sent? Did they review and approve them being sent?
4. Nature of their interactions with Boone. Discussion vs. Intimidation.
5. Do they want intervention withdrawn or to be removed as intervenors?

Sent from my Verizon W [REDACTED]

10/25/2015

ORR - EXHIBIT 1



POWER GENERATED BY KERR DAM
 POWER USED BY MISSION VALLEY POWER

Attachment 4

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Confederated Salish and Kootenai Tribes)
Energy Keepers, Incorporated)

Project No. P-5-100

AFFIDAVIT OF BOONE COBE

STATE OF MONTANA)
County of Sanders) ss:

Boone Cole, being first duly sworn upon oath, deposes and says:

1. I am a citizen of the United States; a resident of the State of Montana, of legal age, and I am competent to be a witness. I am percipient and if called upon to testify could testify to the following; all of which are within my own personal knowledge.

2. I am an individual residing on the Flathead Indian Reservation ("FIR"). I am a rancher and own fee land on the FIR; I am an irrigator, a member of the Jocko Irrigation District; I am the Chairman of the Board and as such am a member of the Executive Committee of the Flathead Joint Board of Control ("FJBC").

3. I make this affidavit of my own accord and do not speak for any other individual or entity, including the irrigation districts and FJBC.

4. I am very familiar with the Flathead Irrigation Project's [the "Project"] history and with the issues surrounding Project operations. I am also very familiar with the Low Cost Block of Power ("LCB") and Net Power Revenues ("NPR"), and their associated issues, including the issues involved in the above captioned action.

5. Both LCB and NPR are vital to the continued viability of the Project and the irrigators who make their living on farms and ranches served by the Project.

6. I am providing this Affidavit in response to the Supplemental pleadings filed on October 5, 2015 and November 10, 2015, by attorney, Lawrence A. Kogan's on behalf of TED HEIN, DEAN BROCKWAY, BUFFALO WALLOW LLC, WESTERN WATER USERS ASSOCIATION LLC, GENE ERB, JR., PAUL A. and BARBARA GRIECO, MARY K. MATHEIDAS, R. ROY and SHEILA M. C. VALLEJO.

7. Although I do not know the Matheidases, I consider each of the remaining individuals named in the preceding paragraph to be a friend.

8. I understand that the following are the "clients" that have severed their relationship with Mr. Kogan, at least with respect to the above captioned action, and have withdrawn as intervenors:

- Linda Ambo;
- Gary and Sandy Baerlsch;
- Charley and Carol Lyons;
- Robert and Erlene Robinson; and
- Ray L. and E. Anne Swenson.

9. I am personally very concerned with the positions taken by attorney Kogan and have been outspoken regarding my concerns, both at FJBC Board meetings and in conversations that I have had with friends and other irrigators who will ultimately be impacted by these proceedings.

10. I was especially concerned when I saw the names of the individuals attorney Kogan named as intervenors in this action. I did not believe that those individuals understood the positions that attorney Kogan was taking and did not understand what could and could not be addressed in these proceedings.

11. I took it upon myself, at no one's direction, to speak with some of the individuals named as intervenors. On October 23, 2015, I spoke with Carol Lyons, Sheila Vallejo, Dean Brockway and Ted Hein regarding Kogan's attempted intervention in the FERC proceeding. I visited with Ray Swenson on November 2, 2015. I spoke independently with Ted Hein and Dean Brockway and inquired as to their level of understanding of attorney Kogan's motion to intervene, particularly since it contained so many factual errors and did NOT reflect the Joint Board's position as it purported to do. Additionally, I expressed to them the potential damage that I firmly believed the intervention could do to the Board's efforts before FERC.

12. Dean Brockway assured me that he had no idea what had been filed, or even that anything had been filed. His only connection was that he had been a party to the earlier action by attorney Kogan regarding the transfer of Kerr Dam to the CSKT. He had not seen any documents or consented to be party to this action. I understand that he has since consented to attorney Kogan's representation.

13. Both the Lyons and the Vallejos, who are dear friends of mine, had already heard of the fallout of attorney Kogan's attempted intervention by the time I talked to them. They were very apologetic and remorseful for having any part in anything that was counterproductive to the Board's efforts in any way. Both have been staunch supporters of the Board. They both assured me that they were told that attorney Kogan would only be "supporting the Board's efforts" and in general they thought he was working with the Board. Neither knew about this particular action or had seen any of the documents that attorney Kogan filed.

14. Ray Swenson, also told me that he had not seen the documents that were filed.

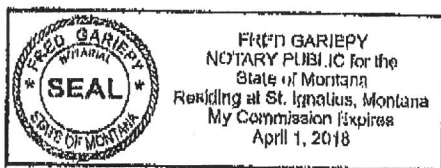
15. I consider all of the individuals with whom I spoke to be friends, and I certainly never used any "Mafia" tactics as attorney Kogan suggests.


16. I was not directed by any of the Board's attorneys to do or say anything to any of the individuals with whom I met. I did not believe that the intervenors had been provided with good information from attorney Kogan, and wanted to make sure that they each understood my concerns. I acted on my own meeting and speaking with those individuals. I was not acting on behalf of the Board or the Board's attorneys, although I know that they share many of my same concerns.

Further your affiant says not.


Boone Cole

SUBSCRIBED AND SWORN to before me this 13th day of November, 2015.




SIGNATURE
Fred Garlepy

PRINT OR TYPE NAME
Notary Public for the State of Montana,
Residing at St Ignatius, Montana
My commission expires: April 1, 2018

MONTH, DAY, YEAR (201*)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Washington, DC, this 13th day of November, 2015.

/s/ Harry A. Dupre
Harry A. Dupre
Duncan, Weinberg, Genzer
& Pembroke, P.C.
1615 M St., N.W.
Suite 800
Washington, DC 20036
Tel: (202) 467-6370
Fax: (202) 467-6379
had@dwgp.com