

153 FERC ¶ 63,013  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Confederated Salish and Kootenai Tribes  
Energy Keepers, Incorporated

Project No. 5-100

ORDER OF CHIEF JUDGE DENYING MOTION  
TO INTERVENE OUT OF TIME, RULING ON SUPPLEMENTAL FILINGS,  
AND GRANTING NOTICE OF WITHDRAWAL

(Issued November 13 2015)

1. On October 21, 2015, Ted Hein, Dean Brockway, Buffalo Wallow LLC, Western Water Users Association LLC, Scott and Linda Ambo, Gary and Sandy Baertsch, Gene Erb, Jr., Paul A. and Barbara Grieco, Charley and Carol Lyons, Mary K. Matheidas, Robert and Erlene Robinson, Ray L. and E. Anne Swenson, and R. Roy and Sheila M.C. Vallejo (Petitioners), filed a motion to intervene out of time in this proceeding (Motion to Intervene Out of Time).
2. On November 5, 2015, Petitioners supplemented their Motion to Intervene Out of Time (Supplement). The Chief Judge hereby accepts Petitioners' Supplement for filing and consideration.
3. On November 10, 2015, Scott and Linda Ambo, Gary and Sandy Baertsch, Charley and Carol Lyons, Robert and Erlene Robinson, and Ray L. and E. Ann Swenson filed a Notice of Withdrawal (Withdrawing Petitioners) from the instant Motion to Intervene Out of Time on the grounds that they have no interest in participating in this proceeding. Accordingly, Withdrawing Petitioners' request to withdraw from participation in this proceeding is hereby granted.
4. On November 10, 2015, Ted Hein, Dean Brockway, Buffalo Wallow LLC, Western Water Users Association LLC, Gene Erb, Jr., Paul A. and Barbara Grieco, Mary K. Matheidas, and R. Roy and Sheila M.C. Vallejo (Remaining Petitioners) filed a Second Supplement to their October 21, 2015, Motion to Intervene Out of Time. The November 10, 2015, Supplement is in effect an answer to an answer, which is not permitted under the Commission's rules.<sup>1</sup> Accordingly, the Remaining Petitioners' Second Supplement is hereby rejected and the Chief Judge will not consider the arguments made therein.

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<sup>1</sup> 18 C.F.R §385.213(b) (2015).

5. As grounds for their request, Remaining Petitioners assert that they each are members of the same irrigation districts (Flathead, Mission and Jocko Valley Irrigation Districts (Districts) which the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (FJBC) (hereinafter FJBC/Districts) which the FJBC is charged with representing. Remaining Petitioners argue that they are irrigators engaged in the business of ranching and/or farming on the Flathead Indian Reservation and/or also reside there, and consequently, are consumers of electricity, and as such they have an interest in ensuring that the public benefits from any settlement entered in this proceeding. Remaining Petitioners also allege that FJBC/Districts' proposed negotiating position does not adequately represent their interests and that their intervention will not cause any prejudice or undue delay or result in additional burden upon any party. In their November 5, 2015, Supplement, Remaining Petitioners allege that the FJBC's Montana and D.C. counsels have engaged in objectionable behaviors, demonstrating that Remaining Petitioners' interests are not adequately represented.

6. On November 6, 2015, FJBC/Districts filed an answer in opposition to the Motion to Intervene Out of Time, as supplemented on the same date, strongly denying the allegation that FJBC/Districts and their counsels engaged in inappropriate behavior, stating that the Supplement is devoid of any specificity regarding any communications except those with Mr. Hein. FJBC/Districts point out that Mr. Hein is a member of the Executive Committee of the FJBC, and that as such he has the right to attend and participate in regularly and especially convened FJBC meetings. FJBC/Districts further assert that the allegations raised on Exhibit 2 and Exhibit 3 to the Supplement are baseless and constitute an attempt to disrupt the settlement proceedings. FJBC/Districts aver that Remaining Petitioners' disclosure of privileged information regarding confidential settlement positions FJBC/Districts severely prejudices the FJBC/Districts' settlement positions and are evidence of Remaining Petitioners' attempt to disrupt this proceeding and burden the participants. FJBC/Districts object to the contentions raised in Remaining Petitioners' Motion to Intervene Out of Time on the grounds that the Districts are entities created under Montana law to perform certain obligations and exercise certain authority on behalf of the owners of irrigable lands served by the Flathead Irrigation Project (FIP), and that the FJBC is a local governmental entity under Montana law that serves as the central control agency of the Districts. FJBC/Districts point out that FJBC and the Districts are elected local governments under Montana law, which empowers irrigation districts with the authority and responsibility to represent landowners within district boundaries as to irrigation matters. FJBC/Districts further point out that while they strive to reach consensus, given the 2400 Members and 12 Board Members, that goal is not always attainable, and that the fact that a few members disagree with a given FJBC/Districts' action does not mean that the FJBC/Districts are not properly representing their members and the public interest. FJBC/Districts disagree with Remaining Petitioners' assertion that the FJBC/Districts' negotiating position should

include reference to water rights, because water rights is a state function and the Commission does not adjudicate water rights.

7. The Chief Judge agrees with FJBC/Districts' that Remaining Petitioners' interests are already represented by FJBC/Districts and that they have failed to demonstrate any independent interests not already represented herein. As pointed out by FJBC/Districts, the FJBC/Districts operate on a majority rule basis and the fact that a few members do not agree with an action taken by FJBC/Districts does not mean that the FJBC/Districts are not properly representing their members and the public interest. FJBC/Districts are entities created under Montana law which empowers irrigation districts with the authority and responsibility to represent landowners within district boundaries as to irrigation matters.<sup>2</sup> Additionally, the Chief Judge finds that Remaining Petitioners' seek to have issues addressed in this proceeding that are beyond the scope of the Order Establishing Hearing and Settlement Judge Procedures, issued on September 17, 2015.<sup>3</sup> The Commission established a hearing in this case to determine: ". . . whether the Confederated Salish and Kootenai Tribes (Tribes), as licensees for the Kerr Hydroelectric Project No. 5, . . . must make any part of the output from the project available to the United States, for and on behalf of the Flathead Board or the Districts, and, if so, on what terms and conditions."<sup>4</sup> The Remaining Petitioners' attempt to raise issues relating to: (1) "whether the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation," and (2) irrigator water rights<sup>5</sup> are clearly outside the scope of the issues set for hearing in this case. The Chief Judge further finds that granting Remaining Petitioners' Motion to Intervene Out of Time will disrupt the proceeding and will place additional burdens on other parties. Accordingly, for all of the foregoing reasons, Remaining Petitioners' Motion to Intervene Out of Time is hereby denied.

Curtis L. Wagner, Jr.  
Chief Administrative Law Judge

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<sup>2</sup> See Mont. Code Ann. § 85-7-1601.

<sup>3</sup> *Confederated Salish and Kootenai Tribes, Energy Keepers Incorporated*, 152 FERC ¶ 61,207 (2015) (September 17th Order).

<sup>4</sup> See Paragraph 1 and Ordering Paragraph (A) of the September 17<sup>th</sup> Order.

<sup>5</sup> Motion at PP 18, 23).

Document Content(s)

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