

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

Confederated Salish and Kootenai Tribes ) Docket No. P-5-100  
Energy Keepers, Incorporated ) Accession No. 20151022-5037 (public)  
 ) Accession No. 20151022-5038 (privileged)

**SECOND SUPPLEMENT TO  
MOTION 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  
FOR LEAVE TO FILE A MOTION TO INTERVENE IN THE  
ARTICLE 40(C) HEARING OF THE KERR HYDROELECTRIC PROJECT LICENSE  
AND TO PARTICIPATE IN THE SETTLEMENT JUDGE PROCEDURES ORDERED  
BY THE CHIEF ADMINISTRATIVE JUDGE**

**TO THE COMMISSION AND CHIEF JUDGE, CURTIS L. WAGNER, JR.**

Movants, through their undersigned counsel, hereby file this second supplement to their Motion for Leave/Intervene Out-of-Time (“Motion for Leave/Intervene”) to further explain how Movants satisfy the conditions of FERC Rules of Practice and Procedure, namely, Rules 214(b)(1)-(3), 18 C.F.R. §§ 385.214(b)(1)-(3) and Rule 214(d)(3), 18 C.F.R. § 385.214(d)(3). For the reasons explained below, Movants respectfully request that they each be permitted to intervene in, and be made a party to, the subject proceedings, with all rights attendant thereto, on an expedited basis no later than November 16, 2015.

**I. Clarification and Supplementation of Prior Filings**

1. 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, the remaining Movants in the above-referenced matter, by their undersigned counsel, submit as part of the administrative record the following additional clarifying and

supplemental information to support the public and nonpublic (privileged and confidential) versions of the Motion for Leave/Intervention Out-of-Time (20151022-5037 and 20151022-5038, respectively) Movant's had previously filed and supplemented. Movants also respectfully request that the Commission and Chief Administrative Judge act on their underlying Motion for Leave/Intervention Out-of-Time and clarifying and supplemental filings, including this filing in an expedited manner, no later than Monday, November 16, 2015.

2. For the sake of clarifying the administrative record, Movants Hein and Brockway sit on and are members of the Flathead Joint Board of Commissioners (“FJBC”). Movant Hein is the duly elected Commissioner-at-Large, while Movant Brockway is a duly elected Commissioner of the Jocko Valley Irrigation District. Movant Brockway is inexplicably the only sitting Commissioner whose name and position have not been included on the FJBC website (Ex. 1).

3. For the sake of clarifying the administrative record, Movants had filed their Motion for Leave/Intervene to participate as a Party in these 1985 Kerr Dam operating license Article 40(c) public hearing and settlement conference proceedings to better understand and explain to District Members the significance of the low-cost block of power provided under Article 40(a) and its computation and relationship to members' water rights. Movants' efforts in this regard are purely in the public interest, as they are focused on ensuring the ongoing delivery of sufficient low-cost power to ALL irrigators and residents located on the Flathead Indian Reservation (“Reservation”) without compromising their economically valuable legal water right interests. Movants, through their undersigned counsel, have endeavored to protect these interests by complying with applicable FERC processes and procedures. On October 23, 2015, Movants filed their initial settlement conference proceeding negotiating position with Judge Michael Haubner in a timely manner pursuant to his direction. Unable to secure prior consent from the

FJBC or the Confederated Salish and Kootenai Tribes of the Flathead Reservation (“CSKT” or “Tribes”) to participate in the settlement conference meeting scheduled for 10:00 am, on October 26, 2015 in Washington, D.C., Movants, through their undersigned counsel, contacted, secured and attended a meeting with Judge Haubner and his Attorney-Advisor, Veronica Bradley, earlier that morning. The undersigned counsel relayed to Judge Haubner and Attorney-Advisor Bradley Movants’ efforts to communicate with the FJBC and their Montana and D.C. counsels about their low-cost power block-related concerns, as well as, about the inappropriate behaviors in which the FJBC Chairman and FJBC Commissioner, directly, and the FJBC’s counsels, indirectly, engaged to aggressively “convince” the undersigned counsel’s clients to withdraw their Motion for Leave/Intervene (*See* 20151106-5020). Based on this discussion, Judge Haubner stated he would be interesting in having the undersigned counsel, on Movants’ behalf, participate in that morning’s scheduled settlement conference meeting, and would try at its inception to persuade the Parties to grant consent for such participation. Notwithstanding Judge Haubner’s efforts, the Parties refused to consent. On November 2, 2015, following Movants’ submission of two conditional voluntary offers of withdrawal of intervention to the FJBC and its Montana and D.C. counsels, and the FJBC’s 7-1 vote (with one abstention) to reject Movants’ request for consent to participate in these proceedings held during the FJBC’s November 2, 2015 public meeting, Movants filed with the FERC a supplement to their Motion for Leave/Intervene (*See* 20151106-5020).

4. For the sake of clarifying the administrative record, Movants previously established that they each are ranchers, farmers and residents of the Flathead Indian Reservation and members of the Flathead, Mission and/or Jocko Valley Irrigation Districts (“the Districts”). Movants also established that they each hold economically valuable land and water-based legal rights –

“interests which may be directly affected by the outcome of the proceeding[,]” (i.e., adversely affected by the insufficient delivery of low-cost electricity), consistent with FERC Rules of Practice and Procedure Rule 214(b)(2) and 18 C.F.R. § 385.214(b)(2) (*See* 20151022-5037 at paras 9-10). Movants, furthermore, established they hold economic and legal interests similar to those held by several classes of persons that comprise a significant subset of the population currently living and working on the reservation. In other words, since Movants’ interests in these proceedings are largely representative of those held by many irrigators and residents living and working on the reservation who are also Members of the Districts, Movants’ participation in these settlement conference proceedings “is in the public interest,” consistent with FERC Rules of Practice and Procedure Rule 214(b)(3) and 18 C.F.R. § 385.214(b)(3) (*See* 20151022-5037 at para. 11; 20151022-5038 at para. 18).

5. For the sake of clarifying the administrative record, Movants also had established, consistent with FERC Rules of Practice and Procedure Rule 214(d)(3) and 18 C.F.R. § 385.214(d)(3) (*See* 20151022-5038 at paras. 18-23), that the Commission should grant Movants’ Motion for Leave/Intervene, because their land, water and power-related interests and the similar interests of other District Member irrigators and residents living and working on the reservation, which the FJBC is charged by State law and its organization bylaws with representing in these proceedings, are, in fact, not being “adequately represented” by the FJBC. Movants had taken the precaution to ensure that its discussion of these issues as it relates to the FJBC settlement conference negotiating position were treated as “privileged and confidential information” under 18 C.F.R. § 388.112(a)-(b) and not publicly disclosed.

6. For the sake of clarifying the administrative record, Movants had previously emphasized that the FJBC’s May 28, 2015 petition for Kerr Dam Project license Article 40(c) public

hearings, which the FERC had granted on September 17, 2015, had focused only on whether the CSKT and Energy Keepers, Inc. (“EKI”), the Tribes’ federally chartered subsidiary corporation (both now co-licensees to the Kerr Dam Hydroelectric Project (P-5) following the conveyance of the Project to the Tribes on September 5, 2015 and FERC’s order approving the partial transfer of the NorthWestern Energy-CSKT co-license to the Tribes and EKI),<sup>1</sup> must make any part of the output from the Kerr Hydroelectric Project available to the United States. (FJBC Petition at 6; 152 FERC ¶ 61,207 at Ordering Para. A). Movants also had noted that its raising of the Kerr Dam license Article 40(c)(ii) issues during the settlement conference proceedings, notwithstanding the failure of the FJBC Article 40(c) hearing Petition to incorporate a discussion of the Article 40(c)(ii) issues within its scope, would not prolong these proceedings or impose additional burdens upon the Parties to said license given the Tribes’ status as a Party to the 1985 license and the Interior Secretary’s role in the license and its familiarity with the license terms (*See* 20151022-5037 and 20151022-5038 at para. 25). Movants had taken the precaution to ensure that its discussion of the 40(c)(ii) issues as they related to the FJBC negotiating position were treated as “privileged and confidential information” under 18 C.F.R. § 388.112(a)-(b) and not publicly disclosed.

7. For the sake of clarifying the administrative record, Movants had noted how the FJBC had previously failed to convene a special meeting prior to October 12 to explain to District Members the FERC orders granting the FJBC’s request for a public hearing, directing the establishment of settlement conference proceedings, appointing a settlement conference judge and establishing a settlement conference proceeding schedule, the FJBC’s understanding of the issues to be discussed at those proceedings and their potential negotiating positions (*See* 20151022-5037 and 20151022-5038 at para. 13).

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<sup>1</sup> See 152 FERC ¶ 62,140 (Sept. 1, 2015), at p. 7, Ordering Para. A.

8. For the sake of clarifying and supplementing the administrative record, Movants wish to direct the Commission and the Chief Administrative Judge to the FJBC's ongoing lack of transparency and accountability to District Members with respect to the low-cost block of power and other FERC-related issues, and more generally, despite the FJBC's legal status as a local government advisory board (2-3-102(1) Montana Code Annotated ("MCA")) that is bound by contractual agreement (Ex. 2),<sup>2</sup> state laws and Attorney General Opinions to operate openly in the public interest (e.g., 85-7-605, 85-7-1612 MCA; 51 A.G. Op. 12 (2005)). The Districts, as principals, are each designated by State law (85-7-109 MCA) as a "public corporation for the promotion of the public welfare" (Ex. 3). The Districts formed the FJBC to serve as their operating agent for purposes of conducting the Districts' business in promotion of the public welfare (Ex. 4). To this end, the FJBC, like the Districts, through its Officers (including Chairman, and Commissioners), "are responsible directly to irrigators to make decisions and take actions for the general benefit of all irrigators,"<sup>3</sup> and are subject *inter alia* to Montana ethics (2-2-101 to 2-2-126 MCA), conflicts-of-interest (2-2-201 to 2-2-207; 2-3-101 to 2-3-104 MCA) and public participation and right-to-know laws (2-3-101 to 2-3-114; 2-3-201 to 2-3-204; 2-3-211 to 2-3-215; 2-3-221 MCA) (Ex. 5)<sup>4</sup> which are intended to promote public transparency and accountability. By virtue of these Montana statutes, Movants have "a right conferred by rule or statute" to participate indirectly in these proceedings through adequate representation provided

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<sup>2</sup> See *Contract Between the Flathead, Mission and Jocko Irrigation Districts, Forming the Flathead Joint Board of Control* (May 27, 2014).

<sup>3</sup> See *Operating Bylaws of the Flathead Joint Board of Control* (May 2014), at Art. II, Sec. 1. See also Id., at Art. II, Sec. 3 ("As democratically elected officers of local governments, Board Commissioners are obligated under these bylaws and Montana law, Title 2, Chapter 2, Part 1, Code of Ethics, Part 2, Proscribed Acts Related to Contracts and Claims, and Part 3, Nepotism, to make decisions and take actions for the best interest of irrigators, not in their own self-Interest, and without any conflict of interest. All Board Commissioners, by taking the oath of office, agree to fulfill their public duties without regard to their private interests.")

<sup>4</sup> See Montana State University Local Government Center, Montana Code Annotated TITLE 2 GOVERNMENT STRUCTURE AND ADMINISTRATION, CHAPTER 3 - PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATIONS, Part 1 Notice and Opportunity to Be Heard, available at: <http://www.msulocalgov.org/resources/Data/Resources%20by%20Topic/Open%20Meetings%20and%20Right%20To%20Be%20Heard/MCA%20Notice%20Opp%20Heard%20FULL.pdf>.

by the FJBC/Districts, which if wanting, would entitle Movants, as District Members, to directly participate on their own behalf, consistent with FERC Rules of Practice and Procedure Rule 214(b)(1) and 18 C.F.R. § 385.214(b)(1).

9. For the sake of clarifying and supplementing the administrative record, Movants submit that the FJBC, through the majority of its Board of Commissioners and its Montana and D.C. counsels, had failed to provide to ALL District Members website-available copies of the agendas and minutes of FJBC regular and special meetings convened during 2014 and/or 2015, including the more recent FJBC meetings relating to the Kerr Dam Project license Article 40(c) public hearing and settlement conference proceedings, in contravention of State law public transparency and accountability standards (2-3-103; 2-3-212 MCA). The FJBC, through its officers, the majority of its Board of Commissioners, and its Montana and Washington, D.C. counsels, also had failed to truthfully and comprehensively explain to Movants and ALL other District Members, including members who attended such meetings: 1) what precisely Kerr Dam Project license Articles 40(c)(i) AND (ii) each pertain to; 2) the legal bases and justifications for the FJBC not including the resolution of Article 40(c)(ii) issues within the scope of their May 28, 2015 public hearing request (Ex. 6); and 3) the underlying premises and presumptions the FJBC/Districts have made on Movants' and District Members' behalf concerning Movants' and District Members' on- and off-reservation water rights and legal entitlement to low-cost reservation electricity in pursuing the current Article 40(c)(i) negotiations with the CSKT, the State of Montana and the U.S. Department of Interior's Bureau of Indian Affairs. These FJBC procedural failures, furthermore, in contravention of State law (2-3-101; 2-3-103; 2-3-111 MCA), have denied Movants and other District Members sufficient time and means to formulate and submit substantive comments concerning the merits and scope of FJBC's participation in

these proceedings, and to have those comments that had been submitted by District Members (including a legal opinion Movant's undersigned counsel had prepared) considered and taken into account prior to the FJBC deciding to attend the October 26, 2015 settlement conference meeting in Washington, D.C.

10. For the sake of clarifying and supplementing the administrative record, the FJBC convened a public meeting on November 2, 2015, which, in part, discussed the FJBC's decision to neither approve nor oppose this Motion for Leave/Intervene. During this meeting, the FJBC negatively portrayed Movants' Motion for Leave/Intervene as disruptive of the settlement comment process and Movants' undersigned counsel's efforts to work with the FJBC as insincere. The FJBC also failed to inform District Members about Movants' two offers to withdraw their Motion for Leave/Intervene which they had submitted to the FJBC through the undersigned counsel. The first offer was submitted on October 23, 2015, prior to numerous incidents of FJBC Chairman harassment and Montana counsels' indirect communications with the undersigned counsel's clients which had been successful in pressuring several such clients to withdraw from the Motion for Leave/Intervene, and to the initial October 26, 2015 settlement conference meeting. The second offer was submitted on November 2, 2015, following the initial settlement conference meeting (*See* 20151106-5020). The FBJC's discussion of Movants' objective in these proceedings, furthermore, was false and inaccurate and effectively misinformed and misled District Members in contravention of the FJBC's public trust duties under State law (2-2-103 MCA). The FJBC, through its Montana and D.C. counsels, moreover, failed to address at the November 2, 2015 public meeting, in a clear and understandable manner, any of the questions Movants had raised in their Motion for Leave/Intervene or in its two offers of withdrawal. FJBC counsels had insisted that they could not address these questions before

District Members at the regular meeting because they related to the FJBC/Districts' settlement conference negotiations strategy which constituted privileged and confidential information developed in anticipation of administrative FERC litigation. The FJBC counsels, however, failed to reveal to District Members that the only adverse parties in the contemplated administrative litigation would be other State and Federal public bodies, which would, under State law, arguably enable FJBC to disclose such issues and strategy to District Members (2-3-201; 2-3-203(1) and (4)(b) MCA). The FJBC counsels also failed to reveal to District Members that they were arguably entitled to submit comments with respect to such issues and strategy because the FJBC's strategy-related decisions were made *not* to protect *FJBC* interests, but rather, to protect the interests of ALL Districts *and their Members*, including Movants (2-3-112(2) MCA).

11. For the sake of clarifying and supplementing the administrative record, during the FJBC's November 2, 2015 public meeting, the FJBC, through its Commissioners and its D.C. counsel, stated its conclusion that the current settlement conference proceedings were essential to preserving the low-cost block of power guaranteed by Articles 40(a) and (c) of the previous Kerr Dam license. D.C. counsel emphasized to District Members, however, that the right to a low-cost block of power belonged to, and the terms and conditions thereof were to be determined collectively by, the Flathead Irrigation Project (currently operated by the U.S. Interior Department's Bureau of Indian Affairs) and the Districts. In her view, this right did not belong to, and therefore, the terms and conditions thereof could not be determined by, individual District Members. According to D.C. counsel, "it's the Districts and the Irrigation Project, it's *not the individual members*" (emphasis added)<sup>5</sup> of the Districts who are entitled to the low-cost block of

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<sup>5</sup> These and other speakers' quotations set forth in this filing were taken directly from a video recording of the November 2, 2015 FJBC public meeting.

power. D.C. counsel's statement apparently overlooked and/or disregarded Article II, Section 2 of the FJBC bylaws (governing the conduct of both the Districts and the FJBC) which obliges the FJBC, as the Districts' agent, to ensure that it "fulfills its duties to irrigators" and remains "responsible directly to irrigators to make decisions and take actions for the general benefit of all irrigators."

12. For the sake of clarifying and supplementing the administrative record, the FJBC had assigned one of its Commissioners the task, during the FJBC's November 2, 2015 public meeting, of briefly describing to District Members what appeared to be a critically important underlying basis/presumption guiding the FJBC's participation, and likely its settlement negotiation position, in these settlement conference proceedings which D.C. counsel's comments had previously only touched upon. During that meeting, Commissioner Tim Orr made the following statement:

"This is about *the low cost power block* folks. It *has nothing to do with your land rights or water rights*. This is low cost block of power. *It is within the influence of the Flathead Irrigation Project or Mission Valley Power however you look at it.* The important thing is that this is owned by the USA. *Mission Valley Power is owned by the USA not the Tribes – they are operating it. This Flathead Irrigation Project is owned by the USA.* We're getting close to getting it back for operation. The most important thing – they [the USA] reserved the water for Flathead irrigation. That way, they could distribute it to all of you. Flathead Irrigation. Everyone that uses power from Mission Valley Power within their influence gets a break on the power. We've got the cheapest power in the northwest because of the Flathead Irrigation Project. The most important thing is that it is called the "use" of that water right. It's just the use – they're not giving it up. The government is not giving up their water right for us. They're keeping it. It's in the 1985 license agreement"<sup>6</sup> (emphasis added).

This statement, however, was more of a conclusion than an explanation, which resulted in District Members raising additional questions that were not clearly answered.

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<sup>6</sup> *Id.*

13. For the sake of clarifying and supplementing the administrative record, in responding to a District Member's question asked during the FJBC's November 2, 2015 meeting about the relationship between the low-cost block of power and District Member water rights, D.C. counsel made the following statement:

"FERC does not adjudicate water rights. *That is a fake issue.* [...] The only thing FERC does, is that when Congress tells it to, it requires low -cost power as a quid pro quo for water rights being used, but it does not adjudicate those water rights. That is an issue for State courts. I'm not saying *issues regarding water* are not valid, or not hotly contested, but they *simply are not appropriate for FERC*. FERC will not adjudicate water rights, and *to the extent they are raised, they will cost everybody a lot more money and undermine our positions on the low-cost power*" (emphasis added).<sup>7</sup>

D.C. counsel's statement was intentionally misleading and indirectly suggested that Movants' Motion for Leave/Intervene had sought to have FERC adjudicate their water rights in relation to the low-cost block of power. Much to the contrary, Movants' had merely questioned whether the FJBC's proposed low-cost power block negotiating position should include reference to water rights (*See* 20151022-5037 and 20151022-5038 at para 13), and the extent to which, if any, the Interior Secretary's sale of electricity off-reservation would impact District Members' on-reservation water rights (*See* 20151022-5038, at par. 18).

14. For the sake of clarifying and supplementing the administrative record, as noted in paras. 12-13 above, FJBC Commissioner and D.C. counsel individually and collectively represented that the low-cost block of power has nothing to do with irrigator water rights, and that if irrigator water rights are raised during these settlement conference proceedings, it would be very costly for the Districts' irrigators. Movants, through their undersigned counsel, submit that these representations are misleading and untrue, and provide the following evidence that the FJBC, through its D.C. counsel, has misrepresented the relationship of the low-cost power block to

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<sup>7</sup> *Id.*

water rights. On November 6, 2015, D.C. counsel's legal assistant, Julie L. Smith, dispatched an email to serve notice on the undersigned counsel, among others, of the FJBC/Districts' Opposition to Movants Motion for Leave/Intervene. That email correspondence included a number of recipients with clear interests in federal reserved water rights that would be opposed to District Members' concerns about the impact of the low-cost block of power on irrigator water rights. (Ex. 7). These email recipients *inter alia* included persons not known by the undersigned counsel to be Parties to these Kerr Dam Article 40(c) public hearing and settlement conference proceedings: 1) FERC Trial Attorney Cheryl Ryan [Cheryl.Ryan@ferc.gov], formerly of the Washington, D.C. law firm VanNess Feldman which currently represents the CSKT in these FERC proceedings; 2) Jamie Gough, longtime Water Uses Program Manager at the U.S. Department of Agriculture ("USDA")'s U.S. Forest Service ("USFS"), Ogden, UT [jgough@fs.fed.us]; 3) Jody M. Miller, an attorney with the Office of USDA's U.S. Forest Service, Missoula, MT [jmmiller01@fs.fed.us]; 4) Terry Egenhoff, Regional Special Uses Coordinator for USDA's U.S. Forest Service Special Uses–Lands and Recreation division, Region 1 - Natl. Forests/Grasslands: MT, Northern ID, Northwest-SD & ND [tegenhoff@fs.fed.us]; 5) Leon F Szeptycki, Environmental Counsel for Trout Unlimited [lszeptycki@tu.org], a nonprofit organization the mission of which is to "Restore healthy stream flows and habitat [...] in seven states—California, Colorado, Idaho, Montana, Utah, Washington and Wyoming" by "[winning] major victories for fish in courts and state capitals;" and 6) Dr. Catherine Vandemoer, a highly trained hydrologist who is Chairman of the Board of the Montana Land & Water Alliance, an organization ostensibly "dedicated to protecting the property rights of Montanans" [4mtlandwater@gmail.com].<sup>8</sup>

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<sup>8</sup> See Catherine Vandemoer, Ph.D., *Meet the New Compact....Same as the Old Compact*, Western Montana Water Rights (12/24/2014), available at: <https://westernmtwaterrights.wordpress.com/2014/12/26/meet-the-new-compact->

15. For the sake of clarifying and supplementing the administrative record, the USDA-USFS previously entered into the “Water Rights Compact of Montana and the United States of America Department of Agriculture Forest Service,” which was codified into State law in 85-20-1401 MCA.<sup>9</sup> This compact was filed with the Montana Secretary of State under the provisions of 85-2-702 on April 17, 2007. As the compact (85-20-1401) states:

“This Compact is entered into by the State of Montana (‘State’) and the United States of America (‘United States’) to settle for all time any and all claims existing on the Effective Date of This Compact to *federal reserved water rights* for National Forest System Lands administered by the Forest Service [...] WHEREAS, section 85-2-703, MCA, provides that the State may negotiate compacts concerning *the equitable division and apportionment of water between the State and its people and the federal government with claims to non-Indian federal reserved water rights within the State of Montana*; [...] WHEREAS, *the United States wishes to secure water rights to fulfill the purposes of National Forest System Lands in the State of Montana*; WHEREAS, the United States, in quantifying and securing water rights to meet National Forest System purposes, seeks cooperatively to accommodate the interests of the State and its citizens and to avoid the conflict and uncertainty inherent in litigating federal reserved water rights claims. *The United States believes that the natural flows needed for favorable conditions of flow, for fisheries, and for other resource management goals and obligations on National Forest System Lands can be achieved, without materially affecting the interests of the United States, through the use of state law as provided in this Compact.*” (emphasis added).<sup>10</sup>

Apparently, the USDA-USFS had previously ensured that the federal government had reserved sufficient waters for “discrete administrative uses” (85-20-1401, Art. I(4) MCA), “dispersed administrative uses” (85-20-1401, Art. I(5) MCA), “emergency fire suppression” on “Natural Forest Land Systems” (85-20-1401, Art. II(A)-(C) MCA), and for “instream flow on the South Fork Flathead Wild and Scenic River in the amount of the entire flow of the river, less any of the United States’ Discrete Administrative Uses [...] and Dispersed Administrative Uses [...]”

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[same-as-the-old-compact/](#)

<sup>9</sup> See Title 85, Chapter 20, Part 14.

<sup>10</sup> See 85-20-1401 MCA, supra at Preamble and Recital Paragraphs 2, 4, 5.

provided that the instream flow water right is subordinate to all Water Rights Recognized Under State Law with a priority date before the Effective Date of This Compact” (85-20-1401, Art. II(D) MCA) (Ex. 8). If, however, it is true, as D.C. counsel had represented during the FJBC’s November 2, 2015 public meeting that the low-cost block of power has nothing to do with water compacts, which are not binding on FERC in any event, Movants, through their undersigned counsel question the necessity and rationale for involving USDA-USFS in these Article 40(c) low-cost block of power settlement conference proceedings. Movants submit that the USDA-USFS’ interest in these proceedings belies the fact, contrary to FJBC and D.C. counsel representations, that the low-cost block of power *does indeed involve water rights issues* that may affect Movants’ and similarly situated District Members’ legal and economic interests.

16. For the sake of clarifying and supplementing the administrative record, Trout Unlimited was previously a Party in administrative and judicial litigation against the Montana Power Company (“MPC”), a prior FERC co-licensee with the Tribes and the principal operator of the Kerr Dam, contesting MPC’s challenge of the proposed conditions the Interior Secretary had imposed on the fish and wildlife mitigation and enhancement (“Mitigation and Management”) plans that MPC had developed pursuant to Articles 45 and 46 of the 1985 Kerr Dam license agreement.<sup>11</sup> Trout Unlimited, along with the Interior Secretary, subsequently participated in settlement negotiations with MPC “to resolve the issues arising out of Interior’s conditions then pending in the court of appeals.”<sup>12</sup> Trout Unlimited, along with MPC, PPL Montana, the CSKT and the Interior Department, ultimately entered into a settlement agreement amending the terms of the 1985 license agreement and dismissing the appeals with prejudice.<sup>13</sup> The 2000 DOI-directed FERC Order approving of said agreement contained three amended articles (Arts. 64 ,

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<sup>11</sup> See 93 FERC ¶ 62,198 (2000) at pp. 2-3.

<sup>12</sup> *Id.*, at 3.

<sup>13</sup> *Id.*, at “Appendix B – Agreement to Amend License Terms” at pp. 30-37.

67 and 81) requiring MPC/PPL Montana to pay extensive sums of money and to engage in extensive consultation with and reporting to the Interior Department’s Fish and Wildlife Service, especially “to minimize take of bull trout.”<sup>14</sup> While Trout Unlimited’s prior interest in ensuring that the previous FERC licensees of the Kerr Dam operated it in a manner that did not endanger fish, wildlife and the environment can be explained, the nature and extent of Trout Unlimited’s current interests in the Article 40(c) low-cost block of power negotiation settlement conference proceedings is not readily apparent, though it is likely to guarantee the protection of fish, wildlife and the environment *through the preservation of federal and tribal reserved water rights.* Trout Unlimited’s involvement in these proceedings, contrary to FJBC and D.C. counsel representations, belies the fact that the low-cost block of power *does indeed involve water rights issues* that affect Movants’ and similarly situated District Members’ legal and economic interests.

17. For the sake of clarifying and supplementing the administrative record, Movants Hein and Brockway have informed the undersigned counsel that Dr. Catherine Vandemoer is currently serving as the appointed informal adviser to the FJBC with respect to all FERC-related issues, including the low-cost block of power, but they remain unaware of the true scope and extent of Dr. Vandemoer’s representation of the FJBC/Districts’ broader interests in these FERC settlement conference proceedings, and the authority and influence that she wields more generally over the FJBC, its Board of Commissioners, its Montana and D.C. counsels and the Districts with respect to ancillary matters. Movants submit that Dr. Vandemoer was responsible for recommending and securing D.C. counsel for the FJBC. Movants also submit that Dr. Vandemoer’s involvement in the low-cost block of power issue is especially curious considering her long-established and well-earned public reputation inside and outside of the U.S.

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<sup>14</sup> *Id.*

government. Abundant evidence reveals that Dr. Vandemoer served as the Special Assistant to former Assistant Interior Secretary and Bureau of Indian Affairs Director, Ada Deer, as the National Oceanic and Atmospheric Administration National Marine Fisheries' Regional Coordinator for the Mid-Columbia (River) Basin, and as the consultant to several Indian tribes and nongovernmental groups championing federal and tribal reserved water rights, including those for fishery instream flows, at the expense of irrigator land and water rights. Abundant evidence also reveals that Dr. Vandemoer had performed her "best" governmental and nongovernmental work *inter alia* in northern California and southern Oregon (Klamath Basin), northern Oregon and southern Washington (mid-Columbia River Basin), Wyoming (WindRiver), and North Dakota (Fort Berthold). As support for these assertions, Movants, through their undersigned counsel, wish to draw the Commission's and Chief Judge's attention to a third party-developed website to which Movants and their undersigned counsel were directed by outside parties that contains approximately twenty-eight original source documents establishing Dr. Vandemoer's credentials as well as more than twenty years of Dr. Vandemoer's work experience for the federal government, Indian tribes and fish, wildlife and environmental nonprofit groups.<sup>15</sup>

18. For the sake of clarifying and supplementing the administrative record, Movants, through their undersigned counsel, also wish to draw the Commission's and Chief Judge's attention to the website of the Montana Legislature, which contains: 1) a copy of Dr. Vandemoer's resume; 2) a copy of a June 19, 2014 email correspondence she submitted to John Metesh, the Chair of the Legislature's Water Policy Interim Committee CSKT Compact Technical Working Group, offering her "technical assistance to the Working Group as an expert in the quantification of

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<sup>15</sup> See We The People Radio, *Who is this Ubiquitous "Lady Operator" Dr. Kate?* (2015), available at: <http://www.wethepeopleradio.us/dr-kate/>.

federal reserved water rights, particularly with regard to those federal reserved rights belonging to Indian Tribes;” and 3) a video copy of the presentation she delivered to the Working Group on June 25, 2014 about the quantification of federal reserved water rights (Ex. 9). During her presentation, Dr. Vandemoer made the following statements establishing her experience and credentials:

“[...] I have spent the bulk of my professional career, which seems like a lifetime, working for Indian tribes on the quantification of federal reserve water rights, their management, identification, training [of] staff [] how to manage and protect federal reserve water rights. The bulk of my work has been in Wyoming from the Big Horn adjudication. I also worked in Washington, D.C. for the Assistant Secretary of Indian Affairs, and out in Portland with the National Marine Fisheries Service. There have been a lot of policy works and so forth that I have done, including the Endangered Species Act and its application in Indian country with regard to federal agencies, and, having chaired a couple of water rights negotiating teams and so forth. The first part of my presentation is to just share with you basically what I know about the quantification of federal reserve water rights. That is the question here – what is the federal reserved water right belonging to the Tribes? Obviously, the Tribes have water rights [and] they have their own self-governance powers and so forth. Beyond that point, what then is the amount of water that is necessary? [...] When I talk about the quantification of federal reserved water rights, basically it applies both in adjudication and in a negotiation. [...] Did you know that there is a federal reserve right for fishery instream flows? There is no federal reserve right for a robust river. If you want the water, put it into a standard that’s accepted by a court of law and so forth [e.g., a fish survival standard as set forth in a treaty].”<sup>16</sup>

Movants, through the undersigned counsel, submit that Dr. Vandemoer’s involvement in these low-cost power block proceedings, given her federal and tribal reserve water rights work experience, and the advice she has recently rendered to the Montana Legislature with respect to the State’s review and passage of the CSKT Water Compact, is highly suspicious and inappropriate. This is especially true if, as the FJBC’s D.C. counsel has represented in

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<sup>16</sup> The above quotation was transcribed a video copy of Dr. Vandemoer’s June 25, 2014 presentation before the Legislature’s Water Policy Interim Committee CSKT Compact Technical Working Group.

criticizing the undersigned counsel, the CSKT Water Compact has no bearing on FERC's jurisdiction over low-cost block of power issues.

"Another error was the [Movants'] pleading stated we were wrong for not addressing the compact. The compact is not binding on FERC. FERC has its independent jurisdiction and it doesn't matter what the compact says. FERC still has an obligation to figure out what it thinks is the appropriate license conditions applicable to implement the low-cost block of power."<sup>17</sup>

D.C. counsel's statement, however, does not rule out the possibility that CSKT Compact provisions could influence what FERC considers to be an appropriate license condition applicable to the low-cost block of power. In effect, it reveals that the low-cost block of power does indeed involve water rights issues that may affect Movants' and similarly situated District Members' legal and economic interests, contrary to FJBC and D.C. counsel representations.

19. For the sake of clarifying and supplementing the administrative record, Movants submit that neither the FJBC nor its Montana or D.C. counsels discussed with District Members, including Movants, during the FJBC's November 2, 2015 public meeting, anything regarding the EKI-NorthWestern Energy Point-to-Point Transmission Service Agreement that FERC had approved on October 16, 2015 (Ex. 10 ). This agreement provides for EKI's sale of Kerr Dam-generated electricity to Mission Valley Power for delivery to points on the reservation. This material omission further substantiates the FJBC's nontransparent relationship with the Districts' Members. Movants, nevertheless, recognize that the guaranteed ongoing delivery of low-cost power to the reservation depends, in part, on the price at which EKI sells the FERC-accepted 12-MW [flat block] of electricity "point-to-point [...] from the Kerr facility to Mission Valley Power across limited transmission facilities located entirely within the Kerr transmission

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<sup>17</sup> These quotations were taken directly from a video recording of the November 2, 2015 FJBC public meeting.

[115kV] switchyard...”<sup>18</sup> Movants also recognize that the guaranteed ongoing delivery of low-cost power to the reservation depends, in part, on the price that Mission Valley Power, a U.S. government (Bureau of Indian Affairs-) owned utility, operated and maintained, since October 1, 1988, by the CKST pursuant to a ‘638’ self-determination contract (Ex. 11), pays for the transmission of purchased EKI-generated electricity to Movants and other residents of the reservation over the 42MW line NorthWestern Energy dedicated to transmitting electricity from Bonneville Power Association to Mission Valley Power.<sup>19</sup>

20. For the sake of clarifying and supplementing the administrative record, an October 2015 correspondence prepared by Jean Matt, the Mission Valley Power General Manager, reaffirms that “energy purchases for the service area have remained at 80% bought from Bonneville Power Association, 19% bought from Kerr Dam, and 1% purchased from small hydro facilities on the Flathead Indian Reservation” (Ex. 12). This document also reveals that “Mission Valley Power customers will see a change in their kWh price due to the energy purchase increase from Bonneville Power. At 06.6 cents per kWh this is still 03.8 cents cheaper per kWh than the State of Montana average.”<sup>20</sup> Movants, through the undersigned counsel submit that, if Mission Valley Power purchases only 19% of the electricity it delivers to the reservation from EKI/Kerr Dam, any cost savings made available to District Members, including Movants, by the FJBC securing from the Tribes a low-cost block of power will be more than offset by the 06.6 cents per kWh power rate charged by Bonneville Power Association, the discount energy supplier of 80%

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<sup>18</sup> See NorthWestern Corporation (Montana), Docket No. ER15-2576, *Service Agreement No. 744 – Service Agreement for Firm Point-to-Point Transmission Service between NorthWestern Corporation and Energy Keepers, Incorporated*, (Submitted for Filing and Acceptance Aug. 31, 2015) (Ex. 2), available at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13974257>; Federal Energy Regulatory Commission Office of Energy Market Regulation, *Acceptance of NorthWestern Corporation Transmission Service Agreement* (Docket No. ER15-2576-000) (Oct. 16, 2015), available at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14015645>.

<sup>19</sup> See *Id.*

<sup>20</sup> *Id.*

of the electricity Mission Valley Power delivers to the reservation. Given this reality, Movants seriously question the significance of the low-cost block of power, and an even better overall rate for electricity delivered to the reservation could be secured by having the Bonneville Power Association become a Party to these proceedings.

## **II. Request for Expedited Review of Movant's Motion for Leave/Intervene, as Clarified and Supplemented**

21. Movants also request for the Commission and Chief Administrative Judge to act on their underlying Motion for Leave/Intervene and clarifying and supplementary filings, including this filing, no later than Monday, November 16, 2015. Movants are mindful of the Commission Staff's workload, the recent filing of the FJBC, and the fact that this is Movants' second supplemental filing in connection with this matter. Movants respect the Commission's and Chief Administrative Judge's right to dispose of this filing pursuant to the prescribed 15 day period. Nevertheless, should they require 15 days to take action on this filing it would place Movants in a compromised status in these proceedings. The settlement judge's October 27, 2015 order directed the Parties to exchange outlines stating their respective legal positions by no later than November 13, 2015, and to exchange their responses to these legal-position outlines by no later than December 4, 2015. It also scheduled a settlement conference for January 12, 2016 at 10:00 a.m. EST.<sup>21</sup> Although the settlement judge has requested that Movants submit to his chambers an outline setting forth its legal position concerning the low-cost block of power by the end of this week (November 13, 2015), with which Movants shall comply, Movants would be unable to exchange the outline of its legal position with those submitted by the Parties to these settlement conference proceedings, particularly, the FJBC. Similarly, Movants were previously unable to

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<sup>21</sup> See FERC Order Scheduling Settlement Conference, Confederated Salish and Kootenai Tribes Energy Keepers, Incorporated (Project 5-100) (Oct. 27, 2015).

secure from the Parties an exchange of initial negotiating positions following Movants' October 23, 2015 submission thereof to the settlement judge. This result obtained because the Parties, especially the FJBC which is charged with representing their interests, had refused to consent to Movants' participation in these proceedings. These Parties' refusal to permit Movants to participate in these proceedings has denied Movants the opportunity to play a constructive role in helping to resolve the low-cost block of power issue, now or in the future. Were the Commission and the Chief Administrative Judge to act in an expedited manner, as requested, and to decide in favor of Movants' Motion for Leave/Intervene, Movants and other similarly situated District Members who have, thus far, been denied information about the FJBC's and Tribes' initial and evolving settlement conference negotiating positions, would have greater certainty about the sources and blended cost of their electricity, and the relationship between the low-cost block of power and their water rights. Such certainty would improve Movants' ability to adequately prepare for and contribute constructively to the settlement conference scheduled for January 12, 2016. For these reasons, expedited action by the Commission is needed to eliminate the cloud of uncertainty over Movants' role in said proceedings.

Wherefore, for the foregoing reasons, Movants respectfully request that they each be permitted to intervene in, and be made a Party to, the subject proceedings, with all rights attendant thereto, on an expedited basis no later than November 16, 2015.

Respectfully submitted

November 10, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing document upon the participants, to date, in this proceeding in accordance with the requirements of Rule 2010 (18 C.F.R. § 385.2010) of the Commission's Rules of Practice and Procedure.

New York, NY  
November 10, 2015

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