

Montana Land and Water Alliance, Inc.
P.O. Box 1061
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July 16, 2015

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
Washington, D.C.

Subject: Project No. P-5-098 Kerr Dam Partial License Transfer Proceeding

Dear Secretary Bose:

Please accept the Montana Land and Water Alliance response to the June 9, 2015 answer of the Confederated Salish and Kootenai Tribes and Energy Keepers, Inc. to our Motion to Intervene in the Kerr Dam partial license transfer proceedings.

We respectfully seek intervention in these proceedings as described in our submittal of May 26, 2015 and believe our contribution will aid agency decision-making.

Thank you for your consideration.

Sincerely

/s/ Catherine Vandemoer

Catherine Vandemoer, Ph.D.,
Chair, Montana Land and Water Alliance, Inc., 406-552-1357

Attachment

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

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

Project No. 5-098

**RESPONSE OF THE MONTANA LAND AND WATER ALLIANCE TO
THE CONFEDERATED SALISH AND KOOTENAI TRIBES
ANSWER TO AND REQUEST FOR DISMISSAL
OF MOTIONS TO INTERVENE**

Pursuant to the Federal Energy Regulatory Commission (Commission) Rules of Practice and Procedure (18 CFR Part 385), the Montana Land and Water Alliance (MLWA) respectfully submits this response to the Answer of the Confederated Salish and Kootenai Tribes (CSKT) to the MLWA Motion to Intervene in the Kerr Partial License Transfer Proceedings, Docket No. 5-098.¹

On April 28, 2015, the Commission issued a notice opening a period for motions to intervene, protest, or comment on project P-05-098, the partial license transfer of the Kerr Dam from the CSKT to its recently-formed subsidiary, Energy Keepers Incorporated (EKI). The MLWA, representing farmers, ranchers, urban residents dwellers, rate payers, fisherman, sportsmen and businessmen, timely submitted its motion to intervene and protest the partial license transfer on May 26, 2015. The MLWA motion to intervene relies chiefly upon 16 U.S.C. §801, which states:

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

The MLWA's review of the CSKT/EKI application within this context demonstrates that the CSKT/EKI will be and are declaring their exemption from certain of those previous conditions,

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

and our intervention suggests that these §801 deficiencies can be remedied by disclosure and appropriate license conditioning². Citing the “first of its kind” hydropower facility licensing and operation by a federally recognized Tribe, the MLWA also suggested that Congressional oversight may be required.

The *CSKT/EKI Answer* also dismissed the MLWA intervention as a collateral attack on the CSKT’s ownership of Kerr Dam or attempting to delay the conveyance of the facility to the CSKT. The MLWA summarily rejects this assertion and others made by the CSKT/EKI. The *CSKT/EKI Answer* also asserts that all of the interventions are the same which is easily refuted below. We respectfully urge the Commission to reject the *CSKT/EKI Answer* and grant the MLWA Motion to Intervene.

I. Ownership and Conveyance of Kerr Dam to CSKT Irrelevant to Proceedings

In their summary of comments to the motions to intervene, the CSKT/EKI improperly characterize all the motions to intervene, including the MLWA motion, as some kind of collateral attack on the CSKT ownership of the Kerr Dam:

*Specifically, the ...Keenan/Jackson, **MLWA**, and MPSC Motions each argue that additional administrative process is needed to determine whether the Kerr Project should be conveyed to CSKT.³ (emphasis added)*

The MLWA firmly rejects this CSKT/EKI assertion. Stating the obvious, there was no mention of the ownership or conveyance of the Kerr facility to the CSKT in the MLWA intervention document, and it should be evident that all potential parties to this proceeding understand that the Kerr ownership or conveyance is not a question.

II. The MLWA Motion is Distinct

The MLWA Motion to Intervene raises a number of issues that are similarly raised by other interveners to the partial license transfer proceeding. That similar issues were raised in fact demonstrates remarkable consistency in what needs to be addressed. However, each intervener represents different constituencies and consequently brings valuable expertise, unique concerns

² Pursuant to Commission rules and regulations, any license conditions must be agreed upon by both the Commission and the licensee. In response to the *CSKT/EKI Answer* in FN 16 page 7, we note that since a license has already been issued to the CSKT as a co-licensee with NorthWestern, and EKI is a subsidiary of the CSKT, the license is ripe and can be conditioned as consideration of EKI as a co-licensee is underway.

³ *CSKT/EKI Answer*, page 2.

to examine, and different information to the table that can assist the Commission in its decision-making.

III. EKI as Co-Licensee

We agree with the Commission and the Tribes that the instant proceeding is only about whether EKI should be added as a co-licensee to the Kerr Project effective on the conveyance date:

*This proceeding is solely about whether, for legitimate business reasons, it is appropriate to add EKI as a co-licensee effective on the Conveyance Date.*⁴

Hence, the MLWA Motion to Intervene focuses on and contains information relevant to the terms and conditions of the license and the CSKT/EKI stated but *undocumented* assertion that:

The addition of EKI as a co-license will have no effect on legal standing, license conditions, license, compliance obligations, or the application of any other state and federal requirement or regulation (CSKT/EKI Answer at 6)

The CSKT/EKI co-license application admits that EKI, a brand new company with no previous record of managing hydroelectric projects, will not follow state regulations, reporting requirements, and some federal laws contrary to the requirements of 16 U.S.C. §801.

Moreover, the EKI as a new company has never been subjected to the Commission's review as a licensee or the public hearing process and may be a first for the Commission. There remain serious doubts as to the CSKT/EKI intentions regarding the delivery of both water and a low cost block of power to certain agricultural users,⁵ flood control operations and coordination with Hungry Horse Reservoir, and lakeshore management agreements negotiated with local governments by previous licensees.⁶ MLWA constituents will be affected by all of these uncertainties that now exist and must have a voice in articulating and resolving them.

While the status of the CSKT as an Indian Tribe, and EKI as its wholly-owned federally-chartered corporation is not an issue in or focus of this proceeding, it does have consequences for the literal meaning of 16 U.S.C. §801. What does it mean in terms of the Commission's

⁴ *Ibid* p.2

⁵ See *Motion of the Flathead, Mission, and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control...to Intervene*, May 28, 2015. "The partial license transfer request is predicated on the need for EKI to "begin entering into power purchase agreements, generation interconnection agreements, and coordination agreements necessary to generate and sell electricity from the Kerr Project . . ." Application at 1. CSKT and EKI make no mention of any desire or requirement to make the output of the Kerr Hydroelectric Project available to United States, for and on behalf of FJBC or the Districts. As such, it cannot be assumed that the Applicants will make any of the output of the Kerr Hydroelectric Project available to the United States for an on behalf of the Districts, nor can it be assumed that Applicants will enter into power purchase agreements which take into account the Districts' rights to the output of the project".

⁶ *Motion to Intervene, Docket P-5-098*, Senators Verdell Jackson and Bob Keenan, May 26, 2015.

responsibilities to the public in licensing a facility when the licensee is not subject to previous license conditions?⁷ Does the license for an applicant who is not subject to previous license conditions need additional terms and conditions? What other federal guidelines may be applicable and would they assist these proceedings?

The difficulty with this particular license is that many aspects of federal, state, and Tribal law need to be carefully coordinated to ensure the best possible outcome for all and so that no law or previous condition is violated. While the Commission may believe some of these issues are “outside the scope of the Commission’s deliberation”, the overall and overriding public trust and interest mandate a comprehensive approach to ensuring that the Kerr facility is properly licensed and managed. Although this may entail more formal involvement of certain federal departments, for example Interior, it may also suggest appropriate license terms and conditions which require resolving these issues by a specified time period. The MLWA stands ready to work with the Commission, the other interveners, and the Tribes in a constructive proceeding.

IV. Conclusion

The CSKT/EKI answer to the MLWA Motion to Intervene dismisses and derides public concerns that could easily be remedied by the CSKT/EKI themselves and does not provide the Commission with adequate information to address our concerns. The availability of a process such as intervention can ultimately enable the public to shape agency decision-making in complex contexts, such as the CSKT/EKI partial license transfer presented here, and offers a suitable venue to resolve the MLWA concerns effectively.

Therefore, the MLWA respectfully requests the Commission grant our Motion to Intervene in the partial license transfer proceedings involving the Kerr Project. The issues we raise are serious and legitimate, and we hope that the Commission will be responsive to them.

Respectfully submitted,

/s/Catherine Vandemoer

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⁷ The CSKT’s reference to the CSKT Water Compact provision that has not been approved by Congress and is outside of FERC authority regarding the low-cost block of power for the Flathead Joint Board of Control, is an example of the Tribes’ tendency to cite some other authority rather than to honor a commitment of a previous FERC licensee as required by 16 U.S.C. §801

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document and attachment upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Polson Montana, this 16th day of July, 2015.

/s/ Catherine Vandemoer
Chair, Montana Land and Water Alliance
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Document Content(s)

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