

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

BOB KEENAN )  
Montana State Senator )  
P.O. Box 697 )  
Bigfork, Montana 59911, )

VERDELL JACKSON )  
Flathead Conservation )  
District Supervisor )  
555 Wagner Lane )  
PO Box 697 )  
Kalispell, Montana 59901, )

and )

POINTER ENTERPRISES, INC. d/b/a )  
Pointer Scenic Cruises )  
450 Grand Dr. )  
Big Fork, Montana 59911, )

*Plaintiffs,* )

v. )

NORMAN C. BAY, in his capacity as )  
Chairman of the Federal Energy Regulatory )  
Commission )  
888 First Street, N.E. )  
Washington, D.C. 20426, )

PHILIP D. MOELLER, in his capacity as )  
Commissioner of the Federal Energy Regulatory )  
Commission )  
888 First Street, N.E. )  
Washington, D.C. 20426, )

CHERYL A. LAFLEUR, in her capacity as )  
Commissioner of the Federal Energy Regulatory )  
Commission )  
888 First Street, N.E. )  
Washington, D.C. 20426, )

TONY CLARK, in his capacity as Commissioner )  
of the Federal Energy Regulatory )  
Commission )  
888 First Street, N.E. )  
Washington, D.C. 20426, )

**COMPLAINT FOR  
TEMPORARY RESTRAINING  
ORDER, PRELIMINARY  
INJUNCTION AND  
DECLARATORY RELIEF**

CIVIL CASE NO.: 15-cv-1440

COLLETTE D. HONORABLE, in her capacity as  
 Commissioner of the Federal Energy Regulatory  
 Commission  
 888 First Street, N.E.  
 Washington, D.C. 20426,

SALLY JEWELL, in her capacity as  
 Secretary of the U.S. DEPARTMENT OF THE  
 INTERIOR  
 1849 C Street, N.W.  
 Washington, D.C. 20240,

KEVIN K. WASHBURN, in his capacity as  
 Assistant Secretary, BUREAU OF INDIAN  
 AFFAIRS  
 U.S. Department of the Interior  
 1849 C Street, N.W.  
 Washington, D.C. 20240,

DAN ASHE, in his capacity as Director of the  
 U.S. FISH AND WILDLIFE SERVICE  
 U.S. Department of the Interior  
 1849 C Street, N.W.  
 Washington, D.C. 20240,

*Defendants.*

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Come now the Plaintiffs, Bob Keenan, Verdell Jackson and Pointer Enterprises, Inc., d/b/a Pointer Scenic Cruises, by their undersigned counsel, pursuant to Fed. R. Civ. P. 65 and LCvR 65.1, and file this Complaint for Temporary Restraining Order, Preliminary Injunction and Declaratory Relief, and allege as follows:

**INTRODUCTION**

1. This is an action for an *emergency* Temporary Restraining Order (“TRO”) and preliminary injunction prohibiting the Federal Regulatory Commission (“FERC” or “Commission”) from authorizing, approving and facilitating the scheduled September 5, 2015 conveyance of the Kerr Hydroelectric Project, Project No. 5 (“Kerr Project”) to the Confederated

Salish Kootenai Tribes of the Flathead Reservation (“CSKT” or “Tribes”), and the partial transfer of the current joint FERC license held by the CSKT and NorthWestern Energy Corporation (“NorthWestern”) to the CSKT’s recently formed federally chartered wholly-owned subsidiary corporation, Energy Keepers, Inc. (“EKI”) (collectively, “the conveyance”). If allowed, the conveyance will violate FERC’s obligations under the Federal Power Act (“FPA”) and the Administrative Procedure Act (“APA”) to ensure compliance with said laws and regulations regarding project acquisition, license transfer, license amendment, public reporting, and public notice and comment (transparency). This also is an action for Declaratory Relief to declare that the conditions under which NorthWestern lawfully could transfer its license have not been met.

2. This also is an action for an *emergency* Temporary Restraining Order (“TRO”) and preliminary injunction prohibiting the U.S. Department of the Interior (“DOI”) and DOI’s Bureau of Indian Affairs (“BIA”) and Fish & Wildlife Service (“FWS”) from unduly interfering with and/or otherwise influencing or biasing FERC’s decision-making regarding the conveyance, to prevent DOI interventions from compromising the interests of the tribal and nontribal irrigators, businesses, recreationalists and residents of the Flathead Indian Reservation and surrounding area in favor of the interests of the CSKT Tribal Government, in violation of the federal rules and regulations described below and Plaintiffs’ constitutional rights to equal protection under the law. This also is an action to declare that DOI intervention in, interference with or influence of FERC’s decision-making regarding the conveyance had violated and will violate applicable federal rules.

3. This case involves the first-ever conveyance under U.S. government auspices, of exclusive ownership, management and control of a major dam/reservoir within the Columbia River Basin, one of the four largest contiguous ecosystems in the U.S., to the CSKT, among the

first of 566 federally-recognized Indian tribal entities established pursuant to section 16 of the Indian Reorganization Act of 1934 (IRA-1934). DOI and its BIA and FWS divisions are the chief federal government architects of the scheduled conveyance, in service to agency and successive presidential administrations' policies to enhance, increase and grow tribal "self-governance," "self-determination" and "sovereignty." The conveyance is clearly intended to reward a 30-year effort by DOI, BIA, FWS and the CSKT to "correct the wrongs of the past," by indirectly and incrementally reestablishing the Tribes' ownership and control over the waters and lands passing through, appurtenant to and surrounding the Flathead Indian Reservation in northwestern Montana. If the conveyance is permitted to proceed without FERC's close public inspection, examination and due diligence, generations-old tribal and non-tribal family farms, ranches and other businesses resident to the Reservation and the surrounding area will suffer irreparable injuries.

4. This is a case with significant national security implications because the subject matter of the conveyance is a dam/reservoir with "black start" capabilities bearing a federal "high hazard potential" classification that is part of the flood control system of the Columbia River Basin providing more than 40% of total U.S. hydroelectric generation. The Kerr Project also is categorized by Lake County, Montana as a "high hazard dam" 186 feet in height with a storage capacity of 1,960,000 acre-feet, and having a drainage area of approximately 7,100 square miles. It also is the first-ever major hydropower facility/license conveyance to a Native American tribal government to take place since the events of September 11, 2001, and the 2010 issuance by the congressionally appointed "Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack" of its report focusing, in part, on the vulnerabilities of the U.S. water infrastructure, including supporting hydroelectric facilities, to terrorist attack.

### **JURISDICTION**

5. This Court has jurisdiction over this action pursuant to 16 U.S.C. § 825p and 28 U.S.C. § 1331 and 5 U.S.C. § 702.

6. The relief requested is authorized pursuant to 28 U.S.C. §§ 1651 and 2201 to 2202. An actual and present controversy exists between the parties within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq.

### **VENUE**

7. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and (e), and 5 U.S.C. § 703. Defendants Department of the Interior and Bureau of Indian Affairs and present officials of such federal agencies reside in this judicial district. A substantial part of the events or omissions giving rise to the claims have occurred in this district due to decisions made by Defendants.

### **PARTIES**

#### **A. Plaintiffs**

8. Bob Keenan (“Keenan”) is a resident of Northwestern, Montana and co-owner and co-manager of the historic Bigfork Inn and Restaurant at Big Fork, Montana. He also is a currently serving member of the Montana State Senate representing Senate District 5; a former President of the Montana State Senate; a former member of the Montana House of Representatives; and a former candidate for United States Senate representing the State of Montana. Keenan has, for 13 years, represented thousands of Montana residents who will be irreparably harmed as the result of the scheduled September 5, 2015 conveyance of the Kerr Project No. 5 and accompanying FERC license exclusively to the Confederated Salish and Kootenai Tribes (“CSKT” or “Tribes”), which conveyance consummates a long interconnected series of incremental steps Defendants have executed in coordinated fashion since 1985 to

restore the CSKT's pre-Hellgate Treaty of 1855 water and land rights, having cultural and religious significance, through transference to the Tribes of ultimate ownership and control over said Project, at the expense of irrigators living on the Flathead Indian Reservation, and businesses and recreationalists living off of said reservation ("the Project ownership issue"). During 2015, Keenan joined with Jackson as a FERC Intervenor seeking disclosure from FERC of information and hearing opportunities permitting the evaluation of FERC's, determinations regarding the conveyance of the Kerr Project and accompanying license transfers to the Tribes and EKI to ensure that these transactions are in the public interest of northwestern Montanans. Senator Keenan currently resides at PO Box 697, Bigfork, Montana 59911.

9. Verdell Jackson ("Jackson") is a currently serving Supervisor of the Flathead Conservation District, which approves projects that affect river and lake water levels in Flathead County, and a Kalispell area resident and farmer. He also is a former serving member of the Montana State Senate representing Senate District 5, and a former serving member of the Montana House of Representatives representing House Districts 6 and 79, holding bachelor's and master's degrees in business. Mr. Jackson had, for 16 years, represented thousands of Montana residents who will be irreparably harmed as the result of the scheduled September 5, 2015 conveyance of the Kerr Project No. 5 and accompanying FERC license exclusively to the Confederated Salish and Kootenai Tribes ("CSKT" or "Tribes"). Jackson has been a frequent FERC Intervenor regarding the Project ownership issue since at least 2014. Supervisor Jackson currently resides at 555 Wagner Lane PO Box 697, Kalispell, Montana 59901.

10. Pointer Enterprises, Inc. d/b/a Pointer Scenic Cruises ("Pointer") is a privately held small business enterprise operating in Big Fork, Montana that specializes in water passenger transportation, tourism and recreational scenic cruises along and within the Flathead Lake, the largest natural freshwater lake west of the Mississippi River in the contiguous United States.

Pointer has served as a frequent FERC Intervenor since at least 1998 regarding the Project ownership issue on behalf of businesses, such as Pointer, serving recreationalists. Pointer has directly suffered over the years from FERC licensee's management of Flathead Lake and River levels producing abnormal and extreme effects, which have, from time-to-time, reduced Pointer's free navigability of the Lake and its tributaries, rendered its docks unusable, endangered the operation of its watercraft, jeopardized the safety of its out-of-state and foreign customers, interrupted its relationships with other local businesses (i.e., restaurants) and prematurely terminated several of its busiest business seasons. Pointer, as well, has long sought to secure information from FERC concerning agency determinations regarding management of lake levels and river flow rates and the conveyance of the Kerr Project and accompanying license transfers to ensure that these transactions are in the public interest of northwestern Montanans. Pointer's place of business is 450 Grand Dr. Big Fork, MT 59911.

**B. Defendants**

11. The Federal Energy Regulatory Commission ("FERC") is an independent federal agency comprised of 5 commissioners that is responsible *inter alia* for regulating the interstate transmission of electricity, natural gas, and oil, and for reviewing and overseeing the licenses for, and inspecting the operating facilities of proposed and existing private, municipal, and state hydroelectric projects. FERC also oversees environmental matters related to hydroelectric projects. FERC served as the official agency responsible for administering the 1985 Agreement, and had, via several critical Orders issued pursuant to the dictates of the DOI and its former Secretary, effectuated the substantial transformation of that Agreement's terms and conditions. FERC has more recently administrated the final steps in preparation for the scheduled conveyance of the Kerr Project to the CSKT.

12. Norman C. Bay is sued in his official capacity as the currently serving Chairman of FERC. Philip D. Moeller, Cheryl A. LaFleur, Tony Clark and Collette D. Honorable are all sued in their official capacity as currently serving FERC Commissioners. Each of these persons will be responsible for issuing the Order concerning the legality of the partial license transfer of the CSKT's and NorthWestern's jointly held license to EKI, and for effectuating the scheduled conveyance of the Kerr Project to the CSKT without an adequate and rigorous public due diligence having been performed, unless this Court grants Plaintiffs the relief they have requested.

13. NorthWestern Corporation d/b/a NorthWestern Energy is a current co-licensee with the CSKT of the Kerr Hydroelectric Project No. 5 (the "Project"), having acquired it from PPL Montana, LLC on November 18, 2014. The CSKT are anticipated to acquire NorthWestern's interests in the license and Project on September 5, 2015, pursuant to the terms of the license as set forth in the 1985 Agreement.

14. Department of the Interior ("DOI") is the federal agency responsible for the management and conservation of most federal land and natural resources, and through its Bureau of Indian Affairs, the administration of programs relating to American Indians. DOI was largely responsible for developing all of the fish, wildlife and environmental conditions that FERC adopted as amendments to the 1985 Agreement to substantially change the agreement, and which will govern the CSKT's and EKI's implementation of the FERC license that will be transferred to them upon the scheduled Kerr Project conveyance that is the subject of this dispute, if this Court does not grant the relief Plaintiffs have requested.

15. Sally Jewell is sued in her official capacity as the currently serving Secretary of the Interior. As Secretary of the Interior, Ms. Jewell has ultimate responsibility for DOI's activities and policies, including those that are based on Indian, environmental and wildlife

policies developed and implemented by former DOI Secretary, Bruce Babbitt that now inform the scheduled conveyance of the Kerr Project to the CSKT.

16. Bureau of Indian Affairs (“BIA”), a division of DOI, serves 566 federally recognized tribes and administers and manages more than 55,700,000 acres of land held in trust by the United States, including reservations, for Native Americans in the United States, Native American Tribes and Alaska Natives. BIA’s Division of Water and Power promotes tribal self-governance/self-determination through sound management of irrigation, dam, and power facilities owned or operated by the BIA. The BIA is currently in control of the Flathead Irrigation Project (“FIP”) which administrates the irrigation system that pumps water from the Kerr Reservoir and the Flathead River to the complex system of irrigation and lateral canals constructed for the benefit of and paid for by all irrigators situated on the Flathead Indian Reservation, including Plaintiffs. Since the BIA is in present control of the FIP, unless this Court grants the relief Plaintiffs have requested, the scheduled conveyance of the Kerr Project will place total control of all Flathead Lake and River waters and FIP access to them into the hands of BIA and the Tribes, at the expense of the irrigation community.

17. Kevin K. Washburn is sued in his official capacity as the currently serving Assistant Secretary of the Interior and Director of the BIA. In these capacities, Mr. Washburn has ultimate or shared responsibility with Ms. Jewell for BIA’s activities and policies, which are based on the policies of former Interior Secretary Bruce Babbitt, including those that now inform the scheduled conveyance of the Kerr Project to the CSKT.

18. Dan Ashe is sued in his official capacity as the currently serving Director of the U.S. Fish and Wildlife Service. In these capacities Mr. Ashe has ultimate or shared responsibility with Ms. Jewell for FWS’s activities and policies, including those that now inform the scheduled conveyance of the Kerr Project to the CSKT.

### **THE ADMINISTRATIVE PROCEDURE ACT**

19. The Administrative Procedure Act (APA) provides a right to judicial review to any “person suffering legal wrong because of agency action.” 5 U.S.C. § 702. The APA defines agency action to “include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. §§ 551(13), 701(b)(2).

20. The APA provides that a court shall compel an agency action that is “unlawfully withheld or unreasonably delayed,” and shall hold unlawful and set aside agency actions found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(1) & (2)(A).

### **STATEMENT OF FACTS**

21. The Kerr Project conveyance that is the subject of this action arises from Ordering Paragraph (C)(1) of the Settlement and Approval of License Transfer Agreement entered into between the Montana Power Company (“MPC”), the CSKT, the Flathead, Mission and Jocko Valley Irrigation Districts of the Flathead Irrigation Project (“the FIP”), the Montana Consumer Counsel, and DOI (“the 1985 Agreement”). On July 17, 1985, FERC issued an Order approving the 1985 Agreement, (Ex. 1) following a FERC administrative law judge’s prior (April 16, 1985) recommendation (Ex. 2) to end costly litigation initiated by the Tribes. The 1985 Agreement established MPC and the CSKT as joint licensees “of record” under a single license with a term of 50 years.

22. Ordering Paragraph (C)(1) of the 1985 Agreement generally provided to MPC the exclusive right to own the Kerr Project, and to control, operate and maintain it, having all of the rights and obligations of licensee, from the “effective date” until the “date of conveyance.” This paragraph also provided the CSKT with the option, exercisable between the license’s 29<sup>th</sup> and 30<sup>th</sup> year, of taking full ownership, management and control via exclusive conveyance of the

Kerr Project and assumption of the license for the remainder of the 50-year license and in the event of license renewal. The exercise of this option would be deemed valid as long as the Tribes notified the DOI Secretary, the FIP, and the Commission of their intent to exercise the option and specified the conveyance date at least one year prior to the scheduled date. In addition, the Tribes were required to remit full payment of the conveyance price to the scheduled conveyance date which they state they are currently prepared to do on September 5, 2015.

23. At the 1985 Agreement's inception, the Commission had found that the purposes for which the Kerr Project was "best adapted" were the improvement or development of "the [navigable U.S.] waterways for the benefit of *interstate or foreign commerce*, the improvement or utilization of water power development [hydroelectricity], and for other beneficial purposes, including recreational purposes" (emphasis added). As agriculture and ranching were then and have since remained a primary source of interstate and foreign commerce for the Flathead Reservation and northwestern Montana, and the State of Montana more generally, the Commission's findings implicitly included irrigation within the primary category of activities for which the Kerr Project's operation was best suited. Furthermore, the 1985 Agreement provided only a single article that expressly referenced MPC's obligations to the CSKT – Article 52. That article required MPC to develop a cultural resources management plan "in consultation with" the Tribes (i.e., the respective Salish Cultural and Kootenai Cultural Committees created by resolution of the CSKT Tribal Council) and the Montana State Historic Preservation officer.

24. Through a sequence of carefully choreographed steps spanning many years in preparation for the scheduled conveyance, but before the Tribes provided their required notification, FERC issued three major Orders approving, authorizing and facilitating the adoption of numerous substantive amendments that radically altered and added to the terms and conditions of the 1985 Agreement, thereby substantially transforming the purposes for which the

Kerr Project was “best adapted.” These substantive and procedural changes were developed by DOI and its BIA and FWS divisions, in consultation with the Tribes and Montana State wildlife officials, in implementation of FPA § 4(e) and Articles 45(a), 46(a) and 47 of said agreement. These Orders were intended to impose broad new conditions on the joint licensees to address the Kerr Dam Project’s anticipated and/or projected effects on fish and wildlife and their related environments on Flathead Lake and the lower Flathead River and on the delta and nearby islands at the head of Flathead Lake. These conditions called for adjustments to lake levels and river flows that adversely affected Plaintiffs. The second and third of these three FERC Orders approved subsequent amendments DOI had made to some of these new articles to take into account the findings of environmental impact statements (“EIS”) that DOI had, in the interim, prepared in fulfillment of the requirements of the National Environmental Policy Act (“NEPA”).

25. While FERC was the agency “of record” that had issued these Orders to ensure the Kerr Project’s compliance with the 1985 Agreement’s amended terms and conditions, the express language of Articles 45(b) and 46(b) of the 1985 Agreement provided the DOI Secretary with the sole authority to impose such § 4(e) conditions in the amended license as if the license were an initial license. These articles also effectively directed FERC to essentially “rubberstamp” these DOI changes into the agreement upon receiving them. “Upon receipt of the Secretary’s conditions, the Commission, by order, *shall* adopt and include the conditions in their entirety in this license” (emphasis added). FERC employees are known to think of the Commission as an independent federal agency, within the meaning of 44 U.S.C. §§ 3501 et seq., and thus, as being “[i]ndependent from political party influence,” “[i]ndependent from President’s/Congress’ influence,” and “[i]ndependent from parties’ influence” in contested cases. However, the lack of administrative discretion that FERC had exercised and continues not to exercise, and/or the administrative discretion that FERC had exercised and continues to exercise

arbitrarily and capriciously and contrary to law, in issuing these Orders adopting and incorporating wholesale such major DOI-crafted amendments into the 1985 Agreement raise serious questions regarding how independent the Commission actually is.

26. Evidence of DOI's direct role in and control over the development of these FPA § 4(e) conditions and FERC's adoption of them can be found in two related federal register notices issued on November 22, 1994 (Ex. 3), and February 2, 1995 (Ex. 4). These notices solicited public comments on DOI's proposed § 4(e) conditions imposing both operational and nonoperational measures on the Kerr Hydroelectric Project license. The operational measures provided "for the imposition of a *base load operational scenario*" that "precluded the use of Kerr Dam as a load regulating or peak power generation facility, and require[d] minimum flows, certain restrictions on flow fluctuations (ramping rates), and a two year ramping rate study" (emphasis added). The nonoperational measures provided for "the development of a Fish and Wildlife Implementation Strategy, development of an operational rule curve, habitat acquisition, habitat development, fishery supplementation and reintroduction, development of recreational resources, and the identification and projection of cultural resources on the Flathead Indian Reservation." Significantly, the 1994 federal register notice explicitly provided DOI's view on who was "in-charge:" "The mandatory language of Section 4(e) *requires the Commission to accept, without modification*, Secretarial conditions reasonably related to the protection and adequate utilization of the reservation and its purposes, and which are supported by substantial evidence. *See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 777, n. 18, 778 (1983)" (emphasis added).

27. FERC issued its first significant Order changing the 1985 Agreement on June 25, 1997 (Ex. 5). It was issued in apparent resolution of a dispute between former Kerr Project owner/licensee MPC, which had issued its proposed Mitigation and Management Plan in

implementation of Articles 45-47 of the 1985 Agreement, and DOI which, by then, had finalized its own new FPA § 4(e) conditions. Significantly, the EIS DOI staff had developed to assess these competing plans had concluded that, “the alternative including the conditions imposed by Interior, *which staff stated the Commission was obligated to adopt*, would provide the greatest benefit to fish and wildlife resources, but would eliminate the project’s positive economic benefits” (emphasis added). Tellingly, notwithstanding their adverse projected economic impact, FERC ruled that it was “required to include the proposed [operational] conditions in the license.” As the Commission explained, “As an initial matter, we note that any economic analysis of the impact of Interior’s conditions is of at best tangential relevance to our decision here. As we have explained, *we are obligated* (with the exceptions noted [- i.e., except for cultural resources and recreation requirements]) *to include Interior’s conditions in the license. This is the case regardless of whether those conditions would increase, decrease, or have no impact on the project’s net benefits*” (italicized and underscored emphasis added). Ultimately, FERC’s Order adopted DOI’s directive to add 25 new articles – Arts. 55-79 in service to DOI’s and the Tribes wildlife and environmental concerns. As compared to the 1985 Agreement which contained only 1 article referencing the CSKT (Art. 52 – cultural resources), the 1997 amendments featured 6 additional articles (Arts. 59, 63-67) discussing CSKT participation in the development and implementation of fish and wildlife studies, strategies and plans, as well as funding for the acquisition of fee simple lands for the Tribes for fish and wildlife management purposes.

28. The 1997 DOI-directed FERC Order contained several articles assigning the FERC licensee specific tasks requiring extensive consultation with the FWS. These included Articles 63, 64, 68-73, 76 and 78.

29. On October 30, 1998, FERC issued a second critical Order amending the 1985 Agreement. (Ex. 6). This Order apparently resolved MPC’s challenge to the FPA § 4(e)

conditions DOI had imposed and which FERC had adopted in its 1997 Order. It also facilitated DOI's intervention, without FERC's objection, to further modify the 1985 Agreement. The Order revised Article 60 requiring MPC, in consultation with other agencies, to develop a drought management plan for Flathead Lake for filing with the DOI Secretary, who reserved the right to reject, modify or otherwise alter the plan. It also deleted Article 77 and added new Article 80 pursuant to which the Commission reserved the right to ensure the licensee takes all necessary measures to protect bull trout. Significantly, the Commission also reserved the right, pursuant to newly added Article 81, to order the licensee to implement any measure the DOI Secretary deems necessary to ensure the adequate protection and utilization of the Flathead Indian Reservation or the Flathead Waterfowl Production Area.

30. New Article 81 of the 1998 DOI-directed FERC Order (signed by FERC Secretary, David P. Boergers) also indirectly assigned the FERC licensee open-ended tasks requiring extensive consultation with the DOI Secretary and FWS with respect to waterfowl to ensure the Secretary could reach its waterfowl determination and direct FERC accordingly.

31. On May 4, 2000, FERC appears to have issued its first verified notice in the federal register concerning the Kerr Project. It announced the joint April 28, 2000 application filed by PPL Montana and the CSKT to amend the 1985 Agreement a third time, and soliciting comments from the public concerning same.

32. On December 14, 2000, FERC issued its third significant Order (Ex. 7) modifying the 1985 Agreement, yet again, at the direction of the DOI Secretary. These modifications amended Ordering Paragraph (C)(2) to redefine the calculation of the conveyance price the CSKT must remit on the conveyance date. It also amended previously added Articles 59, 64-67 to ensure that the Kerr Project would be operated in compliance with Endangered Species Act requirements.

33. The 2000 DOI-directed FERC Order (signed by Fred E. Springer, Director of FERC's Division of Hydropower Administration and Compliance) contained three amended articles (Arts. 64 , 67 and 81) requiring extensive FERC licensee consultation with and reporting to FWS, especially "to minimize take of bull trout."

34. "Appendix B – 'Agreement to Amend License Terms'" accompanying the FERC 2000 Order (pp. 30-37) that had been entered into between MPC, the CSKT, PPL Montana, DOI and Trout Unlimited, explicitly acknowledged DOI's primary role in developing these amendments and directing FERC's adoption of them. It stated, "By Orders issued on June 25, 1997 and October 30, 1998, FERC amended the License [to the 1985 Agreement] to include the Department [of the Interior]'s conditions."

35. On June 2, 2002 (Ex. 8), the BIA issued a federal register notice that further demonstrated DOI's primary role in amending the license conditions of the 1985 Agreement. Said notice sought to gather public information "necessary for preparing an EIS for a proposed drought management plan relating to the operation" of the Kerr Project and Flathead Lake, which had been required by Article 60, newly added as part of FERC's DOI-directed 1997 Order. It also announced scheduled public meetings that would take place in Kalispell and Charlo, Montana during July 9-10, 2002 to discuss the EIS.

36. On July 26, 2006, DOI-BIA issued a federal register notice announcing the availability of its draft EIS for a drought management plan for the operation of the Kerr Project. It also notified Montanans about two scheduled meetings that would take place in Kalispell and Polson, Montana on Aug. 29-30, 2006 (Ex. 9).

37. On April 16, 2010, DOI-BIA issued a federal register notice announcing the availability of, and opportunity to submit public comments concerning, the final version of the EIS it had draft approximately 5 years earlier for the drought management plan relating to the

Kerr Project's operation (Ex. 10). The notice stated that "The BIA will issue a final decision on drought management planning at the Kerr Hydroelectric Project no sooner than 30 days following the publication date of this notice." It is Plaintiffs' knowledge or belief that BIA sometime thereafter issued this Final EIS and directed FERC to directly or indirectly incorporate it into the 1985 Agreement.

38. At the inception of the 1985 Agreement, the BIA had managed the Flathead Irrigation Project ("FIP"), a complex matrix of many irrigation and lateral canals running throughout the Flathead Reservation that had been constructed for the primary purpose of serving the reservation's irrigation community, as FERC had acknowledged in Article 26 thereof. As the result of FERC's 1997 Order adopting DOI-directed amendments to the 1985 Agreement, the BIA's role in administrating the Kerr Project expanded. Newly added Articles 60 and 63 now required extensive Kerr Project licensee consultation with the BIA which inseparably linked the operations of the Kerr Project (Dam/Reservoir) with the operations of the FIP covering approximately 135,000 acres of Flathead Indian Reservation lands.

39. In April 2010, it was reported that the irrigators comprising the Flathead Joint Board of Control ("FBJC") had resumed control over the FIP. This followed from their repayment to the BIA in 2004 of all expenditures the U.S. government had previously incurred to construct, operate and maintain the Flathead Indian Reservations' irrigation system. This resumption of control also was driven by the BIA's approval of a Cooperative Management Entity ("CME") to administrate the FIP prospectively that was to be comprised of an equal number of appointees made by the irrigation districts and the CSKT. For several years, thereafter, the CME found itself unable to properly function as the result of the CSKT's and BIA's decision to re-determine the Tribes' representation on the CME based on the proportion of the total Reservation acreage the Tribes held communally through all of its landowners. As a

result, disagreement ensued and the CME was dissolved. Despite the negotiation efforts that followed, the BIA resumed control over the FIP in March 2014. This thereafter precipitated the fractured FBJC to initiate litigation in the U.S. District Court in the District of Missoula, Montana that ultimately proved, in August 2015, to be unsuccessful. (Ex. 11) Unless the District Court's Order is appealed, the BIA's resumption of control over the FIP will stand as a matter of law.

40. On January 10, 2014, PPL Montana and NorthWestern filed their application with FERC for the transfer of FERC licenses to the Kerr Project and 3 other dams, as part of NorthWestern's overall acquisition of 11 PPL Montana dams. On February 3, 2014, FERC subsequently issued a notification apprising the public of such application for license transfer, including that relating to the Kerr Project.

41. On March 3, 2014, an American Arbitration Association Board panel issued its "Final Award," pursuant to Paragraph VI(C)(3)(a) of the 1985 Agreement, "hold[ing] that the Estimated Conveyance Price as of the 30<sup>th</sup> anniversary of the Effective Date [was] \$18,289,798" (Ex. 12).

42. On March 4, 2014, DOI submitted a Notice of Intervention in response to FERC's February 3, 2014-issued Notice of Application for Transfer of Licenses and Soliciting Comments and Motions to Intervene. DOI's notice stated that, "The Department intervenes *for the purposes of becoming a party*, and to ensure that its interests *and those of its bureaus are included in this proceeding*. The Department is a party to the underlying licensing proceeding *and is a signatory to the 1985 and 2000 settlement agreements that were submitted to the Commission*" (emphasis added) (Ex. 13). In other words, DOI sought to ensure that NorthWestern's assumption of PPL Montana's FERC license would include acceptance of the Kerr Project conveyance required by Ordering Paragraph (C)(1) of the 1985 Agreement.

43. On March 5, 2014, the CSKT filed with FERC its “Notice of Conveyance”, designating September 5, 2015 as the conveyance date for the Kerr Project No. 5, reflecting the CSKT’s exercise of the unilateral and exclusive option granted it to purchase the Kerr Dam pursuant to Paragraph VI(C)(3)(a) of the 1985 Agreement (Ex. 14).

44. On April 14, 2014, the CSKT filed with FERC its “Application for Approval of Partial Transfer of License and Co-Licensee Status” (Ex. 15). The Tribes requested that “the effective date of the License transfer and addition of EKI as a co-licensee be September 5, 2015, upon receipt by NorthWestern of the Estimated Conveyance Price and the conveyance of the Kerr Project to CSKT (“Conveyance Date”).” The application alleged that it contained information that satisfied the requirements of Sections 9.1-9.3 AND 131.20 of the FERC regulations, and that based on such information, “the partial transfer of the Kerr Project license and awarding the CSK and EKI co-licensee status is in the public interest.”

45. On May 29 or 30, 2014, Plaintiff Jackson filed with FERC a “Motion to Intervene” (Ex. 16) and “Cover Letter” (Ex. 17) with respect to the proposed transfer of the Kerr Project No. 5 license from PPL Montana to NorthWestern. On July 8, 2014, FERC issued a “Notice Granting Intervention” accepting that motion as having timely filed on June 2, 2014 (Ex. 18).

46. On July 24, 2014, FERC issued its “Order Approving Transfer of License” for the Kerr Hydroelectric Project, FERC Project No. 5-094, from PPL Montana to NorthWestern, which transfer was subject to transferee’s “acceptance of all the terms and conditions of the license, *including conveyance of the license to the Tribes*” (Ex. 19) (emphasis added).

47. On or about August 22, 2014, Plaintiff Jackson filed with FERC a “Request for Rehearing of FERC Order Transferring License,” in response to the July 24, 2014 FERC Order (Ex. 20).

48. On September 19, 2014, FERC issued a “Notice Dismissing Request for Rehearing,” denying Plaintiff Jackson’s previously filed request. It explained that, since Plaintiff’s request for rehearing “raise[d] issues germane to the final 1985 license order, rather than to [the] July 24 order, he fail[ed] to identify how he [was] aggrieved by the latter order” (Ex. 21).

49. On or about September 24, 2014, Plaintiff Jackson filed with FERC a “Request for Clarification on Notice Dismissing Request for Rehearing.” It generally sought substantiation from FERC regarding which FERC rules and/or 1985 Agreement provisions authorized the conveyance of the Kerr Project to the CSKT without further review by FERC confirming the Tribes’ compliance with applicable federal and state laws (Ex. 22).

50. On October 29, 2014, the FERC Office of Energy Projects issued a response to Plaintiff Jackson’s September 24, 2014 request (Ex. 23 ), FERC issued *inter alia* the following 3 key responses to this question: 1) “Ordering Paragraph C of the 1985 [Agreement] [...] provided that on the conveyance date, Montana Power’s interest in the Kerr Project would, ‘without any further action on the part of [Montana Power], the Commission, or any other entity, vest in the Tribes;” 2) “a Tribe that is a hydropower licensee is subject to the Commission’s regulatory authority to the same extent as any other licensee. Once the Kerr Project is conveyed to the Tribes, they will continue to be jurisdictional *under Part I* of the Federal Power Act (FPA)” (emphasis added); and 3) “In the 1985 order, the Commission determined that the license issued - which included the provisions allowing for conveyance to the Tribes of Montana Power’s interest in the project, without further review - was best adapted to a comprehensive plan for improving or developing the waters in question. No entity sought rehearing or judicial review of that order, which is now final.” FERC, however, neglected to mention that its previous Finding #3 (p. 8) in the 1985 Agreement stated that *it had then granted only 3 requests to intervene*.

51. On December 8, 2014, FERC issued its “Order on Petition for a Declaratory Order”, treating both the CSKT and Energy Keepers, Inc. (“EKI”), a subsidiary corporation of the Tribes chartered by the United States Department of Interior pursuant to section 17 of the Indian Reorganization Act, as “instrumentalities of the Federal government,” and consequently, as public utilities under both the Federal Power Act of 1920, as amended, and the Public Holding Company Act of 2005 (with the CSKT deemed a “public holding company” under the latter statute for such purposes), thereby exempting them from important FERC facility acquisition, license transfer, public reporting and accountability requirements (Ex. 24 ).

52. On January 12, 2015, the State of Montana’s Reserved Water Rights Compact Commission signed the CSKT Water Compact entered into between the State of Montana, the CSKT and the United States of America (Ex. 25).

53. On January 13, 2015, NorthWestern filed with FERC its “Submission of Certified Copies of Instruments of Conveyance,” acknowledging acceptance of the July 24, 2014 FERC order approving the transfer of the Kerr Dam license from PPL Montana to NorthWestern, and reflecting the specific fee lands and easements located in Flathead and Lake Counties, Montana, that were so conveyed (Ex. 26);

54. On April 14, 2015, the CSKT and NorthWestern Corporation jointly submitted to FERC their “Application for Approval of Partial Transfer of License and Co-Licensee Status,” requesting that FERC “add EKI to the [1985] Kerr Project license,” and treat September 5, 2015 as the “effective date of the License transfer [from NorthWestern to CSKT] and of the] addition of EKI as a co-licensee [...] upon receipt by NorthWestern of the Estimated Conveyance Price and the conveyance of the Kerr Project to CSKT (‘Conveyance Date’)” (Ex. 27).

55. On April 16, 2015, both chambers of the Montana Legislature passed Senate Bill 262 restating and reaffirming the terms of the CSKT Water Compact and submitted it for

signature to Montana Governor Bullock. On May 2, 2015, Montana Governor Bullock signed SB262 into State law, thus finalizing the State's ratification of the CSKT Water Compact.

56. On or about May 26, 2015, Plaintiffs Keenan and Jackson filed with FERC a "Motion to Intervene" in response to in response to the joint CSKT and NorthWestern notice of "Application for Approval of Partial Transfer of License and Co-Licensee Status," about which FERC had previously issued a public notice on April 28, 2015. (Ex. 28) Plaintiffs' Motion to Intervene *inter alia* made 3 key requests: 1) a request for "[d]ocumentation of the Tribes' compliance with all conditions of the previous licensee as stated in Section II (3)5 of the transfer application, particularly what the EKI and the Tribes consider[] 'applicable state laws;'" 2) a request that the Tribes guarantee their public accountability with respect to their treatment and disposition of funds derived from Kerr Project operating revenues; and 3) a request for documentation confirming the Kerr Dam's participation in any Emergencies or other [Department of] Homeland Security exercises involving other "black start" dams.

57. On or about June 9, 2015, the CSKT and EKI filed with FERC their "Answer to Motions to Intervene and Comment." (Ex. 29) Two of the Tribes' responses, in particular, reflect their discomfort and disdain with Plaintiffs' questions. For example, their Motion stated that: 1) "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. However, this proceeding is not about whether CSKT should become the licensee or whether the Project should be conveyed on the Conveyance Date. That proceeding took place in 1985 and those issues are resolved" (p. 2); and 2) "The Ke[e]nan/Jackson and MLWA Motions raise issues that have nothing to do with the addition of EKI to the Kerr Project License. All four of the Kennan/Jackson Motion's arguments pertain to CSKT's fitness as a licensee of the Kerr Project due to CSKT's status as a federally-recognized Indian Tribe." (p. 4).

58. On June 25, 2015, the CSKT filed thousands of allegedly prioritized culturally and religiously significant water claims in the Montana Water Court in an effort to intimidate those parties still interested in opposing Congress' ratification of the Compact. Were Congress not to ratify the Compact and the Water Court to adjudicate these claims in favor of the Tribes (the 'worst-case scenario'), the detailed map the CSKT have filed shows that they would gain physical and/or regulatory control over nearly 2/3 of the State of Montana's waters and lands (Ex. 30).

59. On July 1, 2015, the CSKT filed other allegedly prioritized water claims in the Montana Water Court in an effort to show the extent of their culturally and religiously significant claims over state waters and lands, should the Court favorably adjudicate their claims and Congress ratify the Compact. In the 'best-case scenario,' the detailed map accompanying these filings shows that approximately 1/5 of the State of Montana's waters and lands would fall under the physical and/or regulatory control of the Tribes (Ex. 31).

60. On July 1, 2015, the Bureau of Indian Affairs ("BIA") filed its response to and accepted NorthWestern's prior request for a variance from the Final EIS the BIA had previously prepared *in March 2010* that FERC had apparently incorporated into the 1985 Agreement. (Ex. 32) Pursuant to the variance, "discharge from Kerr Dam will be reduced within the ramping rate constrains identified in license articles 57 and 58 to achieve proposed outflows of 5,570 cubic feet per second (cfs) and 3,300 cfs by July 15 and July 31, respectively. This operation will allow [licensee] to maintain lake level elevations above 2,892 feet above mean sea level, approximately one foot below pool."

61. On July 15, 2015, Plaintiffs Keenan and Jackson filed with FERC their "Response to the [CSKT] and [EKI] Answer to Motions to Intervene and Comment." (Ex. 33) It posed two fundamental questions: First, how is EKI able to fulfill the 1985 Agreement Kerr Project license

terms and conditions it would assume from private FERC licensee NorthWestern if EKI was only first established as a federally chartered corporation at the end of 2012, and had never before operated or managed *a* hydroelectric facility or sold electricity? Second, how could the FERC consider the partial transfer of NorthWestern's Kerr Project license to the EKI to be "in the public interest" given EKI's lack of dam operations and management experience?

62. On August 24, 2015, Plaintiff Pointer filed with FERC the most recent of the many interventions it has filed, since 1998, concerning "Kerr Project No. 5" (Ex. 34), (Ex. 35), (Ex. 36) and (Ex. 37). This new intervention (Ex. 38) recalled those prior filings and tied them together with present-day issues. First, the Pointer intervention highlighted how FERC had failed over the course of many years to convene any public hearings in Montana to afford local stakeholders an "opportunity to be heard" not only regarding the FERC Orders relating to the management of Flathead Lake levels and Flathead River flows, and thus, the operation and management of Kerr Dam/Reservoir, but also regarding the scheduled conveyance of the Kerr Project to the CSKT. Plaintiff Pointer expressed incredulity concerning this blatant failure considering how Kerr Project stakeholders, including itself, had meticulously documented the harmful economic effects those Orders had had on their businesses. Second, it focused on how the FERC's issuance of a prior Order approving the 1985 Agreement "effectively waived FERC hydroelectric facility acquisition [] requirements that called for prior public notice and comment, and a formal determination by FERC that the then-proposed but not yet exercised option to acquire the Kerr Dam Project and license would be 'in the public interest' 30 or more years hence." Plaintiff Pointer's most recent intervention, furthermore, raised the following question: "Since these requirements have long been waived in promotion of tribal self-governance, how then can FERC now be assured that proceeding with such transaction on September 5, 2015 is in

the public interest, especially considering that we all are in a post-9/11 world and closely monitoring potential national security issues?”

63. On August 30, 2015, an article appeared in the *Missoulian* entitled, “Tribes get ready to celebrate their takeover of Kerr Dam.” It reflected the Tribes’ apparent confidence that the Kerr Project conveyance scheduled for September 5, 2015 would take place without incident, and indicated that “Norman Bay, the chairman of the Federal Energy Regulatory Commission [*and a named Defendant in this action*], will attend [the] [...] commemorat[i]on of] the historic moment the same day, from 10 a.m. to 2 p.m., at the Joe McDonald Health and Fitness Center on the campus of Salish Kootenai College in Pablo.” Furthermore, the article emphasized how although “[t]he dam [had previously been] built on *an important Native American religious and cultural site* and opposed by many tribal members” (emphasis added), it may “now help restore and revitalize [the] tribes.” (emphasis added)

64. On September 1, 2015, FERC issued its “Order Approving Partial Transfer of License” (Ex. 39). Said order “approved [...]the partial transfer of the license for the Kerr Project No. 5 from NorthWestern Corporation and the [CSKT] as co-licensees, to NorthWestern Corporation, the Confederated Salish and Kootenai Tribes and Energy Keepers, Incorporated, as co-licensees.” FERC also granted the motions to intervene that Plaintiffs Keenan and Jackson and other Intervenors had previously filed. Significantly, FERC denied Plaintiffs’ request for a public hearing, again, on spurious grounds. However, it indicated that other Intervenors’ “request for a hearing pursuant to Article 40(c) output” (re: the extent of any allocation by the Tribes of Kerr Project-generated energy for the benefit of the FIP or the Irrigation Districts operated by the BIA from the time of conveyance to the expiration of the license) “will be addressed in a separate proceeding.” The order, moreover, set forth the final steps of the conveyance which NorthWestern and the Tribes must follow (152 FERC ¶ 62,140 (9/1/15)).

65. The scheduled September 5, 2015 conveyance of the Kerr Project and license is an indispensable element of DOI's, FERC's and the CSKT's overall long-term political strategy to restore to the Tribes their pre-Hellgate Treaty of 1855 on and off-reservation waters and lands which hold primary cultural and religious significance to the Tribes. For all intents and purposes, the scheduled September 5, 2015 conveyance of the Kerr Project to the Tribes will ensure the CSKT's ownership, management and control of *ALL 12* dams and reservoirs on the Flathead Reservation (Ex. 40), at the expense of the reservation's irrigation community.

66. The scheduled September 5, 2015 conveyance of the Kerr Project and license, however, is a legally flawed conveyance that does not comply with various substantive and procedural federal regulatory and constitutional requirements as set forth below.

67. FERC's abdication of administrative discretion, and/or FERC's exercise of administrative discretion arbitrarily and capriciously and contrary to law, which empowered DOI-driven, CSKT-friendly tribal self-governance, fish, wildlife and environmental policy priorities and systemic abuse of the administrative process to redefine and govern the 1985 Agreement and the FERC licensees' implementation of it, effectively deceived Montana stakeholders who, instead of focusing on the DOI public pronouncements, had detrimentally relied upon FERC's apparent misrepresentations that *it*, rather than DOI, was the "official" overseer of Kerr Project licensees and their operations of the dam facility and infrastructure. FERC and DOI had managed to successfully perpetrate this grand deception upon the Montana public and Plaintiffs for a period of approximately 30 years.

68. Aside from the regulatory noncompliance and due process issues it engenders, this grand federal agency deception and the resultant regulatory derogations it has spawned also pose the potential for serious economic harm and safety risks befalling Plaintiffs and other stakeholders conducting business or residing on or near the Flathead Indian Reservation, and

these have now risen to the level of a potential national security risk. This Court, out of an abundance of precaution, must view these failings in the context of the post-9/11 world in which we all live and work, where threats and isolated acts of terrorism are no longer uncommon occurrences, but are carefully considered, reviewed and assessed by federal agencies and law enforcement officials charged with protecting the public interest.

#### **NATIONAL SECURITY IMPLICATIONS**

69. Between 2008 and 2015, representatives from various U.S.-based Turkish American organizations and the Islamic Government of the Republic of Turkey have made considerable efforts to establish business and cultural exchange relationships with Native American tribes and their members, including students. These organizations have included the Washington, D.C.-based Turkish Coalition of America (“TCA”), Turkish Cultural Foundation (“TCF”), Turkik American Alliance (“TAA”) and Turkish Heritage Organization (“THO”), and the Irvine, California-based West America Turkic Council. During this period, the Turkish Government agencies involved have included the Ankara, Turkey-based Ministries of Industry and Trade, Economic Affairs, Foreign Affairs, Environment and Urban Planning (formerly Public Works and Housing) and the Turkish International Cooperation and Coordination Agency (“TIKA”).

70. These organizations and ministries have convened, attended or subsidized a number of important Native American events in the United States, including the annual Reservation Economic Summit (“RES”) event hosted by the National Center for American Indian Development (“NAID”). For example, in March 2011 the “government of Turkey became the first foreign nation to ever send an official delegation to the RES - the premier Native American economic and business development conference.” These Turkish organizations and ministries also have hosted all-expenses-paid trips, conferences and events that have taken

place in the Islamic Republic of Turkey. During 2009, 2010 and 2011, for example, Native American delegates had met with government ministry officials, technical university professors and religious and cultural organization representatives to engage in cultural exchanges, and to discuss how to invest in and do business with Native American tribes and assist those communities' development needs while further strengthening economic ties between Turkey and the United States. (Ex. 41)

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

72. On January 6, 2011, Congressman Martin Heinrich (D-NM) (for himself and on behalf of Congresswomen Bono-Mack, and Lummis) introduced H.R. 205, the "Helping Expedite and 5 Advance Responsible Tribal Homeownership ("HEARTH") Act of 2011" and referred it to the Committee on Natural Resources. The HEARTH Act entitled any federally recognized tribe to lease lands held communally in trust by the U.S. government for the benefit of the tribe (i.e., not lands owned individually as allotments in trust) for up to 75 years. Tribes would become eligible to enter into such leases provided they were executed pursuant to tribal lease regulations the Interior Secretary had first approved, the leases were entered into for public, religious, educational, recreational, residential, business, and other purposes pursuant to no more than a 75-year term, or for business or agricultural purposes for initial and renewable 25-year terms up to a total of 75 years. Qualifying leases eligible to escape DOI scrutiny did not include those entered into for purposes of exploration, development, or extraction of any mineral resources, which would instead require compliance with standard BIA lease regulations. H.R. 205 was intended to amend 25 U.S.C. 415 (Aug. 9, 1955), which had authorized the leasing of

restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases.

73. On April 12, 2011, the “TCA and the [...] TCF hosted Congressman John Boehner (R-OH), the Speaker of the House, at a dinner. They were joined by Congresswoman Ileana Ros Lehtinen (R-FL), chairwoman of the House Foreign Affairs Committee, as well as Congressman Ed Whitfield (R-KY) and Congresswoman Virginia Foxx (R-VA), two co-chairs of the Turkey Caucus. TCA hailed this as a symbolic ‘first official meeting between members of the Congressional leadership and leaders of the Turkish American community, signaling Congressional recognition of the increasingly important and positive contributions of the Turkish American community.’”

74. On June 24, 2011, Oklahoma Congressman, Tom Cole (R-OK), introduced and reported to the Committee on Natural Resources H.R. 2362 entitled, the “Indian Tribal Trade and Investment Act of 2011.” The bill’s purposes were to: “(1) to remove or ameliorate the certain barriers to facilitate trade and financial investment in Indian tribal economies; (2) *to encourage increased levels of commerce and economic investment by private entities incorporated in or emanating from the Republic of Turkey*; and (3) to further the policy of Indian self-determination by strengthening Indian tribal economies and political institutions in order to raise the material standard of living of Indians (emphasis added).” The bill permitted six tribes participating in a demonstration project to lease communally held reservation lands the U.S. government holds in trust for the tribe (i.e., not lands held by individuals) pursuant to 25-year leases for up to 75 years without first securing the Interior Secretary’s approval of the lease. To be eligible, the leases had to be executed pursuant to tribal regulations that the Secretary had first approved. In addition, the lease had to be entered into with one or more private entities incorporated in or emanating from the Republic of Turkey, for business and economic development, public, educational, or

residential purposes. Leases escaping DOI review also would be permitted for other purposes, including the development or use of natural resources in connection with lease operations, grazing and for certain investment-intensive farming, but not for purposes of exploration, development, or extraction of any mineral resources. Notably, since the Republic of Turkey was the main benefactor, the bill did not provide for a tribe's entering into a lease with a Turkish enterprise for religious purposes.

75. On September 22, 2011, former CSKT Chairman James Steele and TAC President G. Lincoln McCurdy coauthored an editorial in the *Missoulian* hailing the “burgeoning relationship between Indian Country and the Republic of Turkey, a relationship that had culminated in the introduction in Congress of the Indian Tribal Trade and Investment Act of 2011, H.R. 2362.”

76. On November 3, 2011, the Subcommittee on Indian and Alaska Native Affairs of the House Committee on Natural Resources convened a hearing to discuss H.R. 205 (the HEARTH Act of 2011) and H.R. 2362 (the Indian Tribal Trade and Investment Demonstration Project Act of 2011). During his testimony, Congressman Coleman noted how if the HEARTH Act were enacted it would provide the benefits offered under the Indian Tribal Trade and Investment Demonstration Project Act to all Indian Tribes. Congressman Coleman, furthermore, explained why his bill focused on the Republic of Turkey. “The single most frequent question people ask me about H.R. 2362 is: Why Turkey? The answer to that is simple. Turkey, through their trade ministry, has shown interest in partnering with tribal economies... People in Turkey [also] have a genuine affinity towards American Indians. Many Turks believe that Indians share a common ancestry with the Turks dating back millennia...” (Ex. 42).

77. TAC President, G. Lincoln McCurdy also provided testimony at the November 2011 hearing that echoed Representative Coleman's sentiments. Mr. McCurdy expressed his

support for H.R. 2362 because it would “capitaliz[e] on the unique and genuine interest Turkish Americans and Turkish companies have shown in working with Indian Tribes, spurred by TCA’s efforts to build bridges between Turkey and Indian Country.” In addition to extolling the burgeoning cultural and student exchanges that had resulted from TAC efforts, Mr. McCurdy also highlighted how Turkey’s expanding GDP and growing desire to engage in labor-intensive foreign direct investment focused on the “construction, mining, finance, manufacturing and technology/communications sectors,” had resulted in Turkish firms generating many “employment opportunities in Russia, Turkmenistan, Egypt and Kazakhstan [...]. Iraq and Afghanistan” could “boost the economies of participating Indian Tribes...” (Ex. 43).

78. Although both bills had languished in committee during 2011, they each were reintroduced in 2012. Ultimately, H.R. 2362, the language of which expressly referenced the Republic of Turkey, had failed to muster sufficient votes to secure passage in the House of Representatives, while the more innocuously sounding H.R. 205 secured overwhelming House support and unanimously passed the U.S. Senate in July 2012. Later the same month, the President signed H.R. 205 (the HEARTH Act) into law. As a result, ALL Native American Tribes became eligible to lease their reservation lands to any third party, including foreign enterprises based in the Republic of Turkey and other foreign countries, without engendering DOI oversight provided a tribe’s leasing regulations had first secured DOI approval and the leases were entered into for other than natural resource or mineral extraction purposes.

79. During the period in which the legislative processes briefly described above had unfolded, and thereafter, a number of alarming reports surfaced about the Republic of Turkey’s harboring, funding and facilitating the broadcast disseminations of the ostensibly moderate but proven extremist Muslim Brotherhood and its leaders recently deposed from Egypt, along with other Islamic fundamentalist terrorist groups, including Hamas which also had been harbored by

the Government of Qatar. These articles also discussed how Turkish President Erdogan's governing Justice and Development Party (AKP)'s Islamic orientation was responsible for such activities, for Turkey's aggressive attacks on the socialist forces of the pro-Kurdish People's Democratic Party in both Turkey and Syria which the U.S. had supported against the Islamic State ("ISIS") in northern Syria, and for the Turkish Government's repeated failure to actively pursue attacks on ISIS together with the U.S. Most of these articles had originated from Middle Eastern media sources – *Al Arabia News* (Oct. 2013), *Abu Dhabi Media* (March 2014), *Al Monitor* (Feb. 2015), *JerusalemOnline* (July 2015), *Cairo Post* (Aug. 2015), and from *The Atlantic* (May 2013) and *New York Times* (Sept. 14-15, 2014) and (Aug. 2015).

80. In addition, an April 2012 article appearing in *EurAsianet*, an Open Society Institute-funded media publication, reported that "Uzbek leaders ha[d] intensified a campaign to contain Turkish economic and cultural influences in Uzbekistan. The most prominent component of this crackdown ha[d] been the arrest of 54 Turkish entrepreneurs over the past two years and the closure of at least 50 Turkish-operated businesses. In addition, the presidential administration in late February ordered all state-owned and private television channels to stop airing Turkish sitcoms, claiming that they were 'inappropriate' for an Uzbek audience. Turkish-funded schools have also been forced to close. Underlying Tashkent's actions [wa]s mounting distrust of the Islamist orientation of Turkey's governing Justice and Development Party (AKP). It would seem that Uzbek President Islam Karimov's government worrie[d] that the AKP [wa]s working to promote Islamic piety not only in Turkey, but in the Turkic states of Central Asia. [...] In particular, Tashkent [wa]s suspicious that the AKP [wa]s somehow abetting the activity of an Islamic evangelical movement led by the Turkish theologian Fetullah Gulen, whose ideas are rooted in concepts earlier espoused by Bediuzzaman Said Nursi in the mid-20th century. [...]"

Uzbekistan ha[d] accused Turkey of harboring Uzbek terrorists and sponsoring banned underground religious groups in Uzbekistan.”

81. These disturbing media reports spanning 2012-2015 raise serious questions about the motivations underlying the Republic of Turkey’s extensive public outreach to the Native American community. (Ex. 44).

82. During November 2013, Prime Minister Erdoğan was reported to have personally supported TIKA’s offer of \$200,000 in aid to the Confederated Tribes of Warm Springs Reservation in Oregon “to assist in bringing water to the Warming Springs region where nearly 5,000 Native Americans currently reside.”

83. During June 2009 and January 2010, TCA had taken two different Turkish delegations on trips to the United States to visit, respectively, the Pine Ridge Indian Reservation of the Oglala Sioux Tribe of South Dakota and the reservations of the Hopi Tribe and the Navajo Nation of Arizona.

84. The 17 participating “federally recognized” tribes from 11 states that had participated in the November 2010 trip to Turkey included: 1) the Bay Mills Indian Community of Michigan; 2) the Stockbridge-Munsee Band of Mohican Indians of Wisconsin; 3) the Navajo Nation of Arizona and New Mexico; 4) the Couer d’Alene Tribe of Idaho; 5) the Tunica-Biloxi Tribe of Louisiana; 6) the Seneca Nation of New York; 7) the Rosebud Sioux and Sicangu Oyate of South Dakota; 8) *the Assiniboine-Sioux, Crow and Salish and Kootenai (CSKT) tribes of Montana*; 9) the Cherokee, Cheyenne, Arapaho, Fort Sill Apache, Osage and Quapaw nations of Oklahoma; and 10) the Colville Reservation tribes and the Yakama Nation of Washington.

85. Three Montana tribes had participated in the November 2010 trip, and they had been accompanied by two Montana state agencies (State Tribal Economic Development

Commission and the State Tribal (Indian Country) Economic Development Program) and the Montana-based nonprofit, Native American Development Corporation.

86. These news reports raise even more serious questions about the relationship between Turkey's \$200,000 gift, the Turkish Governments' prior 2009 and 2010 visits to the Pine Ridge, Hopi and Navajo Indian Reservations, the Native American community's November 6-14, 2010 trip to Istanbul, and the Turkish Government's and business community's interest in engaging in economic development activities on the Native American reservations selected.

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

88. With respect to Montana, it is more than coincidental that the CSKT and its subsidiary EKI, as the sole and exclusive Kerr Project (Kerr Dam and Reservoir) owners, managers and licensees, could, beginning on September 5, 2015, be responsible for regulating the levels of the Flathead Lake and the flows of the Flathead River, consistent with CSKT cultural and religious priorities, which are intended to benefit the Tribes rather than the general "public interest."

89. These Turkish groups' selection in 2010 of 17 tribes from 11 states (including the CSKT), the Turkish Trade Minister's prior decision to visit the Hopi and Navajo Indian Reservations, and Prime Minister Erdogan's \$200,000 gift to the Warm Springs Tribe of Oregon

are certainly not unrelated or whimsical events. The reservations of most of these tribes are located within 100 miles of a nuclear power plant, registered nuclear fuel facility or registered uranium mine or deposit and also a water source (Ex. 45). It is quite possible that the Turkish Government, sponsored business enterprises and affiliated groups and members seek access to the uranium deposits and bountiful water sources surrounding the Flathead Reservation for production of yellowcake capable of later conversion to a gaseous state for eventual use in incendiary devices. This “coincidence” should, at the very least, give this Court pause to require FERC and other federal agencies possessing concurrent jurisdiction over national security matters to undertake an in-depth review of the Kerr Project transaction *before* the scheduled September 5, 2015 conveyance is permitted to take place.

90. To begin with, the U.S. Department of Energy has reported that 11 percent (approx. 453) of the 4,225 mines providing uranium ore to the Atomic Energy Commission for defense-related purposes from 1947 to 1970 are located on tribal lands (Ex. 46).

91. The DOE also has reported that there are 19 abandoned defense-related mines located in the State of Montana, 10 of which are designated in size as “small” mines (0-100 tons of ore produced), 8 of which are designated in size as small-medium mines (100–1,000 tons of ore produced), and 1 of which is designated in size as a “medium” mine (1,000–10,000 tons of ore produced). In total, these 19 mines produced 8,866 tons of ore (Ex. 47).

92. In addition to these abandoned defense-related mines, there is also evidence of substantial other underground uranium deposits on or in the mountains and forests located within 25-50 miles of the northern, southern and eastern portions of the Flathead Indian Reservation. Los Alamos National Laboratories, for example, has found evidence of considerable uranium deposits (Ex. 48): 1) in the Dry Fork Creek drainage, approximately 35 km east of Libby, Montana; (Ex. 49) and (Ex. 50); 2) in the three streams draining a mountainous area north and

northwest of Dahl Lake (about 40 km west of Kalispell) [in or near Lost Trail National Wildlife Refuge] originating on Pleasant Valley Mountain (Ex. 51), (Ex. 52), (Ex. 53), (Ex. 54) and (Ex. 55); 3) approximately 15 to 20 km west of Flathead Lake along Wild Bill Creek (Ex. 56), (Ex. 57), (Ex. 58) and (Ex. 59); 4) in a spring located approximately 10 km due north of Smith Lake (Ex. 60); and 5) in seven stream locations East of Flathead Lake, in Flathead Valley in the area of Wolf and Schmidt Creeks. (Ex. 61), (Ex. 62) and (Ex. 63).

93. Furthermore, DOI's U.S. Geologic Survey, in cooperation with the Jefferson Valley Conservation District and Jefferson County, has sampled 40 ground-water wells in Jefferson County in water year 2007 for uranium and other radioactive elements. [...] The objectives of the USGS study were to evaluate the geologic setting in which elevated uranium concentrations occur in Jefferson County and to provide information about the occurrence and concentration of uranium and other radioactive elements that had not been studied previously. The presence of uranium in area ground water had previously been documented by required monitoring of public-supply systems, information from private citizens, and a Montana Department of Health and Human Services biomonitoring study" (Ex. 64).

94. Moreover, the Montana Bureau of Mines and Geology has determined that there is at least one abandoned uranium mine located in Una Mountain in the Bear Ranger District, which is approximately 30 air miles due east of the town of Charlo located on the Flathead Indian Reservation. However, this mine, identified as "PO005400" with coordinates (NE 19N 14W 15), was "screened out and not visited by MBMG." According to the report, it was screened out because "there were no references to it in the MILS database and the location was too general (+/-1 km). The location in the MILS database is listed as section 15, T19N, R14W (Una Mountain quadrangle)" (Ex. 65).

95. Whether or not it can be confirmed that it is the Turkish Government's ambition to acquire raw nuclear materials that can later be refined for military purposes from Indian reservation lands, including from the Flathead Indian Reservation, it remains plausible that members of Turkish enterprises interested in and/or currently doing business with the CSKT on the Flathead Indian Reservation could have affiliations with terrorist organizations the Turkish Government has harbored (e.g., Muslim Brotherhood) or have employees bearing such affiliations that have their own bold agendas. And, given the CSKT's technical capabilities and apparent gullibility/naivety, the CSKT, tribal members, Plaintiffs and similarly situated persons, may be at peril.

96. Multiple CSKT Annual Reports and published quarterly newsletters (e.g., S&K Group Spirit) spanning 2009-2015 reveal the CSKT's technical expertise in high profile DOE & USACE uranium mill tailings cleanups, and in U.S. & foreign (Middle Eastern) military hardware component manufacturing & logistics software management, both within the U.S. and Riyadh, Saudi Arabia. It is quite possible that the Turkish Government, sponsored Turkish business enterprises and affiliated terrorist groups or members may be seeking access to such expertise for possible acquisition and use of incendiary devices to compromise Kerr Dam and/or other off-reservation targets.

97. It may be recalled that Plaintiffs had previously sought documentation from FERC demonstrating that the Kerr Dam Project, inclusive of the CSKT and EKI, had participated in any Emergency or Department of Homeland Security ("DHS") exercises or in any network of "'black start' dams that are activated in case of a national emergency, such as an EMP attack." Plaintiffs have yet to receive a reply to this portion of their request from FERC, NorthWestern or the CSKT, despite the scheduled September 5, 2015 conveyance of the Kerr Project.

98. Plaintiff's use of the FERC *e-Library* yields little additional information about the Kerr Project conveyance, the CSKT's ability to fulfill its FERC co-licensee obligations under the 1985 settlement, or the CSKT's and NorthWestern's adoption of protocols to ensure the safety of the dam. Even where relevant documents relating to Kerr Dam's maintenance and safety record and the CSKT's co-licensee performance have been located they have been given either an online "availability" designation of "CEII" or a misleading designation as "public." In both cases, they tend to be inaccessible given their actual designation as "CEII." A document's designation of "CEII" means that stakeholders "don't have permission to access this document" because its subject matter relates to "Critical Energy Infrastructure Information." As a result, stakeholders seeking access to such information have no choice but to "file a CEII request under 18 C.F.R. § 388.113" with the designated CEII Coordinator on a prescribed "Electronic CEII Request Form" that incorporates a legally binding "Non-Disclosure Agreement." This entails a rather detailed and time-consuming mandatory procedure and can potentially engender cost-prohibitive document search and duplication fees if a fee waiver requested pursuant to a separate involved procedure (not unlike a FOIA fee waiver procedure) is ultimately denied by the FERC CEII Coordinator.

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

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

101. The DHS hosts a “Dams Sector” website. The term “Dams Sectors” is defined as comprising “the assets, systems, networks, and functions related to *dam projects*, navigation locks, levees, hurricane barriers, *mine tailings impoundments*, or other similar water retention and/or control facilities. *Dam projects* are complex facilities that typically include water impoundment or control structures, reservoirs, spillways, outlet works, powerhouses, and canals or aqueducts. In some cases, navigation locks are also part of the dam project” (emphasis added).

102. The DHS website also contains a key document entitled, *Dams Sector-Specific Plan – An Annex to the National Infrastructure Protection Plan 2010*, which explains why the FERC website did not disclose many documents relevant to the condition of the Kerr Project and the capabilities (or lack thereof) of the CSKT and EKI to adequately protect it from possible criminal or terrorist attacks. The Preface to this document makes clear that DHS, FERC and the national security agencies have likely been coordinating pursuant to a “Dams Sector-Specific Plan” in an effort to thwart possible threats of terrorist attacks on dams throughout the nation. “The Dams Sector-Specific Plan (DSSP) was developed to complement the NIPP in achieving a safer, more secure, and more resilient Dams Sector *by reducing vulnerabilities, deterring threats, and minimizing the consequences of terrorist attacks, natural disasters, and other incidents.* [...] The National Infrastructure Protection Plan (NIPP) provides the unifying structure for the integration of critical infrastructure and key resources (CIKR) protection and resilience efforts as part of a coordinated national program” (emphasis added).

103. Plaintiffs are arguably excused for lacking extensive knowledge of the coordinated DHS/FERC national safety and national security rules, procedures, protocols and exercises to which the Kerr Project and the CSKT/EKI are and will be subject. This Court, however, is not. It should take judicial notice of the CSKT's and EKI's failure to tender any documentation confirming the Kerr Project's participation in such exercises, and FERC's ongoing failure to respond to Plaintiffs' many objections and documentary requests concerning the Kerr Project's scheduled conveyance/transfer to the CSKT/EKI, more generally. Plaintiffs are, therefore, justified in calling for this Court to grant their request for an Emergency Temporary Restraining Order and Preliminary Injunction, and for the scheduling of a Hearing to discuss these issues in light of the newly synergized national security-related information that Plaintiffs have, in good faith, provided for this Court's immediate review.

**FIRST CLAIM FOR RELIEF**  
**VIOLATION OF FERC PROJECT ACQUISITION AND LICENSE**  
**TRANSFER RULES AND REGULATIONS**  
**(Defendants Bay, Moeller, Lafleur, Clark and Honorable)**

104. Plaintiffs incorporate herein by reference the allegations in all preceding paragraphs.

105. In December 2014, FERC issued an Order approving, for FERC jurisdictional purposes, the designation of the CSKT and EKI as "exempt public utilities as defined in section 201(f) of the FPA," and thereby concluding that the "PUHCA 2005 and relevant Commission regulations do not apply to the Tribes and EKI." Tellingly, FERC neglected to mention that such designation had exempted the CSKT from meeting the requirements of most of Part II of the Federal Power Act and corresponding regulations. Most importantly, it exempts the CSKT, a "federally recognized tribe," from meeting the hydroelectric facility acquisition requirements imposed by FPA § 203, virtually making it impossible for FERC to determine under current (post-9/11) conditions that the Kerr Project conveyance is in "the public interest." In addition,

such designation also exempts the Tribes and EKI from many of Part II's key public reporting and accountability ("books and records") requirements which FERC will now be unable to utilize to discern whether the CSKT and EKI are in compliance with their Kerr Project license obligations.

106. On account of and to ensure the scheduled conveyance, FERC has unlawfully failed to enforce the CSKT's compliance with, and facilitated its violation of, the following FERC project acquisition rules and regulations: FPA Part II, § 201(e) and (f) (16 U.S.C. §§ 824(e) and 824(f)), 18 C.F.R. § 33.1 (b)(3)(iii)(D)(4)); FPA Part II §203(a)(1) and (4) (16 U.S.C. § 824b(a)(1) and (4)), 18 C.F.R. §§ 33.1(a) and (b)(1).

107. In addition, on account of and to ensure the scheduled conveyance, FERC has unlawfully failed to enforce the CSKT's and EKI's compliance with, and is actively facilitating their violation of, the following FERC license transfer rules and regulations: FPA Part I, § 8 (16 U.S.C. § 801); FPA Part I, § 9(a)(2) (16 U.S.C. § 802(a)(2)), 18 C.F.R. §§ 9.1-9.3, 131.20.

108. FERC has not required EKI to provide other than cursory evidence of its qualifications to, and experience in, operating and managing hydroelectric facilities. In addition, FERC has not required EKI to demonstrate, via other than cursory evidence, what "applicable laws" it has complied with, how it has complied with them, the extent of its exemptions from such laws and why the partial license transfer to EKI is in "the public interest." Paragraph 15 of FERC's September 1, 2015 order granting EKI a partial license transfer as requested states that, "Section 8 of the FPA sets forth *no specific standard* for transfers..." (emphasis added). Paragraph 12 of said order states that, "[i]n any event, the FPA contemplates licensing hydropower projects to Indian Tribes." (152 FERC ¶ 62,140 (9/1/15)). These statements read in juxtaposition to one another, in light of the new information contained in this Complaint, the accompanying Exhibits, and the Memorandum supporting Plaintiffs' Motion for a TRO, confirm

the real possibility that FERC’s failure to conduct any reasonable due diligence review of EKI experience and capabilities (primarily because of its designation as a federally chartered corporation of a “federally recognized tribal entity”) could potentially result in persons of suspicion identified in Plaintiff’s filings working for or doing business with EKI on the Flathead Indian Reservation that present a genuine dam safety and personal safety and national security risk to Plaintiffs and all other stakeholders located on or near the reservation. FERC’s failure to show that the partial license transfer to EKI is *actually* in the public interest, and thus, to enforce the CSKT’s and EKI’s compliance with, and to actively facilitate the Tribes’ violation of the aforementioned FERC license transfer rules and regulations, amounts to agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” as required by 5 U.S.C. § 706(1) & (2)(A). As the result of such violations, Plaintiffs have been irreparably harmed.

**SECOND CLAIM FOR RELIEF:  
VIOLATION OF FERC AND APA NOTICE AND COMMENT  
AND PUBLIC HEARING RULES  
(Defendants Bay, Moeller, Lafleur, Clark and Honorable)**

109. Plaintiffs incorporate by reference herein the allegations in all preceding paragraphs.

110. The hearings and other meetings and consultations that Plaintiffs have repeatedly requested since, at least, 1998 are not trial-type hearings. FERC has acknowledged it possesses the discretion to hold both formal trial-type hearings and informal hearings when appropriately requested. (*Cascade Power Company*, 74 FERC ¶ 61,240 at 61,822 and n. 16 (1996), citing *Sierra Association for Environment v. FERC*, 744 F.2d 661, 661-62 (9th Cir. 1984)). The Commission also should recall, in the interest of equity and fairness, that it “has in any event often noted that *the right to notice and opportunity for hearing is inherent in all license articles*

*under which there has been no final determination of an issue*” (emphasis added). (*Cascade* at 6, n. 16, citing *Montana Power Co.*, 51 FERC ¶ 61,374 (1990)).

111. FERC, in its September 1, 2015 order granting the CSKT-EKI application for partial transfer of license (152 FERC ¶ 62,140 (9/1/15)), however, chose not to exercise its discretion in this manner. Rather, FERC decided to deny Plaintiffs’ request for a public hearing on this issue. It reasoned that, where a hearing can be based on the factual record but no new issue of material fact has been identified “that cannot be adequately resolved based upon the record before [it],” no public hearing is required. (*Id.*, at par. 13.). Once again, FERC has acted arbitrarily and capriciously and contrary to law by failing to acknowledge having received new issues of material fact Plaintiffs had previously identified in their May 25, 2015 intervention. In particular, Plaintiffs Keenan and Jackson had sought information ensuring that the proposed partial transfer of NorthWestern’s FERC license to the CSKT’s EKI subsidiary would not compromise the safe operation and maintenance of the Kerr Dam, as evidenced by proof of the Kerr Dam’s participation in Department of Homeland Security (“DHS”) exercises. Since Plaintiffs Keenan and Jackson have taken the added precaution of filing this action, this Court should now compel FERC to respond to their prior information request, as well as, to the allegations contained within this complaint that add further context to the new issues of material fact previously identified that, by any measure, are worthy of an immediate public hearing in Montana.

112. To ensure the scheduled conveyance scheduled for September 5, 2015, FERC has unlawfully failed to exercise its administrative discretion to grant, and/or exercised its administrative discretion arbitrarily and capriciously and contrary to law not to grant, stakeholder requests for a hearing, rehearing and/or consultation in northwestern Montana to discuss whether the scheduled Kerr Project acquisition by the Tribes is currently in the “public interest” taking

into account the post-9/11 world in which we all live in, as fair, just and equitable treatment and the preservation of national security would demand. In failing to currently provide Plaintiffs with due process on this issue, FERC has violated the following FPA regulations and applicable APA provisions: (FPA) 18 C.F.R. §§ 385.101-.102 (Subpart A - applicability & definitions), 18 C.F.R. §§ 385.501-.502 (Subpart E - hearings), 18 C.F.R. §§ 385.601 (Subpart F - conferences), and 18 C.F.R. §§ 385.701-.702, .704 and .713 (Subpart G – decisions); (APA) 5 U.S.C. 551 et. seq. As the result of these violations, Plaintiffs have been irreparably harmed.

113. To recall, on January 13, 2015, NorthWestern filed with FERC its “Submission of Certified Copies of Instruments of Conveyance,” acknowledging acceptance of the July 24, 2014 FERC order approving the transfer of the Kerr Dam license from PPL Montana to NorthWestern, and reflecting the specific fee lands, structures and easements located in Flathead and Lake Counties, Montana, that were so conveyed to it by PPL Montana.

114. In order for the scheduled conveyance to the CSKT of the Kerr Project and accompanying license to take place as scheduled, NorthWestern must present, no later than September 5, 2015, its Instrument(s) of Conveyance evidencing its ownership and clear title to all of the specific fee lands, structures and rights of easement located in Flathead and Lake Counties, Montana, that are to be conveyed to the Tribes.

115. In addition, FERC must determine that NorthWestern has satisfied all of the conditions imposed by its Kerr Project license, including those regulations governing NorthWestern’s sale of the Kerr Project to the CSKT, before FERC is legally authorized to issue an order recognizing said transaction. One such rule requires NorthWestern to submit to a public hearing that FERC would convene to provide interested stakeholders the opportunity to learn about and contest the contemplated transaction. Only following such a hearing is FERC

authorized to first determine whether the contemplated sale of the Kerr Project is “in the public interest.”

116. Thus far, FERC has refused to hold a public hearing to permit stakeholders to ask probing questions that might invite answers bearing upon whether NorthWestern’s contemplated sale of the Kerr Project to the Tribes is “in the public interest.” While FERC has permitted Plaintiffs to submit protests and motions to intervene regarding the transfer of a partial license from the CKST to EKI following or contemporaneous with the transfer of the NorthWestern’s portion of its joint license to the CSKT, the Commission has thus far refused to address questions about the Kerr Project conveyance itself that Plaintiffs and other similarly situated stakeholders have posed.

117. These FERC actions undertaken with respect to the contemplated sale by NorthWestern of the Kerr Project to the Tribes violate the following applicable substantive statutory and regulatory provisions: FPA § 203(a)(1)(A) and (a)(4); 16 U.S.C. § 824b(a)(1)(A) and (a)(4); 18 C.F.R. §§ 33.1(a)(1)(i). As the result of such violations, Plaintiffs have been irreparably harmed.

118. Such FERC actions undertaken with respect to the contemplated sale by NorthWestern of the Kerr Project to the Tribes violate the following additional procedural statutory and regulatory provisions: 18 C.F.R. §§ 385.101-.102 (Subpart A - (applicability & definitions), 18 C.F.R. §§ 385.501-.502 (Subpart E - hearings), 18 C.F.R. §§ 385.601 (Subpart F - conferences), and 18 C.F.R. §§ 385.701-.702, .704 and .713 (Subpart G – decisions); (APA) 5 U.S.C. 551 et. seq. As the result of these violations, Plaintiffs have been irreparably harmed.

**THIRD CLAIM FOR RELIEF:  
DECEPTIVE NON-EXERCISE OF ADMINISTRATIVE DISCRETION AND/OR  
EXERCISE OF ADMINISTRATIVE DISCRETION ARBITRARILY AND  
CAPRICIOUSLY AND CONTRARY TO LAW**

**(Defendants Bay, Moeller, Lafleur, Clark and Honorable)**

119. Plaintiffs incorporate by reference herein the allegations in all preceding paragraphs.

120. To ensure the scheduled conveyance, FERC had unlawfully failed to exercise its administrative discretion, and/or exercised its administrative discretion arbitrarily and capriciously and contrary to law, before approving three major “non-capacity<sup>1</sup> amendments qualifying as “significant alterations” to the 1985 Agreement, following extensive prior FERC consultation with the DOI Secretary, BIA and DOI Fish & Wildlife Service (“FWS”). These agencies had developed the fish, wildlife and environmental conditions that ultimately served as the bases for the amendments that FERC had approved in its 1997, 1998 and 2000 Orders, which had substantially transformed the licensing terms and conditions of the 1985 Agreement. In addition, FERC had failed to notify Plaintiffs or to offer Plaintiffs an opportunity for a hearing to contest said FERC Orders. FERC’s failure to disclose its merely ministerial role in adopting such amendments, without much, if any in-depth review resulting in any substantive changes thereto, was followed by FERC’s additional failure to provide Plaintiffs and other similarly situated public stakeholders with notice and an opportunity for a hearing. These FERC failures violated the following FERC rules and regulations: FPA Part I, § 6 (16 U.S.C. § 799); 18 C.F.R. §§ 4.200(b), 4.201(a) and (c), 4.202(a). As the result of such violations, Plaintiffs have been irreparably harmed.

121. Plaintiffs only learned of FERC’s deceptions, misrepresentations and misleading behavior upon securing the representation of Counsels of Record. Were it not for FERC’s

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<sup>1</sup> “A ‘non-capacity’ license amendment is a project modification involving either: [...] ! operational changes such as modifications to operating levels, minimum instream flows, revised ramping rates and other changes affecting environmental resources [or] [...] ! compliance filings (filings pursuant to license articles or other Commission orders) such as filing of study results, mitigation plans, study plans, or schedules ordered in the license articles...” See Federal Energy Regulatory Commission Administration of Hydropower Administration and Compliance, *Compliance Handbook* (March 2004) at 64, available at: [http://www.ferc.gov/industries/hydropower/gen-info/handbooks/compliance\\_handbook.pdf](http://www.ferc.gov/industries/hydropower/gen-info/handbooks/compliance_handbook.pdf).

deceptions, misrepresentations and misleading behavior, Plaintiffs would have endeavored to secure from FERC information about DOI's primary role in amending the 1985 Agreement behind-the-scenes, and Plaintiffs would have petitioned both FERC and DOI to conduct joint public hearings and re-hearings to contest such amendments. In addition, had Plaintiffs been informed earlier of FERC's and DOI's 'bait-and-switch' agency strategy, Plaintiffs also would have appealed the 1997, 1998, 2000 and 2014 FERC Orders ("final agency actions") administratively and/or judicially on a timely basis. For this reason, Plaintiffs are entitled to an equitable tolling of the otherwise applicable 5-year statute of limitations under 28 U.S.C. § 2462 and/or the 6-year statute of limitations available under the Administrative Procedure Act.

122. FERC has continued to perpetrate these deceptions, misrepresentations and misleading behaviors in violation of applicable statutory provisions and regulations, beginning with its Order approving the 1985 Agreement, and continuing with the Commission's issuance of the 1997, 1998, 2000 and 2014 Orders, *each* amending FERC licensee obligations with respect to the operation and management of the Kerr Project and causing injury to Plaintiffs in each instance. For this reason, Plaintiffs are entitled, pursuant to the doctrine of "continuing violations," to a tolling of the 5-year statute of limitations under 28 U.S.C. § 2462 and/or the 6-year statute of limitations available under the Administrative Procedure Act.

**FOURTH CLAIM FOR RELIEF:  
VIOLATION OF DOI PROCEDURAL RULES AND REGULATIONS  
(Defendant Jewell)**

123. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

124. DOI has long been the "actual" lead federal agency developing the fish, wildlife and environmental conditions that it deemed necessary to implement the Indian Reorganization Act of 1934, that FERC adopted pursuant to FPA § 4(e), *as-is*, under DOI's explicit direction, as substantial amendments to the 1985 Agreement. DOI, however, failed to disclose its important

role to Plaintiffs and other public stakeholders, and instead chose to hide behind FERC, which had publicly represented itself as the “official” federal agency of record possessing legal authority to administrate the Kerr Project license. DOI’s failure to publicly disclose that *it* and not FERC had been primarily responsible for rendering the agency final decisions that led to amendments that substantially transformed the licensing terms and conditions of the 1985 Agreement violated the following DOI procedural rules and regulations: 25 C.F.R. § 2.7 (notice of administrative decision); § 2.3 (appeals of administrative decision); § 2.10 (statements in support of appeals); § 2.15 (filing of timely appeals of administrative decision); and § 2.21 (access to the administrative decision and supporting records); 45 C.F.R. § 45.11-13 (filings); §§ 45.20-45.26, 45.30-45.35 (hearings); §§ 45.40-45.47 (pre-hearing conference). As the result of these violations, Plaintiffs have been irreparably harmed.

125. Plaintiffs only learned of DOI’s deceptions, misrepresentations and misleading behavior upon securing the representation of Counsels of Record. Were it not for DOI’s deceptions, misrepresentations and misleading behavior, Plaintiffs would have endeavored to secure from DOI information about *that* agency’s primary behind-the-scenes role in amending the 1985 Agreement. Plaintiffs also would have petitioned DOI separately or together with FERC to conduct public hearings and re-hearings to contest DOI’s decisions to impose such conditions as amendments to the 1985 Agreement. In addition, had DOI informed Plaintiffs of this agency ‘bait-and-switch’ strategy, Plaintiffs also would have appealed DOI decisions serving as the bases for the 1997, 1998, 2000 and 2014 FERC Orders at the administrative and/or judicial levels on a timely basis. For this reason, Plaintiffs are entitled to an equitable tolling of the otherwise applicable 5-year statute of limitations under 28 U.S.C. § 2462 and/or the 6-year statute of limitations available under the Administrative Procedure Act.

126. DOI has continued to perpetrate these deceptions, misrepresentations and misleading behaviors in violation of applicable statutory provisions and regulations, beginning with the execution of the 1985 Agreement, and continuing with DOI's development of fish, wildlife and environmental conditions (consistent with the Endangered Species Act) that FERC adopted as 1985 Agreement amendments in its 1997, 1998, 2000 and 2014 Orders, *each* amending FERC licensee obligations with respect to the operation and management of the Kerr Project and causing injury to Plaintiffs in each instance. Such DOI behavior continued thereafter with the agency's 2015 issuance of a variance from DOI-developed and FERC-approved Flathead Lake drought management plan, again injuring plaintiffs. For these reasons, Plaintiffs are entitled, pursuant to the doctrine of "continuing violations," to a tolling of the 5-year statute of limitations under 28 U.S.C. § 2462 and/or the 6-year statute of limitations available under the Administrative Procedure Act.

**FIFTH CLAIM FOR RELIEF:  
VIOLATION OF FIFTH AMENDMENT EQUAL PROTECTION CLAUSE  
(All Defendants)**

127. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

128. During their administration of the 1985 Agreement, DOI and FERC abrogated their legal responsibility to represent and take into account the views of all public stakeholders engaged or interested in the Kerr Project, when making amendments to the 1985 Agreement. Nevertheless, the record shows that these agencies directly and indirectly represented the views and interests of only one stakeholder, namely the CSKT, at the expense of Plaintiffs' and other similarly situated persons.

129. DOI's and FERC's conduct in this regard demonstrated and continues to demonstrate an unmistakable bias toward and preference for one select group or classification of

persons, including entities owned by them, that are known to qualify as CSKT tribal members. While DOI and FERC had encouraged and facilitated consultations, meetings and hearings with the CSKT, it did not extend itself in the same manner, if at all, to Plaintiffs and other similarly situated persons.

130. The agencies' ongoing biased behavior regarding both substantive and procedural matters in connection with the Kerr Project was and remains tantamount to engaging in and sanctioning offensive racial discrimination against entities other than the CSKT, which is designated by the U.S. government as a "federally recognized tribal entity."

131. Sections 2 and 3 of Amendment II of the 1960 Amendments to the Constitution and Bylaws of the Salish and Kootenai Tribes of the Flathead Reservation Montana, very clearly demonstrate a form of racial discrimination against persons that fail to meet some rather explicit blood-line requirements. Section 2 defines "present membership" as including only those who, having already met capital roll inclusion requirements, "*possess one-fourth (1/4) or more Salish or Kootenai blood or both*, and are born to a member of the Confederated Tribes..." (emphasis added). Similarly, Section 3 defines "future membership" as including any person who, already having applied for and established eligibility for such membership and that he is a natural child of a member of the Confederated Tribes, "show[s] that [...] (c) he possess one-quarter (1/4) degree or more blood of the Salish or Kootenai Tribes or both..."

132. The CSKT's legal counsel recently included these amendments as "Attachment A" along with the CSKT's August 2014 filing entitled, "Jurisdictional Status." The objective of that filing was to secure FERC authorization to treat the CSKT and EKI as public utilities exempt from many of the requirements of Part II of the Federal Power Act of 1920, as amended, and Public Holding Company Act of 2005. FERC had apparently overlooked the language of Attachment A when it issued its December 2014 Order granting such requested status, based

as it was on the CSKT's status as a "federally recognized tribal entity" subject to such blood line requirements. As the result of such grant of status, the CSKT need not now satisfy *inter alia* FPA § 203's requirements for securing FERC approval of its scheduled acquisition of the Kerr Project on September 5, 2015, and other important "books and records" public reporting and accountability requirements imposed by these statutes.

133. The scheduled September 5, 2015 Kerr Project conveyance is a prime example of the longstanding and deeply embedded DOI, BIA and FWS-driven federal policy of promoting tribal self-governance, self-determination and sovereignty at every opportunity, which, not infrequently, occurs at the expense of the "public interest." To achieve this result, a legal fiction was created by which agencies' express or implied preferences for tribes' cultural and religious rights, such as significant fish, wildlife and environment rights and interests, were converted into 'protected' *political* rights. This occurred via the federal government's designation of a tribe as a "federally recognized tribal entity" based on its meeting of tribal community/group organization, membership and other *political* criteria. (Ex. 66) This has long permitted the DOI, BIA, FWS, EPA and other federal agencies to adopt and implement agency policies and regulations that accord the CSKT and other "federally recognized tribal entities," on *political* grounds, maximum legal and regulatory flexibilities and derogations at the public's expense, without such otherwise racially discriminatory policies appearing legally indefensible and unjustified.

134. The DOI's development of the many fish, wildlife and environmental conditions that served to substantially amend the terms of the 1985 Agreement, which the DOI continues to believe are in compliance with otherwise facially neutral fish, wildlife and environmental laws and regulations, was and remains intended to satisfy and further the CSKT' long-term objective of securing their pre-Hellgate Treaty of 1855 *culturally and religiously* significant water and land rights. The DOI's artificial conversion of the CSKT's cultural and religious rights into

*political* rights via the agency's emphasis of the Tribes' "federally recognized tribal entity" designation, however, has occurred at the legal and economic expense of the on-reservation irrigators and off-reservation businesses that Plaintiffs and other similarly situated stakeholders have operated and continue to operate.

135. The DOI and FERC were and remain well aware that, by enabling the CSKT via these 1985 Agreement amendments to obtain full ownership and control of the Kerr Dam/Reservoir, they would permit the Tribes to control all of the water and land on and appurtenant to the reservation in furtherance of their *cultural and religious* rights - at the expense of the common law and state land and water rights of agrarian and non-agrarian businesses that mostly non-CSKT tribal members hold. In other words, DOI and FERC were and remain fully aware of the consequences of employing these policies on the Flathead Indian Reservation, considering that most of the individually owned fee-patent allotments on the reservation are farmed and ranched by non-Indians (90%) (Ex. 67), and the BIA maintains the FIP infrastructure in a state of disrepair (Ex. 68).

136. DOI's and FERC's behavior over several presidential administrations has irreparably harmed Plaintiffs and denied them the equal protection and due process to which they are entitled under the law, in violation of the 5th Amendment to the U.S. Constitution.

### **RELIEF REQUESTED**

Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants and provide the following relief:

A. Entry of a temporary restraining order and preliminary injunction:

1) Prohibiting the Federal Regulatory Commission ("FERC") from authorizing, approving and/or facilitating the conveyance of the Kerr Hydroelectric Project, Project

No. 5 to the Confederated Salish Kootenai Tribes of the Flathead Reservation (“CSKT”), and the partial transfer of the current joint FERC license held by the CSKT and NorthWestern Energy Corporation (“NorthWestern”) to the CSKT’s recently formed federally chartered wholly-owned subsidiary corporation, Energy Keepers, Inc. (“the conveyance”); and

2) Ordering FERC to hold a public hearing in Montana on the conveyance and provide all interested parties and stakeholders adequate notice of the scheduled hearing; and

3) Ordering FERC to carefully consider, review and assess any and all national security implications of the conveyance;

4) Prohibiting the U.S. Department of the Interior (“DOI”) and DOI’s Bureau of Indian Affairs (“BIA”) and Fish & Wildlife Service (“FWS”) from unduly interfering with and/or otherwise influencing or biasing FERC’s decision-making regarding the conveyance, to prevent DOI interventions from compromising the interests of the tribal and nontribal irrigators, businesses, recreationalists and residents of the Flathead Indian Reservation and surrounding area in favor of the interests of the CSKT Tribal Government, in violation of the federal rules and regulations described below and Plaintiffs’ constitutional rights to equal protection under the law.

B. Entry of a declaratory judgment that the conditions under which NorthWestern lawfully could convey the Kerr Project and transfer its license have not been met; and

C. Entry of a declaratory judgment that DOI intervention in, interference with or influence of FERC’s decision-making regarding the conveyance has violated and will violate applicable federal rules.

D. Granting to Plaintiffs costs, fees and expenses, including attorneys and other fees, etc. under the Equal Access to Justice Act (28 U.S. Code § 2412).

E. Granting to Plaintiffs such other and further relief as the interests of justice may require.

Respectfully submitted,

Dated: September 2, 2015

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*(Pro Hac Vice Pending)*  
*(District Court Application Pending)*