

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

Confederated Salish and Kootenai Tribes)	Project No. 5-098
Energy Keepers, Incorporated)	Project No. 5-004

**MOTION OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION
DISTRICTS AND THE FLATHEAD JOINT BOARD OF CONTROL OF THE
FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS
TO INTERVENE, COMMENTS ON APPLICATION FOR PARTIAL TRANSFER OF
LICENSE AND CO-LICENSEE STATUS
AND REQUEST FOR HEARING REQUIRED BY ARTICLE 40(C) OF THE KERR
HYDROELECTRIC PROJECT LICENSE**

The Flathead, Mission and Jocko Valley Irrigation Districts (“the Districts”) and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (“FJBC”) jointly and severally hereby move to intervene in this proceeding pursuant to Rule 214 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure and the Commission’s Notice issued April 28, 2015 in the above-referenced proceeding. The Districts and FJBC also comment on the April 14, 2015 application by the Confederated Salish and Kootenai Tribes (“CSKT”) and Energy Keepers, Incorporated (“EKI”) for a partial transfer of license and co-licensee status of the Kerr Hydroelectric Project, FERC Project No. 5, located on the Flathead River and Flathead Creek in Flathead Lake County, Montana. Pursuant to Article 40(c) of the Kerr Hydroelectric Project License, the Districts and FJBC hereby request the mandatory hearing set forth in that Article. In support thereof, the Districts and FJBC state:

I. BACKGROUND

On March 7, 1928, Congress authorized the Commission to issue licenses involving lands within the Flathead Reservation “upon terms satisfactory to the Secretary of the Interior . . . for the development of power, of power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects[.]”¹ On May 23, 1930, the Federal Power Commission, predecessor to the FERC, issued the original license for the Kerr Hydroelectric Project for a term of 50 years to the Rocky Mountain Power Company.² As a term of the original license, the licensee was required to make available to the United States, for and on behalf of the Districts, certain low-cost energy amounts generated by the project.³

The current license for the Kerr Hydroelectric Project was issued by the Commission on July 17, 1985.⁴ The 1985 license approved and incorporated a settlement agreement by various parties, including the Districts, the Department of Interior (“Interior”), and CSKT. The terms of the license and settlement agreement require that the license for the project transfer to CSKT thirty years after the license was issued and upon payment of CSKT of the costs of the project. In addition, the license and settlement agreement include special protections for the Districts’ right to the output of the Kerr Hydroelectric Project, including requiring that the Districts retain their low-cost hydropower rights until such time as CSKT becomes the sole licensee of the project. The 1985 license explicitly did not cover or resolve whether CSKT (and EKI) must

¹ Act of March 7, 1928, 45 Stat. 200, 212-213.

² Tenth Annual Report of the Federal Power Commission, at p. 222 (1930).

³ *Id.* at p. 224; *see e.g., Montana Power Co.*, 73 FERC ¶ 61,298, at 61,828 (1995) (“During the term of its previous license, Montana Power sold, at a low price, some of the power generated by Project No. 5 to the United States, on behalf of the Flathead Irrigation Project, a Department of the Interior irrigation and power distribution project administered by the Bureau of Indian Affairs that serves lands, most of which are held by non-Indians, within the Flathead Reservation. The Districts, which are local Montana governmental entities, represent most landowners who receive water and power from the Irrigation Project.”).

⁴ *The Montana Power Co.*, 32 FERC ¶ 61,070 (1985).

make any part of the output from the project available to the United States, for and on behalf of the Flathead Irrigation Project (“FIP”) or the Districts (including the continuation of the provision of low-cost power to the Districts), when the license is conveyed to CSKT (and EKI) and if so, the applicable terms and conditions. Instead, the 1985 license and settlement agreement include a provision requiring the Commission on request of the Tribes, Interior, or the Districts, to hold a hearing to determine those issues. Specifically, Article 40(c) of the Kerr Hydroelectric Project License states:

This joint license does not cover or resolve the questions of whether, from the time the project is conveyed by [the licensee] to the Tribes until the expiration of the joint license, (i) the Tribes must make any part of the output from the project available to the United States, for and on behalf of FIP or the Districts, or if so on what terms and conditions, or (ii) the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation. . . . Upon request of . . . the Tribes, [Interior], or the Districts . . . the Commission shall set such matters for hearing within twelve months of the date of the request

II. PARTIAL LICENSE TRANSFER APPLICATION

On April 14, 2015, the CSKT, doing business as EKI, and NorthWestern Energy filed an application for a partial transfer of the license and co-licensee status for the Kerr Hydroelectric Project, in P-5-098. The Applicants request that the Commission add EKI to the license for the Kerr Hydroelectric Project and that the effective date of the license transfer and addition of EKI as co-licensee be September 5, 2015, which is the date the license is proposed to be conveyed from NorthWestern Energy to CSKT. The partial license transfer request is predicated on the need for EKI to “begin entering into power purchase agreements, generation interconnection agreements, and coordination agreements necessary to generate and sell electricity from the Kerr Project” Application at 1.

III. STATEMENT OF INTEREST

The exact legal name of the Districts are: Flathead, Mission and Jocko Valley Irrigation Districts and the exact legal name of the FJBC is the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts. Their principal place of business is 524 N. Main Street, St. Ignatius, Montana. The FJBC is a local governmental entity under Montana law that serves as the central control agency of the Districts. *See* MONT. CODE ANN. § 85-7-1601. FJBC and the Districts are elected local governments under Montana law, which empowers irrigation districts with the authority and responsibility to represent landowners within district boundaries as to irrigation matters, including relations with the United States, and irrigation project operation. *See generally* MONT. CODE ANN. Title 85, Chapter 7, Parts 1-22.

Each of the Districts was a party to the 1985 Settlement, the provisions of which were approved and incorporated into the 1985 Kerr Hydroelectric Project License. Each of the Districts currently receive low-cost power from the Kerr Hydroelectric Project and has rights (as detailed in Article 40(c) of the Kerr Hydroelectric Project License) to have a hearing to resolve the question of their rights once the Kerr Hydroelectric Project is conveyed to CSKT (and potentially, EKI).

The persons to whom correspondence, pleadings and other papers with regard to this proceeding should be addressed and the persons whose names are to be placed on the Commission's official service list are designated as follows, in accordance with Rule 203:

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IV. MOTION TO INTERVENE

As demonstrated *supra*, the Districts and FJBC each have a direct and compelling interest in this proceeding and seek intervention herein to protect their interests as they may appear, or as they may be affected by, filings made by Applicants, third parties, or by any order issued by the Commission. The Districts' and FJBC's interests cannot be adequately represented by any other party.

V. COMMENTS AND REQUEST FOR HEARING REQUIRED BY ARTICLE 40(C) OF THE KERR HYDROELECTRIC PROJECT LICENSE

The partial license transfer request is predicated on the need for EKI to “begin entering into power purchase agreements, generation interconnection agreements, and coordination agreements necessary to generate and sell electricity from the Kerr Project” Application at 1. CSKT and EKI make no mention of any desire or requirement to make the output of the Kerr Hydroelectric Project available to United States, for and on behalf of FJBC or the Districts. As such, it cannot be assumed that the Applicants will make any of the output of the Kerr

Hydroelectric Project available to the United States for an on behalf of the Districts, nor can it be assumed that Applicants will enter into power purchase agreements which take into account the Districts' rights to the output of the project.

Accordingly, the Districts and FJBC hereby request the mandatory evidentiary hearing set out in Article 40(c) of the Kerr Hydroelectric License. As per Article 40(c), that hearing will determine whether CSKT and EKI Tribes must make any part of the output from the Kerr Hydroelectric Project available to the United States, for and on behalf of FIP or the Districts, and, if so, on what terms and conditions.

WHEREFORE, the Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts respectfully request that they each be granted intervenor status in this proceeding with all rights attendant to that status and that the Commission establish the evidentiary hearing set out in Article 40(c) of the Kerr Hydroelectric Project License.

Respectfully Submitted,

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

/s/ Kathleen L. Mazure
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Date: May 28, 2015

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Washington, DC, this 28th day of May 2015.

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