

UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

Confederated Salish and Kootenai Tribes)
Energy Keepers, Inc.)
NorthWestern Energy Corporation)

Project No. P-5-098

PETITION FOR REHEARING
MONTANA LAND AND WATER ALLIANCE
September 30, 2015

1. Pursuant to section 313(a) of the Federal Power Act (FPA), 16.U.S.C. § 825l (2012), and the Federal Energy Regulatory Commission’s (Commission) regulations at 18 C.F.R. § 385.713 (2015), the Montana Land and Water Alliance (Alliance) respectfully submits this Petition for Rehearing in the matter of the Commission Order 152 FERC ¶ 62,140 (Order) issued September 1, 2015.
2. The Order grants the partial license transfer of the Kerr Project to a subsidiary of the Confederated Salish and Kootenai Tribes (CSKT), Energy Keepers, Inc. (EKI). The Order also granted the motions to intervene of the Montana Public Service Commission, the Flathead Joint Board of Control, and Senators Verdell Jackson and Bob Keenan. The Commission omitted the Alliance as having also been granted intervenor status.¹
3. The Alliance suggests that due diligence requires FERC to provide substantive, responsive answers to the questions raised in the Alliance’s and other motions for intervention, or to provide a forum in which to do so. We assert that the Commission’s Order of September 1, 2015 failed to address the substantive concerns of the Alliance and other intervening parties and has failed to provide a forum for public participation.

¹ We are unsure if the Commission’s Order of September 1, 2015 was just an oversight of the Alliance, as Footnote 7 of the Commission’s order confirmed that “since no answers were filed in opposition to the timely motions to intervene, the movants became parties at the end of the 15 day period. 18 C.F.R. § 385.215 (2015).”

Background

4. The Commission issued a public notice of the application for the Kerr Dam partial license transfer and co-licensee status on April 28, 2015 and requested comments, motions to intervene, and protests. The Alliance timely submitted its Motion to Intervene, along with other parties, by May 28, 2015. The CSKT filed an answer to the motions to intervene and protests, requesting that FERC dismiss the motions, to which the Alliance and each of the other parties responded. Late in the proceedings, the Bureau of Indian Affairs (BIA)² submitted a letter requesting that the Commission grant the partial license transfer, to which the Alliance responded.
5. The Montana Land and Water Alliance intervened in the proceedings because of its broad representation of a number of interests who will be and have already been affected by electric rate increases from the Kerr facility; water delivery for irrigation and ranching needs; recreational interests affected by river and lake level operations; and business interests. Moreover, the Alliance's constituents will be forced to pay higher property taxes as a result of the CSKT/EKI and NorthWestern failing to consider local economic needs that have always been supported by Kerr Dam since its construction.

Montana Land and Water Alliance Concerns

6. The essence of the Alliance's concerns about the partial license transfer is that unlike every other licensee in the United States, the CSKT and EKI have already and will continue to evade public scrutiny³, Commission review, and Congressional review, all of which are required under FERC regulations and under the terms and conditions of the Indian Reorganization Act of 1934.⁴ To wit:

² The Commission's September 1, 2015 Order improperly cited the BIA as "the Tribes". The BIA is a federal trustee for the Tribes.

³ It matters not that the CSKT/EKI "say" that they are "committed" to meeting the conditions of the previous licensee: there is no written proof of this assertion. The Tribe has already raised regional electrical rates, approved by the BIA without public scrutiny; and the available material from the CSKT/EKI does not convey any certainty whatsoever. FERC should be mindful of the record of the CSKT in saying one thing and doing another, for example, with their recent water rights compact.

⁴ Wheeler-Howard Act - 48 Stat. 984 - 25 U.S.C. § 461 et seq. Section 17 of the Indian Reorganization Act allowed Tribes to organize government corporations under the auspices of the United States, confirming the domestic dependent status of the Tribes. Importantly, the Act did not apply to lands (and presumably waters) inside existing irrigation projects that had been constructed prior to 1934. The Kerr project was constructed to meet the irrigation and power needs of a federal irrigation project, the Flathead Project. The Tribes are not "independent" sovereigns as are the states; they are wholly reliant on the United States.

- a. While the Commission is authorized to grant licenses to “federally chartered corporations,”⁵ it cannot ignore the requirements of other federal statutes that require, for Indian Tribes, a higher level of scrutiny including congressional oversight. Congress has not been apprised of the Commission’s action.
- b. The CSKT/EKI and its corporations, organized under the auspices of the United States, have a ‘federal status’ that require it to meet certain federal obligations as would any other federal entity regarding its use or reservation of natural resources, including hydropower facilities.⁶ This is especially true if the facility of interest was not built for the Tribes solely because of their status as Tribes.⁷
 - i. Alternatively, we note that NorthWestern Corporation is still listed as a co-licensee, and the Commission’s Order acknowledges that the Tribes and NorthWestern, as co-licensees, are “jointly and severally liable for compliance with all license obligations.”⁸ We believe that NorthWestern Corporation is still responsible for payments to Lake County and state taxes on its income. In other words, the Kerr facility cannot be licensed just to serve the needs of a Tribe when an entire region relies on its power.
- c. The Alliance believes that the Commission did not have enough time, or did not do the research, to fully investigate the concerns of the interveners including the Alliance. From the time of the first submission May 28 to the issuance of the Commission order on September 1, no communication was received from the Commission and only after the Commission made its decision and issued the notice were interventions formally granted. The Commission’s own letter demonstrates the utter lack of attention to the Montana public’s concerns through its reliance on cases that are not relevant to this discussion and its referral back to is 1985 ruling.

7. The Commission’s standard response to any concerns raised by the public is to cite “decisions already made” through the 1985 Kerr Licensing proceeding, and that FERC

⁵ FN 18, Order, See 16 U.S.C. § 797(e) (2012) (Commission may issue license to “any corporation organized under the laws of the United States or any State thereof”).

⁶ Payment in lieu of taxes is one requirement of federal agencies operating hydropower facilities. It is unacceptable for the Commission to say “that’s not our concern” while simultaneously denying interveners a venue in which to raise and resolve these issues. “Payments in Lieu of Taxes” (PILT) are Federal payments to local governments that help offset losses in property taxes due to non-taxable Federal lands within their boundaries. The key law is Public Law 94-565, dated October 20, 1976. This law was rewritten and amended by Public Law 97-258 on September 13, 1982 and codified as [Chapter 69, Title 31 of the United States Code](#). The law recognizes the inability of local governments to collect property taxes on Federally-owned land can create a financial impact. A public hearing with the relevant federal agencies would enable these issues to be identified and properly addressed.

⁷ When non-federal funding is an integral part of any project that tribes want to assume ownership and management, P.L. 93-638 prohibits a Tribe from owning or operating such a project without congressional oversight to safeguard non-Tribal members served by the project.

⁸ FN 16, Order. See, e.g., New York Irrigation District, 46 FERC ¶ 61,379 at 62,183 (2003)

has already decided that the transfer is in the public interest. *But it is not the Commission's right to decide for a state agency what is in the public interest.*⁹

8. Contrary to the Commission's assertion, the CSKT has never been certified as being able to meet all the conditions of the previous licensee. The Commission's assertion in 1985 that "*applicant [Montana Power Company and the Tribes] has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effectuate the purposes of a license for the project*" was incomplete.¹⁰ Given the status of the Tribes as not being subject to state taxes, regulation or oversight, this is a *clear error* on the part of the Commission now, some thirty years after that uninformed decision was made.¹¹

MLWA Petition for Rehearing

9. Based on the aforementioned discussion, and incorporating all Alliance documents previously submitted to the Commission, the Alliance respectfully requests the Commission rehear the decision granting the partial license transfer of the Kerr Project to the CSKT/EKI.
10. While we have not objected in principle to the partial transfer of the license, the Alliance believes that a number of outstanding questions remain that can only be resolved by bringing together the relevant parties, including federal agencies and Congress, to ensure the successful operation of the Kerr facility for all concerned. This appears to the Alliance to require, at a minimum, consultation with Congress, a public hearing, and consultation with relevant federal agencies to address the gap in state oversight and regulation that has developed as a result of this unfinished license transfer.
11. Finally, we would like the Commission to correct the September 1, 2015 letter to indicate that the Alliance has been granted status as an intervener.

Respectfully Submitted,

/s/ Catherine Vandemoer

Catherine Vandemoer, Ph.D.
Chair, Montana Land and Water Alliance, Inc.

September 30, 2015

⁹ <http://www.ferc.gov/resources/guides/hydro-guide.pdf>

¹⁰ FN 21, Order. 32 FERC ¶ 61,070 at 61,178 (1985). The CSKT at that time were considered a co-licensee *only* for the implementation of two (2) articles of the license, not for the operation of the project by itself.

¹¹ It was uninformed because at that time the Commission did not contemplate or understand the implications of a Tribe not subject to any state regulation within the context of the Commission's obligations to the states.

CERTIFICATE OF SERVICE

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

Dated at Polson, Montana, this 30th day of September, 2015.

/s/ Catherine Vandemoer

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