

152 FERC ¶ 61,207  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Confederated Salish and Kootenai Tribes  
Energy Keepers, Incorporated

Project No. 5-100

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued September 17, 2015)

1. On May 28, 2015, the Flathead, Mission, and Jocko Valley Irrigation Districts (the Districts) and the Districts' Flathead Joint Board of Control (Flathead Board) filed a request for a hearing regarding whether the Confederated Salish and Kootenai Tribes (Tribes), as licensees for the Kerr Hydroelectric Project No. 5, located on the Flathead River in Flathead and Lake Counties, Montana, must make any part of the output from the project available to the United States, for and on behalf of the Flathead Board or the Districts, and, if so, on what terms and conditions. In this order, we establish hearing and settlement judge procedures to resolve these issues.

**I. Background**

2. The current 50-year license for the Kerr Hydroelectric Project was issued by the Commission, on July 17, 1985,<sup>1</sup> to The Montana Power Company (Montana Power) and the Tribes, as co-licensees. The 1985 license order, which approved a settlement agreement by various parties, including the Districts, the Department of the Interior (Interior), and the Tribes, provided that Montana Power would own and operate the project for the first 30 years of the license term, after which the Tribes, upon payment to the company of a specified sum, become the owner and sole licensee of the project.<sup>2</sup>

3. During the prior license term, Montana Power had sold low-cost power from the project to the United States on behalf of the Flathead Irrigation Project, an Interior irrigation and power distribution project administered by the Bureau of Indian Affairs

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<sup>1</sup> *The Montana Power Company*, 32 FERC ¶ 61,070 (1985).

<sup>2</sup> *See id.* at 61,177.

that serves lands, most of which are held by non-Indians, within the Flathead Reservation. The Districts, which are local Montana governmental entities, represent landowners who receive water and power from the Irrigation Project.<sup>3</sup> The 1985 license provided that, while Montana Power owned the project, it would continue the power sales to the United States, but left open the question whether the Tribes should be required to do so when they took over the project.<sup>4</sup> Article 40(c) of the license, states, in pertinent part that

This joint license does not cover or resolve the questions of whether, from the time the project is conveyed by [Montana Power] to the Tribes until the expiration of the joint license . . . the Tribes must make any part of the output from the project available to the United States, for and on behalf of [the Flathead Irrigation Project], or if so on what terms or conditions . . . Upon request of . . . the Tribes, the Secretary [of the Interior], or the Districts, made any time after the fifteenth anniversary of the Effective Date [of the license] . . . , the Commission shall set such matters for hearing . . . .<sup>[5]</sup>

4. On April 15, 2015, the Tribes, Energy Keepers, Incorporated (Energy Keepers) and NorthWestern Corporation, the successor to Montana Power, filed an application seeking authorization to partially transfer the Kerr Project to Energy Keepers, as a co-licensee, effective September 5, 2015, the date on which the license was proposed to be conveyed from NorthWestern Energy to the Tribes. The purpose of the transfer was to allow Energy Keepers, a corporation wholly owned by the Tribes, to “begin entering into power purchase agreements, generation interconnection agreements, and coordination agreements necessary to generate and sell electricity from the Kerr Project . . . .”<sup>6</sup>

5. The Commission issued a public notice of the application on April 28, 2015, establishing May 28, 2015, as the deadline for filing comments, motions to intervene, and protests. On May 28, 2015, the Districts and the Flathead Board intervened and, among other things, requested a hearing pursuant to Article 40(c).

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<sup>3</sup> See *Montana Power Company*, 73 FERC ¶ 61,298, at 61,828 (1995).

<sup>4</sup> See 32 FERC ¶ 61,070 at 61,177.

<sup>5</sup> *Id.* at 61,185.

<sup>6</sup> April 15, 2015 application at 1.

6. On June 9, 2015, the Tribes and Energy Keepers filed a response arguing that the motion for hearing does not raise any issues germane to the transfer proceeding. They stated that the proceeding is not the appropriate forum to request an Article 40(c) hearing, and that a motion to intervene cannot unilaterally change the nature of an on-going proceeding.

7. On June 24, 2015, the Districts and Flathead Board filed a response, arguing that the motion for hearing was proper.<sup>7</sup>

8. By order issued September 1, 2015, the Deputy Director, Division of Hydropower Administration and Compliance, authorized the partial transfer, noting, in passing, that the request for an Article 40(c) hearing would be addressed in a separate order.

## **II. Discussion**

9. We agree with the Tribes that the transfer proceeding and the Article 40(c) proceeding should be distinct. Indeed, this question is moot, given that the transfer has been approved. Nonetheless, we see nothing improper in making the request for the hearing in a pleading in the transfer proceeding, particularly given that the Districts and the Flathead Board did not suggest that the Article 40(c) hearing in any way delay the transfer. Article 40(c) permits the Districts to request a hearing any time after the fifteenth anniversary of the effective date of the license: that anniversary occurred in July 2000. The 1985 license gives the Districts the right to request a hearing, and we are obligated by the terms of the license to grant that request.

10. The Tribes and Energy Keepers argue that a section 40(c) proceeding is likely unnecessary. They assert that they have no immediate plans to unilaterally change the amount or terms of the delivery of the low-cost block of power to the Districts after the Conveyance. Furthermore, the Tribes and Energy Keepers state that under the terms of a recently-negotiated water compact (“Water Compact”) ratified by the state of Montana, the irrigators will continue to receive the irrigation portion of the low-cost block of power described in Article 40(a) from the Tribes in the same manner that NorthWestern has been providing this power.<sup>8</sup> However, there is no guarantee that this will occur, and we cannot deny the Districts the hearing to which they are entitled.

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<sup>7</sup> Section 385.213(a)(2) of our Rules of Practice and Procedure provides that an answer generally may not be made to an answer. Accordingly, we reject the June 24, 2015 response. We note that the Districts and the Flathead Board characterize the Tribes’ June 9, 2015 filing as a motion to deny the motion for hearing. However, the June 9, 2015 pleading is clearly an answer in both title and substance, and we will treat it as such.

<sup>8</sup> See June 9, 2015 answer at 11-12.

11. While we are setting this matter for trial-type evidentiary hearing procedures, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in doing so, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>9</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>10</sup> The settlement judge shall report to the Chief Judge and the Commission within ninety (90) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge may provide the parties with additional time to continue their settlement discussions. If the parties cannot settle this matter, the case will proceed to hearing.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act, and by the Federal Power Act, and pursuant to the Commission's Rules of Practice and Procedure, and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning whether the Tribes shall make any part of the output of the project available to the United States, for and on behalf of the Flathead Irrigation Project or the Flathead, Mission and Jocko Valley Irrigation Districts, and, if so, under what terms and conditions. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

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<sup>9</sup> 18 C.F.R. § 385.603 (2015).

<sup>10</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five (5) days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

(C) Within ninety (90) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and with the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report every thirty (30) days thereafter until the settlement discussions conclude.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.