162 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Confederated Salish and Kootenai Tribes Project No. 5-103
Energy Keepers, Incorporated

OPINION NO. 559

ORDER ON INITIAL DECISION

(Issued February 15, 2018)

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1. This proceeding is before the Commission on exceptions to the Initial Decision issued on December 29, 2016,[1] by the Presiding Administrative Law Judge (Presiding Judge). At issue is whether the Confederated Salish and Kootenai Tribes (Tribes) and Energy Keepers, Incorporated (Energy Keepers), co-licensees for the Séliš Ksanka QÍispé Project No. 5 (SKQ Project),[2] located on the Flathead River in Montana, are required to make any part of the project's output available to the United States for, and on behalf of, the Flathead, Mission, and Jocko Valley Irrigation Districts (Districts) and the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts (FJBC) (Issue I), and if so, on what terms and conditions (Issue II). The Initial Decision concludes that Tribes/Energy Keepers are not required to make any part of the SKQ Project output available to the United States for, and on behalf of, Districts/FJBC; accordingly, the Initial Decision does not reach the issue of what terms and conditions are required.

2. In this order, the Commission affirms in part, and reverses in part, the Initial Decision, as discussed below. We conclude that Tribes/Energy Keepers have no obligation to make any part of the SKQ Project's output available to the United States.

I. Background and Procedural History

A. Background

3. The Tribes are a federally-recognized Indian tribal government formed under section 16 of the Indian Reorganization Act of 1934.[3] The 1855 Treaty of Hellgate, which first codified the Tribes' sovereign status and government-to-government relationship with the United States, reserved to the Tribes approximately 1,245,000 acres located in what is now western Montana, known as the Flathead Indian Reservation (Reservation), for the Tribes' "exclusive use and benefit."[4]

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[1] *Confederated Salish and Kootenai Tribes and Energy Keepers, Inc.*, 157 FERC ¶ 63,030 (2016) (Initial Decision).

[2] The name of the project was changed from the Kerr Hydroelectric Project to the Séliš Ksanka QÍispé Project on November 9, 2015. *Confederated Salish and Kootenai Tribes and Energy Keepers, Inc.*, 153 FERC ¶ 62,092 (2015). This order refers to the "Kerr Project" when discussing the history of the project, and the "SKQ Project" when referring to the project post-2015.

[3] 25 U.S.C.A. § 5123 (West 2012) (formerly 25 U.S.C. 476).

[4] Treaty of Hellgate, July 16, 1855, 12 Stat. 975.

4. The Flathead Allotment Act of 1904 (1904 Act)[5] assigned parcels of Reservation land to individual tribal members and opened unassigned parcels for non-Indian settlement. The 1904 Act directed that a portion of the proceeds from the sale of Reservation lands would fund "irrigation ditches" and "other necessary articles" to promote Indian agriculture on the Reservation.[6] In 1908, Congress amended the 1904 Act (1908 Act),[7] authorizing the Secretary of the U.S. Department of the Interior (Interior) to sell additional Reservation land, and to use a portion of the proceeds from the sales to construct "irrigation systems" to serve all irrigable Reservation lands.[8] The 1908 Act required non-Indian landowners served by the irrigation systems to repay the funds appropriated for construction of the systems, in addition to paying annual charges for operation and maintenance.[9] These irrigation systems eventually became the Flathead Indian Irrigation Project (FIIP), which is owned and operated by Interior's Bureau of Indian Affairs (BIA) and irrigates approximately 128,000 acres of Reservation land.[10]

5. In 1909 Congress again amended the 1904 Act,[11] authorizing the Secretary of the Interior to reserve lands within the Reservation for potential power or reservoir sites.[12] To provide power to the irrigation systems, Interior reserved a site (now the SKQ Project) and began constructing a small hydroelectric facility and irrigation tunnel on the site

[5] Act of April 23, 1904, Pub. L. No. 58-159, 33 Stat. 302.

[6] *Id.* § 14, 33 Stat. at 305.

[7] Act of May 29, 1908, Pub. L. No. 60-156, 35 Stat. 444.

[8] 35 Stat. 450 (amending §§ 9, 14 of 1904 Act).

[9] *Id.*

[10] Initial Decision, 157 FERC ¶ 63,030 at P 5 (citing Ex. CSK-19 at 10).

[11] Act of March 3, 1909, 35 Stat. 781.

[12] *Id.* at 796.

(Newell Tunnel Project); by 1911, the project was abandoned.[13] In 1920, Rocky Mountain Power Company (Rocky Mountain), a subsidiary of Montana Power Company (Montana Power), first filed an application for a preliminary permit with the Federal Power Commission (FPC) to study development of the site.[14]

6. In 1926, Congress appropriated additional funds for the construction, maintenance, and operation of the irrigation systems on the Reservation, but conditioned the receipt of these funds on the formation of districts that would be required to execute repayment contracts with the United States (1926 Act).[15] In response to the 1926 Act, the Districts were formed under Montana law and executed the specified repayment contracts.[16]

7. In 1928, Congress authorized the 1926 Act's unexpended balance of the $395,000 available for construction of the power plant to be used, in the discretion of the Secretary of the Interior, for the construction and operation of a power distributing system and for purchase of power for the distributing system, subject to execution of appropriate repayment contracts (1928 Act).[17] The 1928 Act provided that the net revenues derived from the operation of the distributing system must be used to reimburse the United States.[18] It also authorized the FPC, upon terms satisfactory to the Secretary of the Interior and in accordance with the Federal Water Power Act, to issue licenses "for the

[13] *See* Ex. CSK-1 (13:6-11) (Prepared Direct Testimony of Brian Lipscomb); Ex. CSK-29 (Notices of Appropriation of water rights).

[14] Initial Decision, 157 FERC ¶ 63,030 at P 7; *see also* Ex. FJB-9 at 4. The application was amended in 1921, but Rocky Mountain "did not press its application during 1921 and the years immediately following by reason of financial depression. . . ." *Id.*

[15] Act of May 10, 1926, Pub. L. No. 69-206, ch. 277, 44 Stat. 453, 464-66 (1926 Act).

[16] Initial Decision, 157 FERC ¶ 63,030 at P 6 (citing Ex. FJB-4).

[17] Act of March 7, 1928, Pub. L. No. 70-137, ch. 137, 45 Stat. 200, 212-13 (1928 Act).

[18] *Id.* at 212.

development of power, of power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects. . . ."[19]

8. After several years of inactivity with respect to project development, Rocky Mountain submitted a memorandum to the Commission of Indian Affairs, proposing to pay an annual rental fee for use of Reservation lands, in addition to providing power for FIIP and payment to the United States for the Newell Tunnel site.[20] In 1930, the FPC issued Rocky Mountain a license to develop the project, with terms approved by the Secretary of the Interior, including a condition requiring Rocky Mountain to make low-cost power from the project available to FIIP at specified rates, consistent with a revised proposal submitted by Rocky Mountain in 1928.[21] Specifically, Article 26 of the license stated, in part:

> On June 1, 1939, or on such earlier date as the project works may be placed in commercial operation, and thereafter throughout the remainder of the term of the license, Licensee shall make available, at the project boundary at or near the Licensee's generating station, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of one mill per kilowatt hour: (1) electrical energy in an amount not exceeding 5,000 horsepower of demand to be used exclusively for pumping water for irrigation; and (2) electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale.[22]

Montana Power acquired the project in 1938, and the project began commercial operation in 1939.[23]

9. In 1948, in response to the continued failure of non-Indian landowners to repay FIIP construction debt via the repayment contracts, Congress authorized adjustments of

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[19] *Id.* at 212-13. The Federal Power Act was originally named the Federal Water Power Act. 16 U.S.C. §§ 791a – 825r (2012).

[20] Ex. FJB-9 at 5.

[21] Initial Decision, 157 FERC ¶ 63,030 at P 9 (citing Ex. CSK-6 at 2-3) ("This is the origin of the "low-cost power" at issue here."). *See also The Montana Power Co.*, 32 FERC ¶ 61,070, at 61,175 (1985) (1985 License).

[22] Ex. CSK-6 at 2 (excerpt of May 23, 1930 original license).

[23] *See* 1985 License, 32 FERC at 61,175-76.

FIIP's repayment obligations (1948 Act).[24] In particular, the 1948 Act authorized Interior to use "net revenues"[25] from the FIIP "power division" to repay FIIP irrigation and power distribution system construction debt over a fifty year term beginning January 1, 1950.[26] The power division exclusively provided retail electric distribution service to the Reservation, while the irrigation division pumped and conveyed water to Reservation landowners.[27] At that time, BIA operated, managed, and maintained both the "power division" and "irrigation division" of FIIP.[28] The 1948 Act required the irrigation districts to execute amended repayment contracts with the United States and additionally allowed for cost recovery from all electric ratepayers on the Reservation, including ratepayers that were not members of the Districts.[29]

B. 1985 Relicensing

10. Montana Power filed an application for a new license for the Kerr Project in 1976.[30] Shortly thereafter, the Tribes filed a competing license application for the project.[31] The original license for the project expired in 1980, and pending the issuance

[24] Act of May 25, 1948, Pub L. No. 80-554, ch. 340, 62 Stat. 269 (1948 Act).

[25] The 1948 Act directs that "net revenues . . . shall be determined by deducting from the gross revenues the expenses of operating and maintaining the power system, and the funds necessary to provide for the creation and maintenance of appropriate reserves . . ." *Id.* § 2(b), 62 Stat 269.

[26] *Id.* § 2, 62 Stat. 269-70.

[27] *See* Initial Decision, 157 FERC ¶ 63,030 at P 12; *see also* Ex. CSK-19 at 10 (Prepared Direct Testimony of Jean Matt). Since 1986, Mission Valley Power (MVP) has been the sole retail electric distribution utility serving the Reservation. *Id.* at 2-3. MVP is owned by Interior and operated by the Tribes pursuant to a contract with BIA, and its rates are set by its Board of Directors. Initial Decision, 157 FERC ¶ 63,030 at P 10; *see also* Ex. CSK-19 at 2-4.

[28] *Id.*

[29] 1948 Act at § 2, 62 Stat. 269-71.

[30] 1985 License, 32 FERC at 61,176.

[31] *Id.*

of a new license, the Commission issued an annual license to Montana Power for each year during the relicensing proceeding.[32]

11. On July 17, 1985, the Commission issued a 50-year license for the project to Montana Power and the Tribes as co-licensees.[33] The license order approved a settlement agreement between several parties, including the Districts, Interior, and the Tribes.[34] The settlement agreement provided that Montana Power would own and operate the project for the first thirty years of the license term, after which the Tribes, upon payment to Montana Power, would become the sole owner and licensee of the project.[35]

12. Consistent with the settlement agreement, the license order dictated that while Montana Power owned the project, it would continue to provide low-cost power from the project to the United States, for the benefit of FIIP, in roughly the same quantity and cost that Montana Power had been providing pursuant to its previous license.[36] But the license expressly deferred the question of whether the Tribes would be subject to the same requirement.[37] Article 40(c) provided that resolution of the low-cost power issue would be resolved by way of agreement between the parties, with approval by the Commission, or by the Commission after hearing, subject to the authority of the Secretary of the Interior, "[u]pon request of (i) the Tribes, the Secretary [of the Interior], or the Districts, made any time after the fifteenth anniversary of the [e]ffective [d]ate [of the license]. . . ."

C. Recent History and Current Proceeding

13. On July 7, 1999, the Commission approved a transfer of the Kerr Project license from Montana Power and the Tribes to PP&L, Montana, LLC (PPL Montana) and the

[32] *Id.* at 61,176 and n.5.

[33] *Id.* at ordering para. (A).

[34] *Id.* at 61,177.

[35] *Id.*

[36] *Id.* at Art. 40(c).

[37] *Id.*

Tribes.[38] PPL Montana transferred its share of the license to NorthWestern Corporation (NorthWestern) on July 24, 2014.[39]

14. On April 14, 2015, Tribes, Energy Keepers,[40] and NorthWestern filed an application to partially transfer the license to add 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 Commission issued public notice of the application on April 28, 2015. On May 28, 2015, Districts/FJBC filed a motion to intervene in the proceeding and requested a hearing pursuant to Article 40(c) of the project license. The Commission granted the partial transfer on September 1, 2015.[41] Shortly after the transfer, Tribes and Energy Keepers changed the name of the project from the Kerr Project to the SKQ Project.[42]

15. On September 17, 2015, the Commission granted Districts/FJBC's request for a 40(c) hearing, subject to settlement procedures, to determine whether the Tribes should be required to make any part of the output of the SKQ Project available to the United States, for and on behalf of the FIIP, and if so, under what terms and conditions.[43] After the parties were unable to reach an agreement, the Acting Chief Administrative Law

[38] *Montana Power Company*, 88 FERC ¶ 62,010, at 64,025 (1999) (partial transfer requested in connection with PPL Montana's agreement to purchase Montana Power's hydro power assets).

[39] *PPL Montana, LLC*, 148 FERC ¶ 62,072 (2014).

[40] Energy Keepers is a corporation formed under section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477 (2012), wholly-owned by the Tribes, and created for the purpose of operating, maintaining, and administering the project on the Tribes' behalf.

[41] *Confederated Salish and Kootenai Tribes*, 152 FERC ¶ 62,140 (2015). The order noted that the request for an Article 40(c) hearing would be addressed in a separate order.

[42] *Confederated Salish and Kootenai Tribes of the Flathead Reservation and Energy Keepers, Inc.*, 153 FERC ¶ 62,092.

[43] *Confederated Salish and Kootenai Tribes, et al.*, 152 FERC ¶ 61,207, at ordering para. (A) (2015).

Judge terminated the settlement procedures and designated Administrative Law Judge H. Peter Young to preside over the hearing.[44]

16. The hearing was conducted on June 7 and 8, 2016, and the evidentiary record closed on June 29, 2016. Post-hearing initial briefs were filed on July 8, 2016; post-hearing reply briefs were filed on August 5, 2016. On August 12, 2016, Tribes/Energy Keepers filed a motion to strike portions of Districts/FJBC's reply brief, asserting that the brief impermissibly raised a new legal position—that the 1948 Act is ambiguous—thus depriving Tribes/Energy Keepers of the opportunity to address the argument. Tribes/Energy Keepers also alleged that Districts/FJBC improperly supplemented the evidentiary record developed at hearing by appending an April 7, 1948 report prepared by the Committee on Public Lands in the House of Representatives (Committee Report) (Appendix A of the brief) and Court Minutes and Order on Stay from the Montana Water Court (Montana Water Court Order) (Appendix B of the brief) that Districts/FJBC did not previously cite or offer as evidence. On August 31, 2016, the Presiding Judge granted the motion in its entirety, striking Appendices A and B and the argument that the 1948 Act is ambiguous from Districts/FJBC's brief.[45]

17. The Initial Decision was issued on December 29, 2016.[46] The Initial Decision concludes that "there is no legal obligation for Tribes/Energy Keepers to make any part of the Project output available to the United States, for and on behalf of FIIP, or Districts/FJBC."[47] In light of this conclusion, the Initial Decision finds the second issue—under what terms and conditions the output be provided to the United States—to be moot.

18. Districts/FJBC filed a Brief on Exceptions on January 30, 2017. On February 21, 2017, Commission trial staff (Trial Staff) filed a Brief Opposing Exceptions; and Tribes, Energy Keepers, and Interior filed a Joint Brief Opposing Exceptions.

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[44] February 8, 2016 Order of Chief Judge Terminating Settlement Procedures, Designating Presiding Administrative Law Judge and Establishing Track II Procedural Time Standards.

[45] *Confederated Salish and Kootenai Tribes and Energy Keepers, Inc.*, 156 FERC ¶ 63,036 (2016).

[46] Initial Decision, 157 FERC ¶ 63,030.

[47] *Id.* P 126.

II. Districts/FJBC Motion to Strike

19. On April 4, 2017, Districts/FJBC filed a motion to strike portions of Trial Staff's Brief Opposing Exceptions. In particular, Districts/FJBC seek to eliminate the roughly three pages of Trial Staff's brief discussing its disagreement with the Initial Decision that *City of Seattle, Washington*,[48] which discusses the Commission's policy against including in licenses requirements regarding the allocation of project power, is not applicable to the burden of proof issue in this proceeding. Citing Rule 711(d) of the Commission's Rules and Regulations,[49] Districts/FJBC argue that Trial Staff's failure to take exceptions to the Initial Decision resulted in waiver of any objection to the Initial Decision and therefore, Trial Staff is barred from making any further arguments that *City of Seattle* is controlling. Districts/FJBC assert that they agreed with the Initial Decision's rejection of *City of Seattle*.

Trial Staff Answer in Opposition

20. On April 19, 2017, Trial Staff filed an answer opposing Districts/FJBC's motion to strike. Trial Staff argues that although it did not file a brief on exceptions, Commission regulations still entitle Trial Staff to respond to the arguments made by Districts/FJBC in their Brief on Exceptions, and points out that Commission policy disfavors motions to strike. Trial Staff asserts that it was not aggrieved by the Initial Decision and had no reason to file a brief on exceptions.

Commission Determination

21. Rule 711(a) of the Commission's rules and regulations provides that "any participant may file a brief opposing exceptions in response to a brief on exceptions."[50] Rule 711(d) dictates that "[i]f a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived."[51]

22. While Trial Staff's Brief Opposing Exceptions disagrees with the Initial Decision's findings regarding the significance of *City of Seattle* and argues that the case should be controlling in this proceeding, we find that the brief properly responds to

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[48] 143 FERC ¶ 61,247, at P 15 (2013) *(City of Seattle)*.

[49] 18 C.F.R. § 385.711(d) (2017).

[50] *Id.* § 385.711(a)(ii).

[51] *Id.* § 385.711(d).

statements made by Districts/FJBC in their Brief on Exceptions. Districts/FJBC's brief states that the "policy [explained in *City of Seattle*] was developed to address a different circumstance and was created 25 years after the 1985 relicensing and settlement."[52] Thus, according to Districts/FJBC, "none of the parties to the 1985 settlement could have intended for *City of Seattle* to apply to this proceeding" and "the Commission should apply the burdens that were applicable to the participants in the 1985 relicensing proceeding."[53] Districts/FJBC refer to *City of Seattle* as part of their broader argument that the Initial Decision should have placed the burden of proof on Tribes/Energy Keepers.

23. Trial Staff does not request that the Commission make any changes to the Initial Decision's findings regarding the burden of proof. Rather, it responds directly to Districts/FJBC's statements on *City of Seattle* and arguments regarding the burden of proof. Trial Staff is entitled to such a response. Given the foregoing reason and the Commission's general policy disfavoring motions to strike,[54] we deny Districts/FJBC's motion.

III. Discussion

24. Districts/FJBC argue that it was error and not the product of reasoned decision-making for the Presiding Judge/Initial Decision to: (1) strike from the record portions of Districts/FJBC's reply brief; (2) find that Districts/FJBC carry a burden of persuasion in this proceeding; (3) adjudicate contested water rights; (4) require Districts/FJBC to establish in this proceeding that they have water rights being used by the SKQ Project; (5) find that Districts/FJBC have a heightened burden to establish with clear Congressional intent that Tribes/Energy Keepers must provide low-cost power; (6) find that Tribes/Energy Keepers have no legal obligation to provide any part of the SKQ Project output to the United States, for and on behalf of FIIP or the Districts; (7) fail to address under what terms and conditions Tribes/Energy Keepers must provide low-cost power (Issue II); (8) fail to conclude that Tribes/Energy Keepers must continue to provide (i) up to 7.466 megawatts (MW) of capacity at up to 100 percent load factor during all months of the year, and (ii) additional capacity of up to 3.734 MW at up to 100 percent load factor during the months of April through October; (9) fail to conclude that

[52] Districts/FJBC Brief on Exceptions at 19.

[53] *Id.*

[54] *See, e.g., Boston Edison Co.*, 61 FERC ¶ 61,026, at 61,147 n. 114 (1992) (explaining that "motions to strike are not favored, and allegedly objectionable material will not be struck unless the matters sought to be omitted have no possible relationship to the controversy, may confuse the issue, or otherwise prejudice a party") (citing *Power Mining Inc.*, 45 FERC ¶ 61,311, at 61,972 (1988)).

the rate for power that benefits the FIIP and Districts/FJBC should continue to be equal to the cost of producing that power, and the cost of producing that power is (i) $11.80 per megawatt hour (MWh), assuming the annual rental payment is properly updated to reflect its current economic value, or (ii) $19.53 per MWh, assuming the annual rental payment is not updated; (10) fail to conclude that the point of delivery for the low-cost power should remain the Kerr Bus, and the United States should continue to have no obligation to pay for any transmission costs associated with the provision of low-cost power from the Kerr Project; and (11) fail to conclude that transparency provisions are needed to permit confirmation of whether Tribes/Energy Keepers have complied with their low-cost power obligations.

A. Presiding Judge's Decision to Strike from the Record Portions of FJBC/District's Reply Brief

Order on Motion to Strike

25. On August 31, 2016, the Presiding Judge granted Tribes/Energy Keepers' August 12, 2016 motion,[55] striking the following language from Districts/FJBC's reply brief:

> Moreover, the legislative history of the Act of 1948 conclusively proves that the "special basis" energy is a direct reference to the low-cost power from the Kerr Project. As explained in an April 7, 1948 report prepared by the Committee on Public Lands in the House of Representatives that formed the basis of the Act of 1948, Section 2(g) was intended by Congress to "[y]ield a reasonable return on the value of the [FIIP's] interest or equity in the power development *at Kerr Dam*."[] This report proves that Congress intended the reference to "special basis" energy to directly refer to the low-cost power provided from the Kerr Project. CSKT/EKI and Commission Trial Staff's arguments that the Act of 1948 does not reference the Kerr Project should be rejected.[56]

The Presiding Judge found that the discussion of the ambiguity of the 1948 Act for the first time in Districts/FJBC's reply brief deprived opposing participants an opportunity to respond, thus violating due process. The Presiding Judge also struck from the record Appendices A and B to Districts/FJBC's brief, which included the Committee Report and Montana Water Court Order described above, finding that the appendices violated the record closing date and the fifty-page limitation imposed on reply briefs.

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[55] August 31, 2016 Order on Motion to Strike.

[56] Districts/FJBC Reply Brief at 16.

Brief on Exception and Briefs Opposing Exceptions

26. Districts/FJBC argue that the Presiding Judge erred in striking portions of its reply brief. They contend that the issue of the 1948 Act's ambiguity was clearly raised in its initial brief. Districts/FJBC also assert that their reply brief's discussion of the legislative history of the Act of 1948 was appropriate because it "addressed and rebutted the incorrect arguments raised in [Tribes/Energy Keepers'] initial brief."[57] In particular, Districts/FJBC explain that the 1948 Act's legislative history helped refute the argument that the 1948 Act does not mention the Kerr Project. According to Districts/FJBC, striking this response from the record erroneously precluded Districts/FJBC from rebutting the legal arguments raised by Tribes/Energy Keepers.

27. With respect to Appendices A and B, Districts/FJBC maintain that the documents were not provided to supplant the evidentiary record, but rather as courtesy copies in "an attempt to assist the [administrative law judge] in his review of the lengthy and extensive legal documentation."[58] Districts/FJBC argue that striking the appendices was improper because the documents were legal in nature and have no factual weight.

28. Trial Staff and Interior, jointly with Tribes/Energy Keepers, agree with the Presiding Judge's decision to strike the language and appendices from Districts/FJBC's reply brief. Trial Staff argues that Districts/FJBC were fully aware of the ambiguity of the 1948 Act before the record closed, as evidenced by their witnesses at the hearing. Trial Staff disagrees with Districts/FJBC's statement that the 1948 Report has "no factual weight," and asserts that the legislative history is subject to very different interpretations, and is not appropriate for official notice after the record has closed. Finally, Trial Staff argues that, even if the Commission were to consider Districts/FJBC's argument and legislative history, it does not change the Initial Decision's conclusion that the 1948 Act is ambiguous and does not support a finding that Tribes/Energy Keepers are required to provide low-cost power.

Commission Determination

29. Districts/FJBC's initial brief does not, as Districts/FJBC assert, "clearly raise[]" the issue of ambiguity in the 1948 Act.[59] The only mention of ambiguity in FJBC/Districts' initial brief is in footnote 24, which states that, "[t]o the extent that statutory language is not plain and unambiguous, it is appropriate to look beyond the

[57] Districts/FJBC January 8, 2017 Brief On Exceptions at 15.

[58] *Id.* at 16.

[59] *Id.* at 15.

statutory language and consider matters addressed by the Congress that lend clarity to the statute and reflect the underlying statutory policy and legislative intent of the Congress."[60] However, this footnote merely provides an explanation for when it is appropriate to examine legislative history in interpreting a statute. Districts/FJBC's argument that the 1948 Act reaffirmed Congress's intent to require the licensee of the Kerr Project to compensate the Districts for low-cost power does not contain a single reference to the Act's legislative history. Instead, the initial brief states that the plain language of the 1948 Act is an "express confirmation" of Congress' intent.[61]

30. Furthermore, Districts/FJBC's discussion of the 1948 Act's legislative history was not simply a response to legal arguments made by Tribes/Energy Keepers in their initial brief. While Tribes/Energy Keepers' brief offers historical context for the 1948 Act, it does not seek to justify its reading of the Act with legislative history. Rather, Tribes/Energy Keepers' argument is that the 1948 Act does not mention the Kerr Project, and therefore cannot be considered a clear expression of Congressional intent to require the licensee to provide low-cost power.

31. Nevertheless, we find that it was inappropriate to strike Districts/FJBC's legislative history argument from the record. As noted above, the Commission does not favor motions to strike: "allegedly objectionable material will not be struck unless the matters sought to be omitted have no possible relationship to the controversy, or may confuse the issue, or otherwise prejudice a party."[62] Moreover, the Commission has stated that "arguments raised in a brief, as distinct from evidence, are not generally the proper subject of a motion to strike."[63] We do not believe that consideration of the 1948 Act's legislative history will prejudice Tribes/Energy Keepers because interpretation of the 1948 Act has been at issue since the beginning of this proceeding. Districts/FJBC's use of legislative history to supplement its interpretation of the 1948 Act is no different than citing new legal authority for the first time in a reply brief. Because we consider the 1948 Act's legislative history in this order, we will also allow Districts/FJBC's stricken appendices to become part of the record.

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[60] Districts/FJBC July 8, 2016 Initial Brief at 10 n. 24.

[61] *Id.* at 19.

[62] *See, e.g., Boston Edison Co.*, 61 FERC at 61,147, n.114 (citing *Power Mining Inc.*, 45 FERC at 61,972).

[63] *Id.* at 61,147 n.115.

B. Burden of Persuasion

Initial Decision

32. With respect to the question of which party to this proceeding bears the burdens of proof, the Initial Decision found that "Article 40(c) should be construed to preserve and continue . . . the burdens of proof applicable to the 1985 Project re-licensing proceeding."[64] This requires, according to the Initial Decision, "Tribes/Energy Keepers—in conjunction with Interior and Trial Staff—to make at least a *prima facie* demonstration in the first instance that the Treaty originally entitled Tribes to the Project site's full power value…." (threshold burden).[65] If Tribes/Energy Keepers satisfy the threshold burden, the burden of *persuasion* shifts to Districts/FJBC. To satisfy their burden, Districts/FJBC must affirmatively "demonstrate clear Congressional intent to require Tribes/Energy Keepers, in their capacity as Project licensees, to continue to provide low-cost Project power to Districts/FJBC."[66] The Initial Decision found that if Districts/FJBC carry their burden, Tribes/Energy Keepers, Interior, and Trial Staff would then ultimately be responsible for rebutting "any evidence supporting a conclusion that low-cost Project power obligations subsequently imposed by Acts of Congress on previous Project licensees continue to apply to Tribes/Energy Keepers."[67]

Brief on Exception and Briefs Opposing Exceptions

33. Districts/FJBC agree with the Initial Decision's conclusion that the Article 40(c) proceeding should be treated as an intentionally deferred continuation of the 1985 Kerr Project relicensing proceeding. They likewise agree that Article 40(c) should be construed to preserve the burden of proof applicable to the 1985 proceeding. However, Districts/FJBC argue that the Initial Decision, in applying these findings, erred in concluding that FJBC/Districts carry the burden of persuasion to demonstrate Congressional intent requiring Tribes/Energy Keepers to continue providing low-cost power. According to Districts/FJBC, because the Tribes bore the burden to prove that the Montana Power/Tribes' 1985 joint license application was in the public interest, and because this proceeding is an extension of the 1985 relicensing proceeding, the Initial

[64] Initial Decision, 157 FERC ¶ 63,030 at P 87.

[65] *Id.*

[66] *Id.*

[67] *Id.*

Decision should have concluded that Tribes/Energy Keepers continue to bear the burdens of proof and persuasion in this Article 40(c) proceeding.[68]

34. Trial Staff asserts that the Initial Decision correctly placed the burden of persuasion on Districts/FJBC, and further assert that Districts/FJBC should bear the burden to present evidence supporting their requested allocation.[69] Trial Staff reiterates its view that the policy articulated in *City of Seattle*[70]—i.e., that those seeking an allocation of project power carry a burden to provide supporting evidence—should be applied to this proceeding. Interior and Tribes maintain that, as the party advocating for a license condition requiring a specific allocation of power, FJBC/Districts are required to establish that such a provision would be supported by substantial evidence.[71]

Commission Determination

35. We agree with the Initial Decision's conclusion that the Article 40(c) proceeding is properly construed as an intentionally deferred continuation of the 1985 relicensing proceeding, and that any burdens of proof or persuasion applicable to the 1985 proceeding should govern the current proceeding. However, given this premise, we do not agree with the Initial Decision's conclusion that Tribes/Energy Keepers bear the burden to make a *prima facie* demonstration that the Treaty originally entitled the Tribes to the project site's full power value.

36. The Commission's longstanding policy regarding allocations of power is to leave the disposition of project power in the hands of the licensee unless Congress has made a legislative directive to the contrary.[72] As noted in *City of Seattle*, "[o]f the more than one thousand licenses issued to present, in only two has the Commission reserved power to a

[68] Brief on Exceptions at 17-20.

[69] Trial Staff Brief Opposing Exceptions at 12-16.

[70] 143 FERC ¶ 61,247 at P 15.

[71] Interior, Tribes, and Energy Keepers Joint Brief Opposing Exceptions at 13.

[72] *See, e.g., Power Authority of the State of New York and Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 109 FERC ¶ 61,092 (2004) ("It has [] been the practice of this Commission and the predecessor Federal Power Commission since the issuance of licenses began in 1920 to leave the disposition of project power in the hands of the licensee […] unless Congress has made a legislative directive to the contrary.").

specific recipient absent a Congressional directive."[73] Of those two exceptions, both power allocations were eliminated during relicensing.[74] This policy stems from the Commission's determination that the public interest is best served by promoting reliance on competitive markets to ensure that all customers have access to electric power at the lowest cost possible.[75] Based on this policy, the Commission explained in *City of Seattle* that, "[w]here a non-licensee requests an allocation of project power, the non-licensee bears the burden to provide supporting evidence." We find *City of Seattle's* statement of the burden of proof to be controlling here.

37. In addressing the burden of proof articulated in *City of Seattle*, the Initial Decision states that such a burden only requires the non-licensee to provide supporting—not persuasive—evidence to support its claim, a burden which Districts/FJBC "easily have satisfied."[76] We disagree. While *City of Seattle* does not explore at length burden of proof, we think it is clear that when a non-licensee party requests terms that are contrary to Commission precedent or policy—and particularly policy as long-standing as that articulated in *City of Seattle*—the requesting party bears a heavy burden of proof to support its request. In this case, such evidence must persuade the Commission that the requested power allocation is required by law[77] or is necessary to the public interest as to overcome established policy. To the extent that the Initial Decision distinguishes between the burden of production and the burden of persuasion, the Commission's view

[73] *City of Seattle*, 143 FERC ¶ 61,247 at P 13.

[74] *Power Authority of the State of New York and Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 107 FERC ¶ 61,259, at PP 10-17 (2004) (eliminating license article requiring power allocation on rehearing after learning that resolution memorializing Congressional intent had never been approved); and *New York Power Auth.*, 118 FERC ¶ 61,206, at PP 68-73 (2007) (declining to allocate power to investor-owned utilities in New York in the absence of Congressional authority and reiterating the Commission's policy "not to require specific allocation of power from licensed projects, but to leave those matters to private contract and, as appropriate, state regulation").

[75] *Id.* P 96.

[76] *Id.* ("[I]nsofar as *City of Seattle* addresses burden of proof, it simply states: 'Where a non-licensee requests an allocation of project power, the non-licensee bears the burden to provide supporting evidence.'").

[77] The Commission also has an independent obligation to ensure that its licenses comply with federal law, including any legislation or other authority that requires the Commission to require a specific power allocation.

is that, as the non-licensee requesting a specific power allocation, FJBC/Districts are responsible for meeting both burdens.

38. The licensee does, as FJBC/Districts assert, bear a burden to demonstrate that its proposed project is in the public interest.[78] However, the FPA does not require the licensee to demonstrate why every term *not* included is in the public interest (i.e., the licensee is not required to prove a negative). The burden to demonstrate that a term or condition that is contrary to Commission policy should be included in a license falls squarely on the requesting party. Meeting this burden requires providing the Commission with supporting evidence (i.e., burden of production) that meets the substantial evidence and public interest standards of the Federal Power Act (i.e., burden of persuasion). Moreover, the Commission must issue a license that meets the FPA's standards, but need not find that every aspect of an applicant's proposal does so. Indeed, it is rarely, if ever, the case, that the Commission issues a license that is identical to the project as proposed.

39. The Initial Decision rejects any reliance on *City of Seattle* for burden of proof purposes because it finds the case distinguishable on two grounds. One, *City of Seattle* was a relicensing proceeding and the case at hand is not.[79] Two, the current proceeding was initiated to resolve only two narrow issues: whether Tribes/Energy Keepers are required by their license to provide low-cost power, and if so, on what terms and conditions.[80]

40. We do not find these distinguishing grounds to be meaningful. As noted above, all parties concede, and we agree, that the instant proceeding is effectively a deferred relicensing proceeding on the two issues presented. Thus, *City of Seattle* cannot be distinguished on the grounds that it was a current relicensing proceeding—to do so would render meaningless the decision to treat the hearing here as a deferred relicensing proceeding. And while the issues in this proceeding are indisputably narrower than the comprehensive set of issues presented during relicensing, this does not, by itself, have any bearing on whether the power allocation in *City of Seattle* is analogous to the

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[78] A relicensing proceeding requires a fresh look and a new application of the comprehensive development and public interest standards of sections 4(e) and 10(a) of the Federal Power Act in light of current facts and policies. As stated in *City of Seattle*, given the Commission's clear policy, "[t]he heart of the public interest determination with respect to [power allocation] is whether there is any longer a reason to treat the disposition of power from this project differently from any other project." *City of Seattle*, 143 FERC ¶ 61,247 at P 15.

[79] Initial Decision, 157 FERC ¶ 63,030 at P 79.

[80] *Id.*

scenario at hand. Both Commission decisions involved precisely the same issue: whether an existing power allocation should be eliminated during relicensing. We find that the *City of Seattle* accurately describes the burdens the Commission would have applied to the 1985 relicensing proceeding regarding power allocation, and accordingly that are applicable here.

C. Water Rights

Initial Decision

41. After finding that Tribes/Energy Keepers satisfied the threshold burden to prove the Treaty of Hellgate originally entitled Tribes to all water rights at the project site, the Presiding Judge determined that "District/FJBC's entire claim of continuing entitlement to low-cost Project power is grounded in their contention that every Project *licensee* had/has an obligation to provide low-cost power as *quid pro quo* for using Districts [sic] water rights."[81] Following from this, the Presiding Judge reasoned that in order to establish that Tribes/Energy Keepers are obligated to continue to provide low-cost project power to Districts/FJBC, Districts/FJBC "must establish by some means *that* (if not *how*) Districts/irrigators acquired Project site water rights the Treaty granted exclusively to Tribes."[82]

42. The Presiding Judge concluded that Districts/FJBC "failed in the extreme" to satisfy these burdens.[83] The Presiding Judge infers that Districts/FJBC believe that the 1926, 1928, and 1948 Acts and legislative histories clearly demonstrate that Congress intended to require the licensee to provide low-cost power to the Districts, and therefore Districts/FJBC did not find it necessary to provide evidence to establish that Districts/irrigators acquired water rights at the project site that the Treaty originally granted exclusively to the Tribes. The Presiding Judge determined that "Districts/FJBC technical reliance on Congressional belief does not satisfy their burden to support an essential element of their claim to low-cost Project power."[84]

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[81] Initial Decision, 157 FERC ¶ 63,030 at P 86 (emphasis in original).

[82] *Id.* P 94.

[83] *Id.* P 95.

[84] *Id.*

Brief on Exception and Briefs Opposing Exceptions

43. Districts/FJBC argue that the Initial Decision erred in concluding that Districts/FJBC must establish that they acquired water rights for the project. In support of this argument, Districts/FJBC cite the Chief Administrative Law Judge's decision in reviewing an out-of-time motion to intervene that "irrigator water rights are clearly outside the scope of the issues set for hearing in this case."[85] Districts/FJBC renew their argument that any burden placed on them to establish water rights would require the Commission to adjudicate water rights. They also note that the water rights at issue are pending adjudication before the Montana Water Court, and thus it is not possible for any party to establish that they currently have water rights at the project.

44. Trial Staff believe that the Initial Decision properly addressed Districts/FJBC's claim that they are entitled to water rights, and disagree with the assertion that the Presiding Judge adjudicated contested water rights. Tribes/Interior likewise believe that the Initial Decision's treatment of water rights was proper because, in their view, it does not affect any water right that a party may actually hold. Tribes/Interior assert that the Initial Decision merely evaluates the parties' evidentiary showings put forth in this proceeding.

Commission Determination

45. It is well established that the Commission does not have legal authority to adjudicate or allocate water rights, and that such authority is reserved to the states.[86] However, the Initial Decision makes clear that no water rights are being adjudicated.[87] We agree that the Montana Water Court—not the Commission—is the proper forum to adjudicate disputed water rights. The Initial Decision does not purport to interfere with, or impact the findings of, the Montana Water Court.

46. Nevertheless, water rights are central to the current proceeding because, according to Districts/FJBC, the 1928 Act sought to compensate the Districts for the Kerr Project's use of the Districts' water rights. In particular, in their initial post-hearing brief, Districts/FJBC stated that "[t]he replacement of the Newell Tunnel Project with the Kerr Project required use of the appropriated water rights of the [Flathead Irrigation Project]

[85] Districts Brief at 23 (citing *Confederated Salish and Kootenai Tribes Energy Keepers, Inc.*, 153 FERC ¶ 63,013, at P 7 (2015)).

[86] 16 U.S.C. § 821 (2012). *See also, e.g.*, *City of Tacoma, Washington*, 110 FERC ¶ 61,239, at P 3 (2005).

[87] *See* Initial Decision, 157 FERC ¶ 63,030 at P 95.

and the Districts in the Newell Tunnel."[88] Districts/FJBC explain that the 1928 Act balanced the Districts' interest in the Kerr Project's water rights with the Tribes' land rights. Accordingly, the Presiding Judge determined ownership of water rights to be an "essential factual predicate to [Districts/FJBC] claimed entitlement to low-cost Project power."[89] When Districts/FJBC failed to offer evidence establishing their water rights, the Presiding Judge concluded that they failed to meet their burden of persuasion.

47. We disagree with Districts/FJBC that the Initial Decision impermissibly adjudicates or allocates water rights. The Presiding Judge is clear that his findings have no effect on the contested water rights currently pending before the Montana Water Court.[90] However, we also disagree with the Initial Decision regarding the significance of water rights in this proceeding. Districts/FJBC's burden in this proceeding, as discussed above, is to demonstrate that Congress intended for the project licensee to provide low-cost power to FIIP, for the benefit of the Districts. If Districts/FJBC were able to provide evidence that they obtained water rights used to generate project power, it would arguably support their claim that Congress, in requiring that low-cost power be provided to the Districts, was balancing the Districts' interests with the Tribes' land rights. However, we do not believe that establishing water rights is an "essential factual predicate."[91] If any of the Acts in question, independently or collectively, on their face or through their legislative histories, demonstrate Congressional intent to compensate the Districts via low-cost power from the SKQ project, then Districts/FJBC would satisfy its burden. For the reasons described below, Districts/FJBC has not done so.

D. Standard for Demonstrating Congressional Intent

Initial Decision

48. The Initial Decision states that, to satisfy their burden, Districts/FJBC affirmatively must demonstrate clear Congressional intent to require Tribes/Energy

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[88] Districts/FJBC Initial Post-Hearing Brief at 12

[89] Initial Decision, 157 FERC ¶ 63,030 at P 93.

[90] *Id.* P 95 n.38 ("[N]o water rights issues are being adjudicated in this proceeding. Districts/FJBC simply are required to substantiate the factual predicate to their claimed entitlement to low-cost Project power. Their ability or inability to do so has implications only for Project license condition purposes. It has absolutely no impact on whatever water rights Districts/FJBC might have.").

[91] *Id.* P 93.

Keepers . . . to continue to provide low-cost Project power to Districts/FJBC."[92] The Initial Decision describes Districts/FJBC's burden as requiring "clear" Congressional Intent—rather than simply intent—because the burden shifts to Districts/FJBC only after Tribes/Energy Keepers demonstrate that the Treaty entitled the Tribes to the project site's full power value.[93] As explained in the Initial Decision, "an Act of Congress can abrogate [] treaty rights only if the act exhibits clear Congressional intent to do so."[94]

49. The Treaty of Hellgate expressly set aside Reservation lands, which include the project site, for the Tribes' "exclusive use and benefit."[95] Finding that the Treaty clearly set aside water rights on the Reservation for the Tribes, the Initial Decision states that Treaty rights cannot be abrogated without clear Congressional intent, and requires Districts/FJBC to demonstrate clear intent.

Brief on Exception and Briefs Opposing Exceptions

50. Districts/FJBC object to, what they describe as, the imposition of a "clear Constitutional intent" requirement because "the 'clear statement rule' is only applicable to proceedings in which the historic power of the States might be preempted"—which they assert is not the case in this proceeding.[96] They further argue that application of the clear statement rule, based on the premise that the power allocation would violate the Tribes' treaty rights, would be improper because no court has found that the Treaty grants exclusive water rights to the Tribes, and the Commission lacks jurisdiction to make such a decision. And even if this were the case, Districts/FJBC argue, requiring low-cost power for the benefit of the Districts does not necessarily deprive the Tribes of water rights. According to Districts/FJBC, the Commission must determine Congressional intent and, to the extent that any statute is not plain and unambiguous on its face, examine appropriate legislative history and related material.

51. Interior and Tribes/Energy Keepers note that the Initial Decision does not mention the "clear statement rule," and assert that the standard applied by the Initial Decision is

[92] *Id.* P 28.

[93] *Id.* P 88.

[94] *Id.* P 89 (citing *United States v. Dion*, 476 U.S. 734, 738-39 (1986)).

[95] *Id.* PP 4, 88.

[96] Districts/FJBC Brief on Exceptions at 28.

based on well-established Commission precedent.[97] They argue that Commission precedent dictates that legislative history alone is insufficient to sustain a claim for a power allocation to be included in a Commission license.[98] Interior/Tribes/Energy Keepers acknowledge that legislative history may be consulted to clarify ambiguous terms of a statute, but assert that "it is entirely inappropriate to use legislative history to attempt to read into a statute a power allocation that is totally absent from the words of the statute itself."[99] Likewise, Trial Staff acknowledge that legislative history can play a role in interpreting ambiguous statutory language, but argue that Districts/FJBC mischaracterize the statutory text they rely on as unclear or ambiguous.[100]

Commission Determination

52. Consistent with our discussion regarding water rights above, the Commission views the Treaty as persuasive factual evidence that supports Tribes/Energy Keepers' interpretation of the subsequent Acts of Congress. However, because we refrain from making a determination that the Treaty granted exclusive water rights to the Tribes, we will not apply the heightened standard that FJBC/Districts describe as the "clear statement rule"[101] in our subsequent analysis. As relevant here, clear Congressional

[97] Interior, Tribes, and Energy Keepers Joint Brief Opposing Exceptions at 14. Interior and Tribes/Energy Keepers assert that Districts/FJBC's argument is puzzling because the Initial Decision does not mention the "clear statement rule." *Id.* We note that although the Initial Decision does not explicitly mention the clear statement rule, it does appear to apply a heightened burden requiring clear Congressional intent based on its finding that the Treaty reserved water rights to the Tribes, and cites *United States v. Dion* as an example of the clear congressional intent requirement. *See* Initial Decision, 157 FERC ¶ 63,030 at P 89.

[98] Interior, Tribes, and Energy Keepers Joint Brief Opposing Exceptions at 14, n.49.

[99] *Id.* at 14-15.

[100] Trial Staff Brief Opposing Exceptions at 17.

[101] We note that we disagree with Districts/FJBC's assertion that "clear" congressional intent is only required when the historic power of the states might be preempted. *See, e.g., United States v. Dion*, 476 U.S. at 738-39 ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights....").

intent is only required when a Congressional act purports to abrogate treaty rights, and we do not find it necessary to decide whether the Treaty granted exclusive water rights to the Tribes for the purpose of the hydroelectric project.

53. The burden is on Districts/FJBC to provide persuasive evidence that Congress intended to require the requested power allocation. And while we do not impose a heightened burden on Districts/FJBC to show clear Congressional intent, there must still be an actual directive from Congress to the Commission. Such directive must not require extensive review of legislative history or multiple statutes.[102] In assessing Congressional intent in the Acts provided, the Commission will first look to the statutory language, and if the language is not plain and unambiguous, the Commission will consider the legislative history and other material that may clarify the legislative intent of Congress.[103]

E. Legal Obligation to Provide Low-Cost Power

54. Districts/FJBC argue that the Initial Decision's errors, as described and addressed above, resulted in the erroneous holding that Tribes/Energy Keepers have no legal obligation to continue providing low-cost power. They believe that when properly analyzed, the 1926, 1928, and 1948 Acts, as well as the repayment contracts between the United States and the Districts, demonstrate Congress's intent that licensees of the SKQ Project must provide low-cost power for the benefit of the FIIP and the Districts/FJBC. Because we disagree with the Initial Decision's discussion of the burden of proof and the importance of water rights applicable to this proceeding, we will reexamine the record to determine if Districts/FJBC meet their burden, as described above.

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[102] For example, the Commission required a power allocation in the license for *New York Power Auth.*, 118 FERC ¶ 61,206, because section 836 of the Niagara Redevelopment Act, 16 U.S.C. § 836 (2012), states that:

> The Federal Energy Regulatory Commission shall include among the licensing conditions . . . the following:
>
> > (1) [. . .] the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance. . . .
> >
> > (2) The licensee shall make a reasonable portion of the project power subject to the preference provisions of paragraph (1) of this subsection available for use within reasonable economic transmission distance in neighboring States. . . .

[103] *See, e.g.*, *DePierre v. United States*, 564 U.S. 70, 79, 83-84 (2011).

1. 1926 Act

55. The 1926 Act appropriates funds "[f]or continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation."[104] Availability of these funds is explicitly conditioned on execution by the "district or districts organized under state law" of "an appropriate repayment contract, in form approved by the Secretary of the Interior . . . ."[105] Pursuant to the Act, the repayment contract "shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States."[106] The 1926 Act specifies that the United States will be reimbursed in the following order: (1) for power development; (2) for the deferred obligation on the Camas Division; (3) for construction cost on each acre of irrigable land within the entire project; and (4) for operation and maintenance costs within the entire project.[107]

Initial Decision

56. The Initial Decision finds that Districts/FJBC's reliance on the 1926 Act is "specious on a number of grounds."[108] First, the Initial Decision notes that the Act focuses exclusively on irrigators, Districts, and FIIP, and does not reference the project, revenues derived from the project, or low-cost power. The Initial Decision concludes that this circumstance alone renders the Act unable to "satisfy the 'clear Congressional intent to allocate Project power to FIIP, for the benefit of Districts/irrigators requirement—let alone provide any basis for a Districts/irrigators claim to low-cost Project power."[109]

57. The Presiding Judge was also unpersuaded by the 1926 Act's reference to "net revenues." The Initial Decision cites *Confederated Salish & Kootenai Tribes of Flathead Reservation, Mont. v. United States*[110] as definitive proof that FIIP never had any

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[104] 1926 Act, 44 Stat. at 464.

[105] *Id.* at 465.

[106] *Id.*

[107] *Id.*

[108] Initial Decision, 157 FERC ¶ 63,030 at P 101.

[109] *Id.*

[110] 181 Ct. Cl. 739, 745, 749 (1967).

ownership interest in the project site and as confirmation that "net revenues" refers exclusively to the FIIP power division, rather than the Kerr project.[111] The Initial Decision further concludes that there is no evidence to support Districts/FJBC's argument that Congress intended the net revenues to cover ongoing FIIP operation and maintenance assessments, finding instead that Congress intended the net revenues referenced in the act to be used to discharge accrued/preexisting debt from FIIP development, construction, and operation and maintenance.[112]

Brief on Exception and Briefs Opposing Exceptions

58. Districts/FJBC argue that the 1926 Act demonstrates Congress's intent that Districts/FJBC benefit from low-cost power in several ways. They assert that the Act supports requiring low-cost power because: (1) it demonstrates Congress's intent that the Districts pay the costs for, and benefit from, the FIIP, including its Newell Tunnel power development; (2) it required the Districts to enter into repayment contracts with the United States, specifying the legal obligations between them pertaining to the water and power resources of the Reservation; and (3) it establishes that "net revenues" accruing from the power portion of the FIIP were intended to assist and subsidize the costs of the FIIP.

59. Trial Staff does not dispute that the 1926 Act appropriated funds to construct the FIIP, that it required the Districts to enter into repayment contracts, or that it identifies net revenues to subsidize the costs of the FIIP. However, Trial Staff emphasizes that FIIP, which consists of both an irrigation system and a retail power distribution system, and is owned by the United States, is separate and distinct from the Kerr Project. Staff argues that if Congress had intended to require low-cost power to be delivered to the United States from the Kerr Project, it would have expressly stated so.

60. Interior and Tribes/Energy Keepers emphasize that the 1926 Act does not mention the Kerr Project, and that there is no relationship between the Kerr Project and FIIP, except that Mission Valley Power (MVP)[113] and Energy Keepers have entered into an agreement for the sale and purchase of power, some or all of which may be generated at the SKQ Project. Interior and Tribes/Energy Keepers assert that the intended beneficiary of the 1926 Act is the United States Treasury—not FIIP or the Districts. Interior and Tribes/Energy Keepers also point out that that the Districts did not repay any of the funds expended by the U.S. on the Newell Tunnel Project to refute FJBC/Districts' argument

[111] Initial Decision, 157 FERC ¶ 63,030 at P 102.

[112] *Id.*

[113] *See supra* footnote 28.

that the Districts were the intended beneficiaries of the project that is mentioned in the 1926 Act.

Commission Determination

61. We agree with the Initial Decision's conclusion that the 1926 Act does not require Tribes/Energy Keepers to provide low-cost power to the Districts. The 1926 Act does not mention the Kerr project—which had not yet been built—or low-cost power. The Act does require that "net revenues" from operation of the "power plant" be used to reimburse the United States, but there are numerous reasons why this language falls short of requiring a future licensee of the project to provide low-cost power to the Districts. Most obviously, the plain language of the 1926 Act requires that the Districts reimburse the *United States* for debt incurred in financing the power plant, for which the Act allocates $395,000. In other words, the Act required that the net revenues derived from the future power plant would be used to repay the United States. This alone is sufficient to defeat Districts/FJBC's reading of the Act. But we also must consider that the power plant referenced in the 1926 Act was never built and the money allocated for the power plant in the 1926 Act was reallocated for alternative use. Finally, the low-cost power provision did not arise from the 1926 Act's reference to "net revenues," but instead from Montana Power's proposal to provide the discounted power in exchange for a license.[114]

2. 1928 Act

62. The 1928 Act provides, in relevant part:

> That the unexpended balance of the $395,000 available for continuation of construction of a power plant may be used, in the discretion of the Secretary of the Interior, for the construction and operation of a power distributing system and for purchase of power for said project but shall be available for that purpose only upon execution of an appropriate repayment contract as provided for in said Acts: *Provided further*, That the net revenues derived from the operation of such distributing system shall be used to reimburse the United States in the order provided for in said Acts: *Provided further*, That the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation and of water rights reserved or appropriated for the

[114] *See* Ex. FJB-9.

> irrigation projects; *Provided further*, That rentals from such licenses for use of Indian lands shall be paid the Indians of said reservation as a tribe. . .”[115]

Initial Decision

63. The Initial Decision finds that Districts/FJBC’s reliance on the 1928 Act is flawed in several respects. Most significantly, the Initial Decision states:

> Accepting *arguendo* that the term “irrigation projects” references FIIP, Districts/FJBC cannot establish the 1928 Act clearly intended to compensate Districts/irrigators for Project use of any water rights reserved or appropriated for FIIP unless they also establish by some means that those water rights belonged to Districts/irrigators in the first instance.[116]

In other words, because Districts/FJBC cannot prove they owned the water rights for the project, they cannot establish that Congress intended to compensate them for use of those rights.

64. The Initial Decision finds that the record supports an alternative interpretation, namely that reference to “reserved” water rights in the 1928 Act is to the Tribes’ water rights originally reserved by Interior under the 1909 Act for the Newell Tunnel Project.[117] The Initial Decision states that the 1928 Act legislative history is “immaterial, demonstrably incorrect or equivocal in any event.”[118] For these reasons, the Initial Decision concludes that the text of the Act cannot support FJBC/Districts’ interpretation.

Brief on Exception and Briefs Opposing Exceptions

65. According to Districts/FJBC, the 1928 Act contains three essential provisions. First, they believe it “confirmed that the Kerr Project uses the ‘water rights reserved or appropriated for the irrigation projects,’ which Congresses [sic] intended as a reference to the water rights of the Districts.”[119] Second, it ensured that the Tribes would be compensated for use of their lands in the form of rental payments. Third, the Act gave

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[115] 1928 Act, 45 Stat. at 212-13.

[116] Initial Decision, 157 FERC ¶ 63,030 at P 107.

[117] *Id.* at 108.

[118] *Id.* at 110.

[119] Districts/FJBC Brief on Exceptions at 36.

Interior conditioning authority to "ensure that the Districts would be compensated for the use of" their water rights.[120]

66. Districts/FJBC assert that the legislative history of the 1928 Act demonstrates Congress's belief that the project uses the Districts' water rights. They first cite to an exchange at a Senate debate where Senator Walsh of Montana states his belief that "[t]he appropriation by the United States is in trust for the settlers on the project, and for the district when it shall be organized."[121] In the same exchange, Senator Walsh states that he believes the Tribes own the project site, but not the water rights.[122] Districts/FJBC also cite an exchange where two Senators discuss Montana Power Company's proposal to deliver 15,000 horsepower at cost to the districts, which according to Districts/FJBC, demonstrates that Congress clearly understood the 1928 Act would require low-cost power to be provided for the Districts.[123] Senator La Follete, who described the Montana Power Company's bid as having "quasi-judicial status" because it was formed with participation from Interior and the FPC, stated: "[I] am convinced that if the House text is enacted, a provision will be contained in the lease given to the successful bidder providing for the furnishing of this amount of horsepower at a low or nominal sum. . . ."[124]

67. Districts/FJBC also refer to several other exchanges and documents that they believe support their interpretation of the 1928 Act. Most notably, the Rocky Mountain Power Company's 1929 brief in support of its application for a project license states: "In making its decision upon this important matter, it is submitted that the Commission should bear in mind that 98 [percent] of these lands, and all of the waters connected with this project, belong to the State of Montana and to citizens of the United States other than Indians. . . ."[125] The brief further states that "every dollar that is exacted above a fair

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[120] *Id.* at 37.

[121] Districts/FJBC Brief on Exceptions at 38 (citing Ex. FJB-16 at 12).

[122] *Id.*

[123] *Id.* at 38-39 (citing Ex. FJB-16 at 12).

[124] *Id.* at 40 (citing Ex. FJB-17 at 6).

[125] *Id.* at 39 (citing Ex. FJB-9 at 4-5).

rental charge for the use of these tribal lands is taking exactly that much money from the people who own these water-rights…."[126]

68. Trial Staff argues that there is no support for Districts/FJBC's interpretation of the 1928 Act. Trial Staff believes the Act authorized the FPC to issue, upon terms satisfactory to Interior, licenses to private parties for development of power on the Reservation. In Trial Staff's view, the Act demonstrates Congress's recognition that the Tribes have a right to compensation for the value of the Reservation lands used for the project. Trial Staff cites several exchanges from the same Senate debate cited by Districts/FJBC, as well as additional legislative history, which Staff asserts plainly and clearly show that the 1928 Act did not make any allocation of power to the settlers.[127]

69. Tribes and Interior assert that the 1928 Act unambiguously does not require Tribes/Energy Keepers to make any of the SKQ Project output available to the United States, and therefore that the Act's legislative history is irrelevant. Tribes/Interior disagree with the Districts/FJBC interpretation of the 1928 Act's phrase "water rights reserved or appropriated for the irrigation projects." Instead, they assert that the Act's reference to "water rights reserved" is to the Tribes' federally reserved water rights, and its reference to "appropriated water rights" is to the claims identified in notices of appropriation filed by Interior for the benefit of the Tribes. Tribes/Interior believe that the legislative history demonstrates that Congress specifically considered mandating the Kerr Project to provide low-cost power, but elected not to do so.

Commission Determination

70. On its face, the 1928 Act modified the 1926 Act in two significant ways. First, it allowed the funds previously allocated for construction of the power plant to be used for construction and operation of a power distribution system, subject to the Secretary of the Interior's discretion. Second, it authorized the FPC to issue a permit or license, upon terms satisfactory to the Secretary of the Interior, for development of the power plant on the Reservation, and required any licensee to compensate the Tribes for use of their lands.

71. Aside from the reference to "water rights reserved or appropriated for the irrigation projects," we find that the words of the 1928 Act are unambiguous, and accordingly do not find it necessary to consult the Act's legislative history.[128] Even if we were to construe this reference as acknowledgement that the future power plant would

[126] *Id.*

[127] Trial Staff Brief Opposing Exceptions at 29-34 (citing Ex. FJB-16 at 10-12 and Ex. FJB-17 at 11-12).

[128] *See, e.g., Connecticut Nat'l Band v. Germain*, 503 U.S. 249, 253 (1992).

use District water rights, there is still no support for Districts/FJBC's argument that this language requires Tribes/Energy Keepers, as licensees of the SKQ Project, to provide low-cost power to the Districts. The 1928 Act makes no mention of either compensating the Districts or low-cost power. The Act provides for net revenues from the *distribution system* to be used to repay the United States. It also directs that the Tribes be compensated for the use of Reservation lands.

72. Furthermore, the 1928 Act leaves the terms of any power plant license to the discretion of the FPC and Interior. Districts/FJBC contend that Interior was given conditioning authority to "ensure that the Districts would be compensated for the use of" District water rights.[129] But the Act lends no support to this interpretation. Indeed, we find it more likely that the conditioning authority given to Interior, which includes both the Bureaus of Reclamation and Indian Affairs, was intended to protect the Tribes, given that the Act explicitly requires that the licensee pay rental fees for use of Indian lands.[130] In any case, the 1928 Act is clear: the conditioning authority is discretionary and is reserved exclusively to the Secretary of the Interior.[131] As explained in Interior's initial post-hearing brief, with which we agree, Interior's exercise of its authority under the 1928 Act is a matter of policy, and Interior's policy position regarding the licensee's obligation to provide low-cost power has changed since the 1928 Act was passed, because FIIP and MVP have finally repaid their debt to the United States.[132]

73. Assuming *arguendo* that the 1928 Act is ambiguous, such that examination of the Act's legislative history is necessary to determine Congressional intent, we find that, when viewed comprehensively, the legislative history does not support Districts/FJBC's interpretation of the Act. Read in isolation, the excerpts offered by Districts/FJBC arguably represent the views of a few Senators during debate, but they do not necessarily reflect a broader consensus.[133] The statements from the debate cited by Districts/FJBC

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[129] Districts/FJBC Brief on Exceptions at 37.

[130] 1928 Act, 45 Stat. at 213.

[131] *Id.* at 212-13 ("[T]he Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects. . . .").

[132] Interior Initial Post-Hearing Brief at 13-14.

[133] *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 312 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

are not unequivocal. For example, Senator La Follette's declaration—that "[I] am convinced that if the House text is enacted, a provision will be contained in the lease given to the successful bidder providing for the furnishing of this amount of horsepower at a low or nominal sum"[134]—provides little support to Districts/FJBC's interpretation that the 1928 Act itself required a low-cost power provision in the Kerr Project license. His statement could have equally been an acknowledgment that Montana Power had proposed to provide low-cost power at cost, an outcome he believed likely if the 1928 Act authorized the FPC to issue a license to a private developer.

74. Districts/FJBC also cite to Senator Walsh's statement that "[t]he appropriation by the United States is in trust for the settlers on the project, and for the district when it shall be organized."[135] However, almost directly following this statement, Senator Walsh summarizes the situation as follows:

> [The Indians] owned the entire reservation, portions of which, including the power sites and the timberlands and the villa sites around Flathead Lake, were all reserved, and reserved, I take it, to the Indians. So the Indians own the riparian lands upon which the dams will have to be abutted; but the settlers say, "We own the water, and it takes water as well as the dam to make power, and therefore we have an interest in this power development." That may or may not be sound; but in view of these contentions, I submit that we are talking about trifles here.[136]

If anything, this exchange demonstrates, as Tribes/Interior assert, that the Senators were aware of the conflict over water rights at the project site and made the conscious decision not to require a low-cost power provision in the 1928 Act. This conclusion is supported by other excerpts from the legislative history, including the following excerpts from a later exchange between Senators Walsh and King:

> Mr. King: . . . the Indians claim that the water power belongs to them and the white settlers who acquired lands, paying $7 an acre, and made contracts with the Government for the purpose of buying water from the Government claim that they ought to be entitled, if not to all, at least to a portion of the benefits arising from the development of power?
>
> Mr. Walsh: That is their claim.

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[134] Ex. FJB-17 at 6.

[135] Districts/FJBC Brief on Exceptions at 38 (citing Ex. FJB-16 at 12).

[136] Ex. FJB-16 at 12.

> Mr. King: That controversy has not been settled, but it is not particularly involved in the matter here before us except in an indirect way?
>
> Mr. Walsh: It is involved only indirectly, and it is involved just simply in this way: The Montana Power Co., realizing the controversy and contest between these two conflicting interests with reference to this power site, makes a proposition that it thinks will make an appeal to both the parties interested. This is the situation as it presents itself here.
>
> […]
>
> Mr. Walsh: But there is nothing in the bill that affects the situation at all. It leaves it just where the law of 1920 put it. Whatever power they would have under that law they would have if this legislation were enacted."[137]

This exchange casts substantial doubt on Districts/FJBC's assertion that the 1928 Act requires the Commission to include the low-cost power provision.

75. In sum, we find no support for Districts/FJBC argument in the plain language of the 1928 Act. The Act clearly places conditioning authority in the discretion of the FPC and Interior. In light of this finding, examination of the Act's legislative history is not necessary. However, even if we determined the Act to be ambiguous, the legislative history does not support a finding that the 1928 Act requires Tribes/Energy Keepers to provide low-cost power to the Districts. For these reasons, we affirm the conclusion of the Initial Decision regarding the 1928 Act.

3. 1948 Act

76. The 1948 Act was enacted in order to ensure:

> [T]he repayment to the United States of all reimbursable costs heretofore or hereafter incurred for the construction of the [FIIP] irrigation and power systems . . . , including such operation and maintenance costs as have been covered [sic] into construction costs under the [1928 Act] and supplemental Acts, and including the unpaid operation and maintenance costs for the irrigation seasons of 1926 and 1927, which are hereby covered [sic] into construction costs. . . .[138]

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[137] Ex. FJB-17 at 11-12.

[138] 1948 Act, 62 Stat. at 269.

Two subsections of the 1948 Act are relevant to the current dispute. First, section 2(g) provides:

> Electric energy available for sale through the power system shall be sold at the lowest rates which, in the judgment of the Secretary of the Interior, will produce net revenues sufficient to liquidate the annual installments of the power system construction costs established pursuant to subsection (f) of this section, and (for the purpose of reducing the irrigation system construction costs chargeable against the lands embraced within the project and of insuring the carrying out of the intent and purpose of legislation and repayment contracts applicable to the project) to yield a reasonable return on the unliquidated portion of the power system construction costs, and (for the same purpose) *to yield such additional sums as will cover the amount by which the wholesale value of the electric energy sold exceeds the cost thereof where such excess is the result of the electric energy having been obtained on a special basis in return for water rights or other grants.*[139]

Second, section 2(h) provides that: "All net revenues hereafter accumulated from the power system shall be applied annually to the following purposes, in the following order of priority. . ."[140] The sixth category of priority states: "To liquidate the annual operation and maintenance costs of the irrigation system."[141]

Initial Decision

77. The Initial Decision finds that Districts/FJBC's failure to substantiate the factual predicate that the Districts/irrigators owned water rights at the project site undermines their reliance on the 1948 Act. According to the Initial Decision, the reference to "electric energy having been obtained on a special basis in return for water rights or other grants" in section 2(g) of the 1948 Act is "most reasonably [] interpreted simply as an instruction for the Secretary [of the Interior] to take FIIP's discounted power allocation…into account when determining the lowest retail rate that would generate sufficient net revenues to liquidate the accrued FIIP debt."[142] However, the Initial Decision also concludes that the "section 2(g) ambiguity necessarily vitiates any

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[139] *Id.* at 270-71.

[140] *Id.* at 270.

[141] *Id.*

[142] Initial Decision, 157 FERC ¶ 63,030 at P 116.

Districts/FJBC reliance on the 1948 Act for purposes of imposing low-cost power" whether this interpretation is correct or not.[143]

78. Turning to section 2(h) of the Act, which establishes prioritized cost categories for repayment to the United States, the Initial Decision finds, contrary to Districts/FJBC's argument, that Congress did not intend net revenues from the project to cover ongoing annual FIIP operation and maintenance expenses.[144] The Initial Decision finds that the record affirmatively contradicts Districts/FJBC's claim that Congress intended section 2(h)(6) of the Act to cover ongoing annual operation and maintenance expenses, finding instead that the operation and maintenance expenses covered were those converted into construction costs by prior acts, plus accrued/unrepaid FIIP operation and maintenance indebtedness the Districts incurred in previous irrigation seasons.[145]

79. The Initial Decision also notes that Congress intended the 1948 Act to operate for a finite period—fifty years or until the FIIP debt was fully liquidated—and that such period ended in 2004 when FIIP's debt to the United States was fully repaid.[146] According to the Initial Decision, because Interior's conditioning authority in the 1948 Act was only to ensure that FIIP's debt obligations were liquidated, Interior's conditioning authority over the project license is now entirely discretionary.

Brief on Exception and Briefs Opposing Exceptions

80. Districts/FJBC assert that the 1948 Act reaffirms the directives contained in the 1926 and 1928 Acts. Specifically, they argue that section 3 of the 1948 Act continued the requirement that the Districts enter into repayment contracts with the United States to pay for the costs of FIIP, which they believe demonstrates Congress's continued intent that the Districts have a special status and interest in the FIIP. Furthermore, according to Districts/FJBC, section 2 of the Act requires that net revenues continue to assist the Districts in paying for the costs of FIIP. In order to ensure that net revenues would accrue, the Act required that MVP reflect in its retail rates "electrical energy having been obtained on a special basis in return for water rights or other grants,"[147] which

[143] *Id.* P 117.

[144] *Id.* P 118.

[145] *Id.* P 119.

[146] *Id.* P 122.

[147] 1948 Act, 62 Stat. at 269.

Districts/FJBC assert is an express confirmation of Congress's intent that low-cost power from the Kerr Project be provided for the benefit of FIIP and FJBC/Districts.

81. Districts/FJBC state that, to the extent the reference to "special basis" energy is ambiguous, the legislative history demonstrates that the reference is to low-cost power from the Kerr Project. Citing an April 7, 1948 report prepared by the Committee on Public Lands in the House of Representatives (Committee Report), Districts/FJBC assert that "Section 2(g) was intended by Congress to "[y]ield a reasonable return on the value of the [FIP's'] interest or equity in the power development *at Kerr Dam*."[148] They believe that the Presiding Judge's decision not to consider the report was an error, and that the report demonstrates Congress's intent that a low-cost power requirement be included in the license for the Kerr Project.

82. Interior and Tribes/Energy Keepers support the Initial Decision's interpretation of the 1948 Act. They generally argue that the Act's plain language does not require that low-cost power be provided to the Districts, noting that the Act does not mention the project or low-cost power. They further assert that, like the 1926 and 1928 Acts, the 1948 Act was intended to remedy the Districts' long-standing failure to reimburse the United States for federal funds expended on FIIP, and that the intended beneficiary of the Act is the United States. Interior and Tribes/Energy Keepers believe that the Presiding Judge properly struck the legislative history of the 1948 Act, but, in the event that the documents were struck in error, they assert that the singular reference to the Kerr Project merely indicates that Congress was aware of the contract with Montana Power in 1948.

83. Trial Staff agree with the Initial Decision's conclusions. Trial Staff asserts that Districts/FJBC failed to establish that the 1926 and 1928 Acts require low-cost power, and therefore, to the extent that Districts/FJBC argue that the 1948 Act reaffirms those Acts, their arguments must fail.

Commission Determination

84. Districts/FJBC argue that the 1948 Act's requirement that net revenues accrue with the use of "electric energy having been obtained on a special basis in return for water rights or other grants" is an express confirmation that Congress intended to require the Kerr Project licensee to provide low-cost power for the benefit of FIIP and the FJBC/Districts. We acknowledge that section 2(g) refers to low-cost power provided by the Kerr Project, but disagree as to the significance of this reference. The 50-year license granted to Montana Power in 1930 required low-cost power to be provided to the

[148] Brief on Exceptions at 44 (citing H.R. REP. No. 80-1691, at 3 (1948) (emphasis added)).

Districts, and the dam began commercial operation in 1939.[149] Thus, at the time the 1948 Act was passed, the Districts had been receiving power pursuant to Article 26 of the license for nearly ten years. Based on our interpretation of the 1926 and 1928 Acts as explained above, we agree with the Initial Decision's conclusion that the 1948 Act's reference to "special basis" energy is merely a reference to the low-cost power required by the Kerr Project license. Indeed, we find the reference to "water rights *or other grants*"[150] is an acknowledgement of the complicated history of the low-cost power provision memorialized by Article 26 of the project license.

85. According to the Initial Decision, the 1948 Act's section 2(g) reference to special basis energy is most reasonably interpreted as an instruction for the Secretary of the Interior to take FIIP's low-cost power provided by the license into consideration when determining the lowest retail rate that would generate sufficient net revenues to liquidate the accrued FIIP debt.[151] We agree with this interpretation. The legislative history confirms that "special basis energy" referred to low-cost power from the Kerr Project. The Committee Report confirms that the Secretary is required to set the rates so as to "yield a reasonable return" on both the "unliquidated power system costs" and "the value of the [FIIP's'] interest or equity in the power development at Kerr Dam."[152] As the Initial Decision explains, "[t]his interpretation makes section 2(g) internally consistent because the Secretary's failure to account for the circumstance that FIIP was receiving additionally discounted cheap project power under Article 26 of the 1930 license would have caused the Secretary to violate the Congressional mandate to set Reservation retail electric rates at the lowest level that would generate sufficient net revenues to liquidate the accrued FIIP debt."[153]

86. In sum, we think the 1948 Act's language does not itself impose a low-cost power requirement on the SKQ Project licensee. The 1930 license already imposed such a requirement, and by the time the 1948 Act was passed, the license was still 32 years from expiration. Moreover, we do not find that the 1948 Act supports an assertion that the 1926 or 1928 Acts imposed a low-cost power requirement on the licensee of the Kerr Project because we believe the 1948 Act should be viewed as referencing the 1930

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[149] 1985 License, 32 FERC at 61,175-76.

[150] 1948 Act, 62 Stat. at 271.

[151] Initial Decision, 157 FERC ¶ 63,030 at P 116.

[152] Committee Report at 3.

[153] Initial Decision, 157 FERC ¶ 63,030 at P 116.

license's requirement, rather than an independent obligation to provide low-cost power to the Districts.

4. Repayment Contracts

87. The 1926 Act made further appropriations of FIIP construction funds contingent on the Districts, acting through Interior, executing repayment contracts with the United States, in order to repay FIIP-related debt.[154] On January 14, 1928, the Districts and the United States, acting through the Secretary of the Interior, executed the required repayment contract (1928 Repayment Contract).[155] After the Districts failed to fully repay FIIP debt through these contracts, the 1948 Act required the Districts to execute amended repayment contracts with the United States.[156]

88. The 1928 Repayment Contract references "water and other rights and privileges appropriated or reserved for said project for power purposes" and a new power plant expected to provide "ample and cheap electrical power for pumping water for irrigation and other project purposes, and for sale, and to aid in paying project construction and other charges . . . contemplated by the [1926 Act]."[157]

Initial Decision

89. The Initial Decision finds that the 1928 Repayment Contract's references to "project" are to FIIP, but finds that because Districts/FJBC failed to establish their claim to water rights at the project, "the consequent need to infer or assume the repayment contract reference to 'water and other rights and privileges appropriated or reserved for said project for power purposes' is directed to Districts/irrigators' water rights fails to satisfy the 'clear Congressional intent' requirement."[158]

90. The Initial Decision comes to the same conclusion regarding the reference to "ample and cheap electrical power . . .," noting that this phrase is "not remotely identical" to the "low-cost [Project] power" as used in articles 26 and 40(c) of the Kerr Project

[154] 1926 Act, 44 Stat. at 465.

[155] Ex. FJB-4.

[156] 1948 Act, 62 Stat. at 269.

[157] Ex. FJB-4 at 7.

[158] Initial Decision, 157 FERC ¶ 63,030 at P 103.

license.[159] According to the Initial Decision, this reference reflects Congress's presumption that FIIP would benefit from access to relatively cheap power in the form of retail distribution.[160]

Brief on Exception and Briefs Opposing Exceptions

91. Districts/FJBC argue that the repayment contracts provide further evidence that Congress intended the licensee of the Kerr Project to provide low-cost power to the Districts, as required by the 1926 and 1948 Acts. They assert that the reference to water rights in the 1928 Repayment Contract is especially clear because the Tribes are not a party to the contract.

92. Trial Staff, Interior and Tribes/Energy Keepers support the Initial Decision's finding that the repayment contracts do not support Districts/FJBC's argument, and reiterate that the repayment contracts do not involve Tribes/Energy Keepers or the Commission's license for the SKQ Project.

Commission Determination

93. The repayment contracts are not persuasive evidence of Congressional intent to require the licensee of the SKQ Project to provide low-cost power. First and foremost, the amended repayment contracts were executed *after* the 1926 and 1948 Acts, and did not involve Congress. What the Districts and Interior agreed to through private negotiation, or even what they interpreted the Acts to mean, is not persuasive evidence of earlier Congressional intent.[161]

94. Even setting aside the amended repayment contracts' limited persuasiveness in demonstrating prior Congressional intent, the quoted language from the 1928 Repayment Contract does not require that cheap power be provided "in exchange for" water rights, as Districts/FJBC assert; that contract merely acknowledges that the Secretary of the Interior is authorized "to permit the use of water and other rights and privileges appropriated or

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[159] *Id.* P 104.

[160] *Id.* P 105.

[161] Indeed, the Supreme Court of the United States has explained that even a subsequent Congress's interpretation of past legislation is not controlling. *Consumer Product Safety Comm'n v.GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("In evaluating the weight to be attached to these statements, we begin with the oft-repeated warning that 'views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'").

reserved for said project. . . ."[162] Moreover, the 1928 Repayment Contract was executed before the 1928 Act, which is significant because the repayment contract required by the 1926 Act contemplated that the Newell Tunnel Project would be completed, in part, using the $395,000 allocated for its construction by that Act. However, the 1928 Act reallocated the unused portion of the $395,000 "for the construction and operation of a power distributing system," and directed that the "net revenues derived from the operation of such *distributing system* shall be used to reimburse the United States…."[163] The 1928 Act does not mention net revenues related to the Kerr Project. Thus, to the extent Districts/FJBC argue that the 1928 Repayment Contract required "ample and cheap electrical power" to benefit FIIP "[through net revenues] by said quoted statutes"[164]—this obligation was eliminated in the 1928 Act. This fact undermines Districts/FJBC reliance on the 1928 Repayment Contract to show Congressional intent.

5. Initial Decision's Failure to Address Issue II: Under What Terms and Conditions Tribes/Energy Keepers must provide Low-Cost Power

95. Districts/FJBC argues that correcting the errors contained in the Initial Decision will result in a conclusion that Tribes/Energy Keepers are legally obligated to continue providing low-cost power to the United States, for the benefit of FIIP or the Districts, and therefore, "it was error and not the product of reasoned decision-making for the Initial Decision to conclude that Issue II and its sub-component issues are moot."[165] They further assert that despite the Initial Decision's conclusion, in light of the fully-developed record, failing to consider Issue II was counter to the interests of administrative efficiency and judicial economy. They request that the Commission reverse the Initial Decision's conclusion that Issue II is moot and find that the sub-component issues should have been determined as described in their Brief on Exceptions. Trial Staff, Interior, and Tribes/Energy Keepers support the Initial Decision's finding that Issue II is moot.

96. We agree with the Initial Decision that Issue II is moot in light of the Commission's conclusion that Tribes/Energy Keepers are not required to provide low-cost power to the United States, for or on behalf of the Districts. The second issue, which was agreed upon by all parties to this proceeding, was explicitly worded such that it would only be addressed if the Presiding Judge and/or Commission concluded that

[162] Ex. FJB-4 at 7.

[163] 1928 Act, 45 Stat. at 212 (emphasis added).

[164] Ex. FJB-4 at 7.

[165] Districts/FJBC Brief on Exceptions at 48.

Tribes/Energy Keepers are obligated to provide low-cost power: "*If there is a legal obligation*, under what terms and conditions shall the output be provided to the United States for and on behalf of the Flathead Irrigation Project or the Flathead, Mission and Jocko Valley Irrigation Districts?"[166] Accordingly, we do not address Districts/FJBC's exceptions 7-11, as these exceptions relate exclusively to the second issue.

The Commission orders:

(A) The Initial Decision is hereby affirmed, in part, and reversed, in part, as discussed in the body of this order.

(B) Districts/FJBC's motion to strike portions of Trial Staff's Brief Opposing Exceptions is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[166] March 2, 2016 Revised Preliminary Statement of Contested Issues (emphasis added).