

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

Séliš Ksanka Qíispé Project

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Project No. 5-000

**ENERGY KEEPERS, INCORPORATED'S AND THE CONFEDERATED
SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION'S
RESPONSE TO LAKE COUNTY COMMISSIONERS' PETITION FOR
OPERATIONAL REVISIONS AT HUNGRY HORSE DAM AND SKQ DAM**

Sxʷnq̓ ʔels l Suw̓ ečm / Ksuk̓it̓mumal̓ 'A ·k' ałmukwa'its, Incorporated (d/b/a Energy Keepers, Incorporated) (“EKI”) and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (“CSKT”) (collectively, the “Licensees”), Licensees for the Séliš Ksanka Qíispé Project No. 5 (the “Project”), hereby submit to the Federal Energy Regulatory Commission (“FERC” or the “Commission”) this response to the March 5, 2024 Lake County Commissioners’ (“Lake County” or the “County”) Petition.¹

The Licensees have consistently complied with the terms of the License, and in implementing that License, act as good stewards of the water and fisheries resources. In its February 5, 2024 letter, FERC determined that the Licensees’ operations in the summer of 2023 and the resulting lake levels of less than full pool were authorized by the License.² Nothing in Lake County’s Petition provides evidence to the contrary. Instead, dissatisfied with that result, Lake County now argues for a “solution” to achieving the summer lake levels preferred by Lake County. This “solution” would improperly require FERC to: (1) change the Flathead Lake levels authorized under Article 43 without the Licensees consent; (2) eliminate or modify Article 56—a

¹ Lake County Commissioners’ Petition for Operational Revisions at Hungry Horse Dam and SKQ Dam to Remediate Dangerously Low Water Levels at Flathead Lake During the Summer Wildfire Season, Project No. 5-000 (filed Mar. 5, 2024) (“Petition”).

² Letter from Kelly Houff, FERC Division of Hydropower Administration and Compliance, to Brian Lipscomb, EKI, Project No. 5-104 (issued Feb. 5, 2024).

Federal Power Act (“FPA”) section 4(e)³ condition; (3) ignore its obligations under the Endangered Species Act; (4) modify Hungry Horse Dam operations, which FERC lacks authority to do; and (5) otherwise act outside of its authority in several ways.⁴ In asking FERC to adopt this “solution,” the County has manufactured public safety concerns as a pretext. The County’s concerns pertaining to public safety are disingenuous at best as the County has recently initiated a process to divest itself of public safety obligations under State and Federal law for crimes involving Indians on the Reservation.⁵

Quite simply, the County’s Petition is nothing more than an effort to ensure a constant summer lake level to benefit a small group of lakefront dock owners—forcing the Licensees to curtail revenue from, and stream flows benefiting Tribal fisheries and other natural resources below, the Project. Importantly, all revenue generated from the Project is used by the CSKT to provide essential governmental services to its members and the residents of the Flathead Indian Reservation, including wildfire prevention and response, a significant portion of which are administered in Lake County.

Moreover, through this Petition, the County further attempts to improperly shirk its own responsibilities to address wildfire safety and evacuation routes through its planning and zoning. Thus, the Licensees respectfully request that the Commission take no action on Lake County’s Petition.

I. The Petition and the Relief Requested Are Procedurally Deficient and Improper.

Lake County appears to be attempting to establish that it has the status to intervene, but there is no proceeding at FERC in which to intervene. The Secretary has issued no Notice under

³ 16 U.S.C. § 797(e).

⁴ See Petition at 5-9.

⁵ See Lake County Resolution No. 22-42(a) (Jan. 3, 2023) (attached hereto as Exhibit A).

Rule 210.⁶ Although styled as a petition, Lake County does not indicate that it is filing said petition under Rule 207 or explain how the relief it is requesting is authorized under Rule 207.⁷

There is no basis for the relief that Lake County requests. Lake County does not assert that the Licensees are violating the License. Indeed, Lake County’s letter concedes that the relief that it is requesting is greater than “mere compliance with the[] FERC license.”⁸

Instead, Lake County attempts to improperly alter the Project License without the Licensees consent by arguing for a “solution” that would change the lake levels authorized under Article 43 and deprioritize the minimum instream flows required by Article 56.⁹ Article 56 is a section 4(e) condition and it cannot be modified without the consent of the Secretary of the Interior. Furthermore, pursuant to FPA section 6, a license “may be altered . . . only upon mutual agreement between the licensee and the Commission after thirty days’ public notice.”¹⁰ If the license does not reserve the Commission’s authority with respect to a matter, then any changes in the license conditions on that matter require the licensee’s consent. Lake County does not point to any article in the License that provides FERC with a basis to reopen the license with respect to wildfire prevention, and thus the changes that Lake County is requesting require the Licensees’ consent.

Lake County also requests relief that FERC cannot grant. In particular, Lake County suggests that the purpose of Hungry Horse Dam must be changed, and it must be operated to

⁶ 18 C.F.R. § 385.210 (2023).

⁷ *Id.* § 385.207.

⁸ Petition at 2.

⁹ *Id.* at 6-7.

¹⁰ 16 U.S.C. § 799.

supplement lake levels in Flathead Lake.¹¹ Hungry Horse Dam is under the jurisdiction of the Department of the Interior, not FERC.

Finally, Lake County asserts that the Licensees should lease the project to someone with more experience and expertise, presumably an entity that is not a federally-recognized Indian tribe or its wholly-owned company.¹² The Licensees are experienced and expert operators of the Project. As FERC already concluded, the Licensees are in full compliance with the terms of the License in how they are managing lake levels and frankly believe they are operating in the best interests of the environment and the public overall. Regardless, there is no mechanism by which licensees can be forced to lease their projects.

In sum, there is no basis under which FERC can or should provide the relief that Lake County is requesting without the consent of both the Licensees and the Department of the Interior. The Licensees do not consent to the requested modifications to the License.

II. Inadequate Egress in the Communities That Surround Flathead Lake Should Be Addressed by Local Governments, Not FERC.

FERC guidance makes clear that wildfire hazards should be addressed by local governments, not FERC. As FERC's 1992 *Guidelines for Public Safety at Hydropower Projects* recognizes: "FERC is primarily concerned with the hazards created by project structures and operations. . . . [T]he implementation of safety measures to minimize accidents that are not associated with project structures or operations is usually the responsibility of local entities and law enforcement agencies."¹³ Lake County does not contend that Project structures or operations cause wildfires or increase the potential for wildfires to occur. Wildfires are a natural part of the

¹¹ Petition at 8.

¹² *Id.* at 8-9.

¹³ FERC, *Guidelines for Public Safety at Hydropower Projects* at 2 (Mar. 1992), available at <https://www.ferc.gov/sites/default/files/2020-04/public-safety.pdf>.

landscape. Wildfires are not caused by the Project, regardless of lake level. Thus, pursuant to FERC guidance, safety measures to address wildfire hazards are within the purview of local entities, not FERC. Where FERC has addressed wildfire through licensing conditions, it has been where the project directly increases the risk of wildfire. That is not the case here.

Indeed, CSKT dedicates significant resources to public safety and wildfire prevention and protection. CSKT operates the primary law enforcement agency, the primary fire prevention and fuel reduction program, and the primary wildfire suppression agency on the Flathead Reservation and within Lake County. In addition, CSKT voluntarily provides significant financial support to Lake County.

Lake County has many options to address their concerns, particularly through land use planning and zoning on private lands within the County, which may specifically include planning for avoidance of development that would involve danger due to wildland fire. To the extent that the County is now concerned that neighborhoods on private lands surrounding Flathead Lake lack adequate evacuation routes for wildfire, that situation was caused by deficient zoning and planning policies of the County, and it is the County's responsibility to remedy that situation.

III. The County's Assertion That Keeping Flathead Lake at Full Pool Is Needed for Public Safety Is Meritless.

The County is attempting to disguise its interest in keeping Flathead Lake at full pool to achieve recreational desires of a small group of lakefront dock owners in the cloak of a public safety concern. However, there is no merit to the County's contention that keeping Flathead Lake at full pool is necessary for public safety in the event of a wildfire, and the County's Petition must also be denied on that basis.

Indeed, it would be deeply irresponsible for the County to rely on Flathead Lake as a secondary evacuation route for several reasons. First and foremost, evacuating by boat would be

unsafe, putting lives in danger. The same extreme weather conditions that make wildfire so dangerous and deadly also make boating unsafe during fire events. For example, evacuation for the Boulder 2700 fire occurred in the middle of the night under extreme weather conditions with wind gusts up to 60 MPH. Launching a boat in these conditions would have been extremely hazardous. Relying on a boat for evacuation in these conditions would put the passengers of any boat in danger.

Second, regardless of the Project's operations, there is no guarantee that Flathead Lake could be maintained at full pool during the summer months.

Third, Flathead Lake must be drawn down during certain times of the year for flood control purposes. Although drawdown typically does not coincide with wildfire season, the recent 2024 Smokehouse Creek Fire in Texas and 2021 Marshall Fire in Colorado demonstrate that wildfires may occur at any time of the year.

Fourth, many residents around Flathead Lake do not have access to private docks or boats, and Flathead Lake is unavailable to those residents as an evacuation route. Thus, if the County's goal is to provide a secondary evacuation route to protect as many members of the public as possible, drawing down the Lake and exposing shoreline around the Lake provides a more appropriate form of egress as it would allow homeowners to use the exposed shoreline as a potential way out.

Fifth, encouraging residents to take to the Lake during wildfire is dangerous because it leaves those individuals exposed to smoke inhalation. Critically, Lake County provides no citation to any authority that suggests that waterbodies serve as an appropriate form of wildfire egress, and the Licensees are not aware of any. To the extent that those with boats can and should rely on the Lake as an evacuation route, the Licensees' operations do not preclude them

from doing so. The property owners could simply decide to extend their boat launches or install floating docks.

Indeed, the Licensees are aware of no situations where fire suppression or emergency response agencies have ever recommended evacuation by boat on the Lake. In one instance recreationists were evacuated from an uninhabited island on the Lake after starting a fire while on the island. There have been no other instances where fire agencies have deemed a water-based evacuation a safe method of avoiding a wildfire.

IV. Conclusion

Lake County's Petition not only requests relief that cannot be granted, but the concerns it identifies are self-inflicted and its solutions are meritless. The Licensees request that FERC take no action on Lake County's Petition, which is nothing more than a transparent attempt to disguise the recreational interests of an elite select few in the cloak of a public safety concern.

Respectfully submitted,

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Dated: March 20, 2024

Exhibit A

Lake County Resolution No. 22-42(a) (Jan. 3, 2023)

RESOLUTION No. 22-42 (a)
TO WITHDRAW FROM PUBLIC LAW 280

- WHEREAS, Public Law 280 is a Federal law that defines criminal jurisdiction over tribal Members within reservation boundaries; and
- WHEREAS, When enacted, Public Law 280 required mandatory participation by state and tribal governments in certain states, and allowed voluntary participation in other states; and
- WHEREAS, Montana is a "Voluntary Participation" State that required an agreement between the State of Montana and the Bureau of Indian Affairs, at the request of the Confederated Salish and Kootenai Tribes ("CSKT") in order for the State to assume jurisdiction over tribal members; and
- WHEREAS, In 1963 The State of Montana enacted Montana Code Annotated, 2-1-301 (codified at that time as RCM 1947, 83-801). The statute, titled "Assumption of Criminal Jurisdiction of Flathead Indian Country", provided, "The state of Montana hereby obligates and binds itself to assume, as herein provided, criminal jurisdiction over Indians and Indian territory of the Flathead Indian Reservation and country within the state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st session)"; and
- WHEREAS, on May 15, 1964, the CSKT passed tribal ordinance 40-A, consenting to the state's assumption of Public Law 280 jurisdiction over tribal member's and
- WHEREAS, on May 19, 1964, the Board of Lake County Commissioners did by resolution consent to the adoption of tribal ordinance 40-A, as required by state law, and Lake County has been a participant in the implementation of Public Law 280 between CSKT and the State of Montana since that time; and
- WHEREAS, the County's participation historically provided benefits to residents of Lake County, tribal members and the State of Montana in respect to crime prevention, investigation, deterrence, prosecution, rehabilitation and treatment; and
- WHEREAS, the circumstances surrounding the County's participation have changed significantly in the ensuing nearly six decades. In 2017 the State of Montana conducted a fiscal analysis of the cost to Lake County of enforcing tribal criminal jurisdiction in Lake County pursuant to Mont. Code Ann. 2-1-301. It determined the cost was \$4.011 million at that time, and would increase to \$4.383 million by FY 2021; and results in:
1. Less control of county budgeting due to various and unanticipated costs and consequences of Public Law 280 compliance that ought to be borne by the State of Montana rather than Lake County taxpayers; and
 2. Diversion of limited law enforcement personnel such that there is increasing evidence of a loss of control of Lake County borders such that unlawful, scheduled illicit drugs such as fentanyl and methamphetamines have become increasingly common in Lake County; and
 3. Lost opportunity costs in the areas of affordable housing, drug court, financing and opioid treatment and rehabilitation.
- WHEREAS, In recognition of the need for funding for law enforcement, in June of 2008, County voters approved a public safety levy that has no sunset provision.
- WHEREAS, As a result of this voted levy, property taxpayers have contributed approximately 15 million dollars in additional tax revenue since 2008 to enhance the County's ability to fund public safety. The majority of funds raised by the levy are being used to offset the rise in PL280 costs.

WHEREAS, In 2020 County voters rejected a levy request to construct and staff a new detention center; and

WHEREAS, Nearly 50% of real property in Lake County is tax exempt; and therefore Lake County is without adequate revenue to fund construction of a detention center or added law enforcement to provide for continued participation in Public Law 280; and

WHEREAS, Lake County does not have the economic resources to continue participation in Public Law 280 without significant detriment to the real property taxpayers of Lake County, Montana; and

WHEREAS, The State of Montana is not providing funding for County costs incurred from Public Law 280; and

WHEREAS, The 2021 Legislature of the State of Montana enacted Montana Code Annotated 2-1-306(3), providing "no sooner than six months after July 1, 2021, and after consulting with tribal government officials concerning withdrawal, the Board of County Commissioners of Lake County may, by resolution, withdraw consent to enforce criminal jurisdiction on behalf of the State of Montana over the Confederated Salish and Kootenai Tribes and all federally recognized tribal members, within six months after receipt of the resolution, the governor shall issue a proclamation to that effect."

WHEREAS, Lake County taxpayers cannot continue to fund the State of Montana's responsibilities with respect to Public Law 280 without continually compromising other County services; and,

WHEREAS, All attempts by the Board of County Commissioners of Lake County, Montana, for assistance or fiscal support by and through the State of Montana to meet the costs associated with Public Law 280 on and within Lake County have fallen on deaf ears;

WHEREAS, All requirements necessary to the withdrawal of consent by Lake County to enforce criminal jurisdiction on behalf of the State of Montana over the Confederated Salish & Kootenai Tribes and all federally recognized tribal members have been met; and,

WHEREAS, the Board has recently learned that one or more bills are being drafted, and are likely to be introduced at the 2023 Session of the Montana Legislature;

WHEREAS, the aforementioned bills are designed to, and may satisfactorily address the funding problems faced by the County; and

WHEREAS, the Board desires to allow the Legislature adequate time to consider and address the issue.

WHEREAS, Lake County held a public hearing on Tuesday, January 3, 2023 at 2:00 pm in the Large Conference Room of the Lake County Courthouse at 106 4th Avenue East, Polson, MT 59860, and took additional public comment on the proposed action; and

NOW, THEREFORE IT IS RESOLVED AS FOLLOWS:

Lake County hereby withdraws its consent to enforce criminal jurisdiction on behalf of the State of Montana over the Confederated Salish and Kootenai Tribes, said withdrawal becoming effective May 26, 2023 unless vacated prior to that date;


The effective date of this resolution is May 26, 2023;


The Board of County Commissioners reserves the right to amend, modify or withdraw this resolution in consideration of legislative action taken on or before its effective date;


Unless amended, modified or withdrawn, this resolution shall be formally delivered to the Governor of the State of Montana on or about May 26, 2023 along with a request that the Governor initiate the procedure set forth in Mont. Code Ann. § 2-1-306(3), which provides, "Within 6 months after receipt of the resolution, the governor shall issue a proclamation to that effect."

PASSED AND ADOPTED this 3 day of January, 20 23.

BOARD OF LAKE COUNTY COMMISSIONERS


Gale Decker, Chairman


Steve Stanley, Member


William D. Barron, Member

ATTEST:

by  dep-
Katie Harding, Clerk & Recorder

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary in the above-captioned proceeding.

Dated at Washington, DC this 20th day of March, 2024.

/s/ Melear Tauch
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