

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

Selis Ksanska Qlipse (SKQ) Dam

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FERC Project No. 5

**NATIONAL ORGANIZATION TO SAVE FLATHEAD LAKE (NOSFL) REPLY  
TO OPPOSITION OF ENERGY KEEPERS INC. AND CONFEDERATED SALISH AND  
KOOTENAI TRIBES OF THE FLATHEAD RESERVATION TO PETITION FOR  
OPERATIONAL REVISIONS TO REMEDIATE LOW WATER LEVELS AT  
FLATHEAD LAKE**

**I. OVERVIEW**

The National Organization to Save Flathead Lake (NOSFL) replies to the response by Energy Keepers Inc. and Confederated Salish and Kootenai Tribes of the Flathead Reservation (Energy Keepers or Licensees) opposing NOSFL's petition seeking modest operational changes to avoid a repeat of last summer's disastrously low water levels at Flathead Lake that jeopardized boaters' safety and resulted in substantial economic losses to the local community as evidenced by continued letters by impacted stakeholders to the FERC docket supporting the NOSFL petition and urging relief.

As we will discuss throughout this reply, Energy Keepers' response contains material inaccuracies and omissions. What's most alarming about the response is that Energy Keeper never disputes the extensive harm suffered by NOSFL members and the broader community but instead suggests that these impacts simply don't matter. Energy Keeper's lack of respect for all beneficial users – as require by the license<sup>1</sup> -- likely explains why Energy Keepers has not implemented a drought management plan in its eight years as licensee in direct violation of Article 60, has not taken any steps as did its predecessors to make operational adjustments to protect recreational uses

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<sup>1</sup> *Montana Power Company*, Order Approving Settlement an Issuing New License, 65 FERC ¶ 61,070 at 61,178, P. 5 (1985).

and gone so far as to urge the Commission not to rule on NOSFL's petition at all, depriving NOSFL of its due process rights to a response from the Commission and an opportunity to seek appeal.

Accordingly, the Commission should disregard Energy Keeper's response and grant NOSFL's petition. Because this reply will assist in developing a complete record, and briefly addresses the Commission's February 5, 2023 Compliance Letter to Energy Keepers (which is new information), the Commission should accept this reply and waive the prohibition on an answer to an answer.<sup>2</sup>

## II. ARGUMENT

This reply focuses on two main points. First, Energy Keepers is in violation of Article 60 of the license by failing to file or update the Drought Management Plan (DMP), which the Commission has held is the sole responsibility of the licensee.<sup>3</sup> Neither compliance with the MOU nor coordinating with the Corps excuse Energy Keepers from developing and implementing a DMP, and the Commission erred in its February 5, 2024 letter finding otherwise. Second, regardless of whether Energy Keepers is in violation of the license or not, the Commission has authority to adjust project flows or modify the terms of the license to remediate unexpected adverse impacts, including those to recreation.<sup>4</sup> Energy Keeper has not shown that the modest operational changes proposed by NOSFL or implemented by predecessor licensees would adversely affect any other resources.

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<sup>2</sup> *Grand River Dam Authority*, 186 FERC ¶ 61,045 (2024)(waiving Rule 213 (a)(2) and accepting reply that aids in record development).

<sup>3</sup> *PPL Montana*, 98 FERC ¶ 61,098 (2002)(holding that licensee has sole responsibility for submitting drought management plan under Article 60).

<sup>4</sup> *Allegheny Hydro No. 8 & 9*, 88 FERC ¶ 62, 170 (1999)(amending license to require flashboards to maintain lake elevations for boating), *Alabama Power Company*, 53 FERC ¶ 61,217 (1990), affirmed *Alabama Power v. FERC*, 979 F.2d 1561 (1992)(ordering new minimum flows to protect fish and enhance recreation resources, over objection of licensee).

**A. Energy Keepers is in violation of Article 60 of the license because it did not develop and implement a DMP.**

**1. Article 60 is a key provision for balancing competing interests in the event of a drought.**

Article 60 of the license requires the licensee to develop and implement a drought management plan in consultation with the Corps, Interior, Reclamation, and the Montana Department of Environmental Quality. Importantly, Article 60 is a critical provision of the license, developed to address the possibility that drought conditions could result in a conflict between Interior's minimum flow prescriptions in Article 56 and the lake elevations required by Article 43. In fact, Interior's Final Environmental Impact Statement (FEIS) describes that the purpose of the DMP is to "avoid and resolve potential water use conflicts in years where there is insufficient water" to meet the requirements of Articles 43 and 56.<sup>5</sup> Moreover, contrary to Energy Keepers' revisionist interpretation of Article 60 as having the narrow function of maintaining minimum flows during drought,<sup>6</sup> the FEIS makes clear that Article 60 was intended to spread the adverse effects of drought as equitably as possible across all users. For that reason,

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<sup>5</sup> FEIS at Section 1.2, p. 1-4 (March 2010), online at the NOSFL Website at <https://fillthelake.com/flathead-lake-news>

<sup>6</sup> Energy Keepers' Answer at 10-12.

the FEIS rejected alternatives that prioritized one use over another:<sup>7</sup>

## **2.4 ALTERNATIVES ELIMINATED FROM FURTHER STUDY**

In addition to the alternatives described in section 2.3 above, BIA considered three other alternatives that relied on existing procedures, without the use of climate forecasting tools, to respond to drought conditions. They included: (1) Giving priority to sustaining lake levels by reducing instream flows; (2), giving priority to meeting the minimum instream flows by reducing lake levels, and (3) allowing flexibility relative to timing and magnitude of the minimum instream flows to benefit lake levels.

Based on additional technical work (described in Appendix B), BIA concluded that implementation of alternatives that do not resolve conflicts between lake levels and minimum instream flows would negatively affect either the Flathead River below the Kerr Project or Flathead Lake elevations or both. In addition, since these alternatives did not effectively resolve conflicts between the requirements of Article 43 and Article 56 as required by Article 60, they did not meet the purpose and need for agency action and have been eliminated from further study.

## **2. Energy Keepers has not diligently pursued compliance with Article 60.**

The Commission has held that the licensee has sole responsibility for compliance with the requirements of Article 60, specifically development and implementation of the DMP.<sup>8</sup> As licensee, Energy Keepers is responsible for compliance with Article 60. Yet in the eight years since the license was transferred, Energy Keepers has not implemented the DMP or taken any steps to obtain final approval of the plan from Interior.

Energy Keepers also contends that it should not be required to abide by the DMP because it is outdated. Specifically, Energy Keepers claims that the DMP (1) is triggered by predicted water supply volumes which do not capture rapid snow melt and (2) assumes that droughts will only occur once every 18 years and not more frequently.<sup>9</sup> Energy Keepers' characterizations are inaccurate or irrelevant and do not excuse failure to implement the DMP. Regarding triggers,

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<sup>7</sup> *Id.* at Section 2.4.

<sup>8</sup> *PPL Montana*, 98 FERC ¶ 61,098 (2002) at 61,308 (holding that PPL Montana has responsibility and authority to develop the DMP).

<sup>9</sup> Energy Keepers Reply at 14.

Energy Keepers is simply wrong that the DMP is activated by water supply volumes. Appendix B to the FEIS describes the multiple models used to predict drought which take account of forecasted precipitation, snowpack and runoff and climate factors like El Nino.<sup>10</sup> Under these models, both last year's lower-than-normal snowpack of 2023, and now 2024 trigger the DMP – proof that the DMP remains valid. Meanwhile, the purported increased frequency of droughts since the FEIS was completed confirms that far from being outdated, the DMP is more necessary than originally anticipated.

Energy Keepers also argues that it is not bound by the DMP because the plan was never finalized.<sup>11</sup> But Interior's recalcitrance does not absolve Energy Keepers' inaction. At the very least, Energy Keepers could have taken steps to prod Interior to act or asked the Commission to intercede. What Energy Keepers and the Commission cannot do, however, is to continue to allow a void in place of a pivotal license provision that would maximize protection for all beneficial uses in the event of a drought.

Finally, Energy Keepers suggests – and the Commission erroneously agreed – that its coordination with the Corps is a substitute for following the DMP.<sup>12</sup> Article 60 does not give the Corps unilateral authority over drought management; to the contrary, the Corps is one of four other agencies that must be consulted.<sup>13</sup> Nor does Energy Keepers "mutual agreement" with the Corps under the MOU to modify Flathead Lake levels due to low flows<sup>14</sup> a proxy for a DMP. For starters,

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<sup>10</sup> FEIS, Appendix B, Part 2.1.2 (modeling triggers for Alternative 2).

<sup>11</sup> Energy Keepers' Response at 10.

<sup>12</sup> Energy Keepers' Response at 15, Commission Letter to EKI at 6 (February 5, 2023)(noting that Corps was consulted for drought management).

<sup>13</sup> *Montana Power Company*, Order Approving MOU, 35 FPC 250 (1966)(noting that licensee and Corps will exchange information on flood control under the MOU).

<sup>14</sup> Energy Keepers' Response at 9.

because the MOU is incorporated into the license,<sup>15</sup> any modifications to the MOU terms -- even with mutual agreement -- require Commission approval of a license amendment or variance which does not appear to have happened here. Moreover, modifying the MOU and Article 43 results in recreational users bearing the brunt of drought impacts which is contrary to the DMP's goal to protect all uses in drought conditions.

**B. Even if Energy Keepers has not violated the license, the Commission may still order the operational changes proposed by NOPSL.**

**1. The Commission has authority to revise project operation to address impacts.**

Energy Keepers contends that it is complying with the provisions of its license,<sup>16</sup> so no Commission action is required to address NOPSL's complaints. Not so. Even if the Commission finds Energy Keepers in compliance with the narrow letter of the license,<sup>17</sup> it still has authority to require Energy Keepers to take action to remediate known and substantial harm to recreational uses under Article 12 of the license. And as NOPSL pointed out, on two occasions, the Commissioner exercised its reserved authority to require both structural and operational license modifications to protect recreational interests.<sup>18</sup>

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<sup>15</sup> *Id.* (noting that MOU is incorporated into Article 21 (now Article 43) of the license and includes terms of settlement with lakeside residents).

<sup>16</sup> Energy Keepers Response at 9-12.

<sup>17</sup> The Commission's letter of February 5, 2023 responded to complaints by roughly 25 lake users alleging that Energy Keepers' failure to maintain lake levels violated the license. The Commission found Energy Keepers had complied with the license but did not address the violation of Article 60 raised here by NOSFL. Nor did the letters address the safety issues that result from low water levels such as exposed rock described in NOSFL's petition at 12-13, leaving the Commission to observe that no safety concerns had been raised.

<sup>18</sup> *Allegheny Hydro No. 8 & 9*, 88 FERC ¶ 62, 170 (1999)(amending license to require flashboards to maintain lake elevations for boating), *Alabama Power Company*, 53 FERC ¶ 61,217 (1990), affirmed *Alabama Power v. FERC*, 979 F.2d 1561 (1992)(ordering new minimum flows to protect fish and enhance recreation resources, over objection of licensee).

Not only are the modifications proposed by NOPSL within the Commission's power to grant, but they are also proven to be feasible. As described in the petition, on at least three occasions, predecessor licensees obtained approval for modifications to minimum flows or other license requirements to address anticipated drought. There is no reason that Energy Keepers cannot do the same.

**2. Energy Keepers does not offer any credible reason for not adopting NOSFL's proposed modifications.**

As noted earlier, Energy Keepers does not dispute NOSFL's evidence of dangerously low water levels that imperiled the safety of lake users and wreaked havoc on the community's economy. Instead, Energy Keepers suggests that NOSFL's members are a small select group (notwithstanding the dozens of complaints on the docket and the multiple license protections for lakeside communities) whose interests don't count and callously asserts that they should install floating docks, without so much as acknowledging the associated permitting hassles and extensive costs. Unfortunately, as a licensee, Energy Keepers does not have the same luxury as a private company to operate the project to advance its interests at the expense of other stakeholders. Instead, Energy Keepers is obligated to operate the project to balance and optimize all recognized beneficial uses.

What's more, adopting NOSFL's changes would have minimal effect on other users. The record lacks any persuasive evidence to show that implementing NOSFL's modest operational proposal would adversely impact any other users – including Energy Keepers itself. Although Energy Keepers' asserts that operational changes would harm fish and wildlife resource, the FEIS already determined that the short-term reductions to minimum flows in the DMP needed to maintain lake levels at or near full pool would not have significant adverse environmental impacts. Energy Keepers also says that NOSFL's proposal will interfere with its obligation to

manage erosion under Article 68<sup>19</sup> which required construction of physical barriers to mitigate erosion, not operational changes. And it is hard to figure how NOSFL's proposed flow changes – which apply primarily in spring and summer would interfere Energy Keepers' post-Labor Day drawdowns which it claims reduces wave power concentration and further controls erosion.<sup>20</sup>

### **III. CONCLUSION**

The Commission has before it largely undisputed adverse impacts to recreation, safety, and the local economy on one hand and a short-term, non-invasive solution to mitigate those impacts with minimal or non-existent impacts to Energy Keepers or any other users. Based on this record, there is simply no rational basis for the Commission to reject NOSFL's petition.

Moreover, the Commission must deny Energy Keepers' offensive request that the Commission not act on NOSFL's petition. As NOSFL has urged, with summer just three months away, there is still time for Energy Keepers to implement operational changes and seek any approvals that may be required. Failure to act by the Commission means another recreational season would be lost and would leave NOSFL in limbo, with no opportunity to seek judicial review.

For all these reasons, along with those set forth in the original petition, the Commission must expeditiously grant NOSFL's petition or in the alternative, convene a technical conference for stakeholders to develop an operational protocol for the 2024 summer season.

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<sup>19</sup> Energy Keepers Response at 7.

<sup>20</sup> Id.



Respectfully submitted,

*/s/ Carolyn Elefant*

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Carolyn Elefant  
LAW OFFICES OF CAROLYN ELEFANT  
7315 Wisconsin Avenue, #400 West  
Bethesda, Maryland 20814  
(202) 297-6100  
[carolyn@carolynelefant.com](mailto:carolyn@carolynelefant.com)

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## **CERTIFICATE OF SERVICE**

I certify that on February XXX, 2024, I have served the foregoing Petition through the e-file system and on the parties by email at the contact information listed at the Commission website.

*/s/ Carolyn Elefant*

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Carolyn Elefant