Lake County Commissioners 406-883-7204 Fax (406) 883-7283

LAKE COUNTY

106 4th Ave. E. Polson, Mt. 59860

March 1, 2024

BEFORE THE UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION

Selis Ksanka Qlispse (SKQ) Dam **FERC Project No. 5**

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

"Public safety is a core responsibility of government entities, ensuring the well-being and security of communities. Through law enforcement, emergency response, regulatory frameworks, and public education, governments protect citizens, prevent crime, and manage disasters effectively."[1] As public officials we are obligated to bring a real and dangerous public safety threat to the attention of FERC. The purpose of this petition is to make your agency aware of the public safety hazard precipitated by the historically low levels of Flathead Lake during the summer of 2023. The lake level is controlled by the operations of SKQ Dam, owned by the Confederated Salish and Kootenai Tribes (CSKT) and managed by Energy Keepers, Inc. (EKI) a CSKT corporation, and Hungry Horse Dam (HGH), a Bureau of Reclamation facility.

Previously, several documents have been sent to your agency from our County, the National Organization to Save Flathead Lake (NOSFL) and EKI providing in detail the factors that contributed to the historic low water levels. This letter will not attempt to re-visit those arguments. The purpose of this petition is to inform your agency in detail of the public safety concern brought about by the dangerously low level of the lake during western Montana's wildfire season.

Although in your response to NOSFL's petition you state that, "Further, no public safety incidents were reported to the Commission," [2] the petition did mention that in September of 2023 the Lake County Commissioners filed comments highlighting hazards associated with low water levels such "as loss of a secondary escape route during a wildfire."[3]

In our role as Commissioners we do not claim to be experts in the operation of dams and reservoirs, but we can look at information related to those operations, and identify potential solutions that should be

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[1] Govbusinessreview.com; *"Ensuring Public Safety:"* The Role of Government in Protecting Communities, July 11, 2023.

[2] See FERC *"Non-compliance Allegations and Complaints Regarding Flathead Lake Levels;"* letter to Brian Lipscomb, CEO EKI, February 5, 2024, pg. 6.

[3] See NOSFL *"Petition for Operational Revisions to Remediate Dangerously Low Water Levels at Flathead Lake;"* January 5, 2024, pg. 12.

studied in depth by FERC. Looking at the low level of Flathead Lake simply from the perspective as to whether or not EKI complied with license requirements, which FERC has done, presents no potential solutions to future low lake levels.[4] In addressing public safety of thousands of lakeshore residents in Lake and Flathead counties, EKI must be held to a greater degree of accountability than mere compliance with their FERC license.

CONTACT INFORMATION AND STATEMENT OF INTERVENTION

Lake County is one of 56 counties in the State of Montana. As such, the County is governed by elected officials who occupy the offices of Commissioner, Sheriff, Clerk and Recorder, Treasurer, Superintendent of Schools, County Attorney and Clerk of District Court. State statutes define the authority and jurisdictional boundaries of each office. The County's population is approximately 32,000 with many residents being part-time. The part-time residents own homes on Flathead Lake and spend their summers living and relaxing in the area. During the summer months the population grows dramatically as people plan vacations in the area and spend time in vacation rentals, bed-and-breakfasts, or hotel rooms.

A. The south one-half of the bed of Flathead Lake is owned by the United States, but managed for the benefit of the CSKT. [5] The SKQ Project operates pursuant to a 1985 joint licensing agreement (amended) issued by FERC to the Montana Power Company and the CSKT Tribes of the Flathead Nation. The licensing agreement provided for the CSKT and EKI to be co-licensees holders in 2015.[6]

B. Because the County satisfies the criteria for intervention under Rule 214 of the Commission Rules of Practice and Procedure, 18 C.F.R. 385.214, and in light of the County's previously granted intervention in the P-5 Project (Kerr Dam), its intervention has previously been affirmed.[7]

I. THE WILDFIRE SEASON IN WESTERN MONTANA

A. For a variety of reasons, the wildfire season in western Montana has steadily increased in both length of time and severity. Forested lands that surround the lake have not been spared from destruction by these fires. The Montana Department of Natural Resources and Conservation (DNRC) has posted the following statement on their website, "Fire is a part of Montana. That means that we, as Montanans, must learn how to live with fire. You can prepare yourself, your

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[4] See FERC *"Non-compliance Allegations and Complaints Regarding Flathead Lake Levels;"* letter to Mr. Brian Lipscomb, February 5,2024, pages 5 and 6.

[5] *Confederated Salish and Kootenai Tribes v. Namen,* Civ. No. 2343, August 14, 1974.

[6] *See* letter from Energy Keepers, Inc., to FERC; August, 2023, pg. 1.

[7] *See "Notice Granting Intervention,"* Doc. Accession # 20140708-3052, July 7, 2014.

home, and your community for wildfire." One of the preparations encouraged by the DNRC is to, "Prepare your family and community for smoke impacts and **evacuation,**" (our emphasis).[8]

B. Flathead Lake's lakeshore encompasses nearly 185 miles in Lake and Flathead counties. A significant portion of the lakeshore lies within areas designated as "Wildland Urban Interface, (WUI)" land. This land is defined as, "The WUI is the zone of transition between unoccupied land and human development."[9] Contributing significantly to the dangers posed by wildfire is the growth of this WUI especially along the shore of Flathead Lake. New data indicates that between 2005 and 2024 the WIU acres has grown by 105,154 acres and now totals 312,267 acres.[10]

C. The *Lake County Community Wildfire Protection Plan* is a collaborative effort between Lake County, the Montana Department of Natural Resources, and the Confederated Salish and Kootenai Tribes. The document provides the following narrative describing the current weather conditions of Lake County: "Climate change, including increasing air temperatures and less rainfall, is causing warmer and drier conditions that favor higher fuel loads and increase the risk of larger, more frequent, and more intense wildfires in Lake County. Hotter, drier summers in particular are causing longer fire seasons in Montana."[11]

II. RECENT FIRES ALONG THE WILDLAND URBAN INTERFACE OF THE SHORELINE OF FLATHEAD LAKE

A. The arson-caused 2021 Boulder Fire burned approximately 2,590 acres and destroyed 14 homes and 17 structures along the east shore of Flathead Lake and on Finley Point.[12] Evacuation of residents residing on Finley Point following blowup of the fire was difficult due to the single road residents relied upon for access to their homes. Firefighters and law enforcement officers risked their lives to evacuate residents and save whatever structures they could. "The power and energy and force that came down that mountain was apocalyptic. The fire behavior was absolutely out of this world," John McCullough, Chief of the Finley Point/Yellow Bay Fire Department observed.[13] Thankfully, all residents were successfully evacuated. During the evacuation process, a secondary escape route was available as a last resort. The lake was at full pool, people still had their boats on lifts or in the water and could have used them to flee the destructive blaze if necessary.

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[8] The Montana Department of Natural Resources; *"DNRC Fire Prevention and Preparedness;"* dnrc.mt.gov.

[9] USFA.FEMA.GOV; U.S. Fire Administration

[10] *Lake County Community Wildfire Protection Plan,* 2024, Pg. 11.

[11] "2023 *Lake County Community Wildfire Protection Plan;"* Pg. 14.

[12] Daily Missoulian, *"Suspect in Boulder 2700 fire convicted, sentencing set for May;"* Feb. 14, 2024, Zoe Buchli.

[13] Daily Missoulian, *"Polson community heals following Boulder 2700 fire;"* John McCullough, Chief of the Finley Point Yellow Bay Fire Department.

B. The Elmo Fire was detected along Highway 28 on July 29, 2022, at approximately 4:30 PM. Although local Volunteer Fire Departments, Tribal Fire Management, Montana Department of Natural Resources, and Missoula Smokejumpers responded quickly, the fire grew significantly in the first few hours, prompting the initial evacuation of residents. Elmo is a small community situated on the west shore of Flathead Lake. Many residents are part-time and own homes with lakeshore or lake access. Although not heavily forested, the community and homeowners live in fear of wildfire and the danger it presents to their homes and lives. "For the second summer in a row, a wildfire has destroyed homes near the shores of Flathead Lake, offering a stark reminder of the danger fire poses to one of the fastest-growing areas in the state."[14]

C. On July 4, 2003, local firefighters responded to a fire called in to Lake County dispatch from King's Point Road in Polson, MT. King's Point residents can only access their property via a single narrow causeway connecting the mainland with the former island. The *County Dispatch Case Report* noted that emergency personnel were "unable to get across (the causeway) to evacuate, (due to) too much heat and traffic."[15] Fortunately for residents of the Point, the Polson Fire Department's fireboat was used to contain the fire to a single house and nearby foliage and trees. The summertime population of the Point is estimated to be over 800. The vulnerability of the area to wildfire is significant; heavily wooded with large amounts of fuel such as downfall, pine needles, and dried grasses during the summer fire season. The low lake level during the summer of 2023 put residents of the Point in an extremely vulnerable position if a wildfire had erupted any time after mid-summer. By that time, most residents had removed their boats from the water, or their boats were on lifts that were unusable due to low water. The only escape route available to residents was the narrow causeway and the fire department's boat would not have been an option as a firefighting resource due to the low lake level. A secondary escape route by way of water utilizing a boat was not an option. One of the most important tenants of wildfire safety; a secondary escape route was unavailable. The Governor of Montana mentioned the importance of a secondary escape route after visiting the Elmo fire in 2022. A post from his office stated the following, "Create and practice an evacuation plan with your family. Prepare an emergency "Go Kit" and **plan at least two evacuation routes,"**[16] (our emphasis)

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[14] Montana Free Press, *"Where Wildfire Meets Population Growth;"* Justin Franz, August 4, 2022.
[15] *Lake County Case Report*-203CR0012868; July 4, 2003.
[16] *See* MT.gov, Governor's Office, August 5, 2022.

V. EKI HAS STATED THAT THE LOW LAKE LEVEL IS THE "NEW NORMAL" AND FERC HAS ERRORONESSLY AGREED.

A. EKI has stated numerous times the initial cause(s) of the low lake level during the summer of 2023 was attributed to:

1. Low snowpack during the 2022-2023 winter in the Flathead Basin drainages that supply water to Flathead Lake.
2. An early and warm spring that resulted in an early runoff of the snowpack, possibly due to climate change;

B. On August 28, 2023, with the lake 30.5 inches below full pool, an elevation never previously experienced during the summer recreation season and the snowpack gone, EKI provided further explanation of the cause of the lake drawdown by relating that contractual obligations downstream of SKQ Dam forced them to maintain outflows greater than inflows into the lake during the summer months.[17]

C. In that same letter, EKI warned lake users that the low level may be the "new normal," and longer docks, or floating docks, might be necessary in the future for residents with lakeshore property.[18]

D. FERC's conclusion to the petition filed by the NOSFL was summarized in the following statement: "Based on our review of the information you provided in your WY 2023 filing, your monthly operations report, publicly available data, comment letters, and our independent analysis, you complied with the operational requirements of your license in the summer of 2023."[19] Again, that conclusion does nothing to address the low lake levels that threaten thousands of Lake and Flathead County residents living in homes on the shore of Flathead Lake during the summer wildfire season. EKI must be held to a higher standard than mere compliance with their license when it comes to public safety.

VI. TWO SOLUTIONS TO THE LOW LAKE LEVEL INTO THE FUTURE.

Several steps related to the operation of Hungry Horse Reservoir and SKQ Dam, if taken together, could prevent a low lake level as experienced in the summer of 2023.

A. The restoration of the original purpose for construction of Hungry Horse Dam and reservoir is needed.

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[17] *See* letter from Energy Keepers, Inc., to FERC; August, 2023; Page 3.
[18] *See* letter from Energy Keepers, Inc., to FERC; August, 2023; Page 7.
[19] See FERC *"Non-compliance Allegations and Complaints Regarding Flathead Lake Levels;"* letter to Mr. Brian Lipscomb, February 5,2024, pages 5 and 6.

1. Completed in 1953, the dam was to be a storage reservoir that could supply water downstream for SKQ dam and other Columbia River Dams for the production of power. Added together, the two large reservoirs would be able to store copious amounts of water during spring runoff to be used later in the dry season.[20] "The Corps of Engineers initially proposed raising the level of Flathead Lake to store more water for downstream powerplants, but local opposition to damming the pristine lake, the largest freshwater lake in the American West, turned the focus to the nearby South Fork of the Flathead River."[21]
2. During the seventy years following construction of the dam, the Bureau of Reclamation has re-purposed the facility primarily for restoring and maintaining the salmon fish population in the lower Columbia River. This conversion has rendered the use of water from Hungry Horse to help regulate the level of Flathead Lake, in the words of the Bureau of Indian affairs, 'untenable.' "During the NEPA scoping process, it became clear that relying substantially on water released from the Hungry Horse Project to offset drought impacts at the Kerr Project was untenable. The Hungry Horse Project has myriad regulatory requirements unrelated to Kerr Project operations that the Bureau of Reclamation (the Hungry Horse Project Operator) must address."[22] If climate change claims are true, Flathead Lake and HGH should move management for flood control to the mitigation of effects of drought on both bodies of water.
3. EKI controls the top ten feet of Flathead Lake and continues to draw down about nine feet of water each spring despite what snowpack levels might predict as runoff.[23] This has occurred each spring for the past five years despite snow water equivalent percentages that have ranged from 91% of normal to 112% of normal.[24] The spring drawdown of Flathead Lake should be driven by snowpack estimates in the lake drainage basin. The greater the snowpack, more drawdown may be necessary; snowpacks significantly below normal should result in less of a spring drawdown. Two feet of extra water in the lake in the spring would be very beneficial in helping the lake reach full pool for the summer during a drought.

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[20] HGH storage at full pool approximately 3.5 million acre feet; Flathead Lake at full pool approximately 18.8 million acre feet. An acre foot of water is the amount needed to cover one acre of land with one foot of water.
[21] www.nps.gov/articles/montana-hungry-horse-dam.htm
[22] *See "Final Environmental Impact Statement for Drought Management Planning at the Kerr Hydroelectric Project on Flathead Lake, Montana;"* Bureau of Indian Affairs; Page S-4; March 2010.
[23] Flathead.uslakes.info
[24] msl services.mt.gov

4. HGH full pool is 3,560 feet, while full elevation of the dam is 3,565 feet. According to HGH operator Joe Fenolio, the extra amount can be used in a flood emergency.[25] In the past, most of the operational decisions for HGH revolved around flood control. Management must now become more oriented towards helping relieve the impacts of drought. This point was emphasized in the summary of the *Final Environmental Impact Statement for Drought Management Planning at the Kerr Hydroelectric Project on Flathead Lake, Montana*: "However, operating the Project solely for flood control purposes, particularly during forecasted drought conditions, will increase the likelihood that summertime lake levels cannot be met and maintained during drought years."[26] At full pool HGH reservoir stores 3,467,129 acre feet of water.[27] One foot of water depth in Flathead Lake contains 129,000 acre feet of water. Simple math projects that HGH reservoir, if full, could potentially raise Flathead Lake about 27 feet. Filling HGH reservoir to 3,565 feet and then using four or five feet more of HGH could be used to add an additional one foot to the lake level.
5. Protection of human life must be given more emphasis than protecting fisheries in the Columbia River Basin. Brian Lipscomb, CEO of EKI has stated that, "The flow of water out of the dam (SKQ) is monitored to benefit downstream fisheries for native fish like bull trout and west slope cutthroat trout."[28] Whatever contracts in place that obligate EKI to provide water to support fisheries can be amended, or opted out of, in the interest of public safety.
6. EKI's mission to make SKQ Dam productive financially has played a role in the low lake level problem. The *CSKT 2022 Annual Report* includes the following: "In FY 2022 EKI generated $75.3 million in net revenues, a 250% increase from 2016 allowing the company to return over $173M to CSKT over its first seven years of operating the SKQ project."[29] Despite the revenue information, Lipscomb continues to maintain that the dam could not have been operated differently during the summer of 2023 as, "Anything that would have been done to keep the lake fuller than it was would have negatively affected

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[25] Columbia River Technical Management Team meeting minutes, July 12, 2023.
[26] *"Final Environmental Impact Statement for Drought Management Planning at the Kerr Hydroelectric Project;"* Bureau of Indian Affairs, Page S-1, March 2010.
[27] *"Hydrology of Hungry Horse Reservoir, Northwestern Montana;"* W.D. Simons and M.I. Rorabaugh, 1971.
[28] *"Raising Flathead Lake's Water Level a Complicated Conundrum;"* Kate Heston; Whitefish Pilot; July 12, 2023.
[29] csktribes.org; 2022 Annual Report

tribal resources. Those resources include downstream obligations for other watersheds, abiding by the Endangered Species Act, and producing power and revenue," (our emphasis).[30] Based on the numbers provided, EKI has documented that the dam has been a financial success for the Tribes. It appears that EKI could reduce some of the power production of SKQ in the interest of public safety without sacrificing substantial income.

7. There was a possibility of an offer of additional water from HGH to Flathead Lake during the summer of 2023, but Brian Lipscomb, CEO of EKI, declared that any water sent from HGH to help maintain a lake level of a minimum of one foot below full pool (2892') would not be kept in Flathead Lake.[31] Minutes of the same TMT meeting of July 12, include the following: "He (Joe Fenolio, HGH operator, Bureau of Reclamation) will look at Flathead Lake elevations during critical periods like now. In general, they give their forecast and EKI are the ones that decide what they want to do with that amount of water and discharge per their FERC license.[32] EKI must find a way to accept water from HGH, and then keep that water in Flathead Lake to maintain a reasonable level of water during the summer months.
8. The Secretary of the Interior should mandate that HGH release water from HGH reservoir to supplement the water in Flathead Lake. Contrary to Brian Lipscomb's assertion that, "Mother Nature, not the Secretary of the Interior, is ultimately in charge of the lake's water levels,"[33] the Secretary does indeed have the power to control Flathead lake's water level.

A. EKI should consider leasing SKQ Dam to a corporation that has more experience and expertise in managing a hydroelectric facility. This action would provide EKI with a reliable source of income despite the fluctuating price of electricity on the open market, where EKI is marketing the power they produce. Taking this path would also relieve EKI of the responsibility of attempting to maintain the lake level during the summer months. The lease agreement could contain a condition that the lessor maintain a lake level of no greater than one foot below full pool during the summer fire season. Previous license holders were able to maintain the lake at full pool, or very near, in years when the snowpack and spring precipitation amounts were significantly below historical

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[30] *"Zinke's Fill the Lake Act Meets Mixed Reactions;"* Kate Heston; Whitefish Pilot; November, 29, 2023.
[31] This statement by Mr. Lipscomb is not included in the TMT minutes. Commissioner Decker attended the meeting and noted this statement in his unofficial minutes of the meeting.
[32] Columbia River Regional Technical Management Team minutes; pg. 12; July 12, 2023 meeting.
[33] *"Zinke's Fill the Lake Act Meets Mixed Reactions;"* Kate Heston; Daily Interlake; November, 24, 2023.

levels. This option keeps the CSKT owners of SKQ Dam, while transferring the responsibility of management to another party.

CONCLUSION

FERC and EKI are obligated to review and give strong consideration to the negative impact to public safety resulting from a Flathead Lake level so low in the summer that it negates any use of a secondary escape route for residents due to wildfire. The numerous excuses previously used such as climate change, contractual obligations, lower than average snowpacks, water for downstream fisheries, etc. will be of little use following a devastating wildfire that may result in the loss of human life. Brian Lipscomb's assertion that EKI anticipates doing, "nothing different than last year,"[34] Lake County has offered potential solutions, it is now FERC's and EKI's responsibility to determine which may be viable and produce an implementation plan. In closing, the Commission would remind readers of our petition this quote from a December, 2021 FERC document:

> "It is imperative that the dams subject to FERC's jurisdiction are maintained and operated in a manner that consistently prioritizes public safety," Chairman Glick said. "The improvements to the Commission's dam safety program included in today's order demonstrate our commitment to these issues."[35]

Sincerely,

LAKE COUNTY BOARD OF COMMISSIONERS

Gale Decker, Chairman

Steve Stanley, Member

William D. Barron, Member

[34] *"Raising Flathead Lake's Water Level a Complicated Conundrum;"* Kate Heston; Whitefish Pilot; July 12, 2023.
[35] *"FERC Finalizes Dam Safety Regulations;"* Docket No. RM20-9; Order No. 880, December 16, 2021.