

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

Selis Ksanska Qlipse (SKQ) Dam

)

FERC Project No. 5

**NATIONAL ORGANIZATION TO SAVE FLATHEAD LAKE (NOSFL) PETITION FOR
OPERATIONAL REVISIONS TO REMEDIATE DANGEROUSLY
LOW WATER LEVELS AT FLATHEAD LAKE**

During the summer of 2023, water levels at Flathead Lake which are controlled by the Selis Ksanska Qlipse (SKQ) Project No. 5, located near Polson, Montana reached dangerously low levels. Precipitated by imprudent flow management by project operator, Energy Keepers Inc. (Energy Keepers), these unusually low water levels adversely impacted area recreation and tourism causing significant economic loss, particularly to small business owners and imperiled the safety and enjoyment of shoreline property owners, boaters, swimmers and fisherman forced to navigate ordinarily submerged rock exposed by the drawdowns. *See* Attachment 1 (photos of damage). Since July 2023, twenty five complaints filed at the Commission by individual landowners, local government officials, the National Organization to Save Flathead Lake (NOSFL) along with a congressional inquiry alerting the Commission to Energy Keeper's questionable operational practices have gone unaddressed by the Commission. Now, recent news reports of inordinately low snow levels in Montana¹ heighten the likelihood that last summer's low lake levels will repeat themselves absent Commission action. Energy Keepers is aware of the shortfall, having publicly announced on its Facebook Page that snowpack is only 62% of normal in the Flathead Basin as of late December 2023.²

¹ See <https://dailyinterlake.com/news/2023/dec/19/dry-december-challenges-montana-ski-areas/>

² See <https://www.facebook.com/photo?fbid=862952595621127&set=a.553770783205978>.

Accordingly, the NOSFL, a local grassroots, nonprofit organization comprised of shoreline property owners along Flathead Lake, recreational users and agricultural and small businesses in the Polson, Bigfork, Lakeside and other surrounding areas in northwest Montana area file this formal petition requesting that the Commission direct Energy Keepers to adopt a revised operating practices described herein for the upcoming 2024 season. Before this filing, NOSFL connected with Energy Keepers directly by letter earlier this week, but in the interest of expediting a resolution, NOSFL is filing this petition now.

As we discuss in our petition, both PPL Montana (PPL) and Northwestern Energy, predecessor licensees took proactive steps during comparable or less acute droughts to maintain lake levels, with both PPL and NorthWestern Energy going so far as to obtain a variance from the Commission to avoid reduction of lake levels below required summer elevations.³ Moreover, notwithstanding section 6 of the Federal Power Act, 16 U.S.C. §799, the Commission retains reserved authority under Article 12 of the 1985 project license which provides that the operations of the licensee related to storage and discharge of waters shall be controlled by reasonable regulation as the Commission may prescribe for beneficial public uses, including recreational purposes.⁴

This petition is organized as follows. **Part I** reaffirms NOSFL's intervention in this lengthy proceeding. **Part II** explains the history of the SKQ Project and the many protections for all beneficial uses incorporated in the license, including a requirement to develop a Drought Management Plan as well as the proactive efforts by predecessor licensees to modify operations

³ See Letter, Office of Energy Projects, Docket P-5 (July 2, 2015)(approving variance request by Northwestern Corporation to modify minimum flow requirements).

⁴ Order No. 540 Standard Conditions for Inclusion in Preliminary Permits and Licenses, 54 FPC 1702 (1975)(Standard Article 12). Incorporated by reference in *Montana Power Company*, Order Issuing New License, 31 FERC ¶61,070 at 61,193 (1985).

to preserve recreational uses during periods of low water levels. **Part III** describes last summer's acute drought conditions and how Energy Keepers – despite having been aware of expected low lake levels for months in advance – took no steps to ameliorate the reduced elevation levels, stranding docks, imperiling user safety and, causing substantial economic harm to the surrounding community. Finally, in **Part IV**, NOSFL offers a proposal that will avoid a repeat of low water levels for the summer of 2024 and argues that the Commission's reserved authority and the current record in this proceeding compel the Commission to order Energy Keepers to implement these measures, including consulting with Department of Interior if necessary.

This petition is filed pursuant to Rule 207(a)(5) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.207 and in accordance with Commission precedent.⁵

I. CONTACT INFORMATION AND STATEMENT OF INTERVENTION

A. NOSFL Reaffirms its Intervention

NOSFL has already intervened in this proceeding, but given the duration of this docket and in an abundance of caution, NOSFL reaffirms its intervention. As an organization of shoreline property owners and recreational users of Flathead Lake and area businesses that serves tourism and agricultural businesses, NOSFL's members are directly impacted by lake flow management, and suffered economic harm and loss of enjoyment due to last summer's low flows. No other entity can represent NOSFL's interests in this proceeding, or bring to bear its members' unique expertise of decades-long familiarity with the SKQ Project (formerly known as Kerr Dam). Because NOSFL satisfies the criteria for intervention under Rule 214 of the Commission Rules of Practice and Procedure, 18 C.F.R. §385.214, its intervention should be reaffirmed.

⁵ *Woodstone Lakes Dev.*, 95 FERC ¶ 61,461 at 62,640 (2001) (explaining that petition, not complaint, is appropriate procedural mechanism for asking commission to invoke reserve authority to amend operational terms in a license to address low flows),

B. Notice

These contacts should be added to the service list.

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II. HISTORY OF THE SKQ PROJECT AND PROTECTIONS FOR RECREATIONAL USES AT FLATHEAD LAKE

A. The License’s Evolving Terms Expressly Recognize Recreational Use

The SKQ Project is a three-unit hydroelectric project with an installed capacity of approximately 208 megawatts located on the Flathead River in northwestern Montana approximately 4.5 miles downstream from the natural outlet to Flathead Lake.⁶ Originally known as the Kerr Dam, the SKQ project was first granted a 50-year license by the Federal Power Commission (the predecessor agency to FERC) on May 23, 1930 which was transferred to Montana Power Company in 1938. In 1985, the Commission issued a new 50-year license jointly to Montana Power (later acquired by PPL, then NorthWestern Energy) and the Confederated Salish and Kootenai Tribes (Tribe) of the Flathead Reservation.⁷ The Tribe purchased the dam from Northwest Energy in September 2015, and Energy Keepers, the tribally owned corporation became a co-licensee responsible for operation and management responsibility for the project under the license.⁸

⁶ *Montana Power Company*, Order Amending License, 79 FERC ¶ 61,376 at 62, 509 (1997).

⁷ Order Issuing License, 32 FERC ¶ 61,070 (1985).

⁸ *Confederated Tribes*, Order Transferring License, 152 FERC ¶ 62,140 (2015).

The licenses and numerous amendments issued over the years acknowledge the significance of Flathead Lake to the region and the multiple uses it supports, including recreation.

For example, a Commission order amending the license in 1997 described that:

Flathead Lake, the largest natural freshwater lake west of the Mississippi, is 28 miles long and, at its broadest point, is 15 miles wide. The lake and the nearby portions of the Flathead River house a thriving and varied fishery, and support a varied population of wildlife and vegetation. The area contains a number of historic and prehistoric cultural resource sites. Flathead Lake is also an important recreation site, and many second homes and retirement developments are located along the shoreline.⁹

Water levels at Flathead Lake are controlled by the licensee in accordance with a series of license articles and a memorandum of understanding with the Corps of Engineers. Many of these requirements were adopted to ensure that project operation would not impinge on recreational use.¹⁰

For example, an MOU between the licensee and the Corps establishes minimum and maximum lake elevations as follows:

Corps MOU: (1) The Licensee and the Corps of Engineers will cooperate in exchanging data and coordinating operations for flood control. (2) Conditions permitting, the lake will be drawn down to elevation 2883 feet, the minimum level under the license, by April 15th and will be raised to elevation 2890 feet by Memorial Day (May 30th) and to elevation 2893 feet, the maximum level under license by June 15th. (3) When the lake reaches elevation 2886 feet, in a moderate or major flood year, the Licensee will gradually open its spill-gates to maintain free flow and will not close the gates until after the danger of exceeding elevation 2893 feet has passed.¹¹

In addition, sub-paragraph (f) of the MOU states:

The level of Flathead lake shall be raised to elevation 2890 feet by Memorial Day. the lake will then be raised as rapidly and early thereafter as possible to reach 2893 feet taking into account the flood potential still existing in the river basin above the lake as determined by the Corps. Should the potential flood condition subside then

⁹ *Montana Power Company*, 79 FERC at 62, 510 (1997).

¹⁰ For convenience, many of the relevant license articles summarized in the text are attached in full as Attachment 2.

¹¹ *Montana Power Company*, 35 FPC 250 (1965).

the filling of the lake will be accelerated so that the lake reaches the 2893 foot level by June 15.¹²

In approving the MOU,¹³ the Commission noted that the terms were endorsed by an association of lakeside residents interested in having lake levels raise as soon in the recreational season as possible. The Commission also expressly found that the provisions of the MOU serve the interests of flood control, power, recreation, and other beneficial uses.¹⁴

The new project license issued in 1985 reaffirmed the importance of recreational uses through incorporation of Standard Article 12:

Standard Article 12: The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the licensee shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health and property and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and other beneficial public uses, including **recreational purposes** and the Licensee shall release water from the project reservoir at such rate in cubic feet per second or such volume in acre feet per specified period of time as the Commission may prescribe for the purposes herein before mentioned.¹⁵

The new license also reaffirms the continued applicability of the Corps MOU in Article 43:

Article 43: Article 12 notwithstanding, it is specifically understood that during the term of this license, the Licensee may regulate Flathead Lake between elevations 2883 and 2893 in such manner as will make not less than 1,219,000 acre feet of storage capacity available to the Licensee. Unless otherwise ordered, and subject to article 44 below, such regulation shall be in accordance with the [Corps MOU].¹⁶

¹² See Letter by Office of Energy Projects to Northwestern (July 2, 2015) at 2 (quoting from MOU).

¹³ *Montana Power Company*, 35 FPC 250 (1965).

¹⁴ *Id.*

¹⁵ Order No. 540 Standard Conditions for Inclusion in Preliminary Permits and Licenses, 54 FPC 1702 (1975)(Standard Article 12). Incorporated by reference in *Montana Power Company*, Order Issuing New License, 31 FERC ¶61,070 at 61,193 (1985).

¹⁶ *Montana Power Company*, Order Issuing New License, 31 FERC ¶61,070 at 61,193 (1985).

Because of the contentious nature of the 1985 license proceeding, certain matters were left to be resolved pending results of further studies. For example, Article 44 of the new license originally established an interim flow regime pending development and implementation of a fish resource mitigation and enhancement plan.¹⁷ As part of the plan adopted under Article 45, the Department of Interior recommended new operational flows which were included in Article 56, which was added as part of a 1997 license amendment.¹⁸ Article 56 modified Article 44 by prescribing new minimum outflows as follows:

Article 56: Imposes seasonal minimum flow requirements of 3200 cfs between August 1-April 15; increase from 3200 cfs to 5000 cfs/day for April 16-April 30; continuous 12700 cfs from May 1-June 30; reductions from 12700 cfs to 6400 cfs at 420 cfs per day July 1-July 15 and reduced from 6400 cfs to 3200 cfs at 200 cfs per day from July 11 to July 31. These flows can be modified with DOI approval¹⁹

The 1997 amendments also added the provisions below:

Article 57: Establishes maximum daily flow changes ranging from 500 cfs for mean flow less to 10,000 cfs for mean flow between 40,000 to 60,000 cfs

Article 58: establishes maximum allowable ramping rates of 250 cfs/hour for mean flow between 3200 and 7500 cfs and 1000 cfs/hour for mean flow of 7500 cfs or greater

Article 60. The licensees, in consultation with the U.S. Army Corps of Engineer, the Bureau of Reclamation, the Bureau of Indian Affairs, and the Montana Department of Environmental Quality, shall develop and implement a drought management plan for Flathead Lake. The drought management plan shall include, but not be limited to, provision for re-evaluation and adjustment of Flathead Lake flood control requirements and other provisions necessary to facilitate compliance with lower Flathead River minimum instream flow requirements designated by the Secretary of the Interior.

¹⁷ Order Issuing New License, 32 FERC ¶61,070 (1985) (Article 44).

¹⁸ See *Montana Power Company*, 79 FERC at 62, 510 (1997)(discussing history of Article 45 and related studies, and adoption of article 56).

¹⁹ These articles were added to the license in 1997 in *Montana Power Company*, 79 FERC at 62, 510 (1997). Significantly, operations under Articles 56-58 may be modified for emergencies or short periods of time with written approval from the Secretary of Interior. See also Attachment 2 (full text of articles).

Article 62. The licensees shall provide to the Secretary of the Interior annually on or about May 1, but no later than May 10, an annual operational schedule to be supplemented on a monthly basis. The annual schedule shall include month-end estimates of water surface elevation at Flathead Lake and estimates of monthly discharge from Kerr Dam. The monthly supplement shall include a report of actual operations over the previous month and shall include daily water surface elevation at Flathead Lake and spill and releases at Kerr Dam. The annual schedule and monthly supplements can be based on hydrologic and operational information compiled by other cooperating agencies. **The operational schedule shall take into account forecasted inflows to Flathead Lake, flood control and recreational requirements in Flathead Lake as well as minimum flow requirements at Kerr Dam.**

B. Operational Challenges and Importance of Drought Management Plan

The adoption of the 1997 amendments created operational challenges during drought years. As the Department of Interior's Bureau of Indian Affairs explained in the Final EIS for the DMP:

During low-water years there may be an insufficient volume of water to achieve Article 43 lake levels while maintaining the minimum instream flow requirements of Article 56. Recognizing this potential conflict, and in response to comments received on the Department's proposed section 4(e) conditions, the Secretary also included Article 60 in the Kerr Project license. Article 60 specifically requires the development of a Drought Management Plan.²⁰

The BIA's preferred approach for a DMP is Alternative 2, which includes the following key requirements:

- Flexibility would be authorized in meeting minimum instream flows.
- By April 10 each year, the licensee would obtain runoff forecasts and determine whether to terminate, maintain without deviation, or maintain with deviation from minimum instream flows. Deviation would be requested if forecasts show the June 15 lake elevation of 2892.2' cannot be met while maintaining flows.

²⁰ See Final EIS at Section 1.2.9 (March 2010). The Final EIS is available online at the NOSFL Website at <https://fillthelake.com/flathead-lake-news>. Excerpts from Alternative 2 discussed *infra*. are included in Attachment 1.

- The licensee would submit a notice of intent to deviate to the Secretary and others. This would include information on forecasts, proposed minimum flows, expected lake elevations, and consultation details.
- The Secretary would have 10 days to approve, modify or deny the proposed deviation. If there is no response in 10 days, the deviation is considered approved. Approved deviations could reduce peak flows to 8000 cfs and shift timing up to 2 weeks early.
- The licensee would aim for a June 15 lake elevation of at least 2892.2' and maintain it from June 16-September 15.
- An adaptive management plan would be developed to assess assumptions, predictions, indicators, and recommend Drought Plan modifications.
- Climate indicators and runoff would be reviewed every 5 years to account for climate change.²¹

BIA concluded that under Alternative 2, target lake level of 2,892.2' feet was achieved and maintained in all drought years evaluated, recreation season lake elevation exceeded 2,892.4' feet in 80% of drought years, and that 20% of the drought years evaluated required instream flow deviations to 8,000 cfs and 10% required deviations to 10,500 cfs.²²

Article 60 was adopted in 1997. Yet, 26 years later, Energy Keepers – which is charged with developing and implementing the DMP – still has not satisfied this obligation as required in Article 60, notwithstanding that BIA's preferred Alternative 2 in the DMP in the Final EIS would have mitigated the effect of last year's drought (*see also* discussion at Part III, *infra*) and will offer substantial relief going forward for the 2024 season.

²¹ As a side note, Energy Keepers has suggested that low lake levels are the product of climate change. Yet even if that were the case (and there is no evidence to support this claim), the DMP obligates Energy Keepers to consult with stakeholders and evaluate whether additional operational changes are needed to ensure that **all** of the project's beneficial uses are sustained. Energy Keepers has not done so.

²² Final EIS at S-9.

C. Predecessor Licensees Took Proactive Steps to Manage Drought

As just discussed, the DMP offers balanced guidance on managing flows to minimize impacts to recreation without adversely impacting other uses. Yet with or without a formal DMP or ROD in place, the licensee retains discretion to seek flow modifications during drought conditions which past operators have exercised to maintain lake elevations during the summer recreational season.

For example, during the summer of 2001, the Flathead Basin experienced severe drought. Because of inadequate volume of water flowing into the lake, it was impossible for PPL, the then-operator to satisfy the competing demands for water levels in the lake and to comply with the Article 56 flow releases.²³ At that time, the DMP was not yet developed but still PPL sought and received Commission dispensation regarding the Flathead Lake refill requirements²⁴ PPL also received Interior's acquiescence to temporarily delaying the ramp up rates under article 56.²⁵

In 2004, PPL took similar proactive measures. In April 2004, PPL wrote to the Commission notifying it of developing low water conditions with precipitation and snowpack runoff in mid-March well below normal, and April forecasts showing snowpack of 65% of average for that time of year. Based on this information, PPL reported that it reduced outflows to minimum

²³ See PPL Letter to FERC (April 22, 2004) at p. 3.

²⁴ *PPL Montana LLC et. al.*, 95 FERC ¶ 61,363 (2001). Specifically, PPL proposed to modify the average monthly flows for May and June to enable it to fill the lake to a target elevation of 2892.5 feet, or 0.5 foot below the elevation required by Article 43. It calculates that it could meet and maintain this elevation by ramping up the flow releases beginning May 1, as required by Article 56, but then maintaining the discharges only at about 9,000 cfs from May 9 through the end of June. PPL Montana explained that this reduction in minimum flows would have no adverse effect on fish located below the project, because springtime minimum flows above 8,000 cfs would provide substantial habitat. In PPL Montana's view, this proposal would balance the interests of recreational users of Flathead Lake and the need to provide adequate river flows to sustain lower river aquatic resources during the drought. *Id.* at 62377.

²⁵ PPL Letter to FERC (April 22, 2004) at 3, n. 8 (discussing history of drought operational modification request).

permissible under the license and began filling the lake. But PPL warned that if low precipitation levels continued, it might not achieve full pool by June 15 without a modification to Article 56 outflows.²⁶ Ultimately, no change was needed, but PPL's advance notification of a possible issue reflects responsible operation.

Finally, on May 27, 2015, NorthWestern Energy, successor to PPL first notified the Commission of drought conditions, and the possible need to seek modifications to the Article 56 flow requirements and dutifully provided several updates.²⁷ Ultimately, on June 24, 2015, Northwestern reported that compliance with Article 56 would drop lake levels below 2892 feet. By that time, the DMP had been developed and reviewed in a Final EIS but not formally approved by Interior. Still, NorthWestern proposed, consistent with the DMP, a variance from the Article 56 minimum flows to ensure that lake elevation would be maintained at 2892 feet from June 15 through September 1.²⁸ Both the Commission and BIA approved the proposed changes,²⁹

On July 31, 2015, NorthWestern reported that it could maintain the lake at an elevation at or above 2893 during July 2015 with current inflow of 4700 cfs and outflow of 3300 cfs going into August. Northwestern stated that these conditions would allow it to maintain the lake elevation at or above 2892 for the foreseeable future and maintain minimum flows at or above 3200 cfs without further variance.³⁰

PPL's and NorthWestern's flow management practices stand in stark contrast to Energy Keepers. Whereas these predecessor companies filed multiple notices at FERC of impending

²⁶ *Id.*

²⁷ NorthWesternEnergy Letter to FERC (June 16, 2014)(describing Flathead Basin conditions and updates on developing drought conditions).

²⁸ NorthWestern Energy Letter to FERC (June 24, 2015)(proposing modifications based on DMP).

²⁹ FERC Office of Energy Projects Letter Order (July 2, 2015) approving modifications.

³⁰ Northwestern Energy Letter to FERC (July 31, 2015).

drought conditions before it was even certain that modifications would be needed, the FERC Docket for Project 5 during January to June 2023 does not contain a single communication from Energy Keepers - even though as discussed in the next section, drought conditions were already forecast at that time. Moreover, even after dock owners' letters began populating the docket in July and early August 2015, Energy Keepers did not take any steps to activate the DMP or seek modifications to maintain lake levels. PPL's and NorthWestern's past practice during drought conditions establish a standard of prudent management against which Energy Keeper's operations should be measured.

III. THE DROUGHT CONDITIONS OF 2023

A. The Damage

It is critical for the Commission to understand the impact that last season's severe drought and depleted lake level elevations had on shoreline homeowners, tourists and vacationers and small businesses within the surrounding area. The precipitous drop in lake elevations was not merely an inconvenience, but a serious safety concern to boaters and swimmers endangered by exposed rock. *See Attachment 2 (photos)*. Low water levels also stranded boats not just for a day or two but for a month or more, cutting the summer vacation season short and causing economic harm to surrounding businesses still struggling to recover from lost seasons due to the pandemic. The letters filed on the Commission docket - many from elderly owners - convey the anger and frustration over low water levels and both Energy Keepers' and the Commission's tone-deafness to the situation.

The drought conditions were alarming enough to prompt letters from government officials. In September 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 and economic losses to the area. Montana Congressman Matthew Rosendale dispatched an

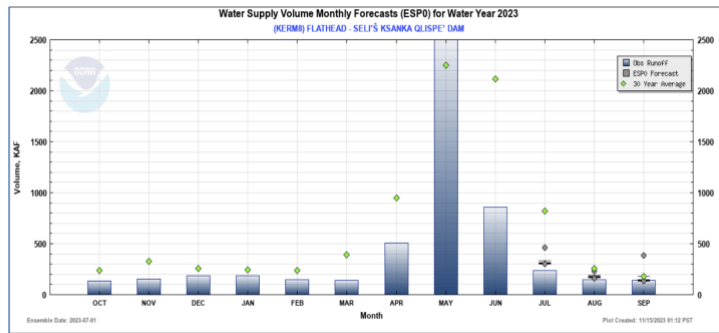
inquiry to the Commission in August 2023, asking whether project operators complied with articles 60 and 62 of the license, but five months later, the Commission has yet to respond

As stated at the outset, ever since the project was built back in the 1930’s, recreational interests have been acknowledged and respected in the licensing process and operational decisions, including the development of the Corps MOU and the DMP along with the 1985 license’s recognition of Flathead Lake’s recreational opportunities. In this context, last summer’s events are unprecedented and incompatible with the historic protections accorded to recreational users.

B. Overview of Drought Conditions

1. Energy Keepers anticipated the 2023 drought conditions.

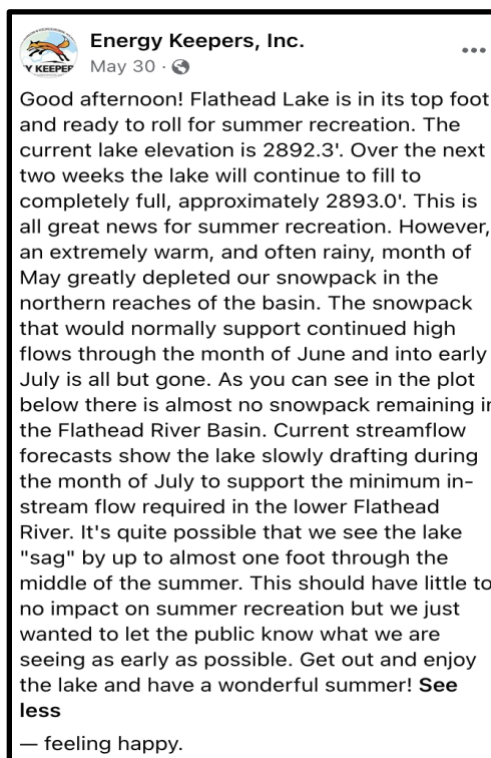
Last summer’s low water levels began with an historically dry year characterized by low snowpack and a record rate of snowmelt across northwest Montana. As a result, water supply volumes in the Flathead basin were 63% of the 30-year median, according to data from the Flathead Lake Biological Station (FLBS)³¹ and NOAA as shown on the chart below.



Monthly observed and forecast water supply for Flathead Lake. Since October 2022, water volumes have averaged less than 60% of average, with June and July coming in at 40% and 29% respectively. Data via NOAA

³¹ <https://flbs.umt.edu/newflbs/media/2738/updatedlowlakeleveldatainfosheet.pdf>

Energy Keepers was fully aware of the impending drought. On May 30, 2023, it posted the following message on its Facebook Page:³²



Recall that when PPL experienced low snowpack runoff back in 2004 (*see* Part II, *supra*), it reported it to the Commission in April 2004 – even though modifications were ultimately unnecessary. Likewise, by May 27, 2015, NorthWestern Energy began filing nearly weekly updates at FERC about unusually low water levels.

2. No DMP or prudent flow management practices by Energy Keepers.

By contrast, here, Energy Keepers did not similarly alert the Commission or more importantly, begin developing a plan to implement the DMP to avoid a drop in lake elevation. The DMP was designed to address these drought events – which Energy Keepers' predecessor NorthWestern likewise recognized.

³² <https://www.facebook.com/photo/?fbid=748361440413577&set=a.553770783205978>

As summarized above in Part II.B, under the DMP, the licensee would review forecasted drought conditions from October-December and if drought conditions are forecasted the DMP would be activated, January-April climate would be reviewed each month and the DMP would remain in force or deactivated. By no later than April 10th another determination shall be made based on forecasts and determine whether Article 56 minimums should be lowered and to what extent based on the forecasts including Hungry Horse flows. The Licensee would make every reasonable effort to achieve a lake elevation of 2892.2 by June 15th and to make those same efforts to maintain that level or higher from June 16th to September 15th. The Plan provides for an adjusted outflow to as low as 8000 cfs between May 16 and June 30, a reduction from the 12,700 cfs flows under Article 56. As NOSFL pointed out to the Commission,³³ this relatively minor adjustment initiated on May 15 would have increased lake levels by about three and a half feet. And even if the adjusted flows were not ramped down to 8000 cfs until June 1, lake levels still would have been higher by nineteen inches on July 31st. This minor change would have avoided the disastrously low lake levels that caused wide-reaching harm not just to recreation but to irrigation activities and fish.

In its August 25, 2023 filing at the Commission, Energy Keepers state that its coordinated operations with the Corps excused compliance with the Drought Management Plan. But as shown earlier, operation of Flathead Lake is governed by several articles and agreements which apply simultaneously. Therefore, coordinating with the Corps did not eliminate the requirement to follow the Drought Management Plan.

Energy Keepers made other imprudent operating decisions that further exacerbated the drought's impacts. Since early July 2023, Energy Keepers has consistently generated at a flow

³³ See NOSFL Letter to Commission, September 15, 2023

rate of 4300 cfs and not the minimum flow of 3200 cfs as outlined in Article 56 – a questionable practice given drought conditions with low upstream storage.³⁴

3. Without intervention, the 2023 low water levels will repeat.

Absent operational changes and prudent planning and management by Energy Keepers, another summer season of low lake levels promises to occur based on current low snow levels in December 2023. Just last week, Energy Keepers posted on Facebook that snow water levels are 62 percent of normal:



With the start of the recreational season just five months away, it is imperative for Energy Keepers to begin planning now to ensure lake levels remain elevated throughout the summer. Energy Keepers' most recent January 2024 filing at the Commission³⁵ confirms the need to put a plan in place. Based on NOFSL's review of the filing (which contained conflicting information), the level of Energy Keepers intended drawdown is unclear, and Energy Keepers' forecasts seem

³⁴ It also appears that Energy Keepers received authorization to fill the lake earlier than the dates specified in the MOU. If so, NOSFL was never notified of such a request, nor has it been filed in the FERC docket. Yet even though a variance was employed for early fill, Energy Keepers did not seek a similar request to modify Article 56 flows.

³⁵ See Attachment 3 (Energy Keepers' and NOAA forecasts and NOSFL's spreadsheet).

unduly optimistic.³⁶ Even though Energy Keepers' submission lacked detail, it contains enough information to show a strong need for two action steps of 1) a higher lake level on April 15th and 2) a reduction of Article 56 minimum flows in the May through July time frame.

IV. THE COMMISSION HAS LEGAL AUTHORITY TO ORDER ENERGY KEEPERS TO ADOPT THE NOSFL PROPOSED OPERATIONAL MODIFICATIONS

A. The NOSFL Proposal

To avoid a repeat of last summer, the Commission must intercede and direct Energy Keepers to begin planning now to ensure that it can maintain lake levels at a minimum of 2892.2 feet throughout the season. Specifically, NOSFL recommends that the Commission order the following:

- In light of current data showing historically low snowpack and forecasts of low precipitation, Energy Keepers must begin to implement the 2010 Drought Management Plan Alternative 2, BIA's preferred option in the FEIS in January 2024
- Energy Keepers must adopt one of the following two options or a combination are both options that are available under the DMP to maintain lake levels at no less than 2892.2' for June 15th through September 15th as required under the DMP:

³⁶ The Energy Keepers' filing (Attachment 3) appears to contain conflicting information: the cover letter says the lake will be drawn down to 2883 feet by April 15, but the spreadsheet forecast suggests it will be drawn down to 2887 feet. NOSFL has also reviewed NOAA Northwest River Forecast Center 120 day forecast for the majority of the expected flows into Flathead Lake as measured at Columbia Falls and the expected outflows at the SKQ Dam. It would appear the Energy Keepers forecast uses NOAA's forecast through about mid-March and then they jump to a 50% climatology or a more average forecast of stream inflows. That assumption is extremely optimistic given snowpack and El Nino weather patterns and if the DMP and modifications of Article 56 are not planned for and approved as necessary the lake will very likely be at disastrously low levels in 2024 just like 2023.

- 1) Reduce the April 15th lake level from 2883 to as high as 2888 due to severe drought conditions that already exist.
 - 2) As soon as possible but by no later than April 10th a streamflow forecast shall determine whether Article 56 minimum stream outflows should be reduced. Reducing flows from 12700 cfs to 8000 cfs from May 16 to June 30, 2024 would add approximately three and a half feet to lake levels which should suffice to avoid last season's problems. Actual reduction of the minimum flow to 8000 cfs can be adjusted to a higher outflow level or less than 45 days as conditions determine and depending on the April 15th starting lake level. An adjustment to the July minimum flows may be also be appropriate to meet the daily flow requirements under Article 57 and to better match with inflows. The spreadsheet attached to NOSFL's September 15th 2023 letter to the Commission demonstrated that adjusting June and July Article 56 flows would have kept the lake level at 2892.3 just above the DMP minimum target of 2892.3 in 2023.
 - 3) In no event would the target lake level exceed 2893 feet. If the lake level at April 15th is 2888' (or higher than 2883'), it is expected that less dam outflow adjustments to Article 56 levels would be required. NOSFL and other stakeholders would work with EKI to better assure the lake level is maintained at the 2892.2 to 2893 level from June 15 to September 15th by using a combination of the two deviation options.
- At the end of summer 2024, Energy Keepers, in consultation with all stakeholders shall review the data and determine whether additional adjustments to the DMP are necessary.

B. The Commission's Authority to Take Action

The Commission must take immediate action to require Energy Keepers to take steps to avoid a repeat of last summer's events. The record contains substantial evidence to show that Energy Keepers' imprudent management and operational decisions either caused and/or substantially exacerbated low water levels at the project. Further, Energy Keepers has not been diligent in taking whatever action remains to implement the DMP in ongoing contravention of Article 60's requirement added 26 years ago. There are also solutions: the record shows that PPL and NorthWestern Energy successfully averted draining the lake during the summer months even in severe drought through a combination of proactive planning, ongoing communication with relevant agencies and, in the case of NorthWestern, implementation of the DMP measures contained in the 2010 FEIS.

Unfortunately, Energy Keepers has departed from decades of prudent management by its predecessors, thus warranting this petition for the Commission's intervention. The Commission has authority to order the relief that NOSFL seeks and must exercise it here.

First, at least some of Energy Keepers' operating decisions – most specifically, its failure to develop and implement a DMP - violate the license. Energy Keepers' decision not to abide by the DMP adopted in the FEIS, in contrast to its predecessors, upsets the delicate operational balance needed to sustain all of the project's beneficial uses recognized in the 1985 new license. The Commission has not only the discretion but the obligation to enforce the terms of a license and other operational requirements. In fact, in a recent case, an appellate court overturned an order where the Commission refused to investigate violations of a license article that resulted in flooding and that City of Miami had complained about to the Commission. *See City of Miami v. Fed. Energy Regulatory Comm'n*, 22 F.4th 1039 (D.C. Cir. 2022). To date, however, the Commission

has ignored the many filings alerting the Commission to the low lake elevations and resulting damage.

The Commission also has discretion to modify and alter terms of the license with or without the licensee's consent. Standard Article 12 which is incorporated into the license reserves to the Commission the power to prescribe and revise rules and regulations for operating the project for beneficial public purposes, including recreational uses.

The Commission invoked a similar reopener clause to address identical complaints of low water levels in *Allegheny Hydro No. 8 & 9*, 88 FERC ¶ 62, 170 (1999). There, shortly after the project was licensed, the Commission began receiving complaints from adjacent landowners, recreational boaters and a state agency that low water levels were adversely impacting recreation. In general, (and as here), the complaints revolved around lower water levels causing submerged objects to become boating hazards and that privately owned boat docks had become non-functional. The state agency filed a request asking the Commission to invoke its reserved authority to "rectify low water levels caused by the project." In response to the agency's letter, staff convened a meeting at the project to explore different options, including installation of flashboards at the dam which the licensee was instructed to adopt for one season. Thereafter, the flashboard option was reviewed and ordered permanently. So some precedent exists for NOSFL's request.

Here, NOSFL's proposed operational changes are less intrusive and expensive than an amendment to add flashboards to a dam. Essentially, NOSFL only asks the Commission to direct Energy Keepers to responsibly plan for drought and seek operational changes that Energy Keepers has the power to ask for under the license. As shown, predecessor licensees have taken comparable steps *on their own initiative* without compromising power production, irrigation, flood control or

other uses. That past operators have ably managed the project and maintained adequate lake levels in the past also proves that NOSFL's requested relief is both feasible and eminently reasonable.

V. CONCLUSION

The 2024 summer recreational season is fast approaching, and the Commission has yet to act in response to dozens of complaints, including NOSFL's letter, regarding Energy Keeper's imprudent operation of the project and last season's dangerously low water levels. As noted at the outset, NOSFL has been in contact with Energy Keepers but the Commission's inattention to this matter despite widespread public concern demands immediate action. The Commission cannot ignore this evidence and must act and grant NOSFL's petition and proposed operational modifications. Should the Commission decline to grant the petition, in the alternative, it must conduct a very expeditious review of Energy Keeper's operational practices and convene a meeting with the licensee and stakeholders well in advance of the recreational season to explore and adopt operational changes to minimize impacts to recreation and other beneficial project uses in time to address the 2024 lake levels.

Respectfully submitted,

/s/ Carolyn Elefant

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January 5, 2024

CERTIFICATE OF SERVICE

I certify that on January 5, 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

Carolyn Elefant