

KERR PROJECT ACQUISITION: REGULATORY AUTHORITY

(Volume 1, Issue 3)

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As water finally began to flow through Kerr Dam in 1939, producing some of its first megawatts of electricity, it might have been hard to believe that 74 years later, the Confederated Salish and Kootenai Tribes (CSKT) would be in the process of acquiring the hydroelectric facility.

Fast forward to the year 2013, two years until 2015, when the Tribes plan to execute their opportunity to acquire the dam. How is this possible?

To answer that question, one must first identify who has the authority to regulate hydroelectric development on rivers within the United States. Prior to 1920, that authority was exercised individually by the Secretaries of various federal agencies with authority to manage federal lands and federal interests.

Such an unorganized approach, with multiple decision-makers attempting to govern power development on unified river systems, was deemed to be unacceptable by Congress. A different approach was then legislated by Congress, when it enacted the Federal Power Act of 1920, consolidating oversight and control of hydropower development into one agency, the Federal Power Commission (now known as the Federal Energy Regulatory Commission).

Several sections of the Federal Power Act are particularly relevant to Indian Country including Section 4(e) which authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for hydropower projects (16 U.S. Code §797).

As the primary regulatory body of hydroelectric dams in the United States, FERC first issued a 50-year license for construction of Kerr Dam in 1930 to the Rocky Mountain Power Company, a subsidiary of the Montana Power Company. Due to difficult economic times and low power prices, Rocky Mountain Power Company delayed the start of construction for four years. Thereafter, from 1934 until 1939, construction went on continuously, when the structure of the Kerr project was completed and the first of three turbine/generator units was installed. Rocky Mountain Power Company then transferred its interest in the license to the Montana Power Company, and the dam began producing power.

A second generating unit was installed and placed into service in 1949. The first two units utilized the natural flow of the Flathead River and storage in Flathead Lake. A third generating unit was installed and placed into service in 1954 in order to take advantage of additional water storage that became available with completion of the Hungry Horse Project upstream.

In 1976, CSKT filed an application with FERC, as a competitor with the Montana Power Company, for relicensure of the Kerr project for a second 50-year term. In 1980, the first FERC license expired, and for the next five years FERC issued a series of one-year licenses to Montana Power Company while the two competing applications were considered by FERC. On July 17, 1985, the Tribes successfully negotiated a settlement to the dispute. As a part of that settlement, CSKT became a co-licensee with Montana Power Company (now PPL Montana), for another 50-year license through 2035.

Although licensing authority for hydropower projects was consolidated into the FERC by Congress, that authority is not exclusive or absolute. Congress understood that when the FERC was going to issue a license for a dam to be located within a federal reservation (such as an Indian reservation, National Forest Service lands, National Park Service lands, etcetera) that FERC must share its decision-making authority. To effectuate this understanding, Congress included Section 4(e) within the Federal Power Act which required FERC to consult with sister federal agencies and adopt their sister agencies' conditions into FERC licenses that would impact resources under those agencies' jurisdiction.

Consequently, when someone wants to build a dam on a river system on federally reserved lands that will be impacted by the proposed dam, (such as a federally reserved Indian reservation, National Forest Service lands, or National Park Service lands), then that person is required to work with the federal agency whose lands would be impacted by the proposed dam to ensure that the purpose of the affected federal lands is preserved. In the case of Kerr Dam, CSKT worked closely with the Department of Interior, the federal trustee of the lands impacted by Kerr Dam, to ensure that the underlying purposes of the federally reserved lands, the Flathead Reservation, were considered, with pertinent issues included as conditional provisions in the current license.

In addition to concerns for protection of natural resources, Congress was also concerned that the occupants of a federal Indian reservation be fairly compensated for the existence of any FERC licensed project within a tribe's reservation. To address this concern, Congress included Section 10(e) within the Federal Power Act, authorizing FERC, subject to approval of the affected Indian tribe, to "fix a reasonable annual charge for the use" of an Indian reservation. In the case of Kerr Dam, this provision in the Federal Power Act has been critically important, as it created an annual land use payment to CSKT. In 2013, this payment is approximately \$19 million.

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