

## KERR PROJECT ACQUISITION: THE FERC LICENSE

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The Tribes fought hard for their rights to the dam in the relicensing negotiations of 1985. CSKT demonstrated foresight by arguing for the unilateral right to acquire Kerr Dam in 2015. Today the Tribes are on a path of preparation to execute this opportunity, in addition to planning for the obligations of managing a hydroelectric facility once the conveyance of the project takes place.

Some key provisions in the 1985 negotiations and subsequent Federal Energy Regulatory Commission (FERC) license include the following:

- The Tribes accepted a reduced payment for the use of the occupied lands where the dam sits, in addition to use of the reservoir (Flathead Lake), in exchange for the option to exclusively acquire the dam in 2015.
- This window of opportunity for the Tribes to acquire the dam is set between the 30<sup>th</sup> and 40<sup>th</sup> anniversaries of the effective date of the new license (between the years 2015 and 2025), when the Tribes may, in their sole discretion, designate a date for the conveyance of the Kerr project to CSKT. Once this 10-year window expires, the Tribes' opportunity to acquire Kerr Dam terminates.
- Additionally, PPL Montana's selling price is set by a formula that includes the original cost of construction, less depreciation. Now, especially after the deregulation of the energy industry in Montana, this regulated book value of the assets will be a considerably lesser amount than the market value of the assets.
- No later than 2010, PPL Montana was required to provide the Tribes, the Secretary of the Interior, and FERC with a written estimate of that conveyance price.

In their estimated conveyance price of 2010, PPL Montana offered a project price tag of \$55.4 million, updating the price again in 2012 to \$51.6 million.

The Tribes dispute this conveyance price, especially because they contend that PPL Montana is not sticking to the provisions within the FERC license that sets the price at "original cost, less depreciation."

In the estimate, the Tribes dispute the inclusion of \$34.2 million for the cost of environmental mitigation. The Tribes have several arguments contending that this portion of the conveyance estimate is not part of the "original cost, less depreciation" formula. Primary among these arguments, the \$34.2 million represents the cost for implementing the mitigation requirements of section 4(e) of the Federal Power Act which are not costs generally allowed to be included as capital costs in the determination of

the “original cost of construction less depreciation”. Moreover, the FERC license specifies that the conveyance price shall not include environmental costs that the Montana Public Service Commission has authorized the Kerr project’s owner to recover from Montana’s electrical rate payers. The \$34.2 million is such a cost.

In pursuit of the originally agreed upon price, the Tribes have invoked the dispute resolution provisions provided in the license. The updated conveyance price provided by PPL Montana has been disputed, negotiations have been attempted and failed so the Tribes demanded a formal arbitration process on December 21, 2012.

Today, an arbitration panel has been established that includes three expert panelists, two of whom are versed in how to account for the finances of hydroelectric and energy matters such as the Kerr project, and one who has deep experience in conducting trial and arbitration proceedings. This arbitration panel is expected to rule on the matter by March 2014.

Considering the complexity, and how much is riding on the outcome of the arbitration process, Energy Keepers, Inc. has retained the law firm, Van Ness Feldman. Based in Washington, D.C., with a sister office in Seattle, Wash., this legal practice specializes in energy, natural resources, land use, real estate, government transactions and litigation.

Once there is a final conveyance price on the table, the Tribes have one year to provide written notice to PPL Montana, the Secretary of the Interior, the Flathead, Mission and Jocko Valley Irrigation districts, and FERC of their intended date of conveyance. The soonest conveyance could occur is in the year 2015 (the 30<sup>th</sup> anniversary of the currently issued license). The Tribes intend to provide written notice to PPL Montana on September 5, 2014 of their intent to acquire Kerr Dam on September 5, 2015.

If the Tribes choose not to purchase and acquire the Kerr project, instead allowing for their right of conveyance to terminate, there is one additional, but critical action that might occur. If conveyance does not take place, then PPL Montana has a right to renegotiate the annual land use and occupancy fee they are paying to the Tribes. In 2013, this amounts to \$19 million dollars, and the Tribes’ concern is that PPL Montana would be interested in paying a much lesser amount, and would fight in negotiations to pay less than their current annual obligation to the Tribes.

Understanding what is at stake, and the general time constraints imposed by the current FERC license provisions, the Tribes have been actively working toward creating the necessary foundations to acquire the Kerr project when the first opportunity presents itself in 2015.

Beginning with the creation of Energy Keepers, Inc., this company is organized as a federally chartered corporation, under authority of section 17 in the Indian Reorganization Act (IRA) of 1934. By creating this separately chartered corporation in August 2012, the Tribes significantly protect themselves from the liability inherent in the process of acquisition and management of the dam upon conveyance. Primarily, the assets of the CSKT and the corporation are separate from one another. Additionally, Energy Keepers, Inc. is not subject to federal income tax. Other considerations to

having a federal charter include: eligibility for federally guaranteed loans; ability to issue certain tax exempt bonds; and joint ventures or equity partnerships are possible via an Limited Liability Company subsidiary that is also chartered under section 17 of the IRA.

The headquarters for Energy Keepers, Inc. have been established in Polson, with Brian Lipscomb as the Chief Executive Officer; Charmel Gillin as the Business Manager; Bart Vanderhoof as Plant Manager; Joe Hovenkotter as General Counsel; Jordan Thompson as Associate General Counsel; and Sherry Dupuis as the Administration and Records Manager. Additionally, Daniel Howlett is currently working with Bonneville Power Administration in Portland, Ore., to gain experience and on-the-job training for his position with Energy Keepers, Inc. as the Power Marketing Coordinator.

Five Board Members have also been selected by the Tribal Council and include Thomas Farrell; Daniel Decker; Robert Gauthier; Lon Topaz and Thomas Babineau.

Moving forward, fiscal year 2013 will continue to be an important year for the continued development of infrastructure that will allow for a smooth conveyance of the Kerr hydroelectric project to the Tribes in 2015.

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