

Tribes take growing interest in hydro-power

(On June 16 the law firm Karnopp Petersen LLP will host a dinner in celebration of the 50th anniversary of its service to the Confederated Tribes. All tribal members are invited to attend the celebration, which will be held at the Warm Springs Museum at 5 p.m. In honor of this enduring relationship, the Spilyay is presenting a series of articles highlighting cases and events that embody the shared history between the tribes and the law firm.)

Pelton-Round Butte hydroelectric project

The Pelton-Round Butte hydroelectric project, the largest hydroelectric project in the state of Oregon, has been in operation for nearly 50 years. Since the beginning, the tribes have received compensation for the project's extensive use of tribal lands. Other Indian tribes with hydro projects located on their reservations have received similar compensation. However, the Confederated Tribes of Warm Springs was the first Indian tribe in the nation to become a licensee and part owner of a federally licensed hydro-power project. Because of great foresight and shrewd negotiating by tribal leaders and tribal representatives, the project has become a crucial source of income for the tribes and an investment in the future of the Warm Springs reservation.

Project history

The area surrounding the confluence of the Crooked and Metolius rivers with the Deschutes has long been recognized as having tremendous potential for hydropower production. The site was set aside as an Indian Power Site Reserve back in 1910. The Federal Power Commission (now the Federal Energy Regulatory Commission, or "FERC") issued Portland General Electric a license to build and operate the project in 1951.

The project was to consist of three dams - Pelton, Round Butte and the Re-Regulating dam. As the dams were to utilize extensive tribal lands, the license required PGE to negotiate with the tribes to determine fair compensation for those lands.

The negotiations continued until December 1955. PGE and the tribes agreed to a payment formula for Pelton dam that resulted in an average payment to the tribes of \$94,000 a year for the first 20 years. Importantly, as part of the deal, the tribes obtained the right to put power generators on the Re-Regulating dam, if it should ever become economically feasible to generate power there in the future. Pelton Dam was completed and became operational in 1958.

Soon after, PGE decided that it would be beneficial to raise the height of the proposed Round Butte dam. Since this would result in flooding additional tribal lands, PGE was forced to renegotiate with the tribes to amend the initial agreement. Tribal attorney Owen Panner took part in the negotiations, which resulted in an amended agreement in 1961.

The amendment provided that the amount of compensation paid to the tribes for use of tribal lands related to Round Butte Dam would be adjusted after 10 years, instead of the 20 years established under the Federal Power Act, and then re-adjusted every five years. The tribes also insisted that the amount of the compensation be decided by a board of arbitrators rather than by FERC.

Although it was expected that

it would take several years to fill the reservoir behind Round Butte Dam, the dam was completed just before the floods of 1964. As a result of the floods, the reservoir was filled in only a few weeks and the dam was fully operational.

Renegotiating the tribes' compensation

By 1974, ten years had passed since Round Butte Dam became operational and it was time to renegotiate the tribes' compensation.

Since 1964, the tribes had received an average of \$246,000 a year for Round Butte. PGE proposed an adjustment based on the consumer price index that would result in an increase in the annual payment to approximately \$406,000 a year. However, the tribes believed this was unfair, as power values had increased a great deal more than the consumer price index. After negotiations failed, the matter went to arbitration as required in the amended agreement.

After a six-day hearing, where both sides presented witness testimony and other evidence, the arbitrators issued their decision on July 14, 1977, three years after the negotiations began. The order effectively raised the compensation from \$246,000 a year to approximately \$1.09 million a year.

PGE was required to make back payments dating to the expiration of the original compensation term in 1974, along with 6 percent annual interest. PGE challenged the arbitrator's decision in federal court, where the decision was ultimately upheld.

By the following year, it was time to negotiate the adjusted compensation for Pelton Dam, as the first 20-year period of that dam's operation had passed. The tribes filed a petition with FERC for a price adjustment in January 1978. After two years of legal briefs, extensive filings and numerous hearings by a FERC administrative law judge, the judge issued an initial order increasing the tribes' compensation for Pelton from approximately \$94,000 to a little over \$1 million a year.

The award went up and down the appeals process within FERC for a few more years, and finally resulted in a 1982 order granting the tribes compensation of \$650,000 for 1978, to be increased annually in accordance with the consumer price index, as well as interest for the back payments. Thus, in 1983, the tribes' compensation for Pelton was \$1.04 million.

Meanwhile, the compensation for Round Butte was due to be adjusted again in 1979. The parties were unable - again - to agree to a fair price, so the issue went to arbitration - again. Power values had continued to increase substantially since the 1974 adjustment (which, of course, was not finalized until 1977).

Because of the rising value of power, and after extensive proceedings - again - the arbitrators awarded the tribes an increase from \$1.09 million to \$4.7 million annually for Round Butte. PGE challenged this decision in federal court, where the decision was overturned. The tribes and the United States, as trustee, appealed that decision to the Court of Federal Appeals for the Ninth Circuit.

Tribal leaders and the officers of Warm Springs Power Enterprises, which was established in 1981, spent a great deal of time and energy on these drawn-out compensation adjustment processes. In addition, tribal attorney Dennis Karnopp,

and a young, new attorney with the firm, Jim Noteboom, spent a substantial amount of their time during the late 1970's and 1980's on the negotiations, hearings, arbitrations and endless appeals in order to ensure the tribes received fair compensation for the project. It was becoming increasingly clear that a more long-term solution should be sought.

Accordingly, the tribes and PGE agreed to enter into settlement negotiations, with federal judge Otto Skopil Jr. acting as mediator, in order to resolve the issue of compensation for both Pelton and Round Butte dams through the end of the FERC license in 2001.

The case in the Ninth Circuit Court of Appeals was put on hold while the parties tried to reach settlement. Finally in 1985, after a seven-day hearing before Judge Skopil, PGE and the tribes reached a settlement agreement.

The settlement provided first that PGE would pay the tribes \$18.15 million for all back payments due for both dams up until December 31, 1984. As for future compensation, the parties agreed to a fairly complex formula. As a result, by the end of the license term, the tribes received an annual payment of approximately \$11 million as compensation for the Project.

The Reregulating Dam

Back in 1955 the tribes astutely reserved the right to install and operate generators in the reregulating dam and sell the power if it ever became economically feasible to do so.

With the rising cost of power, that time came in the late 1970s and early 1980s. The Tribal Council presented a referendum proposing the construction of the Pelton Reregulating Dam Hydroelectric Project to the tribal membership. A landslide 84 percent of tribal members voted in favor of the proposal on May 15, 1979, and appropriated \$10 million of tribal funds to construct the project.

On February 20, 1980, FERC issued an order making the tribes a co-licensee with PGE for the Pelton project, making The Confederated Tribes of Warm Springs the first Indian tribe in the United States to be licensed by FERC to operate a hydroelectric project.

The Reregulating Dam was

dedicated in a ceremony on July 16, 1982. The Reregulating Dam has resulted in millions of dollars of revenue for the tribes since that time.

New license for the Pelton project

The initial FERC license for the Pelton-Round Butte hydroelectric project expired in 2001. PGE submitted an application to FERC for renewal of the license in 1999. At the same time tribal leaders determined that, through Warm Springs Power Enterprises, the tribes were capable of operating the entire project.

Thus, the tribes submitted a separate application to FERC for a license to own and operate the dams. Soon thereafter, PGE and the tribes began negotiating to reach a settlement over future ownership of the project.

The tribes and PGE entered into a Long Term Global Settlement and Compensation Agreement in April 2000. To avoid the redundant and adversarial negotiations for compensation every few years, as in the first license term, the settlement terms cover the entire 50 year period of the new license.

The settlement recognizes the

tribes' long term goal of managing and controlling all the natural resources of the reservation, including hydropower. In light of this, the re-licensing agreement gives the tribes the right to purchase the controlling 50.01 percent interest in the Pelton project from PGE at net book value during the period of the new license.

The tribes initially obtained ownership, under the Settlement, of one-third of the project in 2002. The tribes have two future purchase options, one in 2021 for 16.66 percent and one sometime between 2029 and 2038 for an additional .02 percent, which will give the tribes the controlling interest in the project.

In addition, the tribes retain its 100 percent ownership of the Reregulating Dam. The tribes are now a co-owner and co-licensee of the entire Pelton-Round Butte project with PGE.

As licensees, PGE and the tribes entered in settlement negotiations with governmental regulators, including the U.S. Fish and Wildlife Service, the State of Oregon, and the tribes' Natural Resources Branch, as well as interested non-governmental organizations, such as

The Federal Energy Regulatory Commission has been in the final approval process since last July, and the tribes expect FERC to issue the historic new license to PGE and the tribes in the very near future.

WaterWatch, to establish the terms and conditions of the new FERC license. Those negotiations culminated in a settlement agreement reached last year.

In July of last year all the parties to the settlement agreement gathered together to celebrate the success of their efforts at a signing ceremony at the Museum at Warm Springs. The ceremony was attended by Gov. Kulongoski and Secretary of the Interior Gail Norton. FERC has been in the final approval process since last July, and the tribes expect FERC to issue the historic new license to PGE and the tribes in the very near future.

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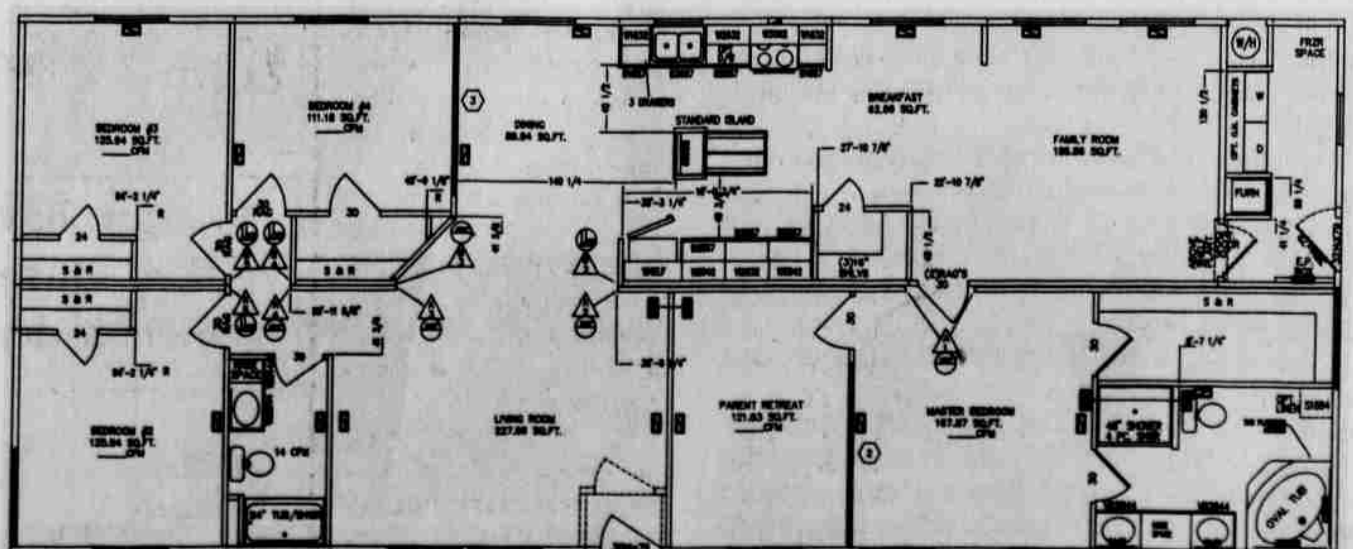
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