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A SHIFT IN POWER

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Professional Paper

presented in partial fulfillment of the requirements  
for the degree of

Master of Arts, Environmental Science and Natural Resource Journalism

The University of Montana  
Missoula, MT

May 2012

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*Laughlin, Breeana Clare, M.A. Spring 2012, Environmental Science and Natural Resource Journalism*

A shift in power

Chairperson: Henriette Lowisch

*After almost 80 years of the Kerr Dam operating on reservation land, the Confederated Salish and Kootenai Tribes are preparing to become the sole owners of the dam in 2015.*

*The takeover of Kerr Dam would mark a major milestone in a century-long battle of the Confederated Salish and Kootenai tribes to take back lost resources on native land. However, the tribes have a long to-do list to cross off before they can take over the dam including price negotiations, hiring and training workers and creating an energy company to market the power.*

*While tribal representatives say the community will benefit from keeping profits from the dam local, government officials say because the tribes won't be required to pay county taxes, they will need to work closely with them to make sure that all the taxes hitherto paid by the dam's current owners, Pennsylvania Power and Light, will continue to flow. The Tribes would also be subject to strict regulatory standards, including the Federal Energy Regulatory Commission and the Environmental Protection Agency.*

## **A shift in power**

***The Confederated Salish and Kootenai Tribes want to recapture resources from the Flathead River by taking control of Kerr Dam in 2015.***

*By Breeana Laughlin*

*Environmental Science and Natural Resource Journalism*

*University of Montana*

It wasn't an easy drive for Steve Lozar on his way to Kerr Dam that cold November morning. The first real sign of winter had hit northwest Montana overnight, disguising the country roads with a thick layer of glistening white powder.

Lozar's tires made the first marks down the winding road to the base of the dam. As he exited his PT Cruiser, his breath caught the crisp air, sending a cloud of fog into the sky. He walked steadily toward the power station, the ground crunching beneath his boots. Tiny flakes of snow began to sparkle on his long gray ponytail.

Lozar's had mixed feelings about the dam since he visited the gigantic concrete structure as a boy. The growing hum of the turbines makes him feel small, but it also emits a wave of nostalgia.

“We didn't want the dam. We were opposed to it right from the very start,” Lozar said. “But now many of us have ties to the place.”

A tribal council member for the Confederated Salish and Kootenai Tribes on the Flathead Reservation, Lozar has witnessed the environmental damage caused to the Flathead River, the body of water he describes as the tribal lifeline. But now he considers Kerr Dam a key to prosperity for the Confederated Salish and Kootenai Tribes. To him, taking control of Kerr Dam means recapturing a major tribal resource after almost 80 years.

A witness and a warrior, today he tours the Kerr Dam as a prospective investor.

The outcome of the Confederated Salish and Kootenai Tribes' pursuit to take over the dam has implications not only for the northwest Montana tribe, but for the 566 federally recognized Indian tribes across America. The Bureau of Indian Affairs estimates that while Indian land makes up only five percent of land in the United States, it contains about ten percent of all energy resources nationwide.

Other Native American tribes have acquired a stake in energy projects. The Confederated Tribes of Warm Springs Reservation co-own the Pelton Round Butte hydroelectric project on the Deschutes River in Oregon. The Yakama Nation has a tribal energy utility that includes small hydro facilities. A number of other tribes also have power sharing agreements through the Federal Power Act.

But the size and scale of the Confederated Salish and Kootenai Tribes' venture to take over the ownership of a hydroelectric dam is unprecedented.

“What we are doing is pretty unique, and lots of Indian Country is looking at what we're doing,” Lozar said. “So are a lot of investment bankers. So are a lot of state legislators. So it's even that much more important we are successful.”

The effort to take over the dam is costly and time consuming, and there's a certain amount of risk

to it. But, Lozar said there's an honorable war at stake. Today's warriors are dressed in suits, but the spirit is still the same.

“There's a justness to it,” Lozar said. “Two hundred years ago we would have gone to protect our families with bows and arrows and guns. Today's warrior is the person who is packing that degree and making sure we retain this place.”

### **A man-made marvel**

Kerr dam stands as a man-made marvel amid some of Montana's most eye-catching scenery.

The crisp water of the West's largest freshwater lake cradles the gigantic concrete structure. Deep-green pine trees dot the grassy hills along the shoreline. In the distance, the snow-capped Mission Mountains command the valley below. When the spill gates are released, the calm blue water from the reservoir unravels to form waterfalls crashing into the river below.

Steve Lozar first visited Kerr Dam as a boy. His father, who worked as a greaser at the dam after serving in World War II, almost lost his life in a turbine when it started to spin.

“Dad was in a tough spot there. But he survived,” Lozar said. “Kerr Dam almost made me not exist.”

In spite of the near tragedy, Lozar has fond childhood memories of the dam. He loved to play around the dam's housing area.

“We were very poor and it was kind of a fairytale land,” he said. “It was a wonderful thing for me.”

Lozar was sent to Indian school in Wyoming, then went on to study in California.

“Boy, it was a culture shock and a half for me,” he said.

One day, he caught a ride to the ocean and went surfing.

“I fell in love with it. I was hooked,” Lozar said.

He ended up surfing all through the 1960s and moved to Hawaii where he surfed the big waves of Pipeline and Sunset Beach.

It was the river back home that had instilled in him a love of water.

“The same prayers I would say on the river, I would say in Hawaii as soon as the sun would set – virtually every night,” Lozar said. “That relationship was never broken.”

When Lozar came back home to raise his family in July of 1975, Kerr Dam began to play a different part in his life.

“It wasn't going away. We realized that in the 30s,” Lozar said. “In all the years that I was working and raising my family I knew we had the possibility of purchasing the dam.”

### **Community impacts**

After almost 80 years of the Kerr Dam operating on reservation land, the Confederated Salish and Kootenai Tribes are preparing to become the sole owners of the dam in 2015.

Representatives from the Confederated Salish and Kootenai Tribes said profits from the dam will be the economic engine that will drive the tribes into the future.

The tribal council plans to use profits to improve education and health care for tribal members. Lozar said they also plan to expand other social services and provide better and more affordable housing.

“It's addressing everything we've done traditionally as far as the extended family. That sets us apart from the rest of the population,” he said.

The tribes have been buying land along the lake and river and restoring habitat that's historically been affected by Kerr Dam. The tribal councilman said these strategies will be amped up when they have sole ownership of the dam.

There may or may not be a per-capita payment for tribal members created from extra revenue Kerr Dam generates. Lozar said the tribal council is leaning against it.

“The prevailing feeling right now is we recognize the struggle of individuals – but better to build jobs locally, better to have good health care and education for kids – rather than give you \$400 to head to Wal-Mart in Missoula,” he said. “That can be a politically difficult thing and requires a certain amount of courage and commitment from the council, but this is a council that is willing to take that hit.”

Lozar said not only the tribe, but the entire community will benefit because the profits from the dam will stay local, instead of going to Allentown, Pennsylvania - the headquarters of the dam's current owners, Pennsylvania Power and Light.

Tribal corporations aren't taxable entities, so the tribes won't be required to pay county taxes on revenue from dam operations.

Lake County commissioner Paddy Trusler said government officials will need to work closely with the tribes when they take over the dam to make sure that all the taxes hitherto paid by Pennsylvania Power and Light will continue to flow.

Trusler said the regulatory part of dam operations has huge implications on Flathead Lake because water levels can affect property values along the shoreline, and the county relies on healthy property values to provide services.

“If that particular process is not maintained or improved from what it is right now it can have consequences on property value,” he said. “We always want to try and maintain those property values for the revenue that is generated.”

School District 23 in Polson, the quaint lakeside town near the dam, is a major recipient of tax money from Pennsylvania Power and Light of Montana. In 2011, the elementary and high school district received about \$375,000 in taxes from the dam, and the state school levy received another \$375,000.

“We need to be very, very cognizant of the revenue that the dam provides to the school district,” Trusler said.

Lake County Superintendent of Schools Gale Decker is running for Lake County Commissioner. In his election bid, he presents Kerr Dam as a major local issue, stating “the greatest impact Lake County residents will see when the tribes take control of the dam is the loss of the largest taxpayer in the county.”

In 2011, Pennsylvania Power and Light paid about \$1.2 million in taxes to Lake County.

Decker said if the tribe doesn’t agree to make payments in lieu of taxes, the county may receive payments from the federal government, called PILT money, to help offset losses in property taxes due to nontaxable Federal lands within the county's boundaries. If neither of those options comes to fruition, the lost revenue may end up being absorbed by the rest of the property owners in Lake County.

The schools superintendent said he has spoken with tribal council representatives in the past about the dam transfer and was cautiously optimistic that an agreement will be made to make up lost funds to the school.

“They've been really good through the process telling us what their plans are as far as taking over the dam and running it, but the loss of revenue is obviously a big issue,” Decker said. “Hopefully it's going to get resolved before 2015 – before the actual takeover – and there will be some kind of agreement in place.”

County Commissioner Trusler said he has a good working relationship with tribal Energy Director Brian Lipscomb.

“I would like to believe that relationship has been beneficial, so when the actual purchase occurs that relationship is hopefully going to continue,” Trusler said.

Lipscomb said the tribes are contemplating a payment in lieu of taxes to the schools and local government.

“We recognize that there are services being provided by the taxes being paid,” Lipscomb said.

But, he said, the tribes haven't determined what the payment is going to be or how that payment would be made.

Meanwhile, Lake County residents shouldn't have to worry about hikes to their power rates. The majority of the power currently provided to local residents by tribally-owned Mission Valley Power comes from the Bonneville Power Administration at wholesale rates that are much less expensive than those found on the open market. The tribes anticipate selling energy produced through Kerr Dam on the open market to customers around the western United States, including urban areas in Washington, Oregon and California.

Selling electricity on the wholesale market is, by nature, uncertain. Market prices fluctuate and are trending downward not just because of high springtime water flows, but because of the availability of relatively inexpensive natural gas.

If natural gas prices stay low, the profit to be made from hydroelectric electricity is likely to stay

low, said Tom Powers, an economics professor and power consultant in Missoula, Montana. But if natural gas prices shoot back up, the money made from electricity is likely to rise as well.

“It’s a market-oriented situation with considerable volatility that involves some risk,” Powers said. “Whether the risk is your profits aren’t as great as you wished they were is one thing. If the risk is that you won’t even be able to cover your costs, that’s another thing.”

### **Holding the power**

Three employees currently work at Kerr Dam through Pennsylvania Power and Light of Montana.

Lloyd Turnage is a Kerr Dam employee who also happens to be a tribal member. He's worked on the dam since 1985.

“To me, as a tribal member and as a Kerr employee, if the turnover goes smoothly and the tribes manage it very responsibly, the potential benefit to the tribal members is huge,” Turnage said.

But, he says, taking over the dam is 'no small potatoes.'

“It goes way beyond the day to day operation of running the units and generating power,” Turnage said.

The tribes receive about \$18 million per year in rent from Pennsylvania Power and Light of Montana to operate the dam on tribal land.

“Right now, they get about the same amount of money each year depending on inflation,” Turnage said.

“When the tribes run it themselves they will have good years and so-so years,” he said.

The tribes expect to make an additional \$12 million per year in profits once they take over the dam. But they will have to be ready for flooding, droughts, potential power outages or other hits that could occur.

The amount of snow and runoff affects the profit to be made from the dam. Even a good snow year doesn't guarantee a hefty profit because it can cause energy prices to fall.

The tribes will also have to assume greater risk if something goes wrong – if a piece of equipment fails they will have to pay for repairs and potentially replace the cost of energy lost.

“Our plant runs mostly trouble free but there are times when you can have a major outage at an inopportune time and be behind for months,” Turnage said.

### **A ticking clock**

Recognizing the intricacies involved with dam ownership, the tribes decided to bring in an expert of their own. In 2010, Brian Lipscomb returned from Portland to the reservation where he grew up to head the Confederated Salish and Kootenai Tribes' Department of Energy.

The Montana native has a degree in civil engineering. He's worked off the reservation for a large portion of his career, but he's also played a major part in natural resource management for the

tribes. Lipscomb was the tribes' Fish and Wildlife director for 10 years. He also worked to address the negative environmental impacts of Kerr Dam in 2003 as the director of the Department of Lands. Today, his focus is on managing the tribes' energy assets. Kerr Dam is at the top of the list.

"It keeps me plenty busy, along with keeping tribal members informed about where we are headed," Lipscomb said.

"It's a pretty fast and aggressive timeline. People say, 'You've got three years – that's no problem.' But that's not the view from my world."

The Confederated Salish and Kootenai Tribes have a long to-do list to cross off before they can take over the dam.

"We have all the burdens that any wholesale generating utility would have," Tribal attorney Joe Hovenkotter said. "We have to set up a corporation, develop the capability to possess, defend, operate and maintain the facility. We also have to develop the ability to market the power. And participate in all the regulatory functions that go along with the facility."

Cost negotiations are in the works. The 1985 dam license agreement lists the tribes' buying price as the original cost of dam construction less depreciation. Pennsylvania Power and Light of Montana initially estimated this price at \$55.4 million.

Tribal representatives said they are still far apart as to what the cost should be. If they can't agree on a price, the tribes and PPL Montana will go to arbitration. In an arbitration, each party would present their facts and figures and a panel of experts would decide what the cost will be.

"We are looking at the best-case scenario, the worst-case scenario, and somewhere in-between," Tribal Councilman Lozar said. "We are still a long way away."

Skilled employees are fundamental to the success of the dam. Lipscomb said the tribes are in the process of developing staff training programs. The tribes expect to select their dam operators by September of 2012. Before they work at Kerr, the future operators will train at a Pennsylvania Power and Light hydroelectric facility.

A new power marketer has also been hired and will be getting practical training in Portland, Ore., over the next few years. This will help the tribes fully understand the workings of the Bonneville Power Station, and how to move power around the grid for the greatest economic return.

Kerr Dam ownership will not only require people to work on the dam itself, but also the creation of a tribal corporation to manage energy contracts and market their power. Right now the tribes have an energy department. Eventually the tribes want to form an energy company that will be separate from the tribal government.

The tribes already have a number of companies that bring revenue from their services into the tribal budget. The energy company will be added to this list.

"All of our tribal enterprises operate somewhat autonomously from our tribal government because there needs to be a corporate veil over our enterprises," Lozar said.

The number one reason for failure in Indian Country for Indian businesses is political interference

from their governments, Hovenkotter said. Establishing a business separate from tribal governments also makes them more attractive to business partners and clients because it's easier to solve disputes over contracts.

Twelve to 20 new job positions will be created through dam operations and the energy company, and tribal members will be given priority.

“With added jobs you tend to see future generations with better education and better economic assets,” energy director Lipscomb said.

### **Homeland lost**

The takeover of Kerr Dam marks a major milestone in a century-long battle for the Salish and Kootenai tribes to take back lost resources on native land. The dam was constructed during a time when tribal resources were being snatched away by government policies that encouraged white settlement. It was the last great land grab in the West – and was even advertised as that.

The Flathead Reservation was established by the Hellgate Treaty of 1855 and includes 1.3 million acres.

The Flathead Allotment Act was created in 1904 and passed through Congress by U.S. Senator Joseph Dickson of Montana without the Salish and Kootenai Tribes' knowledge or involvement. The allotment act divided the Flathead Reservation into parcels based on the amount of land it would take for a family to survive and still be profitable for agriculture. Tribal members were given a piece of land. The remaining properties were classified as excess government land and opened for homesteading.

The Native American communities became poverty stricken. In the following decades, many tribal members would sign away their deeds as they tried to settle debts.

Meanwhile, the federal government began to realize policies to assimilate tribal members were failing. In the early 1930s, the Indian Reorganization Act gave tribes authority to form their own government.

The Confederated Salish and Kootenai Tribes were the first in the United States to adopt a constitution and a corporate charter.

“Part of the reason they did that was out of the concern for the way their resources had been taken from them by the Montana Power Company for establishing the Kerr Project,” said tribal attorney Hovenkotter.

“They have been working continuously ever since to reacquire the Kerr facility,” he said.

While tribal members were witnessing the land slip through their grasp, hydro power was beginning to take hold across the United States. Montana Power Company came onto the scene with the goal to build a dam on the Flathead River.

Lipscomb said most tribal members had little say in whether or not the dam should be built on the reservation. Some people, he said, were wooed by Frank Kerr, the president of the power company, who would hold dinner parties, buy groceries for families and make promises he couldn't deliver about providing power for free.

“We never fully realized those benefits from the facility,” Lipscomb said. “Nor did, I believe, we fully comprehend the impacts we might suffer as the dam was being constructed.”

River banks were blasted. Channels dried up and tunnels were drilled through rock cliffs. The wilderness below the dam was transformed into a huge tent village, complete with a hospital and market. Many locals were employed during the construction of the dam, including tribal members. Most were laborers – with picks and shovels. The work was hard and dangerous. Nine tribal members died during the construction of the dam.

Kerr Dam was completed in 1938. It stretches more than 550 feet long and stands 204 feet high – taller than Niagara Falls. It raised the level of Flathead Lake by 10 feet.

### **Re-establishing stewardship**

The tribes sought to regain access to the river ever since their land was being taken away. Since Kerr Dam had such a huge impact on the river, they wanted to be the ones to call the shots on how the dam was operated.

The payments the tribes received from the dam’s owners gave them an economic base to conduct government activities and buy back reservation land.

At the lowest point tribal members owned only 20 percent of reservation land. They now own about 74 percent of property on the Flathead Reservation.

The tribes have become legally savvy in finding ways to recapture their resources.

“They’ve been very focused and had a lot of foresight to do whatever they could to reacquire their land,” attorney Hovenkotter said.

The tribes litigated three times between 1939 and 1985 in an attempt to increase the rent Montana Power Company was paying them, to make up for some of the environmental injuries caused by the dam. This includes the loss of habitat and vegetation both in the reservoir and down river. Although they didn’t win on all fronts, the tribes managed to get the land rental charge increased each time a new turbine was placed into the powerhouse.

The Confederated Salish and Kootenai Tribes have been involved in other legal battles involving natural resources. They’ve gotten special access for hunting and gathering. They’ve fought for tribal rights to protect fish and wildlife. This includes about \$18.5 million in settlement claims from the Clark Fork River Superfund. They’re also negotiating for control of water rights on the reservation.

Because the creation of Kerr Dam coincided so succinctly with their loss of resources, the tribes have concentrated heavily on controlling the dam. They filed a competing license against Montana Power Company at the end of the dam's original 50-year license in the late 1970s.

During licensing negotiations, the tribes used their authority under the Federal Power Act to put pressure on Montana Power Company. Tribal attorney Hovenkotter said the tribes were able to create a clear threat to Montana Power Company’s ability to relicense the facility by enacting environmental mitigation responsibilities, making the project less economically appealing.

In a major breakthrough, they were brought in as partners in the Kerr Dam license in 1985. This came nine years after filing the competing license application, and after countless hours of negotiations. The 30-year licensing agreement was established through the Federal Energy Regulatory Commission and included the option for the Confederated Salish and Kootenai Tribes to purchase the dam outright in 2015 and retain sole ownership for 20 years.

### **Full Circle**

The Kerr power plant will be almost 80 years old in 2015, when the tribes plan to take it over.

They say the previous owners have taken very good care of the facility and have a great track record of inspections given yearly by the Federal Energy Regulatory Commission, as well as an inspection conducted for the tribes in 2007. The dam is expected to operate beyond the end of the tribes' license, which will be up for renewal in 2035.

Once the tribes gain control of the dam, they'll face another, equally daunting challenge: to operate a multimillion-dollar operation subject to the pressures of the electricity market.

They'll also be under the scrutiny of several regulatory agencies, including the Federal Energy Regulatory Commission, the Occupational Safety and Health Administration, the North American Electric Reliability Corporation and the Environmental Protection Agency, watching for compliance with homeland security requirements, worker safety, flood control, electricity generation and transmission regulations and environmental protection standards.

Operating a facility the size of Kerr Hydroelectric Project is no small feat. But tribal representatives involved with the Kerr Dam takeover said it's a challenge worth taking. If the tribes take ownership of the dam, Tribal Councilman Lozar said they will have come full circle.

"Kerr Dam gives us the possibility to take care of ourselves as we did hundreds of years ago. We won't be relying on anybody because we are going to be the generators and the power marketers using our own resources," he said.

The outcome of the Confederated Salish and Kootenai Tribes' quest for ownership of the dam will mark a turning point in their history.

Successful management of Kerr Dam could catapult them to a position as a major player in the energy arena. It could also serve as an example that investment, legal savvy, passion and persistence are a winning combination when it comes to reclaiming natural wealth taken from Native Americans across the country more than a century ago.