

MEMORANDUM ON AUTHORITIES OF A PEOPLE'S UTILITY DISTRICT IN OREGON IN COOPERATION OR CONTENTION WITH OTHER SUCH DISTRICTS

By: Dan Meek, Portland attorney

The three questions posed are:

1. Would the creation of a People's Utility District (PUD) in Clackamas County (including some or all of the territory of the county) enable the Clackamas PUD to work with the Multnomah County PUD or other PUDs?
2. What happens to the generating resources when both PUDs are interested in acquiring them?
3. What happens in the event of disputes between PUDs?

Here are my quick answers:

1. Would the creation of a People's Utility District (PUD) in Clackamas County (including some or all of the territory of the county) enable the Clackamas PUD to work with the Multnomah County PUD or other PUDs?

First, a PUD in Clackamas County could include only the territory that is listed on the petition for such a PUD which has been circulating in Clackamas County for some months now. It cannot include territory currently served by the electric department of the City of Canby.

Second, any PUD can work with another PUD in a variety of ways. To begin with, they can work together under contract. For example, right now the Interlachen PUD (in Multnomah County, near the airport) contracts with the Rockwood Water PUD (east Multnomah County) to operate virtually the entire Interlachen water system.¹ Additional information on this arrangement is available from Interlachen's general counsel, Linda Williams (linda@lindawilliams.net).

Further, PUDs can execute intergovernmental agreements under ORS Chapter 190, which authorizes any local government entities, including PUDs to enter into agreements for joint operation of any or all of their facilities.

190.010 Authority of local governments to make intergovernmental agreement.

A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of a function or activity:

- (1) By a consolidated department;
- (2) By jointly providing for administrative officers;
- (3) By means of facilities or equipment jointly constructed, owned, leased or operated;
- (4) By one of the parties for any other party;
- (5) By an intergovernmental entity created by the agreement and governed by a board or commission appointed by, responsible to and acting on behalf of the units of local government that are parties to the agreement; or
- (6) By a combination of the methods described in this section.
- (7) This is extremely broad authority for joint operations by PUDs.
- (8) There is another statute which authorizes PUDs and municipal utilities to undertake joint projects (Chapter 262), but it is far less flexible than Chapter 190.
- (9) Thus, there is ample statutory authority for any PUD to fully integrate its operations with any other PUD or PUDs or with any other local government entities of any sort, including cities. This would enable a Clackamas PUD to operate jointly with the existing electric facilities of the City of Canby or even to have the City of Canby run the electric system for the entire county.

2. What happens to the generating resources when both PUDs are interested in acquiring them?

Any PUD can buy any generating resource from any entity that owns the generating resource and wishes to sell it. But I assume this question refers to generating resources that both PUDs are interested in acquiring by eminent domain, such as PGE's hydroelectric facilities on various Oregon rivers, including the Clackamas River and the Willamette River.²

An eminent domain proceeding could be started by any PUD to acquire those hydro facilities. In ***Emerald PUD v. PacifiCorp***, 302 OR 256 (1986), the Oregon Supreme Court held that PUDs have clear authority under the Oregon Constitution to condemn the hydroelectric facilities owned and operated by private utilities, such as PacifiCorp.

The public mandate that generated the constitutional amendment and chapter 279 itself indicate that the legislature intended Oregon Laws 1931, chapter 279, section 29(e), codified as amended at ORS 261.305(5), to include PUD authority to condemn existing hydroelectric facilities of private utilities.

As quoted earlier, Oregon Laws 1931, chapter 279, section 29(d), granted PUDs the "power * * * [t]o acquire * * * real and other property necessary or incident to the business of such districts, [and] * * * to acquire, develop, and/or otherwise provide for * * * water power and electric energy." We read the next paragraph of section 29 to allow eminent domain as one method by which this acquisition power of PUDs can be exercised. Section 29(e) grants PUDs authority "[t]o exercise the power of eminent domain for the purpose of acquiring any property * * * necessary for carrying out the provisions of this act." Paragraphs 29(d) and 29(e) should be read together.

When this is done, section 29 not only "clearly grants [PUDs] authority to acquire existing hydroelectric facilities, and electricity from them, by contract," 41 Op.Att'y.Gen. at 337, but also clearly grants PUDs the authority to acquire existing hydroelectric facilities by eminent domain. The mandate of the people and the warning of Governor Meier warranted no less. The 1931 legislature responded to the constitutional mandate. It enacted ORS chapter 261 which gives PUDs the necessary tools to "develop the water and energy resources of this state for the benefit of the people of this state and to supply public utility service, including water, water power and electric energy for all uses and users." ORS 261.007. *See also* Brown, *supra*, 20 Or.L.Rev. at 49 (discussing PUD power to condemn existing utilities).

In Emerald PUD v. PacifiCorp, 100 Or App 79 (1990), the Oregon Court of Appeals later ruled that Emerald PUD could not condemn PacifiCorp's dams on the Umpqua River, because the public benefit to Emerald PUD would be outweighed the harm to the customers of PP&L, who would lose the benefits of the dams. The specific reasoning was that, if Emerald PUD acquired the dams, it would simply buy less of the then-cheap power available to it from BPA, so Emerald customers would not benefit much. On the other hand, since PacifiCorp had no right to buy preference power from BPA, its customers would suffer a financial loss greater by at least a factor of two than the benefit that the Emerald customers would gain.

This rationale is no longer valid, of course, since:

- (1) BPA power is no longer cheap. It runs 3.4 cents/kWh right now, with another rate increase pending, which is not far from the price in the wholesale power market.
- (2) A newly formed PUD would not be merely reducing its purchases from BPA but instead would be using the power from the dams to serve customers previously served by the private utility.

Emerald PUD's basic problem was that it sought to acquire the dams but not the customers that the dams were presently serving. Here, a Clackamas PUD could seek to acquire a sufficient amount of PGE's hydro facilities, along with the customers that those facilities are presently serving (PGE's customers in Clackamas County). In any event, the initiation of separate eminent domain proceedings by a Multnomah PUD and a Clackamas PUD would likely result in a negotiation between

them to (1) create an Intergovernmental Agreement under Chapter 192 and pursue the generating resources jointly, or (2) divide up the generating resources in an equitable manner and pursue separate eminent domain proceedings for separate generating resources.

The only PGE generating resources of significant value above depreciated book value are the hydroelectric facilities. PGE's thermal power plants, even if condemned at depreciated book value, are no bargain.

3. What happens in the event of disputes between PUDs?

The PUDs can use the courts, just like any other government entities.

Another topic, not specifically mentioned in the 3 questions, is whether a PUD can acquire service area and electric distribution system assets beyond its political boundaries. For example, could a Multnomah PUD acquire PGE's service area and distribution system in Clackamas County?

Any PUD can probably purchase any distribution assets anywhere in Oregon, if they are offered for voluntary sale by the current owner (in this example, PGE).³ A voluntary sale by PGE to a PUD is not likely, however.

If a PUD must use its authority of eminent domain to acquire distribution system assets, it can exercise that power only within its own political boundaries, unless the voters of an area outside of those boundaries affirmatively vote to either (1) annex their territory to the PUD or (2) authorize the PUD to acquire utility distribution system assets in their territory. ORS 261.315.⁴ If the voters annex their territory to the PUD, then they become ordinary constituents of the PUD, entitled to vote for PUD directors. If they merely authorize the acquisition of utility distribution system assets beyond the PUD's political boundaries, they would become customers of the PUD but not electoral constituents of the PUD.

¹ Although Rockwood has put the term "Water" in its name, it is exactly the same legal entity as any other PUD in Oregon. There is only one type of PUD in Oregon, governed by Article XI, Section 12, of the Oregon Constitution and ORS Chapter 261.

² Article XI, Section 12, of the Oregon Constitution provides:

Section 12. Peoples' utility districts. Peoples' Utility Districts may be created of territory, contiguous or otherwise, within one or more counties, and may consist of an incorporated municipality, or municipalities, with or without unincorporated territory, for the purpose of supplying water for domestic and municipal purposes; for the development of water power and/or electric energy; and for the distribution, disposal and sale of water, water power and electric energy. Such districts shall be managed by boards of directors, consisting of five members, who shall be residents of such districts. Such districts shall have power:

- (a) To call and hold elections within their respective districts.

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- (b) To levy taxes upon the taxable property of such districts.
 - (c) To issue, sell and assume evidences of indebtedness.
 - (d) To enter into contracts.
 - (e) To exercise the power of eminent domain.
 - (f) To acquire and hold real and other property necessary or incident to the business of such districts.
 - (g) To acquire, develop, and/or otherwise provide for a supply of water, water power and electric energy.

Such districts may sell, distribute and/or otherwise dispose of water, water power and electric energy within or without the territory of such districts.

The legislative assembly shall and the people may provide any legislation, that may be necessary, in addition to existing laws, to carry out the provisions of this section. [Created through initiative petition filed July 3, 1930, and adopted by the people Nov. 4, 1930]

³ **261.305 General powers of district. People's utility districts shall have power:**

- (1) To have perpetual succession.
- (2) To adopt a seal and alter it at pleasure.
- (3) To sue and be sued, to plead and be impleaded.
- (4) To acquire and hold, including by lease-purchase agreement, real and other property necessary or incident to the business of the districts, within or without, or partly within or partly without, the district, and to sell or dispose of that property; to acquire, develop and otherwise provide for a supply of water for domestic and municipal purposes, waterpower and electric energy, or electric energy generated from any utility, and to distribute, sell and otherwise dispose of water, waterpower and electric energy, within or without the territory of such districts.
- (5) To exercise the power of eminent domain for the purpose of acquiring any property, within or without the district, necessary for the carrying out of the provisions of this chapter.

⁴ **261.315 Acquisition of distribution facilities outside district.** (1) Except as to distribution facilities located in unincorporated territory at or near the boundaries of the district and forming an interconnected part of the distribution system within the district, as determined by the county governing body after a public hearing, no facilities then being used for the distribution of electric energy outside the boundaries of the district shall be acquired by it until the acquisition thereof is approved by a majority of the electors registered in the territory in which the facilities are located, voting on that question at an election duly called for that purpose as provided in this section. If a part of the facilities is located within a municipality, the election shall be conducted so that the electors of the municipality may vote separately and their votes counted separately, and the part within any municipality may not be acquired unless a majority of the electors of the municipality voting on the question approves.