

NWHA SMALL HYDRO WORKSHOP

Private Developer – Public Entity

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Public-Private Small Hydro “Venture”

- Public entity with infrastructure or water rights.
- Private entity with money, technology, expertise, and willing to take risk.
- Public entity wants the project; private entity wants the opportunity



Limits and Restrictions

- Principle: Entrepreneurial efforts of public entities limited by long-standing prohibitions against intermingling with private enterprise
- State-driven, and every state different
- Use Oregon as an example
- State constitution, statute, rules

State constitutional limits

- Prohibition on government from being a stockholder in or lending credit to private corporations, Art. IX, Sec. 9
- Prohibition on delegation of government functions to private enterprises, Art. I, Sec. 21; Art. III, Sec. 1, Art. IV, sec. I
- Very difficult to create a private for-profit or not-for-profit corporation, association, LLC, etc. with government participation
- *Miles v. City of Eugene* (Or. Sup. Ct. 1969)

The Solution?

- Contract
- But ... still limits
- Public entity can contract with private entity for certain governmental functions, but may not yield oversight and control of functions to private entity



Contract limits

- Public entity must retain governmental accountability over the actions of the private entity
- Private entity may not, by contract or otherwise, be given decision-making control within the public entity
- Affects ownership and operations issues
- General examples with schools, prisons, liquor control, etc.
- *Steamboaters v. Winchester Water Control Dist.* (Ct App 1984)

As applied to small hydro and irrigation districts ...

- District authority to construct and operate a hydro project
- Statutory authority to enter into venture for construction/operation of a hydro project
- Limits within the statute and rule authorizing the “joint venture”
 - Gross/net project income parameters
 - Proprietary interest in project lands
 - Control over operation of the project

Ownership and operations

- Fee title and leases
- Joint ownership, such as tenants in common
- Insurance issues
- Tort liability issues
- Beware of public contracting responsibilities

Summary



- Every project different
- Research land ownership, easement ownership, water right ownership
- Be aware of grant and loan requirements and restrictions
- Explore options for structuring investment, development relationship, asset ownership, power sales, etc., be aware of constitutional, statutory, and regulatory restrictions