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Bracewell Team Advises on Massive Mitigation Deal



ONE OF THE FOUR HYDROELECTRIC DAMS SCHEDULED FOR REMOVAL AS PART OF THE KLAMATH RIVER RENEWAL PROJECT

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Houston may not be the first place that comes to mind when we think about environmental mitigation. The city is famous for its urban sprawl, concrete jungle, and oil and gas industry.

But Houston-based environmental mitigation specialist RES is in the spotlight after winning a huge contract to conduct restoration work on what may be the world's largest dam removal project.

"It's a cool thing for a Houston-based company to be pushing the edge of some of the environmental stuff," RES general counsel Sam Burley, who lives and works in Houston, told *The Texas Lawbook*. "And it'll be interesting to see how energy transitions, how all of that stuff comes together."

RES announced last month that it had agreed to a contract with the nonprofit Klamath River Renewal Corporation (KRRC) to provide restoration services in connection with the removal of four dams on the river, which stretches across California and Oregon. The

agreement between RES and KRRC finalizes habitat restoration, maintenance, and liability transfer responsibilities for a fixed price, "opening the door to a successful restoration of native vegetation and anadromous fish habitat along the historical, pre-dam path of the Klamath River," according to the announcement.

The \$450 million project has attracted a great deal of national attention over the years, including support in 2019 from then-Senator (and now U.S. Vice President) Kamala Harris.

"The Klamath River is kind of a lifeblood of Northern California and Southern Oregon, and the Native American tribes that live along its banks and have depended upon the river forever," said Bracewell Washington D.C. partner Jason Hutt, who worked on the contract alongside Burley.

Hutt said it was his first time working with RES, though he added he has worked "across from them" multiple times.

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“That’s obviously, I think, a nice compliment when someone who sat across the table from you turns around and engages you to help them accomplish their business objectives,” Hutt told *The Lawbook*. Partner Hans Dyke and associate Joshua Robichaud, both of Washington, D.C., were also on the team assisting RES in the restoration contract.

The project’s main goal is to reopen access to more than 400 miles of historical anadromous fish habitat, including critical spawning areas. To achieve that goal, the restoration contract covers the design, construction, and long-term management of 18,000 feet of high-priority tributaries. It also includes revegetation of 2,200 acres of new ground set to be exposed once reservoirs behind the dams are drawn down.

The giant project required a unique fixed-price contract structure, Burley said, to take into account the risk and uncertainty around nature.

“It’s hard to tell what’s going to happen until after the dams come down, because there are natural systems and processes,” Burley said. “We set up a contract that basically has RES responsible for 10-plus years for whatever happens. If there’s a fire, that’s our responsibility to find a way to still get the system to perform. If there’s flooding, if the river performs differently than we expected.”

Under a typical fixed-price contract, Hutt explained, a “finite universe of tasks” are completed allowing parties to determine a price. There are usually provisions for change orders if changes need to be made.

“In this case, we had to develop a fixed-price contract for an unknown set of tasks, where the certainty associated with those tasks is unknown,” Hutt said.

“And there’s no ability to change, or there’s a very limited ability to change, what the ultimate price would be to complete those tasks. And so, you have to have different provisions in there and financial assurance mechanisms in there that give the counter-parties certainty that you will be able to complete the task, in accordance with all the permits, and ecosystem planning documents that are going to be governing those tasks over the course of doing it.”

Burley also said the project marked his first time working through a progressive design build structure rather than the traditional request for proposals bidding structure.

“Here, they did have a very well-done design,” Burley said. “And then we came in, and we provided some advice, and it goes through that process. Once you get into it, and you have a good relationship with the technical adviser who sort of acts as the client rep, that’s where

it gets pretty intuitive and pretty. So, I think for big, complicated projects, it’s the best process I’ve ever seen.”

Hutt said he had previously seen progressive design structures in the construction industry, but the Klamath River restoration scheme was the first time he had seen it used in the environmental realm.

“That’s what’s kind of exciting about this, where you’re using a concept that’s been used elsewhere, but the way it manifests itself in an ecosystem restoration is totally different,” he said. “And you have to think how that needs to adjust the way that the parties contract with one another to get it done.”

Hutt added that the project could provide a valuable test case for using progressive design structures in both the environmental and infrastructure realms.

“I think that there are other major infrastructure projects in the country where you’re going to have to go through some sort of dismantling process over time,” he said. “And the parties seeking to do that will need to figure out how to contract with one another to accomplish those goals.”

Outside the main contract, Burley and the RES legal team also hashed out a commitment to team with the Yurok and Kuruk Tribes in California to incorporate their expertise and knowledge into the restoration work.

“One of the one of the things that we agreed on with RES pretty early was that if we didn’t have the tribes on our team, for purposes of the restoration, for purposes of doing the design, and then for doing the actual restoration, we wouldn’t be able to do the project, for a couple of reasons,” Burley said.

“One is that they’re going to be part of the long-term maintenance, they’ve lived on the river for forever. We actually had a visit with them. And they talked about how their families have fishing spots that they’ve had for back 100 generations...and then two, they’ve been doing river restoration work on the Trinity River, which is up near there. And so, they have really, really good, qualified crews.”