

TESTIMONY

**THE CONFEDERATED TRIBES
OF THE UMATILLA INDIAN RESERVATION**

OF

**DAVID TOVEY
EXECUTIVE DIRECTOR**

ON S.613

**BEFORE THE SENATE SELECT COMMITTEE
ON INDIAN AFFAIRS**

MAY 19, 1999

Good Morning Mr. Chairman,

My name is David Tovey, and I welcome the opportunity to present the testimony of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) on Senate Bill 613 before this distinguished Committee. I serve as the Tribal Executive Director, a position I have held for the past year. Prior to that I served as Director of the Tribal Department of Economic and Community Development for 10 years. I have also served as the President of the Affiliated Tribes of Northwest Indians (ATNI) Economic Development Corporation for the past four years.

I have been directly involved in the development and financing of our Wildhorse Resort, which includes a casino, a 100-room hotel, a championship 18-hole golf course, a 100 slip RV park, as well as our Tamastlikt Cultural Institute. Also appearing with me this morning is Daniel Hester, who has served as the Tribe's legal counsel for the past 15 years and has been involved in the financing and development of each of these enterprises.

Mr. Chairman, you introduced S.613 to amend 25 U.S.C. Section 81 so as to encourage "tribal economic development," to eliminate "excessive and unproductive bureaucratic oversight of tribal decisions" and to provide for disclosures regarding tribal sovereign immunity in tribal contracts. The CTUIR is generally in agreement with the objectives of S.613. We have had considerable experience with Section 81 approvals in recent years. Since 1995, the development, financing, and the recent refinancing, of our resort enterprises has resulted in 33 separate documents receiving either outright Section 81 approvals, or Section 81 accommodation approvals. The Section 81 approval process has certainly added to the total costs associated with these financial transactions and has imposed a significant burden on the CTUIR, the lenders and contracting parties involved in these financial transactions, as well as the BIA, in reviewing and approving the various documents.

As a result of the recent CTUIR experience, the CTUIR has the following concerns regarding Section 81 as currently written:

- ▶ There is uncertainty about what transactions require Section 81 approval;

- ▶ The Section 81 approval process increases the transactional costs associated with the development and financing of tribal enterprises; and
- ▶ There is a lack of adequately trained and experienced BIA personnel to provide a meaningful review of financial documents during the Section 81 review process.

With these concerns in mind, the CTUIR has the following comments regarding S.613:

1. The CTUIR wholeheartedly agrees with the amendment to Section 81 that eliminates the need for BIA approval of contracts that tribes enter with their own legal counsel. This change is long overdue. This amendment is consistent with a 1994 amendment to Public Law 93-638 which removes the need for prior BIA approval for tribes to use 638 funds for legal services of tribal contracts with legal counsel performing legal services associated with 638 contract administration. 25 U.S.C. Section 450j-1 (k)(7).

2. S.613 would create a new subsection (b) that would impose timelines on Secretarial approvals under Section 81. While the CTUIR agrees that timelines for Secretarial action on tribal agreements are essential, the CTUIR believes that the 90-day time period under (b)(1) is too long. The CTUIR believes this time period in subsection (b)(2) should be shortened to 30 days. Furthermore, the CTUIR suggests that the time period for the Secretary to inform a tribe of their intent to review an agreement the tribe has stated is not subject to Section 81 review should be reduced from 45 days to 30 days. In many commercial settings, time is of the essence and a prolonged period of federal agency review of documents can increase transaction costs or even render a project infeasible.

3. The CTUIR urges the Committee to revise S.613 to provide that Secretarial determinations regarding whether Section 81 approval is required for a particular agreement to be binding so as to remove uncertainty regarding Section 81 application to any agreement or transaction. Under Subsections (b)(2) and (c)(2), the Secretary can determine that a tribal agreement is not subject to Section 81 approval. In many cases, lenders and other parties with whom tribes seek to contract demand Section 81 approvals, even in cases where tribal legal counsel and the BIA conclude no Section 81 approval is necessary. This demand is motivated by the lender or other contracting party's concern that a court may later determine Section 81 approval was required, and as a result of the lack of such approval, the agreement is null and void under the terms of Section 81. Accordingly, the CTUIR suggests that subsections (b)(2) and (c)(2) be amended to

make it clear that when the Secretary determines that Section 81 approval is not required, whether that determination is made by action or inaction, such determination is binding upon the parties to the agreement. By providing certainty on this issue, unnecessary transactional costs and the potential loss of a business opportunity can be avoided.

4. S.613 also imposes a requirement that any tribal agreement subject to Section 81 approval must address tribal sovereign immunity in the agreement in order to receive Section 81 approval. The CTUIR sees no need for these requirements in Section 81. In our experience, the parties we have dealt with are fully aware of tribal sovereign immunity. Each of our agreements squarely address the remedies available to both parties in the event of a breach, the existence of tribal sovereign immunity, and the extent to which the Tribe has consented to the waiver of that immunity, consented to the jurisdiction of a particular court for addressing any breach of contract and damages associated with such breach. If the objective of S.613 is to put lenders and other contracting parties on notice regarding the existence and potential consequence of tribal sovereign immunity, our experience clearly indicates that no such notice is required.

5. The CTUIR believes that S.613 would benefit the Section 81 review and approval process, and ultimately tribal economic development objectives, by further clarifying what agreements Section 81 applies to. While S.613 contains a subsection (c)(3) which authorizes the Secretary to issue guidelines for identifying which agreements Section 81 does not apply to, the CTUIR believes it would be useful to clarify the statutory language in the first paragraph of Section 81 that requires Section 81 approval for any tribal agreements that are “relative to their [tribal] lands” Considerable time has been spent in our transactions trying to determine which documents Section 81 applies to in light of this ambiguous language and the fact that all our projects have been constructed on tribal lands. Resolving the ambiguity involves lawyers -- lawyers for the Tribe, the lender, bond counsel and other parties to a transaction -- all of which are included in transactional costs that the Tribe must bear.

The CTUIR urges that Section 81 approval only be required for tribal agreements that involve a contracting party receiving some possessory interest in tribal lands, such as an easement or license. Any clarification that can be brought to S.613 as to what agreements Section 81 applies to would be helpful in reducing unnecessary costs and would remove obstacles to economic development.

6. Finally, the CTUIR urges the Committee to recognize the importance of providing adequate BIA funding for the hiring of qualified personnel to provide meaningful Section 81 review of the commercial and financial agreements that tribes are increasingly entering. With recent reductions in BIA staffing at the Agency and Area Office levels, the CTUIR's experience demonstrates that the BIA does not have sufficient staff to provide a timely and meaningful Section 81 review. It is critical to tribal economic development that any agreements requiring Section 81 approval receive effective and efficient review by BIA staff. While we have had tremendous cooperation in the past five years in our economic development efforts from both the Director of the Portland Area Office, Stan Speaks, and the Umatilla Agency Superintendent, Phillip Sanchez, we know that the expansion of tribal economic development initiatives and meaningful review of increasingly sophisticated tribal financial and commercial agreements will require additional professional staff in the BIA field offices.

This concludes my comments to S.613. Attached to my testimony is a letter from Jesse Smith, Assistant Vice President of Seattle-Northwest Securities Corporation, who served as the underwriter in our recent \$17 million bond issue, the proceeds of which were used to refinance the loans to construct our Wildhorse Resort enterprises, and for other purposes. Mr. Smith's letter, from a lender's perspective, supports many of the points raised in the CTUIR testimony I have just presented.

Again, Mr. Chairman, on behalf of the CTUIR, we welcome the opportunity to address the Committee on our views on S.613. We applaud the Committee in its efforts to facilitate tribal economic development. The development of a reservation economy on the Umatilla Indian Reservation has been the top priority of the CTUIR for the past decade. Tribal objectives such as restoring our Reservation land base, providing job opportunities to our tribal members, protecting the Treaty-reserved fishing and hunting rights, and providing additional funds to support tribal governmental programs for the benefit of tribal members and other residents of the Umatilla Indian Reservation require tribal economic development and the tribal funds and jobs they generate. In essence, our tribal economic development is our tax base. Your efforts in facilitating this development are appreciated.

Attachment

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