

TESTIMONY ON S. 266, REGARDING THE USE OF THE TRUST LAND AND RESOURCES
OF THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF
OREGON,
PRESENTED BY OLNEY PATT, JR., CHAIRMAN,
CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS,
JULY 24, 2001

Mr. Chairman, members of the Committee, I am Olney Patt, Jr., Chairman of the Tribal Council of the Confederated Tribes of the Warm Springs Reservation of Oregon. The Tribe appreciates your having scheduled this hearing on S. 266, and it is my pleasure to present today the views of the Warm Springs Tribe on this legislation regarding the use of trust land and resources on our Reservation.

In summary, the Warm Springs Tribe strongly supports S. 266, and urge that, with the adoption of clarifying revisions soon to be finalized among the Oregon Delegation sponsors of the legislation, the Committee approve, and the Senate pass, this essential legislation as soon as possible.

PELTON BACKGROUND AND AGREEMENT.

S. 266 provides for federal approval of an historic Agreement reached on April 12, 2000, between the Confederated Tribes of the Warm Springs Reservation of Oregon, Portland General Electric Company (PGE), and the United States Department of the Interior. This Agreement is important not only to the parties, but to all the citizens of Oregon, because of the responsible way in which it deals with the ownership of one of the State's most important resources, the Pelton-Round Butte Hydroelectric Project. It also provides a model for the rest of the country to demonstrate how the United States, Indian tribes and electric utilities can work together to solve the often contentious issues surrounding hydroelectric projects and the use of Indian lands.

The Pelton-Round Butte Hydroelectric Project is a 440 megawatt project consisting of three dams and generation units on the Deschutes River in Central Oregon. About one third of the Project lands are located on the Warm Springs Indian Reservation. Currently, PGE owns and operates the two larger dams and their generating facilities while the Tribe owns and operates the 19 megawatt generating facility located in the Re-regulating Dam. Today, PGE pays approximately \$11,000,000 in annual rental charges to the Tribe for the use of our land.

Beginning in the summer of 1998, representatives of the Tribes and PGE commenced negotiations to attempt to reach a settlement on all issues between us relating to ownership and operation of the Pelton Project. Because of the trust responsibility of the Department of Interior to the Tribe, Department representatives participated in the negotiations. On April 12, 2000, Interior, Tribal and PGE representatives signed the Long-term Global Settlement and Compensation Agreement and its Included Agreements that is the subject of S. 266.

The key elements of the Agreement are:

1. On January 1, 2002 the Tribe will purchase from PGE at its net book value a 33.33% interest in the Project. The Tribe has the option to purchase an additional 16.66% interest on January 1, 2022, as well as a further option to purchase a controlling .02% interest in the Project no later than 2037. The length of the Agreement is approximately fifty years, with flexibility to run a little longer or shorter depending upon when the new FERC license for the Project is actually issued, and the length of the license itself, which can be from thirty five years to fifty years. To provide for our purchase of our share of the Project and to cover the costs of Project modifications anticipated under the new license, Warm Springs must secure approximately \$30 million from the bond market by January 1 of 2002.
2. PGE will operate the Project and be guided by an Operating Committee composed of representatives of the Tribe and PGE as owners.
3. The Tribe has the option to sell its share of the power to PGE or on the open market.
4. The Agreement settles all disputes between the parties and establishes the compensation to be paid to the Tribe for the use of its lands and resources throughout the period of the entire license.

ISSUES.

One of the central issues that the parties have been concerned about since the inception of the negotiations is the legal authority for the Agreement. As a general principle of federal Indian law, the United States must consent to the lease, sale, or other conveyance of tribal trust lands, resources, or other assets. Although there is a high likelihood that there is legal authority under existing federal law for this Agreement, there is not absolute certainty. And, because the economic consequences to the parties would be so serious if it were ever to be held that there is no legal authority for the Agreement, and because the lenders who will finance the Tribe's purchase of Project interests will require legal certainty, it is essential to the Tribe and PGE that all questions regarding authority for the Agreement be resolved definitively.

Briefly, these are the issues that gave the Tribes and PGE pause regarding legal authority:

1. Under 25 USC § 415(a), the Warm Springs Tribe only has leasing authority for trust lands of 25 years with an option for a 25-year renewal. The Agreement at hand committing Tribal resources and land extends beyond those periods and beyond just the lease of land. The 99 year lease authority , as

provided in Section 1 of S. 266, could provide sufficient time for a lease of land, but is not broad enough in scope to cover the full range of Warm Springs resources and assets involved in the Project.

2. Section 17 of the Indian Reorganization Act of 1934 (25 USC § 477) under which the Warm Springs Tribe is organized limits leases of Indian lands to 25 years.
3. The general right of way statute dealing with Indian lands (25 USC § 323) is made inapplicable by the provisions of 25 CFR § 169.2(c), which provides that the right of way regulations do not apply to hydroelectric projects licensed under the Federal Power Act on Indian reservations.
4. The Indian Non-intercourse Act (25 USC 177) generally requires that all leases and other conveyances of tribal lands have specific federal authority, of which the foregoing are examples.
5. The revenues the Tribe will receive from the sale of power from its portion of the Project are the proceeds of Tribal trust assets and federal consent may be required to make a pledge of those revenues legally binding on the Tribe.
6. Although 16 USC 803(e) provides for the payment of annual charges for the use of Indian lands in connection with hydroelectric projects, there is no express authority in that section for the actual lease of those lands. Similarly, 16 USC 797(e) regarding the Secretary's conditioning authority does not contain the express authority required.

The parties believe that if a court were faced with the question of whether or not there was federal authority for this Agreement, it would answer in the affirmative. However, because of the length, complexity and magnitude of the Agreement, its uniqueness, and some ambiguities on the face of existing statutes granting authority, it is important that such doubt be removed and this can best be done by specific federal legislation tailored to this Agreement.

THE LEGISLATION.

S. 266 does the following:

1. Section 1(a) confers authority on the Interior Secretary to approve leases of up to 99 years for trust land on the Warm Springs Reservation and land held in trust for the Warm Springs Tribes, similar to authority that has been conferred for many other tribes.
2. Section 2(a) provides specific federal approval for the use of our Tribal lands, resources, or other Tribal assets described in the Agreement. It ratifies and confirms the authority of the parties, which include the Interior Secretary, to sign the Agreement, the actual signing of the Agreement, and its distribution among the parties. It also deems the Secretary as authorized to approve and carry out the agreement. This particular sentence would confer upon the Secretary sufficient authority to approve and implement the Agreement in the event the Secretary's current authority, despite ratification and confirmation, is determined to be lacking. Finally, Section 2(a) provides that no federal law, such as

those discussed earlier in this testimony, would render the Agreement unenforceable or impede the ability of the Tribe to pledge the revenues that it receives from the sale of power to pay bond holders.

3. Section 2(b)(1) makes it clear that the legislation does not apply to any provisions of the Agreement other than those dealing with Tribal lands, resources, or other assets. It also makes it clear that it does not affect the normal Federal and State regulatory approvals that would be required for an agreement of this type.

4. Section 2(b)(2) is included to address a concern of the Department of the Interior that the legislation not, by implication, cast any doubt on current authorities relied upon by Interior to approve the Agreement. Interior Department personnel were regularly consulted while S. 266 was being drafted, and this language to safeguard Interior's authorities was included in the bill at their direct request. By fully preserving Interior's authorities, this provision also eliminates any concern about similar agreements needing legislative approval.

S. 266 will not only give the parties to the Agreement the necessary assurances that they need about the authority for this Agreement, it will provide the lenders that finance the Tribes' purchase of Project interests from Portland General Electric assurance that there are no legal impediments to the pledge of revenues the Tribe receives from the sale of power from the Project to the lenders.

POTENTIAL AMENDMENTS.

S. 266 is the result of extensive discussion and collaboration between ourselves, PGE, the Interior Department, and Congressional personnel in the Oregon Delegation and on this Committee. At the time S. 266 was introduced, a House companion bill, H.R. 483, was also introduced by all five members of the Oregon House Delegation. The only difference between S. 266 and H.R. 483 is the addition of an April 12, 2000 effective date at the end of the House bill. Otherwise in the House, Resources Committee personnel have carefully evaluated H.R. 483, and have suggested several revisions to clarify the legislation. These revisions are under discussion with the Oregon Delegation, and we expect to have them settled in the next few days. They do not change the substance of the legislation, and basically fine tune its language. We hope that the Senate Indian Affairs Committee will be able to adopt these revisions, and incorporate them in approving S. 266.

We expect the revisions will make the legislation more explicit that nothing in this legislation is to create any inference whether the Secretary of the Interior did or did not have authority to sign and implement the Global Settlement Agreement. The effect of this revision is to essentially neutralize this legislation from having any effect on the Department's authorities regarding the use of tribal resources for hydro projects.

By very clearly safeguarding Interior's authorities, the revision will further quell any question about whether this legislation will prompt other legislation for similar projects involving tribal resources. By basically removing this particular legislation from having any impact on the Interior Department's authorities, those authorities remain intact and unaltered for any future projects. In addition, there are

several factors that make this Agreement truly unique and make it unlikely that a similar situation requiring federal legislative approval will arise in the future. They include:

1. The Agreement involves a tribe's purchase of a part of a hydroelectric project located on its reservation from an existing licensee. The only other hydroelectric project of similar magnitude on an Indian reservation is the Kerr Project in Montana, and in that case the Tribe and the Montana Power Company reached a joint ownership agreement approximately 15 years ago.
2. The purchase involves bond financing by the Tribe which requires an unqualified opinion from bond counsel regarding the enforceability of the underlying agreement, thereby increasing the level of certainty needed regarding enforceability.
3. The agreement has some highly unique aspects that are unlikely to be present in other agreements, such as settling license ownership beyond the term of the next license, settling compensation to the Tribe in the form of a share of the power output from the project rather than a dollar amount that can be adjusted over time, and defining PGE's liability for Treaty rights claims by the Tribe.

In summary, the uniqueness, length, breadth and complexity of the Agreement are the reasons that legislation is required to approve it. We are aware of no similar situations that would require legislative approval.

We anticipate that Senators Smith and Wyden will convey the revisions to the Committee in the next few days, and ask the Committee to adopt them when S. 266 is marked-up.

We urge the Committee's prompt consideration and approval of S. 266, and its prompt passage on the Senate floor.

Thank you for the Committee's time and attention. I would be pleased to answer any questions.