

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF
OREGON

Comments on

The Energy Policy Act of 2005, Section 1813 Right of Way Study

May 15, 2006

The Confederated Tribes of the Warm Springs Reservation of Oregon (“Tribe”) is a federally recognized tribe comprised of three tribes – the Warm Springs, Wasco and Paiute Tribes occupying the Warm Springs Indian Reservation (“Reservation”) in north Central Oregon. There are approximately 3,800 tribal members, approximately 90 percent of whom reside on or near the Reservation. The Reservation is comprised of 640,000 acres, about 2/3 forest lands and 1/3 range land.

Background

The Warm Springs and Wasco Tribes entered into a treaty with the United States on June 25, 1855. In that treaty, the tribes ceded title to approximately 10 million acres of land in north Central Oregon and reserved for their exclusive use the Warm Springs Indian Reservation. They additionally reserved important hunting, fishing and gathering rights on unclaimed lands outside the reservation. Tribal members continue to exercise these rights on the millions of acres of BLM and Forest Service lands surrounding the Reservation. Through a comprehensive memorandum of understanding, the Tribe acts as a co-manager on these federal lands to protect and preserve these important off-reservation rights.

Two provisions of the treaty are directly relevant to the Section 1813 Right of Way Study. After describing the boundaries of the reservation, the treaty provides “all of which tract shall be set a part, and, so far as necessary, surveyed and marked out for their exclusive use . . . ; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent.” Article 9 of the treaty also provides “the said Confederated Bands agree that whensoever, in the opinion of the President of the United States, the public interest may require it, that all roads, highways and railroads shall have the right of way through the reservation herein designated, or which may at anytime hereafter be set apart as a reservation for said Indians.” No provision is made for rights of way other than railroads and roads in the treaty.

With passage of the Indian Reorganization Act in 1934 (the “IRA”), the three tribes occupying the reservation availed themselves of the provisions of Sections 16 and 17 of the IRA. Under Section 16, the Tribe adopted a constitution and bylaws establishing a form of tribal government under which all governmental authority was exercised by a tribal council. The Tribal Council consists of 11 members, 8 of which are elected every three years, and 3 of which are chiefs selected by their respective tribes to serve on the Tribal Council for life. The United States also issued to the Tribes a federal

corporate charter pursuant to the provisions of Section 17 of the IRA, under which the Tribe carries out much of its proprietary business activity. Copies of the Constitution and Bylaws, and Federal Corporate Charter are attached.

The Reservation itself is bounded on the west by the summit of the Cascade Mountain Range, on the south by the Metolius River, on the east by the Deschutes River, and on the north by the Tygh highlands. Over 400,000 acres is forested. Timber from these lands supplies the Tribe's lumber mill. The majority of the remainder of the land is rangeland. Minimal agricultural activity occurs on the reservation because of short growing seasons for relatively poor soil.

The Reservation, like many others, was allotted to individual Indians late in the 19th Century. This allotment caused the fractionated ownership problem that is prevalent on so many reservations. The Tribe undertook to cure that problem beginning in the 1960s. In 1961, Congress passed the Warm Springs Land Consolidation Act, which authorized the Tribe to purchase lands within its own reservation. Prior to that, the Tribe had been prohibited from such purchases.

The Tribe then began setting aside money each year to purchase lands from willing allottee sellers and fee holders. After 45 year of purchases, the Tribe now owns approximately 93 percent of the land within the reservation. Approximately seven percent is still held by allottees and less than one-third of one percent is held in fee. Of the few hundred acres of fee land remaining within the Reservation, most of it is held by individual Indians. No non-Indians live on fee lands within the Reservation. Consolidation and control of the Tribe's own lands has, thus, been a hallmark of tribal policy for decades. When the Tribe began its consolidation effort, the only major non-Indian business on the reservation was the lumber mill owned by Jefferson Plywood. In 1967, the Tribe purchased this mill.

Since the Reservation was established, the Tribe has struggled to maintain control of its land as a homeland for its people. The Warm Springs Reservation was recognized early on by the United States as one of the poorest reservations ever established. Yet, the Tribe has created and maintained a tribal homeland that serves as the glue to hold its people and culture together. They have overcome the challenges posed by reservation allotment, and periodic non-Indian attempts to gain control of reservation resources. The Tribe controls its land base and manages it wisely.

The tribal government derives its income from Reservation resources. It does not do it at the expense of cultural or religious values. For example, forest lands, valuable for timber production, are often managed for huckleberry production, a food of great religious and cultural significance to the Tribe. More than 30 years ago, the Tribe established in-stream flows for on-reservation streams necessary to protect the salmon fishery that defines its culture. Recently the Tribe's forests were certified as "green" by the Forest Stewardship Council, and the Tribe now markets environmentally sound lumber. The Tribe has established state-of-the-art integrated resource management plans for the forest and range lands that ensure sustainable use of those lands and protection of religious and cultural values.

The Tribal Council has adopted comprehensive laws governing the reservation which are enforced by their justice system through the tribal courts. Those laws govern all non-Indian activity on the reservation. The Tribe has been delegated enforcement authority under the Clean Water Act by the Environmental Protection Agency (the “EPA”) and manages water resources on the reservation under that authority and the Tribe’s inherit authority. The Tribe is in the process of acquiring regulatory authority over air quality on the reservation from the EPA.

The Tribe has established a number of business enterprises that provide income to the tribal government with which to provide essential governmental services. Those enterprises include Warm Springs Forest Products Industries, Warm Springs Composite Products, Warm Springs Construction Enterprise, Kah-Nee-Ta Vacation Resort and Gaming Enterprise, the Museum at Warm Springs, Warm Springs Water and Power Enterprises, Warm Springs Ventures, and Tectonics International. Although not wealthy, the Tribe has managed to create a secure homeland for its members with the limited resources available to it. They have been able to do this because of the control and integrity of the Reservation land base. It is that control and integrity that will allow the Tribe to meet the significant challenges that it faces in the future to provide employment and housing for its rapidly growing membership.

It is in this context that the right of way issue must be examined. Rights of way potentially impinge upon the ability of the Tribe to control and manage its land base far into the future. In addition, the Tribe must ensure that it derives fair compensation for the use of its resources in order to provide for the tribal membership. It was only when the Tribe was able to begin managing its own affairs that it began to achieve a degree of success and realize its aspirations for its people. Anything that infringes upon this right and ability will be vigorously opposed by the Tribe and is fundamentally inconsistent with the Tribe’s exclusive use of its own reservation.

Consent requirement

First is the issue of tribal consent as it applies to rights of way. Removal of tribal consent requirements is fundamentally inconsistent with the provisions of the treaty. The entire bargain struck in the treaty was based on the Tribe’s cession of title to most of its ancestral lands in return for a guaranteed exclusive use to a small fraction of its aboriginal territory. Past violations of the consent principle throughout Indian Country have resulted in grave hardship for Indian tribes and have compounded the challenges in providing for the future of Indian people. That problem should not now be further exacerbated by new misguided attempts to remove the consent requirement.

Second, removal of the consent requirement is inconsistent with the provisions of the Indian Self Determination Act. It is under this act that tribes have been enabled to chart their own futures. Energy companies, motivated solely by their own profit, should not be allowed to unilaterally determine the future of Indian tribes in any respect.

Third, the issue of consent has not been a serious impediment to the granting of rights of way on the Warm Springs Reservation. The Reservation, with tribal consent,

contains numerous roads, railroads, telecommunications, energy and other rights of way. Some of these serve the Reservation, while others merely pass over it. Historically, the Tribe received inadequate compensation for some and adequate compensation for others. As the Tribe's control of its own resources and financial sophistication has improved, so has the economic return for rights of way through the Reservation. What it is clear is that any future rights of way decisions made by the Tribe must ensure that the Tribe receives adequate economic return for the use of its resources.

Fair compensation

That brings us to the subject of fair compensation. The Warm Springs Reservation, like many Indian reservations, is criss-crossed by numerous energy rights of way. The Bonneville Power Administration, PacifiCorp, Portland General Electric Company, and Wasco Electric Company all maintain transmission rights of way. PacifiCorp and Wasco Electric also have distribution rights of way. Warm Springs Power and Water Enterprises, a tribal enterprise, maintains a transmission right of way in connection with its Reregulating Dam Hydroelectric Project. The Tribe has also been in active discussion for several years with TransCanada Pipelines, Ltd., regarding the location of a gas lateral pipeline across the Reservation.

The Warm Springs Tribe is, in addition, an energy producer and has embarked on a course to become a significant supplier of renewable energy in the Pacific Northwest. It currently owns a 1/3 interest in the 440 MW Pelton-Round Butte Hydroelectric Project with PGE. Under agreement with PGE it will eventually acquire a controlling interest in the Project. It also owns the 19 MW Reregulating Dam Hydroelectric Project and a 7 MW biomass project which operates using wood waste from the Tribe's lumber mill. The Tribe is developing a new 16 MW biomass facility at the mill that will utilize materials from tribal and adjoining national forests removed in connection with forest health and wildfire reduction projects. The Tribe is completing a comprehensive wind energy assessment for Tribal lands under a DOE grant. Finally, it continues to inventory and study significant geothermal resources on the Reservation for future development.

The Tribe's first experience with energy rights of way began in the 1950's with the licensing of the Pelton Hydroelectric Project by the Federal Power Commission. Until that time little development had taken place on the Reservation, and the Tribe was only beginning to sell its timber. The Federal Power Act and the FPC required Portland General Electric Company to enter into an agreement with the Tribe for the use of its lands. The 1955 agreement and subsequent 1960 amendment provided annual charges for the use of tribal lands in connection with the generation and transmission of power. The initial annual charges were approximately \$90,000 for the Pelton Dam and \$200,000 for the Round Butte Dam. The Federal Power Act and the tribal agreement provided for periodic readjustments of these charges. Since 1920 the FPC had used the "sharing of the net benefits" method to determine appropriate annual charges project located either on Indian lands or in government dams. The theory was that the net benefit of a project was the difference between energy costs at the licensed project compared with the next best alternative available to the developer. The net benefit was then "shared" between the

landowner (either the Tribe or the government dam owner) and the developer. This was in recognition that both made essential contributions to the feasibility of the project. Typically the benefit was shared 50/50 between owner and developer. By the mid-70's the value of power had risen substantially in the United States and through a series of vigorously contested readjustment proceedings before FERC and arbitration panels the compensation to the Tribe for the use of their lands rose to about \$5 million per year. In 1986 the Tribe and PGE entered into a comprehensive settlement agreement covering the remainder of the license period ending in 2001. At the end of the license period the compensation was approximately \$11 million per year.

The provisions of the Federal Power Act are particularly instructive with regard to the Section 1813 study. They deal with each of the issue raised by the current controversy. Section 10(e) of the Federal Power Act (16 USC Section 803(e)) provides in relevant part:

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of ... for recompensing it for the use, occupancy, and enjoyment of its lands or other property ... Provided, That **when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing:** Provided further, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefore shall be issued without charge; **and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations;** but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefore in any license shall be such as determined by the Commission...

Pursuant to these provisions licensees are required to obtain the consent for a project within the reservation. Periodic adjustment to the rents is made. And FERC considers the economic value of the project when adjusting charges.

In the 1970's the Tribe entered into negotiations with the Bonneville Power Administration to construct a new right of way across the Reservation. The Tribe rejected initial offers based on traditional appraisals of their lands. The Tribe thought it was unreasonable to commit to an intrusive right of way for very little compensation. Eventually the Tribe and BPA agreed to split the difference between the cost of a right of way across the Reservation and an alternate route around the Reservation. The Tribe received \$4 million, approximately 40 times the original offer.

Finally, in 2000 the Tribe entered into a settlement agreement with PGE regarding future ownership of the Pelton-Round Butte Project after the expiration of the original license. As a part of this agreement it was necessary to amend 25 USC 415 to extend leasing authority on the Warm Springs Reservation from 25 years to 99 years in recognition of the fact that the long term agreement reached between the parties was not feasible with limited leasing authority. The agreement made the Tribe and PGE joint venturers in the project and aligned their interests in a way that minimizes the opportunity for future conflict.

The foregoing development on the Warm Springs Reservation would not have been possible if traditional appraisal methods had been used. There simply would have been inadequate incentive for the Tribe to commit its resources. It was made possible because valuation of tribal interests was based on the value of its lands for power production or transmission purposes. Many rights of way are routed across tribal lands that have minimal value as range or desert lands. Even if the full value of these lands was paid to the Tribe it would be a pittance compared to their enormous value as energy rights of way. As the saying goes, real estate values are based on three factors – location, location, and location. It is the strategic location of rights of way across Indian lands that give them real value. The Tribe should be entitled to realize this value.

Traditional appraisal techniques are totally inappropriate for valuation of tribal lands in connection with rights of way. Traditional methods include comparable sales, income analysis, cost analysis and cost of development. As applied in condemnation and acquisition proceedings with regard to energy rights of way they end up valuing the land for purposes other than for developing or transmitting energy. For example, in the context of the Federal Power Act landowners whose lands are condemned for hydroelectric project are not entitled to compensation based on the power production potential of their lands. In the arid west these types of lands can typically sell for less than \$100 per acre when their value for power production or transmission purposes by exceed that amount by orders of magnitude.

Traditional appraisals are inappropriate for tribal land valuations for a number of reasons. First, they do not include in the valuation a number of things that are of primary importance for the Tribe. They do not factor in tribal historic, cultural, religious, privacy,

community or other interests of the Tribes. They are contrary to the “exclusive use” provisions contained in many Indian treaties. They do not recognize that the highest and best use of the property is for energy production or transmission. They do not consider what impacts these rights of way may have on the rest of the Reservation. They do not consider what impacts the rights of way may have on the sovereignty of the Tribe and its ability to govern activities within its boundaries. They do not value lost opportunity costs to Tribes.

Just as with traditional appraisal methods, appraisals based on energy production or transmission values may be carried out in a number of ways yielding a range of values. The method most appropriate in a particular case may vary based on the specific circumstances. Following is a description of a number of ways that such an appraisal could be approached.

1. Costs of alternative routes around the reservation. This embodies the principle of “substitution” in traditional appraisal methodology. The method directly measures the “location” value of tribal lands that is its location as the cheapest route available. It is highly unlikely that a developer would pay the full amount for less than a perpetual right of way since anything less than that would have to factor into the cost of the tribal right of way any future costs associated with renewals, etc. It simply becomes a matter of bargaining to arrive at some allocation that will be acceptable to both.
2. Valuation of energy system across reservation as compared to valuation of system as a whole. Individual states already parse out the value of an energy company among each state for income and property tax purposes as a means of constitutionally determining what they can tax. The reservation portion of the system receives a valuation as a percentage of the whole and then, at least for private companies, a portion of the income of the company can be attributed to the system on the reservation. An appropriate allocation between landowner and developer can then be negotiated. One advantage of this approach is that it can form the basis for adjusted charges in the future based on the changing profitability of the company, either up or down.
3. Wheeling charge. Under FERC Order 888 directing open transmission across FERC regulated electric lines a per kWh charge is levied. The same principle could be applied to energy rights of way, i.e. the payment to the Tribe depends on the amount of energy transmitted across the reservation. Logically, the amount of energy transmitted and the length of the right of way are indicators of the value of the right of way.
4. Comparable sales. Increasingly there are market sales of rights of way that can be used to determine value. Bolton and Sick concluded that

“The proper method for appraising properties within a corridor is to use market data occurring within a corridor. There is a vast amount of existing corridor space currently available, literally hundreds of thousands of miles. If buyers and sellers for a particular type of property exist in the market place, then market data will be

available to the appraiser.”

http://www.powerlinefacts.com/Power_Lines_and_Property_Values.htm

The market data approach was used in a recent report to the National Oceanic and Atmospheric Administration entitled “Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries”. In this case market value was deemed to be the best method of valuation because of the particular circumstances involved. It also recognizes that fair market value will change over time and so should the amount charged under the permit.

“The authors of this report recommend the analysis of comparable previous transactions as the appropriate approach to determining fair market value. Most appraisers have rejected land-based, across-the-fence methods as inadequate to address current market conditions in the fiber-optic communications market. While the scenario of the willing buyer and seller emphasizes build-around cost as an upper bound on market value for rights of way, the information required to evaluate build-around cost, particularly for submarine cables, is prohibitive. Income-based analysis also requires substantial information that is not readily available in most cases. Furthermore, expectations about future income are already incorporated into previous market transactions.”

<http://sanctuaries.noaa.gov/library/national/fmvfinalreport.pdf>

Unless tribes can receive value for rights of way based on their use as energy transmission corridors there is little incentive for the Tribe to grant rights of way. If nothing else, the tribe will reason that it should wait until it has the necessary access to capital to develop the lands as an energy corridor and then realize the economic benefit for itself, rather than to bargain away use of its lands for a tiny fraction of that value. The valuation issue is the key to dealing with the consent issue as it relates to renewals of rights of way. Unless the tribe can be assured that it can derive a portion of the economic value of the right of way there is little incentive to consent to renewal. On the other hand recognition of the entitlement of the tribe to a portion of the economic value sets that stage for a productive negotiation between the tribe and energy company.

Over the last 10 years this subject has received considerable attention in the context of right of way corridors in other contexts. It is increasingly recognized that denial to landowners of any value associated with the actual use of the right of way is inappropriate. In fact, the issue has been considered in connection with rights of way across federal lands. In the draft “Capitol Hill Corridor Valuation Declaration: An Appeal for a Paradigm Shift from Monopoly to Market Corridor Valuation Methods and Federal Rights of Way Rent Schedules” the signatories concluded

“Conventional corridor valuation methods (e.g. Across-The-Fence (ATF) Method, Reproduction Cost Method, Liquidation Value Method, Value for Non-Corridor Use), and legal case law approaches such as the Nominal Method, are both self-interested and polarizing approaches that do not solve the corridor fair market rent valuation or easement valuation problems at hand in a “new economy” in a

deregulated environment. Deregulation of the natural gas, telecommunications, and regional electric utilities requires consideration of alternative methods that reflect “buyer’s market” value that assume the availability of an alternate route in contrast with “seller’s market” value (ATF value, corridor premiums) that are predicated on no alternate route.” <http://www.appraisers.org/disciplines/BLM-14.htm>

The signatories concluded that rural federal land rents would be much higher if enterprise-based, rather than land-based rents, were used

“Federal land management agencies are likely to realize significantly higher rents for secondary uses of their corridors and lands from enterprise-based rents than from land-value based rents especially in rural areas where the bulk of its properties are located. Based on widely-advertised going rents from major fiber optic companies it is rough estimated that average rural land values would have to exceed \$21,780 per acre to be equivalent to quoted “going rents” in the fiber optic industry... **In other words, land-based values would likely yield rents from around 2% of what enterprise-based values might generate in rural areas...**” (Emphasis in original)

It is axiomatic that appraisals must be based on the highest and best use of the land. It would be a very rare case in which rural Indian lands suitable for energy corridors had a higher and best use than for energy transport or transmission purposes. Bolton and Sick examined the question of corridor valuation and concluded

“CVM (Corridor Valuation Methodology) is the most accurate and reliable approach to evaluating a right-of-way corridor or the property rights within the corridor. This method conforms to the principle of highest and best use, the unquestioned bedrock for appraising real property. Market data reflecting highest and best use ought to *always* be used in analyzing the appraised property, regardless of the resulting value conclusion, as long as careful consideration is given to the differences as a basis for adjustment of the market data. The ATF method may have some applicability to appraising property not located in a corridor. ATF methods seem inherently inconsistent with accepted appraisal practice when evaluating an established corridor property because it employs data that plainly does not reflect the subject’s highest and best use.” <http://www.boltonandbaer.com/downloads/articleValuation.pdf>

And yet, the ATM method is one of the most common methods that has been used to value Indian lands. Much of the root of current disputes between tribes and energy companies has its root in the fact that energy companies are thinking in terms of valuations that do not consider the highest and best use of Indian lands to be for energy transmission or transport purposes.

Suggestions for change

The Section 1813 study has unfortunately established a negative dynamic with regard to participation by Indian tribes in America's energy future. Tribes know the origins of the legislation and understandably see it as one more in a long line of efforts to part them from their lands. Little has been said by the energy issue at the Denver meetings to dissuade them from that idea. In fact, threats of removal of consent requirements at the meetings have reinforced the tribe's conclusions.

If Congress is serious about dealing with this issue and America's energy problems it will seek to make tribes partners in that effort, not adversaries. Many energy companies have recognized this and have developed significant and positive relationships with tribes. Warm Springs is just one example. Those efforts have been jeopardized by this study.

But there are things that Congress can and should do to make the problem better, not worse.

First, short lease terms are a problem. If the consent requirement is maintained many tribes would have no problem with longer lease terms. In fact, the Warm Springs Tribe sought and obtained amendment to 25 USC Section 415 to lengthen permissible lease terms for Warm Springs tribal lands to 99 years in recognition of the fact that short lease terms do not provide sufficient time to make many projects commercially viable.

Second, the decision of the U.S. Supreme Court decision in *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997) has made tribes leery of right of way grants. Although express reservations in rights of way may solve some of the problems created by this case Congress should consider a legislative fix to the problem.

Third, the decision of the U.S. Supreme Court in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) and earlier precedents have made economic development on Indian reservations even more difficult by allowing states to impose tax burdens on non-Indian developers for on-reservation activity and property even though the states provide virtually no services on the reservation. These rulings have made it very difficult for Tribes, the entities that actually provide governmental services to the developers, to levy their own tax which would create a dual burden on the project. For this reason, rights of way payments to Tribes must necessarily include money to provide governmental services – one more reason to value tribal rights of way different than other rights of way.

Fourth, federal agencies, particularly the Department of the Interior lack the necessary expertise and resources to adequately advise and protect the interests of tribes. Although the energy interests of tribes are enormous the Department has only a small fraction of its personnel with expertise in the energy field that it does in other trust resource areas such as forestry.

Fifth, there should be clear recognition that right of way payments to Indian tribes for energy rights of way should take into account of energy corridor value of the right of way.

Sixth, the ability of the tribes and the energy industry to enter into joint ventures that align their economic interests should be facilitated. This can be done with common mechanisms involving bonding authority, accelerated depreciation, tax credits, and guaranteed loans.