

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In The Matter of Puget Sound
Power and Light, et al.
Amended Application for Construction
Permits and Facility Licenses,
SKAGIT/HANFORD NUCLEAR PROJECT

Docket Nos.

STN 50-522, 50-523



PETITION TO INTERVENE

Pursuant to 10 C.F.R. § 2.714(a)(1) the Columbia River Inter-Tribal Fish Commission files this petition to intervene in the above captioned proceedings. In support of this petition, petitioners would show the following.

I. NAME AND ADDRESS OF THE PERSON REPRESENTING PETITIONERS TO WHOM COMMUNICATIONS CONCERNING THIS PROJECT SHOULD BE ADDRESSED:

S. Timothy Wapato
Columbia River Inter-Tribal Fish Commission
8383 N.E. Sandy Blvd., Suite 320
Portland, OR 97220

II. NATURE OF PETITIONER'S INTEREST:

The Columbia River Inter-Tribal Fish Commission consists of the fish and wildlife committees of four Columbia River tribal governments: Confederated Tribes of the Warm Springs Indian Reservation; Confederated Tribes and Bands of the Yakima Indian Nation; Nez Perce Tribe of Idaho; and the Confederated Tribes of the Umatilla Indian Reservation. Prior to execution of treaties between these tribes and the United States, members of these tribes fished in the rivers and tributaries of the Columbia River basin -- particularly in the Columbia River itself as it flows through southeastern Washington and then forms the boundary between the states of Oregon and Washington. They

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also hunted and gathered wild berries and roots throughout these areas. The fish taken from these regions of the Columbia River were and still are primarily fall, spring, summer, and chinook salmon, steelhead, and coho. The fishing, hunting, and gathering activities did and still do play a major role in the culture, religion, and commerce of the Columbia River tribes.

While the tribes ceded much of their historical territory to the United States, the tribes also reserved to themselves certain rights, among them the right to fish at all usual and accustomed places in common with citizens of the United States; the exclusive right to fish in streams running through or bordering upon the reservations; and the right to hunt and gather roots and berries. The Columbia River including what is known today as the Hanford Reach is a part of the vast territory ceded to the United States by some of the tribes represented on the Inter-Tribal Fish Commission. The Hanford Reach of the Columbia River provides irreplaceable habitat for the most important stocks and runs of chinook salmon and steelhead remaining in the Columbia River basin. The tribes represented on the Inter-Tribal Fish Commission have a treaty-secured interest in these natural resources. See, e.g., United States v. Oregon, 302 F.2d 570 (9th Cir. 1976); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D.Or. 1977).

The fishing rights reserved by the tribes implicitly incorporate the right to have the treaty fishing right protected from environmental degradation. See United States v. Washington (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980). The Nuclear Regulatory Commission is burdened with the obligation to refrain from degrading or authorizing others to degrade the fish habitat to the extent that would deprive the tribes of their moderate living needs. Phase II, 506 F. Supp. at 208. Similarly, when the tribes expressly reserved to themselves the right of taking fish, they also implicitly reserved to themselves the right

to water, of sufficient quantity and quality, to maintain the fish and the fish habitat. United States v. Adair, 478 F. Supp. 337 (D. Or. 1979); United States v. Anderson, No. 3643 (E.D. Wash. July 23, 1979).

Bright fall chinook is presently the largest chinook run in the Columbia River which offers an opportunity for harvest by in-river Indian fishermen. Bright fall chinook are functionally defined as the segment of the fall chinook run which is destined to pass McNary Dam. Its characteristically late spawning time means this chinook is of high commercial quality when caught by in-river Indian fishermen. The bright run makes up roughly 45 percent of the total fall chinook return destined to pass Bonneville Dam. Bright chinook spawning is almost entirely confined to the upper Columbia Basin in the area between McNary and Priest Rapids Dam known as the Hanford Reach. Both natural production and hatchery production occur in this area, but natural production is predominant. In addition hatchery production of chinook salmon and steelhead takes place at some six hatcheries which are located on tributaries to the Columbia River at points above the proposed discharge site of the Skagit/Hanford nuclear facility.

III. EFFECT OF COMMISSION ACTION:

Construction and operation of the Skagit/Hanford Project will entail the risk of accidental release of fission products, which would adversely affect the anadromous fish of the Columbia River and consequently the culture, religion, and commerce of the Columbia River tribes. Construction and operation of the plants will lead to expanded use of the Columbia River hydro-power projects for peaking power, resulting in serious adverse impacts on the anadromous fish resources of the Columbia River. This would diminish the availability of fish to the Columbia River tribes. In addition, the diminishment of some runs of salmon or steelhead may pose a threat to the survival of a particular race of fish. Construction and operation of the Skagit/Hanford Project will increase

the shipment of radioactive materials through the Pacific Northwest region, thus increasing the risk of loss to treaty fishing rights. Operation of the project will expand the volume of radioactive waste requiring storage, at a time when no satisfactory long-term storage arrangements have yet to be made. The possibility that such storage may be located in the Columbia River basin and at the Hanford Reservation poses a threat to the long-term survival of the anadromous fish of the Columbia River.

Operation of the project will increase the risk of catastrophic nuclear accident which could cause significant damage to the anadromous fishery of the Columbia River. Finally investment of billions of dollars in the construction and operation of the Skagit/Hanford plant will limit funds available in the region for energy alternatives such as conservation that do not present the same threat to salmon and steelhead migration as an increasingly developed hydrothermal power system.

IV. SPECIFIC ASPECTS OF PROCEEDING AS TO WHICH PETITIONERS SEEK TO INTERVENE:

Intervenors seek through their intervention to present evidence and legal arguments and conduct examination of applicant's experts to demonstrate the following:

(1) that the applicants have relied on an inflated calculation of the demand for electrical power in justifying pursuit of their license and have inaccurately calculated the impacts of delay or denial of the construction permits;

(2) that the applicants' benefit-cost analysis is fundamentally flawed by, among other things, use of misleadingly low estimates of the financial and environmental costs of the project and by use of an inflated assumption of the project's power availability and reliability benefits

for the region which, in fact, possesses significant, less-costly alternatives for providing the same or greater benefits.

(3) that there are cost-effective, environmentally preferable alternatives capable of meeting the energy demand which the project is designed to serve even under the applicants' project cost assumptions and that the availability of alternatives is even greater if more accurate project cost figures are used;

(4) that acquisition of the project by the Bonneville Power Administration pursuant to the Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501, is highly unlikely, and that inability of BPA to purchase the project is a central consideration in the decision to proceed or halt the project;

(5) that applicant has failed adequately to identify, discuss, and evaluate the significance of the environmental impacts of construction and operation of the plant, including, but not limited to, impacts on the fish and wildlife resources of the Columbia River, dangers of catastrophic accidents, either in fuel and waste transportation or in plant operation, and the impact on the economic and environmental viability of the project from the continuing problem of devising satisfactory long-term storage arrangements for nuclear waste material; that if those impacts are fully assessed the project appears even less desirable when compared to available alternatives; and that construction and operation of the proposed facilities and the storage of waste generated at those facilities and the transportation of nuclear fuel and waste products may violate the treaty-reserved rights of some or all Columbia River tribes, to wit, the right to fish at all usual and accustomed fishing sites in common with citizens of the United States, the exclusive right to fish in rivers bordering and running through the respective reservations, the right to water of sufficient quality and quantity to maintain the fish that are the substance of the expressly reserved fishing right, and the

right to hunt, gather roots and berries, and pasture their horses and cattle upon the lands ceded by the respective tribes to the United States;

(6) that the commission may not legally issue a permit or license for the proposed project until adequate long-term nuclear waste storage facilities and procedures are established, or, at a minimum, until the conclusion of the commission's on-going Waste Disposal Confidence proceedings; without establishment of those facilities, or, at least, without a favorable conclusion of the Waste Disposal Confidence proceedings, the commission cannot find that it can reasonably be assured that the activities authorized by the license can be conducted without endangering the health and safety of the public, 10 C.F.R. § 50.35(a)(4), nor can it fully assess the environmental impacts of those activities pursuant to NEPA.

V. CAUSE FOR ACCEPTANCE OF THIS PETITION:

1. No Other Means Exist to Protect Petitioner's Interest

Unless granted leave to intervene the ability of the Columbia River Inter-Tribal Fish Commission to protect treaty reserved rights to fish and wildlife, particularly anadromous fish including salmon and steelhead will be impaired and impeded. This forum constitutes the last available administrative forum in which the petitioner can protect its rights. See, In the Matter of Puget Sound Power and Light Company, 8 NRC 587, 589 (1978).

2. Petitioners Interest Cannot Be Represented By Other Parties.

No other parties to this proceeding have an interest in the subject matter of this contest comparable to treaty reserved rights. Consequently, the petitioner cannot rely upon other parties to adequately represent its interest in this hearing.

The state of Washington by its tentative determination on the draft NPDES permit has evidenced a position contrary to the interests of the petitioner. Furthermore, in its position as a litigant against the Columbia River treaty tribes in another forum, the state of Washington cannot be relied upon to protect the petitioner's interests. See. e.g., Confederated Tribes and Bands of the Yakima Indian Nation v. Malcolm Baldrige, Case No. C-80342 T (W.D. Wash.) wherein the state of Washington has joined as a party defendant in opposition to the tribal plaintiffs asserting their treaty reserved fishing rights.

3. Petitioner Will Not Delay Proceeding

Petitioner presents issues of fact similar to existing parties to this proceeding who contest issues regarding adverse effects that the proposed project would have on fish and wildlife of the Columbia River basin. Petitioner does intend to contest issues regarding the environmental effects of the proposed Skagit/Hanford project discharges into the Hanford reach of the Columbia River. While the commission anticipates full and active participation in these proceedings, the petitioner intends to conduct its case in an expeditious and businesslike manner. In addition, the petitioner notes that the applicant has requested the Nuclear Regulatory Commission and the Energy Facility Site Evaluation Council to postpone evidentiary hearings on environmental matters until the Spring of 1983. 1/ In light of this request any minor delay which may result from granting petitioner leave to intervene should not be significant.

1/ Letter from Theodore Thomsen, attorney for applicants, to Judge John F. Wolf, dated April 26, 1982

4. Petitioner's Intervention Will Not Prejudice The Rights of Existing Parties.

The petitioner presents its petition to intervene at a time prior to evidentiary hearings and well in advance of a final determination. This consideration should enter into the determination by the commission. See generally, Duke Power Co., 6 NRC 460 (1977). Also, it is apparent that were the United States to assert this petition solely on behalf of the Indian tribes no laches would effectively be asserted to bar the petition. The Indians have the same rights in this respect as does the government. In the Matter of Puget Sound Power and Light Company, 8 NRC 587, 597 f.n. 9 (Nov. 24, 1978) citing United States v. Beehe, 127 U.S. 338 (), for the principle that the United States is not bound by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a interest is established past all controversy or doubt.

5. Petitioner's Intervention Will Assist In Developing A Sound Record.

Petitioner has in its employment biological, water resources, statistical, and legal capabilities which it can and will devote to this proceeding as the need arises. More specifically petitioner's staff includes seven fisheries biologists, one civil engineer with notable credentials in Columbia River water management, three attorneys one of which assisted in developing U.S. Environmental Protection Agency national water quality criteria documents, and substantial computer capabilities, all of which may be devoted to developing a sound record. Additionally, petitioner recognizes that it has little specific expertise in the area of liquid effluent discharges from nuclear power projects. However, petitioner is currently taking steps to obtain such expertise to devote to this proceeding.

6. Good Cause For Petitioner's Delay

The petitioner asserts that the delay in filing its petition is due to a number of circumstances and that many of the circumstances are directly related to protecting the anadromous fish populations migrating through and/or spawning in the Hanford Reach of the Columbia River. Among these circumstances, are that petitioner has been substantially occupied with the development of a fish and wildlife program pursuant to section 4(h) of the Regional Power Act, Public Law 96-501. Since September of 1981 petitioner has devoted thousands of hours to this program the purpose of which is to protect, mitigate, and enhance the anadromous fish of the Columbia River basin and related spawning grounds and habitat including provision of flows of sufficient quality and quantity to serve this end. Specific measures for protection of the Hanford Reach have been recommended for inclusion in this program. See, The National Marine Fisheries Service, The U.S. Fish and Wildlife Service, The Columbia River Inter-Tribal Fish Commission, The Washington Department of Fisheries, The Washington Department of Game, The Oregon Department of Fish and Wildlife, and The Idaho Department of Fish and Game, Initial 4(h) Recommendations For the Protection, Mitigation, and Enhancement of Anadromous Fish In the Columbia River Basin (P.L. 96-501), 416-444 (Nov. 15, 1981).

The petitioner has recently devoted substantial time and effort in responding to requests from congressional subcommittees regarding proposed amendments to the Magnuson Fishery Management and Conservation Act. Public Law No. 94-265 16 U.S.C. § 1801 et. seq. A number of parties, including the four Columbia River tribes, have endorsed amendments that are intended to provide protection from over-harvest of naturally spawning stocks of anadromous fish. Specifically these amendments if adopted would result in greater

protection of the chinook salmon and steelhead populations spawning in the Hanford Reach of the Columbia River.

The United States-Canada salmon interception negotiations have been proceeding for approximately twelve years. The two countries recently have evinced a willingness to negotiate a framework agreement, with ancillary documents that will address the details of implementation which may specifically address returns of bright fall chinook to the Columbia River. For this reason and others petitioner devoted substantial staff time to preparing for and participating in the negotiations that took place from April 18-23, 1982. One staff attorney, one biologist, and the executive director worked on this issue for nearly nine days to the virtual exclusion of all other issues.

The pending case of Yakima Indian Nation v. Baldrige, No. C80-342T (W.D. Wash.) is a complex and multifaceted litigation regarding among other things the return of bright fall chinook to the Columbia River. The case currently involves, as defendants, the Secretary of Commerce and the states of Oregon and Washington (the latter two are intervening defendants). It has become clear that full and effective relief in this case can not be granted in the absence of the State of Alaska. The joinder of the latter, however, involves difficult and arcane issues of personal jurisdiction, amenability to service, and venue. The staff has provided substantial assistance to the tribal attorneys in the preparation of the motion to join the state of Alaska as a defendant. One law clerk and one staff attorney worked at least half time on this project during the week of April 12. One biologist worked full-time on preparing a supporting affidavit for several days during the weeks of April 12 and April 26. The motion was filed on April 27.

The petitioner prepared a comprehensive statement of reasons in its appeal of the decision of the regional forester for region 7 (USDA) to

aerially apply the pesticide carbaryl to 208,000 acres of forest land in eastern Oregon. The preparation of that appeal involved the full-time work of one policy analyst, one biologist, and one staff attorney during the week of April 12. The statement of reasons was filed April 20, 1982.

Petitioner has also been actively participating in regulatory development at the Bonneville Power Administration. This participation primarily has been directed toward incorporation of environmental and fish and wildlife considerations and criteria into Bonneville's proposed policy on billing credit and resource acquisitions. Petitioner's participation has involved attending public hearings and submitting several sets of written comments for the record, including comments on the proposed billing credits regulations April 23, 1982, and comments on resource acquisition procedures March 17.

Tribal representatives actively participated in the regulation process of Pacific Coast ocean fisheries this year, as in recent years. Tribal involvement focused upon the goal of curtailing ocean harvest of Columbia River chinook salmon which are destined for the tribes' usual and accustomed fishing sites in the upper Columbia Basin.

Ocean fisheries in offshore federal waters are regulated by the U.S. Department of Commerce through the NPFMC off the coast of Alaska and the PFMC off the coasts of Oregon, Washington, and California. Columbia River spring, summer and fall chinook range throughout this entire geographic area. In 1981 Columbia River tribes petitioned the Secretary of Commerce to curtail ocean fisheries to allow sufficient fish to return to their natal Columbia River to meet fishery allocation needs to Indian tribes, and conservation for perpetuation of the depressed runs. This process was repeated this year, and specific regulatory requests were offered by the tribes in March, 1982

to meet conservation and Indian fishery allocation requirements.

Since January of this year, tribes participated in a number of regulatory hearings and direct negotiations with state and federal agencies to formulate ocean fishing principles and regulation options for Columbia River salmon management. Seven technical and policy group meetings were held throughout January and February with additional meetings in March and April in Seattle and Portland with tribal representatives and the states of Alaska, Oregon, Washington. These efforts absorbed the time of three fishery biologists and one staff attorney throughout much of the winter and spring of 1982.

VI. CONCLUSION

For all the foregoing reasons, petitioner Columbia River Inter-Tribal Fish Commission respectfully requests that it be granted leave to intervene in this proceeding, with the right to have notice of and appear at all pre-hearing conferences and hearings that are held, and that they may introduce evidence and submit argument in support of their interests as outlined in this petition.

DATED THIS ____ day of May, 1982.

Respectfully submitted,

S. Timothy Wapato
Executive Director
Columbia River Inter-Tribal Fish Commission
8383 N.E. Sandy Blvd., Suite 320
Portland, OR 97220

STATE OF OREGON)
) ss.
County of Multnomah)

S. Timothy Wapato, being first duly sworn, deposes and says that he is Executive Director for Columbia River Inter-Tribal Fish Commission; that

he is authorized to make the foregoing Petition to Intervene; that he has read the same and knows the contents thereof and that all statements contained therein are true and correct to the best of his knowledge, information and belief.

James B. Martin for
S. Timothy Wapato S. Timothy Wapato

Subscribed and sworn to before me this 5th day of May 1982.

Steven P. Price
Notary Public for Oregon

My Commission Expires 11-13-84