



NRC PUBLIC DOCUMENT ROOM
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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| In the matter of |) | |
| |) | |
| PUGET SOUND POWER & LIGHT |) | Docket Nos. STN 50-522 |
| COMPANY, <u>ET AL.</u> |) | STN 50-523 |
| |) | |
| (Skagit Nuclear Power Project, |) | |
| Units 1 and 2) |) | |

NRC STAFF RESPONSE TO APPLICANTS' BRIEF IN SUPPORT OF APPEAL

On November 24, 1978, the Licensing Board in the referenced proceeding issued "Decision and Order Granting Intervention" (Decision), in which the Board granted intervention to the Upper Skagit Indian Tribe, the Sauk-Suiattle Indian Tribe, and the Swinomish Tribal Community (the Indians) pursuant to their Petition to Intervene filed on June 13, 1978. On December 11, 1978, the Applicants filed a timely Notice of Appeal and "Applicants' Brief in Support of Applicants' Appeal of Licensing Board Decision and Order Granting Intervention to Three Indian Tribes" (Brief). In their Brief, Applicants argue that the Decision should be reversed in that it relies on factors that are erroneous as a matter of law.

The Staff, in its answer to the petition filed by the Indians, dated August 4, 1978 (Staff Answer) and in its "Response to the Board's Request and Petitioner Tribes' Responses", dated November 21, 1978 (Staff Response), argued that the Petition to Intervene should be denied but that the Indians should be

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permitted to submit certain information which would be necessary for the Board to make a determination as to whether any of the matters that the Indians seek to raise are appropriate issues to be considered in this proceeding. Specifically, the Staff argued that the Indians must show, as a prerequisite to being granted permission to intervene: the location of their residences and fishing areas; the expected loss to the Skagit River system fishery from construction and operation of the proposed facility; and socio-economic impacts, other than those caused by a loss of fish, the Indians may suffer from the project which have not been, or have been inadequately, considered by the Staff thus far. The Staff was of the view that if the Indians provided this information, it, together with the Petition as supplemented would presumably shift the balance of the factors in 10 CFR § 2.714(a)(1) in their favor.

Since the Staff's last filing, the Indians admittedly have not supplied any additional information which would satisfy the Staff's request. However, the Staff is willing to concede that the information needed to cause the factors described above to weigh in favor of admission of the Indians could easily be supplied through discovery, at least as to the residence and location of fishing spots. Accordingly, the Staff supports the conclusion that the Board reached in its Decision, that the Indians should be admitted as parties to this proceeding.

However, the Staff partially agrees with the Applicants that at least some of the bases asserted by the Board for permitting intervention of the Indians are unfounded in fact or law. The portions of the Decision that are objectionable to the Staff are all related to Applicants' argument that the Decision improperly accorded preferential status to the Indians (Brief, pp. 12-18). The Staff's discussion of these matters follows.

1. Rights of Indians in Relation to Those of the U.S.

In its Decision, the Licensing Board indicated that 28 U.S.C. 1362, which authorizes Indian tribes to initiate litigation when the United States government does not do so, has been interpreted to accord treatment to suing Indian tribes similar to that of the United States had it sued in their behalf. Decision, p. 18 citing Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976). Applying this co-plaintiff approach, the Licensing Board reasoned that if the petition to intervene were filed solely by the United States on behalf of the Indians, "the factors recited in the Commission's regulations for a late filed petition to intervene would yield to the public interest which the government represents." Decision, pp. 19-20 (footnote omitted). Thus, because of this preferential status, the Licensing Board is of the opinion that the Indians are exempt from NRC regulations.^{1/} Similarly, under this rationale the Licensing Board

^{1/} Even though the Licensing Board is of the opinion that the Indians are exempt from NRC regulations, it should be noted that the Indians have not requested any special treatment under the regulations. In fact, the Indians concede that they do not have "an absolute right to intervene without regard to NRC regulations." Petitioners' Reply Brief, p. 21.

held that laches could not be effectively asserted to bar the petition since the Indian tribes have the same rights in this respect as does the U.S. government. Decision, p. 20, n. 9. The NRC Staff submits that this reasoning by the Licensing Board is in error for several reasons.

First of all, the Licensing Board's decision is in error because if the United States had petitioned to intervene on behalf of the Indians, it would be bound by the requirements of 10 CFR § 2.714. 10 CFR § 2.714 sets forth rules of procedure to be followed by any "person" whose interest may be affected and who desires to participate in the proceeding. A canon of statutory construction is that a general statute imposing restrictions does not impose them on the government itself without a clear expression or implication to that effect. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1959), rehearing denied 362 U.S. 956 (1959). Thus, in common usage the term "person" does not include or apply to the sovereign. United States v. Cooper Corp., 312 U.S. 600 (1940).

However, the Commission's Rules of Practice explicitly defines "person" to include a government agency, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity. 10 CFR § 2.4(o). It is without doubt that under the Atomic Energy Act "Government agencies are on an equal footing with all others before

the Commission with respect to obtaining licenses from the Commission ***." H.R. Rep. No. 2639, 83rd Cong., 2nd Sess. (1954)(conference report) at 46. See also, section 273 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2020, "Licensing of Government Agencies"; Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, slip op. at 21 (November 9, 1978). Similarly, the United States is on an equal footing with all other persons seeking intervention, and is bound by the requirements of 10 CFR § 2.714. Thus, if the United States had filed the petition to intervene on behalf of the Indian tribes, the petition would still have to comply with the requirements of 10 CFR § 2.714.^{2/}

Obviously, if the United States filed an untimely petition in an NRC proceeding, a Licensing Board could give weight to the public interest represented when determining whether substantial good cause for the late filing existed. However, we submit that this determination of substantial good cause must be made by the Licensing Board and cannot be waived under any circumstances.

The Licensing Board is not only of the opinion that the NRC regulations regarding untimely filings do not apply to United States' petitioners, but also that case law supports the proposition that the United States cannot be barred by the

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It is equally true that "a general statute in terms applying to all persons includes Indians and their property interests " Federal Power Commission v. Tuscarora Indian Nation, supra at 116, 120. See also, cases cited in Staff Answer, p. 16.

equitable defense of laches where it is asserting a public right. Decision, p. 20, n. 9. It then reasons that since the Indians have the same rights in this respect as does the United States, they cannot be barred by laches. Id.

The NRC Staff is of the opinion that the doctrine of laches is not applicable in this case and, in fact, has not been asserted by any party to this proceeding. Laches is a purely equitable doctrine and is generally peculiar to a court of equity. See 27 Am Jur 2d § 154. While it is true that the existence of an administrative remedy does not necessarily bar the aid of equity, it has been held that equity principles should not intervene until a prescribed administrative remedy is exhausted. Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937). This is particularly true where there is an explicit legislative command that a prescribed administrative procedure be followed. Aircraft and Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 at 775 (1946). Thus, we submit that since the Commission has mandated a prescribed administrative procedure for consideration of petitions to intervene (10 CFR § 2.714), general principles of equity should not intervene to override this mandate.

Accordingly, the doctrine of laches should not be asserted as a defense to bar an untimely petition to intervene and, in fact, such a defense has not

been asserted by either the Applicants or the Staff in this case.^{3/} Therefore, the Licensing Board's apparent ruling that the defense of laches cannot be asserted against either the United States or the Indians is misplaced and is in error as a matter of law when applied solely to the Indians.

2. Trust Responsibility

The Staff agrees with the Applicants that the Board improperly applied a trust responsibility by the United States on behalf of Indians as a basis for granting admission for intervention of the Indians. Decision, pp. 18-20; see also Brief, pp. 20-25. As Applicants correctly point out, the Decision fails to specify what trust responsibility it is referring to when it, in effect, equates the Petition filed by the Indians with one filed by the United States government.

The Staff has argued in its earlier filings with the Board that any trust relationship that may exist between the Indians and the federal government does not grant to the Indians a waiver of their obligations to comply with the Commission's regulations requiring the timely filing of petitions for leave to intervene. Staff answer pp. 13-17. Although the Staff now concedes that the

^{3/} The Licensing Board has also indicated that laches cannot be asserted against the Indians since they have the same rights as the United States. However, we could note that it has been held that the exemption of the United States from the defense of laches is personal to the sovereign; it does not pass on to another litigant even when the suit is prosecuted in the name of the government on behalf of other individuals. Cressey v. Meyer, 138 U.S. 525 (1890); United States v. Beebe, 127 U.S. 338 (1887). Accordingly, the defense of laches could be asserted against the Indians.

Indians could easily make a showing which would satisfy the regulations as to late-filed petitions, it considers it important for the Appeal Board to reverse that portion of the Board's decision that relies for a basis upon an asserted trust responsibility by the U.S. to the Indians. Such a precedent should not be allowed to stand.

As the Applicants point out, a trust duty simply cannot exist in the absence of a specific statute, treaty or agreement creating such a duty. See, Brief, p. 22, n. 12, and cases cited therein. The Staff has also indicated that a general fiduciary relationship, unlimited and undefined, simply does not exist. Staff Answer, p. 15 and cases cited therein. Although the Board does not expressly do so, presumably it rests its opinion on the relevance of the trust responsibility with respect to the Indians on the provisions of the Treaty of Point Elliott, which is relied on by the Indians in their Petition to Intervene. However, as the Staff has argued in its November 21, 1978 Response (at p. 3) and the Applicants contend in their Brief (at pp. 23-25), the Treaty of Point Elliott grants only the right of access of the Indians to the Skagit River system, and nothing more. This access will not be denied to the Indians by the proposed project and cannot be asserted as a basis for special consideration in determining whether the Indians should be admitted to the proceeding. See, Staff Response, pp. 3, 4; FES, § 11.7.9; and Brief, pp. 24, 25. Consequently,

the Staff does not perceive how the treaty in any way assists the Board's determination that the Indians have a special right of intervention in this proceeding.

Conclusion

The Staff urges the Appeal Board to reverse those portions of the Licensing Board's Decision wherein the Board relies, as a basis for permitting intervention of the Indians, upon the assumption that the Indians should be accorded preferential treatment. Thus, the Indians' Petition, as supplemented, must undergo a scrutiny of the five factors pursuant to 10 CFR § 2.714(a). The Staff supports the conclusion of the Board permitting intervention of the Indians, since there exists at least one good basis in the Decision for supporting the conclusion. That basis is that the Indians have asserted one new area, special genetic damage to them as a result of the effects of low-level radiation on their unique situation involving extensive inbreeding, which has not been previously considered by the Staff, and upon which the Indians may be able to make a contribution. The Staff considers that the location of the residences and fishing location of the Indians may be established during discovery such that it can be shown that the Indians might be exposed to low-level radiation from the facility. Thus, despite the failure of the Board to expressly consider the five factors of § 2.714(a)(1), the Staff concludes that they would weigh in favor of admitting the Indians as parties. See

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANTS' BRIEF IN SUPPORT OF APPEAL" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 26th day of December, 1978:

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Staff's analysis of the Petition, as supplemented, with respect to the five factors in Staff Response, pp. 7-12.

Respectfully submitted,



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Dated at Bethesda, Maryland
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