

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) Docket Nos.
Permits and Facility Licenses,)
SKAGIT/HANFORD NUCLEAR PROJECT) STN 50-522, 50-523

DOCKETED BY
SERVICE

MOTION FOR LEAVE TO REPLY TO APPLICANT'S RESPONSE IN OPPOSITION TO
CRITFC'S MOTION FOR ADMISSION OF SECOND SUPPLEMENT TO PETITION TO
INTERVENE

I. Introduction

On May 5, 1982, the Columbia River Inter-Tribal Fish Commission (CRITFC) filed an untimely Petition to Intervene along with a Supplement to Petition to Intervene listing the contentions it wished to litigate. On May 19, 1982, and May 25, 1982, the Applicant and the NRC Staff, respectively, submitted their responses to the untimely petition and contentions.^{1/} (Applicant's First Reponse) Both Applicant and Staff acknowledged that CRITFC met the "interest" and "specific aspect" requirements of 10 C.F.R. § 2.714(a). However, Applicant objected to the CRITFC petition on grounds of untimeliness whereas the Staff concluded that the balance of the five factors set forth in 10 C.F.R. § 2.714(a)(1) weighed in favor of CRITFC being permitted to intervene in this proceeding. Both Applicant and Staff, however, objected to certain specific contentions submitted by CRITFC in its Supplement to its Petition to Intervene.^{2/}

- 1/ The NRC Staff inadvertently neglected to serve a copy of its response on CRITFC. This service was completed on June 9, 1982.
- 2/ CRITFC's five contentions largely incorporated by reference previous contentions filed by the Natural Resources Defense Council (NRDC) or the National Wildlife Federation/Oregon Environmental Council (NFW/OEC). CRITFC's Contention 4 asserted supplemental issues concerning aquatic impacts which were not addressed in the contentions submitted by NRDC or NFW/OEC. These supplemental issues were objected to by both Applicant and Staff because they lacked basis and specificity.

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On July 2, 1982, the licensing Board issued a Memorandum and Order concerning CRITFC's late-filed petition to intervene. The Board concluded that CRITFC's petition was technically deficient in that the requisite authorization from CRITFC's members was lacking and that the petition was not properly signed. The Board further noted that it would rule on the admissibility of CRITFC's contentions after the deficiencies were corrected and the late filing question resolved.

On July 16, 1982, CRITFC submitted its response to the Board's July 2, 1982, Memorandum and Order. Since the NRC Staff did not identify or object to any technical deficiencies in the execution of CRITFC's original petition to intervene, it did not take any position as to whether the Board-noted deficiencies have been cured by CRITFC's response.

In addition, CRITFC submitted a "motion for Admission of Second Supplement to Petition to Intervene" on July 16, 1982, (Motion). In this Motion, CRITFC again listed and renumbered the contentions it wishes to litigate, along with specific and additional bases for the contentions. Particularly, it submitted additional bases to support its initial contention (Contention No. 4 in the May 5, 1982, Supplement) concerning the impact of the Skagit/Hanford Nuclear Project (S/HNP) on Columbia River fish resources and the potential infringement on Indian treaty rights.

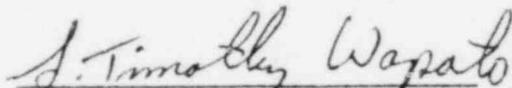
On July 30, the Applicant filed its Response in Opposition to the CRITFC's Motion for Admission of Second Supplement to Petition to Intervene. (Applicant's Second Response) In addition to raising objections to the untimely nature of the petitions based on the considerations of 10 C.F.R. 2.714(a)(1), the Applicant objected to certain contentions raised by CRITFC, and objected to the standing of CRITFC. At this time CRITFC wishes to respond to the objections to standing raised by the Applicant, while reserving any rights to address specific objections to contentions at a later time.

II. Right to Reply

Pursuant to 10 C.F.R. 2.730(c) the moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or Assistant Secretary. Accordingly the CRITFC requests permission of the presiding officer for leave to reply to the issue of standing. It has been recognized in NRC proceedings that each presiding board must fashion a fair procedure for dealing with such objections to petitions as are filed. See Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979). At least with respect to contentions, the proponent of the contention must be given some chance to be heard in response. In any event, the cardinal rule of fairness is that each side must be heard. Id.

Initially Applicant did not object to the standing of CRITFC to intervene in this proceeding. Applicant's First and Second Responses, p. 3. However, in its July 30 filing Applicant now raises objection to CRITFC standing. Applicant's Second Response, p. 3. Had this objection been raised in Applicant's First Response, CRITFC could have responded at the time of filing its Second Supplement to Petition to Intervene. In any event, CRITFC now requests leave to reply.

Respectfully Submitted,



S. Timothy Wapato, Executive Director

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

Dated this 19th day of August, 1982.

REPLY OF CRITFC TO APPLICANT'S SECOND RESPONSE

It is relatively clear that no constitutional restrictions affect intervention in administrative proceedings. 3 Davis, Administrative Law Treatise 241 (1958); Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978). Indeed judicial precedent suggests that administrative agencies are encouraged to adopt creative approaches to maximize productive public participation in their proceedings. Portland General Electric Co. et. al. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-2T, 4 NRC 610, 615 (1976); (citing) Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994, 1005-1006 (D.C. Cir. 1966). In this regard the NRC has determined that there is no legal impediment preventing administrative agencies from allowing wider participation in their proceedings than is required by statute. Id. at 614. In part, the NRC has concluded that contemporary judicial concepts of standing are generally accepted as useful guides in determining the kinds of interests a petitioner must establish, In the Matter of Edlow International, 3 NRC 563 (1976) (emphasis added), and should be applied in determining whether a petitioner is entitled to intervene as of right. Portland General Electric, at 614 (emphasis added). Nevertheless where a petitioner may lack standing to intervene as of right, intervention may be granted in the Licensing Board's discretion as guided by the factors contained in 10 C.F.R. 2.714(a) and 2.714(d). Id. at 616. CRITFC avers that regardless of which of the above tests is applied, it has standing to raise the contentions described in its Second Supplement to Petition to Intervene. Furthermore the broad discretion of the NRC to determine the extent of public participation would withstand judicial scrutiny involved in any challenge to an order permitting intervention by CRITFC. See Cities of Statesville v. A.E.C., 441 F.2d 962, 976-77 (1969). In contrast the reluctance of the courts

to elevate form over substance in the law of standing suggests that the obverse may not be true; viz. any challenge to an order denying intervention by CRITFC might not withstand judicial scrutiny. See Washington Apple Advertising Commission v. Hunt, 432 U.S. 333, 345 (1977).

In applying the case law of standing in an individual proceeding the NRC has found that stronger or more definite proof of injury is needed to establish standing in court than to demonstrate interest under 10 C.F.R. 2.714(a). Washington Public Power Supply System (Hanford Nos. 1 and 4), LBP7511, INRC 252, 257 (1975); cited with approval Portland General Electric, at 616:

To have standing in court there must be some injury that has occurred or will probably result from the agency action involved. On the other hand, Section 189 of the Atomic Energy Act, 42 USC 2239, provides that the commission shall grant a hearing upon the request of any person "whose interest may be affected by the proceeding, and shall admit any such person as a party to the proceeding." [Emphasis supplied.]

Washington Public Power Supply System at 256. In this regard the NRC has "always followed a liberal construction of judicial standing tests in determining whether a petitioner is entitled to intervene as a matter of right in domestic licensing proceedings." Portland General Electric, at 616.

In the instant proceeding, CRITFC has a definite substantial stake in the outcome. The right to fish is "not much less necessary to the existence of the Indians than the air they breathed" United States v. Winans, 198 U.S. 371, 381 (1905). Not only do individual members of each Fish and Wildlife Committee fish upon Hanford Reach salmon stocks, these committees individually and as CRITFC exercise treaty guaranteed sovereign rights to manage the fishery resource.

The applicant argues that:

In short, the Petitioner is not an official representative of the tribes, it has not treaty rights of its own, and it has no authority to assert the treaty rights of the tribes; rather it would seem that the Petitioner simply has an academic interest in protecting the tribal treaty rights.

Applicant's Second Response at 4. However, this argument is based on fundamental misconceptions. While the treaty fishing right is a property right of the tribe, Whitefoot v. United States, 293 F.2d 658, 663 (Ct. Cl. 1961), nevertheless individual tribal members do have standing to assert the treaty right. F. Cohen, Handbook of Federal Indian Law, 451 (1982 ed.); Sohappy v. Smith, 302 F. Supp. 899, 912 (D. Or. 1969), aff'd and remanded, 529 F.2d 570 (9th Cir. 1976). The inference that the tribe alone sustains injury due to loss of the treaty right is erroneous. Rather all tribal members and organizations may be affected by diminution of a treaty right including the four Fish and Wildlife Committees individually and collectively as the Columbia River Inter-Tribal Fish Commission.

The treaty right to a fishery secures more than the opportunity to go fishing; the treaty right secures the sovereign right to act to protect the fishery resource as a resource manager. See Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974). In Settler the Ninth Circuit held

It would be unreasonable to conclude that in reserving these vital [fishing] rights, the Indians intended to divest themselves of all control over the exercise of those rights The Indians must surely have understood that tribal control would continue after the treaty.

Id. at 236 (emphasis added). Two years later the Supreme Court honored retained tribal sovereignty:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at

the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 322 (1978) (citations omitted) (emphasis added).

The sovereignty to protect the fishery resource is exercised in substantial part by the Fish and Wildlife Committees of each tribe individually and as CRITFC. Typically each Fish and Wildlife Committee is empowered to engage in programs or actions that will protect, promote, or enhance wildlife resources on the reservation or that wildlife off the reservation in which the Indian tribe has an interest by virtue of treaty reserved rights. Wildlife Code of the Confederated Tribes of the Umatilla Indian Reservation, Ch. 2, § 6, (1982). Additionally each Fish and Wildlife Committee is typically authorized to enact rules and regulations. Id. at § 7. By their actions as CRITFC, the Fish and Wildlife Committees exercise in a coordinated manner their sovereignty on matters affecting their collective interest in the Columbia River fishery. It is the ability to protect, promote, and enhance the Columbia River fishery resource as measured by the integrity of treaty secured rights which may be affected by the instant proceeding. Any impact to treaty reserved rights, viz. authorization to diminish the viability of the fishery resource, necessarily affects the ability of each Fish and Wildlife Committee individually and as CRITFC to carry out their authorized functions. Indeed treaty reserved rights form the basis for all activities of CRITFC.

Some of CRITFC's activities include, formal representation on the Salmon Plan Development Team of the North Pacific Fisheries Management Council, formal representation on the U.S.-Canada Salmon Interception

Treaty Negotiations delegation, formal representation in the Columbia River Water Management Group, formal representation on the Fish and Wildlife Subcommittee of the Scientific and Statistical Advisory Committee of the Northwest Power Planning Council, designation as a tribal coordinating entity for consultations with the Northwest Power Planning Council, and CRITFC is the "Columbia River tribal coordinating body" and thus a voting member of the Salmon and Steelhead Advisory Commission for the purposes of Sections 103 & 110, of Salmon and Steelhead Conservation and Enhancement Act of 1980, P.L. 96-561 (Dec. 22, 1980). Much of this work would be moot if the Hanford Reach salmon stocks were destroyed by the Applicant's project. Indeed these stocks are the limiting consideration in the only remaining significant Indian commercial harvest season on the Columbia River. It should be recognized that these activities represent more than a mere interest in a problem. These activities are the indicia of retained sovereignty exercised by the Fish and Wildlife Committees as CRITFC.

The Supreme Court has rejected the need for injury to a property right or economic injury to confer standing. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 154 (1970). Clearly retained sovereignty rights are a sufficiently cognizable interest to confer standing. See United States v. Wheeler, 435 U.S. 313 (1978). "But the "injury in fact" requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." Sierra Club v. Morton, 405 U.S. 727 (1972). Clearly each Fish and Wildlife Committee individually and as CRITFC could be injured by diminishment of the treaty secured rights to a fishery. The treaty reserved right to fish is more than "the right to dip one's net into -- the water ... and bring it out empty."

United States v. Washington, 506 F. Supp. 187, 206 (W.D. Wash. 1980).

As managers of the Columbia River fishery resource, the four Fish and Wildlife Committees as CRITFC have a definite stake in ensuring the viability of the fishing resource and the integrity of the treaty right which forms the basis for their action. Thus it would be erroneous to conclude that CRITFC may not be adversely affected by the S/HNP proceeding.

In determining suitability for discretionary intervention the Licensing Board should be guided by the following factors:

- a) Weighing in favor of allowing intervention --
 - 1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
 - 2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
 - 3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.
- b) Weighing against allowing intervention --
 - 4) The availability of other means whereby petitioner's interest will be protected.
 - 5) The extent to which the petitioner's interest will be represented by existing parties.
 - 6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

Portland General Electric Co., at 616. The primary factor to be considered is the significance of the contribution that a petitioner might make. Id.

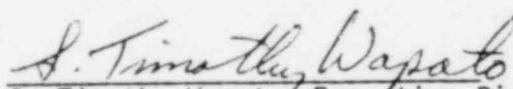
In both its initial petition to intervene and the second supplement CRITFC has addressed these factors. Based on its previous filings in this proceeding CRITFC avers that even if standing is not granted as a matter of right, discretionary standing should be accorded. The importance of Hanford Reach salmon stocks cannot be understated, nor can the immediacy of the depressed state of these stocks be understated. Indeed the four

Columbia River treaty tribes are currently in litigation against the states of Alaska, Washington, and Oregon as well as the U.S. Department of Commerce to protect these very same Hanford Reach stocks from overharvest. Yakima v. Baldrige, No. C-80-342T (W.D. Wash. June 1981). In addition to the potential significant contributions CRITFC can make to substantial issues of law and fact not otherwise presented, the importance of Hanford Reach stocks and their immediate need for protection weigh in favor of CRITFC's discretionary intervention.

CONCLUSION

Based on the foregoing consideration, CRITFC respectfully suggests that it would meet tests for both intervention as of right and discretionary intervention as formulated by the NRC. Thus CRITFC requests the ASHB for leave to intervene in the Skagit/Hanford Nuclear proceeding.

Respectfully Submitted,


S. Timothy Wapato, Executive Director

Dated this 19th day of August 1982.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of August 1982, served true copies of Petitioner, Columbia River Inter-Tribal Fish Commission's Motion for Leave to Reply to Applicant's Response in Opposition to CRITFC's Motion For Admission of Second Supplement to Petition to Intervene, by mail, postage prepaid, upon the following:

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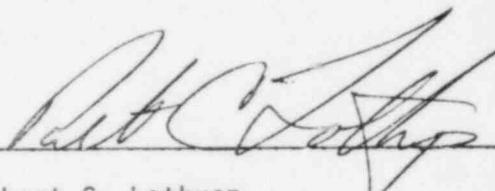
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