

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

In re City of Port Townsend's
Competing Preliminary Permit
Application for Tidal Energy Project
at Admiralty Inlet

TULALIP TRIBES'
MOTION TO INTERVENE

Project No. P-12742

1. INTRODUCTION

On October 4, 2006, the Federal Energy Regulatory Commission (FERC) issued notice of an application by the City of Port Townsend for a competing preliminary permit for the "Admiralty Inlet Tidal Energy Project" in Puget Sound. The Tulalip Tribes hereby moves to intervene pursuant to 18 C.F.R. § 385.210 and § 385.214.

2. STANDARDS FOR GRANTING TIMELY MOTIONS TO INTERVENE

Intervention is proper if a party demonstrates (1) the position taken by the movant, to the extent known, together with the basis in fact and law for the position and (2) the movant's interest in the proceeding. 18 C.F.R. §§ 385.214(a)(3), (b)(1), (2). The movant must demonstrate either: (1) that it has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action; or (2) that it has or represents an interest which may be directly affected by the outcome of the proceeding; or (3) that the movant's participation is in the public interest. *Id.* § 385.214(b)(2).

3. DESCRIPTION OF MOVANT

The Tulalip Tribes of Washington ("Tulalip" or "Tribe") is a federally-recognized Indian Tribe. It is governed by a Board of Directors under authority of the Tribe's Constitution and Bylaws approved by the U.S. Commissioner of Indian Affairs and the Secretary of the Interior on January 24, 1936, pursuant to the Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. §476).

The Tulalip Tribes are the political successor in interest and descendant of treaty signatories commonly referred to today as the Snohomish, Snoqualmie and Skykomish tribes, who were parties to the Treaty of Point Elliott. *U.S. v. Washington*, 626 F. Supp. 1405, 1577 (W.D.Wash. 1985). In the Treaty, the Tulalip Tribes reserved the right to take fish at usual and accustomed grounds and stations. The Tribes' usual and accustomed fishing areas have been confirmed in numerous federal court proceedings and include marine and fresh water areas in and around Puget Sound. *U.S. v. Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978); *id.* at 1055; *id.* at 1058; *U.S. v. Washington*, 626 F. Supp. 1405,1527-32 (W.O. Wash. 1985), *aff'd*, 841 F.2d. 317 (9th Cir.1988).

4. TULALIP TRIBES' STATEMENT OF INTEREST

The Treaty fishing rights reserved by the Tribe or its political predecessors include the right to engage in fishing activities in the study area identified by the applicant, or the Treaty-protected right to take fish that migrate through that area, or both.

Anadromous fish stocks that are subject to the Tribes' treaty-secured fishing rights migrate through Puget Sound and could suffer significant adverse impacts from the location of a tidal energy project in the project area. This project has a significant potential to interfere with marine mammal migration and movement, and with the movement of currents, sediments, nutrients and forage fish, and therefore to cause unknown adverse impacts to treaty-protected

fisheries resources. The project and its associated on- and off-shore infrastructure may also interfere with tribal fleet movements and operations.

a. The Tulalip Tribes has a Right to Intervene by Statute and Commission Rule

Federal law guarantees a right to the Tribe to participate in this proceeding. The Federal Power Act and implementing regulations encourage participation of Indian tribes in licensing proceedings. FERC must solicit and consider recommendations of Indian tribes affected by a project. 16 U.S.C. § 803(a)(3). Regulations specifically provide for the submission of comments and recommendations by Indian tribes concerning terms and conditions for the protection, mitigation of damages to, and enhancement of fish and wildlife. 18 C.F.R. § 4.34(b)(2).

In addition, FERC, as an agency of the United States has a federal trust responsibility to protect tribal interests and resources. FERC has recognized its trust obligations and amended its regulations, pursuant to a policy statement issued in 2003, to acknowledge and describe its trust responsibility to protect and enhance tribal trust resources. See Final Rule and Tribal Policy Statement, 104 FERC 61,108 (July 23, 2003) (amending 18 C.F.R. Part 2). “The Commission, in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission’s actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources.” 18 C.F.R. § 2.1c(e).

Intervention by the Tribe will assist the Commission in ensuring that the Tribe’s concerns and interests are thoroughly considered. These legal rights and interests support granting the Tribe’s motion to intervene.

b. The Tribe's Rights and Interests Are Affected by the Outcome of these Proceedings

The Tribe seeks intervention in this matter to ensure that its interests, including federally protected treaty rights, are included and considered in this proceeding.

Protection of Puget Sound for fish and marine mammal populations, as well as cultural resources and other matters are critically important to the Tribe. Among other impacts, the project may affect treaty-reserved and federal trust resources of the Tribe by impairing passage of fish, marine mammals and degrading habitat necessary for marine species used for cultural, economic and subsistence purposes. Cultural resources, of vital importance to the vitality of the religious and spiritual practices of Tribal members and the history of the Tribe, may be impacted and threatened by the proposed projects.

c. The Tulalip Tribes' Intervention in this Proceeding Will Serve the Public Interest.

Granting the Tribe's motion to intervene will not only protect the right and interests of the Tribe and its members, it will also serve the public interest concerning Puget Sound. The Tribe seeks protection and enhancement of ecological resources to the benefit of all residents of the state. Many of the state's non-Tribal member residents use Puget Sound for commercial, recreational, aesthetic and other reasons. Due to the importance of Puget Sound to the public interest, the degraded condition of Puget Sound and the number of Puget Sound Species either listed or proposed to be listed under the Endangered Species Act, the Governor for the State of Washington formed the Puget Sound Partnership in December of 2005 to help develop a recovery plan for Puget Sound. Because of the Tribe's historical knowledge of Puget Sound and its expertise in fisheries and marine habitats, the Tribe's participation as an intervener in these proceeding adds valuable information, perspective and expertise in the effort to protect the public's interest in the natural resources affected by the project.

5. CONCLUSION

The Tulalip Tribes' fishing rights in the waters in and around Puget Sound will be directly affected by this application. The Tribe requests intervention in this proceeding due to

concerns that the project will adversely impact marine resources and environmental quality in Puget Sound, as well as the Tribe's own fishing rights.

The Tribe reserves its right to take any position in this proceeding to protect and enhance the Tribe's fishery, wildlife and cultural resources, and to mitigate project effects on those resources, and to recoup its costs associated with the Commission's proceedings in this matter.

Therefore, for good cause shown, the Tribe respectfully seeks approval to intervene as a party in this proceeding. It requests the rights to notice of and to appear at any and all hearings or proceedings, to produce evidence and cross-examine witnesses, to be heard through counsel, through written and oral argument, to be served henceforth with copies of all pleadings, applications, and notices and for such other participation and relief in each proceeding as appropriate in the circumstances.

Finally, please add the undersigned and each of the following persons to the service list for the Tribe for all purposes in this proceeding:

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RESPECTFULLY SUBMITTED this 24th day of October, 2006.

THE TULALIP TRIBES OF WASHINGTON

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CERTIFICATE OF FILING AND SERVICE

Wendy A. Church hereby certifies that on this 24th day of October, 2006, copies of the Tulalip Tribes of Washington's Motion to Intervene were served via U.S. mail to all parties of record, as set forth in FERC's web service list published on this date, described below, in accordance with the rules of the Federal Energy Regulatory Commission.

s/Wendy A. Church

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Submission Contents

Tulalip Tribes Motion to Intervene 061024intervenp12742pet.pdf.....	1-7
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