

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

Docket No. UE 170

In the Matter of)	
PACIFIC POWER & LIGHT (dba PacifiCorp)	)	ANSWER TO THE MOTION
	)	FOR FILING OF AN <i>AMICUS</i>
	)	<i>CURIAE</i> BRIEF BY THE CENTER
	)	FOR TRIBAL WATER
	)	ADVOCACY, CONSENT, AND
	)	OPPOSITION TO THE
Request for a General Rate Increase in the	)	ANSWER OF KOPWU
Company's Oregon Annual Revenues	)	SEEKING TO DENY THAT
	)	<i>AMICUS</i> STATUS
)	
	)	FILED BY THE PACIFIC
)	COAST FEDERATION OF
)	FISHERMEN'S ASSOCIATIONS
)	(PCFFA)
(Klamath River Basin Irrigator Rates))	
)	

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Pursuant to OAR §§ 860-013-0025 and 860-013-0050, the Pacific Coast Federation of Fishermen's Associations (PCFFA) hereby Answers the Motion by the Center for Tribal Water Advocacy (CTWA) to file an *amicus curiae* brief in this case to inform the process concerning certain issues of Indian water law and other legal issues of relevance to this proceeding as described in its Motion. We consent to granting *amicus curiae* status to CTWA as requested in its Motion and urge the ALJ to grant the motion, with appropriate limitations, for the reasons set forth below.

We also oppose the Answer of the Klamath Off-Project Water Users to the CTWA motion. The Klamath Off-Project Water Users, Inc. (KOPWU) Answer opposing providing CTWA with *amicus* status patently cites the wrong standard (i.e., the standard for Intervention). CTWA clearly did not ask for, and does not seek, to intervene in this proceeding, and so none of KOPWU's many objections to its "intervention" apply. CTWA seeks only to file a single brief,

on certain specific and relevant legal issues that it appears uniquely qualified to discuss, in order to better inform this proceeding in the very limited role of *amicus curiae*.

The issues of Indian water rights that CTWA can uniquely explain to this proceeding are quite relevant to this proceeding in several ways, as discussed below, and the proposed CTWA *amicus* brief might well be very helpful in informing the Administrative Law Judge and the Commission on some of these underlying and threshold legal issues. We therefore urge the granting of CTWA's motion for this limited purpose, as an *amicus curiae*. Our argument is set forth below.

**CTWA IS NOT SEEKING TO INTERVENE, ONLY LIMITED PARTICIPATION AS
AN AMICUS FOR THE SPECIFIC PURPOSE OF BRIEFING CERTAIN ISSUES
WITHIN ITS UNIQUE EXPERTISE**

The Center for Tribal Water Advocacy (CTWA) has manifestly not petitioned to intervene under OAR § 860-013-0021. Yet KOPWU argues:

“[T]he motion is an untimely motion to intervene.” (KOPWU, pg. 1)

and further that:

“Although CTWA has styled its request as a motion to appear as *amicus curiae*, it appears from the substance of CTWA's motion that CTWA seeks a role in this proceeding that goes beyond the traditional role of an *amicus curiae*.” (KOPWU, pg. 1)

KOPWU, having set up this artificial straw man, then goes to great lengths to cite the standards for intervention under OAR § 860-013-0021(2), finding that these standards have not been met by CTWA. Indeed, they have not, but for a very good reason – CTWA never applied for, and is not seeking, intervention in the first place. CTWA's motion is explicitly limited only to a request for *amicus* status for a specific and specialized purpose, and nothing more. KOPWU's intervention objections are therefore quite beside the point.

As to concerns about its status, if the ALJ sees fit he should clarify in his Ruling that CTWA's role is the limited one of an *amicus*, and not an intervenor-party. The ALJ may also, if he chooses, limit CTWA's briefing to issues related to the official Issues List in this proceeding, including the impact of federal Tribal water rights law (which CTWA apparently specializes in) on those issues and this proceeding. Such limitations would eliminate most or all of KOPWU's

concerns while allowing the parties in this proceeding the benefit of CTWA's apparent expertise on these issues.

As to KOPWU's observation that this proceeding has now advanced to the briefing stage, KOPWU is quite correct. *However, what better time for CTWA to be filing a brief than during the briefing stage of this case?*

THE PROPER STANDARD IS WHETHER THE AMICUS WILL PROVIDE EXPERTISE TO INFORM THE PROCEEDING

Though the filing of *amicus* briefs is relatively rare in administrative proceedings, it is common in appellate practice and in courts of law. The ALJ, as a judicial officer, clearly has broad discretion, in the interests of justice, to allow an *amicus curiae* to participate in that very limited capacity, if the *amicus* has an interest or special expertise, in order to provide a new or unique perspective as well as a potential contribution toward clarity or better resolution of the issues. Black's Law Dictionary (7th Ed. 1999) defines an *amicus curiae* as follows:

"amicus curiae. [Latin "friend of the court"] A person who is not a party to the lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter."

The Modern Dictionary for the Legal Profession (3rd Ed. – 2001) defines the term as follows:

"amicus curiae. Individuals or groups who are not parties to litigation, but who are nevertheless permitted to present their views on the issues involved in a pending case to the court in written briefs or vial oral presentations. The court exercises its discretion in determining whether to grant permission to participate as *amicus curiae* or to request the participation of any individual or group."

Similarly, the Random House-Webster Dictionary of the Law (2002) states:

"amicus curiae. A non-party that volunteers or is invited by the court to submit its views on the issues presented in a case, because it has an interest in or perspective on the matter that may not be adequately represented by the parties. Usually the *amicus curiae* (or *amicus* for short) only submits a brief, but sometimes the *amicus* is also allowed to participate in oral argument."

It is also by no means a requirement of any of these definitions that an *amicus* must be a "neutral party" in the sense used by KOPWU as in having no opinion or viewpoint of its own on matters in contest. If an *amicus* expressed no viewpoint, what would be the purpose?

The term “neutral party” therefore clearly means in the sense of not being a plaintiff, defendant nor party-intervenor in the proceeding, and this meaning is consistent with the above definitions. Indeed, it is widely recognized in Oregon appellate practice, where *amicus curiae* briefs are commonplace, that any *amicus* may take a position on any issue, as for instance in the Oregon Rules of Appellate Procedure, Rule 8.15(5)(a), which states:

“Rule 8.15(5)(a). A person wishing to appear *amicus curiae* may seek to appear in support of or in opposition to a petition for review, on the merits of the case on review, or both.”

The standard for granting *amicus* status should be whether the proposed *amicus* has something useful to contribute, not that it have no opinions nor independent points of view as KOPWU suggests. Given the special expertise of CTWA on key federal issues of Tribal water rights relevant to this proceeding, CTWA should qualify for that limited *amicus* status.

BROADER ISSUES OF KLAMATH TRIBAL WATER RIGHTS ARE RELEVANT, ARE NOT REPRESENTED BY EXISTING PARTIES, AND CTWA HAS SPECIAL EXPERTISE IN THAT AREA USEFUL TO THE COMMISSION

There is a broader context of federal Indian Treaty and water rights law in which this case is embedded that has not yet been argued or briefed, including the fact that Oregon’s Klamath Tribes hold the most senior water right, “from time immemorial,” in the upper Klamath Basin.

The Klamath Tribes are not Intervenor in this case (contrary to the assertions of KOPWU) and therefore this key interest and issue cannot be adequately represented by any party. While other Tribe’s (specifically the Yurok and Hoopa Valley Tribes) have intervened, these California Tribes’ interests are quite distinct from the specific senior water right interests of the Klamath Tribes in Oregon, and these other California-based Tribes should not be expected to represent the Klamath Tribes’ Oregon water interest.

The relevance of this key issue is this: if the Klamath Tribe’s Oregon water rights are indeed senior to any and all of those of the Bureau of Reclamation, the Klamath Off-Project Water Users (KOPWU) and the Klamath Water Users Association (KWUA), the fact that the Bureau and the water users have junior water rights to those of the Tribes may have a number of legal implications that may limit their “credit for value” claims asserted for “added water” since,

as a matter of federal and state water law, any so-called “added water” that actually exists *might actually belong to the Tribes*, not to the water users.

At the very least, this issue should be briefed. The Center for Tribal Water Advocacy (CTWA), as is apparent from its very name, apparently has expertise in this area of law that could be helpful in shedding light on these currently opaque legal issues in this proceeding.

We therefore urge the ALJ to grant *amicus* status to the CTWA for the limited purpose of briefing us on this specific issue, i.e., whether the current Schedule 33 contract rate standards and the “credit for value” water claims of the Bureau and irrigators “are in violation of the Tribal Trust responsibility of the Bureau of Reclamation, Bureau of Land Management and other federal entities,” and such other similar issues within CTWA’s expertise as the ALJ determines might be informative and helpful to this proceeding.

Respectfully submitted,

Date: February 21, 2006

/s/ _____
Glen H. Spain, for the Pacific
Coast Federation of Fishermen’s
Associations (PCFFA)

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent the attached Answer To The Motion For Filing Of An *Amicus Curiae* Brief By The Center For Tribal Water Advocacy, Consent, And Opposition To The Answer Of KOPWU Seeking To Deny That *Amicus* Status, filed by the Pacific Coast Federation of Fishermen's Associations (PCFFA), to each person on the Service List of this proceeding below as follows: (1) by email to all those with known email addresses; (2) by first class, postage-prepaid U.S. Mail to all known addresses of those who have not waived service by mail. I also sent the original and requisite copies to the PUC Filing Center for immediate filing.

Date: February 21, 2006

/s/ _____
Glen H. Spain

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