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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)

PUGET SOUND POWER & LIGHT)
COMPANY, ET AL.)

Docket Nos. 50-522
50-523

(Skagit Nuclear Power Project)
Units 1 and 2))

November 17, 1978

APPLICANTS' RESPONSE TO THE BOARD'S
REQUEST OF SEPTEMBER 26, 1978

By its letter of September 26, 1978, the Board requested additional submissions from the parties regarding the untimely petition for intervention filed by the Upper Skagit Indian Tribe, the Sauk-Suiattle Indian Tribe and Swinomish Tribal Community ("Petitioners"). The Board's request was for legal analyses supporting or opposing the following questions:

"If intervention were to be denied, and if SCANP, for whatever reason (lack of funds or lack of being real party in interest for the petitioners) were not to appeal in reference to any specific interest protected by the treaties (such as fishing, recreation or general access to the area affected by the proposed Skagit plant); how would the rights of the Indian interests be validly asserted on any appeal, or further consideration or review, that might be sought by the Indians. Relatedly, is it sufficient, and consistent with due process, to relegate

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Indian rights specifically provided for by treaties, or otherwise, to SCANP, which is not a real party in interest in reference to those rights. In other words, are not the interests of SCANP and the petitioners so divergent that SCANP cannot fully represent Indian rights."

These questions refer to the treaty fishing right upon which Petitioners rely in support of their belated attempt to intervene in this proceeding. Before addressing these questions, tly, we wish to emphasize a point we made in our answer of July 28, 1978 to the petition to intervene -- to wit: the Skagit Project will not interfere with Petitioners' claimed treaty right. Applicants' Answer, p. 35. It follows that Petitioners' claimed treaty right affords no basis for granting their petition to intervene.

PETITIONERS' CLAIMED TREATY RIGHT IS THE RIGHT TO FISH
AT CERTAIN LOCATIONS IN COMMON WITH OTHERS

In their response of October 27, 1978 to the Board's first question, Petitioners confirmed that the treaty right on which they rely here is the following right from the Treaty of Point Elliott:

"The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory . . .

The courts have held that this right, and similar rights in other Indian treaties, reserved to the signatory tribes a right of access to fish at certain locations in

common with others. For example, in United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the Supreme Court, in addressing similar language in a treaty between the United States and the Yakimas, described the treaty right as "the right to resort to the fishing places" and said that it gave the Indians:

" . . . a right in the land, -- the right of crossing it to the river, -- the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the State and its grantees." 198 U.S. at 381, 382.

Similarly, in United States v. Washington, 520 F.2d 676 (9th Cir. 1975), the court, in reviewing the treaties (including the Treaty of Point Elliott) between the United States and the Western Washington Indian tribes, and the specific treaty right asserted here, said:

"The United States wished to free most of the land in the Puget Sound area for the impending white migration and settlement. Governor Stevens' task in executing the treaties was to induce the Indians to move onto reservations. The Indians expressed their concern that they would be unable to continue their traditional way of life, centered on the gathering of fish because of limited fishing opportunities on the proposed reservation. The governor overcame their fears by promising them continued access to their traditional fishing areas off the reservations." Id. at 684. (emphasis added).

If the petitioning tribes here do in fact possess such a treaty right of continued access to their "usual and accustomed" fishing places, the question then is whether the

Skagit Project will interfere with that treaty right. It will not, as will be shown.

THE SKAGIT PROJECT WILL NOT INTERFERE WITH PETITIONERS'
CLAIMED TREATY RIGHT

Petitioners have neither identified their usual and accustomed fishing places nor suggested how the Skagit Project might interfere with their right of access to and use of these places. Only three features of the Project will be located along the Skagit River -- the Ranney Collectors, the discharge pipe, and the barge slip. Even assuming that each of these places was used for fishing by Petitioners prior to the 1855 treaty, it seems clear that none of these facilities would interfere with Petitioners' asserted right of access and use. The Ranney Collectors, which will be set back more than 100 feet from the river, obviously will not interfere with access or use. Exh. 158. The discharge pipe will be buried under the bank and thus will not restrict access or use. Final Supplement to FES, § 4.3.1, follows Tr. 7767. The barge slip will change the bank over a relatively short distance for several years. Id., § 4.4. However, except for the few days when the delivery barge will be docked in the slip, the slip will enhance rather than restrict access to the river. If the barge slip is later maintained as a public facility, the enhanced access would continue. If instead it is returned

to its prior riverbank state, the access would be as it presently is. Thus, there is no basis for Petitioners' suggestion that the Skagit Project will interfere with their claimed treaty right.

PETITIONERS' OPPORTUNITIES FOR APPEAL AND REVIEW

The Board requested legal analysis of how Petitioners might assert their interests protected by treaty either on appeal or further consideration or review, if intervention were to be denied and SCANP were not to appeal. The recourse immediately open to Petitioners would be to appeal to the Atomic Safety and Licensing Appeal Board the order denying the petition to intervene, pursuant to 10 CFR § 2.714(a). Following any final decision within the agency which affirmed the denial of intervention, Petitioners could then seek review by the United States Court of Appeals. See, e.g., BPI v. Atomic Energy Commission, 502 F.2d 427 (D.C. Cir. 1974).

Assuming Petitioners were unsuccessful in appealing a denial of intervention, Petitioners would be precluded from appealing to the Appeal Board a partial initial decision or initial decision by the Licensing Board. The reason for this bar is that only a party can appeal an initial decision. 10 CFR § 2.762. An unsuccessful petitioner is not a party to the proceeding. Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB--433, 6 NRC 469

(1977); Consolidated Electric Company of New York (Indian Point Station, Unit 2, ALAB--369, 5 NRC 129 (1977)). For the same reason, Petitioners also would be precluded from obtaining a judicial review of the initial decision by the United States Court of Appeals pursuant to Section 189(b) of the Atomic Energy Act and to the Administrative Orders Review Act, 28 USC § 2341 et seq. Gage v. U.S. Atomic Energy Commission, 479 F.2d 1214 (D.C. Cir. 1973).

The opportunities for appellate review by Petitioners of Licensing Board orders, of course, are not among the factors in 10 CFR § 2.714(a)(1) that are to be balanced in determining whether an untimely petition for intervention should be granted or denied. However, what is pertinent to the petition for intervention here is whether Petitioners have other means available for protecting their treaty fishing right. Petitioners appear to have no other means.

As previously pointed out, the Skagit Project will not interfere with Petitioners' treaty fishing right of access to and use of traditional fishing places. However, assuming for purposes of argument that it might, Petitioners' most direct course of action would seem to be to file a court action seeking to establish and restrain interference with any such right of access and use to which they might be entitled. If relief were justified, it could be specifically fashioned and enforced. By comparison, this

licensing proceeding offers only an indirect and thus less appropriate forum for the establishment and protection of such a right. Therefore, Petitioners have better suited other means available to them for protecting their treaty fishing right and there is no need to grant their grossly untimely intervention on account of their interests protected by treaty.

The Board's final question is whether Petitioners' treaty right could be relegated to and fully represented by SCANP. Petitioners' treaty right is only a small portion of the many concerns and interests asserted by Petitioners in their petition to intervene. Among the numerous nontreaty interests are potential aquatic impacts from the Skagit Project and potential social, economic and genetic impacts on Petitioners. As Applicants have previously pointed out, these nontreaty issues have, to a very great extent, been considered and represented in this proceeding by SCANP. Under 10 CFR § 2.714(a)(1)(iv), this fact weighs heavily against Petitioners being granted intervention.

With respect to the narrower topic of Petitioners' treaty fishing right, Applicants do not advocate that this right has been or should be represented by SCANP. Applicants do urge that it is not necessary to either relegate the treaty right to SCANP or to grant intervention to Petitioners because, as a matter of fact, the Skagit

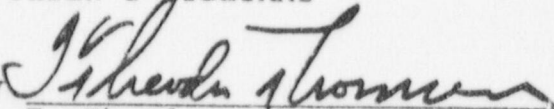
Project will not interfere with Petitioners' treaty right,
and, in addition, because Petitioners have other means
available to protect their treaty right and have failed to
justify their lateness in petitioning to intervene.
Therefore, having considered the Board's questions on
Petitioners' interests claimed to be protected by treaty,
Applicants request that the Petition to Intervene be denied.

DATED: November 17, 1978.

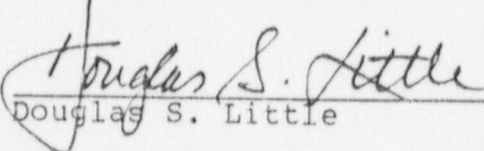
Respectfully submitted,

PERKINS, COIE, STONE,
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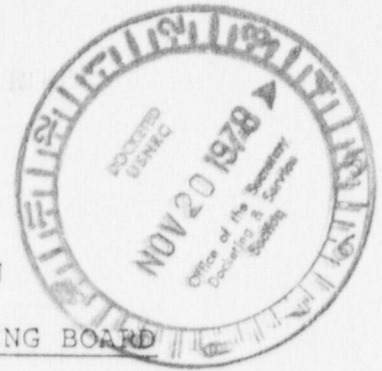
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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| |) | 50-522 |
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| |) | |

CERTIFICATE OF SERVICE

I hereby certify that the following:

APPLICANTS' RESPONSE TO THE BOARD'S REQUEST OF SEPTEMBER 26, 1978.

in the above-captioned proceeding have been served upon the persons shown on the attached list by depositing copies thereof in the United States mail on November 17, 1978 with proper postage affixed for first class mail.

DATED: November 17, 1978

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