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. STN 50-522 50-523
	)	
	)	
(Skagit Nuclear Power Project, Units 1 and 2)	)	
	)	
	)	

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

SCANP's response to the Board's request for additional submissions respecting the Petition for Intervention filed by the Upper Skagit Indian Tribe, the Sauk-Suiattle Indian Tribe, and the Swinomish Tribal Community ("Petitioners") will not address all of the issues and concerns raised by petitioners, the applicant, and the staff in the comprehensive documents already filed with respect to this petition. SCANP supports permitting intevention, however, and will demonstrate that the staff and applicant have underestimated greatly both the importance and complexity of the issues raised by petitioners, and the unique ability of petitioners to address comprehensively the issues it raises.

Both applicant and staff have underestimated the complexity of Indian law in their analyses of the rights of petitioners Indian Tribes under United States v. Washington. The

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staff cites the court's holding that the Tribes reserved fishing rights over 100 years ago and were not recently granted these rights for its proposition that the tribes were aware of the extent of these rights previous to the litigation in U.S. v. Washington, and cannot now be heard to say that that litigation greatly altered the circumstances surrounding petitioners' late application for intervention. Staff's belief that the U.S. v. Washington decision merely reconfirmed preexisting treaty fishing rights reveals a distinct lack of familiarity with the scope and practical effect of this litigation. Judge Boldt found specifically that the state consistently and continually had acted to deny Indian treaty fishing rights and to prevent their assertion. Both public reaction and the massive litigation which has followed the Boldt decision, including the acceptance of review by the Supreme Court last month, undercut completely any assertion that the Boldt decision was a mere reconfirmation of preexisting law and custom. Thus, the staff's comparison between petitioners' late action here and the denial of late intervention to a housewife who can cite only her domestic duties as the cause of her delay is most inappropriate.

In contrast to the misunderstanding shared by the staff and the applicant with respect to the basic principles governing Indian law, petitioners are represented by counsel whose

skills in this area are highly respected. The Native Rights Division of Evergreen Legal Services has played a major role throughout the litigation of U.S. v. Washington. Although the lengthy submissions of the applicant and staff indicate that a great deal of effort has gone into researching applicable Indian law, their submissions also demonstrate that there is a serious danger that the Tribes' treaty rights will either be ignored or misconstrued if petitioners are not allowed to intervene.

These difficulties anticipated by SCANP are nowhere more apparent than with respect to the fisheries issue. The applicant's response of November 17, 1978 purports to answer the question of who will protect tribal fishing rights. But in reality, it does not address this question at all. Instead, applicant merely asserts and reasserts that the proposed project will not have any impact on petitioners' treaty rights. If by some remote chance applicant's conclusion that treaty rights will not be affected is incorrect, applicant has suggested no alternative to intervention which will adequately protect those rights.

While it is not at this point appropriate to address the merits of the applicant and staff assertions that the fisheries impacts of the project are minimal or non-existant, SCANP does contend that staff and applicant have confused the issue of impact on fisheries with impact on Indian treaty rights to take

fish. Aside from the aspects of project construction and operation, the proposed fish hatchery clearly presents an issue bearing on those treaty rights. The applicant and staff propose a hatchery program to offset any losses in the natural fishery despite the fact that the hatchery program itself may reduce the productivity of the Skagit fishery, and adversely affect native stocks. Recent studies indicate that hatchery programs have not been as successful as previously thought in replacing and supplementing natural runs.

But even if it is assumed that the hatchery will indeed maintain the runs at their former levels, we are again confronted with a legal issue which has direct impact on petitioners alone, and which both staff and applicant have failed to address. As applicant points out, see Applicant's Answer to Petition at 41, any hatchery will be operated by the Washington State Department of Game or Fisheries. What applicant has overlooked is that the State of Washington contends and has contended consistently for several years that hatchery fish are not subject to Indian treaty rights. This issue has been pressed upon the Supreme Court but not resolved, see Department of Game v. Puyallup Tribe, 414 U.S. 44, 49-50, (1973) (White, concurring), and is currently at issue in United States v. Washington, Phase II. The staff and applicant analyses of this issue again makes clear that the petitioner's legal expertise is necessary to insure protection tion of their treaty rights in this proceeding.

Applicant's response to petitioners' issue concerning the genetic impacts of local radiation upon an isolated population further reveals the insensitivity of other parties to issues uniquely affecting the petitioners and the need for intervention. Again, SCANP does not intend to argue the merits of this issue in this presentation. But it is clear to us that the issue raised is a substantial one, and is one that is not answered adequately by citation to a regulation concerning general impacts on larger and more diverse populations. The possibility that either low level radiation or an accidental high level release could have a severe adverse impact on a small and discrete population possessing unique cultural characteristics is certainly substantial and worthy of further study.

The applicant's answer, at 37-38, contends only that because the issue has not been studied completely, the intervenors have nothing significant to contribute. Petitioners have stated in detail the nature of the studies they are conducting concerning this issue and who their proposed witnesses will be. It is clear that without any real delay in the proceedings, petitioners will be prepared to make a significant contribution to the record on this issue. But even if this were not so, applicant in its argument has misplaced the burden of proof which both the Commission's own regulations and the Supreme Court have placed on the applicant. See 10 CFR

2.732; Id Part 2, App.A (V)(d)(1); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 98 S. Ct. 1197 (1978). In Vermont Yankee, the Supreme Court held that an intervenor must only make a showing "sufficient to require reasonable minds to inquire further." 98 S. Ct. at 1217. Applicant's position that it and staff have not studied the issue of genetic effects on an isolated population is not a sufficient answer; the NRC's regulations require the applicant to carry the burden of proof on this issue, and the Vermont Yankee decision teaches that the NRC must address this issue. The applicant's suggestion that the issue need not be studied because it has not been studied misses the point and again demonstrates the need to grant intervention to allow petitioners to protect their rights.

After suggesting that the rights of the petitioning tribes will not be affected or are not the appropriate subjects of inquiry in this proceeding, applicant and staff intimate that SCANP is fully capable of representing the interests of the tribes. The petitioning tribes have already stated in detail, Petition at 17, their dissatisfaction with SCANP's showing on the fisheries issue. Petitioners' briefs make abundantly clear that SCANP is not qualified to explicate, let alone adequately protect, the treaty rights of petitioner tribes, nor to undertake the studies and showings which Petioners believe are necessary to protect those rights, and which Petitioners have

already initiated. It is also apparent that there are probably real and significant conflicts of interests between SCANP and petitioner tribes. This is especially true with respect to the fishery issue, where proposals made by petitioners to preserve their treaty rights probably conflict with the desires of SCANP members who are sport and commercial fishermen and who may wish to assure the greatest possible fish runs which are not subject to treaty taking.

The concerns here raised by SCANP are not exhaustive, but should suffice to demonstrate that only the petitioning tribes are in a position to assert and protect native American legal rights. SCANP states its support and full agreement with all contentions raised by petitioners in support of their motion to intervene, and urges the commission to grant said motion.

Respectfully submitted,

ROGER M. LEED

DATED: November 22, 1978

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CERTIFICATE OF SERVICE

I hereby certify that copies of:

INTERVENOR SCANP'S RESPONSE TO THE BOARD'S REQUE
SEPTEMBER 26, 1978

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