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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
PUGET SOUND POWER & LIGHT	)	Docket Nos. 50-522
COMPANY, et al.	)	50-523
	)	
(Skagit/Hanford Nuclear Project	)	December 27, 1982
<u>Units 1 and 2)</u>	)	

APPLICANTS' ANSWER TO YAKIMA INDIAN NATION  
MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER  
OF OCTOBER 29, 1982

On December 10, 1982 the Yakima Indian Nation submitted a "Motion for Reconsideration of Memorandum and Order of October 29, 1982 Regarding Supplement to Petition to Intervene of the Confederated Tribes and Bands of the Yakima Indian Nation" (the YIN Motion). This is Applicants' answer to the YIN Motion.

The YIN Motion requests the Board to reconsider the rulings in its order of October 29 rejecting YIN Contentions 7, 8 and 9. The YIN Motion incorporates by reference the affidavit of Russell Jim (the Jim Affidavit)<sup>1</sup> and the YIN Brief on Contention 10 (the Yin Brief)<sup>2</sup>.

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<sup>1</sup>Affidavit of Russell Jim in support of Yakima Nation's Brief On Admissibility of Yakima Indian Nation's Reworded Proposed Contention 10 and Motion for Reconsideration (December 10, 1982).

<sup>2</sup>Yakima Nation's Brief On Admissibility of Yakima Indian Nation's Reworded Proposed Contention 10 (December 10, 1982).

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Although YIN Contention 7 is mentioned in the initial paragraph of the YIN Motion, no reason is given as to why the Board should reconsider its ruling on that contention. The Board's rejection of YIN Contention 7 was well founded and should not be disturbed.

#### YIN CONTENTION 8

In Contention 8, YIN alleges that Applicants have not provided for access to the Hanford Reservation for the exercise of treaty-reserved rights of YIN and its members within the Hanford Reservation and the S/HNP site area.<sup>3</sup> In its order of October 29, the Board rejected this contention for the reasons set forth in the NRC Staff's response.<sup>4</sup> These reasons were lack of basis and specificity, and in particular, the fact that "access to the entire Hanford reservation is not an issue in this proceeding--this licensing proceeding is only concerned with those limitations of access which might be denied by the construction and operation of the Skagit/Hanford nuclear facility."<sup>5</sup>

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<sup>3</sup>Supplement to Petition to Intervene of Confederated Tribes and Bands of the Yakima Indian Nation (September 29, 1982), pp. 52-54.

<sup>4</sup>Memorandum and Order Re: Supplement to Petition to Intervene of Confederated Tribes and Bands of Yakima Indian Nation (October 29, 1982), p. 4, para. 9.

<sup>5</sup>NRC Staff Response to Contentions of Yakima Indian Nation as Set Forth in Its Supplement to Petition to Intervene (October 20, 1982), p. 17.

These are valid reasons and nothing in the YIN Motion, the Jim Affidavit or the YIN Brief has negated their validity. This proceeding can only be concerned with the question of whether S/HNP would interfere with any YIN right of access that still obtains--not the broader question of whether the continued existence and operation of the Hanford Reservation will do so, as interesting and important as that question may be. As will be shown, the Board's previous rejection of YIN Contention 8 was well founded and should not be reversed.

YIN Contention 8 is based on two implied rights of access stemming from the Treaty with the Yakimas (12 Stat. 951):(1) a right of access to take fish at "usual and accustomed places" and (2) a right of access to hunt, gather and pasture upon "open unclaimed" land.<sup>6</sup>

#### Right of Access to Take Fish

In United States v. Winans, 198 U.S. 371, 25 S. Ct. 662, 49 L. Ed. 1089 (1905), the Court held that the treaty-reserved right to take fish "at all usual and accustomed places" includes a right of access to such places, even over privately held land.

In attempting to supply a basis for Contention 8, YIN appears to suggest that the S/HNP facility might prevent the

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<sup>6</sup>Applicants' Brief Re Admissibility of YIN's Proposed Contention 10 (December 1, 1982), pp. 4-7.

members of YIN from reaching their usual and accustomed fishing sites along the Columbia River within the Hanford Reservation. Yin Brief, p. 7. The only factual basis for this suggestion is the following rather ambiguous statement from the Jim Affidavit (p. 3):

Further, your affiant knows that along the stretch of river that the fencing and exclusion from both project site and the Hanford Reservation will exclude the Yakima Indians from their usual and accustomed fishing sites along that stretch of the Columbia River which have been exercised by the Yakima Indians.

If Jim is suggesting that the fencing proposed for S/HNP (or any other feature of S/HNP) will inhibit access to the Columbia River by the Yakima Indians, he is mistaken. The S/HNP site is set back about six miles from the Columbia River. See the attached affidavit of Michael V. Stimac (the Stimac Affidavit)' and the ASC/ER Sections and Figures cited therein. The only features of S/HNP that come anywhere near the river are the intake and discharge pipelines and the pumphouse. The pipelines will be buried underground and the pumphouse will be set back approximately 200 feet from the riverbank at ordinary high water. Stimac Affidavit, p. 3. It is thus clear beyond dispute that S/HNP will not "exclude" the Yakima Indians from their usual and accustomed fishing sites, as implied by Jim in his affidavit.

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'Affidavit of Michael V. Stimac In Support of Applicants' Answer to Yakima Indian Nation Motion for Reconsideration (December 27, 1982).

If, on the other hand, Jim meant to say that the "fencing and exclusion" maintained by the U.S. Department of Energy in operating the Hanford Reservation exclude the Yakima Indians from their usual and accustomed fishing sites, that would be another matter--a matter, however, that is irrelevant to this proceeding.

The only potentially admissible issue in this proceeding would be whether the licensing of S/HNP would prevent access by the members of YIN to their usual and accustomed fishing places. Clearly it could not. Thus the right of access to take fish provides no basis for YIN Contention 8.

Right of Access to Hunt, Gather and Pasture

The other right of access asserted by YIN as a basis for Contention 8 stems from the privilege to hunt, gather and pasture upon "open unclaimed" land. This privilege is stated as follows in the Treaty with the Yakimas, 12 Stat. 951:

the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open unclaimed land.

YIN notes that the Hanford Reservation, including the proposed site of S/HNP, is owned by the federal government. YIN Brief, pp. 7-8. It follows from this, according to YIN, that the hunting, gathering and pasturing privilege still obtains over the entire Hanford Reservation. In support of this novel proposition, YIN cites two cases. YIN Brief, p. 8. The first is State v. Arthur, 74 Idaho 251, 261 P.2d 135

(1953), cert. denied, 347 U.S. 937 (1954), which was also cited by the Department of Energy in its Limited Appearance Statement (the DOE Statement).<sup>\*</sup> In this case the court held, under a treaty provision similar to the YIN treaty, that a member of the treaty tribe could not be prosecuted by the state for killing a deer out of season on National Forest land. The second case cited by YIN, Confederated Tribes of Umatilla Indian Reservation v. Maison, 262 F. Supp. 871 (D.C. Or. 1966), also involved attempts by a state to regulate hunting by treaty Indians, this time on unclaimed land, including National Forest land, bordering their reservation. Consistent with State v. Arthur, the court held that such hunting is not subject to regulation by the state, except when necessary for conservation. In both of these cases the court reviewed the statements that were made at the time the treaties were signed and concluded that the parties intended and understood that the hunting privilege would extend only to land not claimed and occupied by "whites" or "settlers." To the same effect, see also the two cases discussed in the DOE Statement (pp. 7-9), State v. Coffee, 97 Idaho 905, 556 P.2d 1185 (1976), and State v. Chambers, 81 Wn.2d 929, 506 P.2d 311 (1973).

In our view, none of these cases support the bizarre proposition advanced by YIN here--that all ceded lands owned by

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<sup>\*</sup>Limited Appearance Statement of Department of Energy (November 26, 1982), p. 9, footnote.



the federal government are by virtue of that fact open and unclaimed lands subject to the hunting privilege. YIN Brief, pp. 7-8. If this were the rule, the hunting privilege would still obtain as to all manner of federally owned facilities, ranging from post offices and courthouses to prisons, army camps and air bases. Such a result would be ludicrous and could not have been intended by the parties to the treaties. It seems to us that the Department of Energy is clearly correct in concluding that the Hanford Reservation is no longer either "open" or "unclaimed" within the meaning of the Treaty with the Yakimas, and that it has not been open and unclaimed since at least 1943, when it was fenced and closed to the public. DOE Statement, pp. 9-10.

As important as this dispute between YIN and the Department of Energy may be, it is not relevant to this proceeding and need not be resolved by the Licensing Board in order to reach a decision in this proceeding. The only potentially admissible issue in this proceeding would be whether the licensing of S/HNP would interfere with any YIN hunting privilege that still obtains. Clearly it could not.

In the first place, as documented in the DOE Statement, in 1943 the operational areas of the Hanford Reservation--including the proposed S/HNP site--were fenced and closed to the public. DOE Statement, p. 9. Thus, since 1943 the members of YIN have been "fenced out" of that part of the Hanford

Reservation on which S/HNP would be located. The further fencing by the Applicants of a small area (the S/HNP plant site) within the larger surrounding area (the Hanford Reservation), which is already fenced and closed to the public, would not cause any further interference with the YIN hunting privilege. In other words, erecting an inner fence within an area already fenced would not worsen the interference caused by the outer, existing fence. YIN's dispute is with the U.S. Department of Energy, the agency presently in charge of maintaining the outer fence, and that dispute is not germane to this licensing proceeding.

Secondly, if S/HNP is licensed and construction is begun, the Applicants will then and there "claim" the site (pursuant to their site acquisition arrangements with the DOE), enclose the site with a fence, and occupy it with the plant facilities. Stimac Affidavit, para. 3. At that time, it most certainly will no longer be possible--even under YIN's theory--to argue that the site remains "open unclaimed" land within the meaning of the treaty. A fundamental purpose of the treaty was to facilitate future settlement of the ceded area (which, according to YIN, includes the S/HNP site). Jim Affidavit, p. 2. This purpose was clearly stated in the



treaty<sup>9</sup> and reiterated in the statements made when the treaty was being signed.<sup>10</sup> If and when the Applicants do go forward with the construction of S/HNP, the S/HNP site will thereupon have been claimed, occupied and settled, and the hunting privilege will, by its own terms, expire.<sup>11</sup> Accordingly, even under YIN's theory, the treaty right of access to hunt, gather and pasture provides no basis for YIN Contention 8.

The Board's previous rejection of YIN Contention 8 was well founded and should not be disturbed.

#### YIN CONTENTION 9

As stated in the YIN Motion, the basis for YIN Contention 9 is that the YIN reservation will be a less desirable place to live because of "fear and apprehension" caused by the S/HNP

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<sup>9</sup>For example, the fourth paragraph of Article II of the Treaty with the Yakimas contains the following guarantee:

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

<sup>10</sup>See the contemporaneous statements quoted in State v. Arthur, supra, 261 P.2d at 140-41, and State v. Chambers, supra, 81 Wn.2d at 936.

<sup>11</sup>Because the treaty right involved here, the hunting privilege, either has or will expire by its own terms as the ceded lands are claimed and occupied, no question of an unconstitutional or uncompensated "taking" can arise; the discussion of these theories in the YIN Brief is not applicable where, as here, the treaty right or privilege involved has simply come to an end as contemplated by and provided for in the treaty.

facility. In other words, YIN seeks to raise psychological stress.

The policy of the Commission with respect to consideration of this subject was correctly applied by the Board in its previous rejection of YIN Contention 9.<sup>12</sup> The Commission's policy on this matter is that a contention regarding fear and psychological stress is inadmissible unless it satisfies three criteria: (1) impacts involve post-traumatic anxieties, (2) impacts are accompanied by physical effects, and (3) the post-traumatic anxieties are caused by fears of recurring catastrophe. 47 Fed. Reg. 31762 (July 22, 1982).<sup>13</sup>

The Board previously ruled (correctly) that YIN has not satisfied these criteria. YIN has supplied no new information in support of its motion for reconsideration. It has merely referred to its prior allegations concerning the leakage of stored nuclear wastes on the Hanford Reservation, suggesting that this leakage has been sufficiently serious to require consideration of psychological stress impacts in this proceeding. YIN Motion, p. 2; YIN Supplement (September 29, 1982), pp. 14-15.

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<sup>12</sup>Board Memorandum and Order (October 29, 1982), para. 10.

<sup>13</sup>See also the cases cited in Applicants' Response to YIN Supplement (October 14, 1982), p. 13.

Even giving full credence to YIN's allegations, it is clear that the alleged storage tank leakage on the Hanford Reservation relied on by YIN is not the kind of "catastrophe" intended by the Commission in formulating its policy on this matter. For example, in its statement of this policy the Commission said:

In the Commission's view, the only nuclear plant accident that has occurred to date that is sufficiently serious to trigger consideration of psychological stress under NEPA is the Three Mile Island Unit 2 accident. Accordingly, only this accident can currently serve as a basis for raising NEPA psychological stress issues.

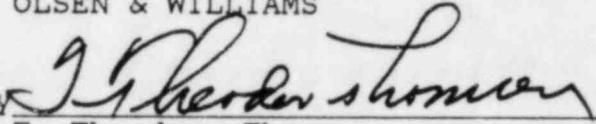
47 Fed. Reg. 31,762. The alleged leakage on the Hanford Reservation not only did not result from a commercial nuclear power plant, but it is not even remotely comparable in terms of seriousness to the Three Mile Island Unit 2 accident.

The Hanford leakage provides no basis for the admission of YIN Contention 9. There is no basis for that contention. The Board's prior decision rejecting that contention should not be altered.

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