

ESTABLISHED BY THE
TREATY OF JUNE 9, 1855
CENTENNIAL JUNE 9, 1955

CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

GENERAL COUNCIL
TRIBAL COUNCIL

POST OFFICE BOX 151
TOPPENISH, WASHINGTON 98948

101.4
cc 113
w/one encl
re guidelines
rec'd from MSM
4-7-83

March 24, 1983

WM Record File
101.4

WM Project WM-10
Docket No. _____
PDR
LPDR

Mr. Hubert J. Miller
Chief, High Level Waste
Technical Development Branch
Nuclear Regulatory Commission

Distribution: _____

(Return to WM, 623-SS)

HAND DELIVERED AT TOPPENISH, WASHINGTON

Re: BWIP

Dear Mr. Miller:

We appreciate your meeting with us today, particularly at 5:30 P.M., considering your busy day in other areas. We hope this meeting can be productive.

We attach for your branch's files a copy of Resolution T-45-83 regarding our participation under 10 CFR Part 60, copy of our P.L. 97-425 Petition to the Secretary of Interior, our Comments on Proposed General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories Pursuant to the Nuclear Waste Policy Act of 1982 Before the United States Department of Energy by the Confederated Tribes and Bands of the Yakima Indian Nation presented on March 21, 1983, and oral and written Comments on Proposed Nomination of Basalt Waste Isolation Project (BWIP) for Characterization Studies and Recommendations on Issues That Should be Addressed in the Environmental Assessment (EA) and the Site Characterization Plans (SCP) Required by the Nuclear Waste Policy Act of 1982 (ACT) Before the United States Department of Energy by the Confederated Tribes and Bands of the Yakima Indian Nation to be presented on March 25, 1983.

We particularly request NRC assistance in delineating the area of concern regarding BWIP and an outline of the expertise that we should be assembling to independently participate and consult with DOE under P.L. 97-425. Regarding the latter area we would appreciate information regarding funding requirements.

Sincerely yours,

Melvin R. Sampson
MELVIN R. SAMPSON, Chairman
Legislative Committee
Yakima Tribal Council

MRS:ls
Enclosures

8306240096

00385

Envelope to 3/24/83
memo from Sampson
to Miller

MAR 30 1983

Honorable Donald Paul Hodel
Secretary of Energy
Washington, D. C. 20585

Dear Mr. Hodel:

The Department of Energy recently identified the Basalt Waste Isolation Project site at Hanford, Washington as a potentially acceptable site for a high-level radioactive waste repository and intends to nominate this site for site characterization pursuant to section 113 of the Nuclear Waste Policy Act of 1982, Public Law 97-425 (Act).

As you are well aware, the Act affords certain rights and status to affected Indian tribes. An affected Indian tribe is entitled to participate in repository siting decisions and is eligible for financial assistance under section 118 of the Act. Section 2(2) of the Act defines affected Indian tribe as follows:

(2) The term "affected Indian tribe" means any Indian tribe --

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste for spent fuel is proposed to be located;

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility; Provided, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe;

By letters dated February 14 and March 8, 1983, the Yakima Indian Nation petitioned the Secretary of the Interior to certify that the Nation qualifies as an affected Indian tribe within the meaning of section 2(2)(B) of the Act. In order for the Yakimes to be deemed an affected Indian tribe in accordance with section 2(2)(B), the following conditions must be met: (1) the Yakima Nation must meet the definition of "Indian tribe" under section 2(15) of the Act; (2) the Yakima Nation must possess congressionally ratified treaty rights outside the boundaries of the Yakima reservation; and (3) the Secretary must find that these treaty rights may be substantially and adversely affected by the location of a nuclear waste repository at the Basalt Waste Isolation Project site.

Indian Tribe

The Yakima Indian Nation is eligible for services provided to Indians by the Secretary of the Interior and therefore, meets the definition of "Indian tribe" as defined in section 2(15).

Congressionally Ratified Treaty Rights

On June 9, 1855, the United States concluded a treaty with the confederated tribes and bands comprising the Yakima Indian Nation. Treaty With The Yakima, June 9, 1855, ratified March 8, 1859, 12 Stat. 951. Article 3 of the Treaty provides in pertinent part:

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

The off-reservation treaty right of the Yakimas to take fish "at all usual and accustomed places . . ." has been affirmed by the U.S. Supreme Court on numerous occasions. See United States v. Winans, 198 U.S. 371 (1905); Seufert Brothers v. United States, 249 U.S. 194 (1919); Tulee v. Washington, 315 U.S. 681 (1942); Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979). In Fishing Vessel Assn., the Supreme Court, quoting from the findings of the district court, discussed the understanding of the treaty negotiators concerning the Yakimas' off-reservation fishing rights:

At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, methods, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty. Id. at 667-668

Treaty Rights are Substantially and Adversely Affected

We find further that the proposed location of the Hanford Waste repository is not only in close proximity to the Yakima Indian Reservation but is also close to the Yakimas' reserved fishing location at Horn Rapids Dam on the Yakima River. The Hanford reservation, which surrounds the Hanford Reach of the Columbia River, contains the fishing, spawning, and rearing locations of salmon and steelhead. This area is customarily used by

Yakima tribal members for commercial and subsistence fishing which is of significant economic and cultural importance to the Yakimas. At this time, there is no scientific data available to prove that the Hanford repository will indeed have an adverse impact on the Columbia River fisheries. However, due to the proximity of the proposed repository to the fisheries in the Columbia River Basins, the fact remains that there is a definite potential for such adverse impacts.

Additionally, the Hanford Waste repository will be a major tribal concern for potential adverse health, safety, and environmental impacts that may be generated during transportation of high-level radioactive wastes to the repository.

Therefore, the Department of the Interior, in accordance with section 2(2)(B) of the Act, certifies that the Yakima Indian Nation may be substantially and adversely affected should the Hanford site be recommended by the Secretary of Energy as an acceptable nuclear waste repository in the State of Washington.

Sincerely,

/S/ Kenneth Smith
Assistant Secretary -- Indian Affairs

~~130/220~~

CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

FEDERAL COUNCIL
TRIBAL COUNCIL

POST OFFICE BOX 151
TOPPENISH WASHINGTON 98948

March 8, 1983

Honorable James L. Watt, Secretary
U. S. Department of Interior
18th and C Street, N.W.
Washington, D. C. 20240

Attention: Office of Trust Responsibility

Re: Recognition of Confederated Tribes and
Bands of the Yakima Indian Nation as an
Affected Indian Tribe Under Public Law
97-425, "Nuclear Waste Policy Act of 1982"

Dear Mr. Secretary:

The Confederated Tribes and Bands of the Yakima Indian Nation, hereinafter called "Yakima Indian Nation", through its appropriate governmental officials, does petition for recognition of its status as an affected Indian tribe as regards the Basalt Waste Isolation Project (BWIP) at Hanford, Washington, pursuant to Public Law 97-425, "Nuclear Waste Policy Act of 1982". With reference to the information available to your department and in supplement thereto, the Yakima Indian Nation submits the following:

STATUS OF YAKIMA INDIAN NATION

The Yakima Indian Nation was created by a treaty with the United States. Treaty With the Yakimas, 12 Stat. 951. The Yakima Indian Nation was created from confederated tribes and bands occupying and using lands within Oregon and Washington Territories. These tribes and bands ranged in a food gathering economy as far south as the now border of California to above the now Canadian-United States border, from the Puget Sound area on the west to as far east as the Bitterroot Mountains in now Montana State. In this larger area of over twenty million acres, these tribes and bands exercised absolute dominion and control and occupied over

Honorable James L. Watt
March 8, 1983
Page 2

ten million acres in the south central portion of now Washington State. This area, hereinafter called the "Ceded Area", with the exception of the Yakima Indian Reservation, was ceded to the United States reserving certain rights within the Ceded Area by Article 3 of the Treaty With the Yakimas. This Ceded Area is described in Article 1 of the Treaty With the Yakimas. The description of the treaty cession in Article 1 and the description of the Yakima Indian Reservation in Article 2 follows:

"Article 1. ... commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point where the northerly tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence easterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes, ($119^{\circ}10'$,) which two latter lines separate the above confederated tribes and bands from the Oakinakane tribe of Indians; thence in a true south course to the forty-seventh (47°) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hah-ne-she, or southern tributary of the same; thence, in a southeasterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White Banks" below the Priest's Rapids; thence westerly to a lake called "LaLac", thence southerly to a point on the Yakima River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island", between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and the Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the mouths of White

Honorable James L. Watt
March 8, 1983
Page 3

Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

Article 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit: Commencing on the Yakima River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakima eight miles below the mouth of the Satass River; and thence up the Yakima River to the place of beginning."

From this Ceded Area described in Article 1, the Yakima Indian Nation reserved for "the exclusive use and benefit of said confederated tribes and bands of Indians", the Yakima Indian Reservation under the aforementioned Article 2 of the Treaty With the Yakimas, 12 Stat. 951. Both the Ceded Area and the Yakima Indian Reservation are physically located within the exterior boundaries of the State of Washington.

It was further provided in the Treaty With the Yakimas that no "white man, excepting those in the employment of the Indian Department", shall "be permitted to reside upon the said reservation without permission of the tribes and the superintendent and agent".

The Yakima Indian Nation and its Tribal Council have been recognized as an Indian tribe and an appropriate governmental body respectively, by the President, Congress, Federal Judiciary, Secretary of Interior and all departments of the Executive Branch of the United States of America. The Yakima Indian Nation's powers of government guaranteed

Honorable James L. Watt
March 8, 1983
Page 4

under the Treaty With the Yakimas have been continuously effective under 25 USC Sec. 478(b) and said treaty. The Chairman of the Yakima Tribal Council signs this petition under tribal authority and as the recognized appropriate tribal official to sign this petition.

The Yakima Reservation, the exclusive homeland of the Yakima Nation, is explicitly subject to the laws of the governmental body of the Yakima Indian Nation. The Treaty With the Yakimas clearly states that the signatory fourteen tribes and bands "for the purposes of this treaty are to be considered as one nation". (Preamble, Treaty With the Yakimas, 12 Stat. 951.) (Emphasis supplied.) In Worcester v. Georgia, 6 Pet. 515, 6 L.Ed. 483 (1832), Chief Justice Marshall explained the legal effect of the use of the terms "treaty" and "Nation":

"The term 'Nation' so generally applied to them means a 'people distinct from others'. The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme Law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'Nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, and have a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense." 6 Pet. 559-560.

"[T]he senate docketing of the law of nations is that a weaker power does not surrender its Independence--its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state." 6 Pet. at 560-561.

This was the law of the land at the time of the execution and ratification of the Treaty With the Yakimas and

Honorable James L. Watt
March 8, 1983
Page 5

establishes the sovereignty of the Yakima Indian Nation--except as limited by the terms of the Yakima Treaty.

Article 2 of the Treaty With the Yakimas provides that the Yakima Indian Reservation is to be set apart for the exclusive benefit and use of the Yakimas and that no one except United States government personnel was to enter the reserved area without the permission of the Yakimas and the United States. The Supreme Court, in Williams v. Lee, 358 U.S. 217, 221 (1958), explained the legal effect of that language:

"[I]n return for [Indian] promises to keep peace, this treaty 'set apart' for their permanent home a portion of what has been their native country, and provided that no one, except United States government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government exists." (Emphasis supplied.)

This implicit right of self-government that flows from this portion of a treaty was reaffirmed and expanded in 1972 by the U. S. Supreme Court in McClanahan v. Arizona Tax Commission, 422 U.S. 164, 173-175, and United States v. Wheeler, 435 U.S. 313, and recently in Merrion v. Jicarilla Apache Tribe, ___ U.S. ___, 71 L.Ed. 21, 102 S.Ct. ___ (1982).

In addition to these governmental rights within the exterior boundaries of the Yakima Indian Reservation, the Yakima Indian Nation also retains governmental powers in the Ceded Area. Settler v. Lameer, 507 F.2d 231 (9th Cir., 1974). The Treaty With the Yakimas constitutes a grant of rights from the Yakimas to the United States and any rights not granted must be considered retained by the Yakima Indian Nation. Settler v. Lameer, supra; U.S. v. Winans, 198 US 371 (1905).

Honorable James L. Watt
March 8, 1983
Page 6

PROPOSED HANFORD SITE

The proposed Hanford site is located within an area owned by the United States and managed under the administrative jurisdiction of the United States Department of Energy (DOE). This area is called the Hanford Reservation. The exterior boundaries of the Hanford Reservation are approximately thirteen miles from the closest boundary of the Yakima Indian Reservation and approximately one mile from the closest treaty-reserved fishing location of the Yakima Indian Nation at Horn Rapids Dam on the Yakima River. The Hanford Reservation surrounds the Hanford Reach of the Columbia River. The Hanford Reach contains Yakima Indian Nation fishing locations and spawning and rearing areas for the production of salmon and steelhead runs for the entire treaty-reserved Yakima Indian Nation Columbia River fishery. Draft Environmental Assessment for Characterization of the Hanford Site, February 1983 (DEA 2/83.)

The proposed Hanford Site for Hazardous Nuclear Waste Materials (HWS) is within the Hanford Reservation above State Highway 240, adjoining Area Lands Ecology Reserve to the south and between the 200 areas and the 300, 400 areas in the Hanford Reservation. The Hazardous Site is approximately seven miles northwest from the Yakima Indian Nation's Horn Rapids Dam fishing location and a like distance from Columbia River fishing, spawning and rearing areas. (DEA 2/83.)

As regards the geology-topography of the HWS, the HWS is located in an area designated as the Pasco Basin which is in a physiographic and structural subdivision of the Columbia River Basalt Group (Columbia Plateau Province). This Columbia Plateau underlies the Hanford Reservation, the Yakima Indian Reservation and in the main the Ceded Area heretofore described. (DEA 2/8, Figure 3--3.)

These essentially flat-lying basalts of the Columbia Plateau have undergone continuing deformation and the north-south compressive forces created generally east-west or northwest-southeast trending ridges. Major structures near the site include the Cold Creek Syncline, Gable Mountain, the Southeast Anticline, the May Junction lineation, and extension of the Yakima Ridge Anticline and Rattlesnake Mountain. (DEA 2/28.)

Honorable James L. Watt
March 8, 1983
Page 7

RESERVED TREATY POSSESSORY OR USAGE RIGHTS
OF THE YAKIMA INDIAN NATION IN THIS AREA

Applicable portions of the Treaty With the Yakimas with its explicit treaty-reserved possessory or usage rights follow:

"Article 3. The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The treaty-reserved possessory or usage rights of the Yakima Indian Nation of fisheries on the Yakima and Columbia Rivers, has long been recognized by your department and the United States of America. The Yakima Indian Nation's treaty-reserved possessory or usage rights to hunt, gather, pasture animals and travel in areas owned by the United States within the Ceded Area have long been recognized by your department and the United States of America. Further, the Yakima Indian Nation's cultural and religious relationship with the land, water and all growing things within their native area and our fundamental belief that the interdependence and protection of the land, water and all living things are a sacred duty under the Creator's Law have been recognized and respected by your department and the United States of America. The right to have these treaty-reserved possessory and usage rights, and the foods and areas associated with these rights free from environmental degradation has likewise been a basic premise of your department and the United States of America. Some of the basic documents helpful in determining the explicit and implicit treaty-reserved possessory and usage rights of the Yakima Indian Nation in the Ceded Area are set forth as follows:

American Indians, North of Mexico
Edited by: Frederick Webb Hodge
Published by: Smithsonian Institution,

Honorable James L. Watt
March 8, 1983
Page 8

Bureau of American Ethnology
Bulletin No. 30
Subject: Shahaptian Family
Pages: 519, 520 and 983
Dated: October, 1912

Intergroup Relations in the Southern Plateau
By: Angelo Anastasio
Ph.D Dissertation, University of Chicago, 1955

Barnaby, J. T.
Dams and the Columbia River Salmon
Presented at the meeting of the American
Society of Ichthyologists and
Herpetologists, Western Division
San Diego, California
Date: Wednesday, June 18, 1947.
Symposium of "Overcoming Obstructions to
Movements of Fishes in Rivers"

Bureau of Ethnology
Fourteenth Annual Report to the Secretary
of The Smithsonian Institution, 1892-93
By: J. W. Powell, Director
Part 2, Published by: Government Printing
Office, 1896

Bureau of Ethnology
Eighteenth Annual Report to the Secretary
of The Smithsonian Institution, 1896-97
By: J. W. Powell, Director
Government Printing Office, 1899
Pages: 944-1006

Bureau of Indian Affairs
Records of the Treaty File. Letters received,
1855 - Washington Superintendency, W-537.
Letter of Governor Isaac I. Stevens to
George W. Mannypenny. The National Archives

Bureau of Indian Affairs
Records of the Treaty File. Minutes of
proceedings leading up to Treaty of
Point No Point
Date: January 26, 1855, The National Archives

Honorable James L. Watt
March 8, 1983
Page 9

Bureau of Indian Affairs, Records of the
Wilber, James H., letter dated November 17,
1881 from H. Price, Commissioner
Subject: Trouble between the Indians and
whites at the Tumwater Fisheries
Records of the Bureau of Indian Affairs (RG 75).
Letters sent: Land Division Letter, Book 87
The National Archives

Bureau of Indian Affairs, Records of the
Letter dated February 21, 1884, to Honorable
C. Delano, Secretary of the Interior, from
E. P. Smith, Commissioner of Indian Affairs.
Record copies of letters sent, Volume 24
The National Archives

Chief Sluskin's True Narrative
By: Luculus V. McWhorter
Published: Washington State Historian
Volume VIII, No. 2, April 1917

Commission, Appointment of
Subject: Bonneville Dam and protection of
the Columbia River fisheries, Document No. 87
Seventy-Fifth Congress, First Session

Commissioner of Indian Affairs, Report 1897
Fifty-Fifth Congress, Second Session
Pages 93, 94, 298
Contents: Fisheries in Washington,
Irrigation, Fisheries

Condition of the Indian Tribes
Report of the Joint Special Committee appointed
under Joint Resolution of March 3, 1865
Pages 8, 9, 424, 425, 440, 441

Craig, Joseph A., and R. L. Hacker
History and Development of Fisheries of
the Columbia River
Bulletin of U.S. Bureau of Fisheries, 1940
Pages 133-216

Davidson, F. A.
Historical evidence of the use and occupancy

Honorable James L. Watt
March 8, 1983
Page 10

by the Yakima Indians of their usual and
accustomed fishing locations at Celilo Falls
and the Dalles on the Columbia River
Date: August 15, 1953

Doty, James

Extracts from the journal of Mr. James Doty,
Secretary for treaties in Washington
Territory and the Blackfoot Country, show-
ing his proceedings in assembling for a
council at the Walla Walla valleys, the
Cayuse, Walla Walla, Nez Perce, Palouse,
Oakinakans, Pisuose and Yakima Tribes of
Indians under the directions of Governor
Isaac I. Stevens, Supt. of Indian Affairs,
Washington Territory

Doty, James

A true copy of the record of the official
proceedings at the Council in the Walla Walla
Valley, held jointly by Isaac I. Stevens,
Governor and Superintendent, Washington Terri-
tory, and Joel Palmer, Superintendent, Indian
Affairs, Oregon Territory, on the part of the
United States, with the tribes of Indians
named in the treaties made at that Council
Date: May 28, 1855 - June 11, 1855

Doty, James

Secretary of Treaties for Washington Territory
under Isaac I. Stevens, Governor, and Com-
missioner of Indian Affairs
Covering the period January 20, 1854 to January 4,
1855
The notification by Gov. Stevens to the Indian
tribes that a treaty council will be held at
Walla Walla in June
YIN Archives, Box 10-1

Executive Document No. 38

Indian war in Oregon and Washington Territories.
Letter from the Secretary of the Interior
transmitting in compliance with the resolution
of the House of the 15th instant, the report
of J. Ross Browne, on the subject of the Indian

Honorable James L. Watt
March 8, 1983
Page 11

war in Oregon and Washington Territories.
Thirty-Fifth Congress, First Session
Date: January 25, 1858

Executive Document No. 39
Indian Affairs on Oregon and Washington
Territories
Thirty-Fifth Congress, First Session, 1857

Executive Document No. 78
Explorations and surveys, Reports to ascertain
the most practicable and economical route
for a railroad from the Mississippi River to
the Pacific Ocean
Thirty-Third Congress, Second Session
Volume 1, 1853-54

Executive Document No. 91
Report of explorations and surveys to ascertain
the most practical and economical route for
a railroad from the Mississippi River
Thirty-Third Congress, Second Session

Findings, U.S. v. Washington
384 F.Supp. 312

Fisheries on the Columbia River, Washington
Territory
Secretary of the Interior Report, 1886-87
Forty-Ninth Congress, Second Session

Fisheries on the Columbia River, Washington
Territory
Secretary of the Interior Report, 1887-88
Fiftieth Congress, First Session

Fisheries, Right of the Indians in the
Wisham Fishery Case
Commissioner of Indian Affairs Report, 1897
Fifty-Fifth Congress, Second Session

Gibbs, George
Indian Tribes of Washington Territory
Published: Ye Galleon Press (reprint) 1972

Honorable James L. Watt
March 8, 1983
Page 12

Gibbs, George
Railroad Survey Report
Geology of Central Washington Territory
Volume 1
Dated: 1855
Pages 477-482

Gordon Report
In the United States Court for the
District of Oregon
United States v. Seufert Brothers
Filed in U.S. District Court March 6, 1917
District of Oregon

Griswold, Gillett
Aboriginal Patterns of Trade between the
Columbia River and Northern Plains
M.A. thesis, Montana State University, 1953

Hewes, Gordon
Aboriginal Use of Fishery Resources in
Northwestern North America
Ph.D Dissertation, University of
California, 1947

Railroad Survey Report
Indian Tribes of Washington Territory
Dated: 1854
Volume 1
Pages 402-428

Railroad Survey Report (Stevens)
Narrative of 1855
Dated: 1860
Volume XII
Pages 222-225

Railroad Survey Report (Gibbs)
Geology of Central Washington Territory
Dated: 1855
Volume 1
Pages: 477-482

Honorable James L. Watt
March 8, 1983
Page 13

Ray, Dr. Vern

Native Villages and Groupings of the
Columbia River Basin
Published: Pacific Northwest Quarterly
Dated: 1936

Ray, Dr. Vern

Tribal Distribution in Eastern Oregon
and Adjacent Regions
Published: American Anthropologist
Volume 40
Dated: 1938

Relander, Click

Drummers and Dreamers
Published: Caxton Printers, Ltd.
Dated: 1956
Subject: Smowhala, The Prophet
Pages 286 through 311 inclusive

Relander, Click

Strangers on the Land
Published: Yakima Indian Nation
Dated: December 1962
A historiet of a longer story of the
Yakima Indian Nation's efforts to
survive against great odds

Report on the Condition of the Yakima
Indian Reservation - Washington

Submitted by the Secretary of the Interior
Sixty-Second Congress, Third Session
Dated: January 23, 1913
Document No. 1299

Secretary of the Interior, Report

Dated: 1884-85
Forty-Eighth Congress, Second Session
Pages: 216-219
Subject: Condition, Habits and Dispositions -
Progress Made - Industrial Boarding Schools -
A Mistaken and Pernicious Policy - Conflict
of Departments - The Indian Police - Piutes -
Fisheries

Honorable James L. Watt
March 8, 1983
Page 14

Secretary of the Interior, Report

Dated: 1886-87

Forty-Ninth Congress, Second Session

Pages: 129, 130, 131

Subject: Joseph's Band of Nez Perces,
Washington Territory - Fisheries
on the Columbia River, Washington
Territory

Secretary of the Interior, Report

Dated: 1887-88

Fiftieth Congress, First Session

Pages 80, 81, 303

Subjects: Fisheries on the Columbia River,
Washington Territory - Condition of
Agency - Civilization and Morals -
Agency Stock

Secretary of the Interior, Report

Dated: 1892-93

Fifty-Second Congress, Second Session

Page 423

Subjects: Census - Indians Living Along
the Columbia - Agriculture - Improvements
and Repairs - Allotments of Lands in
Severalty - Reservation Schools

Secretary of the Interior, Report

Fifty-Fourth Congress, Second Session

1897, Pages 98, 99, 100, 319

Subjects: Wisham and Tumwater Fisheries on
the Columbia River - Fishery, Tumwater -
Commission - Health - Census

Snowden, Clinton A.

History of Washington - The Rise and
Progress of an American State

Published: 1909

Volume 3, Pages 254-375

Chapter XLIII - Treaties With the Indians

Social Economic Status of the Yakima Nation,
Washington State University Circular 397,
1961. Particularly from page 31 regarding
tribal dependence on fisheries.

Honorable James L. Watt
March 8, 1983
Page 15

Swindell, Edward G.

Report on source, nature and extent of fishing, hunting and miscellaneous related rights of certain Indian tribes in Washington and Oregon.

Office of Indian Affairs, 1942

Treaty, Preliminary Proceedings

By: James Doty, Secretary of Treaties for Governor Stevens

Extracts from the journal of Mr. James Doty, Secretary for Treaties in Washington Territory and the Blackfoot Country, showing his proceedings in assembling for a council in the Walla Walla valleys, the Cayuse, Walla Walla, Nez Perce, Palouse, Oakinakans, Pisuose and Yakima Tribes of Indians under the directions of Governor Isaac I. Stevens, Superintendent of Indian Affairs, Washington Territory

Treaty Proceedings of the Yakima Indian Nation

By: James Doty, Secretary of Treaties for Governor Stevens

A true copy of the record of the official proceedings at the council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Governor and Superintendent, Washington Territory, and Joel Palmer, Superintendent of Indian Affairs, Oregon Territory, on the part of the United States with the tribes of Indians named in the treaties made at that Council

Dated: May 28, 1855 - June 11, 1855

Treaty With the Yakimas

12 Stat. 951, 2 Kap. 524

Walker, Deward

Mutual Cross Utilization of Economic Resources of the Plateau

Washington State University,
Laboratory of Anthropology

Report of Investigations No. 41, 1967

Honorable James L. Watt
March 8, 1983
Page 16

Yakima Indian Nation Primer
The Yakima Indian Nation, Retention of
Customs and Beliefs, Tribal Government
and Membership Operations of the Yakima
Agency
Published: Circa 1960

Yakima Tribes v. United States
Docket 161, Indian Claims Commission,
An unconscionable consideration claim,
regarding in part the area herein
involved

As your department has recognized and is clear from available documents, the indigenous people have owned, possessed, occupied and enjoyed use of the resources of the subject region for thousands of years, and continue as the Yakima Indian Nation and its members to rightfully use or possess natural resources except as limited by the Treaty With the Yakimas. Judicial interpretation of these treaty-reserved possessory or usage rights under the Treaty With the Yakimas or similar treaty provisions in the area, can be found at:

Tulee v. Washington, 315 U.S. 681 (1942)

Seufert Brothers v. United States, 249
U.S. 194 (1919)

State v. Arthur, 261 P.2d 135 (Sup. Ct.
Idaho 1953), cert. denied 347 U.S. 937 (1954)

Confederated Tribes of the Umatilla Indian
Reservation v. Maison, 262 F.Supp. 871
(1966), affirmed 382 F.2d 1013 (9th Cir. 1967)

United States v. Taylor, 3 W.T. 88 (1887)

United States v. Winans, 198 U.S. 371 (1905)

Department of Interior, Federal Indian Law,
Government Printing Office (1958), pp. 146,
495-500, 599, 662

Honorable James L. Watt
March 8, 1983
Page 17

United States v. Oregon, 302 F.Supp. 899
(D. Ore. 1969)

Washington v. Washington State Commercial
Passenger Fishing Vessel Ass'n, 443 U.S. 658
(1979)

United States v. Washington, 506 F.Supp. 187
(W.D. Wash. 1980)

United States v. Adair, 478 F.Supp. 337
(D. Ore. 1979)

Kittitas Reclamation District v. Sunnyside
Valley Irrigation District, Opinion, Sept. 10,
1982, Court of Appeals, 9th Cir. Nos. 80-3505,
81-3002, 81-3068, 81-3069.

AFFECTED INDIAN TRIBE

Public Law 97-425, Section 2(2) provides:

"(2) The term 'affected Indian tribe' means any
Indian tribe--

(A) within whose reservation boundaries a
monitored retrievable storage facility, test
and evaluation facility, or a repository for
high-level radioactive waste or spent fuel
is proposed to be located.

(B) whose federally defined possessory or
usage rights to other lands outside of the
reservations's boundaries arising out of
congressionally ratified treaties may be
substantially and adversely affected by
the locating of such a facility. Provided,
That the Secretary of the Interior finds
upon the petition of the appropriate govern-
mental officials of the tribe, that such
effects are both substantial and adverse to
the tribe,"

The issue of whether there is a possibility of more than an
imaginary effect that is antagonistic to the aforescribed

Honorable James L. Watt
March 8, 1983
Page 18

treaty-reserved usage or possessory rights under Subsection (2)(B) is before us. Our national policy has firmly established that the federal government cannot, without compensation, invade the property and rights of an Indian tribe. Our national policy was initially established in the first great act of our Congress, the Northwest Ordinance of July 13, 1787, which declared:

"Art. 3. The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent, and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just or lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them." (Emphasis supplied.)

Here is a national purpose far higher than contemporary standards of private dealing, and a principle that is firmly established in the law of this land. As the United States came west, the provisions of the Northwest Ordinance were repeated in the Acts establishing both the Oregon and Washington Territories. It is under this principle that the Yakima Treaty was signed without conflict and ratified. It is under this principle that this nation's dealings regarding the Yakimas' rights continue to be governed.

In addition, our national government is a constitutional government and the principles of our Constitution must be followed by Congress and the Executive Department, and in the instant case, by the DOE. Certainly it must be recognized that under the Constitution even the federal government cannot take treaty-reserved rights without consent and compensation. Congress, in enacting P.L. 97-425, so intended. 128 Congressional Record H-8165.

As you know, the federal government has not exercised its power of eminent domain to terminate the Yakima Indian Nation's reserved interests within the Ceded Area by condemnation proceedings and the payment of just compensation. Termination of these Indian interests cannot rest on the actual physical possession and exclusion from these lands by the United States and its various

Honorable James L. Watt
March 8, 1983
Page 19

departments. It is clear that such a termination of the reserved rights of the Yakima Indian Nation is a clear violation of the Fifth Amendment of the United States Constitution and can be of no effect. Choate v. Trapp, 224 U.S. 665, 56 L.Ed. 941 (1912). Likewise, the Supreme Court in United States v. Clark, 445 U.S. 253, 63 L.Ed.2d 373, 100 Sup.Ct. 1127 (1980), has determined that Indian lands may not be taken by "inverse condemnation". Cf. United States v. Lee, 106 U.S. 196, 27 L.Ed. 171, 1 Sup.Ct. 240 (1882), holding that a landowner could bring suit for ejectment against federal officials who took possession of land without bringing condemnation proceedings cited with approval in United States v. Clark, 445 U.S. at 255-256, n. 2 (1980).

We further note the provisions of the Indian Intercourse Act found at 25 USC Sec. 177, designed to regulate agreements between tribes and non-Indians purporting to alienate tribal interests, provides in relevant part:

"No purchase, grant, lease or other conveyance, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

Nor can anyone even suggest that the location of a hazardous waste nuclear dump within the ~~lands of the Yakima Indian Reservation~~ was contemplated at the treaty negotiated in 1855.

The Supreme Court has determined that an Indian treaty must be construed, "not according to the technical meaning of its words to learned lawyers, but in the sense in which it would naturally be understood by the Indians". Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979).

Regarding the Yakima Indian Nation's off-reservation possessory or usage rights, it was determined that:

"At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able

Honorable James L. Watt
March 8, 1983
Page 20

to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty." Washington v. Fishing Vessel, supra., at 667-68.

Since atomic fission was to be discovered decades later and the proposal for DOE's hazardous nuclear waste dump being sited in the Ceded Area coming more than 125 years later, we know that the permission to so locate a hazardous nuclear waste dump did not modify these aforementioned material and basic parts of the Yakima treaty reservations. Such action could not have been contemplated by the Yakimas.

The treaty-reserved right to "forever be able to continue the same off-reservation food gathering and fishing practices" as understood by the Yakimas at treaty time continues throughout the Ceded Area and the Hanford Reservation.

As was expressed by the Supreme Court in United States v. Winans, supra, at 384:

"The right [regarding reserved off-reservation rights] was intended to be continuing against the United States and its grantees"

YAKIMA INDIAN NATION'S MEMBERSHIP

The Yakima Indian Nation has a membership approaching 7000 members. Members of the Yakima Indian Nation rely on the natural foods, game and fish for their sustenance. Salmon are an important part of the diet and livelihood of many members. Tribal customs and religion regarding the interdependence of living things and respect for the water and land continue to be a basic part of the being of the Yakima people. Members have loved ones and forebearers interred in burial sites on or adjoining the Hanford Reservation. The archeological value of the Hanford Reservation is high and in proceeding with this study, DOE has not proceeded with the systematic exploration required in 16 USC Sec. 470-1.

Honorable James L. Watt
March 8, 1983
Page 21

POTENTIALLY ADVERSE CONDITIONS THAT MAY
AFFECT THE YAKIMA INDIAN NATION'S
TREATY-RESERVED POSSESSORY AND USAGE RIGHTS

In performing any aspect of the geologic repository program embodied in P.L. 97-425, it is the clear intention of Congress that an Indian tribe should be accorded the consultation and participation provisions of the Act to resolve concerns regarding any potential health and safety, environmental, and economic impacts on the tribe's treaty-reserved usage or possessory rights. 128 Congressional Record H-7732, H-8155-8199, H-8523-8552, H-8580-8598, H-8778-8800, S-15621-15670.

The governing bodies of affected tribes were to be treated the same as states. Id., particularly at H-8165. Allaying fears and apprehension was just as important as the actual impact from the geologic repository program. Id., particularly at H-8167-8168. Congress had in mind the DOE efforts at Lyons, Kansas, and at the WIPP site in New Mexico when the prognosis of DOE regarding the repository was found to be in error. Id.

By allowing states and Indian tribes a place in the process, it is the intention of Congress that fears and apprehension can be allayed and that a geologic repository program without health and safety, environmental, and economic impacts can result. It is the purpose of this Act to allow and indeed provide funds for such participation.

It is indeed too early to allege in all areas that impacts to treaty-reserved usage or possessory rights will be affected by HWS. However, only tribal participation and independent study will facilitate Congressional intent to allay the fears of the Yakima Indian Nation and provide a repository without serious impact to usage and possessory rights.

Within this P.L. 97-425 perimeter, the Yakima Indian Nation does advise of potentially adverse conditions regarding reserved treaty usage and possessory rights of the Yakima Indian Nation resulting from HWS and development of geologic repository on the Hanford Reservation.

Honorable James L. Watt
March 8, 1983
Page 22

Throughout all this discussion it must be remembered that we are considering a time frame, as the treaty negotiators said: "As long as the river flows and the mountain stands". The Yakimas have occupied, used and/or possessed these lands in the treaty area for thousands of years. Consideration for those yet unborn must be an important part of our consideration just as it was for our forebearers at the Walla Walla Treaty Council.

Likewise it must be considered that there is just one Yakima Indian Reservation under the Yakima Treaty and that the treaty-reserved usage and possessory rights are not to be replaced. Different from those who migrate to other lands, the Yakimas must, under their customs, religion and plain facts of life, remain in this homeland. Past is prologue and we will be here, barring a catastrophe or natural disaster, for another 50,000 years.

1. Suitability of Hanford Site

a. Geohydrology

The EPA guideline regarding the time period to be considered concerning release of radioactive material to the accessible environment is 10,000 years. (Proposed 40 CFR 191.13, 28 FR 58205.) Though an extension of this period for the Yakimas who have perpetual reserved treaty rights and whose history shows millenniums of occupation, exceeds this period as can be seen from the discussion below; ~~a mechanism could~~ reasonably exist wherein radionuclides would be transported to the Columbia and Yakima Rivers where the treaty-reserved right to take fish has been judicially established.

As early as 1966, the National Academy of Science reported that the Hanford Reservation was not geologically suitable for permanent nuclear waste disposal except for very dilute amounts of low level waste. (NAS/NRC, 1966.) In response, DOE's predecessor agency responded that insufficient information had been developed at that time to support such a conclusion. (ERDA-1538, 1975.) Rockwell International, the DOE contractor at Hanford, alleges that the Hanford site has favorable geology for radioactive waste disposal. As recently as 1981, however, Rockwell was called to account for such statements by their own Hydrology and Geology

Honorable James L. Watt
March 8, 1983
Page 23

Overview Committee, which is made up largely of University-based scientists. The Committee observed:

There is really only one solid justification for studying this site and it is the sociopolitical fact that the land is a U.S. nuclear reservation. From a hydrogeological perspective, the Columbia River Basalt Group as a whole is not well suited for a high-level waste repository. It may well be that with further data and/or careful engineering design it can be shown to be acceptable, but it cannot be stated that the "geology is favorable." (Carter, 1983.)

In response to the requirements of the Nuclear Regulatory Commission's ("NRC") regulations at 10 CFR Part 60, several groups of government and government-contracted investigators have made independent efforts to formulate computer models which represent the groundwater flow system at Hanford. The principal investigators are Rockwell Hanford Operations ("RHO") (under contract to DOE), Battelle Pacific Northwest Labs ("PNL"), and the U.S. Geological Survey ("USGS"). Three other computer modeling efforts were contracted by RHO, to Los Alamos Technical Associates, Intera Environmental Consultants, and Resource Management Associates. Additionally, a recent RHO modeling effort is documented in RHO-BWI-LD-44, Arnett, et al. (1981.) The results of the PNL study are documented in draft report PNL-3632, Dove, et al. (1979.) The USGS study has not yet been formally released. With the exception of the RHO report, all these studies show a predominantly upward groundwater flow component which travels through the repository stratum and discharges at or near the Columbia River with travel times ranging from 15,000 to 41,000 years (Lehman and Quinn, 1981.) The discordant RHO report describes a "near horizontal flow" which would contain any groundwater contamination within the repository horizon and asserts significantly longer travel times are required for contamination to reach the accessible environment (times in excess of 100,000 years). In accordance with the draft NRC regulation 10 CFR Part 60, there must be a high degree of confidence in the direction and velocity of groundwater flow in an area designated for nuclear waste disposal. The most recent RHO report represents a drastic deviation from all previous computer simulations conducted for the Hanford

Honorable James L. Watt
March 8, 1983
Page 24

site. This inconsistency must be resolved in order to have any assurance the repository will be safe for future generations.

Since flow path and travel time are such critical issues, the NRC undertook an independent evaluation of the discordant RHO groundwater computer model (the PNL model was also examined in this study). The NRC studies pointed out several major inadequacies in the RHO model with major inconsistencies in input data (Lehman and Quinn, 1981). The NRC studies also found that the groundwater flow path was highly dependent upon permeability ratios used in the computer model (Lehman and Quinn, 1981 and Quinn, 1982). These permeabilities are measures of a rock formation's ability to transmit water in the vertical (K_v) and horizontal (K_h) directions. The horizontal permeabilities at Hanford have been tested in the field, but vertical permeabilities have never been tested and values were assigned arbitrarily--despite constant urging from the NRC that DOE conduct these critical field tests. The NRC found that by varying the K_v/K_h ratio by only one or two orders of magnitude the flow path could be redirected from predominantly horizontal flow to predominantly vertical flow. Based on the results of this study, the NRC urged RHO to resolve these critical questions. A special review group was formed to reach a consensus on the flow path. This group includes representatives from RHO, PBL, and USGS--with Lawrence Berkeley Laboratories serving as a referee. The team was to have reached a consensus by October 1982, but is still deadlocked. They have agreed only to create new models of a larger area which includes part of the Yakima Valley as well as the Pasco Basin. To date, very little hydrochemistry data has been made public by DOE. However, the results of analyses carried out by the NRC with a limited hydrochemical data set indicate a very real possibility of upwelling and discharge in the Pasco Basin area and, in particular, to the Columbia River (Lehman, 1982). This evidence also tends to substantiate the flow paths generated in the numerous modeling exercises carried out by the NRC and the other investigators with the exception of RHO.

Estimates of radionuclide travel time from the repository to the accessible environment are also suspect, both because of the flow path discrepancies discussed above and because

Honorable James L. Watt
March 8, 1983
Page 25

porosity values used in all modeling work done to date have been found to be inaccurate. Newly released data which appears in the BWIP Site Characterization Report and Leonhart (1982) indicates that porosity values tested in the field could range from one to three orders of magnitude lower than those used in all previous travel time estimates. The net result of lowering the porosity value is to directly increase groundwater speed and therefore decrease the groundwater travel time between the proposed repository and the accessible environment. All modeling studies to date which estimate travel times have overestimated this value and should be repeated in light of this new field test. (It is noted porosity does not influence the direction of groundwater movement, only the speed.)

In summary, it is clear the hydrogeology of the Hanford site remains controversial within the scientific community. The USGS, PNL and the NRC have all questioned the validity of the groundwater flow path and velocity used by DOE to assess the Hanford Reservation as a high level nuclear waste repository. The implications for potentially substantial and adverse effects on the Yakima Indians are clear. The chance that groundwater may be moving from the repository horizon directly to the Columbia River within time frames of concern cannot be ruled out. Certain radionuclides have half-lives of 25,000 years or more, and only careful and accurate analyses of groundwater flow should be used to determine compliance with the Environmental Protection Agency release standard.

DOE, however, has continued to use potentially inaccurate groundwater flow path and travel time estimates as a basis for the development of radionuclide release scenarios and consequence analyses required by the draft 10 CFR Part 60, and for the design of critical underground facilities and long-term monitoring systems. This error could result in the discharge of radionuclides to the Pasco Basin or Columbia River in relatively short time frames, thus affecting the health and safety of all those living in the vicinity of the Hanford Reservation, and particularly of the Yakima Indians with their treaty-reserved possessory or usage rights in the region and in the Columbia and Yakima Rivers.

Honorable James L. Watt
March 8, 1983
Page 26

Following are pertinent references with regard to the foregoing discussion:

Arnett, R.C.; Mudd, R.D.; Baca, R.G.; and Martin, M.D.; 1981, "Pasco Basin Hydrologic Modeling and Far-Field Radionuclide Migration Potential", BWIP, RHO-BWI-LD-44, June 1981.

Carter, L.J., 1983, "The Radwaste Paradox", Science, Vol. 219, p. 33, January 7, 1983.

Dove, F.H. et al., 1981, Draft, "Assessment of Effectiveness of Geologic Isolation Systems--AEGIS Technology Demonstration for a Nuclear Waste Repository in Basalt", PNL-3632, E.7.

Lehman, L.L. and Quinn, E.J., 1981, "Comparison of Model Studies: The Hanford Reservation", NRC Draft Report, NRC-FOIA-82-591.

Lehman, L.L., 1982, Letter Report to Robert Wright, USNRC, under NRC Contract No. AT-(49-24)-1514, July 22, 1982.

Leonhart, L.S. et al., 1982, "Groundwater Flow and Transport Characteristics of Flood Basalts as Determined from Tracer Experiments", RHO-BW-SA-220P, September 15, 1982.

National Academy of Science/National Research Council, Division of Earth Sciences, Report of Committee on Geologic Aspects of Radioactive Waste Disposal, May 1966.

Quinn, E.J., 1982, "Analysis of the Boundary Conditions and Conductivity Ratios used in Pasco Basin Modeling", NRC Report, NRC-FOIA-82-591.

In addition to the present problems to characterize and model the existing hydrogeology, there exist potential adverse conditions from man-induced or natural phenomena. The potential site exists in the downstream flood plain of the Grand Coulee Dam. Present irrigation and the expansion of the Columbia River Basin Project will have admitted

Honorable James L. Watt
March 8, 1983
Page 27

effect on the groundwater in the area. Other nuclear facilities exist in the area with the danger of meltdown or explosion. An earthquake took place within the Columbia Plateau as currently as July 16, 1936, with a modified Mercalli intensity of VII at the proposed site. DEA 2/83. The close (50 miles) 4.4 event on the Royal Slope needs be considered as well as the existing capable faults immediate to the proposed site. NUREG-0309 Supp. 3. DOE relates that no assessment has been made of these man-induced or natural phenomena as regards the hydrogeology. DEA 2/83. The Yakima Indian Nation should participate in studying these conditions potentially adverse to the Yakima Indian Nation's treaty-reserved rights.

2. Geochemistry

The geochemical conditions at HWS will determine the rate at which radioactive material will be transported through the groundwater system. Important parameters which include solubilities, sorption capacities, dissolution rates, the oxidation-reduction environment and pH must be quantified to develop realistic models and to estimate the concentration of radionuclides where they access the environment. The containment capabilities and lifetimes of the waste package will depend on the geochemical parameters in the repository, particularly in the host-rock environment. An understanding of the above geochemical parameters and the temperature history is necessary to address such issues as the corrosion of waste canisters, the lifetime of the waste package, and the effectiveness of other engineered barriers like backfills and seals. (Proposed 10 CFR Part 960.5-3.)

Work to develop the necessary more complete understanding of the groundwater chemistry is underway but not complete. DEA 2/83 3-33.

Adverse geochemistry at HWS will affect the radionuclides reaching the Columbia and Yakima Rivers and adversely affect the treaty-reserved usage and possessory rights of the Yakima Indian Nation.

3. Rock Characteristics

The construction and safe operation of a repository require that the general geology of the host rock and adjacent

Honorable James L. Watt
March 8, 1983
Page 28

formations at HWS be found to be a safe host for hazardous nuclear waste with regard to their physical and mineralogical nature. The presence of weak zones (stratigraphic or structural) will affect the design of a repository and its eventual sealing. The presence of fluids could present a hazard and an unacceptable site condition if the impact on system performance is too deleterious.

The host rock must also be understood with respect to repository-induced impacts. Phenomena like heat-induced fractures, the hydration and/or dehydration of mineral components, and brine migration will be critical as regards HWS and its suitability. (Proposed 10 CFR 960.5-4.)

Besides the potentially serious hydrologic problems of the Hanford site, there are indications that the structural geology may be a source of difficulty for both the construction and the ultimate effectiveness of a repository in the Hanford basalt. As was recently reported in Science:

[F]ractures found in core samples suggest that the basalt is under high horizontal compressive stress. Besides complicating the design and construction of the repository, the stress might induce fractures and create new pathways for radionuclides to escape. (Carter, 1983, supra.)

Apparently, stress ratios have been measured which are higher than the design ratio of the repository. There is even a question whether it will be possible to sink a 10-foot diameter shaft deep into the basalt, with respected geologists indicating the task will be "pushing the state of the art". (Carter, 1983, supra.)

Obviously, difficulties with the structural geology at HWS and its importance to the integrity of the repository have a possible effect on the treaty possessory and usage rights of the Yakima Indian Nation, especially as they relate to the possible escape of radionuclides into the environment. Particularly since the hydrology of the area shows a flow to the Columbia and even the Yakima River, radionuclides will reach Yakima Indian Nation fishing locations. Further, possible vertical escape to the ground level may effect usage gathering and hunting rights.

4. Tectonic Environment

Both the operation and long-term integrity of the proposed geologic repository at HWS can be affected by tectonic phenomena at or near the site. (Proposed 10 CFR 960.5-5.)

Activity has taken place within the Columbia Plateau in recent times and capable faults exist in the Pasco Basin. NUREG 0309, Supp. 3. Likewise, the need for study to determine capability as regards the contiguous May Junction Monocline has been sought by Skagit/Hanford applicant and NRC staff. ARRS Subcommittee meeting, January 24-25, 1983.

Lack of repository integrity because of earthquake activity may again affect the possessory or usage rights of the Yakima Indian Nation by freeing radionuclides to the environment where these treaty-reserved rights exist.

5. Lack of Access to the Site

The DOE has specified that human intrusion into the site must be prohibited or substantially reduced. (Proposed 10 CFR 960.5-6.)

Limiting access to the Hanford site and HWS has and will affect the treaty-reserved usage gathering, hunting, pasturing, travel, custom and religious rights of the Yakimas.

6. Oil and Gas Discovery

Oil and gas production companies have current strong interest in the eastern one-third of the Yakima Indian Reservation, including Shell, Amco, Arco, Texaco, Cities Service, Chevron, Union Oil of California, Reading and Bates. The area of interest as seen by contemporary drilling is in the basalt of the Columbia Plateau at similar depth and in the same basalt flows that HWS will invade. Preliminary Assessment of Oil and Gas Potential for the Yakima Indian Reservation, CERT, Dec. 1981.

Treaty-reserved possessory rights to oil and gas in the areas of the Columbia Plateau adjacent to HWS may be affected by this intrusion by DOE into said basalt areas.

Honorable James L. Watt
March 8, 1983
Page 30

7. Spoil Piles

The volume of material removed from the shaft will create a spoil pile of 600,000 cubic feet. In addition, another spoil pile of 424,000 cubic feet of basalt removed from the tunnels will be created at HWS. DEA 2/83. In addition, an undisclosed amount of water may be on the site during and as a result of drilling operations.

Dust emissions and chemical leaching are a possible environmental damage. Unstable wind speeds are present in the area. DEA 2/83.

The dust and chemicals from the spoil piles and drilling waters may invade areas where the Yakima Indian Nation has possessory and usage rights and affect these rights.

8. Transportation Hazards

Current estimates are that since Hanford is not located near a concentration of power plants that almost all of the hazardous nuclear waste will have to be transported to HWS. It is estimated that 90% will move by rail over relatively long transportation routes with the remaining 10% by truck. No current detailed evaluation of transportation factors has been prepared. DEA 2/83.

Rail service that serves the Hanford area passes through or adjoins the Yakima Indian Reservation from one direction. These lines are in the flood plain of the Yakima River. I-82, the major interstate highway to the Hanford Reservation, is also in the Yakima River flood plain.

Other rail and highway transportation to the Hanford site from the other direction must cross the Columbia River. Possible accidents or breach of the containers enroute may affect the treaty-reserved possessory or usage rights of the Yakima Indian Nation by release of hazardous waste in these areas.

9. Environmental Protection

Not only must the site ensure safe operation and long-term waste isolation but it must be acceptable in terms of environmental impacts. (Proposed 10 CFR 960.5-9.)

Honorable James L. Watt
March 8, 1983
Page 31

HWS adjoins the Area Lands Ecological Reserve. DEA 2/83. Two animal species listed as threatened or endangered are known to occur within the Hanford Reservation. NUREG 0494. About 60 species of birds are found on the Hanford Reservation and ducks and geese flock there by the thousands during the winter. NUREG 0494. Animals used and taken by the Yakima Indian Nation such as the mule deer frequent the area. NUREG 0494. Many of these animals migrate. Ducks, of course, are in the flyway to and from the Yakima Indian Reservation. In addition, vegetation that comprises natural foods for the Yakimas is found in the Hanford area and the HWS area. NUREG 0494.

Likewise, eels and all species of the Pacific salmon and steelhead trout are located in the Hanford Reach and in the Yakima River. NUREG 0494.

The construction and operation of HWS may affect the treaty-reserved possessory and usage rights of the Yakima Indian Nation to said vegetation, aquatic life and wildlife and their enjoyment as food for members of the Yakima Indian Nation.

10. On-Reservation Social-Economic Concerns

The Yakima Indian Reservation has been reserved as a permanent homeland for the Yakima Indian Nation and its members. Basic Documents. There is no other place that can replace this reserved homeland and its cultural and religious significance. It is within the area that can be affected by any accident at HWS. Likewise, the concern over the location of a hazardous nuclear waste site so near one's homeland is acknowledged. Congressional Record, supra.

The construction and operation of HWS may affect the enjoyment and economic activity on the Yakima Indian Reservation. The general membership has expressed its concern by General Council resolution in your possession.

This concern, if not outright fear, can affect the possessory and usage rights of the Yakima Indian Nation. This is particularly true unless Yakima Indian Nation participation can dispel such concern among its members and persons residing on or doing business within the Yakima Indian Reservation.

Honorable James L. Watt
March 8, 1983
Page 32

11. Cumulative Effects

Nuclear facilities on the Hanford site include the N-Production Reactor and the eight deactivated production reactors along the Columbia River in the 100 Areas. The reactor fuel-processing and waste-management facilities are on a plateau about 11.3 km (7 miles) from the river in the 200 Areas. The 300 Area, just north of the city of Richland, contains facilities for manufacturing reactor fuel and laboratories for research and development. The Fast Flux Test Facility (FFTF) is located in the 400 Area approximately 8.8 km (5.5 miles) northwest of the 300 Area.

Privately owned facilities located within the Hanford site boundaries include the Washington Public Power Supply System generating station adjacent to N-Reactor, the Washington Public Power Supply System power reactor site and office buildings (under construction), a hazardous-waste disposal site near the 200 Area, and a radioactive-waste burial site. The Exxon fuel-fabrication facility is located adjacent to the southern boundary of the Hanford site.

The cumulative effects of these facilities, regarding their production of radionuclides, and the increased possibility of accident, may affect the usage and possessory rights of the Yakima Indian Nation.

12. General

As is recognized by Congress and DOE, a great many factors must be evaluated before a site can be identified and shown to be suitable through detailed study. 48 Federal Register 5675, Congressional Record, supra. As you know, and as the records of your department and the foregoing material show, the Yakima Indian Nation has extensive treaty-reserved possessory and usage rights within the area involved in the studies to determine site and suitability. Not even the DOE has proceeded to the stage to determine suitability. DEA 2/83. Further, DOE has not yet made an assessment of the impacts on the Yakima Indian Nation. DEA 2/83. Congress has directed that such a determination shall be made. P.L. 97-425, Section 112a(E) (vi).

As such detailed study by DOE, in participation with the Yakima Indian Nation, goes forward other possible impacts on

Honorable James L. Watt
March 8, 1983
Page 33

the treaty usage and possessory rights of the Yakima Indian Nation will undoubtedly be under review. However, the haste with which DOE is proceeding makes the submission and recognition of this petition at this time by you a necessity. Limited funds within your department to assist us likewise makes early approval of the Yakima Indian Nation as an affected Indian tribe a necessity. Only in this way may Congressional intent to protect the possessory and usage rights of the Yakima Indian Nation be fulfilled.

13. Conclusion

The Yakima Indian Nation is an affected Indian tribe within the purview of P.L. 97-425.

Sincerely,

JOHNSON MENINICK, Chairman
Yakima Tribal Council

JM:ls

ESTABLISHED BY THE
TREATY OF JUNE 9, 1855
CENTENNIAL JUNE 9, 1955

CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

GENERAL COUNCIL
TRIBAL COUNCIL

POST OFFICE BOX 151
TOPPENISH, WASHINGTON 98948

ORAL

COMMENTS ON PROPOSED NOMINATION OF
BASALT WASTE ISOLATION PROJECT (BWIP) FOR
CHARACTERIZATION STUDIES AND RECOMMENDATIONS ON
ISSUES THAT SHOULD BE ADDRESSED IN THE
ENVIRONMENTAL ASSESSMENT (EA) AND THE SITE
CHARACTERIZATION PLANS (SCP) REQUIRED BY THE
NUCLEAR WASTE POLICY ACT OF 1982 (ACT)

BEFORE THE

UNITED STATES DEPARTMENT OF ENERGY

BY THE CONFEDERATED TRIBES AND BANDS

OF THE YAKIMA INDIAN NATION

MARCH 25, 1983
RICHLAND, WASHINGTON

Good morning.

I am Mel Sampson, representing the Confederated Tribes and Bands of the Yakima Indian Nation. I serve the Yakima Nation as Chairman of the Yakima Tribal Council Legislative Committee.

The Yakima Indian Nation was created in 1855 by a treaty with the United States. Treaty With the Yakimas, 12 Stat. 951. The Yakima Indian Nation was created from indigenous tribes and bands which had occupied and used lands within Oregon and Washington Territories for thousands of years. These confederated tribes and bands ranged in a food-gathering economy as far south as the now border of California to above the now Canadian-United States border, from the Puget Sound area on the west to as far east as the Bitterroot Mountains in now Montana state. In this larger area of over 20 million acres, these confederated tribes and bands exercised absolute dominion and control and occupied over 10 million acres in the south-central portion of now Washington state. This 10-million-acre area, called the Ceded Area, with the exception of approximately 1,300,000 acres which were reserved as the Yakima Indian Reservation, was ceded to the United States reserving certain treaty usage and possessory rights within the Ceded Area. These reserved treaty rights in the Ceded Area include gathering rights, hunting rights, pasturing rights, fishing rights and right of travel within the Ceded Area. The Yakima Indian Reservation was reserved for the exclusive use and benefit of the Yakima Indian Nation as a homeland for the Yakima Indian Nation and its members. The present membership of the Yakima Nation is over 7000.

The Yakima Indian Nation and its Tribal Council have been recognized as an Indian tribe and an appropriate governmental body, respectively, by the President, Congress, Federal Judiciary, Secretary of Interior and all departments of the Executive Branch of the United States of America.

The Department of Energy has, by letter dated March 4 and received March 14, 1983, informed the Yakima Indian Nation of its potential rights under the Nuclear Waste Policy Act of 1982 (the Act). The Yakima Indian Nation, by petition dated March 8, and delivered March 10, 1983, has petitioned the Secretary of Interior for recognition of its status as an affected Indian tribe under the Act as regards the Basalt Waste Isolation Project (BWIP) at Hanford, Washington. Our conversations with responsible public officials both within Congress and within the

Executive Branch lead us to believe that our status as an affected Indian tribe will be recognized.

We appreciate today's time for us to express ourselves preliminarily on the limited purpose of this hearing. We underline "limited purpose of this hearing", for a hearing on the nomination of the Hanford site, its Environmental Assessment, and its Site Characterization Plan is premature. However, at this preliminary stage we will do the best we can and will further supplement our remarks by additional written comments.

Initially, as regards those written comments, we would formally request, as we have previously, that the date for submission of written comments be extended. By the extension of time we will be able to be of more assistance to DOE in our role as an affected tribe under the Act. An extension will not inconvenience the Department as the general guidelines which are a necessary base for the nomination, EA and SCP, have yet to be adopted.

Furthermore, at this early date we wish to record that the mere opportunity by the Yakima Nation to testify and submit written comments on these important steps is not sufficient compliance with the Act. In discussing the public hearings at these steps, the floor manager for the Act pointed out that the Act required additional tribal consultation and tribal participation. We quote:

"In addition, the Act goes on to require the Secretary to consult and work with the governors of the legislators of the states and the governing bodies of any Indian tribes that might be affected."

128 Congressional Record 8794.

At Monday's hearing on the guidelines the panel was informed by the Governor's office and the appropriate legislative committee that contemplated state consultation and participation had not taken place as regards the guidelines and we must presume that a similar situation exists regarding these additional steps. At least we can definitely say that the Department has not consulted with or worked with the governing body of the Yakima Nation as the Act required, regarding any of these steps.

Likewise, you must realize that until required funding under the Act for an affected Indian tribe is received, our consultation and participation will not be able to reach the level that the Act contemplates. Because of the serious reduction of tribal income, basically because of lower returns

from timber sales, we will not be able to participate as Congress intended without financial assistance. We note that even before the Act was passed, the State of Washington has been provided with some funds for this purpose.

In order to facilitate the equality of participation by Indian tribes that the Act contemplates, we would appreciate funds being provided as soon as possible. Indeed, your haste in asking us to comment now raises the question of whether you really intend to follow the Act's requirements regarding both state and tribal participation and consultation. Your Notice does not contemplate such participation or consultation and even your guidelines say nothing more than that you shall seek to enter into binding written agreements to specify procedures for consultation and cooperation with the affected state or Indian tribe. The State of Washington, the Yakima Nation, and, we suggest, no reviewing authority, will be satisfied with "the guidelines, EA and SCP have already been promulgated" excuse when our rights to meaningfully participate have been denied because of delay of funds and other assistance under the Act have not been received. We suggest that your first order of business should be providing this assistance, not rushing into these matters before we can meaningfully participate.

Initially, we must take issue with the conclusions in the Notice that site characterization activities may continue at Hanford while certain requirements of the Act are being implemented, if this is interpreted to mean that the work may continue while the Environmental Assessment is being prepared. Section 112(B) makes it clear, as does an inquiry from Representative Morrison during the enactment of the bill, that the EA must be in place and hearings held on the EA before the drilling and site characterization may continue. 128 Congressional Record H8198. Further, since general guidelines are the necessary foundation for the EA, it is clear that these guidelines adopted pursuant to the tribal and state consultation and participation procedure must also be in place before site characterization may continue or the EA be adopted.

Even though it is too early for us to be very helpful as regards the suitability of basalt as a host for a nuclear waste repository, we will be furnishing written comments regarding what we perceive to be departmental misdirection as regards hydrogeology, geochemistry, seismicity and other areas. We find the proposed EA and the previous EA prepared to sustain a negative declaration for the shaft to be deficient both as to form and to content. An EA should at a minimum inform all persons of any environmental impacts in detail and must be written in language that is understandable to the layman as well

as contain scientific reasoning to alert specialists to particular problems within their expertise. The proposed EA doesn't meet these minimum standards. It likewise fails to follow the standards set forth in Section 112 of the Act.

Indeed, the draft EA admits that DOE does not have complete information regarding this area. Considering the serious problems involved, this is understandable. What we can't understand is the failure of either the draft EA or the SCP to make an honest assessment of the information that is available, and proceeding before the information is available. We must take issue with DOE's advocacy and failure to present a balanced approach. We note with concern that even Rockwell's own Hydrology and Geology Overview Committee reported that Hanford basalts are extremely difficult to characterize and model, and "from a hydrogeological perspective the Columbia River Basalt Group as a whole is not well suited for a high-level waste repository". RHO-BWI-LD-50.

However, it is not too early to question, that even presuming that basalt is a gracious host for these radioactive materials, why the proposed site location?

We note the proximity of the site proposed for nomination to the Yakima and Columbia Rivers. The major importance of the Columbia River to the entire region cannot be ignored. Indeed, it is this great river that makes this portion of the United States the productive area that it is.

It is impossible to find in the extensive Columbia Basin basalts a location that is closer to these two important rivers and we wonder why this obvious drawback to this location hasn't determined that another site within the extensive Columbia River Basalts wasn't nominated for study and characterization. Your furnished materials readily supply the answer from your point of view. It is apparently a primary objective of the DOE to locate the repository within lands already dedicated to nuclear activities. As we have previously testified in the guideline hearings, such non-geologic considerations are improper criteria for the location of a nuclear waste repository under the Act. DOE emphasizes that it has been working in the Hanford area for many years. We suggest that this alone is a good reason that DOE should back up and take another look at the proposed site under the general guidelines. Congress has made it clear in the legislative history of the Act that it does not wish any site or host or site location to be predetermined. Congress has also found that the past efforts to devise a solution to this waste problem have not been adequate. Section 111(a)(3) of the Act.

So while it may be expedient for you to proceed with your past determinations and select an area where the political climate may be favorable and where you have done some work, we must advise that in our opinion such a course raises a reasonable conclusion that it is business as usual at DOE and that the Act is merely a fence that DOE must jump rather than containing the parameters that Congress intended. If you pursue such a course, you must stand ready to have your intransigence viewed as noncompliance with the Act.

We object to the proposed site because of the effect that such a repository site will have on treaty-reserved rights and the persons who retain those rights. A national purpose exists in these United States that transcends the contemporary standards of private dealing and a principle that is firmly established in the Law of this Land. From the first great act of the National Congress (Northwest Ordinance, Act of July 13, 1787) it has been firmly established as a national principle that the property rights or liberty of Indian people should not be "invaded or disturbed" without their consent or just wars. This national purpose is even more important today as the indigenous people who have been gracious hosts to those coming to this land have had their holdings reduced to a small portion of those previously possessed and used.

Indeed morality, if not this national purpose, would require that primary consideration be given to any impact on the little these indigenous peoples reserved. Not even an extreme nuclear power advocate would suggest that at treaty time it was contemplated that a high-level nuclear waste repository would be located on government land in the Ceded Area near the two rivers so necessary to the livelihood of these people indigenous to the land. The Law of this Land clearly holds that what was not implicitly or impliedly conveyed is reserved. ~~Any impact to reserved treaty rights of the Yakimas should not and cannot be considered.~~ In a paraphrase of "I gave at the office", it must be considered that we have already given and an additional burden in the name of progress should not be forthcoming.

As the Supreme Court said:

"At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, method, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material

and basic part of the treaty and of the
Indians' understanding of the treaty."

Washington v. Fishing Vessel, 443 US 658
at 667-68 (1979).

DOE should respect these promises and select another site. You must consider in these guidelines that, contrary to those people who have a predilection to seek new ground, the Yakimas have no place to go. We have been here and will remain here. In our minds we want you to know that we consider the thousands of years we have been here merely prologue, not past. We are entitled to peaceful enjoyment of our reserved rights and enjoyment of our reserved reservation homeland without fear or concern. No decent people would propose any other alternative and the Act implicitly embodies this concern. This important concern is absent from DOE considerations in the furnished materials.

Thank you for the opportunity to appear here today. We will continue to cooperate with you and continue to fulfill our responsibilities not only to our membership but to the land, water and all living things.

ESTABLISHED BY THE
TREATY OF JUNE 9, 1855
CENTENNIAL JUNE 9, 1955

CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

GENERAL COUNCIL
TRIBAL COUNCIL

POST OFFICE BOX 151
TOPPENISH, WASHINGTON 98948

WRITTEN

COMMENTS ON PROPOSED NOMINATION OF
BASALT WASTE ISOLATION PROJECT (BWIP) FOR
CHARACTERIZATION STUDIES AND RECOMMENDATIONS ON
ISSUES THAT SHOULD BE ADDRESSED IN THE
ENVIRONMENTAL ASSESSMENT (EA) AND THE SITE
CHARACTERIZATION PLANS (SCP) REQUIRED BY THE
NUCLEAR WASTE POLICY ACT OF 1982 (ACT)

BEFORE THE

UNITED STATES DEPARTMENT OF ENERGY

BY THE CONFEDERATED TRIBES AND BANDS

OF THE YAKIMA INDIAN NATION

MARCH 25, 1983
RICHLAND, WASHINGTON

YAKIMA INDIAN NATION STATEMENT
ON THE DOE PROPOSAL TO NOMINATE
THE BASALT WASTE ISOLATION PROJECT
FOR CHARACTERIZATION STUDIES

March 25, 1983
Richland, Washington

My name is Melvin Sampson, I am Chairman of the Legislative Committee of the Yakima Indian Nation Tribal Council. I appreciate this opportunity to present the preliminary comments of the Yakima Indian Nation on DOE's proposal to nominate the Basalt Waste Isolation Project for characterization studies. The Yakima Indian Nation will be submitting additional written comments by the deadline, which we urge you to extend by at least another month to provide more realistic time for meaningful comments on these complex issues.

I must begin these comments by strongly protesting the procedures and timing of this action. The expressed purposes of this hearing are to solicit comments on: 1) the nomination, 2) issues to be included in an Environmental Assessment, and 3) issues to be addressed in the Site Characterization Plan. As the Yakimas have already made clear in correspondence with the Secretary of Energy, we believe it is inappropriate for DOE to be drafting or soliciting comments on an environmental assessment ("EA") and Site Characterization Plan ("SCP") prior to the issuance of final siting guidelines as required by section 112(a) of the Nuclear Waste Policy Act of 1982.

Both the EA and the SCP are supposed to be based, in part, on the siting guidelines which are only now being developed. It is self-evident that we cannot properly comment on what should be in an EA or SCP without those final guidelines. Proposed guidelines were issued on February 7. We presented a statement commenting on serious deficiencies in those guidelines at the hearing in Seattle on March 21, and will be presenting additional written comments before the April 7 deadline. We understand DOE is receiving severe criticism from many quarters about the proposed guidelines. It is clear to us that they will require very extensive modifications before they will comply with the requirements of the Nuclear Waste Policy Act. In light of that, we object to the need to submit comments on an EA and SCP when part of the legal framework for those documents--the guidelines--does not yet exist. While we firmly believe that the time to draft and discuss EAs and SCPs

has not yet come, we nevertheless do submit comments so that we are not later prejudiced by failure to do so at this time.

We also object to the very short time periods which DOE has allowed to prepare for this hearing and comments. Less than three weeks is not sufficient notice to adequately deal with the complex issues at hand, even for parties with the necessary resources to do a proper job of it. Considering the volume of background documents which must be reviewed to meaningfully evaluate an EA, and the inadequate availability of those documents, together with the simultaneous need to comment on the draft guidelines, the three week period is ridiculous.

We strongly urge you to extend the deadline for written comments by at least an additional month so that this serious procedural deficiency is at least partially mitigated. There is nothing in the Nuclear Waste Policy Act ("NWPA") which requires such haste in proposing to nominate sites for characterization. In fact, DOE is attempting to shorten the period for choosing 3 sites for characterization from 2 years to 8 months. This rush only makes it clear that the guidelines have nothing at all to do with the choice of sites, and damages DOE's credibility with the public.

As you know, the Yakima Indian Nation has petitioned the Secretary of Interior to be designated an "affected Indian tribe" under the NWPA so that we may receive information, consultation and cooperation rights, and financial assistance to participate in the decision-making process under the Act. Until the Interior Secretary makes this determination, we are placed at an enormous disadvantage in terms of participation. Unfortunately, DOE is proceeding at a headlong pace at BWIP while we wait, and key steps in the process are taking place with the Yakima Indian Nation unable to participate meaningfully.

Finally, we object to the issuance a couple weeks ago of a document called "Draft Environmental Assessment for Characterization of the Hanford Site Pursuant to the Nuclear Waste Policy Act of 1982," (DOE/EA-021J). We submit that the only possible purposes for this document are illegitimate. There is no provision for a "draft EA" in the Nuclear Waste Policy Act. The Act requires an EA based, in part, on the guidelines established pursuant to section 112(a). Since compliance with section 112(a) is only now in process, there are, as yet, no guidelines "established under subsection (a)," and consequently there can be no legally sufficient EA.

About a month ago, DOE was about to begin sinking the exploratory shaft at BWIP, in clear violation of sections

112(f) and 113(b) of the NHPA, which require completion of the EA and SCP, respectively, prior to shaft drilling at Hanford. In response to protests from the Yakima Indian Nation and others, DOE backed off from the position that no prior EA was required, and decided to publish the "Draft EA" and hold this hearing before deciding whether to proceed with shaft drilling. The "Draft EA" cannot satisfy the Act's requirement for an EA described in section 112(b)(1), for the reasons discussed above. It is clear from sections 112 and 113 of the Act that any shaft sinking which DOE undertakes before preparing a final EA and a final SCP based on final siting guidelines will be illegal.

Moreover, if the "Draft EA" was published with the intent that it does comply with the Act, why is DOE now soliciting comments on what the public thinks should be in the EA? We understand that it is quite unusual to publish a draft environmental document and at the same time ask for comments on what should be in the document. It would make sense to have this "scoping hearing" after the guidelines which form the framework for the EA are completed, and before the drafting of the document has been done.

Assuming the "Draft EA" represents DOE's present idea of what an EA based on the proposed guidelines should look like, we present some comments on that document here, to inform DOE why that is not what a legally sufficient EA should include. We do so under protest, as we believe comments on the content of an EA are untimely prior to issuance of final guidelines, and as the "Draft EA" is not published for any legitimate purpose. Nevertheless, we submit the following comments to avoid the possibility of prejudice from failure to do so.

Comments on the "Draft EA"

As an example of what DOE believes an EA should look like, the "Draft EA" bears some comment. As a general matter, the "Draft EA" is not a scientific document. It is an advocacy piece quickly assembled by DOE in an attempt to justify its earlier decision to develop the Hanford Site as a repository. It does not honestly assess the pros and cons of the site. Quite the contrary, it relies almost entirely on work with results favorable to the site by DOE contractors, and virtually ignores many serious problems which have been identified by independent scientists and even its own scientific overview committee.

Chapter 3 of the "Draft EA" purports to constitute compliance with the six EA requirements of section 112(b) of

the NWPA, so our comments will focus primarily on that part of the document.

As to the first statutory requirement, evaluation "as to whether [a] site is suitable for site characterization under the guidelines established under subsection [112(a)]," DOE states:

Where a complete evaluation has not been possible in this assessment, a discussion of the current status of activities relating to the guidelines (currently available information and a brief summary of planned activities) is presented in conjunction with a preliminary conclusion that directly relates to conformance with the proposed siting guidelines.

(p. 3-2). It is understandable that DOE does not yet have complete information on all the issues. The problem with the "Draft EA" is that DOE has not made an honest assessment of all the information that is available. DOE has spent seven years and millions of dollars collecting and analyzing data associated with this site, generating over 700 technical and programmatic documents. We submit that the final EA should include the most thorough possible assessment based on all the information DOE has at this time. Section 3.1 of the "Draft EA" does not do this. In most cases, it merely presents preliminary, favorable indications and avoids obviously adverse ones. (See below.)

The second statutory EA requirement is an evaluation "whether such site is suitable for development as a repository under each such guideline that does not require site characterization as a prerequisite for application of such guideline." DOE declares that "only five of the eighteen proposed siting guidelines were determined to not require site characterization prior to assessing site suitability for development as a repository." (pp. 1-1, 3-63). After so declaring, DOE says absolutely nothing new about those five guidelines in section 3.2, but only refers back to the "available information" and "preliminary conclusions" on those topics in section 3.1, and declares that no disqualifying factors apply. DOE implies that there are inadequate data to address thirteen out of eighteen criteria, but it presents no less data for those than for the five it says it can address at this time.

Technical Comments

A preliminary review of the "Draft EA" by hydrogeologists we have retained reveals numerous technical flaws in DOE's analysis. For one thing, whenever DOE addresses a guideline for which a finding of a "potentially adverse condition" is clearly called for, it stubbornly refuses to make that finding. Probably the most glaring example of this is DOE's preliminary conclusions regarding its proposed system guideline 960.3-2, "Performance After Permanent Closure." The proposed guideline states that a potentially adverse condition is

Geologic setting, site geometries and characteristics, and radionuclide-transport characteristics that are extremely difficult to characterize and model.

The preliminary conclusions in the "Draft EA" state:

The characteristics of the basalts are in some cases rather straight-forward and simple. In other cases, characterization and, hence, a proper understanding and modeling are more difficult and challenging.

(p. 3-8). The fact is, even Rockwell Hanford Operations' own Hydrology and Geology Overview Committee has concluded that the Hanford basalts are extremely difficult to characterize and model. It is widely understood in the geologic community that basalt is hydrologically extremely variable and that transmissivity of groundwater cannot be considered uniform even over short distances. Proper analysis of the groundwater flow field at Hanford will require specialized knowledge of regional systems because traditional methods of characterizing groundwater storage and transmission from point analysis of aquifers must be used very cautiously in basalts. In addition, no inferences regarding flow velocities can be made from hydraulic gradient data in basalt.

Taken as a whole, the extreme complexity of hydrogeologic characterization and modeling at Hanford must be considered an adverse condition, even under the inadequate guidelines DOE has proposed. Indeed, the site may need to be disqualified because "the characteristics that influence radionuclide transport are too complex to allow reasonable confidence of compliance with the proposed [EPA standards]". (Proposed system guideline 960.3-2). The complexity of this site can be appreciated when one realizes that DOE has spent seven years and millions of dollars—drilling more than 20 boreholes and collecting geologic and hydrologic samples, and yet still cannot address the basic guidelines involving the flow system with any degree of

confidence. The addition of a few more data points may not significantly improve this situation. We strongly urge DOE to be more forthcoming when it drafts the final EA for Hanford, and admit that the site is not ideal with respect to many of the guidelines.

Another example where DOE should be more honest and admit there is a potentially adverse condition at Hanford is for the proposed guideline on shaft construction, 960.5-2-3. That proposed guideline states that a potentially adverse condition is:

Rock or ground-water conditions that would require complex engineering measures in the design and construction of the underground facility or in the sealing of boreholes and shafts.

The "Draft EA" admits that there are at least 15 aquifers of significant conductivity between the surface and the repository horizon at BWIP, and that there are "potential high-production horizons" in at least six formations. Whether the blind hole drilling technique or the drilling and blasting technique described in the "Draft EA" (p.3-30) is used, it is clear that complex engineering measures will be required to drill such a large, deep shaft through so many aquifers without flooding the shaft. In addition, the high horizontal compressive stress in the basalt layers may further complicate shaft drilling. Indications are that the state of the drilling art will be taxed in any event. In the comparative section of the "Draft EA", DOE admits that shaft construction at Hanford "presents a challenge." (p.3-63). But rather than confront this obviously adverse condition, DOE's preliminary conclusion simply states its wishful thinking that construction of the shaft at Hanford will show that it can be done (p. 3-31), thus inadvertently admitting that it has never been done before.

DOE has unjustifiably downplayed numerous other technical issues of major concern in its "Draft EA". The final EA should discuss the following issues in greater detail and more forthrightly:

1. With respect to human intrusion through potential resource exploration, DOE argues that the Hanford Site is no more attractive than the area within a 60 mile radius for resource exploration and development. This relates to a deficiency in the proposed guidelines, but the real question should be whether the entire region is attractive relative to others. In that regard, the drilling of four wildcat natural gas wells within a few tens of miles of Hanford by Shell Oil should not be brushed off with the casual observation that no

economical quantities have as yet been found. That Shell is willing to spend millions of dollars per well to drill on the outskirts of the Pasco Basin at a time of vast oversupply of natural gas is some indication that the Columbia Plateau will be favorable for hydrocarbon exploration in the time period relevant to this analysis. The chance of finding quantities of gas important to future generations must be viewed as a very real possibility.

2. In addition, DOE is quick to discount the fact that groundwater will be a resource of future economic value. The fact that groundwater exploitation from the deep basalts is not presently viewed as economic cannot dispense with the issue. Water shortages are occurring presently in other parts of the Columbia Plateau, and water availability is certain to become an increasingly critical issue. In areas quite close to the Pasco Basin agricultural demands have caused large pumping stresses on the upper aquifer system. This has caused large drawdowns to occur and cones of depression have entered the Grande Ronde formation, which is the repository horizon. There is evidence that increased pumping on the Oregon side of the Columbia River south of the Hanford Site has caused water to change its natural gradient and be pulled under the Columbia from Washington State into Oregon. Future water demands cannot so easily be discounted. In the final EA, the potential effects on the deeper system must be analyzed as to possible changes in hydraulic gradient through the repository horizon.

3. DOE has discounted the potential effects of the proposed Ben Franklin Dam and Reservoir on the deep groundwater flow system without any analysis. This is merely conjecture until the planned studies are complete.

4. ~~The groundwater travel time estimates quoted in the EA cannot be considered realistic.~~ Field tested porosity values released in the Site Characterization Report are much lower than those used in all modeling attempts to date. Consequently, travel time estimates given by DOE are probably much too high, since decreasing the porosity directly increases the pore velocity. DOE cannot support its claim that all modeling efforts show travel times to the accessible environment greater than 10,000 years based on this newly released data.

5. DOE's assertion that groundwater flow within the Pasco Basin includes no significant vertical mixing component also is in question. Data recently released by DOE indicates that upwelling and vertical mixing could be occurring in the Pasco Basin. Rates of this mixing must be determined before its significance can be ascertained. More detailed evidence and

analysis of this data will be submitted with our written comments.

6. The "Draft EA" references Arnett, et al. (1980) to substantiate the statement that various credible scenarios would have no significant impact on the flow systems. This report evaluates scenarios such as faults and earthquake swarms on the flow field and flow properties such as permeabilities. Some of the conclusions of this report are seriously in error. The author states that in the case of certain scenarios, "permeability is decreased from 1.0 E-11 to 1.0 E-9 ... and therefore no significant effect occurs." This is in fact a two order of magnitude increase in permeability, not a decrease. The final EA cannot rely on works of this quality.

Guideline-Based Deficiencies

Some criticisms of the "Draft EA" which ultimately go to inadequacies in the proposed guidelines follow.

It is impossible to make a reasonable evaluation of the Hanford Site without quantitative weighting factors for the technical guidelines. The entire presentation in the "Draft EA" concerning evaluation of the site under the guidelines is utterly subjective, as is the comparison of Hanford with other sites currently undergoing investigation as possible repository sites. This type of presentation does not permit an independent analyst to judge the relative merit of the respective sites. The reader of the "Draft EA" must simply accept DOE's judgement as to what constitutes a favorable site. Obviously the fact that the site is on a federally controlled nuclear reservation is a major administrative convenience and a prime motivation to DOE, but that fact should not be permitted to outweigh the "detailed geologic considerations" that are supposed to be the "primary criteria for the selection of sites," (NWSA § 112(a)), and that are of serious concern to the scientific community.

The Hanford Site has not been through the Regional and Area Phase screening processes now required by the NWSA. Its feasibility must be evaluated carefully in this regard. It has not been established that the Columbia Plateau Basalts are a favorable repository medium, and in fact it has long been felt in the scientific community that they are unfavorable. Even Rockwell's own Hydrology and Geology Overview Committee, made up primarily of university-based scientists, told Rockwell in a 1981 report:

There is really only one solid justification for studying this site and it is the sociopolitical fact

that the land is a U.S. nuclear reservation. From a hydrogeological perspective, the Columbia River Basalt Group as a whole is not well suited for a high-level waste repository. It may well be that with further data and/or careful engineering design it can be shown to be acceptable, but it cannot be stated that the 'geology is favorable.'

(Hydrology Overview Committee, Report on Hydrologic Studies Within the Columbia Plateau, Basalt Waste Isolation Project, RHO-BWI-LD-50, June 1980, p. 3).

The obvious intent of the NWPA is that DOE compare a group of sites to each other and eventually select the best site considering all factors. Otherwise, the Act would not require the EA to include a comparative evaluation by the Secretary of the sites that have been considered. Yet under DOE's approach in the proposed guidelines, there will be no effort to rank the sites according to desirability for nomination. Instead, it appears DOE simply wishes to perpetuate its previous rush to develop the Hanford Site, regardless of the site's technical weaknesses.

Although the Hanford Site has been dedicated to nuclear activities for the past 40 years, these activities have little relevance to the issues at hand. It was selected as the location for a plutonium production plant in 1943 by the Manhattan District of the Corps of Engineers. According to Foster (1972), the criteria which resulted in the selection of the site were 1) availability of cooling water; 2) low population and agricultural development; 3) availability of deep, dry soil above the water table for storage of waste (not deep storage); 4) atmospheric stability characteristics which would disperse airborne radioactivity; 5) mild climate allowing year-round construction and operation; and 6) adequate electric power supplies.

Hanford was not selected as a federal nuclear reservation on the basis of its subsurface geology and hydrology. Deep geologic storage or disposal of high level waste was not considered when the site was developed. DOE now attempts to subvert the intent of the NWPA that detailed geologic considerations constitute the primary criteria for site selection, by improperly adding as a starting point for site screening and as a favorable condition the fact of federal ownership of land for nuclear activities. This is not dictated by the Act and it is clearly not consonant with the Act. The final guidelines should delete this emphasis on federal nuclear reservations and the final EA for Hanford should assess the site according to its relative geologic merits as the NWPA

clearly REQUIRES.

Finally, DOE's final EA should consider in its sections dealing with regional and local impacts and environmental and socioeconomic effects the fact that the permanent homeland of the Yakima Indians is nearby, and many of our usual and accustomed fishing places on the Columbia and Yakima Rivers are very close to the proposed repository location. Because of our perpetual relationship to our land, the concept of evacuation for protection from accidents is unavailable to the Yakima people. DOE should consider the fact that the fish in the rivers and other natural foods are important to the Yakimas both for dietary reasons and as part of our traditional religious practices, and that any radioactive or other contamination of those fish, or of other natural foods which we have Treaty rights to take, is totally unacceptable to the Yakimas. The final EA should not completely ignore--as does the "Draft EA"--the fact that a significant number of the nearby neighbors of the proposed repository are American Indians with a very different cultural heritage than other non-Native Americans.

Our location, our culture, and our religious beliefs make us considerably more "risk-averse" as regards a potential high level waste repository than most citizens. The DOE officials who will be making these decisions are undoubtedly among the least risk-averse individuals who can be found. DOE should bear in mind that everybody does not share their unbridled technological optimism, and they should consider the Yakima Indians as we are. A final EA should consider these facts.

Comments on the Nomination

The Yakima Indian Nation strongly opposes the nomination of the Hanford Site for characterization before the siting guidelines are finalized.

Comments on the SCP

Our statement on the content of the SCP will be reserved until we submit our written comments. (Supplemental, to be submitted later.)

ESTABLISHED BY THE
TREATY OF JUNE 9, 1855
CONFIDENTIAL JUNE 9, 1955

CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

GENERAL COUNCIL
TRIBAL COUNCIL

POST OFFICE BOX 151
TOPPENISH, WASHINGTON 98948

COMMENTS ON PROPOSED GENERAL GUIDELINES

FOR THE RECOMMENDATION OF SITES FOR

NUCLEAR WASTE REPOSITORIES,

PURSUANT TO THE

NUCLEAR WASTE POLICY ACT OF 1982

BEFORE THE

UNITED STATES DEPARTMENT OF ENERGY

BY THE CONFEDERATED TRIBES AND BANDS

OF THE YAKIMA INDIAN NATION

**MARCH 21, 1983
SEATTLE, WASHINGTON**

Good Afternoon.

I am Mel Sampson, representing the Confederated Tribes and Bands of the Yakima Indian Nation. I serve the Yakima Nation as Chairman of the Yakima Tribal Council Legislative Committee.

The Yakima Indian Nation was created by a treaty with the United States. Treaty With the Yakimas, 12 Stat. 951. The Yakima Indian Nation was created from indigenous tribes and bands which had occupied and used lands within Oregon and Washington Territories for millenniums. These confederated tribes and bands ranged in a food-gathering economy as far south as the now border of California to above the now Canadian-United States border, from the Puget Sound area on the west to as far east as the Bitterroot Mountains in now Montana state. In this larger area of over 20 million acres, these confederated tribes and bands exercised absolute dominion and control and occupied over 10 million acres in the south-central portion of now Washington state. This 10 million-acre area, called the Ceded Area, with the exception of approximately 1,300,000 acres which was reserved as the Yakima Indian Reservation, was ceded to the United States reserving certain treaty usage and possessory rights within the Ceded Area. These reserved treaty rights in the Ceded Area include gathering rights, hunting rights, pasturing rights, fishing rights and right of travel within the Ceded Area. The Yakima Indian Reservation was reserved for the exclusive use and

benefit of the Yakima Indian Nation as a homeland for the Yakima Indian Nation and its members. The present membership of the Yakima Nation is approximately 7000.

The Yakima Indian Nation and its Tribal Council have been recognized as an Indian tribe and an appropriate governmental body, respectively, by the President, Congress, Federal Judiciary, Secretary of Interior and all departments of the Executive Branch of the United States of America.

The Department of Energy has, by letter dated March 8, and received March 14, 1983, informed the Yakima Indian Nation of its potential rights under the Nuclear Waste Policy Act of 1982 (the Act). The Yakima Indian Nation, by petition dated March 4 and delivered March 10, 1983, has petitioned the Secretary of Interior for recognition of its status as an affected Indian tribe under the Act as regards the Basalt Waste Isolation Project (BWIP) at Hanford, Washington. Our conversations with responsible public officials both within Congress and within the Executive Branch lead us to believe that our status as an affected Indian tribe will be recognized.

We are appearing here today to register our strong objections to DOE's proposed repository siting guidelines, which we believe violate the intent and purpose of the Act.

Initially we must express our concern that meaningful comment on these guidelines is at best difficult and probably futile. DOE has already published announcements that it

proposes to nominate the Hanford Site and a Nevada Test Site (48 Federal Register 9332-9578).

The adoption of these guidelines is contemplated before either EPA's standards or NRC's criteria for a repository siting have been promulgated or NRC concurrence obtained. Proceeding currently are the Department of Energy's hearings and determination on the Environmental Assessment at Hanford, Washington. This haste gives us concern.

As one reads the proposed guidelines, one must come to the conclusion that they are composed of a combination of bits and pieces of other rules and qualifying factors which are so vague and open-ended as to be useless to serve the purposes required by the Act. As one reads the proposed guidelines, they appear to be directed more as a rationale for the selection of the Hanford and Nevada test sites rather than guidelines to be used for the selection and nomination of the Hanford and Nevada test sites. This is contrary to the legislative history of the Act. Two amendments to the Act were passed "to make it clear that the Secretary's preliminary determination that sites are suitable for development as repositories is to be made consistent with the Secretary's guidelines". (128 Congressional Record S-15642.)

We further call to the Department of Energy's attention that the Nuclear Regulatory Commission must concur in these regulations and we suggest that under proper rulemaking procedure that hearings would have to be held by the NRC to

substantiate their concurrence in these rules. Further, as a general comment we must advise that we believe the haste in adopting these guidelines while the petition of the Yakima Nation to be determined to be an affected tribe by the Secretary of Interior and therefore before the Yakima Nation can take effect of the consultation and funding provided for it under the Act, is to limit the Yakima Nation's participation as contemplated by the Act.

The proposed guidelines describe three starting points that "may be used" for the site selection process: 1) focusing on specific geologic media, 2) focusing on particular hydrogeologic settings, or 3) focusing on federal lands already dedicated to nuclear activities.

There is absolutely no indication as to the relationship between these very dissimilar site screening procedures and the guidelines which follow. The third method (focusing on federal lands already dedicated to nuclear activities) is completely at odds with the statutory directive that the guidelines "shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media." Nowhere in the Act is there any hint that existing federal nuclear reservations should be primary criteria for site selection or considered "favorable conditions" in screening sites. Non-geologic considerations are therefore improperly treated as primary criteria in the guidelines. DOE attempts to perpetuate or grandfather its previous determination in siting

a nuclear waste repository at Hanford, in derogation of the explicit requirements of Section 112(a) and the congressional finding that "[f]ederal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate." Act Sec. 111(a)(3).

Moreover, there are no quantitative values, or other prioritization of the various factors. This maximizes the likelihood of subjectivity and choices based primarily on non-relevant factors. Indeed, the guidelines seem to have been designed so that no DOE-contemplated sites can be excluded on the basis of them, not as a basis for determining what sites should be contemplated. The fact of federal ownership, existing nuclear activities and approval from some governmental officials may be administratively convenient to DOE, but they certainly cannot be allowed to assume importance in the site selection.

Specification as to respective weight would help engender confidence that siting decisions were not being made on the basis of political or other non-relevant considerations.

The guidelines also do not clearly distinguish between criteria which are to be used in choosing sites as candidates for characterization and those which are to be used in selecting a repository site from those which have been characterized.

Likewise, the guidelines do not specify qualifying or disqualifying factors for each of the parameters, as required by Sec. 112(a) of the Act.

Further, the guidelines place entirely too much emphasis on the capabilities of engineered systems to compensate for less than favorable geologic conditions.

Finally, the proposed guidelines ignore the intergenerational risk issue and impacts on the treaty-reserved rights of Indian tribes as guidelines in determining site suitability.

The generations who receive the benefits from nuclear power generation made possible by high-level waste repositories should not be allowed to pass the risks to future generations. In the main it is the future generations that will bear the greatest risks under the proposed guidelines. The proposed guidelines do not consider future generations at all in its consideration of socio-economic impacts. Indeed, the focus is all on the money the repositories will generate for the current generation.

The Yakima Indian Nation in its stewardship over the natural resources and treaty-reserved rights must keep this issue in mind. The officials of the Yakima Nation take an oath that they will exercise their stewardship with concern for "those yet unborn".

We suggest that the people of the United States of America have a similar goal. Certainly Congress had this principle in

-
-

mind when it specifically concerned itself with water rights, other natural resources and federal reservations of parks, wildlife refuges, scenic rivers, wilderness areas or forest lands in Sec. 112(a) of the Act. Section 111 of the Act in its findings and purpose clearly specifies that the cost burden relating to waste disposal shall be borne by the persons responsible for generating such waste or spent fuel.

The guidelines ignore this intergenerational risk factor. Indeed, the years that the guidelines propose protection will be provided are clearly inadequate. The guidelines' specified periods may tempt those who count their three score and ten, or contemplate the lives of their issue. However, the law, religion and culture of those indigenous people who have had the responsibility of the land and water in this area for millenniums and now call themselves Yakimas, require that the Yakima Nation must object to any impact to the environment, land or water regardless of the time period. The indigenous peoples who possessed and used this area and now call themselves Yakimas have already been here for more than the contemplated 1,000 or 10,000 years.

Guidelines directed by the Act should consider the impacts that a repository site will have on treaty-reserved rights and the persons who retain those rights. A national purpose exists in these United States that transcends the contemporary standards of private dealing and a principle that is firmly established in the Law of this Land. From the first great act

of the National Congress (Northwest Ordinance, Act of July 13, 1787) it has been firmly established as a national principle that the property rights or liberty of Indian people should not be "invaded or disturbed" without their consent or just wars. This national purpose is even more important today as the indigenous people who have been gracious hosts to those coming to this land have had their holdings reduced to a small portion of those previously possessed and used.

Indeed morality, if not this national purpose, would require that primary consideration be given to any impact on the little these indigenous peoples reserved. Not even an extreme nuclear power advocate would suggest that at treaty time it was contemplated that a high-level nuclear waste repository would be located on government land in the Ceded Area near the two rivers so necessary to the livelihood of these people indigenous to this land. The Law of this Land clearly holds that what was not implicitly or impliedly conveyed is reserved. Any impact to reserved rights of the Yakimas should not and cannot be considered. In a paraphrase of "I gave at the office", it must be considered that we have already given and an additional burden in the name of progress should not be forthcoming.

As the Supreme Court said:

"At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time,

method, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the treaty." Washington v. Fishing Vessel, 443 US 658 at 667-68 (1979).

Any guidelines should have as a primary consideration respect by DOE of these promises.

You must consider in these guidelines that, contrary to those people who have a predilection to seek new ground, the Yakimas have no place to go. We have been here and will remain here. In our minds we want you to know that we consider the thousands of years we have been here merely prologue, not past. We are entitled to peaceful enjoyment of our reserved rights and enjoyment of our reserved reservation homeland without fear or concern. No decent people would propose any other alternative and the Act implicitly embodies this concern. This important concern is absent from these proposed guidelines.

Because of time restraints, we have not addressed sections of these proposed guidelines with specificity. We will furnish additional material before the April 7 deadline and thereafter. We take the responsibility to consult and participate under the Act as an affected Indian tribe seriously. Unfortunately, the speed with which DOE is proceeding and the fact that we have not yet been furnished the tools to aid us specified by the Act will make our contribution less than the Act considered. We will do our best prior to April 7. We will continue to advise even after that time as

resources forthcoming under the Act allow us to adequately study the matter.

Thank you for the opportunity to appear here today. We will continue to cooperate with you and continue to fulfill our responsibilities not only to our membership but to the land, water and all living things.