UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' BRIEF RE ADMISSIBILITY
OF YIN'S PROPOSED CONTENTION 10

On October 29, 1982, the Board issued its "Memorandum and Order Re: Supplement to Petition to Intervene of Confederated Tribes and Bands of Yakima Indian Nation" (YIN Order). In paragraph 11 of the YIN Order, the Board requested YIN, the Applicants, and the NRC Staff to submit briefs supporting their respective positions regarding the admissibility of YIN's proposed contention 10 as reworded by the Board:

> Sovereignty of YIN and trust responsibility of United States of America and the unique relationship between the two governments require that YIN be permitted to raise and the NRC should assist in the examination of any situation, occasioned by the granting of the S/HNP construction permit, for which YIN can support by probative evidence that any of its treaty rights have been abrogated or impaired.

The Applicants believe that there are two points on which the proposed contention should perhaps be clarified. Although

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these two points may be implicit in the contention as presently worded, we suggest that they be made explicit to avoid any misunderstanding. With these two points clarified, the Applicants would have no objection to the admission of the proposed contention for the purposes of the taking of evidence by the Licensing Board.[1]

The first point of clarification relates to the procedural rules of the Commission. The proposed contention could (possibly) be misconstrued as permitting YIN to raise new contentions of possible treaty violations without regard to the Commission's rule governing late filed contentions, 10 USC 2.714. It is generally accepted, and has been the rule of this proceeding, that Indian tribes are not immune from the procedural rules of the Commission. Puget Sound Power & Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58, 63 (1979).

To clarify this point, we suggest that the fourth line of the proposed contention (as set forth in the YIN Order) be revised to read as follows:

> . . . permitted to raise, pursuant to the rules of the NRC, and the NRC should assist in the . . .

Of course, this may be a moot point in this proceeding, since YIN has already stated its contentions. Nevertheless, if

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[1]The Applicants, however, reserve the right to challenge on appeal the legal conclusions embodied in the proposed contention.

YIN were to submit additional contentions, we believe that they should be dealt with pursuant to the Commission's rule governing late filed contentions.

The second point on which we suggest possible clarification of the proposed contention relates to its scope. Although this goes without saying, it should perhaps be explicitly stated that the "situations" that may be examined pursuant to this contention are limited to matters within the jurisdiction of the NRC. This could be accomplished by revising the fifth line of the proposed contention (as set forth in the YIN Order) to read as follows:

> . . . examination of any situation within the jurisdiction of the NRC, occasioned by the . . .

This too may be a moot point in this proceeding, since the Board has rejected YIN's contention 8. YIN Order, paragraph 9. YIN's contention 8 was based on a claimed treaty right of access to the Hanford Reservation. If this right were in issue in this proceeding, we would agree with the Department of Energy[2] that it is questionable whether the Board would have jurisdiction to resolve a dispute between YIN and the United States regarding the existence or nonexistence of this claimed right of access.

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[2]Limited Appearance Statement of Department of Energy, November 26, 1982, p. 2.

In the YIN Order, the Board requested the parties (in their briefs) to assume as given that YIN has prevailed in demonstrating through the introduction of probative evidence proof of the abrogation or impairment of at least one specific treaty right, and invited discussion of questions of law, mixed fact and law, and Board jurisdiction.

The treaty rights asserted by YIN in this proceeding stem from the second paragraph of Article III of the 1855 Treaty with the Yakimas (12 Stat. 951):

> 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 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 unclaimed land.

The specific rights relied on are (1) the off-reservation fishing right (". . . the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . .") and (2) the off-reservation hunting, gathering and pasturing privilege (". . . the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open unclaimed land.").

We turn first to consider the off-reservation hunting, gathering and pasturing privilege. To assume, as requested by

the Board, that YIN has demonstrated abrogation or impairment of this privilege, one would first have to assume that YIN has established that this privilege still exists, i.e. that the Hanford Reservation (on which the S/HNP site is located) is still "open unclaimed land". However, as documented by the Department of Energy, it is not.[3] Further, if and when the S/HNP facilities are constructed on this land, the land so occupied will certainly no longer be "open unclaimed". It thus appears that the hunting, gathering and pasturing treaty privilege does not afford a realistic assumed case as a basis for discussing the treaty rights situation.

We turn next to the off-reservation fishing right, which affords a better basis for discussing YIN's treaty rights. This fishing right, as interpreted by the courts, includes three subsidiary rights: (1) a right of access to "usual and accustomed" fishing places (U.S. v. Winans, 198 U.S. 371 (1905); F. Cohen, Handbook of Federal Indian Law, p. 452 (1982 Ed.)), (2) a right to a specific share (one-half, or less if the tribal needs are less) of each run of fish that passes through a usual and accustomed place (Washington v. Washington

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[3]Limited Appearance Statement of Department of Energy, November 26, 1982.

State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 684-85 (1979) (Fishing Vessel - Phase I), and (3) a right to have treaty fish protected from environmental degradation (U.S. v. Washington, No. 81-3111, Court of Appeals, Ninth Circuit, Opinion November 3, 1982; Petition for Rehearing En Banc filed November 16, 1982) (CA 9 - Phase II).

The first subsidiary right--the right of access--affords a basis for the discussion requested by the Board. First, assume that YIN has demonstrated that the particular stretch of the Columbia River where the S/HNP water intake and discharge facilities are to be located is a "usual and accustomed" fishing place.[4] Assume further, that YIN has demonstrated that the S/HNP facility would interfere with access by YIN to the fishing place in question. For example, assume (which is contrary to the fact) that the Applicants were planning to erect a fence along a significant length of the beach and extending out into the water so as to block YIN's access to the river. In that event, based on Winans, supra, it would seem appropriate for the Licensing Board to consider requiring the Applicants to relocate the proposed fence so as not to prevent reasonable access by YIN to the usual and accustomed fishing

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[4]YIN would have the burden of proof on this issue. Cohen, supra, p. 456, note 88.

place involved. This would be an example of the Licensing Board dealing with a "situation" (within the meaning of YIN's proposed contention 10) to avoid impairment of a YIN treaty right.[5]

The second subsidiary right--the right to a specific share of the fish--does not provide an apt hypothetical illustrative case because it is not apparent how S/HNP could interfere with the taking of this share. However, the third subsidiary right--protection from environmental degradation--does provide a vehicle for posing additional hypothetical illustrative cases.

The protection from environmental degradation aspect of the treaty fishing right is the least well defined aspect. It is only now being defined in the course of Phase II of the Western Washington Indian treaty fishing rights litigation. The latest court decision is the CA 9 - Phase II opinion, supra, handed down November 3, 1982 by the United States Court of Appeals for the 9th Circuit. Doubtless this is but the first of a number of judicial opinions that will be necessary to fully define the environmental degradation aspect of the treaty fishing right.

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[5]If this situation were to arise, a question could be raised as to whether dealing with a fence that extends into navigable waters would be a matter more appropriately dealt with by the Corps of Engineers than by the Licensing Board; this affords an example of a possible limitation on the scope of YIN's proposed contention 10 as regards the Board's jurisdiction.

In the Phase - II treaty fishing rights litigation, the district court held that the treaty right of taking fish incorporates the right to have treaty fish protected from environmental degradation and that the treaties impose upon the State of Washington a duty to refrain from degrading or authorizing degradation of the fish habitat to an extent that would deprive the treaty Indians of their moderate living needs. In essence, the district court found that the Indian's right to an adequate supply of fish required that the treaty be construed to incorporate an absolute environmental protection for the fish. United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980). In CA 9 - Phase II the court of appeals reversed this portion of the district court's holding and summarized its own view of the environmental aspect of the treaty fishing right as follows:

> The treaties do not . . . guarantee an adequate supply of fish to meet the Tribes' moderate living needs. Nor do they create an absolute right to relief from all State or State-authorized environmental degradation of the fish habitat that interferes with a tribe's moderate living needs. Rather, we find that when considering projects that may have a significant environmental impact, both the State and the Tribes must take reasonable steps commensurate with the respective resources and abilities of each to preserve and enhance the fishery.1/
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> 1/The State's obligation derives from the obligation of the United States under the treaty. . . . Presumably the United States, although not a defendant in this lawsuit, is subject to an equivalent duty to take reasonable steps commensurate with its resources and abilities to preserve and enhance the fishery.

Slip. op. at 2.

> The "reasonable steps" duty we find implied by the terms of the treaty focuses on whether the State's (or the Indians') compensatory steps to protect and enhance the fishery--whether made necessary by non-fishing or fishing activities--are reasonable. Imposition of this duty to safeguard the fishery is less intrusive on the State's administrative process than would be the district court's interpretation of the treaty. In addition, a standard that evaluates whether compensatory actions to protect and enhance the fishery are reasonable is more susceptible to judicial review than would be the environmental servitude of the district court.

Slip. op. at 27.

To illustrate, hypothetically, how the "reasonable steps" duty of CA 9 - Phase II might become involved in this proceeding, assume that the Applicants were proposing to use a river water intake for S/HNP using inlet openings one inch in diameter. Assume further that YIN could support by probative evidence that such an inlet structure would cause significant damage to the fish in the Columbia River. Further assume that changing to an inlet structure having openings no larger than one-eighth inch would vastly reduce the potential for damage to the fish, and that changing to this design would be a reasonable step in terms of cost, practicability and all other relevant factors. In that event, it would seem appropriate for the Licensing Board to consider requiring the Applicants to change to an inlet having openings no larger than one-eighth inch. In this case, however, it happens that the Applicants have already chosen to use just such an inlet, having recently announced their decision to change from 3/8 inch openings to

1/8 inch openings. Letter from Applicants' attorneys to EFSEC, November 8, 1982.

Another hypothetical example of how the "reasonable steps" duty might come into play with respect to S/HNP would be to assume that the Applicants were planning to use cooling water condensers with tubes made of Admiralty metal. Then assume that YIN could show by probative evidence that use of Admiralty metal tubes would result in the discharge to the Columbia River of heavy metals in concentrations that would cause significant harm to the fish. Assume further that it would be reasonable, all relevant factors considered, for the Applicants to change their condenser design to use stainless steel condenser tubes rather than Admiralty metal, and that this would vastly reduce the potential for adverse effects on the fish. It might then be appropriate for the Licensing Board to consider requiring the Applicants to change to stainless steel condenser tubes. As it happens, in this case the Applicants long ago changed to stainless steel condenser tubes for S/HNP.

This last example raises a possible limitation on the Board's jurisdiction. With respect to S/HNP, the State of Washington Energy Facility Site Evaluation Council has been authorized, pursuant to the Clean Water Act, to issue the NPDES permit for the project. The evidentiary hearings on that matter, including the environmental effects of the discharge from S/HNP to the Columbia River, have been held and, on November 22, 1982, the Council issued its proposed Findings of

Fact, Conclusions of Law and Order. If the Council completes action on this matter before this subject comes before the Licensing Board, it would then seem inappropriate, if not improper, for the Board to duplicate the work of the Council in evaluating the environmental effects of the project discharge or in imposing water quality related limitations on the project, as suggested in the previous example. See Carolina Power & Light Company (H. P. Robinson, Unit No. 2) ALAB 569, 10 NRC 557 (1979); Philadelphia Electric Company (Peach Bottom Unit 3) ALAB 532, 9 NRC 279 (1979); Tennessee Valley Authority (Yellow Creek Units 1 and 2) ALAB 515, 8 NRC 702 (1978). If this situation does arise in this proceeding, the Applicants would request an opportunity to amplify their position on this aspect of the matter.

DATED: December 1, 1982.

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PUGET SOUND POWER & LIGHT COMPANY, et al.	)	DOCKET NOS.
	)	
	)	STN 50-522
(Skagit/Hanford Nuclear Project, Units 1 and 2)	)	STN 50-523
	)	

CERTIFICATE OF SERVICE

I hereby certify that the following:

APPLICANTS' BRIEF RE ADMISSIBILITY
OF YIN'S PROPOSED CONTENTION 10

in the above-captioned proceeding have been served upon the persons shown on the attached list by depositing copies thereof in the United States mail on December 1, 1982 with proper postage affixed for first class mail.

DATED: December 1, 1982

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SKAGIT/HANFORD NUCLEAR PROJECT
NRC Service List
Docket Nos. STN 50-522 and STN 50-523

DATE December 1, 1982

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