

November 30, 1982

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
PUGET SOUND POWER & LIGHT  
COMPANY, ET AL.  
(Skagit/Hanford Nuclear Power  
Project, Units 1 and 2)

Docket Nos. STN 50-522  
STN 50-523

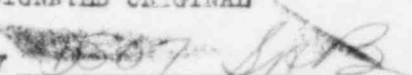
NRC STAFF BRIEF ON ADMISSIBILITY  
OF YAKIMA INDIAN NATION'S  
REWORDED PROPOSED CONTENTION 10

I. INTRODUCTION

On October 29, 1982, the Atomic Safety and Licensing Board issued a Memorandum and Order discussing the Yakima Indian Nation's (YIN's) Supplement to Petition to Intervene. In that Order the Licensing Board reworded YIN's proposed Contention 10 as follows:

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 Licensing Board requested all parties to submit briefs regarding the admissibility of the reworded proposed Contention. For the reasons stated herewith, the Staff opposes the admission of YIN's reworded proposed Contention 10.

DESIGNATED ORIGINAL  
Certified By 

## II. ARGUMENT

### A. YIN's Special Status *Vis a Vis* the United States Does Not Exempt It From the Requirements of the Commission's Rules of Practice.

YIN's reworded proposed Contention 10 asserts that it be permitted to raise at some later point, with the NRC's assistance, "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." Thus the purported contention is not a particular claim of harm now, but an attempt to avoid the requirement of 10 C.F.R. Section 2.714(b) that contentions be specified before pre-hearing conference, by reserving a right to file contentions in the future.

YIN attempts to found this implicit claim to exemption from NRC's procedural rules on its asserted "unique relationship" with the United States and the latter's trust responsibility to it. A similar argument was considered and rejected by the Atomic Safety and Licensing Appeal Board in Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-523, 9 NRC 58 (1979). In that decision, the Appeal Board vacated a Licensing Board's grant of an untimely intervention petition by three Indian tribes. The Licensing Board had concluded that, because of the unique trust obligation owed to the Indians by the United States, a petition could not be denied under any circumstances, even if there were inexcusable delay or prejudice to other parties. The Appeal Board dismissed this thesis as being without foundation and determined

that any late filed contentions must be judged under the standards of 10 C.F.R. Section 2.714(a). Skagit, 9 NRC at 61-63. Later, in affirming the Licensing Board's subsequent denial on remand of the late petition under the standards of Section 2.714(a), the Appeal Board concluded that "[a]lthough the tribes do occupy [a special status vis a vis the United States.] we neither have been referred to nor have discovered on our own anything in the trustee relationship which might be thought to give them greater license to sleep on their rights over a protracted period."

Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-559, 10 NRC 162, 168-69 (1979). After surveying the law, the Appeal Board concluded that "the special status which is enjoyed by the tribes vis a vis the United States is not of itself a sufficient foundation for ignoring the dictates of Section 2.714(a)." Puget Sound Power and Light Co. (Skagit Nuclear Power Project), ALAB-552, 10 NRC 1, 10 (1979).<sup>1/</sup>

It is clear from these decisions that YIN's special status does not exempt it from the Commission's Rules of Practice so as to allow it to raise at some unspecified time in the future some unspecified situation which it may claim violates a treaty right. As with the Indian tribes

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<sup>1/</sup> The Appeal Board came to its conclusion that the Indians' special status did not require the NRC to intervene on their behalf only after "giving the widest possible reach to the trustee relationship as it has been defined over the years in the numerous judicial decisions cited by the tribe: to the Licensing Board [citing, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); United States v. Kagama, 118 U.S. 375, 384 (1886); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); Morton v. Mancuri, 417 U.S. 535 (1974)] - as well as affording full recognition to the sanctity of treaty rights possessed by Indians [citing, e.g., Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968)]." Skagit, 10 NRC at 8-9. YIN bases its claims upon these same cases which the Appeal Board concluded do not support such claims.

formerly involved in this proceeding, the Yakima Indian Nation must abide by the Commission's regulations for timely filings.<sup>2/</sup>

B. The Proposed Contention Fails to Meet the Specificity Requirements of 10 C.F.R. Section 2.714.

Contentions must meet the specificity requirements of 10 C.F.R. Section 2.714. BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974). Because they serve the purpose of defining the "concrete issues which are appropriate for adjudication in the proceeding," (Northern States Power Co. (Prarie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 191, aff'd, CLI-73-12, 6 AEC 241 (1973), aff'd sub nom. BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974)), contentions must be framed "with sufficient preciseness to show that the issues raised are within the scope of cognizable issues to be considered in an adjudicatory proceeding." Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 & 2), LBP 80-30, 12 NRC 683, 689 (1980).

YIN's reworded proposed Contention 10 specifies no issues litigable in a construction permit proceeding, and thus fails to satisfy Section 2.714's requirements. Rather, in this "contention" YIN attempts to reserve to itself the right to raise, at some later point, any situation which it can prove abrogates or impairs any of its treaty rights. Such a

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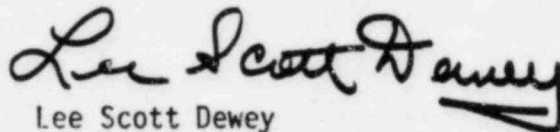
<sup>2/</sup> Despite the contrary import of the proposed contention, YIN appears to agree, for in its Supplement to Petition to Intervene it "urges that within the procedural confines of NRC regulations the ASLB must exercise its discretion on substantive issues in a manner which conforms to the strictest fiduciary obligations." Supplement to Petition to Intervene of Confederated Tribes & Bands of the Yakima Indian Nation, at p. 60 (emphasis supplied).

reservation of rights is extraneous to the focus of a proper contention, and must be excluded. Byron, 12 NRC at 689-90.

III. CONCLUSION

Because YIN's reworded proposed Contention 10 specifies no litigable issues and thereby fails to satisfy the requirements of 10 C.F.R. Section 2.714, and because its unique relationship with the United States affords no basis for exempting YIN from these procedural requirements, the proposed contention should be rejected.<sup>3/</sup>

Respectfully submitted,

  
Lee Scott Dewey  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 30th day of November, 1982

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<sup>3/</sup> The Staff notes that it did not oppose YIN's untimely petition to intervene on May 10, 1982, in part because it believed that YIN's intervention would not impede the timely and orderly conduct of this proceeding. NRC Staff Response to Untimely Petitions to Intervene Filed by the Columbia River Inter-Tribal Fish Commission and the Yakima Indian Nation, at pp. 23-25. An attempt to reserve rights of the open-ended nature presented by the proposed contention is quite different in its effect and is accordingly opposed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF BRIEF ON ADMISSIBILITY OF YAKIMA INDIAN NATION'S REWORDED PROPOSED CONTENTION 10 in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 30th day of November, 1982.

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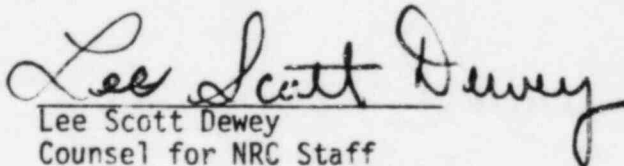
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