December 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.	)	Docket Nos. STN 50-522 STN 50-523
(Skagit/Hanford Nuclear Power Project, Units 1 and 2)	)	

STAFF'S ANSWER TO YAKIMA INDIAN NATION'S MOTION FOR RECONSIDERATION OF THE LICENSING BOARD'S RULINGS ON YIN CONTENTIONS 7, 8, AND 9

I. INTRODUCTION

On September 30, 1982 the Yakima Indian Nation (YIN) filed a list of contentions it wished to litigate in this proceeding. In an October 29, 1982, Order the Licensing Board, inter alia, rejected YIN's contentions 7, 8, and 9. By Motion of December 10, 1982, YIN requests the Licensing Board to reconsider this order and to accept these contentions for litigation. For the reasons set forth below, YIN's motion should be denied.

II. CONTENTIONS FOR WHICH YIN REQUESTS RECONSIDERATION

A. Contention 7: The Commission Should Not Issue Any Construction Permit Facility License For Skagit/Hanford Pending Completion Of The Waste-Disposal Confidence Proceeding

The Licensing Board rejected this contention on the basis of the Commission's announced policy statement (44 Fed. Reg. 45362 (1979)) that in individual license proceedings no consideration shall be given by a

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Licensing Board to the present status of permanent off-site high-level waste repository matters. (October 29, 1982 Order at 4). In its motion for reconsideration, YIN has not provided any discussion as to why the Board's ruling on this contention should be changed. Accordingly, there is no basis for this Board to reconsider its earlier ruling.

B. Contention 8: No Provision Is Made For Access For Enjoyment Of Treaty Reserved Rights By YIN Or Its Members

In this contention YIN had asserted that the Applicant has not provided for access to the Hanford Reservation for the exercise of treaty related rights of YIN witnin the Hanford Reservation and the Skagit/Hanford site area. The Licensing Board rejected this contention on the basis of Staff's argument that access to the Hanford Reservation is not in issue in this proceeding and, insofar as access to the Skagit/Hanford nuclear facility site is concerned, YIN had failed to provide a basis to demonstrate how YIN's tribal member's right of access now exercised would be denied. (October 29, 1982 Order at 4. See also Staff's October 20, 1982 Response to YIN's Contentions at 17).

In its motion for reconsideration, as part of its argument with respect to Contention 8, YIN incorporates the reasons furnished in its December 10, 1982 brief and accompanying affidavit of Russell Jim regarding the admissibility of YIN Contention 10. Its basic arguments include the assertion that the Hanford reservation's lands originally belonged to the Yakima Indians and they cannot be withdrawn by the United States' government's possession and use and the physical exclusion of the Indians. YIN also asserts that its members have a right, pursuant to its treaty with the government, to proceed over the Hanford Reservation to usual and accustomed fishing places and to pasture cattle, gather roots

and hunt on these lands since they are open and unclaimed by virtue of their federal government ownership.

YIN's motion for reconsideration of Contention 8 must fail. This Licensing Board lacks jurisdiction over the basic subject matter in dispute in this contention -- that is, access to the Hanford Reservation. Nothing in YIN's present motion or in the Russell Jim affidavit in any way indicates that the construction of the Skagit/Hanford facility affects or changes this fundamental underlying dispute. As the Staff has pointed out a number of times before in this proceeding, access to the entire Hanford Reservation is not a proper issue for this proceeding. YIN's instant motion still fails to demonstrate how any right of access presently exercised by its tribal members would be adversely affected by construction of the Skagit/Hanford project. Moreover, there are persuasive arguments that the asserted rights do not extend to activities on a United States government secured area such as the Hanford Reservation.

1. This Licensing Board Lacks Jurisdiction to Resolve Property Right Disputes on the Hanford Reservation

The Hanford Reservation presently consists of about 570 square miles of United States government owned lands located in the South Central portion of the State of Washington and used by the Department of Energy (DOE) to conduct energy related programs. As pointed out by DOE, this site was originally established in February 1943 for the production of plutonium for nuclear weapons by the Manhattan District Army Corps of Engineers and from that time to the present, it has been fenced and posted in order to prohibit entry to unauthorized personnel.[1/] YIN's Contention 8 is, in

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1/ Department of Energy Limited Appearance Statement (November 26, 1982) at 3, 9, 10.

YIN's Contention 8 is, in effect, a plea that its tribal members for the first time in forty years be allowed to enter on the Hanford reservation to perform such activities as hunting, fishing, gathering roots and berries and pasturing animals.[2/]

This Board lacks jurisdiction to resolve the question of access on the Hanford Reservation since this is essentially a property right dispute between the Department of Energy and the Yakima Indian Nation. Jurisdiction is lacking since, among other things, this Board does not have authority over the Department of Energy to enforce access rights on the reservation. For that matter, the Department of Energy is not even a party to this proceeding. This Board may not consider matters without the jurisdiction of the NRC. As stated in 10 C.F.R. Part 2, Appendix A, ¶ III(a)(1):

> Petitions and Supplements thereto which set forth contentions relating only to matters outside the jurisdiction of the Commission will be denied. In any event, the granting of a petition for leave to intervene does not operate to enlarge the issues, or become a basis for receipt of evidence with respect to matters beyond the jurisdiction of the Commission.

See also, Public Service Co. of New Hampshire (Seabrook Units 1 & 2), CLI-71-1, 7 NRC at 23-24; CLI-78-17, 8 NRC 179, 180 (1978).

This Board also lacks jurisdiction to settle property right disputes of this nature since they do not come within the purview of matters which it has been authorized to resolve. In an NRC license proceeding, the

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2/ According to the Department of Energy, this is the first time during this entire period that an Indian tribe has ever made this claim for access to the reservation. Id. at 10.

notice of hearing sets the scope of the matters to be heard and to the extent it restricts the scope of the proceeding or hearing board's authority, it is binding upon the board. See Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-400, 5 NRC 1175, 1177-88 (1977). The December 12, 1974 Notice of Hearing for the Skagit construction permit proceeding was limited to safety and environmental issues (39 F.R. 44065 - Dec. 20, 1974), and would not include the type of dispute between DOE and YIN which is set out in YIN Contention 8.

The only possible jurisdiction pertaining to the Hanford Reservation that this Board possesses concerns that small area of land within the reservation where the Skagit/Hanford exclusion area is located.[3/] In exercising its jursdiction in that area, however, as a practical matter, this Board cannot afford relief to YIN with respect to hunting, gathering and pasturing there since it is located within the Hanford Reservation and this Board cannot decide title to the Hanford Reservation nor order the Department of Energy to allow the Indians a right of way across the reservation to reach the Skagit/Hanford site. Moreover, without regard to the question of jurisdiction, it is not clear that the relief requested could be granted since Indians are not allowed a special right of way to

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3/ Pursuant to CFR § 100.3(a), the Applicant will have the authority to determine all activities within this area even though the land therein is not owned by the Applicant.

travel across private land to reach open and unclaimed land for purposes of hunting and gathering. United States v. Vulles, 282 F.Supp. 829 (D. 1968).[4/]

2. Even If this Board has Jurisdiction Regarding Access to the Hanford Reservation, Which is Not the Case, YIN's Tribal Members are Legally Prohibited From Entering the Hanford Reservation to Hunt, Pasture, and Gather

The Yakima Indian Nation bases its claim that it can hunt, gather, pasture and fish on the Hanford Reservation and the Skagit/Hanford site on a treaty between the Yakima Indian Nation and the U.S. government dated June 9, 1855 (hereinafter referred to as the "Treaty of 1855"). (See State of Washington v. Chambers, 506 P.2d 311, 312 (Wash., 1973). The pertinent portion of that treaty that applies to YIN's claims in this proceeding is Article III which provides, inter alia, that:

> 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. (emphasis added).

The Hanford Reservation is located outside of the Yakima Indian Reservation, but it is allegedly on land which was once part of the

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4/ Although they can cross over private lands for purposes of fishing on their usual and accustomed fishing grounds (United States v. Winans, 198 U.S. 371, 381 (1965), this is not an issue with respect to the Skagit/Hanford exclusion area since no usual and accustomed fishing sites are said to be located there. Moreover, it is arguable that the right of way which has been granted in Winans to procede over private land to reach open and unclaimed land would not be available for the Hanford area since it has been closed to the public for national security purposes.

Yakima territory. (See December 10, 1982 Affidavit of Russell Jim attached to YIN brief.) YIN claims it has a right under the Treaty of 1855 to use the Hanford Reservation for hunting, gathering and fishing as "open unclaimed land" and similarly that it may fish thereon at "usual and accustomed" fishing sites.

a) YIN's Right to Hunt, Gather and Pasture on the Hanford Reservation

As set forth in the Treaty of 1855, hunting, gathering and pasturing can be engaged in by the Yakimas on "open unclaimed land" located outside their reservation. DOE asserts that the Hanford Reservation is not "open" since it has been fenced and posted to keep out unauthorized personnel and it is not "unclaimed" by virtue of this land being reserved, occupied, and utilized by the government to carry out a wide variety of energy related activities since the time of the reservation's establishment in 1942.[5/]

As set out in the "Limited Appearance Statement of the Department of Energy", the Hanford Reservation lands were acquired and reserved by the Department of the Army in 1943 under delegation from the President for the production of nuclear weapons. Pursuant to Chap. 421, 36 Stat. 847, 43 U.S.C. § 141[6/], the President had a right to withdraw or reserve lands for any lawful purpose. As stated, in this Act:

5/ See "Limited Appearance Statement of Department of Energy" at 3-6, 9.

6/ Later repealed. (Pub.L. 94-597, Title VII, § 704(a), Oct. 21, 1976, 90 Stat. 2792). However, at the time the Hanford Reservation property was acquired, this statute was still in effect.

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. June 25, 1910, c. 421, § 1, 36 Stat. 847.

After such lands were withdrawn, they were not allowed to be used for any inconsistent purposes. In the case of the Hanford Reservation, as reflected by Real Estate Directives and Federal Register notices which were issued at the time of their withdrawal, these lands were withdrawn "for use of the War Department for military purposes." See e.g., Fed. Reg. 12332 (Sept. 21, 1943).7/ These lands were subsequently transferred to the Atomic Energy Commission and ultimately to the Department of Energy for the same military purposes. (See Limited Appearance Statement of Department of Energy, at 3-5.) Under Section 161(g) & (q) of the Atomic Energy Act of 1954, 42 U.S.C. §§ 161(g) & (q), the Atomic Energy Commission was authorized by Congress to hold land and only allow others access thereon under terms it deemed appropriate. See also Energy Reorganization Act of 1974, § 107(b), 42 U.S.C. § 5817(b).

In addition to the fact that Hanford Reservation land has been officially withdrawn for use as a military reservation, case law

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7/ Where lands have been lawfully withdrawn for national defense purposes, others have no right to take those lands or use them. See Scott v. Carew, 196 U.S. 100, 114 (1905); Wilcox v. Jackson, 38 U.S. 498, 512, 513 (1839). Cf. United States v. Minnesota, 270 U.S. 181, 206 (1926); Federal Power Commission v. Oregon, 349 U.S. 435, 442-448 (1955); Stearns v. United States, 152 F.900, 903 (CA, 1907).

pertaining to the Yakima's Treaty of 1855 and other Indian treaties with the government containing similar language has confirmed that the Indians do not have a right to hunt, gather, and pasture on any lands (much less military lands) which are owned and are actively utilized by others. State of Idaho v. Coffee, supra, 556 P.2d at 1194; State of Washington v. Chambers, supra, 506 P.2d at 314-315; State of Montana v. Stasso, 563 P.2d 562, 562-563 (Mont., 1977); State of Washington v. Byrd, 628 P.2d 504, 505-506 (Wash., 1981).8/

YIN has responded to the issue of "open" and "unclaimed" lands by contending that any land under federal government ownership is "open" and "unclaimed" under the Yakima Treaty definition. (Brief at 7-8). This assertion is refuted by DOE. Furthermore, in responding to YIN's arguments it should be pointed out that although State of Idaho v. Arthur, 261 P.2d 135 (Id., 1953) and Conferated Tribes of Umatilla Indian Reservation v. Maison, 262 F.Supp. 871, 872-873 (1966) have held that National Forest lands were "open" and "unclaimed," these cases are distinguishable from instances involving military or nuclear reservation land. People are routinely allowed entry to National Forest lands which are essentially open areas where hunting is already permitted. Such land bears no resemblance to the Hanford reservation where the public is excluded and numerous energy and defense related activities, vital to this country's national interests, are conducted.

8/ Much of the land in the Hanford Reservation was in private ownership before being acquired and reserved for military purposes in 1942. As the above cases indicate, such land is not "open unclaimed" land insofar as Indian treaty rights are concerned. See "Limited Appearance Statement of DOE," Attachments B & C. YIN has not indicated whether the land in the Skagit/Hanford site was privately owned before 1942 when it was closed to the public as a military reservation.

Case law defining the term "open and unclaimed" is consistent with the interpretation that land is foreclosed to the Indians when it is owned and put to use by others. State of Washington v. Chambers, supra, 506 P.2d at 314-315; State of Idaho v. Coffee, supra, 556 P.2d at 1194. The test in determining whether land was "open" and "unclaimed" was whether the land was "settled by the whites."[9/] What was involved was the common sense resolution of two independent rights -- the right of the Indian to wander, gather roots and berries, pasture his livestock and to hunt" versus the right of the white settlers ". . . . to privacy in the use of the land he had acquired and staked out." The purpose of this resolution was to avoid "the constant difficulties that [had occurred] between the whites and the Indians." The balancing of these interests resulted in the determination that the Indian was restricted only in those areas "staked out by the white man as his own place to settle."

9/ State of Idaho v. Arthur, supra, 261 P.2d at 141; State of Idaho v. Coffee, supra, 556 P.2d at 1194. The history of the 1855 treaty shows that during the negotiations between the Yakimas and the government, Governor Stephens, speaking before the Council of Walla Walla Valley, said (State of Idaho v. Arthur, supra, 261 P.2d at 141):

> You will be allowed to pasture your animals on lands not claimed or occupied by settlers, white men * * * you will be allowed to go to the usual fishing places and fish in common with whites, and to get roots and berries and to kill game on land not occupied by whites; all this outside the Reservation.

State v. Chambers, supra, 506 P.2d at 314-315. In applying this definition of "open" and "unclaimed" to the Hanford Reservation, DOE's Limited Appearance Statement shows that this site has been "staked out" and "settled" by the fact that the land has been acquired and put to use in a number of defense and energy related ways.

YIN's argument regarding the status of federal government lands also is very weak in the absence of ours since any provisions in the Treaty of 1855 with respect to federal government lands. The plain meaning of the words "open" and "unclaimed land" would obviously not include land which has been acquired and then closed off to the public such as the case at the Hanford Reservation.

b) YIN's Right to Fish on the Hanford Reservation

In addition to hunting, gathering, and pasturing rights, the Treaty of 1855 provides the Yakima Indians certain fishing rights which allows them to fish both on and off their reservation. Specifically, for fishing on the reservation this treaty allows them inter alia, "the exclusive right of taking fish in all the streams" and for off-reservation fishing the Yakimas are granted the right of ". . . taking of fish at all usual and accustomed places, in common with the citizens of the territory."

Courts have interpreted that treated related fishing rights vest in the Indians certain privileges not enjoyed by others such as a right to receive a specific share of fish from their "usual and accustomed" fishing places (Washington State Commercial Fishing Vessel Association,

443 U.S. 658, 684-85 (1979)), a right not to have to pay a license fee to fish (Tulee v. Washington, 315 U.S. 681, 685 (1942)), and a right to have their treaty fish protected from environmental degradation. (United States v. Washington, 506 F.Supp. 187 (1980); ___ F.2d ___ (9th Cir., 1982) Opinion No., 81-3111, November 16, 1982). On the other hand, these rights also have been interpreted as not being unlimited. For example, Indians do not have an exclusive right to fish at "usual and accustomed" off-reservation fishing cites (United States v. Winans, supra, 198 U.S. at 381) and States have the power to impose on Indians, equally with others,[10/] regulatory restrictions concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. Tulee v. Washington, supra, 315 U.S. at 684; Maison v. Confederated Tribes of Umatilla Indian Reservations, 314 F.2d 169, 171-173 (1963); United States v. Washington, 384 F.Supp. 312, 333 (1974). Restrictions imposed by the Courts also have included limitations on the amount of net fishing that tribal members can engage in (Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392, 398-399 (1968)) and regulations on the amount of fish they can catch on their reservations so that there is a sharing of the amount of fish caught by Indians and others. (Puyallup Tribe v. Department of Game of Washington, 433 U.S. 165, 173-177 (1977)). In addition, although the Indians have the right to have their treaty fish protected from environmental degradation (United States v. Washington, 506 F.Supp. 187, 208 (1980)), it has recently been held that this right

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10/ Restrictions on Indian fishing rights cannot discriminate against the Indians and prevent them from obtaining less than their fair share of fish. Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44, 48-49 (1973).

is not absolute and is subject to reasonable limitations. (United States v. Washington, supra, 9th Cir., Slip Opinion at 2).

Without addressing the question of fishing rights with respect to the Hanford reservation as a whole, as far as the particular parcels involved in the Skagit/Hanford project are concerned, YIN has not specifically identified any "usual and accustomed" fishing sites. For that matter, there do not appear to be any such sites within the exclusion area of the Skagit/Hanford facility. Although there is a vague claim in the Affidavit of Russell Jim that "a stretch of the Columbia River" will be excluded to the Yakimas because of the Skagit/Hanford facility (Affidavit at 3), there is no apparent basis for such an assertion, especially in view of the fact that the Skagit/Hanford facility will be approximately six miles from the river.[11/] An adequte evidentiary basis must be afforded in support of a contention. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-73-10, 6 AEC 173 (1973).

For these reasons, there are persuasive arguments that the Treaty rights asserted by YIN do not extend to activities at the Hanford Reservation. However, Staff believes that it is unnecessary for this Licensing Board to resolve the underlying legal dispute over treaty rights in connection with this contention. Rather, we believe that the Board should deny admission of this contention on the grounds that it lacks jurisdiction to resolve this underlying dispute and because there

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11/ There has been no suggestion by YIN that the affidavit intends to refer to the very limited stretch of the Columbia River involved in the intake structure.

are no specific allegations by YIN with respect to the specific parcels of land involved in the Skagit/Hanford project.

C. Contention 9: S/HNP Limits Use of Yakima Indian Reservation And Its Members As A Permanent Homeland

YIN's basis for this contention is that the Yakima Indian Reservation would be a less desirable place to live because of fear and apprehension caused by the Skagit/Hanford nuclear facility. In rejecting this contention, the Licensing Board ruled that, to the extent that this contention addressed psychological stress, it is the Commission's policy that a traumatic event must have previously occurred at the site in question before the effects of psychological stress can be litigated.

YIN's request for reconsideration of Contention 9 is based upon its assertion that a traumatic event in the form of escaped nuclear wastes has already occurred at the Hanford site. This request must be denied since the leakage of small amounts of liquids around nuclear waste storage bins to which YIN refers (September 30, 1982 YIN Supplement at 10) is not a "catastrophe", much less a "serious" accident as required by the Commission's July 16, 1982 Policy Statement which provides, inter alia, that:

> Moreover, the majority clearly had only serious accidents in mind, because of the use of the word "catastrophe" and its references to the "unique" Three Mile Island Unit 2 accident in the opinion. In the Commission's view, the only nuclear plant accident that has occurred to date that is sufficiently serious to trigger consideration of psychological stress under NEPA is the Three Mile Island Unit 2 accident. Accordingly, only this accident can currently serve as a basis for raising NEPA psychological stress issues.
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> (Statement at 4)

In view of this emphatic statement by the Commission regarding the magnitude of an accident sufficient for a psychological stress contention, there is no basis for YIN's present motion.

III. CONCLUSION

For the above stated reasons, YIN's request for reconsideration of proposed Contentions 7, 8 and 9 should be denied.

Respectfully submitted,

Lee Scott Dewey

Lee Scott Dewey
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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PUGET SOUND POWER & LIGHT COMPANY, ET AL.	)	Docket Nos. STN 50-522 STN 50-523
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CERTIFICATE OF SERVICE

I hereby certify that copies of "STAFF'S ANSWER TO YAKIMA INDIAN NATION'S MOTION FOR RECONSIDERATION OF THE LICENSING BOARD'S RULINGS ON YIN CONTENTION 7, 8, AND 9" 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 December, 1982:

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