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)	)	

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

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 No. 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.

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For the reasons stated herewith, the Yakima Indian Nation proposes the admission of YIN's reworded proposed Contention 10.

At the hearing held on December 2, 1982, at Lacey, Washington, the Yakima Indian Nation was granted extended time in which to submit this brief.

In our Supplement to Petition to Intervene we set forth the status of the Yakima Indian Nation. Under the law YIN is a "nation" and entitled to the rights thereunder. We incorporate in this brief the cases and argument made in our Supplement to Petition but expand our argument in this regards in answer to some of the contentions made by the NRC Staff and the attorneys for the Applicant.

We understand that what prevails as an understanding of Indian affairs in the minds of the lay public may well have caused counsel to misconstrue the status of the Yakima Indian Nation. Every school boy was mistakenly taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico and Russia. We all remember the little maps in our school books showing the good deals we got. The map showing the vast area that Napoleon sold us for $15,000,000 in 1803 still remains a memory of my childhood. As for the original Indian owners of the continent, we received from our school books the impression that we took the land from them by force and proceeded to lock them up in concentration camps called "reservations". However, we are no

longer school boys but lawyers trying to convey to this Board the f- -al law regarding this nation's relationship with the indigenous owners of the land in this area covered by the Treaty of 1855. The reading of this law regarding this nation's relationship clearly shows that this nation acquired only the right to govern and the acquisition of the acquired lands and rights must have been by treaty or convention. From the very first act of our Congress it has been the law of this nation that rights and resources of the Indians could not be acquired, terminated or dimuted without their consent. While your writer clearly understands the national purpose of this Board and Commission to license nuclear facilities we must remind our learned friends, counsel for NRC and Applicant, that this is not the only national purpose.

Perhaps it was only natural that the first settlers on these shores, who were for many decades outnumbered by the Indians and unable to defeat any of the more powerful Indian tribes in battle, should have adopted the prudent procedure of buying lands that the Indians were willing to sell instead of using the more direct methods of massacre and displacement that had commonly prevailed in other parts of the world. What is significant, however, is that at the end of the Eighteenth Century when our population east of the Mississippi was at least 20 times as great as the Indian population in the same region and when our army of revolutionary veterans might have been used to break down the

Indian claims to land ownership and to reduce the Indians to serfdom without land and rights, we took seriously our national proclamation that all men are created equal and undertook to respect the property and rights which Indians had enjoyed and maintained underneath their tribal governments. Our national policy was first 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 we 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 government is a constitutional government and the principles of our Constitution must be followed by

Congress, the executive department, the judiciary and this Board. Certainly it must be recognized that under that Constitution even the federal government cannot take treaty-reserved rights without consent and compensation.

In United States, et al. v. Michigan, et al., 471 Fed.Supp. 192 (W.D. Mich. 1979), Chief Judge Fox has a lengthy discussion of some of these basic principles and we quote an applicable portion of said opinion for the Board's consideration:

> "Guiding this court is a key concept essential to a proper interpretation of the treaty. This concept is deeply rooted in federal Indian law and was very recently reaffirmed by the Supreme Court in United States v. Wheeler, ___ U.S. ___, 55 L.Ed.2d 303 (1978). . . .
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> "The conceptual framework, then, for interpreting the treaty is that the grant or cession in the treaty is not made from the United States to the Indians. Rather the Indians were the grantors of a vast area they owned aboriginally and the United States was the grantee. The grant from the Indians must be narrowly construed, and especially in light of the wardship relationship existing between the Indian grantors and the grantee United States.
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> "In addition to providing a conceptual framework for interpreting the treaty, Winans also teaches that reservations in treaties are not limited to land. Although the term 'reservation' is commonly thought to pertain to land, other valuable rights not relinquished when the Indians conveyed their aboriginal title are also reservations. The Indians can, and have, reserved rights to cross private lands - - - - -."

While the reserved rights in U.S. v. Michigan were established by implication the treaty rights asserted by YIN in this proceeding are explicitly set forth in the second paragraph of Article 3 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 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 unclaimed land.

It is conceded that the federal government has not exercised its power of eminent domain to terminate the Yakima Indian Nation's reserved interests in the lands within the ceded area by condemnation proceedings and the payment of just compensation. Rather, the Applicant and the Department of Energy choose to rest their termination of these Indian interests by the actual physical possession and exclusion from these lands by the United States and its various 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 U.S.C. 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."

As regards the usual and accustomed fishing places, it is clear that the Indians have a right to proceed to those places within the Hanford Reservation even if they were in private ownership. United States v. Winans, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup.Ct. 662 (1905); Seufert Brothers Co. v. United States, 249 U.S. 194, 63 L.Ed. 555, 39 Sup.Ct. 203 (1919). While the right to pasture horses and cattle, gather roots and berries, and to hunt on private property may be less broad, that is not the question before us. The Hanford Reservation and the site of the Skagit/Hanford Project are lands held by the federal government. It is clear that lands in federal government ownership have been determined to be considered open and unclaimed lands under

treaties similar to the Treaty with the Yakimas. State v. Arthur, 261 F.2d 135 (Sup. Ct., Idaho 1953) cert. denied 347 U.S. 937 (1954); Confederated Tribes of Umatilla Indian Reservation v. Maison, 262 Fed.Supp. 871 (1966), affirmed 382 F.2d 1013 (9th Cir. 1967).

Counsel for the Department of Energy has cited State v. Coffey, 556 P.2d 1185 (Idaho 1976) and State v. Chambers, 81 Wn.2d 929, 506 P.2d 311 (Wash. 1973). These cases are inapposite. Both cases involved hunting on non-federal property and the distinction is clear in both cases. Likewise, State v. Chambers involved lands outside of the ceded area of the Yakima Treaty and the trial court gave an instruction that was approved by the Supreme Court indicating that if the land even looked like it was in government ownership that the parties had a right to hunt on the land under the terms of the Yakima Treaty. The Supreme Court has long determined that in interpreting a treaty that the treaty must be construed not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians. Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 676, 62 L.Ed.2d 823, 99 Sup.Ct. 3055 (1979). The Supreme Court has also said that "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." Menominee Tribe of Indians v. United States, 391 U.S. 404, 20 L.Ed.2d 697, 88 Sup.Ct. 1705 (1968). A treaty will not be deemed to have been abrogated or modified by a

latter statute unless such purpose on the part of Congress has been clearly expressed. Cook v. United States, 288 U.S. 102, 120, 77 L.Ed. 641, 53 Sup.Ct. 305 (1933); United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976); United States v. White, 508 F.2d 453 (8th Cir. 1974).

It would be certainly a lack of due process if the contentions of counsel for NRC and the Applicant are followed. In substance what they are saying is that the Board can proceed to grant this license even though probative evidence would show that the Applicant is proceeding in an unconstitutional manner and contrary to the laws of Congress in a ratified treaty with the Yakima Indian Nation. The Constitution and this Treaty are the Supreme Law of the Land as is clearly set forth in Article VI of the Constitution of the United States. This Board and the Applicant must proceed in a constitutional manner.

Respectfully submitted,

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