



Confederated Tribes and Bands
of the Yakama Indian Nation

0049361

Established by the
Treaty of June 9, 1855

059113

June 1, 1998

Thomas W. Ferns, Project Manager
Remedial Actions Project
Department of Energy
P.O. Box 550
Richland, WA 99352



RECEIVED

JUN 03 1998
DOE-RL/DIS

Dear Mr. Ferns:

The Yakama Nation provides these comments to the Revised Draft Hanford Remedial Action (HRA) Environmental Impact Statement proposed language on Treaty Rights at the Hanford Site. We are very concerned with the entirety of the text proposed in your letter dated May 8, 1998, to Mr. Russell Jim, of the Yakama Nation's Environmental Restoration/Waste Management program. *49819*

The importance of Treaty-reserved rights to the Yakama Nation cannot be overstated. Subsistence activities were an indispensable part of the Yakamas' culture before the arrival of non-Indian settlers. The time-honored relationship between the Yakama people, our lands, and the wildlife and plant resources, has, of necessity, been one of the interdependence "Since Time Immemorial." In our culture and beliefs, we are an integral part of the lands and waters that we occupy. Our very social structure, and religion, are rooted in subsistence activities.

Over hundreds of generations, the subsistence activities of our people have evolved into attitudes and skills that are highly-honored and respected in our traditional society. Usufructuary harvesting activities remain a substantial underpinning of the economy of the Yakama tribal members. In an evermore rapidly changing world, traditional subsistence activities continue to mirror the very essence of whom we are - reflecting a lifeway rooted in thousands of years of living in harmony with this landscape where we were originally placed by the Creator. The use of wildlife and plant resources is one significant means by which the Yakama continue to perpetuate the ancestral ways passed down from generation to generation.

The Yakama Nation strongly objects to the characterization of the section heading entitled, "A Tribal View of Tribal Rights" which is within the proposed HRA EIS

Thomas W. Ferns, Project Manager
Page 2
June 1, 1998

Language. The text set forth in that section does not reflect our understanding of the law regarding Treaty usufructuary rights on "open and unclaimed" lands. Specifically, we cannot agree that the body of judicial decisions that discuss "open and unclaimed lands" can be distilled into a simplistic equation to "public lands of any type." The Treaty Article III reserved rights phrase "open and unclaimed lands" is at one both broader and narrower than such an uncritical characterization.

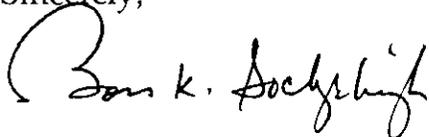
For example, the exercise of Treaty Article III hunting rights is permitted on private lands. See *Washington v. Chambers*, a 1973 case involving the Yakama Treaty of 1855, and the preeminent Washington State case on the issue of "open and unclaimed" lands. On the other hand, the Yakama Nation recognizes that not all public lands, though arguable "open and unclaimed," are suitable for the exercise of Treaty hunting rights. The Nation does not believe that it is appropriate to hunt on public school grounds, University campuses, hospital grounds, or other lands that are "publicly settled" where safety issues may arise.

The proper test of "open and unclaimed" lands is based on an indicia of occupation; underlying questions of land ownership are both insufficient and inappropriate to the construction of off-reservation Treaty reserved rights. The record of the 1855 Treaty Council proceedings, and also contemporaneous documents of the time, amply shows that the central purpose of the Treaty "open and unclaimed lands" provisions was to segregate the activities of Indians, in continuing to pursue their traditional lifeways on their ancestral lands, from non-Indian settlers. Evidence shows that inclusion of the Treaty "open and unclaimed" language was to allow Indians to hunt on all lands except those occupied by non-Indian settlers. "Settlement," as Indians would understand the term in Treaty times, required physical occupation, or some actual physical presence on the land, rather than mere paper ownership. It is obvious that this, too, was the understanding and intent of Isaac Stevens. During the 1855 Treaty negotiations, Governor Stevens confirmed to the Indians that the off-reservation Treaty rights were limited only "where the land is actually occupied by a white settler."

Thomas W. Ferns, Project Manager
Page 3
June 1, 1998

Thus, outward signs of settlement or physical occupation, such as houses, outbuildings, pasturing animals, etc., would indicate to Indians whether the land had been settled or not. The underlying legal title to the land is irrelevant to a determination of whether land is open or unclaimed. This "outward appearance" test is substantially supported by the court's decision in *Chambers*. The test is fact specific, comports with long-honored canons of treaty construction, and permits a greater degree of certainty than tests based on the underlying legal status of the land. The Yakama Nation maintains that this view of the Treaty-reserved usufruct better fits with the original intent of all parties to the Treaty to preserve our ancestral and traditional lifeways.

Sincerely,



for MR. WILLIAM F. YALLUP, Chairman
Yakama Tribal Council

cc: Mr. Russell Jim, YIN ER/WM
Elizabeth F.M. Nason, YIN OLC