



Confederated Tribes and Bands
of the Yakama Indian Nation

060169

Established by the
Treaty of June 9, 1855

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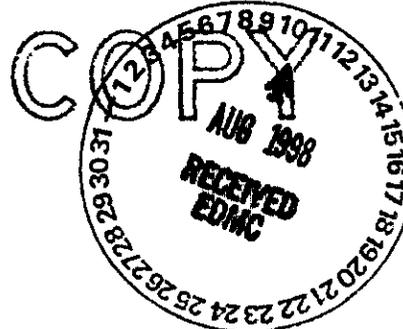
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June 30, 1998

John Wagoner, Manager
Department of Energy
Richland Operations Office
P.O. Box 550
Richland, WA 99352



Dear Mr. Wagoner,

Thank you for the opportunity to review the Comprehensive Land Use Plan (CLUP). We would like to compliment DOE on several points. We are pleased to see a written commitment to honor the Treaties with the Indian Nations. We interpret this as official DOE policy. We also compliment DOE on recognizing that agricultural uses are not appropriate for any of the Sites, including the Wahluke Slope. We also applaud DOE for Chapter 6, which sets up a land use approval process.

While we recognize the good points of the CLUP, overall it has so many fatal flaws that it should not be published as an EIS with a Record of Decision. The major points are discussed here, and additional points are included in the attachment.

The CLUP does NOT define final endstates. In fact, it could preclude ever achieving acceptable endstates if it were used as a way to allow mining, grazing, and industrial development. Even worse, it appears that the CLUP would result in a final ROD which is in direct conflict with existing interim RODs and enforceable milestones in the 100 Area. While the CERCLA/RCRA remedial process "can" use a legitimate land use plan, it does not have to use it if it did not involve all interested and affected parties. The Yakama Nation, which is an affected tribe and natural and cultural resource trustee, did not participate in the development of this land use plan, does not consider it to be a legitimate plan, and does not consider any ROD derived from the plan to be legitimate.

The intent of the CLUP is to "evaluate... environmental consequences associated with each alternative over the next 50-year time frame." This is, frankly, a ridiculously short time frame probably stemming from the Urban Growth Management Act, not from common sense, the nature of the contaminants, or environmental regulations. Therefore, the CLUP cannot be used as a basis for remedial actions and cleanup decisions. It is not clear why a myopically short land use plan tries to set itself up as the basis for establishing cleanup levels, especially when endstate goals are not even mentioned. In fact, DOE has

made public commitments that the CLUP would never be used to usurp the regulators' role under CERCLA and RCRA. Therefore, the CLUP is irrelevant to the cleanup process, despite the identification of this role as a benefit of the CLUP (page 1-1). Other aspects covered in the CLUP, such as cultural and natural resource protection, are already covered by respective management plans, and so the CLUP is not needed on that account, either.

There is no requirement that a land use plan must be prepared using a NEPA process. The NEPA process cannot be used to supersede a Treaty (which is upheld in the U.S. Constitution as the "Supreme law of the land". While a NEPA process could, indeed, have included a scope broader than a typical civic land use plan, it is not clear that any benefit is served by a process which results in an illegal Record of Decision. In fact, the preferred alternative from this CLUP violates its own stated intent to "honor treaties (page ES-44).

In fact, all of the land uses involve the imposition of institutional controls. It is unacceptable to disguise institutional controls as "conservation" and so on. None of the land uses for any of the alternatives achieve the unrestricted access levels that DOE has publicly committed to.

We note for the record that this land use plan in no way diminishes our Natural Resource Trusteeship authority for evaluating injury for any past, present, or future natural resource injury. We do not waive any rights to make damage and mitigation/restoration/compensation claims for such injury. We do not recognize any Irreversible and Irrecoverable (I&I) commitments made by this EIS or its ROD of natural resources (biotic and abiotic), or cultural resources (artifacts, sites, properties, or landscapes), or access to, use of, and quality of natural and cultural resources. Any injury resulting from any action or land use (including actions taken after any parcel might be transferred to another entity), including mining, grazing, recreation, industrial, or R&D use will be evaluated for injury and restoration requirements. Any residual contamination resulting from a failure to remediate to a level where treaty-reserved rights can be safely exercised will likewise be evaluated for injury. Disposal actions will be evaluated for the future potential to cause injury.

The fact that DOE has designated only a miniscule area as "preservation" quality land (BRMP Level 4) is irrelevant to the establishment of injury and mitigation/restoration/compensation requirements or I&I commitments. Significant prime habitat is not within the designated "preservation" areas, which needs to be corrected. Furthermore, the mitigation ratio will not be limited by the current BRMP definitions, but will be addressed on a case-by-case basis according to the Yakama Land Use Policy goals to protect, restore, and enhance natural resources and landscapes at Hanford. The overall impression given by the CLUP is that DOE is not interested in proactive environmental management of Hanford's unique natural and cultural resources.

The land use values listed on pages 1-9 and 1-10 include some, but not all, of the values cited in the Yakama Nation Land Use Policy, which includes Hanford as part of the ceded area. For instance, DOE suitably recognizes that access to cultural resources and protecting the health of future generations are necessary (even if those values are then not carried forward in the CLUP), but does not recognize that the Treaty of 1855 and its derivative YIN Land Use Policy already describe acceptable land uses and endstates for Hanford, and should be cited as primary definition and reference documents in the CLUP.

We can see that an attempt was made to address treaty rights in the present document by including the CTUIR and Nez Perce land use alternatives. However, since neither alternative was selected, it does not seem that any useful purpose was served other than being able to say that tribal alternatives were included. What is the point of participating in such a process, or submitting alternatives if they are only ignored, and treaties are violated anyway?

As discussed in the YIN letter of June 1, 1998 from William Yallup to Thomas Ferns, Section 1.4.2.1 (A Tribal View of Tribal Rights) is particularly offensive in its title, and it is incorrect regarding the test for open and unclaimed land status. The Treaty was listed as a federal law in Chapter 7, then disputed. Why? It is clear that DOE holds a different opinion about treaty rights than the tribes (or the courts) do, but it is not clear why this dispute is aired at all.

Similarly, it is not clear why treaty rights are singled out for dispute, while federal obligations of natural resource trusteeship are not discussed. The brief mention of trust responsibility on page 7-1 shows a misunderstanding of trusteeship. The trust responsibility is not merely a requirement to consult with tribes about impacts of federal actions to trust resources, but to actively protect those resources. The trust responsibility is a legally enforceable relationship between the United States government and American Indian Tribes, and imposes fiduciary standards on the conduct of the federal government, including the duty to take affirmative action to preserve resources on property held in trust by the federal government for tribal use. As a recognized affected tribe, the Yakama Nation asserts that massive contamination within its ceded area where the federal government is responsible for preserving natural resources (*Northern Cheyenne v. Hodel*, 12 Indian L. Rep. 3065) has not been adequately evaluated for its cultural, environmental, health, social, economic and other impacts.

We further assert that allowing mining and grazing across most of the Hanford Site would cause an additional violation of those trust obligations and degradation of environmental quality. To select a non-preservation and non-stewardship alternative clearly is in violation of federal trust obligations. The areas in the preferred alternative designated as "preservation" represent the minimal amount of preservation required by BRMP, and takes a minimalist view of what preservation means. To define most of the Site as suitable for "conservation" (i.e., mining and grazing) but not preservation illuminates the real intent of the EIS and ignores the prime habitat and many unique species that occur at

Hanford (see biota maps in BRMP, and Biodiversity Inventory document by the Nature Conservancy).

The second paragraph in Section 1.4.2.1 is a non sequitur wherein tribes seem to accept responsibility for any exposure that any tribal member receives at any time in the future. It is not clear why a discussion of how tribal governments regulate their members' off-reservation treaty rights belongs here and who it is intended to reassure. We disagree with this paragraph and request that it and similar statements elsewhere be removed.

We agree that there is a need for a land use approval process. However, Chapter 6 ignores the HNRTC, which could have served the same purpose and would probably be more neutral and appropriate since this is the group with legal responsibility for protecting, restoring, and enhancing the quality of natural resources on Site. In fact, most of the natural resource Trustees were not cooperating agencies in the development of the CLUP, and there is no indication that the Hanford Natural Resource Trustee Council was involved.

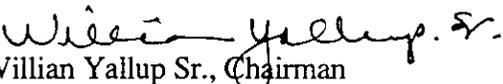
Last but not least, the actual selection of the preferred alternative is discussed in Chapter 5, and a number of attributes were evaluated for each alternative. However, no clear criteria for selecting or rejecting an alternative were given, and the real basis for selecting one alternative over the others is not stated. After a number of attributes were evaluated (albeit incorrectly in many cases), the chapter ends abruptly, and there is absolutely no discussion of who selected the preferred alternative or how it was selected. It appears that after the comparative evaluation was made, DOE simply retired to a back room behind closed doors and arbitrarily picked an alternative, without ever stating the criteria for doing so. While DOE will probably assert its role as "the decision maker" with no particular obligation to reveal its decision criteria or allow the affected peoples, trustees, and tribal governments into the actual decision as co-decision makers, this severely undermines what little credibility DOE has left with its stakeholders, and will cause a great deal of unnecessary tension.

The observations above highlight why the NEPA process, as implemented by DOE, does not work. In this case, the EIS is used as an attempt to formalize the rejection of treaty rights, to use land uses as a way to make I&I claims for almost the entire site thus attempting to preempt the NRDA process, to formalize short-term land uses as a basis for long-term cleanup decisions, substitutes short-term land uses for true endstate goals, and generally does more harm than good. It also seeks to formalize a great deal of industrial development, gives projects free reign to mine the site subject only to an approval process of a decision body not clearly defined in Chapter 6, and could greatly and permanently diminish environmental quality from present levels. Once environmental quality is lost by choosing an injurious short-term land use, the present level of environmental and cultural quality at Hanford would probably never be regained

This also highlights the impossibility of planning short-term land uses without any understanding of the long-term effects of contamination and waste disposal and with no endstate goals defined. What is really needed is a true sitewide EIS that starts with a clear and complete understanding of long-term waste migration and cumulative on-site effects (the Composite Analysis came nowhere close to this goal). The sum of the TWRS EIS and other smaller EISs, minus any idea of past practice and waste disposal sites, does not "cover" all the programs and their materials. The solid waste EIS, if it is ever done, may contribute some information, but will not "fill in the gaps" adequately. We are left with only the fuzziest idea of the tremendous amount of present and future contamination that will affect the entire Pacific Northwest in perpetuity. We strongly recommend that DOE agree to develop this analysis in an open manner (unlike the Composite Analysis, which was completely closed) and probably outside the NEPA process. We are doing our own high-level analysis, which is showing some disturbing long-term cumulative effects. We hope to present this to DOE in the near future.

In the meantime, if you have any questions, please feel free to call Mr. Russell Jim, ER/WM Program Manager.

Sincerely,


William Yallup Sr., Chairman
Yakama Tribal Council

cc:

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Tom Ferns, DOE-RL
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Samuel Penney, NPTEC
Donna Powaukee, NPT ERWM
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Mike Grainey, Oregon
Kevin Clarke, DOE-RL
Doug Sherwood, EPA-Hanford
Randy Smith, EPA
Mike Wilson, WA Dept. of Ecology
Dan Silver, WA Dept. of Ecology
Geoff Tallent, HNRTC Chairman
Senator Patty Murray
Senator Ron Wyden

Additional Detailed Comments

There seems to be an unstated assumption that the HLW, LLW, and MLLW waste left in the 200 Area will never migrate into groundwater and never leave the boundaries of the 200 Area. While this might be true for the next 50 years, the contamination already in the soil and groundwater will continue to migrate, and additional materials will be released during tanks retrieval (short-term) and from the disposal sites (ongoing and long-term). The effect of contamination on land use is not discussed, but is pivotal to the development of land use plans. The Land Use Plan should begin with a clear statement about long-term environmental quality goals, and then discuss how those goals can be achieved. However, since future consequences of waste disposal and unremediated past practice sites are UNKNOWN, it will be impossible to develop a path forward toward those goals. This means that there is a fundamental problem with the entire Strategic Planning and Land Use processes.

Page ES-5 cites the Draft Hanford Cultural Resources Management Plan as being a planning document with implied endorsement of the YIN. This is untrue - we have serious concerns with the plan and do not find it acceptable for protection of cultural resources and cultural uses of Hanford.

Page ES-5 cites the Draft Hanford Biological Resources Management Plan as a similar planning document. We likewise have concerns with this plan and note that we had no input into the development of BRMP or BRMIS.

Page ES-5 also cites the Hanford Strategic Plan as articulating DOE's long-term vision for Hanford. We have a long history of disagreeing with the HSP and trying to get DOE to improve it technically. We disagree with the endstates as stated in the HSP.

The FSUWG is not a decision document and should not be used as a basis for any land uses or any boundaries.

Page ES-11 says that Alternative One (which was not selected) is the alternative which represents a natural resource stewardship role. Since this was not selected, then DOE clearly does not intend to make stewardship part of its mission.

ES4.0 (Affected Environment) understates tribal uses of the site, which probably amount to 99.9999999% of the Site's history since the Missoula floods, if not longer. This amounts to over 10,000 years, which is considerably than the "many years" states on page ES-25. Even when evicted from the Site in 1943 without compensation, cultural uses never completely ceased, just maintained at a lower level in anticipation of return of lands and access as promised. Further, the lands were not merely "used by American Indian tribal members for fishing, hunting, gathering, and pasturing of livestock." This merely reiterates listed treaty-reserved rights, although the treaties clearly state that many other

rights not specifically reserved were also to be reserved. There is no recognition of the religious aspects of the entire Site. This entire section, as well as ES6.0 (Cultural Resources) belittles and understates tribal uses and the meaning of Hanford to tribal members. Section ES4.8 (Socioeconomic Environment) should also have mentioned the role that the Hanford Reach played and continues to play in the sustenance of tribal communities - foods, medicines, homesites, spiritual health, and overall community welfare.

ES4.5 (Biological Resources) does not cite the Nature Conservancy work which continues to identify new species, including many heretofore unknown to science. It also fails to mention that the entire Hanford Site was designated by Secretary O'Leary as a National Environmental Research Park.

ES4.10 greatly understates the amount of contamination currently present, and completely misses the point that contamination will increase in the future as disposed and unremediated wastes migrate through the soil and groundwater.

ES5.1 (Analysis Approach) has several flaws, including but not limited to the following:

1. "Areas" of cultural and religious importance to American Indians were not correctly designated.
2. Tribal uses seem to have been laced in a recreational or preservation category. Traditional uses are not recreational.

ES5.2 (Human Health Impacts) again greatly understates the health impacts of contamination, and repeats the same mistake that land uses determine the degree of allowable exposure and therefore health impact, rather than recognizing that, under various cleanup levels, human uses are *limited* by adverse health effects, and therefore uses are *lost* due to lack of cleanup.

ES5.3.1 (Geologic Resources) should state an absolute requirement to **ELIMINATE ALL GROUNDWATER RECHARGE** in the White Bluffs area, not minimize it! Considering the gravity and extent of ongoing cultural resource harm, there should be an ironclad guarantee that no irrigation will ever be allowed on the Wahluke Slope again.

ES5.3.2 (Water Resources). Contamination of groundwater could occur not only from future uses such as golf courses or agriculture (although these are supposedly not allowed under any land use), but also due to disposal and lack of remediation. These should be stated. The first bullet in this section should reiterate the position that **NO** further degradation of groundwater is acceptable. This is an anti-degradation policy, not just a "groundwater management" policy.

ES5.3.5 (Cultural Resources) again misses the point (or more likely deliberately avoids using the phrase) "traditional cultural property." It also misses the point that cultural use of natural resources is protected by Treaty, by NEPA, and by CERCLA. Another bullet

should be added that indicates DOE's intent to compensate tribes for adverse impacts to tribal cultural-natural resources and for lost access and use. Remember that tribes were the only parties not compensated when Hanford was created, and the opportunity for discussing recompense is long past due.

Since the so-called "value" of activities such as grazing is included in the discussion, the "value" of cultural use must also be included. YIN will be glad to tell DOE how valuable cultural and religious use of the Hanford landscape is to them.

ES5.4 (Environmental Justice). This section should be thrown out entirely. It completely misses the point of Executive Order 12898, and is factually inaccurate regarding the degree of human health effects in the future. The sentence on page ES-39 that says that "tribes assert that a treaty-given right to hunt, fish, or gather plants is diminished (if not voided) if the fish, wildlife, or plants have vanished or are contaminated to the extent that they threaten human health" is incorrect. The phrase "to the extent that they threaten human health" should be removed, because any degree of contamination impairs traditional cultural use.

ES6.2 (Hanford CLUP Policies) says that the CLUP "integrates competing land and resource goals and objectives." No it doesn't – it includes two tribal alternatives and then ignores them both, so there is no visible "integration." Who has compromised? The tribes, not DOE. The overall policy (ES6.2.1) needs to be revised to state an intent to meet natural and cultural trusteeship obligations, an intent to restore environmental quality as part of honoring treaties (it is good that the CLUP agrees to "honor treaties" – this is a breath of fresh air). The protection of cultural resources (ES6.2.3) needs to be strengthened. The policy for siting new development (ES6.2.4) says that it will occur where the DOE, counties and cities' maps are consistent – tribes are noticeably omitted from this list.

Page 1-1 (Second sentence) says that 6% of the site is contaminated - this is incorrect. 200 square miles of groundwater is contaminated, which is approximately half of the main body of the Site. The issue of vertical depth of contamination is a serious issue which is currently misunderstood. One cannot slice Hanford into horizontal layers and treat these layers separately with respect to land use or institutional controls.