



Confederated Tribes and Bands
of the Yakima Indian Nation

Established by the
Treaty of June 9, 1855

October 30, 1989



Ms. Sherri DeFigh-Price
Westinghouse Hanford Co.
Richland, Washington

Re: Section 8.5 of Draft Environmental Protection and Waste
Management Site Specific Plan for the Richland Operations
Office: Detailed Information

Dear Ms. DeFigh-Price:

Thank you for the opportunity to comment on Section 8.5 regarding "Tribal Treaty Rights and Sovereignty." We have reviewed that section and find it to be deficient in its description of this topic. We are enclosing a more detailed and comprehensive discussion of the issue and request that it be substituted for the present discussions.

The enclosed material is based both upon the actual Yakima Treaty language and numerous federal court decisions dealing with that language. The Yakima Nation is very concerned that DOE, as an agency of the United States, treat its activities with us on a government to government basis. Establishing such a relationship will facilitate progress toward solution of our mutual concerns regarding the Hanford Reservation. I look forward to working with DOE in this regard.

Sincerely yours,

Harvey E. Adams
Don Tahkeal, Chairman
Radioactive/Hazardous Waste Committee



8.5 TRIBAL TREATY RIGHTS AND SOVEREIGNTY

Section 1.1.1 of the Department's overall Five Year Plan for Environmental Protection and Waste Management provides that:

"Specifically, DOE will: recognize tribal sovereignty and treaty rights related to tribal and ceded lands;"

As the Hanford site is located on lands ceded to the United States through the Yakima and Umatilla treaties in 1855, a discussion of continuing tribal right and interest is necessary.

Under the laws of the United States, Indian Nations have been treated as "dependent" sovereign nations, reserving unto the tribes all governmental power not granted to the United States. For instance, the Yakima Reservation, the exclusive homeland of the Yakima Nation, is explicitly subject to the laws of the governmental body of the Yakima Indian Nation. The Treaty With the Yakimas ("Stevens Treaty"), clearly states that the signatory fourteen tribes and bands "for the purposes of this treaty are to be considered as one nation." (Preamble, Treaty With the Yakimas, 12 Stat. 951.) (Emphasis supplied.) In Worcester v. Georgia, 6 Pet. 515, 6 L.Ed. 483 (1832), Chief Justice Marshall explained the legal effect of the use of the terms "treaty" and "Nation":

"The term 'Nation' so generally applied to them means a 'people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme Law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'Nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, and have a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense." 6 Pet. at 559-560.

"[T]he senate docketing of the law of nations is that a weaker power does not surrender its Independence--its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state." 6 Pet. at 560-561.

This was the law of the land at the time of the execution and ratification of the Treaty With the Yakimas, and the other tribes in the central Washington and Oregon areas, and establishes the

sovereignty of the Yakima Indian Nation--except as limited by the terms of the Yakima Treaty.

In addition to these governmental rights within the exterior boundaries of the Yakima Indian Reservation, the Yakima Indian Nation at least also retained governmental powers in the Ceded Area. Settler v. Laneer, 507 F.2d 231 (9th Cir. 1974). The Treaty With the Yakimas constitutes a grant of rights from the Yakimas to the United States and any rights not granted must be considered retained by the Yakima Indian Nation. Settler v. Laneer, supra, U.S. v. Winans, 198 U.S. 371 (1905).

Although the Hanford Reservation is located outside the boundaries of any present Indian Reservation, the Department, in Section 1.1.1 above, recognizes that tribes have retained treaty rights in off-reservation areas, including those lands ceded in the treaties. In some regards the treaty language on these issues differs.

For instance, the applicable portions of the Treaty With the Yakimas with its explicit treaty-reserved possessory or usage rights follow:

"Article 3. ... 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 and unclaimed lands."

Article I of the Umatilla tribes recognizes many similar rights, although it provides that the off-reservation gathering and hunting rights are to be exercised "in common with the citizens."

The treaty-reserved possessory or usage rights of "Stevens Treaty" tribes to off reservation fisheries has long been recognized by the United States of America. The "Stevens Treaty" tribes treaty-reserved possessory or usage rights to hunt, gather, pasture animals and travel in areas owned by the United States within their Ceded Areas have long been recognized by the United States of America. Further, the Yakima Indian Nation's cultural and religious relationship with the land, water and all growing things within their native area and their fundamental belief that the interdependence and protection of the land, water and all living things are a sacred duty under the Creator's Law have been recognized and respected by the United States of America and the Supreme Court. (See U.S. v. Winans, infra.) The right to have these treaty-reserved possessory and usage rights, and the foods and areas associated with these rights free from environmental

degradation has likewise been a basic premise of the United States of America. Some of the basic documents helpful in determining the explicit and implicit treaty-reserved possessory and usage rights of the "Stevens Treaty" tribes in their Ceded Areas have already been provided to DOE during the BWIP process.¹

Specifically regarding the Yakima Indian Nation's off-reservation possessory or usage rights, it was determined that:

"At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty." Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 667-68, (1979).

The treaty-reserved right to "forever be able to continue the same off-reservation food gathering and fishing practices" as understood by the Yakimas at treaty time continues throughout the Ceded Area and the Hanford Reservation.

As was expressed by the Supreme Court in United States v. Winans, 198 U.S. 371, at 384 (1905):

"The right [regarding reserved off-reservation rights] was intended to be continuing against the United States and its grantees . . ."

Accordingly, "Stevens Treaty" tribes retained significant rights and sovereignty over lands within their Ceded Areas. These rights include fishing at usual and accustomed fishing sites (many of which are located in the Hanford Reach area), protection of the fishery resource throughout its range, and access for hunting, gathering and cultural rights. The tribes retained these rights as sovereign governments, and in order for these rights to be respected and protected, a government to government relationship between the tribes and the United States must be created and maintained.

¹ See bibliography of resources on this issue contained in March 8, 1983 letter of Yakima Indian Nation to James L. Watt, Secretary of Interior, recognizing Yakima Nation's status as an "affected Indian tribe."

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Author Don Tahkeal, Chairman Yakima Indian Nation	Addressee C. DeFig-Price, WHC	Correspondence No. Incoming: 8904620
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