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Ms. Donna L. Powauke, Manager
Environmental Restoration/Waste Management Program
Nez Perce Tribe
P.O. Box 365
Lapwai, Idaho 83540

MAY 8 1998

Dear Ms. Powauke:

**REVISED DRAFT HANFORD REMEDIAL ACTION (HRA) ENVIRONMENTAL IMPACT
STATEMENT (EIS) PROPOSED TREATY ISSUE LANGUAGE**

Attached is the proposed language regarding the issue of Tribal Rights at the Hanford Site for your review and comment. This write-up is proposed for inclusion in Chapter 1 of the Revised Draft HRA EIS. The U.S. Department of Energy (DOE) would like to receive your comments regarding this text during internal DOE and cooperating agency reviews and before a public draft is released.

As the text says, this is a controversial subject on which both the Tribes and DOE can point to legal justification for their positions in this dispute. Despite any disagreements, however, the subject of Tribal Rights still needs to be discussed in the EIS in response to public comment. The proposed attached language was written by both DOE and those Tribal government representatives who have actively participated in the HRA EIS planning process (please note the attachment is taken exactly as it appears in the EIS right now).

Thank you in advance for your assistance in this request. By working together, we can arrive at wording that is less objectionable to all parties. Your assistance will help us finish publication of the HRA EIS, a document that allows the land-use planning and implementation process at Hanford to continue to move forward.

Please let me know of any comments or changes you might have. The EIS is currently scheduled for formal internal review by DOE and the cooperating agencies in preparation for official approval and distribution. Please contact me with any questions on (509) 372-0649.

Sincerely,

Thomas W. Ferns, Project Manager
Remedial Actions Project

RAP:TWF

Attachment

cc w/attach:
R. Jim, YIN
S. Sobczyk, NPT

J. R. Wilkinson, CTUIR

1.4.2 Integrating Planning Efforts by Other Governments and Agencies

This section includes information supplied to DOE by representatives of other governments and agencies about their respective planning efforts. Key to setting aside institutional differences that allowed planning to proceed was the concept of agreeing to disagree on issues such as tribal rights.

Tribal governments and DOE agree that the treaty-reserved rights of Tribal members to fish at usual and accustomed fishing areas applies to the Hanford Reach of the Columbia where it passes through Hanford.

Nevertheless, Tribal governments and DOE disagree over the applicability to the Hanford Site of Tribal treaty-reserved rights to hunt, gather plants, and pasture livestock. Both the Tribes and DOE can point to legal justification for their positions in this dispute (see below). As this dispute could take years to resolve, the Tribes and DOE have decided not to delay completion and implementation of land-use planning for the Hanford Site while awaiting the resolution of this dispute. Instead, the Tribes and DOE have gone ahead with the land-use planning process while reserving all rights to assert their respective positions regarding treaty rights. Neither the existence of this EIS nor any portion of its contents is intended to have any influence over the resolution of the treaty rights dispute.

1.4.2.1 A Tribal View of Tribal Rights. The Tribes' treaties with the United States reserve the rights of tribal members to hunt, gather plants, and pasture livestock on open and unclaimed lands. Under standard Federal Indian law practice, such treaty provisions are interpreted using the U.S. Supreme Court-defined "canons of construction" for the interpretation of Indian treaties. The application of those canons of construction to the Tribes' treaties indicates that the term "open and unclaimed lands" means public lands of any type. The management status of those lands at any given time is irrelevant. Likewise, the prior ownership status of those lands is irrelevant.

The fact that Tribal members have these treaty rights does not mean that Tribal members' exercise of these rights is unregulated. Tribal governments may regulate their members' exercise of off-reservation treaty rights in the same ways that state governments regulate non-Indian fishing and hunting: by establishing seasons, bag limits, and other administrative controls. As part of their decision making, Tribal governments typically share information and coordinate with other interested governments, such as state fish and wildlife agencies. In certain situations, such as when a resource is threatened with extinction, tribal members' exercise of off-reservation treaty rights can also be subjected to state and Federal regulation.

1.4.2.2 DOE's View of Tribal Rights. The DOE agrees that the "canons of construction" apply to the interpretation of treaty rights. However, DOE does not agree with the Tribes' reasoning regarding the application of the canons to the circumstances at the Hanford Site. Under the canons, the courts would look to the Tribes' contemporary understanding of the treaty terms as of the signing of the treaty. There exists substantial documentation that indicates that the Tribes understood at the time of the signing that lands were no longer "unclaimed" when they were claimed for purposes of the white settlers' activities. Most of Hanford had been so "claimed" at the time it was acquired for government purposes in 1943. The DOE is not aware of any judicially recognized mechanism which would allow these lands to revert to "unclaimed" status merely through the process of being acquired by the Federal government. The portion of the Hanford Site that remained in the Public Domain in 1943 (those lands now having underlying BLM ownership) arguably could have been considered unclaimed at the time the Hanford Site was established. However, those lands, as well as all of the acquired lands were closed to all access initially under authority of the War Powers Acts and then under the authority of the Atomic Energy Act. In order for the Tribes' view that these lands should be considered "open" to prevail, a court would have to find that Congress, in enacting the War Powers Acts and the Atomic Energy Act, did not intend to authorize the Executive Branch to close these vital sites to Tribal access when it granted plenary authority to restrict access under these laws. It is, therefore, DOE's position that the Hanford Site lands are neither "open" nor "unclaimed" and that the treaty reserved rights, by their own terms, do not apply.

Aside from rights reserved by treaty, Tribes have significant other rights under Federal statutes, executive orders, Federal court determinations, and executive branch policies. These include rights concerning cultural resource management access to religious sites, and the Federal trust responsibility to Indian tribes (see Chapter 7).