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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, Plaintiff, v. **UNITED STATES DEPARTMENT OF THE ARMY; ARMY CORPS OF ENGINEERS**, Defendants.	**Case No. 3:14-cv-01963-PK** **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation" or "the Tribe") seek summary judgment regarding the liability of the United States of

America, Department of the Army, and the U.S. Army Corps of Engineers ("United States" or "Defendants") for the response costs it has incurred due to releases and threats of releases of hazardous substances at and from the Bradford Island Site, Multnomah County, Oregon ("the Site"). Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675, as amended, the Yakama Nation is entitled to recover "all costs of removal or remedial action incurred by the . . . Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). The Yakama Nation has incurred costs totaling $99,763.72 from October 1, 2005 through September 30, 2014, exclusive of prejudgment interest. The attached Cost Documentation Reports set forth the costs and underlying documentation for those actions.

The issues raised by this motion are neither novel nor complex. No genuine issue of material fact exists as to the liability of the United States under CERCLA. No genuine issue of material fact exists as to the actions taken by the Yakama Nation in response to releases of hazardous substances from the Site. And no genuine issue of material fact exists regarding the amount of the costs that the Yakama Nation is seeking. The plain language of the statute – of which the United States has availed itself at hundreds of Superfund sites throughout the country – supports a finding that the Tribe is entitled to all of the costs is seeks in this litigation, and a declaratory judgment of liability for the Yakama Nation's future costs.

II. FACTUAL BACKGROUND

A. The Bradford Island Site

Bradford Island is part of the Bonneville Dam complex, which is located on the Columbia River at River Mile 146.1, approximately forty miles east of Portland, Oregon. U.S. Answer to Complaint, Docket No. 13, ¶ 12 (hereinafter "Answer"). From approximately 1942 until 1982, the Defendants managed and disposed of facility-related and household waste materials at a landfill in excavated pits or existing depressions at the northeastern end of the island ("landfill"). *Id*. ¶ 18. The wastes included hazardous wastes, such as building materials containing asbestos and mercury vapor lamps. *Id*. Pesticides and herbicides were also mixed and rinsed from application equipment just south of this area. *Id*. Directly north of the landfill, the Defendants disposed of electrical equipment debris, including light ballasts, electrical insulators, lightning arrestors, electrical switches, rocker switches, a breaker box and electrical capacitors, directly into the Columbia River. *Id*. ¶ 20. West of the landfill on the north end of the island, the Defendants disposed of electrical light bulb debris on a steep slope extending into the Columbia River. *Id*. ¶ 21. From 1958 until 1988, the Defendants admit that they used the sandblast building at the Site for sandblasting operations, equipment painting and electrical transformer disassembly and then disposed of the sandblast grit onto open areas surrounding the sandblast building. *Id*. ¶ 22. From the 1940s until the 1970s, the Defendants also admittedly used a pistol range at the Site for small arms target practice. *Id*. ¶ 23.

The disposal and handling practices performed at the Site resulted in the contamination of surrounding soils, groundwater and sediment with hazardous

substances. The Defendants admit that disposal at the landfill impacted the Site's soil and groundwater with petroleum hydrocarbons, polycyclic aromatic hydrocarbons ("PAHs"), metals, polychlorinated biphenyls ("PCBs") and pesticides/herbicides. *Id.* ¶ 19. The metals released at the Site include arsenic, cadmium, chromium, cobalt, copper, lead mercury, nickel, thallium, and zinc. Affidavit of Rose Longoria, Ex. 1, at 9-8 (hereinafter "Longoria Aff."). The Defendants admit this disposal also resulted in releases of PCBs, PAHs and various metals into the surrounding river sediment. Answer, ¶ 20. These disposals also resulted in releases of lead, mercury, PCBs and total petroleum hydrocarbons ("TPH") to the Site's surface soils, *id*. ¶ 21, and some of the contaminated soil has migrated into the Columbia River. The Defendants admit that wave erosion and slope failure caused this migration of material into the river. *Id*. The Defendants' disposal of spent sandblast grit has resulted in releases of metallic and organometallic constituents into surface and subsurface soils and potentially into the Columbia River via the storm water drainage system. *Id.* ¶ 22. Electrical transformer disassembly and aboveground storage of hazardous waste materials at the sandblast building have resulted in additional releases of PCBs, metals, pesticides, TPH, PAHs and volatile organic compounds ("VOCs") to Site soils. *Id*. The defendants further admit that soils in the vicinity of the pistol range on the south end of the Site have been impacted with metals associated with this operation. *Id.* ¶ 23.

Releases from the Site have impacted the Yakama treaty reserved fisheries resources in the Columbia River, and the tribal members who rely on that resource. The Defendants admit, for example, that elevated levels of PCBs have been found in resident fish. *Id.* ¶ 29. For this reason, state health departments in Washington and Oregon have

issued strict warnings not to eat resident fish in the area near the Site and the Yakama Nation has elected to suspend traditional platform fishing at the Site. Longoria Aff. ¶ 14; Affidavit of Steven S. Parker ¶ 13 and Exs. 5, 7 (hereinafter "Parker Aff.").

B. The Yakama Nation

The Yakama Nation is a federally recognized Indian tribe and the legal successor in interest to the Indian signatories to the Treaty with the Yakamas of June 9, 1855 (12 Stat. 951) (the "Treaty"). Under Article III of the Treaty, the Yakama Nation reserved for itself and its members the right to take fish at all "usual and accustomed places" on the Columbia River, which include, but are not limited to, fishing sites in the Bonneville Pool near and at the Bradford Island Site. Parker Aff. ¶ 4. Most of these fishing sites are registered with the Yakama Tribal Government for commercial, ceremonial and subsistence gill-net and platform fishing, and such activity is regulated under tribal laws and regulations. *Id*. The nature and scope of the Yakama Nation's off-reservation treaty reserved fishing rights on the Columbia River and its tributaries has been extensively litigated in this Court through participation as an original plaintiff-intervener in the continuing jurisdiction case of *United States v. Oregon* (Civil No. 68-513-KI, D. Or.).

The Yakama Nation is a signatory to the 2008-2017 Management Agreement, an order of this Court in *United States v. Oregon* that governs fisheries management in the Columbia Basin. The Court specifically recognizes the Yakama Nation as a co-manager of Columbia Basin fisheries resources along with the States of Oregon and Washington. See *United States v. Oregon,* 699 F.Supp. 1456 (D.Or. 1988) (adopting 1988 Columbia River Fish Management Plan)**.** The Management Agreement designates that portion of the Columbia River between Bonneville Dam and McNary Dam – or Zone 6 – as an

exclusive treaty Indian fishing area.

C. Response Actions Performed

Beginning in December 2005 and continuing to today, the Yakama Nation has taken numerous actions in response to the releases of contamination at and around Bradford Island. Longoria Aff. ¶¶ 5, 7-14, 16. The Tribe began these response activities when its representatives became aware of the release of hazardous substances at the Bradford Island Site and the potential contamination of the Columbia River. *Id.* ¶ 7. The Yakama Nation's response activities involve the monitoring, assessment and evaluation of the releases of hazardous substances and potential impact to the environment, and to the health and welfare of tribal members. *Id.* ¶¶ 7-14, 16. The Tribe has – among other activities – reviewed site background, technical, and decision-making documents, participated in technical meetings, coordinated and communicated with federal, state, and tribal governments, and provided education and outreach. *Id*. All of these activities have been in response to the releases of contamination at the Site. *Id.*

From 2006 to today, the Tribe has participated in the Technical Assistance Group ("TAG") for the Site, the group that provides governmental representatives technical information on Site activities, as well as review and comment on Site documents. *Id.* ¶ 8. It has reviewed the technical and decision-making documents, including studies conducted to assess hazardous substances at the Site. *Id.* ¶¶ 8, 10, 14, 16. Since learning of the contamination, the Tribe has met on numerous occasions with each of the other governments with an interest in the cleanup, and has communicated extensively with the United States. Many of these communications are technical; seeking and providing technical information and providing comments on proposed cleanup actions. *Id.* Others

are necessary to effectuate the actions taken by the Tribe, such as discussing positions taken by the Tribe, or government-to-government meetings regarding the relationship between ongoing cleanup and the Tribe's interests. *Id.* ¶¶ 7-14, 16. The Yakama Nation has determined to undertake these response activities to monitor, assess and evaluate releases of hazardous substances at the Site. *Id.* Moreover, the Tribe has conducted these actions to prevent, minimize, and/or mitigate potential damage to the river environment that it manages, and for the health of Yakama Nation's enrolled members. *Id*.

In addition to these actions, Yakama Nation Fisheries has taken actions to address tribal fishing in the areas on and around Bradford Island. Most of the tribal fishing platforms located in the Cascade Locks fishery are on lands owned by USACE, and are within the area of the Columbia River affected by contaminants from the CERCLA cleanup site at Bradford Island. Parker Aff. ¶ 10. Furthermore, Yakama Nation Fisheries maintains a detailed understanding of the number and location of fishing platforms, numbers of fishing families, and the level of fishing effort in the area affected by contaminants from the Bradford Island CERCLA cleanup site. *Id.* ¶ 11. In 2012, YNF met with USACE staff to discuss a number of safety concerns, including the proximity of the Yakama fishing platforms to the contaminated areas near the Bradford Island Site. *Id.* ¶ 12. YNF recommended that the Yakama Nation Fish and Wildlife Committee "take short term actions to prohibit platforms on Bradford Island and straddling or inside the log boom or any other structures for the dam," noting that "Bradford Island is heavily contaminated and accessible only by boat or driving through restricted areas on Powerhouse I." *Id*. ¶ 13; Ex. 5. The Committee enacted a tribal regulation that "prohibits platform/hook and line fishing on Bradford Island" because, in part, "Bradford Island is highly

contaminated …". *Id*. ¶ 14; Ex. 6. This regulation prohibiting fishing in the immediate vicinity of the Bradford Island Site is still in effect, and YNF has posted notices on the prohibited platforms for tribal members. *Id*. ¶¶ 14, 15; Ex. 7.

D. The Yakama Nation Incurred $99,798.32 for Response Actions as a Result of Releases of Hazardous Substances at the Site

The Yakama Nation's response costs and supporting documentation through September 30, 2014, are set out in three Cost Documentation Reports ("Cost Summaries") prepared by Yakama Nation Fisheries. Affidavit of Jeanna Hernandez, Exs. 2-4 (hereinafter "Hernandez Aff."). The Cost Summaries reflect unreimbursed response costs of $99,798.32 incurred by the Yakama Nation through September 30, 2014, excluding prejudgment interest. The Yakama Nation incurred these costs responding to the releases or threats of releases of hazardous substances at the Bradford Island facility. These costs include payroll of Yakama Fisheries employees, site-specific travel of employees and other costs associated with that travel, technical support services associated with remediation and response activities, and legal support services. All of these costs were incurred as a result of the response activities discussed above and in the attached Affidavits.

E. All Yakama Nation Costs Are Documented and Verified

The Yakama Nation has documented and verified that it has incurred $99,798.32 through September 30, 2014, responding to Defendants' releases of hazardous substances. The Tribe's direct costs include both the Yakama Nation's costs, and the site-specific costs incurred by entities external to Yakama Nation, but paid for by Yakama Nation. To calculate the Yakama Nation's direct costs for the Bradford Island Site, Yakama Nation Fisheries collected documents, including Yakama Nation employee

time sheets, Yakama Nation employee travel vouchers and other related travel receipts. To compile the external, or contractor, costs, Yakama Nation Fisheries collected documents of Yakama Nation expenditures for contractor services, including vouchers, invoices and payment schedules.

The costs incurred are set out in the three Cost Documentation Reports referenced above. Hernandez Aff., Exs. 2-4. To complete these reports, bookkeepers for Yakama Nation Fisheries obtained, compiled and reviewed all supporting documentation for accuracy, completeness, and adequacy. *Id*. ¶ 7. That documentation includes all personnel time sheets, travel advances, contractual invoices attributed to Bradford Island. *Id*. All of the data obtained from the supporting documentation are compared and reconciled with the Yakama Nation's accounting system. *Id*. The categories of costs represented in the Cost Summaries are personnel, fringe benefits, travel, supplies, contractual costs, and other site-related costs. *Id*. ¶ 8. A negotiated indirect cost rate is applied, and those costs are included. *Id*. ¶¶ 18, 19.

It is undisputed that the Yakama Nation has taken actions, incurred costs as a result, and verified a total of $99,798.32 through September 30, 2014 for the Bradford Island Site, exclusive of prejudgment interest.[1]

III. STANDARDS

A. Summary Judgment Standard

Summary judgment is appropriate when the pleadings and evidence establish that there are no genuine issues as to any material facts. *See* Fed. R. Civ. P. 56(c); *Celotex*

[1] The Yakama Nation is prepared to calculate prejudgment interest according to 42 U.S.C. § 9607(a)(4)(D).

Corp. v. Catrett, 477 U.S. 317, 322 (1986); *Manzanita Park, Inc. v. Ins. Co. of North Amer.,* 857 F.2d 549, 552 (9th Cir. 1988). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *Manzanita Park*, 857 F.2d at 552 (citation omitted). The standard provides that the mere existence of some alleged factual dispute will not defeat a properly supported motion; there must be a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986).

Summary judgment is particularly well suited for CERCLA cost recovery. The Ninth Circuit has upheld summary judgment on the issue of the recoverability and amount response costs incurred by staff, attorneys, and accountants of the United States. *See United States v. Chapman*, 146 F.3d 1166, 1168, 1171 (9th Cir. 1998) (declarations and cost summaries sufficient to support grant of summary judgment).[2] Other courts have similarly granted or upheld summary judgment on the amount of response costs.[3]

B. CERCLA Liability Standard

CERCLA was enacted both to "facilitate the expeditious and efficient cleanup of hazardous waste sites" and to assure that those responsible pay for the site cleanup. *Carson Harbor Vill., Ltd. v. Unocal Corp.,* 270 F.3d 863, 881 (9th Cir.2001)(en banc).

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[2] The Tribe is, as noted, treated identically to the United States and States in Section 107(a)(4)(A) of CERCLA, the operable liability provision in this litigation. 42 U.S.C. § 9607(a)(4)(A).

[3] See also *United States v. Findett Corp.,* 220 F.3d 842, 849-50 (8th Cir. 2000); *United States v. Chromalloy Amer. Corp.*, 158 F.3d 345, 347-48 (5th Cir. 1998); *United States v. Hardage,* 982 F.2d 1436, 1442, 1448 (10th Cir. 1992); *United States v. R.W. Meyer, Inc.,* 889 F.2d 1497, 1499-1508 (6th Cir. 1989); *California Dep't of Toxic Servs. v. Neville Chem. Co.,* 213 F. Supp.2d 1134, 1142 (C.D. Cal. 2002), *aff'd,* 358 F.3d 661 (9th Cir. 2004).

Liability for that cleanup "attaches when three conditions are satisfied: (1) the site at which there is an actual or threatened release of hazardous substances is a "facility" under § 9601(9); (2) a 'release' or 'threatened release' of a hazardous substance from the facility has occurred, § 9607(a)(4); and (3) the party is within one of the four classes of persons subject to liability under § 9607(a)." *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1073-74 (9th Cir. 2006).

The United States waived its sovereign immunity and agreed to be treated the same – procedurally and substantively – as any nongovernmental entity, including for purposes of liability under Section 107. 42 U.S.C. § 9620(a)(1); *see also United States v. Shell Oil Co.,* 294 F.3d 1045, 1052 (9th Cir. 2002). This waiver extends to "any instance in which the federal government may be deemed to have operated a facility, regardless of whether the government acted in a regulatory or in a proprietary capacity." *Crowley Marine Svs., Inc. v. Fednav Ltd.*, 915 F. Supp. 218, 221 (E.D. Wash. 1995) (USACE has waived sovereign immunity for suits under CERCLA).

C. CERCLA Cost Recovery Standard

Under CERCLA, if the Yakama Nation conducts a response action it is entitled to recover "all costs of removal or remedial action incurred by the . . . Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A).[4] The courts have adopted a pragmatic, common sense approach regarding the type of evidence that is sufficient to establish the amount of response costs that the United States, or another sovereign government like the Yakama Nation, has incurred with respect to a site. These

[4] The national contingency plan "provide[s] the organizational structure and procedures for preparing for and responding to . . . releases of hazardous substances." *See Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 799 (9th Cir. 1995) (quoting 40 C.F.R. § 300.1).

costs are typically proven, both within the Ninth Circuit and across the country, by means of (1) affidavits describing the response actions for which the costs were incurred, and (2) cost summaries of the voluminous underlying cost documentation relating to various categories of response costs, such as personnel, indirect, travel and contract costs. *See, e.g., United States v. Findett Corp.,* 220 F.3d 842, 849 (8th Cir. 2000); *Chapman*, 146 F.3d at 1172; *United States v. Hardage*, 982 F.2d 1436, 1442-43 (10th Cir. 1992); *Neville Chemical*, 213 F. Supp.2d at 1139-42.

Once the Tribe shows that it has incurred response costs as a result of a release or threat of release of hazardous substances, the burden shifts to the Defendants to show that (1) the response actions for which the costs were incurred were inconsistent with the NCP; (2) the Yakama Nation acted arbitrarily and capriciously or not in accordance with the law in the actions it has undertaken at the Site; and (3) the amount of additional costs incurred as a result. *See U.S. v. Chapman,* 146 F.3d at 1170.

The law in the Ninth Circuit is clear; "where 'the United States government, a [S]tate, or an Indian tribe is seeking recovery of response costs, *consistency with the NCP is presumed,*' and the burden is on the defendant to rebut the presumption of consistency by establishing that the plaintiff's response action was arbitrary and capricious." *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 949 (9th Cir. 2002), quoting *Wash. State Dept. of Transp.,* 59 F.3d at 799.

Finally, to challenge the *costs* incurred by the Tribe in connection with the Site, Defendants must prove that the Tribe's selection of a specific response action was inconsistent with the NCP. *Chapman,* 146 F.3d at 1169-70. As the court in *Hardage* pointed out, "[t]he NCP regulates *choice of response actions*, not costs. Costs, by

themselves, cannot be inconsistent with the NCP." *Hardage,* 982 F.2d at 1443 (citation omitted).

IV. ARGUMENT

A. The United States is a liable under CERCLA Section 107

The United States has admitted facts necessary to establish each of the elements required to impose CERCLA liability. Under the clear definitions in the law, the site is a "facility," a "release" of a hazardous substance from the facility has occurred, and the United States is a "person" subject to liability under Section 107(a).

1. The Bradford Island Site is a "facility"

While the United States has tried to walk a fine, semantic line regarding the extent of a "Site" on and around the Bradford Island Site, there is no question that those areas where released hazardous wastes have come to be located are, in fact, a "facility." A "facility" includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). If a hazardous waste has "come to be located" at a Site, the Site is thus a facility under CERCLA. *Pakootas,* 452 F.3d at 1074. And "the term facility has been broadly construed by the courts, such that in order to show that an area is a facility, the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." *3550 Stevens Creek Assocs. v. Barclays Bank of California,* 915 F.2d 1355, 1360 n. 10 (9th Cir. 1990).

The Defendants admit that the disposal of wastes at the Site has led to releases of lead, mercury, PCBs, and total petroleum hydrocarbons that came to be located in the Site's surface soils. Answer ¶ 21. The Defendants further admit that some of these

contaminated soils migrated into the Columbia River. *Id*. Some wastes containing metals, PCBs and PAHs were disposed of directly into the river. *Id*. ¶ 20. The Remedial Investigation conducted for the Defendants sets forth the types of contamination and several areas where it has come to be located. Longoria Aff., Ex. 1 § 9. It cannot be disputed that all of those areas are a "facility" under the law.

2. A release or threat of release of a hazardous substance has occurred.

CERCLA broadly defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). The United States has admitted that it disposed of wastes containing hazardous substances at and around the landfill on Bradford Island and, in some instances, directly into the Columbia River. Each of PCBs, PAHs, and metals released at the Site has been designated as a "hazardous substance." 40 C.F.R. § 302.4. Those admissions are sufficient to constitute a release under the law.

Moreover, the United States has admitted that hazardous substances disposed of on Bradford Island have migrated into the Columbia River due to erosion. This, too, is a release. The Ninth Circuit has held that "the passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a release under CERCLA." *Pakootas,* 452 F.3d at1074-75 (citing *A & W Smelter & Refiners, Inc. v. Clinton,* 146 F.3d 1107, 1111 (9th Cir. 1998)); *Chapman,* 146 F.3d at 1170; and *Coeur D'Alene Tribe v. Asarco, Inc.,* 280 F.Supp.2d 1094, 1113 (D. Idaho 2003) ("Th[e] passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA in this case.").

3. The United States is a party subject to liability under 42 U.S.C. § 9607(a).

The Defendants admit that they managed and disposed of waste materials at the Site – including hazardous substances – for approximately 40 years. *Id.* ¶¶ 18-22. Thus, the United States admits that under CERCLA Section 107(a) it is an "owner and operator." *Id.* ¶ 35. The United States does not dispute that it is a party subject to liability, and the Court's inquiry on this element can end here.

Because the United States managed and disposed of these materials, it is also liable as an "arranger" under CERCLA. 42. U.S.C. 9607(a)(3); *see also Coeur d'Alene Tribe*, 280 F.Supp.2d at 1132 (party is liable as an arranger if, *inter alia*, it has "the authority to control and to exercise some actual control over the disposal of waste.")[5]

B. The Actions Taken by the Yakama Nation are "Removal or Remedial Actions"

The Yakama Nation is entitled to its costs if they are "costs of removal or remedial action(s)." 42 U.S.C. 9607(4)(A). Each of the actions discussed above, and described more completely in the attached affidavits, fits squarely within CERCLA's definition of response. CERCLA broadly defines removal as, in part:

> … the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, *such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment*, which may otherwise result from a release or threat of release.

[5] An arranger is "any person who by contract, agreement, or otherwise *arranged for disposal* or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances." 42 U.S.C. § 9607(a)(3).

42 U.S.C. 9601(23) (emphasis added).[6] The actions taken by the Tribe are exactly that; actions that the Yakama Nation has taken to monitor, assess and evaluate the conditions at the Site, the actions proposed to be taken, and the effect of those actions on tribal members and the environment. Longoria Aff. ¶¶ 7-14, 16. Moreover, the Tribe undertook these specific actions – including the management and closure of fishing platforms near the Site – to mitigate damage to the public health or welfare. Parker Aff. ¶¶ 13, 14.

C. The Yakama Nation is Entitled to Recover All Costs and to a Declaratory Judgment of Liability for Future Response Costs

The language of CERCLA is clear; responsible parties are liable for "*all costs* of removal or remedial action incurred by . . . the Indian tribe," 42 U.S.C. § 9607(a)(4)(A) (emphasis added). And, liability under CERCLA is joint and several. *See e.g., California v. Montrose Chem. Corp.*, 104 F.3d 1507, 1518 n.9 (9th Cir. 1997). The Ninth Circuit has held that the broad remedial purposes of CERCLA support a liberal interpretation of "all costs." *See Chapman,* 146 F.3d at 1175; *R.W. Meyer Inc.,* 889 F.2d at 1503.

In actions brought by the United States to recover *its* costs, courts interpreting the language in Section 107(4)(A) have found that recoverable response costs include:

[6] A "remedial action" is also broadly defined, and includes "actions consistent with a permanent remedy." 42 U.S.C. § 9601(24). The definition recognizes that remedial actions can be taken in addition to removal actions, and specifically includes "any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment." *Id*.

(1) those costs directly incurred by in assessing, investigating, monitoring, testing and evaluating the releases and threats of release, *see* 42 U.S.C. § 9601(23); *Chromalloy*, 158 F.3d at 349; *Neville Chem. Co.,* 213 F. Supp. 2d at 1124;

(2) prejudgment interest, *see* 42 U.S.C. § 9607(a)(4); *R.W. Meyer Inc.,* 889 F.2d at 1105; *United States v. Monsanto Co.,* 858 F.2d 160, 175 (4th Cir. 1988);[7]

(3) litigation costs, including reasonable attorney fees, administrative costs and investigative costs related to response action(s), *see* 42 U.S.C. § 9601(25); *Chapman*, 146 F.3d at 1175; *United States v. Gurley*, 42 F.3d 1188, 1199-1200 (8th Cir. 1994); *Neville Chem. Co.,* 213 F. Supp. 2d at 1124; and

(4) indirect costs, such as overhead costs in administering the Superfund program and litigating Superfund enforcement actions, *see United States v. W.R. Grace & Co.,* 429 F.3d 1224, 1250 (9th Cir. 2005); *R.W. Meyer Inc.,* 889 F.2d at 1503-1504 (indirect costs are "part and parcel of all costs"); *United States v. Ottati & Goss, Inc.,* 900 F.2d 429, 444-45 (1st Cir. 1990).

All of the costs for which the Yakama Nation seeks recovery in this matter, as set forth in the attached Cost Summaries, fall within the categories of recoverable costs described above. Accordingly, as a matter of law, all the Yakama Nation's costs at the Site are recoverable under law.

Moreover, the Tribe is entitled to a declaratory judgment of liability in any future cost recovery actions regarding the Bradford Island Site. Section 113(g)(2) of CERCLA provides, in pertinent part, that "[i]n any such action described in this subsection, the

[7] CERCLA provides that interest accrues "from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." *See* 42 U.S.C. § 9607(a)(4).

court *shall enter a declaratory judgment on liability* for response costs or damages that will be finding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2)(emphasis added). This provision has been read by the Ninth Circuit as a mandate. "Therefore, if a plaintiff successfully establishes liability for the response costs sought in the initial cost-recovery action, it is entitled to a declaratory judgment on present liability that will be binding on future cost-recovery actions." *City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1007 (9th Cir. 2010). Because the United States is liable, as a matter of law, the Plaintiff is entitled to a declaratory judgment under CERCLA Section 113(g).

D. Yakama Nation's Costs are Sufficiently Documented and Calculated

Yakama Nation Fisheries has compiled true and correct copies of documentation supporting the costs incurred in relation to the Bradford Island Site. Hernandez Aff., Exs. 2-4. These Cost Summaries are, thus, authentic under Federal Rule of Evidence 901. As records kept in the ordinary course of business and under government authority, the records are admissible pursuant to both the business and public records exceptions to the hearsay rule. *See* Fed. R. Evid. 803. Finally, as a summary of authentic and admissible documents, the Cost Summary is admissible pursuant to Federal Rule of Evidence 1006.[8]

The Cost Summaries includes costs, all of which are recoverable, documented and verified. Thus, the Cost Summaries are accurate summations of the Yakama Nation's incurred costs, totaling $99,798.32 in costs through September 30, 2014, exclusive of interest.

[8] Rule 1006 allows summaries of voluminous writings to be admitted in Court when the underlying documents are made available for examination or copying. The Yakama Nation served a demand on Defendants on or before November 18, 2013.

V. CONCLUSION

Based on the undisputed facts in the record, the Yakama Nation has met its burden of demonstrating that the defendants are liable for response costs under CERCLA, that the Yakama Nation has incurred costs of response, and the amount of those costs. For the foregoing reasons, the Yakama Nation respectfully requests the Court to grant the Plaintiff's Motion for Summary Judgment, and enter an Order: (1) adjudging that the Yakama Nation is entitled to recover $99,798.32 in damages, plus interest, from Defendants jointly and severally for costs incurred through September 30, 2014; and (2) declaring that the Defendants are and will be liable, jointly and severally, to the Yakama Nation for all prospective costs incurred by the tribe for any and all of its future response actions taken regarding the Bradford Island Site after the date of judgment in this action.

Respectfully Submitted,

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