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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiff,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE ARMY; ARMY CORPS OF ENGINEERS,

Defendants.

CASE NO.: 3:14-CV-01963-PK

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants United States of America, the Department of the Army, and the U.S. Army Corps of Engineers (collectively, "United States") move for summary judgment in their favor and against Plaintiff Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation" or "Tribe") on the Tribe's claims for response costs as asserted in its Complaint (Dkt. 1) for the reasons set forth in the memorandum, below.

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Pursuant to LR 7-1, counsel for the United States has conferred with counsel for the Tribe. The Tribe opposes this motion.

MEMORANDUM IN SUPPORT OF CROSS-MOTION AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The U.S. Army Corps of Engineers ("Corps") – a component of the Department of Defense – owns and operates Bradford Island, located in Oregon on the Columbia River. Bradford Island is part of the Bonneville Dam complex. Historical operations on the Island resulted in the release of hazardous substances to soils on parts of the island and to adjacent sediments in the Columbia River. The Corps, acting as the "lead agency" at the site, has pursued cleanup of those substances under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") – also known as Superfund -- 42 U.S.C. §§ 9601-75, pursuant to which it has, among other things, conducted site investigations and removed contaminated soils and sediments. The Corps is continuing to conduct the investigations, analyses, assessments and planning necessary to select and implement a permanent remedy at the site.

The Tribe seeks to recover costs that it incurred in undertaking certain activities with respect to the Bradford Island facility, which it claims satisfy the requirements of "removal" as defined by CERCLA section 101(23). Mem. in Support of Plaintiff's Motion for Summary Judgment (Dkt. 21-1) ("Pl. Mem.") at 15-16. The Tribe's activities fall into three categories:

1. Activities that the Tribe claims are "oversight" of the CERCLA removal and remedial actions conducted by the Corps;

2. Negotiations with the Corps to obtain funding for the Tribe's review of and comment on the Corps' removal and remedial actions; and

3. Adoption of a regulation that prohibits fishing by tribal members at certain locations on or near Bradford Island.

Under the facts alleged here, any costs incurred by the Tribe in conducting these activities are not recoverable under CERCLA. First, the Tribe does not have authority under CERCLA or its own laws to conduct "oversight" of the Corps' response actions at Bradford Island. Second, negotiations to obtain a grant of funds from the Corps are not removal actions under CERCLA. Third, a regulation adopted by the Tribe to protect public health could qualify as removal action in certain circumstances, but the evidence shows that the regulation was adopted for purposes other than to protect tribal members against exposure to hazardous substances, or, at least, gives rise to a fact issue that precludes summary judgment in favor of the Tribe's claim.

Accordingly, the Court should grant the United States summary judgment on the Tribe's claims for oversight costs and for costs of seeking funding from the Corps. With respect to the Tribe's claim for costs incurred to adopt its fishing regulation, the Court should either grant summary judgment in favor of the United States or set the case for trial on that issue.

II. STATUTORY AND REGULATORY BACKGROUND

CERCLA's cleanup authority is vested primarily in the President. The President has delegated his authority to various federal agencies. The Environmental Protection Agency ("EPA") is the agency with primary overall responsibility for implementing and enforcing CERCLA's regulatory scheme. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). Other agencies also have been delegated cleanup authority by the President at federal facilities for which those agencies have jurisdiction. *See* 42 U.S.C. § 9615 (authorizing delegation). In particular, the Department of Defense has been delegated cleanup authority for currently owned sites it administers, which include the Bradford Island site. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

CERCLA contemplates two types of environmental clean-up actions: "removal" and "remedial" actions. "Removal" actions include a variety of activities taken to study, clean up and otherwise "prevent, minimize, or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601(23). "Remedial actions" are those that are "consistent with [a] permanent remedy" to the contamination problem and are "taken instead of or in addition to removal actions." *Id.* § 9601(24). Removal and remedial actions encompass a range of activities, including, for example, site investigation, monitoring and evaluation, testing, and actions taken to prevent or abate the release or threatened release of hazardous substances from a site. *Id.* § 9601(23) & (24). Collectively, these actions are called "response" actions. *Id.* § 9601(25).

The selection and performance of remedial actions are governed by the National Contingency Plan ("NCP"), a set of regulations that identifies the methods for investigating hazardous substance contamination and the criteria for determining appropriate response actions. 42 U.S.C. § 9605. The agency that exercises the authority to plan and implement response actions under the NCP is the "lead agency." 40 C.F.R. § 300.5. The lead agency has authority to provide oversight for actions taken by potentially responsible parties to ensure that a response is conducted consistent with the NCP. *Id.* § 300.400(h). Among other things, the lead agency determines the data to be collected and evaluates releases of hazardous substances. *Id.* § 300.420. "The lead agency shall characterize the nature of and threat posed by the hazardous substances and hazardous materials and gather data necessary to assess the extent to which the release poses a threat to human health or the environment or to support the analysis and design of potential response actions by conducting, as appropriate, field investigations to assess the [enumerated] factors." *Id.* § 300.430(d)(2).

Indian Tribes may apply to the lead agency for an agreement to ensure their meaningful and substantial involvement in response activities. A party that has not entered into an agreement with

the lead agency is nevertheless provided many opportunities to comment on the lead agency's plans and actions under the public participation provisions of the NCP. *E.g., Id.* § 300.430(c).

III. FACTUAL BACKGROUND

Bradford Island is part of the Bonneville Dam complex, and is the location of, among other things, the first and second powerhouses, the old and new navigation locks, a spillway, and a fish ladder. Since 1997, the Corps has conducted several investigations to characterize and evaluate the contamination arising from historical activities on Bradford Island. Those investigations have focused on two cleanup areas – known in CERCLA terms as "operable units" ("OUs") – the Upland OU and the River OU. The Upland OU includes four areas where hazardous substances have been identified: the Landfill, the Sandblast Area, and the Bulb Slope, which are all located on the north side of the island, and the Pistol Range, which is located on the south side of the island. Environmental media sampled and evaluated include upland soils, groundwater, soil gas, sediments, surface water, and tissue from multiple species, including clams, sculpin, smallmouth bass, and crayfish. The Corps has also removed and disposed of material and equipment, site soils, and river sediments that contained hazardous substances. *See Upland and River Operable Units Remedial Investigation Report: Bradford Island, Cascade Locks, Oregon* (June 2012) at 1-1 to 1-4, 3-14 to 3-20, and 5-4 to 5-13 (summarizing investigations and cleanup activities) (available at http://cdm16021.contentdm.oclc.org/cdm/ref/collection/p16021coll3/id/98). The Remedial Investigation ("RI") Report uses the data to identify source areas for hazardous substances at Bradford Island; it defines the nature and extent of the environmental contamination; and it identifies the contaminants of potential concern ("COPCs") for human health and contaminants of potential ecological concern ("CPECs") in the Upland and River OUs.

Throughout the CERCLA process, the Corps has solicited and accepted public comments, including comments from the Tribe, on its various reports and plans. For example, the *Draft Final*

Upland and River Operable Units Remedial Investigation Report was provided to the Technical Advisory Group (which the Tribe is a member of, see below) and the public in December 2010 for their review and comment. Declaration of Mark Dasso ("Dasso Dec.") ¶ 11. Additionally, many reports and memoranda containing sampling results drafted by or for the Corps were shared with the Technical Advisory Group as the Corps received the results. *Id.*

The Corps attempted to negotiate a funding agreement with the Tribe in 2013, but was unsuccessful. Dasso Dec. ¶ 12. The Corps issued a Funding Opportunity Announcement for the Bradford Island CERCLA Project in which the Corps announced its intention "to award up to four cooperative agreements for Columbia River Treaty Tribes to work on issues associated with the protection of Tribal Treaty rights, Tribal trust resources, and archaeological resources of religious or cultural importance to the Tribes during the execution of the Bradford Island [CERLCA] Project." *Id.,* at Ex. 3, 1. The Yakama Nation was one of the applicants eligible for such an agreement, and the Tribe submitted an application on July 11, 2013. *Id.* The Corps sought clarification on the application on September 18, 2013, and again on November 8, 2013. *Id.* The Corps received a response to its requests for clarification on December 16, 2013, but the Tribe declined to further clarify its funding application. *Id.* No agreement was reached.

To facilitate the participation of interested parties in the Bradford Island cleanup, in 2005, the Corps convened a Technical Advisory Group, which is comprised of federal and state agencies, and tribes. *Id.* at ¶ 11. The Advisory Group includes U.S. Fish & Wildlife Service, NOAA Fisheries, Oregon Department of Environmental Quality, Oregon Department of Fish & Wildlife, Oregon Department of Human Services, and the Washington State Department of Ecology. *Id.* The tribes include the Yakama Nation, Warm Springs Tribe, Cowlitz Tribe, the Chinook Nation, the Nez Perce Tribe, and the Confederated Tribes of the Umatilla Reservation. *Id.* All of the agencies and tribes are invited to participate in regularly scheduled Advisory Group meetings and given the opportunity

to review and provide detailed comments on all technical work completed for the Bradford Island project. *Id.* The Corps then evaluates each comment and will address the comments as appropriate. *Id.* The Tribe has been a member of the Advisory Group since 2005. *Id.*

IV. STANDARD OF REVIEW

To succeed on a motion for summary judgment, the party with the burden of persuasion at trial must establish beyond controversy every essential element of its claim. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). An essential element of a party's claim to recover response costs under CERCLA section 107(a)(4) is to prove that those costs were incurred in conducting "removal or remedial action" in response to the release or threatened release of hazardous substances. 42 U.S.C. § 9607(a)(4)(A).

V. ARGUMENT

A. The Tribe is not entitled to recover "oversight" costs, because it has no oversight authority and is not the lead agency with respect to response actions at the Bradford Island site.

CERCLA section 107(a)(4)(A) creates a cause of action for recovery of response costs by tribal governments so long as such costs constitute "costs of removal or remedial action" and were incurred "not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). The Tribe's claim to recover oversight costs does not meet either of the statutory requirements.

First, the Tribe admits that it is not an owner of the Bradford Island site and has no authority to require any party to implement a CERCLA response action at the site. Exh. A (Plaintiff's Response to the United States' First Set of Requests for Admission, Interrogatories , and Requests for Production) ¶¶ 1, 3. The Tribe has no authority under CERCLA to conduct oversight of the response actions being conducted by the Corps. Absent such authority to conduct oversight, any alleged oversight activities by the Tribe do not constitute removal or response actions under CERCLA.

Second, absent independent oversight authority,[1] the NCP authorizes only the "lead agency" to provide oversight of response actions at a CERCLA site. 40 C.F.R. § 300.400. The Corps is the lead agency at the Site pursuant to the NCP, and the Tribe agrees. *See* Exh. A ¶4. "*Lead agency* means the agency that provides the OSC/RPM [on-site coordinator/remedial project manager] to plan and implement response actions under the NCP." 40 C.F.R. § 300.5. "In the case of a release of a hazardous substance, pollutant, or contaminant, where the release is on, or the sole source of the release is from, any facility or vessel under the jurisdiction, custody, or control of Department of Defense (DOD) . . . , then DOD . . . will be the lead agency." *Id.* The Bradford Island site is under the jurisdiction and control of the Corps, which is a component of DOD, *see* Complaint ¶ 5, and which has provided the remedial project manager for the facility. Dasso Dec. ¶ 2. Any alleged oversight costs incurred by the Tribe in this case are, by definition, inconsistent with the NCP and, therefore, not recoverable under CERCLA. *See* 42 U.S.C. § 9607(a)(4)(A).

The bulk of the Tribe's claimed expenses are for activities that it admits are "oversight" of the removal and remedial actions that have been and continue to be undertaken by the Corps. In its Complaint, the Tribe alleged that it was entitled to costs for "oversight of the response actions taken by the Defendants." Complaint ¶ 33. When asked in discovery to identify its oversight actions, the Tribe responded: "The Yakama Nation's oversight actions at the Site include *all* administrative, technical and legal services incurred by the Yakama Nation or agents or contractors for the Yakama Nation in reviewing and commenting on proposed actions at the Site, participation in the Technical Assistance Group, evaluating study results, oversight of the EE/CA, remedial investigation and remedial action, and cost recovery efforts." Exh. A ¶ 10 (emphasis added). The Tribe elaborated that it "has engaged in all of these activities at the Site, as discussed further in response to Interrogatory 11, below, and those answers are incorporated herein." *Id.* In its answer to

[1] EPA, for example, has independent oversight authority over federal facilities pursuant to 42 U.S.C. § 9621(e).

Interrogatory 11, the Tribe described in greater detail the activities that were identified as oversight costs in its answer to Interrogatory 10.

In support of its motion for summary judgment, the Tribe offers an affidavit that describes its activities in terms that are substantively identical to the description contained in its answers to interrogatories. *See* Affidavit of Rose Longoria in Support of Plaintiff's Motion for Summary Judgment (Dkt. 21-2) ¶¶ 7 - 14. The only significant difference between Ms. Longoria's affidavit and the Tribe's answers to interrogatories, which Ms. Longoria also signed, is that the affidavit no longer characterizes the Tribe's response actions as "oversight" actions. It is unclear whether this difference represents a conscious shift in the Tribe's position on the nature of its costs. Regardless, any change in the Tribe's position cannot prevent entry of summary judgment denying the Tribe's claim for those costs that it previously admitted are oversight costs. A party cannot create an issue of fact by a declaration contradicting its earlier sworn statement.[2] *Van Asdale v. Int'l Game Tech.,* 577 F.3d 989, 998 (9th Cir. 2009); *see also Cleveland v. Policy Mgmt. Sys. Corp,.* 526 U.S. 795, 806 (1999) (recognizing, without endorsing, "sham affidavit" holdings in every circuit). This principle applies whether the previous statement involved is a purely "factual" contradiction or a "legal conclusion." *See Cleveland,* 526 U.S. at 807.

Accordingly, the Court should deny the Tribe's motion for summary judgment and grant the United States' cross-motion for summary judgment with respect to all costs that the Tribe has identified as oversight costs.

[2] Ms. Longoria signed the answers to interrogatories on behalf of the Tribe. Interrogatory answers are provided under oath. Fed. R. Civ. P. 33(b)(3).

B. The Tribe's efforts to obtain funding from the Corps do not qualify as CERCLA removal or remedial actions.

An Indian tribe may only recover the "costs of removal or remedial action." 42 U.S.C. § 9607(a)(4)(A). CERCLA defines "removal" and "remedial action" *Id.* § 9601(23) & (24). Those definitions include actions to prevent, minimize, and clean up releases of hazardous substances into the environment in order to protect public health or welfare or the environment. Nothing in those definitions suggests the terms encompass efforts by a governmental entity to obtain funds to conduct its activities, and the United States is not aware of any cases that have held to the contrary. Accordingly, the cost to the government of raising funds – whether through taxation, issuing bonds, seeking grants, or otherwise – is not a recoverable response cost.[3] Here, the Tribe negotiated unsuccessfully with the Corps to obtain funding under a cooperative agreement. Dasso Dec. ¶ 12. The cost of those negotiations and other efforts by the Tribe to obtain funding is not recoverable under CERCLA.

C. The Tribe may not recover costs for adopting its regulation prohibiting fishing in the vicinity of Bradford Island.

The Tribe claims that all of the activities for which it claims costs were undertaken to "mitigate damage to the public health or welfare." Pl. Mem. at 15-16. The Tribe's "management and closure of fishing platforms near the Site," *id.*, is the kind of action that could qualify as a removal action, depending on the circumstances, but the Tribe cannot recover costs for its actions here because the costs were not incurred in response to the release of hazardous substances at the Bradford Island site.

CERCLA defines "removal" to include "such actions as may be *necessary* to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed

[3] Costs incurred in taking enforcement activities against a responsible party, which qualify as a response action and may result in the receipt of funds, are recoverable under CERCLA. Negotiations to obtain grants from a lead agency are not an enforcement activity.

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. 42 U.S.C. § 9601(23) (emphasis added). In determining whether a removal action is "necessary," a court should focus "on whether there is a threat to human health or the environment and whether the response action is addressed to that threat." *Cf. Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 872 (9th Cir. 2001) (interpreting "necessary costs of response" under 42 U.S.C. § 9607(a)(4)(B)). Costs of response actions that go beyond what is necessary to address the environmental hazard or that are undertaken for other reasons are not recoverable. *See, e.g., Regional Airport Authority of Louisville v. LFG, LLC,* 460 F.3d 697, 705-06 (6th Cir.2006) (("If a party would have incurred identical costs in the absence of any threat, then the presence of the threat cannot be said to have "cause[d] the incurrence of response costs.") (quoting 42 U.S.C. § 9607(a)(4)).

The Tribe has failed to establish beyond controversy that its fishing regulation was adopted to address a threat to the public health caused by hazardous substances at Bradford Island and not for other reasons. The Tribe adopted is regulation on June 1, 2012. Affidavit of Steven S. Parker (Dkt. 21-3) ¶ 14. The regulation was adopted in response to a meeting with the Corps on May, 18, 2012, which was itself precipitated by the construction of fishing platforms in the spring of 2012 "on the south side of Bradford Island near the fish ladder exit" and "other sites close to Bonneville Dam." *Id.* ¶ 13. At that meeting, the Tribe reports that the Corps' "major concerns" were:

> • Safety – basically the close proximity to the dam and the danger of falling in the water and being swept over the spillways or through the debris passage structures.
>
> • Contamination – Bradford Island is a known contaminated area that is a candidate to be a Superfund Site.
>
> • Security – Post 9/11 security includes fenced off areas that are restricted to unauthorized access.

• Proper Maintenance – especially the log boom protecting the WA-Shore fish ladder that has two platforms straddling the boom.

• Normal Concerns – litter, campfires, building materials, hygiene, etc.

Id., Exh. 5. The Tribe's own "Observations" focus entirely on safety, security, maintenance and normal concerns. *Id.* The Tribe's "Staff Comments" repeat that "Bradford Island is heavily contaminated," and note only that the island is "accessible only by boat or driving through restricted areas." *Id.* The Tribe's memo contains no discussion of the relationship, if any, between contamination at Bradford Island and fishing platforms used by members of the Tribe. *Id.*

The regulation adopted by the Tribe states that "Bradford Island is highly contaminated and Dam structures necessary for proper fish passage (e.g., log booms) require free access for maintenance and repairs." The regulation "prohibits Platform/h&l [hook and line] fishing on Bradford Island and over or inside any Dam structures outside 150 feet above Bonneville Dam." *Id.*, Exh. 6. While the prohibition effectively prevents interference with dam structures, it fails to address the potential threat to the public health allegedly caused by contamination at the Site, for several reasons.

First, according to investigations performed for the CERCLA project, the hazardous substances released at Bradford Island potentially affected resident fish species (e.g., bass, walleye, carp), but there is no evidence that conditions at the Site affect migratory fish species, including salmonids, because they spend very little time in the Bonneville forebay, which extends from the dam to 1.25 miles upstream. Dasso Dec. ¶ 8. For this reason the Oregon Health Authority and the Washington Department of Heath issued fish consumption advisories only with respect to resident species. *Id.* In contrast to the Tribe's regulation, the state advisories explicitly excluded migratory fish species. *Id.* Moreover, the state fish advisories were not limited to Bradford Island, but applied to the Columbia River from Bonneville Dam 150 miles upstream to McNary Dam. *Id.* The Tribe's prohibition only barred fishing within 150 *feet* upstream of the Bonneville Dam. Thus, the Tribe's

prohibition of fishing for any species near Bradford Island was broader than necessary to protect public health (by applying to migratory fish) and too narrow to protect public health (by applying to only a limited stretch of the river affected by contamination).

Second, no fishing occurs on the north side of Bradford Island. Boats are restricted from entering the waters north of the island (the "Boat Restricted Zone") because of safety hazards posed by the spillway of the Bonneville Dam, and no fishing platforms are located on the north side of the island because few fish populate the waters there. Dasso Dec. ¶9. The top of the Bradford Island fish ladder is located on the south side of the island. After exiting the ladder, migrating fish generally cross the navigation channel south of Bradford Island and continue upstream along the Oregon shoreline. *Id.* The median time migrating fish spend in the forebay near the dam is less than one hour. *Id.* ¶ 8. Accordingly, the Tribe's regulation does not appear tailored to address concerns about threats to public health arising from hazardous substances from the Bradford Island site.

Third, no new results of sampling for contamination at Bradford Island were presented to the Tribe at any time between its meeting with the Corps on May 18, 2012 and the adoption of the Tribe's regulation on June 1, 2012. All sampling data available at that time had previously been presented to the Tribe, yet the Tribe took no action to protect public health based on that data. Dasso Dec. ¶ 11. Instead, the Tribe closed fishing platforms on Bradford Island entirely "[a]s a result of this meeting" on May 18, 2012. Parker Aff. ¶ 13

The logical inference supported by the evidence is that the purpose of the Tribe's regulation was to prevent interference with dam structures, and that any protection of the public health was merely incidental. Because the Tribe did not adopt its regulation to respond to a release or threat of release of hazardous substances, and would have adopted the regulation regardless of such release, the cost of adopting the regulation is not recoverable under CERCLA. Based on the Tribe's own

evidence, the Court should enter summary judgment in favor of the United States on the Tribe's claim for costs alleged to have been incurred to protect public health. At the very least, the Court should deny the Tribe's motion for summary judgment because all reasonable inferences must be drawn in the opposing party's favor, both where the underlying facts are undisputed and where they are in controversy. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *McSherry v. City of Long Beach,* 584 F.3d 1129, 1135 (9th Cir. 2009).

D. The Tribe may not recover in this lawsuit response costs for which it has already been compensated.

The Tribe claims that it "incurred a total of $99,763.72 in costs in conducting actions for the Bradford Island Site between October 1, 2005 and September 30, 2014." Affidavit of Jeanna Hernandez (Dkt. 21-4) ¶ 19. The Tribe seeks to recover all of those costs. Pl. Mem. at 19. However, the Tribe, in its discovery responses, acknowledged that "monies from the BPA [Bonneville Power Administration] Grant Contract No. 00035071 and BPA Grant Contract No. 00038748, totaling $18,000, have been used to conduct response activities at the Bradford Island Site." Exh. A ¶18. The funding for those grants, which were primarily for participation in the Technical Advisory Group discussed above, was provided by the Corps through its Direct Funding Agreement with BPA. Longoria Aff. (Dkt. 21-2) ¶¶ 9, 10. The Tribe's cost claim does not appear to have been reduced by the amount of the grants it received.

While CERCLA provides mechanisms for parties to recoup their legitimate response costs from other parties for the actions that necessitated environmental remediation, it does not permit a plaintiff to effectively profit from its actions by collecting twice for the same response costs. "CERCLA expressly prohibits double recovery for response costs." *Boeing Co. v. Cascade Corp.,* 920 F. Supp. 1121, 1133 (D. Or. 1996). This prohibition applies to bar CERCLA recovery for costs already compensated "under any other Federal or State law." 42 U.S.C. § 9614(b). The grants to the

Tribe were made pursuant to Federal Law. *See* 16 U.S.C. § 839d-1; *Memorandum of Agreement between the Department of Energy acting by and through the Bonneville Power Administration and the Department of the Army, Direct Funding of Power Operations and Maintenance Costs at Corps Projects,* No. 98PB-10211 (Dec. 5, 1997).

Moreover, courts have applied equitable principles to bar double recovery in circumstances not covered by 42 U.S.C. § 9614(b), because CERCLA is a "reimbursement" statute that does not permit "recovering the same response costs twice." *Vine Street, LLC v. Keeling*, 460 F. Supp. 2d 728, 765 (E.D. Tex. 2006); *see also Western Prop. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 691 (9th Cir. 2004) (noting CERCLA reflects policy against double recovery). It permits the plaintiff to obtain reimbursement for costs that it has "incurred." Where, as here, the plaintiff has already received reimbursement for those costs from the United States, it cannot be said to have incurred those costs. *Basic Mgmt., Inc. v. United States*, 569 F. Supp. 2d 1106, 1119-20 (D. Nev. 2008) (holding that Plaintiffs have not "incurred," within the meaning of CERCLA, "the specific costs directly paid by or reimbursable by the insurer.").

Pursuant to 42 U.S.C. § 9614(b) and equitable principles, the United States is entitled to summary judgment on claims for response costs for which the Tribe has already received compensation.

VI. CONCLUSION

For the reasons discussed above, the Court should deny the Tribe's motion for summary judgment and should grant the United States' motion for summary judgment.

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