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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' REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants United States of America, the Department of the Army, and the U.S. Army Corps of Engineers (collectively, "United States") filed a motion for summary judgment (Dkt. 27) 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 under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75. The Court should grant the United States' motion because:

1. The Tribe does not have authority under CERCLA or its own laws to conduct "oversight" of the Corps' removal and remedial actions at the Bradford Island Site and, therefore, the Tribe's alleged "oversight" costs are not recoverable;

2. Negotiations to obtain a grant of funds from the Corps are not removal actions for which costs are recoverable under CERCLA; and

3. A regulation adopted by the Tribe to prohibit fishing within 150 feet upstream of the Bonneville Dam does not qualify as a CERCLA removal action because it was designed to protect Tribe members from physical hazards inherent in the operation of Bonneville Dam and not to protect members against exposure to hazardous substances from the Bradford Island Site.

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.

The Tribe confirms that it seeks to recover costs that it claims were incurred in conducting "oversight" of the CERCLA response actions that were undertaken by the U.S. Army Corps of Engineers ("Corps"), but fails to demonstrate that it had any legal authority to conduct such oversight. Instead, the Tribe avoids the issue of its authority by mischaracterizing the United States' argument. Contrary to the Tribe's characterization, the United States is *not* arguing that the Tribe's oversight activities must be authorized by the National Contingency Plan ("NCP") or that oversight costs cannot qualify as response costs that are recoverable under CERCLA. Instead, the Tribe may not recover oversight costs in this case because it has no legal authority – under CERCLA or the Tribe's own laws – to conduct oversight of the Corps' response actions.

The Tribe brings this lawsuit pursuant to CERCLA section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), which, among other things, provides that specified responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government, or a State or an

Indian tribe not inconsistent with the national contingency plan." Although section 107(a)(4)(A) creates a claim for relief under which Indian tribes may recover costs of removal or remedial actions, it does not give tribes the legal authority to take such actions. That authority must be found elsewhere.

A tribe may recover costs for removal or remedial actions taken pursuant to authority delegated to it by the President under CERCLA or pursuant to its own authority under its tribal code. In the absence of oversight authority, any oversight activity conducted by the Tribe does not satisfy CERCLA's definition of "remove" or "removal," which includes "the *cleanup* or removal of released hazardous substances, . . . , 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." 42 U.S.C. § 9601(23) (emphasis added). While the definition of "removal" encompasses a broad range of activities, such activities must be undertaken by an entity that possesses authority to effectuate the cleanup of a site or the protection of the public or the environment against releases from the site. Because the Tribe has no oversight authority, any costs incurred in that activity do not qualify as "costs of removal," and are not recoverable under CERCLA section 107(a).

The Yakama Nation does not have authority under CERCLA to conduct oversight of removal or remedial actions at the Bradford Island Site. CERCLA authorizes the President to conduct removal or remedial actions relating to hazardous substances. 42 U.S.C. § 9604(a)(1). The President has delegated his response authorities under CERCLA to EPA and, with respect to the Bradford Island Site, to the Department of Defense. *See* Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987). The Corps is the lead agency responsible for conducting response actions at Bradford Island. An Indian tribe has authority to perform response actions on behalf of the

President only if the President and the Tribe enter into a contract or cooperative to carry out such actions. *Id.* § 9604(d)(1)(A). No such contract or cooperative agreement has been entered into with the Yakama Nation. Accordingly, the Tribe has no authority under CERCLA to oversee removal or remedial actions by the Corps at Bradford Island.

Nor does the Tribe have authority under its own laws to conduct oversight of response actions at the Bradford Island Site. Bradford Island is located in Oregon; it does not lie within the boundaries of the Yakama Nation. The Tribe's authority under its own laws as to non-Tribal members does not extend to Bradford Island. *See, e.g., Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) ("A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee *lands within its reservation* when that conduct threatens or has some direct effect on the health and welfare of the tribe." (internal quotes and citations omitted; emphasis added)). Moreover, as the Tribe has admitted, "the Yakama Nation does not have legal authority to issue an order requiring any other party to implement a CERCLA response action at the Site." Def. Br., Ex. 1 (Dkt. 27-1) ¶ 3. The Tribe has no management authority to order or direct cleanup actions by the Corps, and, therefore, any costs it incurs are not oversight costs that are recoverable under CERCLA.

Because Bradford Island lies in Oregon, the State may exercise oversight of removal or remedial actions under authority of Oregon law. Here, the Oregon Department of Environmental Quality "has been working with the US Army Corps of Engineers under a voluntary cleanup agreement, to evaluate and *oversee* cleanup of various contamination sources on the island." http://www.deq.state.or.us/lq/cu/nwr/bradford/background.htm (emphasis added). If the Island were located in the Yakama Nation, Oregon would have no oversight authority. *See, e.g., Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1. (1998) (Under principles of federal Indian law, States generally lack civil regulatory jurisdiction within Indian country as defined in 18 U.S.C. §

1151). Just as the State of Oregon could not recover oversight costs for monitoring removal actions within the Yakama Nation, the Tribe may not recover oversight costs for monitoring the Bradford Island Site in Oregon.

The cases cited by the Tribe do not support its argument that a governmental entity without legal cleanup authority may recover oversight costs. To the contrary, in both cases the entities recovering oversight costs plainly had their own cleanup authorities. In *Cal. ex rel. Cal.Dep't of Toxic Servs. v. Neville Chem. Co.*, the State of California brought an action under CERCLA to recover costs associated with the cleanup of hazardous substances at a chemical manufacturing plant in California. 213 F. Supp. 2d 1134, 1136 (C.D. Cal. 2002) *aff'd sub nom. Cal. ex rel. Calif. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661 (9th Cir. 2004). The court held that the state could recover its oversight costs. *Id.* at 1137. In *United States v. Chromalloy Am. Corp.*, the court held that EPA's oversight costs were recoverable response costs under CERCLA. 158 F.3d 345, 349 (5th Cir. 1998). EPA's authority under CERCLA was not contested. Indeed, the responsible party had entered into a consent decree under which it agreed to pay EPA's oversight costs, *id.* at 348, but challenged payment of those costs on other grounds.

The Tribe incorrectly states that the United States' opening brief "sets forth the proposition that the Yakama Nation's oversight costs are not recoverable absent explicit authority in the NCP." Pl. Reply (Dkt. 30) at 3. The United States simply pointed out that the NCP does not provide oversight authority to the Tribe, but "authorizes only the 'lead agency' to provide oversight of response actions." Def. Resp. (Dkt. 27) at 8. The NCP contains no authorization for other entities to conduct oversight, but does not preclude those entities from conducting oversight pursuant to "independent oversight authority." *Id.* As discussed above, the Tribe has no independent oversight authority at the Bradford Island Site.

The Tribe's claim that it is "a trustee for natural resources that it co-manages in the Columbia River" does not give it authority to recover costs related to oversight of the Corps' response actions, despite the Tribe's claim to the contrary. Pl. Reply at 6. CERCLA gives natural resource trustees the right to recover "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(4)(C) and (f). To the extent the Tribe could bring such a cause of action, it would be separate and distinct from the cause of action to recover costs of removal or remedial action provided by 42 U.S.C. § 9607(a)(4)(A). Moreover, the natural resource damages provision supplies no authority to the Tribe to exercise oversight of the Corps' response actions. The other regulatory documents cited by the Tribe are likewise unavailing. The EPA guidance documents cited by the Tribe discuss agency coordination; they do not support the Tribe's claim for oversight costs. *See CERCLA Coordination with Natural Resource Trustees* at 2, OSWER Directive No. 9200-4-22A (July 31, 1997) (recommending that EPA and natural resource trustees share information); *id.* at 3 ("EPA and the Trustees have different but complementary roles under CERCLA."); *The Role of Natural Resource Trustees in the Superfund Process* at 9, OSWER Publ. No. 9345.0-05I (March 1992) ("Coordination involves a two-way communication between EPA and the trustee."). The NCP provides only that a natural resource trustee may "[r]equest[] that the lead agency remove, or arrange for the removal of, or provide for remedial action with respect to, any oil or hazardous substances from a contaminated medium." 40 C.F.R. § 300.615 (e)(2). The NCP does not give the trustee authority to conduct oversight of the lead agency's response actions.

Because the Tribe has no oversight authority, any of its "oversight" activities (e.g., reviewing and commenting on the remedial actions undertaken by the Corps) are no different than similar activities by entities that have an interest in, but no authority over, cleanup of the site (e.g., neighboring landowners, citizen groups). Those activities are governed by the public participation

requirements of the NCP. *See, e.g.,* 40 C.F.R. § 300.415(n) (Community relations in removal actions); *id.* § 300.430(c) (Community relations during remedial investigation and feasibility study). Review and comment on response actions are not themselves response actions, and do not give the reviewer/commenter a claim for response costs in these circumstances.

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

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

The Corps, acting in its capacity as the lead cleanup agency under the NCP, offered the Tribe an opportunity to enter into a cooperative agreement under which the Tribe would receive funding to review the Corps' remedial investigation report and to participate in meetings discussing the remedial investigation. Dasso Dec. (Dkt. 28), Ex. 3 at p. 2. Such reviews and meetings could constitute removal actions to the extent that the Tribe had authority to engage in removal actions at the Site. *See* Section A, *supra.* However, the Tribe seeks to recover the cost of negotiating to obtain a grant for activities that, in this case, were not removal actions. Those costs are not recoverable under CERCLA.

Even if the grant of monies from the Corps were for the purpose of funding removal actions by the Tribe, the Tribe cites no authority for its contention that expenses related to attempts to raise funds qualify as response costs. The Tribe implies that such that expenses of negotiating for funding should be treated as indirect costs, but cites no authority for that proposition. Moreover, the Tribe's own accounting does not treat those expenses as indirect costs.

In addition, allowing the Tribe to recover its funding expenses would be inequitable and establish a perverse incentive. The Tribe applied for funding from the Corps, but objected to providing additional information that the Corps requested to complete the application. Dasso Dec. ¶ 12, Ex. 3 at pp. 16-17. Because the Tribe did not provide additional information as requested, no

contract was entered. The Tribe should not be awarded expenses for an effort that it failed to complete.

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

The Tribe has the burden of establishing its claim, one statutorily prescribed element of which is that the Tribe has incurred "costs of removal." 42 U.S.C. § 9607(a)(4)(A). "Removal" is defined to include certain kinds of actions that "may be necessary." *Id.* § 9601(23). Neither the United States nor the Tribe has been able to identify a judicial decision that interprets "may be necessary" as used by CERCLA. The United States agrees with the Tribe that "may be necessary" establishes a different standard than the phrase "are necessary." Pl. Reply at 10. Nevertheless, the Tribe does not elucidate the applicable standard or even argue that its activities at the Site satisfy any particular standard.

Ordinarily, "may" is "an auxiliary verb qualifying the meaning of another verb by expressing ability, . . . contingency or liability, or possibility or probability." *United States v. Lexington Mill & Elevator Co.,* 232 U.S. 399, 411 (1914) (internal quotes and citation omitted). Thus the phrase "may be necessary," as used here, includes actions which, when taken, appeared to be necessary to address hazardous substances, even if subsequent events show that the action was ultimately unnecessary. The phrase does not, however, include actions that were taken for reasons other than to address hazardous substances.

In the absence of case law interpreting "may be necessary" as used in section 101(23), the United States cited cases that have interpreted "necessary costs of response" under section 107(a)(4)(B), which applies to cost recovery claims by persons other than the United States, States, and Indian tribes. Pl. Br. (Dkt. 21) at 11. Those cases held that "necessary" requires a causal linkage between the costs claimed and the actions taken and hazardous substances at the subject site. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 872 (9th Cir. 2001); *Regional Airport Auth'y of*

Louisville v. LFG, LLC, 460 F.3d 697, 705-06 (6th Cir. 2006). Contrary to the Tribe's contention, Pl. Br. at 11, those cases do not stand for the proposition that the Tribe need not prove that its purported removal actions satisfy the "may be necessary" requirement established by section 101(23). Those cases do suggest, however, that "may be necessary" in section 101(23) requires a proof of a causal linkage between the action taken and hazardous substances at the Bradford Island Site.

The United States' motion for summary judgment should be granted because the evidence contemporary with the Tribe's adoption of its regulation demonstrates that the regulation was tailored to prohibit newly erected fishing platforms from interfering with operations of the Dam and jeopardizing physical safety, and was not tailored to protecting the public from consuming potentially contaminated fish. As explained in more detail in the United States' opening brief (Dkt. 27), the evidence shows:

> The Tribe's regulation was adopted on June 1, 2012, after a meeting with the Corps on May 18, 2012, identified safety, security and maintenance issues created by fishing platforms that were built in the spring of 2012.
>
> Contamination of fish was known to be an issue for six years before June 2012.
>
> No new information about contamination of fish became available for several months preceding June 2012.
>
> In 2012, prohibition of fishing for migratory fish (e.g., salmon) near Bradford Island was known to be unnecessary to protect public health.
>
> Prohibition of fishing for resident fish within 150 feet of the Dam was known to be inadequate to protect public health, because contaminated sediments extend further upstream. Resident fish with elevated PCB levels were collected more than 150 feet from the Dam structures and Bradford Island.

This evidence supports a finding that Tribe adopted its regulation to prevent interference with Dam operations and to protect the physical safety of Tribe members rather than to respond to hazardous substances at the Bradford Island Site. Other evidence contemporary with the adoption of the regulation suggests that protection of the public health was merely incidental to prohibiting

tribal members from fishing within 150 feet of the Dam. Mr. Parker's affidavit (Dkt. 21-3) does not provide grounds for ignoring the evidence that the real purpose of the regulation was to protect the public from hazards presented by the dam, and not to protect the public from possible exposure to contamination.[1] 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.

CONCLUSION

For the reasons discussed above, the Court should grant the United States' cross-motion for summary judgment.

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[1] At most, Mr. Parker's interpretation of circumstances leading up to the Tribe's adoption of its regulation creates a fact issue that precludes summary judgment in favor of either party. It does not extinguish fact issues created by the Tribe's own documents and circumstantial evidence. *See Cornwell v. Electra Central Credit Union*, 439 F.3d 1018, 1029-30 (9th Cir. 2006) (circumstantial evidence alone may create a genuine issue of material fact sufficient to defeat a motion for summary judgment.).