IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiff,

v.

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

Defendants.

3:14-cv-01963-PK

FINDINGS AND RECOMMENDATION

PAPAK, Magistrate Judge:

Plaintiff Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation" or "the Tribe") filed the instant action against Defendants United States Army Corps of Engineers ("ACE") and the United States Department of the Army (collectively, "Defendants"). Yakama Nation's Complaint (#1) contains two claims: (1) a cost recovery claim under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and (2) a claim for declaratory judgment establishing Defendants' liability for the Tribe's future CERCLA response costs. Now before the court are the parties' Cross-Motions for Summary Judgment. Yakama Nation moves the court for summary judgment in its favor on Defendants' CERCLA liability for costs incurred by the Tribe in relation to the Bradford Island Superfund Site (the "Bradford Island cleanup" or the "Site"). Defendants move the court for summary judgment in their favor regarding their CERCLA liability for the same costs. For the reasons provided below, Yakama

Nation's Motion for Summary Judgment (#21) should be granted in part and denied in part, and Defendants' Motion for Summary Judgment (#27) should be denied.

LEGAL STANDARDS

I. Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party taking the position that a material fact either "cannot be or is genuinely disputed" must support that position either by citation to specific evidence of record "including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," by showing that the evidence of record does not establish either the presence or absence of such a dispute, or by showing that an opposing party is unable to produce sufficient admissible evidence to establish the presence or absence of such a dispute. *Id.* 56(c). The substantive law governing a claim or defense determines whether a fact is material. *See Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998).

Summary judgment is not proper if material factual issues exist for trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 318, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied,* 116 S. Ct. 1261 (1996). In evaluating a motion for summary judgment, the district courts of the United States must draw all reasonable inferences in favor of the nonmoving party, and may neither make credibility determinations nor perform any weighing of the evidence. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000).

On cross-motions for summary judgment, the court must consider each motion separately to determine whether either party has met its burden with the facts construed in the light most favorable to the other. *See* Fed. R. Civ. P. 56; *see also, e.g., Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). A court may not grant summary judgment where the court finds unresolved issues of material fact, even where the parties allege the absence of any material disputed facts. *See* Fed. R. Civ. P. 56.

II. CERCLA Cost Recovery Standard

"CERCLA 'generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed.'" *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001) (quoting *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1357 (9th Cir. 1990)). The statute, which is also known as "Superfund," permits the recovery of "all costs of removal or remedial action incurred by [an] . . . Indian tribe not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). The national contingency plan ("NCP") is a set of regulations that dictates the procedures for preparing for and responding to releases of hazardous substances. *See id.* § 9605; 40 C.F.R. §300.1.

CERCLA defines removal action as:

> 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.

42 U.S.C. § 9601(23).

CERCLA defines remedial action as:

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id. § 9601(24). The costs of removal and remedial actions are collectively termed "response costs." *Id.* § 9601(25).

Once a tribe shows that it has incurred response costs as a result of a release or threatened release of hazardous substances, the burden shifts to the defendants to show that the response action for which the costs were incurred was inconsistent with the NCP. *See U.S. v. Chapman*, 146 F.3d 1166, 1170 (9th Cir. 1998). Where a Native American 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 Dep't of Transp. v. Wash. Nat. Gas Co., Pacificorp*, 59 F.3d 793, 799 (9th Cir. 1995)).

FACTUAL BACKGROUND[1]

Yakama Nation's CERCLA claim arises from environmental cleanup activities at the Bradford Island Superfund Site. Bradford Island is part of the Bonneville Dam complex, which is located at River Mile 146.1 on the Columbia River. Between 1942 and 1982 Defendants used the site for disposing waste, disassembling electrical equipment, sandblasting, painting, and target practicing with small arms munitions. Defendants' activities resulted in substantial environmental pollution and degradation at the Site and surrounding areas of the Columbia

[1] The court views the facts in accord with the legal standard governing motions for summary judgment under Federal Rule of Civil Procedure 56.

River. Indeed, Defendants "disposed" of many of their pollutants by dumping them directly into the river.

Defendants have subsequently attempted to remedy their pollution of Bradford Island by, among other things, removing contaminated soil and sediment from the Site and surrounding areas of the Columbia River. However, much of the pollution remains, and as a result, the Washington and Oregon state health departments have issued warnings against eating resident fish from the area near Bradford Island.

Yakama Nation is a federally recognized Native American tribe and the legal successor in interest to the Native American signatories to the Treaty with the Yakamas of June 9, 1855 (12 Stat. 951) (the "Treaty"). Under Article III of the Treaty, Yakama Nation reserved the right to harvest fish at all "usual and accustomed places" on the Columbia River, including fishing sites at and near Bradford Island. Parker Aff. ¶ 4 (#21-3). Most of these fishing sites are regulated under tribal law. Yakama Nation is also a signatory to the 2008-2017 Management Agreement, which is an order of this court that governs the management of fisheries in the Columbia Basin. *United States v. Oregon*, 3:68-cv-00513-KI (#2545, #2546) (D. Or. Aug. 11, 2008). The court has previously recognized Yakama Nation as a co-manager of Columbia Basin fisheries. *See id.*

Beginning in December of 2005 and continuing through today, Yakama Nation has undertaken numerous efforts related to the Bradford Island cleanup. For the purposes of the present motions, the parties agree that the Tribe's efforts generally fall into one of three categories: (1) oversight activities, (2) funding efforts, and (3) regulatory activities. Yakama Nation's oversight activities include, *inter alia*, reviewing and commenting on proposed actions at the Site, participating in a Technical Assistance Group, evaluating study results, and engaging in discussions concerning a draft Engineering Evaluation and Cost Analysis for Defendants'

removal of contaminated sediment. *See* Defs.' Resp. Ex. A, at ¶ 10 (#25-1). Yakama Nation's funding efforts consisted of numerous unsuccessful attempts to obtain funds from state and federal agencies, including defendant ACE, for the Tribe's participation in the Bradford Island Cleanup. *See* Longoria Aff. ¶¶ 8-14, 16 (#21-2).

Yakama Nation's regulatory activities concern the Tribe's enactment of a regulation prohibiting platform and hook and line fishing on Bradford Island (the "fishing ordinance" or the "ordinance"). The parties dispute what actually caused the tribe to enact the fishing ordinance. However, it is undisputed that the ordinance was the "result of" a meeting between the Tribe, ACE, and Bonneville Dam staff in which the parties discussed "safety concerns regarding the proximity of the Yakama fishing platforms both to the Bonneville Dam forebay and to the area near the Bradford Island CERCLA." Parker Aff. ¶¶ 13-14 (#21-3).

Following the meeting, Yakama Nation Fisheries recommended that 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 (internal quotation marks omitted). The Committee then enacted the fishing ordinance "based on findings that 'Bradford Island is highly contaminated and Dam structures for proper fish passage (e.g., log booms) require free access for maintenance and repairs.'" *Id.* ¶ 14.

PROCEDURAL BACKGROUND

Yakama Nation filed its Motion for Summary Judgment (#21) on July 25, 2015. Defendants filed their Response to Yakama Nation's Motion for Summary Judgment (#25) on September 8, 2015. Defendants also filed their Cross-Motion for Summary Judgment (#27) that

same day. Yakama Nation filed its Response to Defendants' Cross-Motion for Summary Judgment and Reply in support of its own Motion for Summary Judgment (#30) on September 22, 2015. Defendants filed their Reply in support of their Cross-Motion for Summary Judgment (#31) on October 6, 2015. The parties presented oral argument on their motions on October 21, 2015. This matter is fully submitted and prepared for decision.

DISCUSSION

Because the substantive elements of a claim or defense determine which facts are material for the purposes of summary judgment, *see Suever v. Connell*, 579 F.3d 1047, 1056 (9th Cir. 2009), I begin with an overview of the elements of a CERCLA cost recovery claim. To establish a prima facie cost recovery claim under CERCLA, Yakama Nation must prove the following four elements: (1) Defendants are within one of the four classes of persons subject to liability under 42 U.S.C. § 9607(a), (2) Yakama Nation's costs were "response costs" caused by the release or threatened release of a hazardous substance, (3) Bradford Island qualifies as a "facility" under § 9601(9), and (4) Yakama Nation's response actions were "not inconsistent with the NCP." *See* 42 U.S.C. § 9607(a); *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074 (9th Cir. 2006). The Tribe's costs must also be uncompensated, as CERCLA does not permit double recovery. *See* 42 U.S.C. § 9614; *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1190 (9th Cir. 2000).

The parties do not dispute that Yakama Nation has established the first and third elements of its cost recovery claim. Moreover, the parties stipulated at oral argument that double recovery is not an issue in this matter.[2] Thus, the parties' Cross-Motions for Summary Judgment turn on

[2] Defendants initially argued that Yakama Nation had already been partially compensated for its costs and was therefore precluded from recovering the full amount of its alleged damages. In response, Yakama Nation provided evidence that it had not been compensated for the costs it

whether Yakama Nation's asserted costs were response costs caused by the release or threatened release of a hazardous substance and whether the Tribe's response actions were "not inconsistent with the NCP." Defendants posit three reasons why Yakama Nation cannot establish those elements of its CERCLA cost recovery claim. I discuss each argument, in turn, below.

I. Oversight Costs

Defendants first argue that Yakama Nation's costs are neither response costs nor consistent with the NCP to the extent they were incurred as a result of Yakama Nation's "oversight" of ACE's response actions at Bradford Island. Although Defendants concede that oversight costs are generally recoverable under CERCLA, they maintain that such costs are recoverable only if the claimant had express legal authority to undertake the oversight activities. Defendants argue that because Yakama Nation lacked oversight authority with respect to the Bradford Island cleanup, it is not entitled to reimbursement of its oversight costs. I disagree.

Yakama Nation was not required to have express authority to engage in oversight activities with respect to the Bradford Island cleanup. Defendants cite no legal authority in support of their argument to the contrary. The text of CERCLA does not contain an authority requirement, and I am unable to find a single case construing the statute as containing such a requirement. *Cf.* 40 C.F.R. § 300.700(a) ("[A]ny person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant."); *see also Fireman's Fund*, 302 F.3d at 949 ("[W]here '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

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seeks to recover in this action. In light of that evidence, Defendants conceded at oral argument that double recovery is no longer an issue in this case.

plaintiff's response action was arbitrary and capricious." (second alteration in original) (quoting *Wash. State Dept. of Transp.*, 59 F.3d at 799).

Indeed, the policy underpinning CERCLA strongly suggests the statue permits Yakama Nation to engage in oversight response actions with respect to the Bradford Island cleanup. CERCLA was enacted to "ensure the prompt and effective cleanup of waste disposal sites" and to "assure that parties responsible for hazardous substances [bear] the cost of remedying the conditions they created." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 968 (9th Cir. 2013) (alteration in original) (citation and internal quotation marks omitted)). To effectuate its underlying purpose, CERCLA makes polluters liable to Native American tribes for "all costs of removal or remedial action . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A).

Thus, Yakama Nation was not required to have express authority to engage in oversight activities in relation to the Bradford Island cleanup. Rather, the primary limitation on the Tribe's ability to recover its response costs is the requirement that its response actions not be "inconsistent with the [NCP]." 42 U.S.C. § 9607(a)(4)(A). Because "consistency with the NCP is presumed," Defendants are required to rebut the presumption by proving the Tribe's response actions were arbitrary and capricious. *Fireman's Fund Ins. Co*, 302 F.3d at 949 (internal quotation marks omitted) (quoting *Wash. State Dep't of Transp.*, 59 F.3d at 799). Defendants have failed to offer sufficient evidence to carry their burden. Therefore, Yakama Nation is entitled to summary judgment on Defendants' liability for the Tribe's oversight costs.

II. Funding Costs

Defendants further argue that Yakama Nation's costs are not response costs to the extent they were incurred as a result of the Tribe's negotiations to obtain funding for its role in the Bradford Island cleanup. I disagree.

The costs Yakama Nation incurred in seeking funding for its response activities are themselves response costs recoverable under CERCLA. CERCLA permits a tribe to recover "*all* costs of removal or remedial action." 42 U.S.C. § 9607 (emphasis added). "'All costs' include indirect costs such as administrative and other overhead costs incurred in managing the greater Superfund program." *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1250 (9th Cir. 2005) (citation omitted). Removal actions include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances" and "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).

It is undisputed that Yakama Nation engaged in numerous efforts to obtain funding for the Tribe's role in the Bradford Island cleanup. *See* Longoria Aff. ¶¶ 9-12, 15 (#21-2). Moreover, the funding efforts "were taken to monitor, assess and evaluate releases at the Site, and to prevent, minimize, and/or mitigate potential damage to the river environment and the health of Yakama Nation's enrolled members." *Id.* ¶¶ 9-12, 15. Yakama Nation was unable to obtain the funding it sought from ACE. *Id.* ¶ 15. Consequently, Yakama Nation's response activities during 2009 through 2011 were "severely limited due to a lack of adequate funding." *Id.* ¶¶ 11-12. Thereafter, Yakama Nation discovered that polychlorinated biphenyls levels in sediment and fish tissue collected in 2011—after ACE removed sediment from the Columbia

River as part of its cleanup efforts—where higher than PCB levels from samples collected in 2001, 2006, and 2007. *Id.* ¶ 13.

The environmental degradation following Yakama Nation's failed funding efforts and resulting inability to directly participate in the Bradford Island cleanup demonstrate that those efforts were removal actions, as the funding "may [have been] 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). Yakama Nation's funding efforts thus fall squarely within the definition of removal action. *See id.* §§ 9601(23), 9607(a)(4)(A); *see also United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 406 (W.D. Mo. 1985) ("[T]o the extent that the activities which were undertaken were useful and necessary to the formulation of the proposed remedy, the costs incurred in such activities might conceivably be recoverable as a part of the response costs for the remedy."), *modified*, 681 F. Supp. 1394 (W.D. Mo. 1988). Consequently, the costs of those efforts are recoverable under CERCLA. *See* 42 U.S.C. § 9607

Indeed, the United States' own CERCLA cost methodology demonstrates that the costs associated with the Tribe's funding efforts are recoverable under the statute. In 2000, the EPA adopted a new methodology for determining recoverable costs under CERCLA (the "full cost methodology"). *See* 65 Fed. Reg. at 35342. Under the full cost methodology, the EPA considers "budgeting functions" to be recoverable costs under CERCLA. *See id.*; *see also W.R. Grace & Co.*, 429 F.3d at 1250 (approving of the EPA's use the full cost methodology). Funding efforts qualify as a budgeting function.

The EPA is the primary agency charged with implementing and enforcing CERCLA. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). Consequently, EPA interpretations

of CERCLA provisions are entitled to judicial deference. *See W.R. Grace & Co.*, 429 F.3d at 1243 (granting deference to the EPA's characterization of response actions); *see also Colorado v. Sunoco, Inc.*, 337 F.3d 1233, 1243 (10th Cir. 2003); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991); *Ashland Oil, Inc. v. Sonford Products Corp.*, 810 F. Supp. 1057, 1060 (D. Minn. 1993). Therefore, this court owes "considerable deference, albeit not necessarily full *Chevron* deference," to the EPA rule stating that budgeting functions are recoverable costs under CERCLA. *W.R. Grace & Co.*, 429 F.3d at 1227.

In sum, Yakama Nation's funding efforts fall squarely within the definition of removal action, the costs of which are clearly recoverable under the text of CERCLA. Moreover, the Tribe's funding efforts also qualify as a budgeting function, the costs of which are also recoverable under CERCLA pursuant to the United States' own methodology. Therefore, Yakama Nation is entitled to summary judgment on Defendants' liability for the costs associated with the Tribe's funding efforts.

III. Costs Associated with Adoption of Fishing Regulation

As a final point of contention, Defendants argue that Yakama Nation's costs of adopting the regulation prohibiting fishing in the vicinity of Bradford Island are not recoverable. According to Defendants, those costs are not response costs because contamination emanating from Bradford Island was not the cause of Yakama Nation's decision to adopt the ordinance. In Defendants' view, Yakama Nation would have adopted the regulation regardless of the release of hazardous substances from Bradford Island.

I find there is a genuine issue of material fact regarding the cause of Yakama Nation's adoption of the fishing ordinance, and as a result, summary judgment is not appropriate for either party on this issue. The express language of CERCLA's cost recovery provision imposes a

causation requirement. *See* 42 U.S.C. § 9607(a)(4); *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1183 (9th Cir. 2000). The "but-for" standard of causation is the applicable standard in single generator[3] CERCLA cases such as the present case. *See Boeing*, 207 F.3d at 1182-86. A reasonable trier of fact could find—but would not be required to find—that but for Defendants' release of hazardous substances, Yakama Nation still would have enacted the fishing ordinance.

As stated above, the undisputed evidence suggests there were multiple reasons Yakama Nation enacted the fishing ordinance. The Tribe enacted the ordinance because of its concerns about the contamination emanating from Bradford Island *as well as* concerns about dam safety, security, and maintenance. Parker Aff. ¶¶ 13-14 (#21-3). Moreover, the fishing ordinance included a prohibition on harvesting migratory fish species. *See id.* Ex. 6 (prohibiting all platform and hook and line fishing on Bradford Island). However, there is no evidence of record that contamination emanating from Bradford Island affected migratory fish species, which only spend a short period of time in the Site's vicinity. Indeed, the fish consumption advisories issued by the Oregon Health Authority and the Washington Department of Heath expressly excluded migratory fish species. Dasso Decl. ¶ 8 (#26). Therefore, the Tribe's fishing ordinance was overinclusive.

Thus, there is a genuine issue of material fact as to the cause of Yakama Nation's enactment of the fishing ordinance. Consequently, neither party is entitled to summary judgment on Defendants' liability for the costs associated with enacting the ordinance.

IV. Declaratory Judgment

Yakama Nation is not entitled to summary judgment regarding Defendants' liability for all future response costs incurred by the Tribe. As stated above, CERCLA imposes liability on

[3] Single generator means there was only one party that generated the release of the hazardous substance that caused the plaintiff to incur response costs.

Defendants for the Tribe's response costs only when such costs are caused by Defendants' release or threatened release of a hazardous substance and when the Tribe's response activities are not inconsistent with the NCP. *See* 42 U.S.C. § 9607(a); *Pakootas*, 452 F.3d at 1074.

Because the court cannot predict to a legal certainty the exact nature or cause of the Tribe's future response activities, it cannot adjudicate Defendants liable for all of the Tribe's future response costs as a matter of law. That said, depending on the facts surrounding Yakama Nation's future response costs, preclusion principles may significantly limit Defendants' ability to contest their liability for those costs. Defendants have not moved for summary judgment on Yakama Nation's claim for declaratory judgment.

CONCLUSION

For the reasons provided above, Yakama Nation's Motion for Summary Judgment (#21) should be GRANTED in part and DENIED in part. Defendants' Motion for Summary Judgment (#27) should be DENIED. The court should enter an order adjudicating Defendants liable for Yakama Nation's response costs that resulted from the Tribe's oversight and funding activities discussed above. The only issues remaining for trial are (1) the amount of Yakama Nation's response costs attributable to its oversight and funding activities, (2) whether the costs Yakama Nation incurred in enacting the fishing ordinance were caused by the release of hazardous substances from Bradford Island, and (3) Yakama Nation's claim for declaratory judgment.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date. If objections are filed, then a response is due fourteen (14) days after being served with a

copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

Dated this 18th day of December, 2015.

/s/ Paul Papak
Honorable Paul Papak
United States Magistrate Judge