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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, Plaintiff, v. **CITY OF YAKIMA,** a municipal corporation, Defendant.	**NO. 1:20-cv-03156-SAB** **PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF YAKIMA'S MOTION FOR SUMMARY JUDGMENT** **6/22/22** **No Oral Argument Requested**

I. INTRODUCTION

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") has incurred costs to ensure that the cleanup of the City of Yakima Landfill Site ("Landfill Site") will be protective of human health and the environment. Under the law, Yakama Nation is entitled to do so. And, under the law, it is entitled to recover those costs from liable parties. In its Motion for Summary Judgment [ECF No. 71], Defendant City of Yakima ("the City" or "Defendant") asks the Court to hold – as a matter of law – that the activities undertaken by the Yakama Nation are not "removal" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), are inconsistent with the National Contingency Plan ("NCP"), and that the resulting costs have been insufficiently documented. The City fails to provide legal or factual support for its Motion for Summary Judgment, and fails to identify even one provision of the NCP that Yakama Nation's actions have violated.

II. ARGUMENT

The City contends that activities undertaken by Yakama Nation are not costs of response and that the activities are "duplicative, wasteful, and do not advance any legitimate cleanup objective" and are thus inconsistent with the NCP. The City also contends that Yakama Nation's accounting of costs is inadequate to prove that the costs were incurred, and that Yakama Nation is seeking costs incurred that were not related to the Landfill Site.

The Court need not entertain the strained analyses that the City proposes, nor accept the disputed and immaterial facts on which it relies. It can merely look at the actions undertaken by Yakama Nation, as set forth in the Plaintiff's pleadings, the responses to written and oral discovery, and the Declaration of Laura Klasner Shira, and decide whether those actions were undertaken to "to monitor, assess, and evaluate the release or threat of release of hazardous substances." Simply put, they were. The U.S. District Court in Oregon reviewed these exact types of activities and concluded that the Tribe's actions were response activities, and that Yakama Nation was entitled to the costs it incurred. This Court should do the same.

A. Yakama Nation's response activities are "removal" actions within the meaning of CERCLA.

Removal actions 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 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." 42 U.S.C. § 9601(23). All of the response actions for which Yakama Nation is seeking reimbursement fit squarely within this definition. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 579 (9th Cir. 2018). In *Confederated Tribes & Bands of the Yakama Nation v. United States*, 2015 U.S. Dist. LEXIS 175785 (D. Ore. 2015), the United States District Court reviewed Yakama Nation's oversight activities at a cleanup

site, "includ[ing], *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." *Id*., at *7. These are the same types of actions undertaken at the Landfill Site, as set forth with specificity in the Declaration of Laura Klasner Shira, ECF No. 70-2 at ¶¶ 5-9 (hereinafter "Shira Decl."). The Court found that:

> … the policy underpinning CERCLA strongly suggests the statue [sic] permits Yakama Nation to engage in oversight response actions with respect to the … 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.'

Id., at *12 (citations omitted).

Other courts interpreting the language in Section 107(4)(A) have found that recoverable response costs include those costs directly incurred in assessing, investigating, monitoring, testing, and evaluating the releases and threats of release. *See, e.g., United States v. Chromalloy Amer. Corp*., 158 F.3d 345, 347-48 (5th Cir. 1998). Those activities include "oversight costs incurred by a government agency *in an effort to ensure* that a site is being adequately investigated and remediated by responsible parties." *California v. Neville Chem. Co*., 213 F. Supp. 2d 1115, 1124 (C.D. Cal. 2002) (emphasis added) (citations omitted). Because Yakama Nation was undertaking these actions in an effort to ensure that cleanup at the Landfill Site would

prevent, minimize, and mitigate potential harm, Shira Decl. at ¶ 10, those actions are "removal" under the statute.

The City misrepresents the case law on this issue. The City cites *Pakootas* for the proposition that actions taken by Yakama Nation must be a reasonable means of "furthering the ends of monitoring, assessing, and evaluating" a site. ECF No. 71, at 8-9. But *Pakootas* does not say that; in fact, it plainly supports a finding that the oversight costs incurred by Yakama Nation are included in the definition of "removal." One need only read the paragraph preceding the City's quoted language:

> No less important [than "the cleanup or removal" of hazardous substances], however, are several associated activities described by the statutory definition. This case concerns two defined categories of related activities: such efforts "as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," and "as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." *Id*. Cleanup-adjacent activities face a low bar to satisfying these definitions of "removal." *See United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) ("The definition of 'removal' is written in sweeping terms."). Section 101(23) covers all activities "as may be necessary" to advance certain threat assessment or abatement goals. This permissive language means qualifying activities need not be performed with the *intent* of achieving the statutory goals; need not be absolutely *necessary* to achieve those goals; and need not *actually* achieve those goals.

Id., at 578-79. Yakama Nation did not "further" the ends of the activities in the statute's definition; Yakama Nation engaged directly in monitoring, assessing, and evaluating the releases and threats of release at the Landfill Site. *Pakootas* does not stand for the

proposition that non-investigative costs are not costs of removal, and a close reading of the case supports Yakama Nation's claims.

The City also contends that activities that are "redundant of work already being performed" are "wasteful and unreasonable" and are, thus, not removal activities. First, nothing in the statute supports this. *See Id*. at 580-81 ("CERCLA's broad remedial purpose 'supports a liberal interpretation of recoverable costs' to ensure that polluters pay for the messes they create…'"). Second, the City provides no support for this statement because it fails to identify what response actions would arguably be "redundant" with Yakama Nation's work. Yakama Nation's actions were taken to ensure that the decisions being made at the Landfill Site would prevent, minimize, and mitigate any potential harm to the environment. Shira Decl., at ¶ 10. Third, the only case cited, *Carson Harbor Vill., Ltd. V. Unocal Corp.,* 270 F.3d 863 (9th Cir. 2001), does not support the City's position. According to the City, the case stands for the proposition that "one of the main purposes of CERCLA…is to encourage efficient and cost-effective cleanups." ECF No. 71, at 9-10. The case does not say this, nor does it agree with the City's statement that an action must be "a reasonable means of furthering the ends of 'removal.'" *Id*. at 10. The concepts of cost-effectiveness and reasonableness are never mentioned in the opinion. "[T]he EPA is required to consider cost when selecting remedial alternatives, whereas 'CERCLA contains no corresponding mandate for removal actions.'" *United States v. W.R. Grace*, 429 F.3d

1224, 1229 (9th Cir. 2005) (citing *United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992). In fact, "response costs not inconsistent with the National Contingency Plan are *conclusively presumed reasonable* and therefore recoverable, …". *United States v. E.I. Dupont De Nemours & Co.*, 432 F.3d 161, 178, citing *United States v. Northeast Pharmaceutical & Chemical Co.*, 810 F.2d 726, 747-48 (8th Cir. 1986) (emphasis added).

The City asks the Court to find that Yakama Nation's review of technical and decision-making documents, for the purpose of ensuring that those decisions are protective of human health and the environment, are not costs of response merely because Ecology also has an oversight role at the Landfill Site. The argument finds no support in the law, the statute, or the courts.

B. Defendant presents no evidence that Yakama Nation's oversight activities are inconsistent with the National Contingency Plan.

As the City admits, the Defendant has the burden of demonstrating to the Court that response actions taken by Yakama Nation are inconsistent with the NCP. ECF No. 71 at 11. "[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 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) (citations omitted). The City

points to no provision with which Yakama Nation's actions are inconsistent and the Court's inquiry can end here.

Instead of providing any specific example, the City contends that the penumbra of Yakama Nation's actions are arbitrary and capricious, and sets forth a series of immaterial and/or unsupported allegations to support this claim. ECF No. 71 at 13-15. Many of these assertions are disputed, see Plaintiff's Statement of Disputed Material Facts, at ¶¶ 6, 9, 10, 16, 17, 50-52, immaterial, *see id*. at ¶¶ 7, 8, 13, 14, or both, and without factual support in the record before this Court. No court has found any of the type of allegations raised by the City sufficient to reject a sovereign's oversight actions as arbitrary and capricious.

The City cites to *United States v. Newmont USA Ltd*., 504 F. Supp. 2d 1077 (E.D. Wash. 2007), arguing that response actions that are "unnecessary and duplicative" are inconsistent with the NCP; this is simply not true. In *Newmont,* this Court addressed the defendant's argument that EPA actions were inconsistent with the NCP. The Court found that there were disputed issues of fact regarding whether certain actions had a rational connection to the removal action chosen by EPA. *Id*. at 1085. The Court did not reject any costs as "unnecessary and duplicative;" the only actions that were inconsistent with the NCP were costs incurred by the ATSDR. *Id*. And even if actions were unnecessary and duplicative, the Court found that EPA need only articulate a satisfactory explanation for taking the actions. *Id*. Here, Yakama Nation has

both described the activities that it undertook, and articulated its reasons for undertaking them.

The City posits that unless an Indian tribe conducts an independent investigation, where a cleanup is being conducted under a state statute, its oversight actions are arbitrary and capricious. ECF No. 71 at 4-5, 9-10. That reading of the NCP requirements has never been adopted and is directly contrary to the stated purposes of CERCLA. Practically, it would read out of the statute the ability of any sovereign to seek its oversight costs. Those costs are, *by definition*, reviewing what has and will be done at a site to ensure that any remedy or removal is protective. *Neville Chem. Co.*, at 1124; 42 U.S.C. § 9601(23). Ensuring that cleanup actions are protective of tribal citizens' health and the environment are not "unnecessary to any legitimate cleanup objective."

The cases cited by the City contrast sharply with the situation here. To the extent that they are at all applicable, they support Yakama Nation's claim. In *Minnesota v. Kalman W. Abrams Metals, Inc.*, the Eighth Circuit found inconsistency where the State violated a particular provision of the NCP requiring that responsible parties be afforded prior notice of cleanup actions, and the opportunity to undertake a cleanup at their own expense. 155 F.3d 1019, 1025-26 (8th Cir. 1998). No such NCP provision has been identified here. As the court stated, "the State may recover all costs except

those *that appellees prove were inconsistent with the NCP*." *Id*. at 1025 (emphasis added).

The court in *Wash. State Dep't of Transp. v. Wash. Natural Gas Co*. was not addressing oversight costs, at all. 59 F.3d 793 (9th Cir. 1995). Instead, it focused on specific NCP requirements that apply to the agency conducting the cleanup. *Id*. at 803. In so doing, the court identified the provisions with which the agency failed to comply. *Id*. 803-5 ("Given the high degree of inconsistency with the requirements set forth in the NCP, WSDOT's action is arbitrary and capricious"). No such effort has been made by the City here. Likewise, the court's decision in *In re Bell Petroleum Servs. Inc*. did not address oversight costs, but a decision by the agency conducting cleanup to install an alternative drinking supply. 3 F.3d 889, 905 (5th Cir. 1993).

The City relies on disputed facts to support its argument, and has provided no examples of Yakama Nation's response actions that are contrary to any provision of the NCP. Because Yakama Nation has articulated its reasons for conducting the oversight activities at the Landfill Site, the Court should reject the City's argument, and find that all costs incurred by Yakama Nation are recoverable.

C. <u>Yakama Nation's response costs are well documented and directly relate to the Landfill Site</u>.

The factual basis for the City's request for summary judgment on costs is unclear, as it freely admits that it is disputing facts regarding Yakama Nation's

documentation of those costs. Yakama Nation contends that it has properly documented all costs, and has done so in the same manner as federal regulatory agencies. ECF No. 69 at 19-20. The City disputes that the costs are appropriately documented, yet seeks summary judgment on the issue. Summary judgment is only appropriate if there is no genuine dispute of material fact. Fed. R. Civ. P. 56(a).

Yakama Nation has provided to the Court all documentation necessary to establish that costs of response have been incurred, and that the response actions taken were all as a result of the release or threatened release of hazardous substances at the Landfill Site. *See*, Declaration of Jeanna Hernandez, ECF No. 70-1; Declaration of Ethan Jones, ECF No. 70-3. While the City attempts to cast doubt on some information contained in those documents, summaries and declarations, the facts set forth in each are not in dispute. These Cost Summaries are authentic and are admissible under the Federal Rules of Evidence. ECF No. 69 at 19-20. The Cost Summaries document recoverable costs that have been verified by Yakama Nation's Lead Superfund Bookkeeper and the Lead Attorney for the Office of Legal Counsel, and total $133,671.70 in costs through September 30, 2021. ECF No. 70-1 at ¶¶ 6, 7, 9; ECF No. 70-3 at ¶¶ 4, 6.

In support of its argument, the City refers to four paragraphs in its Statement of Undisputed Material Facts; three of these are disputed. And one is plainly immaterial to the issue at hand. *See*, Plaintiff's Statement of Disputed Material Facts, at ¶¶ 18, 55-57.

The City lastly claims that Yakama Nation is seeking costs that were incurred at "other sites," and were not as a result of releases or threats of releases of hazardous substances at the Landfill Site. Once again, the City relies on several "facts" which are either disputed or demonstrably untrue, or both. For example, the City contends that "Plaintiff has attempted to claim costs for a separate cleanup site and a larger county development project." ECF No. 71 at 7. All costs sought in this action were incurred as a result of investigations at the Landfill Site. *See*, Shira Decl., at ¶¶ 10, 11. Yakama Nation has attended meetings and reviewed documents regarding adjacent projects, but it did so to ascertain the effects of the contamination at the Landfill Site. Hazardous substances do not respect property boundaries, and an agency investigating a site will often – perhaps always – look to adjacent areas that may be contributing to the contamination. In this matter, all of Yakama's response activities were as a result of releases at the Landfill Site. *Id*. at ¶ 11. This is true regardless of the property names associated with the response activities. *Id*. The City's argument is unsupported in the record and not a basis for granting summary judgment.

Yakama Nation's treatment of the Landfill Site is supported by the law. While Ecology is administering cleanup at the two sites separately, for purposes of CERCLA they are both part of a single, larger facility, which is defined by the extent of contamination. *See* 65 Fed. Reg. 75179, 75181 (Dec. 1, 2000) ("When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a

geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. As a legal matter, the site is not coextensive with that area, and the boundaries of the installation or plant are not the 'boundaries' of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location to which that contamination has come to be located, or from which that contamination came."). The City itself was informed of this by Ecology:

> Please note a parcel of real property can be affected by multiple sites. Releases from the upgradient Boise Cascade Mill facility (#450), which have resulted in a contaminated groundwater plume, may be potentially comingled with releases at the Interstate 82 Exit 33A Yakima City Landfill Site and affect parcel(s) of real property associated with this Site. This opinion does not apply to any contamination associated with the Boise Cascade Mill facility. Please note that for liability purposes under MTCA, **it may be difficult to distinguish the boundary between these two facilities if contamination is comingled.**

Gheen Decl., Ex. 2, ECF No. 73-2 at 2 (emphasis in original).

Furthermore, documentation prepared by the City's technical consultant demonstrates that one *must* look at both the mill and the landfill in order to evaluate the Landfill Site. For example, in the portion of the City's technical consultant's Interim Action Work Plan attached to the City's summary judgment motion, the word "mill" is used over 30 times. *Id.*, Ex. 17, ECF No. 73-17. The overview section is titled "Mill Site and Landfill Site Description and Background." Id. ECF No. 73-17 at 5. Yakama

Nation, Ecology, and the City's own contractor agree that an evaluation of the Landfill Site necessarily entails gaining an understanding of the mill site. The City's attempt to discredit the Yakama Nation for incurring costs to understand the relationship between the two sites should be rejected.

CONCLUSION

The City has failed to identify undisputed, material facts to support its Motion for Summary Judgment. Under the plain language of CERCLA, the actions undertaken by Yakama Nation "to monitor, assess, and evaluate the release or threat of release of hazardous substances" at the Landfill Site are "removal." Nothing done by Yakama Nation with regard to the Landfill Site is inconsistent with the NCP, and the City identifies no provision of the NCP that Yakama Nation has violated. The costs incurred in conducting these oversight actions have been appropriately and accurately documented. The Court should deny the Defendant's motion.

DATED this 24th day of May, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 24th day of May, 2022, I caused the foregoing document to be electronically filed with the court's electronic court filing system, which will generate automatic service upon all parties enrolled to receive such notice.

The following parties will be manually served by First class U.S. Mail, postage prepaid, or by facsimile: N/A

s/ Michael M. Frandina

Attorney for the Plaintiff