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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 REPLY TO DEFENDANT CITY OF YAKIMA'S OPPOSITION TO YAKAMA NATION'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY**

I. INTRODUCTION

The City of Yakima's Opposition to Yakama Nation's Motion for Summary Judgment on Liability demonstrates a fundamental misunderstanding of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Once a CERCLA plaintiff demonstrates that a responsible party is liable, it only need demonstrate that it has incurred some costs of response to maintain a cause of action for recovery of those costs. The amount and nature of the costs incurred by a sovereign can be challenged – though, in this case, those costs have been thoroughly and appropriately documented – but a finding of liability for the responsible party only requires that some costs have been incurred. Unless the City can demonstrate that *every cost* incurred by Yakama Nation was not a response cost, and that *every action* taken by Yakama Nation was inconsistent with the National Contingency Plan ("NCP"), the Court should find that the City is liable for Yakama Nation's costs of response.

II. ARGUMENT

A. <u>The City admits all facts necessary to grant Yakama Nation's Motion</u>.

The City has admitted all the necessary elements of CERCLA liability. The City has admitted that hazardous substances were discovered at the City of Yakima Landfill Site ("Landfill Site"), ECF No. 69, at 13-14, and that some hazardous substances have been released to groundwater under the Landfill Site. *Id*., at 14-15. The City has admitted that it is an owner of the facility. *Id*., at 15. To establish liability, a plaintiff

must demonstrate those elements – that a release or threat of release of a hazardous substance has occurred at a facility, and that the defendant is within one of the classes of liable persons in the statute. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1073-74 (9th Cir. 2006). Each element of liability has been established.

In that case, to be successful on summary judgment regarding liability, a plaintiff need only demonstrate that some response costs were incurred – *even a single dollar* – conducting activities that were not inconsistent with the NCP. *Cal v. Neville Chem. Co.,* 358 F3d 661, 668 n.4 (9th Cir. 2004) ("Under 42 U.S.C. 9613(g)(2), 'an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.' As soon as the Department expended its first dollar, it could have sued [the defendant] for this dollar and sought a declaratory judgment of [defendant's] liability for future response costs."). To deny Yakama Nation's Motion, the Court would have to find that *no* costs were incurred by Yakama Nation that were costs of removal, and that *all* costs incurred by Yakama Nation were inconsistent with the NCP. Neither of these findings is supported by any facts in the record and, critically, neither is supported by the law.

There is no dispute that Yakama Nation has incurred costs, *see* ECF No. 69, at 7-9, 19-20; ECF No. 70-1 (Declaration of Jeanna Hernandez); and ECF No. 70-3 (Declaration of Ethan Jones). The City contends only that the costs incurred were not as a result of "removal" actions. ECF No. 71, at 8. Moreover, there is no dispute regarding

what actions Yakama Nation has undertaken, nor that they were all as a result of the releases or threats of releases of contamination at and from the Site. ECF No. 70-2 (Declaration of Laura Klasner Shira). Based on the foregoing facts, the Court should grant Yakama Nation's Motion.

B. Yakama Nation's response activities are "removal" activities, and are not inconsistent with the National Contingency Plan.

The City's first argument is identical to that set forth in its Motion for Summary Judgment: 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 again contends that Yakama Nation's accounting of costs is inadequate to prove that the costs were incurred, that some costs were inaccurately reported, and that Yakama Nation is seeking costs incurred that were not related to the Landfill Site. Each of these arguments has been fully briefed, *see* ECF No. 75 at 7-14, and Yakama Nation will not repeat itself here.

The response actions undertaken by Yakama Nation fit squarely within CERCLA's definition of a "removal" because they are "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). *See*, ECF No. 69 at 5-7, 16-17. It is undisputed that Yakama Nation's response 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. ECF No. 70-2 at ¶ 10. As such, all oversight actions taken by Yakama Nation are "removal." ECF No. 75 at 3-7.

The response actions taken by Yakama Nation are presumed consistent with the NCP. *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 949 (9th Cir. 2002). As in its own motion for summary judgment, the City throws a mass of disputed claims at the wall and asks the Court to find that the totality of these acts violate the NCP. Although it is not relevant to the Court's analysis, the City has failed to identify any actions that were "unnecessary and duplicative," or for which Yakama Nation has not articulated a satisfactory explanation for undertaking. *See United States v. Newmont USA Ltd.*, 504 F. Supp. 2d 1077, 1085 (E.D. Wash. 2007). The City has failed to demonstrate why Yakama Nation's "oversight" activities – which necessarily oversee actions that have been, or are being, done – are inconsistent with the NCP. And the City has again failed to identify any provision of the NCP with which Yakama Nation's response actions are inconsistent. *See* ECF No. 75, at 7-10.

C. <u>The City fails to demonstrate that the harms at the Landfill Site are divisible</u>.

The City lastly argues that it should be apportioned a "zero share" of liability at the Landfill Site. The singular basis for the City's argument is that it is liable solely because it is a "current owner" of the Landfill Site. This is simply not true. The City itself claims that the Landfill Site is defined by the extent of contamination from municipal solid waste, ECF No. 78 at 15, ¶ 36, and admits that it operated a landfill on the Site. *Id*. at 2, ¶¶ 2-3. The Complaint also sets forth facts sufficient to establish that the City was an operator at the Landfill Site. ECF No. 37 at ¶¶ 26, 27, 31, 35 and 42. Moreover, if the City is correct, no current owner of any facility would ever be jointly and severally liable at a CERCLA facility, and in many cases not liable at all.[1] The Court need not reach either point, however, as the City utterly fails to meet the standards for establishing divisibility in a CERCLA action or explain why this is a reason to deny Yakama Nation's Motion.[2]

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[1] This issue has already been fully briefed in the context of Article III Standing, and Yakama Nation will not repeat those arguments here. *See* ECF No. 64, at 5-6.

[2] Even if the City had attempted to satisfy the criteria for demonstrating that the harm here is divisible – which it did not – such a finding would not preclude summary judgment on liability.

Divisibility under CERCLA is found only in rare cases. "CERCLA liability is ordinarily joint and several, except in rare cases where the environmental harm to a site is shown to be divisible. *United States v. Coeur d'Alenes Co*., 767 F.3d 873, 875 (9th Cir. 2014); *see also* Martha L. Judy, *Coming Full CERCLA: Why* Burlington Northern *Is Not the Sword of Damocles for Joint and Several Liability*, 44 New Eng. L. Rev. 249, 283 (2010) (counting only four decisions finding divisibility out of 160 cases)." *Pakootas*, 905 F.3d at 588. To determine whether CERCLA liability can be apportioned, the Court must engage in a two-part analysis; first, to determine whether the environmental harm at the site is "theoretically divisible" and, second, whether the factual record before the court provides a "reasonable basis" to apportion liability. *Id*. at 588-89.

> At both steps, the defendant asserting the divisibility defense bears the burden of proof. *See* Restatement (Second) of Torts § 433B(2); *see also Burlington Northern II*, 556 U.S. at 614; *NCR*, 688 F.3d at 838. This burden is "substantial" because the divisibility analysis is "intensely factual." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992) (*Alcan-Butler*). The necessary showing requires a "fact-intensive, site-specific" assessment, *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 182 (4th Cir. 2013), generating "concrete and specific" evidence, *Hercules*, 247 F.3d at 718.

Id. at 589. S2992

The City fails to satisfy its burden with regard to both necessary steps. First, the City makes no effort to demonstrate that the harm presented by the Landfill Site – the hazardous wastes present at the municipal landfill – is not a single, indivisible harm.

See id. at 588. There is no argument whatsoever regarding the harm, only the City's conclusory assertion that it is liable solely as a present owner. Even if that were true, it is not sufficient to establish that the harm at the Landfill Site is divisible. *See id.* at 589. Second, the City offers no "reasonable basis" for its contention that it should be apportioned zero liability – and fails completely to provide the "fact-intensive, site-specific" assessment required by law. *See id*. It does not claim that it was unaware of the contamination. It does not claim that it is an "innocent landowner" under the law. And, most importantly, it provides no other party with whom to apportion the liability. In the absence of even one other liable party, liability for the Landfill Site is squarely on the City. In *United States v. Fed. Res. Corp.*, 691 Fed. Appx. 441, 443 (9th Cir. 2017), the Ninth Circuit Court of Appeals found no basis for divisibility where the defendant provided no analysis of the "waste of other potentially responsible parties" at the site. The court held that:

> Divisibility can be established by volumetric evidence and geographic distinctness, *see United States v. Hercules, Inc.*, 247 F.3d 706, 719 (8th Cir. 2001), but there must be 'evidence of a relationship between the volume of waste, the release of hazardous substances, and the harm at the site,' *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 900 (5th Cir. 1993). Here, there is no evidence of that relationship, and there is no reasonable basis for apportionment.

Id. In this case, too, the City has failed to provide any such evidence.

CONCLUSION

First, all elements of CERCLA liability have been admitted by the City. Unless it is able to prove, based on undisputed material facts, that Yakama Nation undertook no response actions at all, or that every action taken by Yakama Nation was explicitly inconsistent with the NCP, the Court should reject the City's argument.

Second, the City provides no reason that its divisibility argument is a basis to deny Yakama Nation's Motion. Even if it had, however, the City falls far short of presenting the fact-intensive, site-specific analysis required to demonstrate divisibility of environmental harm. The Court should grant Yakama Nation's Motion for Summary Judgment on Liability.

DATED this 7th day of June, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 7th day of June, 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