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# Client Alert

**FROM:** **Maureen Mitchell**
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**RE:** **Tribe Obtains Oversight Costs Under CERCLA**

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Indian tribes addressing contaminated sites may find it easier to seek reimbursement of response costs after an Oregon district court awarded the Yakama Nation almost $100,000 in past response costs consisting of oversight costs and the expenses incurred to obtain funding for its environmental work. *Confederated Tribes & Bands of the Yakama Nation v. United States*, No. 3:14-CV-01963-PK, 2015 WL 9942044, (D. Or. Dec. 18, 2015) report and recommendation adopted as modified, No. 3:14-CV-01963-PK, 2016 WL 406344 (D. Or. Feb. 1, 2016). Activities described as "oversight" in the Yakama Nation's claim included reviewing and commenting on proposed remedial actions, participating in technical assistance groups, evaluating study results, and discussing draft evaluations for removing contaminated sediment.

The Army Corps of Engineers argued that CERCLA does not expressly grant Indian tribes legal authority to conduct oversight activities, however U.S. District Court Magistrate Judge Paul Papak disagreed. He concluded that the primary limitation under CERCLA is the requirement that the tribe's response costs "not be inconsistent with the NCP." 42 U.S.C. § 9607(a)(4)(A). The Army Corps, in his view, had not carried its burden of showing inconsistency with the NCP. In a February 1, 2016 Order, U.S. District Court Judge Anna J. Brown adopted the Magistrate Judge's findings and recommendations on this issue. Also recoverable were the Yakama Nation's expenses incurred in connection with unsuccessful efforts to obtain State and U.S. funding for cleanup work, on the basis that they were akin to "administrative and other overhead costs," as well as "budgeting functions" described in EPA's CERCLA full cost methodology for determining recoverable costs. One type of cost not awarded was related to the Yakama Nation's expenses incurred to draft and adopt a fishing ordinance. Summary judgment for this type of cost was denied because the record showed that restricting consumption of contaminated fish was one reason, of several, for the ordinance, which went beyond contamination concerns and regulated other fishing activities.

Going against Magistrate Judge Papak's recommendation, Judge Brown also found in the Yakama Nation's favor on future response costs. She concluded that declaratory judgment was appropriate on the issue of the Army Corps' liability, however the Yakama Nation would be required to show that its future claimed costs are for "response actions" under CERCLA. With the door open to direct response cost claims against the Army Corps in this case, there would appear to be a fairly clear path to recovering those costs.

Perhaps most significant about this decision is the impact that could be felt where Indian tribes want to use federal law to engage in recovery of regulatory expenses associated with investigating and responding to environmental issues at a facility where a release has occurred. In addition to working with EPA and state agencies on payment of oversight costs, PRPs may find themselves defending against direct response cost claims from Indian tribes, even for sites that are outside Indian Country. In this decision, the Yakama Nation's interest in the site, an area of Bradford Island located on the Columbia River, was due to its concern about protecting its treaty fishing rights. Tribal jurisdiction over non-Indians to regulate environmental matters is difficult to establish under U.S. Supreme Court precedents, *e.g.*, *Montana v. United States*, 450 U.S. 544 (1981). This case will likely lead to increased tribal use of CERCLA for cost recovery against PRPs under federal law.