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16 Attorneys for Plaintiff

17 **UNITED STATES DISTRICT COURT**
18 **EASTERN DISTRICT OF WASHINGTON**

19 **CONFEDERATED TRIBES AND**) **NO. 1:20-cv-03156-SAB**
20 **BANDS OF THE YAKAMA NATION,**)
21) **SECOND AMENDED**
Plaintiff,) **COMPLAINT FOR CERCLA**
22 v.) **COST RECOVERY AND**
23) **DECLARATORY JUDGMENT**
CITY OF YAKIMA, a municipal)
24 corporation,)
25 Defendant.)

1 Plaintiff, with written consent from Defendant to file an amended complaint
2 pursuant to Fed. R. Civ. P. 15(a)(2), alleges and amends its Complaint as follows:

3
4 **NATURE OF THE ACTION**

5 1. This is a civil action for recovery of costs under Section 107(a) of the
6 Comprehensive Environmental Response, Compensation, and Liability Act
7 (“CERCLA”), 42 U.S.C. § 9607(a). The Plaintiff seeks to recover the un-reimbursed
8 response costs it has incurred, as well as a declaratory judgment of liability for future
9 response costs, in connection with the historic, ongoing, and threatened release of
10 hazardous substances into the environment at, on, and from the Interstate 82 Exit 33A
11 Yakima City Landfill facility, which is located within the City of Yakima,
12 Washington (the “Site”).

13
14 **JURISDICTION AND VENUE**

15 2. This Court has jurisdiction over the subject matter of this action, and the
16 Defendant, pursuant to 28 U.S.C. § 1331, and Sections 107 and 113 of CERCLA,
17 42 U.S.C. §§ 9607 and 9613.

18 3. Venue is proper in this District under Section 113(b) of CERCLA,
19 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b), because the claims arose, and the
20 threatened and actual release of hazardous substances occurred and is occurring,
21 within the Eastern District of Washington.

22
23 **PARTIES**

24 4. Plaintiff Confederated Tribes and Bands of the Yakama Nation
25 (“Yakama Nation”) is a federally-recognized Indian tribe.

1 5. The Yakama Nation is the legal successor in interest to the Indian
2 signatories to the Treaty with the Yakamas of June 9, 1855 (12 Stat. 951) (“Treaty”).
3 Under Article III of the Treaty, the Yakama Nation reserved for itself and its members
4 the right to take fish at all “usual and accustomed places,” including within the
5 Yakima River Basin and the larger Columbia River Basin.

6 6. Yakama Nation’s Treaty-reserved fishing rights in the Yakima Basin
7 have been recognized by courts of the State of Washington through proceedings in the
8 Yakima River Basin water rights adjudication. See, e.g., *Washington Dept. of Ecology*
9 *v. Yakima Reservation Irrig. Dist., et. al.*, 121 Wn.2d 257, 850 P.2d 1306 (1993).
10 Such rights have also been recognized by this Court and on appeal. See *Kittitas*
11 *Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir. 1985).

12 7. Defendant City of Yakima (“City”) is a municipal corporation organized
13 under the laws of the State of Washington.

14 STATUTORY FRAMEWORK

15 8. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in part:

- 16
- 17 (1) the owner and operator of a vessel or a facility,
- 18 (2) any person who at the time of disposal of any hazardous substance
- 19 owned or operated any facility at which such hazardous substances
- 20 were disposed of . . .
- 21 (4) . . . shall be liable for –
- 22 (A) all costs of removal or remedial action incurred by. . . an Indian
- 23 tribe not inconsistent with the national contingency plan...

24 9. CERCLA Section 101(20)(A) defines “owner or operator” to include
25 “any person owning or operating such facility.” 42 U.S.C. § 9601(20)(A).

1 10. CERCLA Section 101(21) defines “person” to include a “municipality.”
2 42 U.S.C. § 9601(21).

3 11. CERCLA Section 101(22) defines “release” to include “any spilling,
4 leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping,
5 leaching, dumping, or disposing into the environment (including the abandonment or
6 discarding of barrels, containers, and other closed receptacles containing
7 any hazardous substance or pollutant or contaminant).” 42 U.S.C. § 9601(22).

8 12. CERCLA Section 101(9) defines “facility” to include any “pit, pond,
9 lagoon, impoundment, ditch, landfill, [or] storage container,” or any “site or area
10 where a hazardous substance has been deposited, stored, disposed of, or placed, or
11 otherwise come to be located” 42 U.S.C. § 9601(9).

12 13. CERCLA Section 101(25) defines “respond” or “response” as “remove,
13 removal, remedy, and remedial action.” 42 U.S.C. § 9601(25).

14 14. CERCLA Section 101(23) defines “remove” or “removal” as “the
15 cleanup or removal of released hazardous substances from the environment, such
16 actions as may be necessary taken in the event of the threat of release of hazardous
17 substances into the environment, such actions as may be necessary to monitor, assess,
18 and evaluate the release or threat of release of hazardous substances, the disposal of
19 removed material, or the taking of such other actions as may be necessary to prevent,
20 minimize, or mitigate damage to the public health or welfare or to
21 the environment, which may otherwise result from a release or threat of release.” 42
22 U.S.C. § 9601(23).

23 15. CERCLA Section 101(24) defines “remedy” or “remedial action” to
24 include “those actions consistent with permanent remedy taken instead of or in
25 addition to removal actions in the event of a release or threatened release of a

1 hazardous substance into the environment, to prevent or minimize the release of
2 hazardous substances so that they do not migrate to cause substantial danger to present
3 or future public health or welfare or the environment. . . .” 42 U.S.C. § 9601(24).

4 16. CERCLA Section 101(36) defines “Indian tribe” to mean “any Indian
5 tribe, band, nation, or other organized group or community . . . which is recognized as
6 eligible for the special programs and services provided by the United States to Indians
7 because of their status as Indians.” 42 U.S.C. § 9601(36).

8 17. CERCLA Section 114(a) provides that “Nothing in this chapter shall be
9 construed or interpreted as preempting any State from imposing any additional
10 liability or requirements with respect to the release of hazardous substances within
11 such State.”

12
13 **FACTUAL ALLEGATIONS**

14 18. The Washington Department of Ecology (“Ecology”) refers to the Site as
15 the “Interstate 82 Exit 33A Yakima City Landfill.”

16 19. The Site is located on two parcels adjacent to the Yakima River east of
17 North 8th Street and north of East E Street within the limits of the City of Yakima.

18 20. The Yakima River is a “usual and accustomed fishing place” of the
19 Yakama Nation under Article III of the Treaty.

20 21. Since time immemorial a constituent band of the Yakama Nation
21 occupied a village at or near the Site. This tribal group was relocated to another area
22 when the Northern Pacific Railroad was constructed through the City of Yakima.

23 22. After the railroad was built, the properties comprising the Site were part
24 of a non-Indian ranch.

1 23. In 1903 the Cascade Lumber Company purchased and developed the Site
2 properties for use as a lumber mill. Cascade Lumber merged with Boise Payette
3 Lumber Company in the late 1950s to form Boise Cascade. In 2003 Boise Cascade
4 acquired OfficeMax, and changed the name of its paper products company to
5 OfficeMax, Inc.

6 24. Approximately 60 percent of the area of the lumber mill was occupied by
7 large log ponds.

8 25. The lumber mill gradually transitioned from using ponds for wood
9 storage to using log decks with sprinklers. The southernmost log pond was drained,
10 and a portion of this pond was used by the City as a municipal solid waste landfill
11 (“landfill”) on the two parcels within what is now the Site.

12 26. On or about July 15, 1963, the City entered into a lease with Boise
13 Cascade for both parcels which comprise the Site to be used as a municipal solid
14 waste landfill. Under the lease the City agreed to indemnify Boise Cascade (now
15 OfficeMax) for any liabilities arising from the City’s use of the Site as a municipal
16 solid waste landfill.

17 27. Between 1963 and 1970 the landfill was used by the City to dispose of
18 municipal solid waste under its lease with Boise Cascade. The Yakima County Health
19 Department closed down the landfill in 1972.

20 28. The landfill was never lined.

21 29. The landfill covered approximately twenty-eight acres in area.

22 30. Average depth of the landfill has been estimated at about twelve feet,
23 with the deepest portion located in the southeast corner measuring as much as thirty
24 feet below the surface.

25

1 31. Estimates of volumes of municipal solid waste disposed in the landfill
2 range from 388,000 cubic yards to 452,000 cubic yards.

3 32. The Site is a “facility” within the meaning of Section 101(9) of
4 CERCLA, 42 U.S.C. § 9601(9).

5 33. The City is an “owner” and “operator” of the Site within the meaning of
6 Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).

7 34. There have been releases of hazardous substances at the Site.

8 35. Past solid waste disposal practices by the City have resulted in leaking
9 and leaching of hazardous chemicals and metals from the landfill into soils and
10 groundwater at the Site. These contaminants include, but may not be limited to, diesel
11 range organics; heavy oils; vinyl chloride; n-nitrosodiphenylamine; 4,4'-DDT; 4,4'-
12 DDD; endosulfan II; bis(2-ethylhexyl)phthalate; 3,3'-dichlorobenzidine; lead;
13 chromium; arsenic; iron; manganese; nitrate; and PCB aroclors.

14 36. On or about January 11, 1996, the City first notified Ecology of the
15 inadvertent discovery of hazardous contaminants at the Site during the construction of
16 the I-82 Exit 33A off-ramp.

17 37. From 1997 to 2015, the City, in coordination with Ecology, conducted
18 soil and groundwater investigations to identify releases or potential releases at and
19 from the Site. Pursuant to the Washington Model Toxics Control Act (“MTCA”), an
20 Environmental Site Assessment was completed in 2008. A MTCA Remedial
21 Investigation (“RI”) report was issued in 2009 and a supplemental RI issued in 2015.

22 38. Site investigations conducted by the City and Ecology have shown that as
23 a result of the City’s waste disposal practices at the landfill, soil and groundwater at
24 and from the Site are contaminated with “hazardous substances” as that term is
25 defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

1 39. There were and are “releases” within the meaning of Section 101(22) of
2 CERCLA, 42 U.S.C. § 9601(22), as well as the threat of continuing releases, of
3 hazardous substances into the environment at and from the Site.

4 40. Ecology transmitted a letter to the City dated March 30, 2017, identifying
5 the City as a potentially liable person (“PLP”) for hazardous substance releases at the
6 Site pursuant to MTCA. Ecology issued a formal determination that the City is a PLP
7 for the Site in a letter dated May 5, 2017.

8 41. Pursuant to MTCA, on July 9, 2018, Ecology executed Agreed Order
9 No. 15861 (“AO 15861”) with the City. AO 15861 requires the City to produce an
10 updated conceptual site model, a draft feasibility study, and an interim action report
11 (together “Interim Action Plan”) to conduct a removal and/or remedial action for a
12 portion of hazardous releases at the Site related to road construction.

13 42. In AO 15861, Ecology determined that “The City of Yakima is an ‘owner
14 or operator,’ or a person who ‘owned or operated’ at the time of disposal or release, as
15 defined in RCW 70.105D.020(22), of a ‘facility’ as defined in RCW70.105D.020(8).”

16 43. On or about June 17, 2020, the City entered into a purchase and sale
17 agreement (“PSA”) for the purpose of a right-of-way to construct new roads as part of
18 a proposed “East-West Corridor” project.

19 44. The City currently owns property at the Site in fee simple. The two
20 parcels which comprise the Site are Yakima County Parcel No. 191318-41001 and
21 Yakima County Parcel No. 191318-42001. The City owns a portion of both parcels.
22 Part of the portions of both parcels that the City owns are located within the Site.

23 45. The City of Yakima is a current “owner” (as that term is defined in
24 CERCLA Section 101(20)(A), 42 U.S.C. § 9601(20)(A)) of property located within
25 the Interstate 82 Exit 33A Yakima City Landfill facility.

1 46. Under the express terms of the PSA, the City agreed to assume all
2 liability and indemnify OfficeMax for the costs of any remedial activities at the Site,
3 including all claims for recovery of response costs.

4 47. The City's and Ecology's activities in connection with the contamination
5 at the Site constitute a "response" within the meaning of Section 101(25) of
6 CERCLA, 42 U.S.C. § 9601(25).

7 48. The City's and Ecology's activities in connection with the contamination
8 at the Site constitute "removal" and/or "remedial action" within the meanings of
9 Sections 101(23)-(24) of CERCLA, 42 U.S.C. §§ 9601(23)-(24).

10 49. Beginning in 2018, Yakama Nation participated in response actions at the
11 Site and has incurred costs thereby. Response actions include meetings, telephone
12 calls, and electronic mail among representatives of Ecology, the City, and the Yakama
13 Nation's Fisheries Program, as well as written correspondence and comments by
14 Fisheries staff to Ecology on the AO 15861 and Interim Action Plan.

15 50. The Plaintiff is an "Indian tribe" within the meaning of Section 101(36)
16 of CERCLA, 42 U.S.C. § 9601(36).

17 51. Plaintiff has repeatedly made written and verbal requests to the City
18 through respective legal counsel to try and reach an agreement to reimburse the
19 Yakama Nation for its past response costs, as well as adequately fund all of its future
20 costs of participation. The City has refused Yakama Nation's requests.

21 52. Failure by the City to agree to reimburse and adequately fund these costs
22 has already limited, and will severely limit, the Yakama Nation's ability to properly
23 respond to the hazardous releases at the Site. The City's failure to reimburse past
24 response costs has injured the Plaintiff, and the City's failure to pay for future
25

1 response costs will also injure the Plaintiff by preventing the Yakama Nation from
2 adequately protecting its interest in remediation of the Site.

3
4 **FIRST CLAIM FOR RELIEF**

5 **(Recovery of CERCLA Response Costs)**

6 53. The allegations in Paragraphs 1 through 52 are incorporated herein by
7 reference.

8 54. As a result of the releases or threatened releases of hazardous substances
9 at the Site, the Yakama Nation has incurred response costs as defined by Sections
10 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a).

11 55. The costs incurred by the Yakama Nation at the Site are not inconsistent
12 with the National Contingency Plan, 40 C.F.R. Part 300.

13 56. As of September 30, 2020, the Yakama Nation has incurred at least
14 \$42,239.20 in unreimbursed response costs for the Site.

15 57. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the City is
16 liable to the Yakama Nation for all costs incurred by the Yakama Nation to date in
17 connection with its response actions for and at the Site.

18
19 **SECOND CLAIM FOR RELIEF**

20 **(Declaratory Judgment)**

21 58. The allegations in paragraphs 1 through 57 are incorporated herein by
22 reference.

23 59. A present and justiciable controversy has arisen and exists between the
24 Yakama Nation and the City relating to liability for any past and future costs incurred
25

1 by the Yakama Nation to respond to releases or threatened releases of hazardous
2 substances at or from the Site.

3 60. Pursuant to 42 U.S.C. § 9613(g)(2), the Yakama Nation seeks and is
4 entitled to a declaratory judgment that the City is a liable party under Section 107(a)
5 of CERCLA, 42 U.S.C. § 9607(a), for future response costs incurred by the Yakama
6 Nation at the Site.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiff, the Confederated Tribes and Bands of the Yakama
9 Nation, respectfully requests that the Court:

10 1. Award the Yakama Nation a judgment against the City, for all
11 unreimbursed response costs incurred by the Yakama Nation in connection with
12 selection of a remedial action for the Interstate 82 Exit 33A Yakima City Landfill Site
13 in an amount to be determined at trial, including all costs incurred in this action, plus
14 interest;

15 2. Enter a declaratory judgment on the liability of the City for the Yakama
16 Nation's future response costs in connection with the remedial action at the Interstate
17 82 Exit 33A Yakima City Landfill Site that will be binding on any subsequent action
18 or actions by the Yakama Nation to recover further response costs;

19 3. Grant such other and further relief as this Court deems appropriate.

20 DATED this 30th day of August, 2021.

21
22 Respectfully submitted,

23 /s/ Thomas Zeilman

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

1
2
3 I certify that on the 30th day of August, 2021, I caused the foregoing document to
4 be electronically filed with the court’s electronic court filing system, which will generate
5 automatic service upon all parties enrolled to receive such notice.

6 The following parties will be manually served by First class U.S. Mail, postage
7 prepaid, or by facsimile: N/A
8
9

10 s/. Michael Frandina

11 Attorney for the Plaintiff
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