UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD L. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs,

And

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant.

No. CV-04-256-LRS

ORDER GRANTING PLAINTIFFS' MOTION FOR AWARD OF COSTS OF LITIGATION INCLUDING ATTORNEY FEES

BEFORE THE COURT is the Plaintiffs' Motion For Award Of Costs Of Litigation Including Attorney Fees (Ct. Rec. 201).

Telephonic oral argument was heard on January 30, 2009. Paul J. Dayton, Esq., argued on behalf of Plaintiffs Pakootas and Michel. Christopher J. McNevin, Esq., argued on behalf of Defendant.

I. BACKGROUND

In August 1999, the Confederated Tribes of the Colville Reservation (Colville Tribe) petitioned the Environmental Protection Agency (EPA), pursuant to 42 U.S.C. Section 9605 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), to conduct an assessment of hazardous substance contamination along the Columbia River extending approximately 150 river miles from the U.S.-Canada border to the Grand Coulee Dam. EPA began conducting the site assessment in October 1999. The site assessment was completed in March 2003. On December 11, 2003, the EPA issued a Unilateral Administrative Order for Remedial Investigation/Feasibility Study (UAO) to Defendant Teck Cominco Metals, Ltd. (TCM), pursuant to Section 9606(a) of CERCLA.

TCM is a Canadian corporation which owns and operates a smelter in Trail, British Columbia, located approximately 10 Columbia River miles north of the United States-Canada border. The UAO directed TCM to conduct a Remedial Investigation/Feasibility Study (RI/FS) to investigate and determine the full nature of contamination at the "Upper Columbia River Site" due to materials disposed of into the Columbia River from TCM's smelter. The "Upper Columbia River Site" (UCR) includes "all areas within the United States where hazardous substances from [TCM's] operations have migrated or materials containing hazardous substances have come to be placed."

In July of 2004, Plaintiffs Joseph A. Pakootas and Donald R. Michel, enrolled members of the Colville Tribe, filed a complaint against TCM. (Ct. Rec. 1). The Plaintiffs commenced their action under the "citizen suit" provision of CERCLA, 42 U.S.C. Section 9659(a)(1), seeking enforcement of the UAO. The complaint sought declaratory relief (declaring TCM had violated and continued to violate the UAO), injunctive relief (an order enforcing the UAO against TCM), an order requiring TCM to pay civil penalties "to the maximum extent permitted by

CERCLA for each day during which the violation of the UAO continues," and an order granting costs of litigation, including attorneys' fees, incurred in bringing the action.

TCM responded to the complaint with a Motion To Dismiss filed in August 2004, contending there was no subject matter jurisdiction, no personal jurisdiction, and that the complaint failed to state claims upon which relief could be granted.

In September of 2004, the State of Washington was allowed to intervene as a plaintiff as a matter of right under CERCLA. (Ct. Rec. 40). The "Complaint In Intervention" (Ct. Rec. 41) filed by the State sought the identical relief sought by Plaintiffs Pakootas and Michel.

On November 8, 2004, Judge McDonald issued an order denying TCM's Motion To Dismiss. (Ct. Rec. 58). Judge McDonald found the court had subject matter jurisdiction over the Plaintiffs' claims, had personal jurisdiction over TCM, and that Plaintiffs' complaints stated claims under CERCLA upon which relief could be granted. Judge McDonald *sua sponte* certified his order for immediate interlocutory appeal to the Ninth Circuit pursuant to 28 U.S.C. Section 1292(b).

In December 2004, Judge McDonald granted a stay of the district court proceedings pending a decision by the Ninth Circuit on TCM's petition for interlocutory appeal, and pending a final decision on appeal, in the event the circuit granted the petition and accepted the appeal. (Ct. Rec. 83).

In February 2005, the Ninth Circuit granted permission for the interlocutory appeal. (Ct. Rec. 84).

In October 2005, while the appeal was pending before the circuit, Judge McDonald entered an order lifting the stay for the purpose of allowing Plaintiffs Pakootas and Michel, and the State of Washington, to file First Amended Complaints. (Ct. Rec. 105). The First Amended Complaint filed by Pakootas and Michel added the Colville Tribe as a plaintiff seeking additional relief under CERCLA, including declaratory relief regarding cost recovery and natural

resource damages, cost recovery, and natural resource damages. (Ct. Rec. 111) The First Amended Complaint filed by the State of Washington added those same claims under CERCLA. (Ct. Rec. 109).

On July 3, 2006, the Ninth Circuit issued its opinion affirming Judge McDonald's order denying TCM's motion to dismiss. *Pakootas v. Teck Cominco,* 452 F.3d 1066, 1071(9th Cir. 2006).

On October 30, 2006, the Ninth Circuit filed an order denying TCM's petition for rehearing and rehearing en banc. (Ct. Rec. 115). TCM then filed a petition for writ of certiorari with the U.S. Supreme Court. The Supreme Court eventually denied the petition and the Ninth Circuit issued its mandate which was filed on March 3, 2008 in this court. Issuance of the mandate formally returned the matter to this court.

While the interlocutory appeal was pending before the Ninth Circuit, TCM entered into a settlement agreement with EPA in June 2006 under which TCM agreed to perform a remedial investigation/feasibility study (RI/FS) patterned after the relief requested in the UAO. As part of the agreement, EPA withdrew its UAO. Under the agreement, TCM was not required to submit to jurisdiction under CERCLA.[1]

On May 13, 2008, this court entered an order granting the Plaintiffs (collectively Pakootas, Michel, Colville Tribe, and the State of Washington) leave to file Second Amended Complaints. (Ct. Rec. 145). In recognition of the fact that the UAO had been withdrawn, these complaints (Ct. Rec. 147 and 148) dropped claims for injunctive and declaratory relief related to the UAO. They did, however, continue to seek civil penalties for TCM's failure to comply with the UAO, and attorneys' fees and costs incurred by Plaintiffs in seeking to enforce the UAO.

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[1] TCM's subsidiary, Teck Cominco American Incorporated (TCAI), is also a party to the RI/FS Agreement.

On September 19, 2008, this court entered an order (Ct. Rec. 183) dismissing the UAO civil penalty claims on the basis that it did not have subject matter jurisdiction to entertain those claims. This court found the claims constituted a "challenge" to removal or remedial action selected under 42 U.S.C. § 9604 and therefore, were jurisdictionally barred pursuant to 42 U.S.C. § 9613(h). On October 17, 2008, this court entered an order certifying the order of dismissal as a final judgment pursuant to Fed. R. Civ. P. 54(b), thereby allowing for an immediate appeal of the order of dismissal. The September 19, 2008 order of dismissal is currently on appeal before the Ninth Circuit.

Plaintiffs Pakootas and Michel now seek an award of the costs of the litigation, including attorney fees, pursuant to 42 U.S.C. §9659(f). This is the cost provision which pertains to citizen suits brought under §9659.

II. DISCUSSION

42 U.S.C. §9659(f) provides in relevant part:

> The court, in issuing any final order pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate.

In order for a party to attain "prevailing party" status, there must be a material alteration of the parties' legal relationship, and there must also be a "judicial imprimatur" of that alteration. *P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1170-71 (9th Cir. 2007). The "catalyst theory" for prevailing party status was struck down by the U.S. Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S.Ct. 1835 (2001), because it "allows an award where there is no judicially sanctioned change

in the legal relationship of the parties." *P.N.*, 474 F.3d at 1170.[2] A judgment on the merits or entry of a consent decree is not necessary to meet the "judicial imprimatur" requirement. *Id*. at 1172, citing *Carbonell v. I.N.S.*, 429 F.3d 894, 899 (9th Cir. 2003). Although there may remain some uncertainty as to what might constitute a "judicial imprimatur," the existence of some judicial sanction is a prerequisite to "prevailing party" status. *Id*. at 1173. In *P.N.*, the Ninth Circuit stressed that its position was in accord with other circuits, including the First Circuit which in *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 24 (1st Cir. 2004), noted that at the core of the Supreme Court's reasoning in *Buckhannon* was the concept of judicial imprimatur without which "a federal court may be unable to retain jurisdiction so it can oversee execution of the settlement." *Id*. See also *Jankey v. Poop Deck*, 537 F.3d 1122, 1129 (9th Cir. 2008) (sufficient judicial imprimatur where court dismissed case pursuant to a settlement agreement between the parties under which the court retained jurisdiction to enforce the settlement), and *Skaff v. Meridien North America Beverly Hills, LLC*, 506 F.3d 832 (9th Cir. 2007)(per curiam) (sufficient judicial imprimatur where order dismissing the case provided the court would retain jurisdiction to enforce the settlement agreement).

Plaintiffs Pakootas and Michel assert that because their suit to enforce the

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[2] In *P.N.*, the circuit noted that the settlement in *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 (9th Cir. 2002) was clearly judicially enforceable, rendering as dictum the circuit's statement in *Barrios* that the judicial sanction component of *Buckhannon's* definition of prevailing party was mere dictum. *Id*. at 1172. *Barrios* arguably stood for the proposition that the mere fact a settlement agreement was contractually (legally) enforceable, as opposed to judicially enforceable, was sufficient to confer "prevailing party" status. Mere contractual/legal enforceability is not enough because any settlement agreement is a legally enforceable contract. What is needed for there to be "prevailing party" status is an agreement that is judicially enforceable and subject to judicial oversight. See *Bell v. Board Of County Commissioners Of Jefferson County*, 451 F.3d 1097, 1103 n. 7 (10th Cir. 2006), discussing *Barrios*.

UAO culminated in a settlement agreement enforceable in this court "that substantially accomplished the requirements of EPA's UAO," they "substantially prevailed in [their] complaint to enforce the UAO." Plaintiffs contend the RI/FS Agreement, which is patterned after the UAO and requires Defendant to participate in and fund a remedial action selected under CERCLA Section 104 (42 U.S.C. § 9604), materially altered the legal relationship between them and Defendant, and confers on Plaintiffs the status of "prevailing" parties. This is so, say Plaintiffs, because the injunctive relief they sought in their citizen suit seeking to enforce the UAO is embodied by the RI/FS Agreement which effectively implements the UAO. Citing *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987), Plaintiffs contend it is inconsequential that they are not parties to the RI/FS Agreement entered into by EPA and the Defendant because they "stood in the shoes of EPA, filling an enforcement gap where EPA had not acted." Pursuant to the terms of the RI/FS Agreement, EPA can judicially enforce that agreement against Defendant and force it do something it otherwise would not have to do.

The parties and the court have been unable to find any case awarding fees to an individual or entity that, although a party to the litigation, is not a party to the settlement agreement. Even so, the court concludes that based on the special nature of the "citizen suit" in CERCLA litigation, and the unique factual circumstances present here, the RI/FS Agreement between EPA and Defendant materially altered the legal relationship between Defendant and Plaintiffs Pakootas and Michel. Plaintiffs Pakootas and Michel "stood in the shoes" of EPA in seeking to enforce the UAO, and the RI/FS Agreement between EPA and Defendant resulted in a material alteration of the legal relationship between Plaintiffs and Defendant because the RI/FS Agreement afforded Plaintiffs "some relief" on the merits of their UAO claims for injunctive relief. *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672 (1987). Relief need not be judicially decreed.

Here, the RI/FS Agreement is the equivalent of a judicial judgment because pursuant to that agreement, the Defendant altered its conduct in response to Plaintiffs' UAO claims for injunctive relief. *Id*. at 761-62.[3]

Furthermore, the judicial imprimatur requirement is met by virtue of the fact that the RI/FS Agreement specifically provides it is judicially enforceable. Paragraph 37 of the Agreement (Ex. 5 to Ct. Rec. 201) provides that "[s]olely for the limited purpose of an action to enforce its rights and obligations under Paragraphs 4, 40, 41, 43, 50, 57, and 58 of this Agreement, TCM [Teck Cominco] consents to personal jurisdiction in the United States District Court for the Eastern District of Washington or the U.S. Court of Claims, as appropriate." Citing *Labotest, Inc. v. Bonta*, 297 F.3d 892, 893 (9th Cir. 2002), Defendant contends that a settlement agreement "must be adopted or incorporated into an order by the court to satisfy the 'judicial imprimatur' requirement." Alternatively, and citing *Richard S. v. Dept. Of Developmental Serv. Of California*, 317 F.3d 1080, 1084-85, 1088 (9th Cir. 2003), Defendant contends a judgment on the settlement agreement will suffice. Although no judgment was entered on the RI/FS Agreement, nor was there any order of dismissal incorporating that agreement, the court does not read any Supreme Court or Ninth Circuit authority as narrowly holding there is no "judicial imprimatur" in the absence of a judgment, order, or decree. In *P.N.*, the Ninth Circuit held there must be "some" judicial sanction, without limiting what form that sanction had to take, and acknowledged there may remain some uncertainty as to what constitutes a "judicial imprimatur."

Plaintiffs are not seeking "prevailing party" status based on the "catalyst

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[3] In arguing they should be allowed to seek civil penalties from the Defendant on behalf of the United States, Plaintiffs noted they were not parties to the RI/FS Agreement. In arguing they should be allowed to seek costs and fees, Plaintiffs are not changing their position. They acknowledge they are not parties to the RI/FS Agreement, but contend it does not matter because that agreement materially altered the legal relationship between them and Defendant.

theory" that was rejected by the Supreme Court in *Buckhannon*. Because of the special nature of the "citizen suit" in CERCLA litigation and the unique circumstances present in this case, Pakootas and Michel were more than mere "catalysts" in bringing about the RI/FS Agreement between Defendant and EPA. The EPA had not taken legal action to enforce its UAO and so Pakootas and Michel, as allowed by law, "stepped into the EPA's shoes" and filed a "citizen suit"against the Defendant in an effort to enforce the UAO. While it is possible that Plaintiffs could have been included in a settlement agreement with Defendant to resolve the "citizen suit," Defendant knew it was not obligated to reach an agreement with the Plaintiffs, and that the critical entity with which it had to settle was EPA which had issued the UAO.

Pakootas and Michel are "prevailing" parties because they effectively obtained the injunctive relief they and EPA sought, which was compelling the Defendant to perform an RI/FS for the UCR site. Pakootas and Michel should not be foreclosed from receiving fees simply because it was not necessary for them to be parties to the RI/FS Agreement reached between Defendant and EPA, and because Defendant and/or EPA chose not to include them as parties to the agreement. To find otherwise would effectively result in a rule that a "citizen suit" plaintiff can never obtain fees for seeking to enforce a UAO where the EPA subsequently negotiates an agreement with a defendant that, for all intents and purposes, accomplishes the objectives of the UAO.

It is not inconsistent for Plaintiffs to be precluded from seeking civil penalties against Defendant for failing to comply with the UAO, yet allow them to obtain attorney fees and costs incurred in seeking to have the Defendant comply with the UAO. Any civil penalties would have been payable to the United States, not the Plaintiffs. On the other hand, an award of costs, including attorney's fees, will reimburse Plaintiffs for expenses incurred by them in seeking to enforce the UAO. Unlike the UAO claims for civil penalties, allowing an award of costs is

not a "challenge" to remedial action selected by the EPA (that being the RI/FS Agreement with Defendant). Allowing an award of costs is not a "second-guessing" of EPA because the Plaintiffs are seeking reimbursement for the costs of their efforts, not seeking payment of civil penalties that EPA opted to forego in its RI/FS Agreement with Defendant.[4]

III. CONCLUSION

Plaintiffs Pakootas and Michel have "substantially prevailed" on the merits of their UAO injunctive relief claims and therefore, their Motion For Award Of Costs Of Litigation Including Attorney Fees (Ct. Rec. 201) is **GRANTED**.

Pursuant to Fed. R. Civ. P. 54(b), the court will direct the District Executive to enter a final judgment on this award, allowing for a prompt appeal of the court's ruling. The District Executive is directed to enter a final judgment on the claims of Plaintiffs Pakootas and Michel for fees and costs pursuant to 42 U.S.C. Section 9659(f) because there is no just reason for delay, particularly so because of the fact

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[4] At footnote 11 at p. 20 of the order dismissing the UAO civil penalty claims, this court stated that "Plaintiffs' request for fees and costs related to their UAO claims cannot be separated from the UAO claims [and] [i]f the UAO claims fail, so does the request for fees and costs related to those claims."

This was a reference to recovery of fees and costs specifically in conjunction with recovery of civil penalties. Plaintiffs are not "prevailing parties" with regard to their UAO claims for civil penalties since those claims have been dismissed. Plaintiffs did not obtain "some relief" on the merits of those particular claims and they will not recover fees and costs expended in pursuing their UAO claims for civil penalties. They will only recover fees and costs expended in pursuing their UAO claims for injunctive relief on which they did obtain "some relief" on the merits by virtue of the RI/FS Agreement between EPA and Defendant. Once that relief had been obtained, Plaintiffs did not need to reassert UAO claims for injunctive and declaratory relief in the Second Amended Complaints they filed with the court.

that Pakootas and Michel are not parties to any of the remaining claims in this litigation.[5]

The court will not direct Plaintiffs to submit billing materials and affidavits describing work and charges related to their UAO claims for injunctive relief until such time as Defendant either chooses not to appeal the judgment, or until such time as there is final resolution of an appeal taken by Defendant.

IT IS SO ORDERED. The District Court Executive is directed to enter this order, enter judgment accordingly, and forward copies of the same to counsel of record.

DATED this 9th day of March, 2009.

s/Lonny R. Suko

LONNY R. SUKO
United States District Judge

[5] In fact, if Defendant opts to appeal, the parties may want to consider asking the court of appeals to consolidate that appeal with the pending appeal of this court's order dismissing Plaintiffs' UAO civil penalty claims.