No. 10-35045

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
ON APPEAL FROM THE EASTERN DISTRICT OF WASHINGTON (NO. CV-04-0256-LRS)

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; **DONALD R. MICHEL**, an individual and enrolled member of the Confederated Tribes of the Colville Reservation,

Plaintiffs–Appellees,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiff,

and

STATE OF WASHINGTON,

Plaintiff/Intervenor–Appellee,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant–Appellant.

SUPPLEMENTAL BRIEF OF APPELLEES JOSEPH A. PAKOOTAS AND DONALD R. MICHEL

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I. INTRODUCTION

On June 1, 2011, this Panel affirmed the district court's dismissal of Appellees Joseph A. Pakootas's and Donald R. Michel's (collectively, "Pakootas's") citizen suit claim for civil penalties, citing CERCLA's timing of review bar codified at 42 U.S.C. § 9613(h). *Pakootas v. Teck Cominco Metals, Ltd.*, No. 08-35951, 2011 U.S. App. LEXIS 10931 (June 1, 2011).[1] The Panel subsequently directed the parties to submit supplemental briefing explaining how that decision may affect their claims for attorney's fees. In response to the Court's direction, Pakootas explains herein that although the June 1, 2011 Opinion (hereinafter, "Civil Penalties Opinion") does not directly bear on Pakootas's status as a prevailing or substantially prevailing party on his independent injunctive relief claim, this Panel's analysis agrees with the district court's conclusion that Pakootas achieved a judicially-sanctioned material alteration in his legal relationship with Appellant Teck Cominco Metals, Ltd. ("Teck") and, thus, prevailed or substantially prevailed in his claim for UAO enforcement. The Civil Penalties Opinion implicitly recognized that the 2006 settlement between EPA and Teck ("RI/FS Agreement") effectuated the relief Pakootas had sought in his injunction relief claim, causing a material alteration in Pakootas's legal relationship with Teck.

[1] The Opinion was amended on July 1, 2011, to correct the caption. 2011 U.S. App. LEXIS 13632. The amendment did not modify the substance of the Panel's June 1, 2011 Opinion.

Furthermore, by describing EPA's covenant not to sue as the enforcement "hammer" over Teck's head, this Panel reinforced the district court's conclusion that the RI/FS Agreement was sufficiently judicially sanctioned.

This Panel also invited supplemental briefing on recent relevant Supreme Court or Ninth Circuit case law. As explained in greater detail below, the few relevant cases decided since the parties completed briefing address the key role that citizen suit plaintiffs hold in furthering environmental policy and distinguish this case from circumstances in which the defendant's change in behavior was merely voluntary, rather than judicially enforceable.

II. ARGUMENT

A. This Panel's Civil Penalties Opinion Accords with the District Court's Conclusion that Pakootas Prevailed or Substantially Prevailed on His Claim for Injunctive Relief.

1. The Civil Penalties Opinion neither directly favors nor in any manner undermines Pakootas's status as a prevailing party on his claim for injunctive relief to enforce the UAO. The Panel's analysis harmonizes with the district court's prevailing party determination.

Pakootas begins by addressing this Panel's express direction to explain how the Civil Penalties Opinion "may affect [his claim] for attorney's fees." The Civil Penalties Opinion does not directly affect Pakootas's fees claim. In his original complaint, Pakootas sought injunctive relief to enforce EPA's Unilateral Administrative Order ("UAO"), and he also, separately sought civil penalties for

the period of noncompliance with the UAO. ER 510-11. After EPA and Teck entered into the RI/FS Agreement, and EPA withdrew the UAO, Pakootas recognized that the RI/FS Agreement provided the relief that Pakootas sought in his claim for injunctive relief.[2] Therefore, Pakootas's amended complaint did not restate the injunctive relief claim but only maintained an independent claim for civil penalties for the 892-day period of Teck's noncompliance with the UAO. ER 413 ¶ 5.6.

The district court recognized the independence of the injunctive relief and civil penalties claims when it carefully distinguished that it was awarding fees and costs to Pakootas on his "UAO claims for injunctive relief" and that Pakootas would not recover fees and costs in pursuing his "UAO claims for civil penalties." ER 42, n.4. Therefore, this Panel's Civil Penalties Opinion has no direct bearing on Pakootas's claim for attorney's fees on the injunctive relief claim.[3]

Despite the lack of direct connection between the Civil Penalties Opinion and the attorney's fees claim on the independent injunctive relief claim, this Panel's

[2] Namely, Pakootas sought a judicially-enforceable mechanism to require Teck to accomplish the remedial investigation and feasibility study described in the UAO's Statement of Work. As the district court correctly concluded, the RI/FS Agreement obligated Teck to guarantee the accomplishment of that work. ER 17-18, 39.

[3] Because the district court dismissed his civil penalties claim, Pakootas did not seek a determination that he had prevailed and was entitled to attorney's fees on that claim.

analysis in the Civil Penalties Opinion squares with the district court's attorney's fees ruling now pending before the Court. Pakootas explains below that this Panel's analysis supports the district court's conclusions that (1) Pakootas achieved a material alteration in his legal relationship with Teck and (2) the judicial enforceability of that material alteration satisfies the Ninth Circuit's criterion for judicial imprimatur.

2. This Panel implicitly recognized that, through the RI/FS Agreement between EPA and Teck, Pakootas achieved a material alteration in his legal relationship with Teck.

All parties to this appeal agree that an element of the legal standard for prevailing party status is whether the party achieved a material alteration of the legal relationship with the opposing party. Appellant's Br. at 2 (Issue 1). The Civil Penalties Opinion confirms that the RI/FS Agreement materially altered Pakootas's legal relationship with Teck. It is undisputed that Pakootas sought in his injunctive relief claim a mechanism requiring Teck to carry out the remedial investigation and feasibility study described in the UAO. ER 511, ¶ ¶ 6.3, 6.4. This Panel acknowledged without question that the RI/FS Agreement did precisely that, stating that "Teck Cominco and the EPA made a deal to accomplish *the* cleanup." *Pakootas*, 2011 U.S. App. LEXIS 10931, at *14 (emphasis added). *Accord Saint John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1059 (9th Cir. 2009) ("[E]ven if the Agreement required [defendant] to do only

what it is was already doing it was undisputed that [defendant's] behavior became legally required rather than voluntary as a result of the Agreement"); *Richard S. v. Dep't of Dev. Servs. of the State of California*, 317 F.3d 1080, 1087 (9th Cir. 2003) (a settlement agreement materially alters the parties' legal relationship when the "defendants [are] required to do something directly benefiting plaintiffs that they otherwise would not have to do").

In fact, this Panel recognized that the RI/FS Agreement had the beneficial effect of accelerating assurances that the remedial investigation and feasibility study would actually occur. "Like all litigation, a lawsuit against Teck Cominco could go sour for the EPA. No doubt that risk played into its decision to settle the matter by contract." *Pakootas*, 2011 U.S. App. LEXIS 10931, at *17. In this way, the Civil Penalties Opinion reinforces the district court's conclusion that under the "unique factual circumstances present," the RI/FS Agreement afforded Pakootas "some relief" on the merits of his UAO claim for injunctive relief. ER 39. In sum, Pakootas's injunctive relief claim requested a mechanism requiring Teck to accomplish the work described in the UAO; the RI/FS Agreement fulfilled that objective, an outcome recognized by this Panel in its Civil Penalties Opinion.

Notwithstanding the foregoing, Teck may argue that the Civil Penalties Opinion's distinction between the role of EPA and the role of Pakootas in recovering civil penalties requires an interpretation that Pakootas did not prevail in

his injunctive relief claim because he is not a party to the RI/FS Agreement. This Panel should reject any such argument. When Teck entered into the RI/FS Agreement and undertook the remedial investigation and feasibility study requested in the UAO, it took the burden of that obligation and gained the benefit of CERCLA's restrictions on litigation implicating that remedial investigation and feasibility study. This change in the legal relationship between Pakootas and Teck was then confirmed by the Panel's application of CERCLA § 113(h)'s pre-enforcement review bar preventing Pakootas from proceeding to seek the penalties remedy in CERCLA § 106(b). The determination that CERCLA now prevents Pakootas from proceeding on his civil penalties claim confirms the district court's judgment that the RI/FS Agreement materially altered the legal relationship of Pakootas and Teck.

3. Further, the Civil Penalties Opinion concurs with the district court's conclusion that the RI/FS Agreement reflects the necessary quantum of judicial imprimatur.

As also agreed by the parties to this appeal, the second element of the prevailing party standard is the requirement that the material alteration be "judicially sanctioned." Appellant's Br. at 2 (Issue 2). *See Carbonell v. Immigration and Naturalization Serv.*, 429 F.3d 894, 898 (9th Cir. 2005) (citing the legal standard). To satisfy this element, the Ninth Circuit requires only that there be "some" judicial sanction, and it has not attempted to enumerate the

circumstances constituting such sanction. *See P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1173 (9th Cir. 2007) (requiring "some" sanction); *Tipton-Whittington v. City of Los Angeles*, 316 F.3d 1058, 1062 (9th Cir. 2003) (noting that examples given by the Supreme Court were "illustrative, not exhaustive").

Here, this Panel actually relied on the judicial enforceability of the RI/FS Agreement in affirming the dismissal of Pakootas's independent civil penalties claim. *Pakootas*, 2001 U.S. App. LEXIS 10931, at *14 ("[The RI/FS Agreement's] conditional covenant not to sue means that if Teck Cominco does not perform its obligations, the EPA can bring down its hammer, by seeking penalties of up to $27,500 a day for 892 days"). [4] The potential for return to district court if Teck fails to comply with the RI/FS Agreement meets the requirement for judicial imprimatur. *Cf. P.N.*, 474 F.3d at 1172 (observing that the Ninth Circuit has rejected any "overly narrow interpretation" of the judicial sanction element) (citing *Carbonell*, 429 F.3d at 899).

[4] Arguably, in *Saint John's*, the Ninth Circuit stated a third element to a prevailing party determination, that the party seeking prevailing status have obtained "actual relief on the merits" of his claim. *La Asociation de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083,1089 (9th Cir. Oct. 22, 2010) (citing *Saint John's*, 574 F.3d at 1059). Even if *Saint John's* did state a third element, Pakootas satisfies it because the very terms of the RI/FS Agreement requiring site investigation embody the relief Pakootas sought in enforcing the UAO.

B. Recent Ninth Circuit Case Law Further Supports Pakootas's Claim for Fees.

Before responding to this Panel's invitation to take account of recent case law on "attorney's fees claims for parties who have not obtained judicial relief," Pakootas first places the Panel's invitation in context. As explained in prior briefing, Pakootas *did* obtain the quantum of judicial relief necessary to satisfy this Court's prevailing party standard. As recognized by the district court and implicitly by this Panel, the RI/FS Agreement (which materially altered Pakootas's legal relationship with Teck because it forced Teck to implement a remedial investigation and feasibility study patterned after the UAO) is expressly enforceable in the district court. ER 382, ¶ 37. Teck's express consent to jurisdiction has significant meaning here because, without it, the district court might not have jurisdiction to enforce a contractual dispute due to Teck's status as a foreign entity. *And see Roberson v. Giulani*, 346 F.3d 75, 80 (2d Cir. 2003) ("the enforcement of a settlement agreement normally proceeds in state courts unless there is an independent basis for federal jurisdiction").

Ninth Circuit case law issued subsequent to the parties' briefing in this appeal[5] further supports Pakootas's determination as a prevailing or substantially

[5] The parties completed briefing on July 9, 2010, with the filing of Teck's reply brief. Pakootas has not identified any recent Supreme Court opinions relevant to this Panel's invitation for supplemental briefing.

prevailing party. Pakootas discusses below the two relevant cases which (1) address the role of citizen suits in furthering federal environmental policy and (2) distinguish this case from circumstances in which the defendant's change in conduct was merely voluntary, thus, falling short of the prevailing party standard.

1. *Resurrection Bay Conservation Alliance v. City of Seward*, 640 F.3d 1087 (9th Cir. May 19, 2011).

In *Resurrection Bay*, the district court determined that the plaintiff prevailed, and the defendant-appellant did not appeal that determination. 640 F.3d at *9. However, rejecting the appellant's argument that fees should nevertheless be denied under a "special circumstances" exception, this Court explained that fee awards to a prevailing party must be the "rule rather than the exception." 640 F.3d at *10 (citation omitted). This is because a citizen suit plaintiff does not recover an injunction "for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." 640 F.3d at *11 n.4 (quoting *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (concerning a claim under Title II of the Civil Rights Act)). In *Resurrection Bay*, as here, "if EPA had [acted sooner], this litigation could have been avoided completely." 640 F.3d at *11.

2. *America Cargo Transport, Inc. v. United States*, 625 F.3d 1176 (9th Cir. Nov. 5, 2010).

Consistent with the above, the Ninth Circuit appropriately rejected a prevailing party status request in *America Cargo Transport*. 625 F.3d at 1182. There, the defendant's *voluntary* action mooted the plaintiff's claim, thus failing to afford plaintiff a material alteration in the parties' legal relationship. *Id.* In contrast, as the Civil Penalties Opinion describes here, the RI/FS Agreement serves as a judicially-enforceable hammer wielded by EPA to force Teck's carrying out of its terms.

III. CONCLUSION

For the reasons stated above, the judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 5th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011 I electronically filed the foregoing with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate Cm/ECF system.

I certify that for all participants in the case who are registered as CM/ECF users, service will be accomplished by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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