In the United States Court of Appeals
for the Ninth Circuit

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,

vs.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant-Appellant.

No. 10-35045

(Eastern District of Washington
No. CV-04-0256-LRS)

SUPPLEMENTAL BRIEF OF APPELLANT TECK COMINCO METALS, LTD. PURSUANT TO THE COURT'S ORDER OF JULY 7, 2011

PILLSBURY WINTHROP SHAW PITTMAN LLP

CHRISTOPHER MCNEVIN
725 South Figueroa Street
Suite 2800
Los Angeles, CA 90017
Phone: (213) 488-7100
Facsimile: (213) 629-1033

THOMAS A. CAMPBELL
2 Houston Center
Suite 2000
909 Fannin Street
Houston, TX 77010-1018
Phone: (713) 276-7600
Facsimile: (713) 276-7673

KEVIN M. FONG
C. DOUGLAS FLOYD
50 Fremont Street
Post Office Box 7880
San Francisco, CA 94120-7880
Telephone: (415) 983-1000
Facsimile: (415) 983-1200

Attorneys for Appellant
TECK COMINCO METALS LTD.

Table of Contents

Table of Authorities

Page

Cases

APPELLANT'S SUPPLEMENTAL BRIEF IN RESPONSE TO THE COURT'S ORDER OF JULY 7, 2011

Appellant Teck Cominco Metals Ltd. (now Teck Metals Ltd.) submits this Supplemental Brief in response to the Court's Order of July 7, 2011, requesting the parties to address (1) the effect of the Court's recent decision in *Pakootas v. Teck Cominco Metals, Ltd.*, No. 08-35951, on the claims for attorney's fees at issue on the present appeal; and (2) "tak[ing] account of any subsequent Supreme Court or Ninth Circuit case law on attorney's fees claims for parties who have not obtained judicial relief."

I. THE COURT'S DECISION IN NO. 08-35951 SHOULD HAVE NO EFFECT ON THE PRESENT APPEAL

The Court's recent decision in No. 08-35951 holding that the District Court properly dismissed Plaintiffs' and Intervenor's claims for civil penalties for want of jurisdiction should have no effect on the present appeal.

This appeal involves the District Court's award of attorneys' fees for Plaintiffs'/Intervenor's pursuit of their separate claims for declaratory and injunctive relief seeking to enforce EPA's later-withdrawn Unilateral Administrative Order ("UAO") regarding the Upper Columbia River Site. The court's fees award at issue on this appeal was based entirely on Plaintiffs'/Intervenor's pursuit of those ultimately unsuccessful claims

seeking prospective enforcement of the UAO (which they later dropped from their second amended complaints after EPA withdrew the UAO).

Plaintiffs' penalties claims had no effect on the district court's decision to award the fees at issue on this appeal.[1] That award (ER 2 (Dec. 21, 2009); *see also* ER 33 (March 9, 2009)) was issued after the court had already dismissed Plaintiffs'/Intervenor's penalties claims for alleged previous violations of the UAO (ER in No. 08-35951, at 95 (Sept. 19, 2008)), and included no amounts for the pursuit of those claims.

For the reasons stated in our Opening Brief, Plaintiffs and the intervening State are not entitled to fees for pursuit of their claims seeking to enforce the UAO because they dismissed those claims without obtaining any judicial relief or any change in the legal relationship between themselves and Teck with respect to those claims.[2] Consequently, they were not "prevailing parties" on those claims.

---

[1] However, this Court's affirmance of the dismissal of those claims for want of jurisdiction does underscore that Plaintiffs and the intervening State are not prevailing parties, because they have not obtained judicial relief on any of their claims.

[2] Obviously, the fact that EPA's settlement with Teck legally required the dismissal of Plaintiffs'/Intervenor's penalties claims against Teck does not show that they "prevailed" on their claims seeking to enforce the UAO, which they dismissed without obtaining judicial relief of any kind.

II. SUBSEQUENT NINTH CIRCUIT AUTHORITY CONFIRMS THAT PLAINTIFFS AND INTERVENOR ARE NOT "PREVAILING PARTIES" ENTITLED TO AN AWARD OF FEES FOR THE UNSUCCESSFUL PURSUIT OF THEIR CLAIMS SEEKING TO ENFORCE THE UAO

Decisions of this Court with precedential effect[3] issued subsequent to the submission of the parties' briefs confirm that neither Plaintiffs nor Intervenor are "prevailing parties" entitled to an award of fees because (1) they obtained no judicial relief from the District Court, and (2) they obtained no change in the legal relationship between themselves and Teck.

In *La Associacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083 (9th Cir. 2010), plaintiffs sought relief against the City's alleged harassment of day laborers. After the suit was filed, the city voluntarily repealed the governing ordinance, but allegedly continued to harass the laborers. *Id.* at 1086. The trial court subsequently dismissed two of the three plaintiffs for lack of standing. The remaining plaintiff, ATLF, then reached a settlement agreement with defendants, which stated that the

---

[3] Unpublished decisions lacking precedential effect are in accord. *Brown v. Mason*, No. 09-36038, 2011 WL 1654049 (9th Cir. May 3, 2011);

(continued...)

parties disagreed as to reasonable attorney's fees and costs, and allowed plaintiffs 90 days to file a motion for such fees and costs. *Id.* n.3. The trial court denied ATLF's motion for fees. *Id.* at 1087.

This Court reversed on the ground that the settlement agreement had been endorsed by the District Court, which had retained jurisdiction to enforce it. The Court stated: "In determining whether a settlement agreement confers prevailing party status on a plaintiff, we have used a three-part test, looking at : '(1) judicial enforcement; (2) material alteration of the legal relationship between the parties; and (3) actual relief on the merits of [the plaintiff's] claims.'" *Id.* at 1089. Plaintiffs were prevailing parties because the district court had explicitly retained jurisdiction to enforce the agreement. "When 'the district court [has] placed its *stamp of approval on the relief obtained*, that relief has the necessary judicial imprimatur to qualify a plaintiff as a prevailing party.'" *Id.* (emphasis added). The Court also found that the legal relationship between the parties had been materially altered by the agreement. *Id.* at 1089-90. "Appellees were not necessarily subject to the jurisdiction of a federal court for

---

(...continued)
Winnemucca Indian Colony v. United States, 399 Fed. Appx. 240 (9th Cir. 2010).

violating those policies until the settlement agreement was signed. . . . Second, ATLF can now simply move to enforce the settlement agreement rather than having to bring a new action to defend its members." *Id.* at 1090. "Finally, Appellants received 'actual relief' on the merits of their claims. To do so, 'a plaintiff must receive some actual relief that serves the goals of the claim in his or her complaint.'" *Id.* "Here, *Appellants* received relief in the form of a judicially enforceable agreement requiring Appellees to adhere to policies respecting day laborers and their First Amendment rights, relief ATLF sought in its complaint." *Id.* (emphasis added).

By contrast, as pointed out in our Opening Brief (pp. 12-30), the settlement agreement in the present case meets none of the requirements for Plaintiffs or Intervenor to be classified as "prevailing parties." Teck's Settlement Agreement with EPA was never approved, endorsed, or otherwise sanctioned by any court and the District Court retained no jurisdiction to enforce it. Further, by its express terms, it is not judicially enforceable by the plaintiffs, but only by EPA. Nothing that the court did altered the legal relationship between Teck and Plaintiffs or Intervenors. Unlike ATLF, Plaintiffs and Intervener in the present case cannot now "simply move to enforce the settlement agreement rather than having to

bring a new action to defend [their] members." Finally, nothing the court did provided any relief on the merits to the plaintiffs.

Similarly, in *America Cargo Transport, Inc. v. United States*, 625 F.3d 1176 (9th Cir. 2010), ACT sued the United States alleging that the government did not follow the law in allocating who would ship a load of vegetable oil under U.S. AID statutes. *Id.* at 1177-78. Ultimately, the responsible agencies agreed that ACT's interpretation was correct and voluntarily changed their process. The district court then granted defendant's motion for summary judgment, finding that the claims for injunctive and declaratory relief were moot because the government had adopted ACT's position. (The court dismissed ACT's claims for damages because the government had not waived its sovereign immunity.) The district court denied ACT's claim for attorney's fees. *Id.* at 1179.

This Court affirmed the denial of attorney's fees, finding that ACT was not a prevailing party. The Court stated, "To be a prevailing party, a litigant must '*achieve* a material alteration of the legal relationship of the parties[,]' and the alteration must be '*judicially sanctioned*.' . . . ACT does not qualify as a prevailing party because its regulatory victory was the result of the government's voluntary behavior, not judicial action. *See Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002)('[A] "prevailing party"

under the EAJA must be one who has gained [a material alteration] by judgment or consent decree.')." *Id.* at 1182 (emphasis added).

In the present case, Plaintiffs and Intervenor dismissed their claims for declaratory and injunctive relief seeking to enforce EPA's withdrawn UAO without obtaining judicial relief of any kind. There has been no judicial sanction of Teck's voluntary settlement agreement (which was with a non-party entity, the EPA, not with Plaintiffs or Intervenor). That Teck's settlement with EPA may have met some of the objectives that Plaintiffs and the State had sought is irrelevant, because their lawsuit did not achieve that result and the settlement was not sanctioned by any court. *See* our Opening Brief, pp. 21-24. They therefore are not "prevailing parties" as a matter of law.

CONCLUSION

For the reasons stated in this Supplemental Brief and in our Opening Brief, Plaintiffs and Intervenor were not prevailing parties entitled to an award of fees. The judgment of the District Court therefore should be reversed.

Dated: August 8, 2011.

Respectfully submitted,

PILLSBURY WINTHROP
SHAW PITTMAN LLP
KEVIN M. FONG
C. DOUGLAS FLOYD

By /s/ C. Douglas Floyd

Attorneys for Appellant
Teck Cominco Metals Ltd.

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 32-1 AND 32-3 FOR CASE NO. 10-35045

I certify that, pursuant to Ninth Circuit Rules 32-1 and 32-3 , this Supplemental Brief complies with the with the 10-page limit established by the Court's order of July 7, 2011.

Dated: August 8, 2011.

PILLSBURY WINTHROP SHAW PITTMAN LLP
KEVIN M. FONG
C. DOUGLAS FLOYD

By /s/ C. Douglas Floyd

Attorneys for Appellant
Teck Cominco Metals Ltd.

9th Circuit Case Number(s) 10-35045

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Aug 8, 2011 .

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

Signature (use "s/" format) /s/ Thomas E. Morgan

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) August 8, 2011 .

Participants in the case who are registered CM/ECF users will be served 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 document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Eugene I. Annis — Counsel for Defendant-Appellant
LUKINS & ANNIS, PS
Washington Trust Financial Center
717 W. Sprague Ave.
Spokane, WA 99201-3922
T: 509-455-9555

Signature (use "s/" format) /s/ Thomas E. Morgan