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; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiffs-Appellees, and THE STATE OF WASHINGTON, Plaintiff-Intervenor-Appellee, vs. TECK COMINCO METALS LTD., a Canadian corporation, Defendant-Appellant.	No. 16-35742 (Eastern District of Washington No. CV-04-0256-LRS)

APPELLANT'S REPLY BRIEF

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I. THE DISTRICT COURT LACKED AUTHORITY TO CERTIFY UNDER RULE 54(B).

For Federal Rule of Civil Procedure 54(b) to apply, "claims must be multiple." *Arizona State Carpenters v. Miller*, 938 F.2d 1038, 1039 (9th Cir. 1991) (*quoting Cont'l Airlines v. Goodyear Tire & Rubber Co.,* 819 F.2d 1519, 1524 (9th Cir. 1987)). Without multiple claims, a court has no authority to "direct entry of a final judgment as to one or more, but fewer than all, claims." *See* Fed. R. Civ. P. 54(b); *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1029 (6th Cir. 1994).

Plaintiffs the Confederated Tribes of the Colville Reservation ("Tribes") and the State of Washington ("State") (together, "Plaintiffs") argue that "there are two distinct claims in this case"—one for response costs and one for natural resource damages, both under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq*. State Br., p. 25; *see* Tribes Br., p. 17. But Plaintiffs ignore their own pleadings, which allege that Teck is liable under CERCLA and then seek several different remedies flowing from that alleged liability. The Tribes'

complaint asserts that Teck "is a liable party under CERCLA," alleging that Trail smelter "discharges into the Columbia River resulted in disposal into the Upper Columbia River Site of contaminants" and that Teck "is liable as a 'covered person' under 42 U.S.C. § 9607(a)(3) [Section 107(a)(3)]." ER 345. Based on that single claim, the Tribes seeks several remedies: declaratory relief, response costs, and damages for alleged injuries to natural resources. ER 345-348. The State's allegations are essentially the same. ER 359-363.

In seeking to divide their single CERCLA claim into separate ones, Plaintiffs ignore the text of CERCLA, which first identifies the elements of liability and then enumerates various remedies available from a liable party. Pursuant to CERCLA Section 107(a)(4), a responsible party is liable to a tribe or state for two remedies: "(A) all costs of removal or remedial action…not inconsistent with the national contingency plan", plus "(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss…." if the tribe or state is a natural resource trustee for resources that were injured by the release. 42 U.S.C. § 9607(a)(4)(A), (C). Both of these remedies are

supported by a single finding of liability under CERCLA; they are not separate claims.

Plaintiffs argue that proving natural resource damages requires causation evidence beyond that necessary to prove liability for response costs. *See* State Br., pp. 23-25; Tribes Br., pp. 18-19. However, it is not surprising that recovery of multiple remedies for the same claim may involve additional evidence. The critical inquiry in determining whether there is one versus multiple claims is whether those multiple remedies are being sought based on "only one legal right." *See Arizona State Carpenters*, 938 F.2d at 1040. Here, Plaintiffs seek declaratory relief, response costs, and natural resource damages, and they are doing so based on a single legal right under Section 107(a). 42 U.S.C. § 9607(a).

The State suggests that "[j]udicial opinions routinely refer to CERCLA response costs and natural resource damages claims as separate 'claims' or 'causes of action." State Br., p. 22; *see also* Tribes Br., p. 18. In fact, none of the cases cited by the State or the Tribes actually addresses whether natural resource damages and response costs are distinct legal rights or instead different remedies available under Section 107(a). And, the State fails to mention the

case that has come the closest to addressing the issue—*NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682 (7th Cir. 2014). In *NCR Corp.*, the Seventh Circuit described natural resource damages as "among the damages that parties can be required to pay under CERCLA section 107(a)[.]" *Id.* at 709.

The remaining arguments advanced by the Tribes also lack merit. The Tribes suggests that certification under Rule 54(b) may be appropriate if there are "multiple claims…[w]here there is some, but not complete factual overlap between separate claims." Tribes Br., p. 19. But here, Plaintiffs have asserted a single legal claim arising under Section 107(a) of CERCLA. Thus, the cases cited by the Tribes, such as *Local P-171 v. Thompson Farms Co.*, 642 F.2d 1065 (7th Cir. 1981), are irrelevant—they do not address the situation where a single legal claim arises under a statutory provision with multiple remedies.

If there is not a proper basis for directing entry of judgment under Rule 54(b), the district court's Judgment and Amended Judgment should be reversed or vacated, with a full remand to the trial court to complete proceedings on the remaining natural resource damages issues.

II. PLAINTIFFS FAILED TO ESTABLISH PERSONAL JURISDICTION OVER TECK.

The district court erred in relying on the personal jurisdiction test in *Calder v. Jones*, 465 U.S. 783 (1984), because that test is for intentional torts, and Plaintiffs' CERCLA Section 107 claim is not an intentional tort claim.

The U.S. Supreme Court's unanimous opinion in *Walden v. Fiore*, __ U.S.__, 134 S.Ct. 1115 (2014), states that "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contact with the forum." 134 S.Ct. at 1123 (emphasis added). Significantly, *Walden* cites *Calder* in the context of "intentional-tort" cases: "The proper focus of the 'minimum contacts' inquiry in intentional-tort cases is "the relationship among the defendant, the forum, and the litigation. *Calder*, 465 U.S. at 788." *Walden*, 134 S.Ct. at 1126.

The Tribes argues that "the phrase 'intentional tort' is not even used" in *Calder*. *See* Tribes Br., p. 22. In fact, *Calder* describes the conduct at issue there as "intentional, and allegedly tortious, actions [that] were expressly aimed at California." *Calder*, 465 U.S. at 780.

Moreover, in *Walden*, the Supreme Court used the phrase "intentional tort" multiple times, including when describing *Calder*. *See Walden*, 134 S. Ct. at 1117 ("These same principles apply when intentional torts are involved. *See Calder v. Jones*, 465 U.S. 783, 788-789[.]"); *id.* at 1124 (noting that "the defendants' intentional tort actually occurred *in* California" in *Calder*); *id.* at 1126 (citing *Calder* in discussing "[t]he proper focus of the 'minimum contacts' inquiry in intentional-tort cases").

Plaintiffs cite decisions by this Court that do not address whether *Calder* applies only to intentional torts (Tribes Br., pp. 23-24; State Br., pp. 28-29) but fail to adequately address this Court's direct statement that: "We decline to apply *Calder* because it is well established that the *Calder* test applies only to intentional torts[.]" *Holland Am. Line Inc. v. Waresila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007). Plaintiffs suggest that this Court in *Holland America* "referred to 'intentional torts'" only to draw a contrast to "mere untargeted negligence" (Tribes Br., p. 24; *see* State Br., p. 30), but *Calder* repeatedly referred to the fact that the alleged contact was both "intentional" and "tortious." Consistent with *Calder*, this Court's

opinion in *Holland America* refers to "intentional *torts*." *Holland Am.*, 485 F.3d at 460 (emphasis added).

Moreover, even if the *Calder* test did apply here, Plaintiffs have failed to satisfy it. A key element of the *Calder* test is that the defendant "expressly aimed at the forum state." *Yahoo! Inc.*, *v La Lique Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). Here, the discharges to the river in British Columbia were not expressly aimed at the State of Washington. According to Plaintiffs, "[w]hile *Calder* is often applied to defendants who have targeted a specific person, it also applies to acts 'performed … for the very purpose of having their consequences felt in the forum state." Tribes Br., p. 25 (quoting *Lake v. Lake*, 817 F.2d 1416, 1422 (9th Cir. 1987)). The district court did not, and could not, find that "the very purpose" of Teck's actions in Canada was to have the consequences felt in Washington State. *See* ER 70, ¶ 9 (district court found instead that Teck "knew that repose of its waste in Washington State was a natural consequence of river disposal").

Plaintiffs erroneously suggest that "the district court's approach to 'express aiming' follows from *Calder*" because the defendants in *Calder* "engaged in intentional misconduct in Florida knowing that

this would cause serious harm in California." State Br., p. 32 (citing *Simon v Philip Morris, Inc.*, 86 F.Supp.2d 95, 128 (E.D.N.Y. 2000); *see also* Tribes Br., pp. 27-28. However, in *Calder*, the defendants' actions were expressly aimed at the forum state of California — there was ample evidence that California was the "focal point" of the defendants' actions. *Calder*, 465 U.S. at 789. Here, in contrast, the district court did not find, and there is no evidence, that Washington State was the "focal point" of Teck's actions in British Columbia.

Accordingly, there is no personal jurisdiction over Teck, and the case must be dismissed.

III. THE TRIBES' LITIGATION EXPENSES ARE NOT "RESPONSE COSTS" RECOVERABLE UNDER CERCLA.

The district court awarded the Tribes $8,253,676 in litigation expenses as "response costs" under CERCLA Section 107(a)(4)(A), with $4,859,482 in attorney's fees and the rest in expert expenses, all spent to "prove Teck's liability" in this lawsuit. ER 18; *see also* ER 15-19 (detailing the Tribes' expert litigation work claimed as "response costs"); ER 23-24 (tabulating the experts' expenses); ER 35 (district court's characterization that, '[t]he Tribes' response costs

were incurred investigating site conditions [in the litigation] and proving its claim against Teck for declaratory relief regarding cost recovery under CERCLA."); ER 33 (Tribes had no unfunded pre-litigation activities); ER 13 (Tribes' participation in EPA's response action is funded). Neither portion of the award constitutes recoverable CERCLA response costs.

A. The Tribes' attorney's fees are not recoverable as CERCLA "enforcement costs."

The district court held that the Tribes' litigation attorney's fees were recoverable as "enforcement costs" "related to" the Tribes' costs of "removal."[1] ER 30-31. However, the Tribes lacks authority to enforce CERCLA at the Upper Columbia River ("UCR") Site and therefore cannot recover costs to litigate Teck's CERCLA liability to it as "enforcement costs" for the Site. The district court erred, as a matter of law, in concluding that the Tribes' attorney's fees and costs are recoverable as "enforcement costs." *See* App. Opn. Br., pp. 28-35. Moreover, even if the Tribes did have authority to enforce CERCLA

[1] Contrary to the Tribes' suggestion that there were multiple grounds for the district court's award (Tribes Br., p. 38), the district court's findings make clear that the award was based on the assumption that the "Tribes' legal fees and other litigation costs are for 'enforcement activities' related to the Tribes' costs of 'removal.'" ER 30.

at the UCR Site, the Tribes' lawsuit does not constitute "enforcement activity." *See* App. Opn. Br., pp. 35-40.

The Tribes does not have authority to enforce CERCLA at the UCR Site, as the federal government never delegated such authority to the Tribes. The district court's award of attorney's fees is premised on the notion that "[t]he Tribes is statutorily authorized to recover enforcement costs, including attorney's fees" (ER 31), but the statute conveys no such authorization. Rather, as explained in appellant's opening brief, in referencing "enforcement activities" in the definition of "response" (42 U.S.C. § 9601(25)), CERCLA is merely recognizing the federal government's enforcement authority; it did not create authority where it does not otherwise exist. Here, the Tribes does not claim that it otherwise has such authority for the UCR Site. *See* Tribes Br., pp. 31-38. Nor could it, as the federal government, which negotiated the agreement with Teck to implement the response action for the Site (the ongoing Remedial Investigation and Feasibility Study ("RI/FS") that will determine any remedy), never conveyed that authority to the Tribes. *See* ER 211 (EPA never granted enforcement authority to Tribes). EPA continues to be the Lead Agency for the Site. ER 240, ¶ 23 ("EPA oversees and maintains final approval

authority over all [Site] activities."); *see also* ER 1362 ("All work under this Agreement shall be performed subject to EPA oversight."); *see also* 40 CFR 300.5 ("*Lead agency* means the agency that provides the [On-Site Coordinator/Remedial Project Manager] to plan and implement the response actions under the NCP. EPA, the USCG, another federal agency, or a state (or political subdivision of a state) operating pursuant to a contract or cooperative agreement executed pursuant to 104(d)(1) of CERCLA…may be the lead agency for a response action.").

The Tribes asserts that, even without enforcement authority, under Section 107 (42 U.S.C. § 9607), "sovereign entities, such as the Tribes are entitled to receive 'all' costs, subject only to a defendant's burden of proving they are inconsistent with the [NCP].'"[2] Tribes Br., p. 32 (quoting *United States v. Kramer,* 913 F.Supp. 848, 862-64 (D.N.J. 1995)). However, Section 107 refers to "all costs of removal or remedial action"; it is not a blanket authorization to recover "all costs," whatever may be claimed. 42 U.S.C. § 9607 (a)(4)(A). While "removal" or "remedial action" may include "enforcement activities

[2] The Tribes erroneously characterizes Section 107 as an "enforcement provision." Tribes Br., p. 31. It is no such thing. Section 107 governs cost recovery by all parties—both private and governmental.

related thereto" (42 U.S.C. § 9601(25)), not all litigation constitutes an "enforcement" action that is related to a site's removal or remedial action. Here, the Tribes does not have authority to enforce CERCLA at the UCR Site, so its litigation activities were not "enforcement activities" for which it can recover costs.

The cases cited by the Tribes do not address who may have enforcement authority at a given CERCLA site, and they do not address whether and under what conditions an Indian tribe has authority to enforce CERCLA. They certainly do not demonstrate that the Tribes has such enforcement authority here. The UCR Site is not within the jurisdictional boundaries of the Reservation, and the federal government is leading the response action. *See* ER 1323-1360. The evidence shows that the Tribes has undertaken no response action independent of the federal government's (preliminary assessment followed by the ongoing RI/FS); and, the Tribes is and always has been a funded participant in that action. ER 1379, ¶ 49; ER 241, ¶ 26; ER 250, ¶¶ 75-78; *see also* ER 13, ¶ 11.

The Tribes erroneously suggests that this Court's opinion in *Washington State Dept. of Transp. v. Washington Natural Gas Co.* (*WSDOT*), 59 F.3d 793, 800 (9th Cir. 1995) supports a broad reading

of Section 107. *WSDOT* addressed whether a particular state agency was the "state" under 42 U.S.C. § 9607(a)(4)(A), not whether the state (or an Indian tribe)'s lawsuit constituted an "enforcement activity" under CERCLA.

Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986), is similarly inapposite. In *Wickland*, current owners of a hazardous waste site undertook cleanup of the site and sued to recover their incurred costs from liable parties under Section 107(a)(4)(B). The responsible parties argued they were not liable because the current owner had not undertaken the response action under a governmentally authorized cleanup program. *Id.* at 891. The court rejected the argument that an authorized governmental cleanup program is a prerequisite to a private party's Section 107 claim. That point is not at issue here, and *Wickland* and its progeny have no bearing. *See, e.g., Cadillac Fairview/California, Inc. v. Dow Chem. Co.,* 840 F.2d 691, 694 (9th Cir. 1988) (following *Wickland*).

According to the Tribes, "Teck's interpretation would pull apart subsection (A) [of 42 U.S.C. § 9607(a)(4)(A)] to provide the sovereigns' right to recovery of 'all costs' to only one of the three enumerated governments, confining the other to the narrower rights

granted 'other parties' in subsection (B)." Tribes Br., p. 37. Not so—it is Congress that distinguished the enforcement roles of the federal government, states, and Indian tribes in CERCLA.[3] Subsection (A) expressly is limited to costs actually "incurred," and if enforcement authority does not exist, such costs cannot be incurred.

It cannot be assumed that the federal government, the State and the Tribes have co-equal enforcement authority under CERCLA for the UCR Site. For one thing, the Columbia River is a navigable water of the United States. And, while the entirety of the Site is within the State's jurisdictional boundaries, the Site is not contained within the jurisdictional boundaries of the Colville Tribes' Reservation.

Moreover, as explained in Teck's opening brief, CERCLA Section 126 specifies an Indian tribe's rights and roles under CERCLA, which include the rights to notification, consultation, and

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[3] *Alabama v. Ala. Wood Treating Corp.,* 2006 U.S. Dist. LEXIS 37372 (S.D. Ala. June 6, 2006), the unpublished case cited by the Tribes (Tribes Br., p.37), does not address the different enforcement roles of the federal government, states, and Indian tribes in CERCLA, or even the issue of recoverability of costs of "enforcement activities." The issue in that case was unrelated to the issue here; it was whether whether a state that was also a responsible party could recover response costs from other responsible parties under Section 107(a)(4)(A), just as the federal government, or only via a contribution claim under Section 113 like a private party.

access to information, and a role in response actions as provided in the national contingency plan regulations. 42 U.S.C. § 9626.

Congress conferred enforcement authority on the President (and on EPA by delegation) under Section 106, but conveyed no such authority to Indian tribes. 42 U.S.C. § 9606. Thus, absent the federal government's delegation of that authority as contemplated in Section 104(d)(1), CERCLA conveys none. 42 U.S.C. § 9604(d)(1); *see also* 40 CFR 300.5 (the federal government is the lead agency unless there is an agreement otherwise). And no such authority existed here.

The Tribes argues that because Section 107 allows Indian tribes to recover all response costs incurred, Section 107 constitutes implicit authority for tribes to enforce CERCLA and recover litigation expenses at any site. Any such implication of enforcement authority does not satisfy the requirement that attorney fees may be recovered only with explicit Congressional authorization. *United States v. Chapman*[4], "Attorney fees are not recoverable 'absent explicit congressional authorization.'" 146 F. 3d 1166, 1173 (9th Cir. 1998)

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[4] Importantly, the government at issue in *Chapman* was the federal government, with enforcement authority derived from Section 106. Moreover, it had ordered the property owner to clean up, and then incurred response costs when the property owner refused to act, giving rise to the need for a civil action to compel action by the responsible party.

(quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994)).

The Tribes also argues that requiring a plaintiff to have enforcement authority in order to recover costs of "enforcement activities" would "render meaningless" the 1986 amendment adding the term "enforcement activities" to the definition of "response" in Section 9601(25), because "Section 9604(b)(1) already permitted recovery of these costs by the federal government and its delegates." Tribes Br., p. 37. In fact, the 1986 CERCLA amendment was not meaningless; it confirmed that the U.S., and states and tribes with enforcement authority for a given site, can recover enforcement costs. As *Chapman* explained, several district courts had held that the United States could recover attorney fees for enforcement actions prior to the 1986 amendments, but "Congress arguably endorsed these holdings, as well, in the SARA provision redefining the term 'response' to include related enforcement activities." *Id*. at 1174.

Finally, the State argues that "the Supreme Court has never construed 'enforcement activities' as narrowly as Teck"[5] (State Br., p. 40). There is nothing "narrow" in limiting the recovery of litigation

[5] The State's enforcement authority is not at issue in this appeal, which is limited to the district court's award to the Tribes.

expenses to government plaintiffs who are acting with enforcement authority. To the contrary, *Chapman* looked for "explicit authorization" in allowing recovery of attorneys' fees. Litigation expenses are not recoverable merely on the basis of a government entity's status as such, without regard to whether that governmental entity has enforcement authority or was in fact exercising any such authority. Certainly, a tribe may be able to recover its attorney's fees and litigation costs where it has authority to enforce CERCLA for a given site, and where the enforcement action is related to the actual removal or remedial action for that site—for example, where EPA has delegated its authority to that tribe under Section 104(d)(1), for a site within its sovereign boundaries, and it has taken response actions at that site. But this is not that case. There is no such authority for the Tribes for the UCR Site. Accordingly, the Tribes' attorney's fees and litigation costs are not recoverable as "enforcement costs."

The Tribes' lawsuit does not constitute "enforcement activity." Regardless of whether enforcement costs are recoverable by Indian tribes, not every tribal lawsuit under CERCLA qualifies as an enforcement action. This lawsuit does not constitute an enforcement action. For this additional reason, the Tribes' attorney's

fees and costs incurred in this lawsuit are not recoverable as "enforcement costs" under CERCLA.

Even if the Tribes had enforcement authority for the UCR Site – which it does not – in order to be a CERCLA "enforcement" activity, the Tribes' lawsuit must have sought to compel Teck to comply with an obligation to undertake or fund some response action Teck had refused or failed to do. But here, the Tribes' declaratory relief claim does not seek to "enforce" any response action obligation by Teck. *See* ER 345-348; ER 252, ¶ 83. It certainly does not seek to enforce any past, current or future cleanup order issued by EPA, as EPA withdrew its only order in 2006, after reaching agreement with Teck. ER 301. Nor does the Tribes seek to enforce an order by the Tribes (or by any other agency). *See* ER 252, ¶83 ("Neither Teck Metals Ltd., TAI, nor any other affiliate company have ever received an environmental violation notice, investigation or cleanup order from the Colville Tribes related to the UCR Site."); *see also* ER 345.

As explained in Teck's opening brief, the district court did not and could not find that the Tribes' request for declaratory relief needed to be granted in order to compel Teck to undertake response action for the UCR Site or to enforce a demand for reimbursement of

response costs incurred. *See* App. Opn. Br., pp. 38-39. To the contrary, Teck has been undertaking the response action required by EPA, i.e. the RI/FS under EPA oversight, for more than a decade pursuant to the 2006 Settlement Agreement. *See* ER 1361. The Tribes' argument that the RI/FS is not a response action under CERCLA and does not preclude a different response action (Tribes Br., pp. 38-39) misses the point: No other response action is at issue. The Tribes' case is predicated on mere speculation that one day, the EPA *might* order an action that Teck *might* then refuse; that is hardly sufficient to convert this third-party lawsuit into "enforcement." ER 252, ¶83.

Further, even if EPA does some day order an action, and if Teck were to refuse to fund or undertake it, there is no basis to assume that the *Tribes* will actually incur future response costs. The evidence shows otherwise: The Tribes' participation in the UCR Site response action has been and continues to be funded through contracts with EPA, at Teck's cost. ER 235; ER 250-252; ER 1379; ER 1296. Under these circumstances, the Tribes' declaratory relief action to establish a right to the recovery of potential future Tribal costs simply does not constitute "enforcement activity."

Nonetheless, the Tribes asserts that "[t]he Tribes took response action to which its enforcement activities relate," pointing to its petition "prompting EPA to investigate the UCR Site in the first instance" and participation in EPA's preliminary assessment. Tribes' Br., p. 40. In fact, the "response costs" claimed by the Tribes are not the costs of making that petition to EPA or participating in EPA's preliminary assessment. ER 33. In any event, there is no precedent for the theory that petitioning the federal government to take action amounts to a removal or remedial action.

Ultimately, the Tribes' argument is that its lawsuit "culminated in a finding of Teck's liability, thus 'secur[ing] a right to recovery [of] future response costs." Tribes' Br., p. 42. But establishing in court a right to recover future potential response costs has never been viewed as "enforcement activity." To the contrary, lawsuits that have been characterized as enforcement activities have been suits by the government to compel a responsible party to fund or undertake a given response action where the party has refused or failed to do so. *See, e.g., United Sates v. Chapman,* 146 F.3d 1166 (9th Cir. 1998).

The Tribes' request for declaratory relief is not premised on Teck having refused to undertake or fund a response action, or having

refused to reimburse the incurrence of actual response costs by the Tribes (or EPA, or anyone else); it simply is not an "enforcement activity." The record shows that Teck has been complying with its agreement with EPA to fully investigate the site and evaluate potential remedies (*see* ER 59, ¶ 59), and the record shows that Teck repeatedly has committed to remediate, although EPA has not requested that yet. ER 1990, 1993-1994, 1999-2000, 2003. The determination of any remedy will follow completion of an RI/FS that remains ongoing. ER 247-248, ¶¶ 60-62. Accordingly, the Tribes' attorney's fees and litigation costs would not be recoverable under CERCLA even if the Tribes had authority to enforce CERCLA for the UCR Site.

B. The Tribes' litigation costs do not meet the definition of "removal."

Beyond attorney's fees, the district court awarded $3,394,194.43 for the Tribes' experts and consultant fees for this lawsuit. The district court characterized these litigation expenses as "removal" costs. ER 28. These litigation costs do not meet the definition of "removal" and are not recoverable here. App. Opn. Br., pp. 41-47.

Moreover, the district court went beyond the evidence to increase the portion of expert and consultant fees the Tribes claimed as "removal" action costs. In its interrogatory responses, the Tribes stated that all of its costs were for litigation but that $589,907 "may also be characterized" as "removal." ER 1455 ("All response costs claimed … are 'enforcement' costs. The costs listed on the attached schedules and the highlighted entries on the invoices… maybe also be characterized as 'remedial' or 'removal' costs"); ER 1684; ER 1762. The fact that the Tribes characterized all of the costs as "enforcement" is additional confirmation that all of the costs were for litigation. Beyond that, the district court's characterization of the Tribes' $3,394,194 in litigation expert witness and consultant work as "removal" costs (beyond the $589,907 that the Tribes itself characterized as "removal" in sworn interrogatory responses), conflates removal actions with litigation activities. The district court reasoned that the Tribes "assessed and evaluated releases of hazardous substance, thereby proving Teck's liability" to the Tribes. ER 30. However, there is no precedent for the notion that "proving liability" in and of itself constitutes "removal action." To the contrary, the Third Circuit has observed that "[t]he heart of these definitions of

removal and remedy are 'directed at containing and cleaning up hazardous releases.'" *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 850 (3d Cir. 1995) (internal citations omitted).

The Tribes' view is simply that its litigation is a removal action because it "advanced the cleanup." There is no support for the proposition that litigation that "advances cleanup" can do double-duty as a removal action. Further, there are no facts in the record establishing that this lawsuit in fact has advanced any cleanup for the UCR Site. Tribes Br., p. 44 (citing ER 21-22). The Tribes speculates that its "success proving Teck's liability [as to river discharges] enabled EPA to negotiate a CERCLA-based [voluntary] cleanup order" for the implementation of soils removal actions (which were premised on the hypothesis that aerial emissions from the smelter may have impacted those soils). *Id.* The district court findings upon which the Tribes relies do not go this far. Rather, the findings recite the fact that EPA and Teck entered into an agreement in 2015 in which EPA expressly cited CERCLA, not that the Tribes somehow "enabled" EPA to negotiate that agreement. The Tribes was not a party to that agreement and presumes too much in proclaiming that it augmented

the capacity of EPA to enter that agreement, or that any different agreement may have resulted absent the Tribes' lawsuit.

The Tribes also claims that its "refutation" of Teck's divisibility defense "and ultimate success proving Teck's joint and several liability under CERCLA directly advanced the cleanup of the Site." Tribes Br., p. 45. The Tribes' conjecture only serves to confirm that its expert and consultant costs were for litigation, not removing hazardous substances.

Moreover, the Tribes' claim is factually incorrect. According to the Tribes, "the Tribes' scientific work assessed the presence of Teck's hazardous substances and releases of metals in the UCR Site, and was considered in EPA's investigation." Tribes Br., p. 29 (citing ER 18). But the district court did not find that EPA "considered" the Tribes' work. *See* ER 18. The State's assertion that the district court determined that the Tribes' "actions have materially advanced the status of cleanup at the UCR Site" (State Br., p. 42) is similarly flawed. The State cites, among other things, the district court's findings that the Tribes "present[ed] results of scientific investigation to EPA." ER 18. Anyone can present information to EPA, and EPA may decide to list it or not in the Administrative Record. The mere

presentation of information that EPA may later include in the Administrative Record falls far short of showing that the Tribes' litigation experts and consultants' work for this lawsuit "materially advanced the status of cleanup." *See also* ER 250, ¶ 72 ("[T]he RI/FS database does not include data generated by the Colville Tribes' litigation experts and consultants.").

IV. THE DISTRICT COURT ERRED IN DISMISSING THE APPORTIONMENT DEFENSE.

A. The Supreme Court's decision in *BNSF*.

In *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009) ("*BNSF*"), the Supreme Court rejected the notion that CERCLA mandates joint and several liability in all instances. Instead, the Court held that "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" 556 U.S. at 615. The Supreme Court set forth a two-step inquiry for applying the defense: (1) The harm at issue must theoretically be capable of apportionment; (2) If the harm is divisible, the defendant must present a reasonable basis for apportionment of that harm; in other words, it must demonstrate a reasonable way to

apportion the harm among the various sources. *BNSF*, 556 U.S. at 618.

While *BNSF* states that CERCLA defendants "bear the burden of proving that a reasonable basis for apportionment exists" (556 U.S. at 614), it did not alter the general rule that a party moving for summary judgment has the burden to show that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Thus, Plaintiffs had the burden to show that there was no genuine issue of material fact as to whether the UCR Site could be apportioned.

B. The alleged harm is capable of apportionment.

The threshold question on apportionment is concerned with whether—under any set of facts—the harm the Plaintiffs alleged in their Second Amended Complaints is theoretically capable of division. As *BNSF* explained, "[w]hen two or more persons acting independently caus[e] a … single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused." 556 U.S. at 615 (citing Restatement (Second) Torts §§

433A). This is a question of law. *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001).

BNSF repeatedly cites to the Restatement because "Congress intended the scope of liability 'to be determined from traditional and evolving principles of common law.'" *Id.* at 611 (citing *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802 (S.D. Ohio 1983)). The Restatement uses river contamination as the typical case of a divisible harm: "According to the Restatement, the typical case to which this rule applies 'is the pollution of a stream by a number of factories which discharge impurities into it.'" *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 896 (5th Cir. 1993) (internal citation omitted). Pollution of a river by multiple sources exemplifies a divisible harm. Thus, the alleged contamination of a waterway, such as the Upper Columbia River, is divisible based on the respective quantities of pollution discharged into the river.

Comment d to Section 433A of the Restatement (Second) of Torts specifically notes that:

> "[A]pportionment is commonly made in cases of private nuisance, where the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has

> interfered with the plaintiff's use or enjoyment of his land. Thus where two or more factories independently pollute a steam, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream."

Restatement (Second) of Torts at §433A, cmt. d. *See also Bell*, 3 F.3d at 903 ("pollution of a stream by two or more factories may be treated as divisible in terms of degree, and apportioned among the defendants on the basis of evidence of the respective quantities of pollution discharged by each").

Here, Plaintiffs attempt to distinguish Comment d by asserting that CERCLA is analogous to a death or the destruction of a piece of property. Plaintiffs point to Comment i to Section 433A, which states, in part:

> "Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. Death is that kind of harm, since it is impossible, except upon a purely arbitrary basis for the purpose of

> accomplishing the result, to say that one man has caused half of it and another the rest. The same is true of a broken leg, or any single wound, or upon the destruction of a house by fire, or the sinking of a barge."

Restatement (Second) of Torts at §433A, cmt. i. Plaintiffs rely on two examples in Comment i:

> "14. A Company and B Company each negligently discharge oil into a stream. The oil floats on the surface and is ignited by a spark from an unknown source. The fire spreads to C's barn, and burns it down. C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them.
>
> 15. The same facts as Illustration 14, except that C's cattle drink the water of the stream, are poisoned by the oil and die. The same result."

Id.

The harms Plaintiffs alleged do not resemble those in Comment i. Plaintiffs are not alleging a singular harm—such as a death, a broken leg, a house destroyed by fire, or dead cattle. Instead,

Plaintiffs allege that they incurred costs "in response to releases of hazardous substances" at the UCR Site. ER 1185, 1201. Both the Tribes and the State allege that they have:

> "incurred costs in response to release of hazardous substances into the environment at the Upper Columbia River Site. These costs include costs of investigating the nature and extent of contamination from the hazardous substances from the Cominco Smelter (which include arsenic; cadmium; copper, mercury, lead and zinc) and costs of overseeing investigative activities performed by others."

ER 1201; *see* ER 1185.

That is akin to the example in Comment d of a stream polluted by multiple factories, in which harm maybe apportioned "on the basis of evidence of the respective quantities of pollution discharged to the system. Restatement (Second) of Torts at §433A, cmt. d. Citing *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012), the State argues that the Seventh Circuit has held that "commingled contamination of a river from multiple sources was not divisible" (State Br., p. 59; citing *NCR Corp.*, 688 F.3d at 839). In relying upon

the Seventh Circuit's opinion in *NCR Corp.*, the State ignores the procedural setting of that case. The Seventh Circuit simply affirmed a preliminary injunction under an abuse-of-discretion standard of review. *Id.* at 837. The Seventh Circuit assumed there would be a full trial on the merits thereafter. *Id.* at 835. *NCR Corp.* does not support the district court's grant of summary judgment here.

The State speculates that "there is no way to determine what metal is responsible for what amount of harm …because each metal will independently drive the need for the cleanup, and the remedy for all will be the same (dredging, capping, removals, etc.)." State Br., p. 58. The State puts forth no supporting evidence. Moreover, the State simply assumes, without any basis, that EPA will select an active remedy for the UCR Site. In fact, EPA is not even done with the RI/FS, has not selected a remedy, and may well determine that no action is required based on the outcome of the yet-to-come risk assessments or feasibility study. ER 242, ¶ 30. The State also ignores the possibility that different metals may call for different remedies, or no remedy at all. Nor does the State acknowledge the possibility that remedial costs could be apportioned by metal volumes.

Plaintiffs confuse the broader scope of inquiry in the UCR RI/FS being overseen by EPA with the facts at issue in this lawsuit. EPA is not a party to this lawsuit, and Teck has no burden to demonstrate the divisibility of a theoretical, future claim by EPA, only the Plaintiffs' claims actually made in this lawsuit. *That* harm is limited to the six metals the Plaintiffs pleaded and which their experts testified they had bases upon which to opine.

Plaintiffs also alleged in their Second Amended Complaints that the releases of hazardous substances from the UCR Site have resulted in "injury to, destruction of, and loss of natural resources" (ER 1185, 1202) and that these alleged damages are indivisible. That issue has not been litigated yet, and there is no factual record to support such a leap. As a matter of law, natural resource injuries can be divisible. *See In re Acushnet River & New Bedford Harbor*, 722 F.Supp. 893, 901 (D. Mass 1989) (explaining that the responsible party will be jointly and severally liable as to natural resource injuries unless it can prove they are divisible).

Certainly, the (unspecified) natural resource damages Plaintiffs have alleged are not the "kinds of harm, [that] by their very nature, are normally incapable of any logical, reasonable, or practical

division," as contemplated by Comment i. Restatement (Second) of Torts at §433A, cmt. i. They are not, by their nature, a "single result." *Id*. Indeed, by their nature, injuries to natural resources can be varied—by resource (water, fish, birds, etc.), location, source and nature of contamination, and other factors. "[A]pproaches to divisibility will vary tremendously depending on the facts and circumstances of each case." *Hercules*, 247 F.3d at 717 (8th Cir. 2001).

C. There is a reasonable basis for apportionment.

The second inquiry in the apportionment analysis is factual and asks whether there "is a *reasonable* basis for determining the contribution of each cause to a single harm." *BNSF*, 559 U.S. at 615 (Restatement (Second) of Torts § 433A (1)(b)). Divisibility may be established by volumetric, chronological, geographic, or other types of evidence. *Id.* at 1883. "Ultimately, the decision whether to impose joint and several liability turns on whether there is a *reasonable* and just method for determining the amount of harm that was caused by each defendant (or in some cases, by an innocent cause or by the fault of the plaintiff)." *Bell*, 3 F.3d at 896.

In opposing Plaintiffs' motions for summary judgment, Teck showed that there is a reasonable basis for apportioning the harms the Plaintiffs alleged. "[A]pportionment itself is an intensely factual determination." *United States v. Alcan Aluminum Corp.*, 990 F. 2d 711, 722 (2d Cir. 1992) (citing *Chem-Dyne Corp.*, 572 F.Supp. at 811). "[D]iffering contentions supported by expert affidavits raise sufficient questions of fact to preclude the granting of summary judgment on the divisibility [apportionment defense] issue." *Id.* at 723.

Teck presented expert testimony by affidavit providing an apportionment methodology based on historic information about the sources of metals to the UCR Site from numerous mines and mills. ER 721-769. This testimony provided reasonable calculations of the volumes attributable to various sources of the metals the Plaintiffs identified in the second amended complaints. ER 721-769. One of these experts, Dr. Mark Johns, compared the maximum potential mass of the metals allegedly released from Trail smelter slag and effluents in the Upper Columbia River, to the total mass of metals released into the Upper Columbia River from the tailings and waste rock of the numerous mines and mills and other smelters in the area unrelated to

Teck in the Upper Columbia River watershed for which reasonable historic data exists, as well as natural sources. ER 721-767. "Divisibility of the common harm to the Basin based on causation using volumetric calculations may not be the 'perfect' method of divisibility, but it certainly is reasonable based on the historical facts available in this particular case." *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F.Supp.2d 1094, 1120 (D. Id. 2003).

Plaintiffs take issue with this testimony because a seperate expert opinion was stricken after the apportionment decision. That had no bearing on Dr. Johns's testimony, but if it did, that would be a disputed issue for trial.

Plaintiffs argue that Dr. Johns "limited its analysis to the top five centimeters of UCR Site sediments" (Tribes Br., p. 49; *see* State Br., p. 53). While mis-stated, this simply creates a disputed issue of fact that precludes summary judgment. In one of his alternative methods of apportionment, Dr. Johns did limit the amount of sediment considered to the top five centimeters, because that represents the approximate "diffusion boundary layer" at the interface between the sediment and the water below which metals entrained therein cannot interface with the water. ER 718-19. Plaintiffs' experts did not

disagree with this concept, although they disputed whether five centimeters is the proper depth. ER 851; ER 973.

Similarly, Plaintiffs' criticism that Teck "eschewed any analysis of synergistic effects between the six metals it addressed and other wastes" (Tribes Br., p. 53; *see* State Br., p. 60) also creates a disputed issue of fact that precludes summary judgment. Dr. Johns considered that Teck's slag was "co-located" — that is, physically located in the same sediment — with other slag and tailings. ER 719. But it is not chemically mixed with other substances because Teck's slag does not have the propensity to leach under actual conditions. *Id.* Dr. Johns concluded there are no synergistic or disproportionate effects that needed to be factored in into his apportionment. *Id.*

In essence, Plaintiffs' argument is that "Teck faces insurmountable difficulties in establishing any reasonable basis to apportion liability if divisibility is remanded." State Br., p. 61. That merely shows that there are genuine issues of material fact as to whether there is a reasonable basis for apportionment.

D. The District Court erred in granting summary judgment.

In granting summary judgment, the district court erroneously put the burden on Teck to identify all theoretical harm at the 150 mile-long UCR Site, including potential harm that was not put at issue by Plaintiffs. This ignored the fundamental principle that Plaintiffs are the masters of their complaint and define what is at issue in their claims, first in their complaint and then by the expert and other evidence they present.

Plaintiffs simply ignore the procedural posture, that Plaintiffs were the moving party seeking summary judgment on Teck's apportionment defense (*see* Tribes Br., pp. 47-58; State Br., pp. 43-62). Accordingly, Plaintiffs had the burden of either (1) disproving with affirmative evidence an essential element of Teck's apportionment defense, or (2) showing an absence of evidence allowing Teck to meet its burden on an essential element of its apportionment defense. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.,* 210 F.3d 1099, 1102 (9th Cir. 2000). Plaintiffs failed to meet their summary judgment burden in either respect.

Plaintiffs' core claim is that Teck did not address "all the harm at the Site" (Tribes Br., pp. 55-56) and "failed to demonstrate that the harm at issue is theoretically capable of apportionment" (Tribes Br., p. 47) because Teck's expert testimony was limited to the six metals Plaintiffs alleged and addressed in expert testimony (Tribes Br., p. 53; *see also* State Br., pp. 49-50). However, Plaintiffs failed to disprove with their own affirmative evidence that there is a reasonable basis for apportionment or that Teck reasonably addressed the harm alleged at the UCR Site. Plaintiffs do not identify evidence proving that the harm at the UCR Site is more than the six metals that they had pleaded and that Teck's experts therefore analyzed (*see* Tribes Br., pp. 47-58; State Br., pp. 49-62), because Plaintiffs' own expert expressly limited his opinion to those six metals. *See* App. Opn. Br., pp. 63-64. The "harm at issue" was defined by Plaintiffs' complaint and their own expert reports.

Each of these six metals was addressed by the expert testimony offered by Teck. *See* ER 783 ("[M]y opinion address the six metals alleged by Plaintiffs' experts to be sourced from Teck. If Plaintiffs later make further contentions that additional contaminants are attributable to Teck, I reserve the right to address these contaminants

in a further apportionment analysis."). Thus, Teck did demonstrate that the "harm at issue", i.e., what Plaintiffs had identified, was theoretically capable of apportionment and that there is a reasonable basis for apportionment.

Conversely, Plaintiffs failed to meet their summary judgment burden of showing that they are entitled to judgment as a matter of law on Teck's apportionment defense. In granting summary judgment, the district court asserted that "[i]t is apparent the Tribes and the State are seeking to recover response costs from Teck for investigating and cleaning up the entire UCR Site which includes all of the hazardous substances released or threatened to be released from the Site, from whatever source." ER 103 (footnote omitted); *see* Tribes Br., pp. 49-50; State Br., p. 50. But, in seeking summary judgment, Plaintiffs had the burden to show that Teck did not have sufficient evidence of a reasonable basis for apportionment. *See Nissan Fire*, 210 F.3d at 1102. If Plaintiffs' theory was that the basis for apportionment offered by Teck's experts was not "reasonable" because it failed to consider "all of the hazardous substances" (Tribes Br., p. 50; State Br., p. 50), then Plaintiffs should have identified what additional hazardous substances were part of the "harm at issue," in

their view. They failed to meet that burden. It was not Teck's burden to speculate.

The State's assertion that "Teck's divisibility burden is a heavy one" (State Br., p. 47) ignores the procedural setting of this case—it was the State and the Tribes that sought summary judgment. Thus, in seeking summary judgment, Plaintiffs had the burden to show that Teck did not have sufficient evidence of a reasonable basis for apportionment, regardless of what Teck's burden might later be at trial. *See Evansville Greenway and Remediation Trust v. S. Indiana Gas and Elec. Co.*, 661 F.Supp.2d 989, 1013 (S.D. In. 2009) (declining to grant summary judgment on apportionment to allow "full development of a record and a decision on the basis of real facts rather than the artificial and even hypothetical versions of facts the court must assume for purposes of deciding motions for summary judgment").

In arguing that "[p]roof of an apportionment affirmative defense…requires evaluation of *all* of the wastes at the Site" (Tribes Br., p. 54), Plaintiffs cite various cases, but none involved a grant of summary judgment dismissing an apportionment defense where the defendants addressed all harm profferred by the Plaintiffs and

presented expert testimony showing a reasonable basis for apportionment of that harm:

- In *United States v. R.W. Meyer, Inc.,* 889 F.2d 1497 (6th Cir. 1989), the Sixth Circuit affirmed a summary judgment finding the defendants jointly and severally liable for response costs, but it appears the defense of apportionment was not pled, and it was not discussed by the court.

- In *State of Washington v. United States*, 922 F.Supp. 421 (W.D. Wash. 1996), the district court denied motions for summary judgment that liability and damages were divisible. *Id.* at 430.

- In the Ninth Circuit's decision leading up to *BNSF*, the district court had conducted a twenty-seven day bench trial. *See United States v. Burlington Ne. & Santa Fe Ry. Co.*, 520 F.3d 918, 932 (9th Cir. 2008), *rev'd*, 556 U.S. 599 (2009).

- And, in *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988), the defendants "presented no evidence…showing a relationship between waste volume, the release of hazardous substances, and the harm at the site." *Id.* at 172.

Plaintiffs have failed to identify any cases taking the extraordinary step of granting summary judgment dismissing an apportionment defense despite expert testimony showing a reasonable basis for apportionment. The district court erred in dismissing Teck's apportionment defense.

CONCLUSION

For the reasons stated above and in appellant's opening brief, appellant respectfully submits that the district court's judgment should be reversed.

Dated: August 11, 2017.

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CERTIFICATION OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULES 32-2 OR 32-4 FOR CASE NO. 16-35742

This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief is 8,270 words, excluding portions exempted by Fed. R. App. P. 32(f) and is filed by a party filing a single brief in response to multiple briefs. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: August 11, 2017.

/s/ Kevin M. Fong
Kevin M. Fong

9th Circuit Case Number(s) 16-35742

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