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 OPENING BRIEF

PILLSBURY WINTHROP
SHAW PITTMAN LLP
CHRISTOPHER J. McNEVIN
401 Congress Avenue, Suite 1700
Austin, TX 78701
Telephone: (512) 580-9600

PILLSBURY WINTHROP
SHAW PITTMAN LLP
KEVIN M. FONG
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 983-1000

Attorneys for Appellant,
Teck Metals Ltd.

CORPORATE DISCLOSURE STATEMENT

Appellant Teck Metals Ltd., formerly known as Teck Cominco Metals Ltd., is a Canadian corporation; the parent corporation of Teck Metals Ltd. is Teck Resources Limited, also a Canadian corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Codes

Rules and Regulations

Other Authorities

STATEMENT OF JURISDICTION

The district court found that there is a federal question in this case, which is the basis for subject matter jurisdiction in the district court pursuant to 28 U.S.C. § 1331. Excerpts of Record ("ER") 127.

The district court has entered an Order Directing Entry of Final Judgment Pursuant to Fed. R. Civ. P. 54(b), *inter alia*. ER 2. Pursuant to the district court's Rule 54(b) certification directing entry of judgment, a judgment was entered, followed by an Amended Judgment on August 29, 2016. ER 1.

Appellant, Teck Metals Ltd. ("Teck"), timely filed a notice of appeal on September 9, 2016. ER 153-158. Teck also filed a motion for Summary Reversal or Vacatur of Judgments and Full Remand on October 7, 2016. On January 26, 2017, this Court denied Teck's motion for Summary Reversal or Vacatur, concluding "[t]he issues raised are best addressed by the merits panel."

This Court has jurisdiction under 28 U.S.C. § 1292(b).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court had authority to certify final judgment under Rule 54(b).

2. Whether Plaintiffs failed to establish personal jurisdiction over Teck.

3. Whether the district court erred in holding that the Tribes' litigation fees and costs are recoverable under CERCLA.

4. Whether the district court erred in entering dismissal and summary adjudication against Teck on its apportionment defense.

5. Whether CERCLA applies in this case, even though CERCLA does not apply extraterritorially and, moreover, "arranger" liability under CERCLA does not apply without a disposal by a third party, which did not occur here.

STATEMENT OF THE CASE

In response to a petition from Plaintiff the Confederated Tribes of the Colville Reservation (the "Tribes"), in 1999 EPA began conducting a preliminary assessment of the Upper Columbia River Site ("UCR Site"), a 150 mile-long stretch of river from the Canada-United States border south to the Grand Coulee Dam. ER 282, 1323. In 2003, EPA completed its preliminary assessment for the

UCR Site and determined that a comprehensive environmental investigation, referred to as remedial investigation and feasibility study ("RI/FS"), should be undertaken. ER 281-286. EPA looked to Teck, a Canadian company which operates a smelter in British Columbia, Canada adjacent to the Columbia River approximately ten miles north of the border, to undertake the UCR Site RI/FS under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C §9601, *et seq*. ER 1562. In December 2003, EPA issued a Unilateral Administrative Order directing Teck to complete a RI/FS. Teck agreed to undertake a comprehensive environmental assessment but disagreed that such an assessment should be undertaken pursuant to CERCLA because Teck is a Canadian company and was operating in Canada, not the United States. ER 281-300, ER 1562.

EPA-Teck Settlement Agreement. In 2006, EPA and Teck resolved their differences and entered into a settlement agreement by which Teck agreed to conduct and fund the RI/FS for the UCR Site under EPA direction and oversight, consistent with EPA guidance and regulations but not under a CERCLA consent order. ER 1361. In turn, EPA withdrew the Unilateral Administrative Order and waived

its penalties claim for any non-compliance with the 2003 Unilateral Administrative Order. ER 301.

The Tribes as a funded Participating Party. For over a decade, pursuant to that settlement agreement and under EPA oversight, Teck has been performing and funding a massive course of field work, laboratory analysis and risk assessment comprising the UCR Site RI/FS, which remains ongoing. ER 239-241. EPA consults with the Tribes and the State of Washington ("Plaintiffs"), as well as with the United States Department of the Interior ("DOI") and the Spokane Tribe of Indians (together, the "Participating Parties") throughout the RI/FS process, and per the agreement, Teck has and continues to fund all of the RI/FS work, including the Participating Parties' costs. ER 250-252; ER 1379.

Pakootas and Michel's Citizen Suit. After EPA began the RI/FS but before it entered the settlement agreement with Teck, two members of the Tribes filed this case as a citizen suit seeking to enforce EPA's since-withdrawn 2003 Unilateral Administrative Order. ER 1254. The State intervened in the citizen suit. ER 1242. In 2005, the State amended its complaint to add a claim for declaratory relief, response costs and natural resource damages under

CERCLA Section 107(a). ER 1228. Almost simultaneously, the Tribes joined Pakootas and Michel's suit in an amended complaint, without citizen-suit claims but seeking response costs and natural resource damages under CERCLA Section 107(a). ER 1213.

Pakootas and Michel dismissed. In light of the EPA-Teck settlement agreement, Pakootas and Michel ultimately filed a Second Amended Complaint dropping their effort to enforce the Unilateral Administrative Order but continuing to seek penalties. ER 1178. The district court dismissed the penalties claim as an impermissible challenge to EPA's removal or remedial action under CERCLA Section 104, in light of EPA's decision to enter into the settlement agreement with Teck to fund and conduct the RI/FS. ER 1154. Pakootas and Michel are no longer parties to this lawsuit.

Tribes and State's CERCLA Section 107(a) declaratory relief, response costs, and natural resource damages claim. What remained after Pakootas and Michel's dismissal were the State and Tribes' Section 107(a) declaratory relief, response costs and natural resource damages claims. ER 345-348; ER 359- 363. The complaints assert that Teck is liable under CERCLA for discharges of hazardous substances into the Columbia River in Canada, which allegedly

impact the UCR Site downstream in the U.S. ER 341-344; ER 354-356.

Bifurcation of "response costs" and natural resource damages portions of the Section 107(a) claims. With the Tribes and the State as the remaining plaintiffs, the district court bifurcated the case so that the State and Tribes' claim under CERCLA Section 107(a) would be litigated in two phases, declaratory relief for cost recovery in the first phase and natural resource damages in a subsequent phase. ER 351.

Background: CERCLA Section 107(a). Liability under CERCLA is addressed in Section 107(a), which sets forth four classes of persons subject to liability. 42 U.S.C. § 9607(a). A "covered person" in one of the four classes "shall be liable" under Section 107(a), unless subject to a defense set forth in Section 107(b). *Id.* There are, in turn, four types of costs and damages recoverable in a Section 107(a) claim:

> "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under Section 9604(i) of this title."

42 U.S.C. § 9607(a)(4).

Dismissal of Teck's Apportionment Defense in 2011. In July 2011, while EPA was evaluating the nature and extent of any contamination at the UCR Site, the Tribes filed a motion to dismiss Teck's affirmative defense of apportionment, and the State filed a motion for partial summary judgment on that defense. ER 1032; ER 1003. Both motions asserted that the harm at the UCR Site had not been fully defined so that Teck could not prove the harm was apportionable. *Id.*

Teck opposed the motions, and presented reports and testimony of experts who analyzed the harm presented by Plaintiffs' experts and addressed the two elements of apportionment: (1) the harm at issue is

divisible, and (2) a reasonable basis exists to apportion that harm. The defense experts addressed the contaminants that Plaintiffs' experts claimed were attributable to the Trail smelter (six metals identified in the Second Amended Complaints — arsenic, cadmium, copper, mercury, lead and zinc, as well as antimony, which was identified by one of Plaintiffs' experts). ER 1228, 1213. The defense experts opined that the alleged harm put at issue by Plaintiffs, the contamination from these metals, was theoretically divisible. They further opined that the harm was reasonably apportionable based on the mass of metals released from Trail smelter slag in the UCR Site relative to metals released from numerous historic mining and smelting operations in the UCR Site. ER 745-776.

Despite expert disputes on these issues, the district court dismissed Teck's affirmative defense on summary adjudication. ER 88. The district court placed the burden on Teck to identify and quantify all potential harm at the UCR Site, beyond the harm put forward by Plaintiffs' experts. ER 102. Thus, the district court concluded that Teck is jointly and severally liable because (a) Teck did not identify and quantify all hazardous substances in the UCR Site — even those for which Plaintiffs' experts testified they had no data

on which to base an opinion; (b) Teck did not identify all potential sources of such substances, in particular aerial deposition, even though air emissions were not alleged in the case; and (c) Teck did not evaluate the potential for synergy among chemicals in the environment, a matter not raised by Plaintiffs' experts in their case-in-chief reports. ER 115. Because the district court concluded Teck had not considered the entire potential harm, it found the harm to be indivisible, despite expert reports and testimony to the contrary submitted by Teck. ER 123.

Phase I Findings of Fact and Conclusions of Law. After the apportionment defense was dismissed, the parties stipulated to certain facts about the discharge of slag and effluent to the Columbia River in Canada from the Trail smelter, the movement of some of that material to the Upper Columbia River Site, the release of hazardous substances from that material, and Plaintiffs' incurrence of one dollar of response costs. ER 406. The district court thereafter entered its Phase I Findings of Fact and Conclusions of Law, and found Teck liable to Plaintiffs under CERCLA Section 107(a) on these facts. ER 1955.

Air Emissions. After the Phase I Trial, Plaintiffs filed fourth amended complaints adding allegations that, in addition to

discharging hazardous substances into the river, the Trail smelter emitted into the air certain hazardous substances that were carried by the wind to the UCR Site. ER 342; ER 354. Teck moved to strike those allegations; the district court denied the motion. On July 27, 2016, this Court reversed the district court. *Pakootas v. Teck Cominco Metals Ltd.,* 830 F.3d 975 (9th Cir. 2016).

Phase II – Past "Response Costs" Trial. The parties moved to the next phase of the case to adjudicate the amount and recoverability of the State and Tribes' past response costs, continuing to defer natural resource damages to a subsequent phase. ER 401. The response costs portion of the State's claim was settled. ER 335. The Tribes and Teck proceeded to trial on the "response costs" portion of the Tribes' claim, which amounted to the Tribes' costs of this lawsuit since the Tribes' RI/FS participation costs are funded under the settlement agreement between EPA and Teck.

Teck moved for summary adjudication on the grounds that the Tribes' claimed costs consisted entirely of its costs of pursuing this lawsuit, and that because it lacked enforcement authority under CERCLA for the UCR Site, it could not recover such litigation expenses. ER 303. Shortly before trial, the district court granted the

motion in part, holding that the Tribes had no authority to enforce CERCLA at the UCR Site and therefore could not recover its litigation fees and costs as "enforcement activities." ER 180. In December 2015, the parties proceeded to trial on whether, as the district court explained the question, "some of the fees and costs incurred by the Tribes in Phase I of this litigation constitute recoverable response costs under CERCLA because they are not attributable to litigation, but instead are related to 'removal' or 'remedial' action." ER 200.

After trial established that all of the Tribes' costs were attributable to litigation, the district court sua sponte reversed its summary adjudication, holding that the Tribes had "inherent" CERCLA enforcement authority and therefore could recover its litigation costs as "response costs." ER 167. Then, on August 12, 2016, the district court entered its Phase II Findings of Fact and Conclusions of Law, awarding the Tribes $8,253,676.65 in litigation attorney's fees and costs, including expert and consultant costs, as CERCLA "response costs," plus prejudgment interest. ER 42.

The district court further specified that the question of "whether any release or threatened release has caused damages or injury to,

destruction of, or loss of natural resources" was "not at issue in Phase II of the trial," and the district court "makes no finding regarding" that issue. ER 42. Thus, Plaintiffs' natural resource damages allegations remain to be adjudicated.

Rule 54(b) Certification. Simultaneously with its Phase II Findings of Fact and Conclusions of Law, the district court directed entry of judgment pursuant to Federal Rule of Civil Procedure 54(b) awarding the Tribes its legal fees and other litigation costs incurred prior to trial as "response costs" under CERCLA Section 107(a). ER 2-8.

Entry of Judgments. Pursuant to the district court's Rule 54(b) certification directing entry of judgment, a Judgment was entered for the Tribes in the amount of $8,253,676.65. ER 159. On August 29, 2016, an Amended Judgment was entered adding $344,300.00 for prejudgment interest. ER 1.

Notice of Appeal. Teck filed a notice of appeal on September 9, 2016. ER 153-158. Teck also filed a motion for summary reversal or vacatur on the ground that the district court lacked authority to certify under Rule 54(b) of the Federal Rules of Civil Procedure since the natural resource damages allegations portion

of the Plaintiffs' CERCLA Section 107 claim remain to be adjudicated. This Court denied the motion without prejudice to Teck raising the arguments in its brief on the merits. [Order, Jan. 26, 2017]

STATEMENT OF FACTS

In August 1999, the Tribes petitioned EPA pursuant CERCLA Section 105(d) to conduct a preliminary assessment of the Upper Columbia River Basin from the Canadian Border, southward through Lake Roosevelt, to the Grand Coulee Dam, encompassing water, river and lake-beds, and banks. 42 U.S.C. § 9605(d). ER 1323. The Tribes recognized early on that addressing the UCR Site "would be [EPA's] primary responsibility." ER 1663. EPA granted the Tribes' petition and began conducting a preliminary assessment of the Upper Columbia River. ER 1561. In June 2000, EPA and the Tribes entered into a Memorandum of Agreement whereby the EPA provided funding for the Tribes to participate with EPA in the Preliminary Assessment. ER 1355. EPA was the lead agency in the preliminary assessment. ER 1681-1683.

In March 2003, EPA completed its preliminary assessment and site investigation. ER 1155. EPA determined that a Remedial Investigation and Feasibility Study ("RI/FS") should be completed for

the UCR Site and that discharges originating from the Trail smelter and other sources had migrated downriver to the UCR Site. ER 281-286; ER 1681-1684.

By that point, negotiations had begun between EPA and Teck, *see* ER 1562, and while they were underway, on December 11, 2003, EPA issued a Unilateral Administrative Order to Teck under section 106(a) of CERCLA (42 U.S.C. § 9606(a)), directing Teck to conduct an RI/FS under CERCLA for the UCR Site. ER 239, ¶¶14-15; ER 280. EPA chose not to enforce its order while negotiations progressed. ER 239, ¶ 16; ER 265, at ¶ 4.

Teck affirmed its desire to work with EPA to investigate and remediate the UCR Site. Specifically, Teck's then-Chief Executive Officer wrote to EPA that, "What Teck Cominco is willing to do is to enter into an agreement with your Agency, fully enforceable under the laws of the United States, to fund the analysis and to pay for the remediation required." ER 1562. The point of disagreement between EPA and Teck was whether CERCLA applied to a Canadian company operating in Canada. ER 1562. In fact, in January 2004, the Canadian government issued a Diplomatic Note to the Department of State stating that Canada does not believe that CERCLA applies to

Teck and that EPA's Unilateral Administrative Order "may set an unfortunate precedent, by causing transboundary environmental liability cases to be initiated in both Canada and the United States." ER 1565. Canada urged EPA to rescind the order and examine Teck's offer to complete an environmental and human health risk assessment under an enforceable agreement. *Id.*

In May 2004, EPA entered into an updated contract with the Tribes to fund its participation in "the EPA CERCLA Superfund Remedial Investigation/Feasibility Study on the Upper Columbia River/Lake Roosevelt Site." ER 1263. That contract has been amended and renewed at least eight times to provide funding to the Tribes from 2000 through September 30, 2017. ER 1296. Teck advances the funding for this contract to EPA each year, pursuant to the 2006 EPA-Teck settlement agreement. ER 1379; ER 250-252.

On June 2, 2006, EPA and Teck signed the settlement agreement to proceed with the RI/FS. ER 1361. Under the settlement agreement, Teck agreed to fund and conduct the RI/FS under EPA oversight, and to fund the Participating Parties' participation. While not carried out under a CERCLA administrative or judicial order, the agreement requires that the RI/FS be conducted consistent with the

National Contingency Plan and EPA guidance. *Id.* Upon entry into the settlement agreement, EPA withdrew the 2003 order directing Teck to conduct an RI/FS under CERCLA and waived its claim for penalties for non-compliance with the order. ER 301; 220. The settlement agreement made no mention of this lawsuit, and EPA has not intervened in this action.

The RI/FS has proceeded in parallel to, but separate from, this litigation. While the Tribes seeks its litigation costs, EPA oversees the actual response action for the UCR Site, which Teck funds under the settlement agreement. ER 1361; ER 240, ¶ 23. The settlement agreement requires Teck to fund "all work necessary" to "investigate the nature and extent of contamination at the Upper Columbia River Site, provide information for the U.S. Environmental Protection Agency's Baseline Risk Assessment for human health and the environment, and develop and evaluate potential remedial alternatives." ER 1390. This process has proceeded for over ten years, at a cost to Teck of over $74 million as of the Phase II trial. ER 250, ¶73. Because EPA's findings will inform the same issues being considered by the court, Teck moved to stay the litigation pending

completion of the RI/FS. ER1104-1133. The court denied this motion. ER 1098.

SUMMARY OF ARGUMENT

The district court awarded the Tribes $8,253,676.65 in litigation expenses, consisting of attorney's fees, litigation costs, and expert and consultant fees to support this lawsuit. ER 42.

1. Of this sum, $4,859,482.22 consisted of attorney's fees and costs. The district court held that the Tribes' attorney's fees and costs were recoverable as "enforcement costs" related to the Tribes' costs of "removal." ER 30-31. There is no such enforcement authority for the Tribes, and the district court erred, as a matter of law, in concluding that the Tribes' attorney's fees and costs are recoverable as "enforcement costs." *Infra,* pp. 28-35. Moreover, even if the Tribes did have authority to enforce CERCLA at the UCR Site, the Tribes' lawsuit does not constitute "enforcement activity." *Infra,* pp. 35-40.

2. The remainder of the award, $3,394,194.43, consisted of the Tribes' experts and consultant fees for this lawsuit. The district court characterized these costs as "removal" costs. ER 28. These

litigation costs do not meet the definition of "removal" and are not recoverable here. *Infra,* pp. 41-47.

3. The district court's award of attorney's fees and costs is flawed for an additional reason requiring reversal: The district court erred in entering dismissal and partial summary judgment against Teck on its apportionment defense prior to the Phase I trial. *Infra*, pp. 47-68.

4. In addition to these core issues on the merits, there are several threshold issues:

5. The district court erred in certifying under Rule 54(b) and directing entry of judgment. *Infra*, pp. 20-22. If there was no proper basis for directing entry of judgment under Rule 54(b), the district court's Phase II Judgment and Amended Judgment should be reversed or vacated, with remand for further proceedings on Plaintiffs' remaining allegations.

6. Plaintiffs failed to establish personal jurisdiction over Teck and, therefore, the case must be dismissed. *Infra*, pp. 23-27.

7. CERCLA does not apply extraterritorially and, moreover, "arranger" liability does not apply without a disposal by a third party and here, there was no such third party. *Infra,* pp. 69-72. (Teck

respectfully believes that this Court's 2006 decision on these issues was incorrect and preserves these issues for future review by this Court en banc or by the U.S. Supreme Court on certiorari.)

STANDARD OF REVIEW

1. **Rule 54(b).** Whether the district court had authority to certify under Rule 54(b) is an issue of law subject to de novo review. *Wood v. GCC Bend, LLC,* 422 F.3d 873, 879 (9th Cir. 2005).

2. **Personal Jurisdiction.** Teck's argument that Plaintiffs failed to establish personal jurisdiction because the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), does not apply raises an issue of law subject to de novo review. *Schwarzenneger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

3. **Recoverability of the Tribes' Costs.** Whether the district court erred in holding that the Tribes' litigation costs are recoverable as CERCLA enforcement costs involves issues of law subject to de novo review. *See Unocal Corp. v. United States,* 222 F.3d 528, 542 (9th Cir. 2000) (whether statute authorizes attorney's fees is a question of law reviewed de novo); *Mathews v. Chevron Corp.,* 362 F.3d 1172, 1180 (9th Cir. 2004) (mixed question of law and fact generally reviewed de novo).

4. **Apportionment Defense.** Whether the district court erred in entering dismissal and partial summary judgment against Teck on its apportionment defense is an issue of law subject to de novo review. *In re Hanford Nuclear Reactor Reservation Litig.,* 534 F.3d 986, 1000 (9th Cir. 2008).

5. **Applicability of CERCLA.** Whether CERCLA applies extraterritorially and whether "arranger" liability under CERCLA requires disposal by a third party are issues of law subject to de novo review. *Pakootas v. Teck Cominco Metals Ltd.,* 452 F.3d 1006 (9th Cir. 2006).

ARGUMENT

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

The threshold issue is whether the district court had authority to certify under Rule 54(b), which allows a district court to direct entry of a final judgment as to fewer than all claims "[w]hen an action presents more than one claim for relief." Fed. R. Civ. P., Rule 54(b). Thus, this Court must first determine whether the district court's judgment disposes "of an individual claim entered in the course of a multiple claims action." *Wood*, 422 F.3d at 878 (9th Cir. 2005);

quoting Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 7 (1980).

"[A] complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief." *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (1991); *quoting Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n. 4 (1978); *see General Acquisition, Inc. v. GenCorp., Inc.*, 23 F.3d 1022, 1028 (6th Cir. 1994). The fact that multiple remedies may be available under a statute does "not transform a single claim … into multiple claims for Rule 54(b) purposes." *Reyher v. Champion Intern. Corp.*, 975 F.2d 483, 487 (8th Cir. 1992).

That CERCLA includes several remedies does not transform Plaintiffs' single CERCLA Section 107(a) claim into multiple claims for Rule 54(b) purposes. Pursuant CERCLA Section 107(a)(4), several remedies are available, including: "(B) any … necessary costs of response incurred … consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from … a release …." 42 U.S.C. § 9607(a)(4). Each of

these remedies is supported by a single finding of liability under CERCLA, although the natural resource damages remedy has an additional causation requirement (Plaintiffs must prove that releases associated with the Trail smelter resulted in injuries to natural resources). 42 U.S.C. § 9607(a)(4)(C).

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 345-346. Based on that claim under CERCLA, the Tribes seeks declaratory relief, recovery of response costs, and damages for alleged injury to natural resources. ER 345-348. The State's complaint makes similar allegations. ER 359-363.

The district court has determined that the Tribes incurred $8,253,676.65 in past "response costs" through 2013. *See* ER 22. However, the district court has not determined natural resource damages, which Plaintiffs seek as part of their CERCLA Section 107 claims. ER 42.

For Rule 54(b) to apply, "claims must be multiple." *Arizona State Carpenters*, 938 F.2d at 1039 (*quoting Continental 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); *General Acquisition*, 23 F.3d at 1029.

If there was no proper basis for directing entry of judgment under Rule 54(b), the district court's Judgment and Amended Judgment should be reversed or vacated, and there should be a full remand to the trial court for further proceedings on the natural resource damages allegations and remedy remaining in the case.

II. THRESHOLD ISSUE OF PERSONAL JURISDICTION: PLAINTIFFS FAILED TO ESTABLISH PERSONAL JURISDICTION OVER TECK.

The district court recognized that "[t]he burden of establishing personal jurisdiction rests with Plaintiffs." ER 67 (citing *Schwarzenneger*, 374 F.3d at 800). However, the district court held that Plaintiffs had met that burden under an "effects" test based on *Calder v. Jones*, 465 U.S. 783 (1984). ER 70-72. The district court reasoned:

"In cases sounding in tort, as here, *Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1076 (9th Cir. 2006) (*Pakootas I*)), courts inquire whether a defendant 'purposefully direct[s] his activities at the forum state, applying an "effects" test that focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemtisme*, 433 F.3d 1199, 1206 (9th Cir. 2006). The relevant 'actions' here are Teck's disposal of waste into the Columbia River, whether that is deemed to have occurred in Canada and/or in the United States, having 'effects in the UCR site located in the United States. These 'actions' create personal jurisdiction….The 'effects test, which is based on the Supreme Court's decision in *Calder v. Jones,* 465 U.S. 783, 789 (1984), requires that the defendant must have: (1) committed an intentional act; (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be

suffered in the forum state.' *Yahoo!*, 433 F.3d at 1206…"

ER 69.

The district court erred in relying on the *Calder* test in this case because that test is for intentional torts, and a 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), supports the view that *Calder* applies only to intentional torts. While *Walden* did not address whether *Calder* can apply in the absence of any intentional torts, *Walden* does state 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.

This Court's en banc decision in *Yahoo!* did apply the *Calder* test in a case that did not involve an intentional tort. *See Yahoo!*, 433

F.3d at 1206-1209 (applying *Calder* test to suit seeking declaratory judgment that orders by a French court were unenforceable). However, *Yahoo!* did not address whether *Calder* applies only to intentional torts. Indeed, in 2007 (one year after *Yahoo!*), a panel of this Court held: "We decline to apply *Calder* because it is well established that the *Calder* test applies only to intentional torts." *Holland America Line Inc. v. Waresila North America, Inc.*, 485 F.3d 450, 460 (9th Cir. 2007).

Moreover, even if the *Calder* test does apply here, Plaintiffs failed to satisfy the *Calder* test. A key element of the *Calder* test is that the defendant must have "expressly aimed at the forum state." *Yahoo!*, 433 F.3d at 1206. Here, the Trail smelter discharges to the river in British Columbia were not expressly aimed at the State of Washington.

The district court found that: (1) "Teck dumped waste in the Columbia River, intending to take advantage of the natural transport mechanism the river offered, with knowledge its waste would repose in Washington State"; (2) "Teck knew that repose of its waste in Washington State was a natural consequence of river disposal"; and (3) "Teck persisted in river disposal well past its acknowledgment that

its waste reposed in Washington State." ER 70-71. But knowing that waste would "repose" in the State of Washington is not the same as targeting or "expressly aiming" at the State of Washington. The district court's conclusion that "Teck's intentional actions were specifically targeted at Washington State," ER 71, is a leap of logic unsupported by the evidence; the Trail smelter intended to dispose of certain wastes in the Columbia River in Canada as permitted under Canadian laws.

For all of these reasons, there is no personal jurisdiction over Teck, and the case must be dismissed.

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

The district court awarded the Tribes $8,253,676.65 in litigation expenses, consisting of attorney's fees and costs, including experts and consultants fees, on the basis that these were CERCLA "enforcement" and "removal" costs. This award included $4,859,482.22 for attorney's fees and costs as "enforcement" costs, and $3,394,194.43 for expert and consultant fees for this lawsuit, as "removal" action costs. These costs are not recoverable as enforcement or response costs here.

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

When the court awarded the Tribes its attorney's fees and costs, it found that they were incurred for this lawsuit. ER 31-21. Of these attorney fees, the court found that the Tribes spent $427,996.92 for its "Request for EPA Action through Judgment on UAO Enforcement", $3,663,900.02 for "Phase I Declaratory Relief Action" through trial "proving Teck's liability and refuting its divisibility defense" and $411,699.18 in Phase II "proving the Tribes' recoverable response costs." ER 25-26.

Prior to the Phase II trial, the district court had held that the Tribes "can recover response costs pursuant to § 9607(a)(4)(A), but cannot recover enforcement costs as a component of those costs, enforcement costs being attorney's fees attributable to litigation." ER 191. However, after trial, the district court sua sponte reversed its prior decision, concluding that Indian tribes are "treated differently" from private parties under § 9607 and "that difference is sufficient to justify awarding … response costs for "enforcement activities." ER 176. The district court held that the Tribes are entitled to recover attorney's fees and costs as "'enforcement activities' related to

'removal' and 'remedial action.'" ER 176. In so holding, the district court erred as a matter of law.

The Tribes does not have authority to enforce CERCLA at the UCR Site. 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 attorneys' fees." ER 31. That premise is incorrect. CERCLA does not authorize the Tribes to recover the costs of this lawsuit as "enforcement" costs because the Tribes lacks enforcement authority for the UCR Site.

CERCLA contains provisions that specifically address tribal roles in CERCLA. Section 107(a) says that tribes, like the federal government and states, can recover all costs of removal or remedial action not inconsistent with the National Contingency Plan. 42 U.S.C §9607(a)(4)(A). Sections 107(f) authorizes tribes to act as trustees for tribal natural resources and to seek recovery for damages to such resources. 42 U.S.C. §§ 9607(f)

Moreover, CERCLA has a specific section regarding the role of Indian tribes relative to the federal government in a response action. Section 126 provides that the governing body of an Indian tribe shall be treated substantially the same as a state for certain listed purposes:

section 103, dealing with notification of releases, section 104(c) dealing with consultation on remedial actions, section 104(e) regarding access to information, section 104(i) regarding health authorities, and section 105 addressing roles and responsibilities under the national contingency plan, and submitting priorities for remedial action. 42 U.S.C. § 9626.

However, these sections do not confer CERCLA enforcement authority. That authority is conferred on the President in a different section of CERCLA, section 106. 42 U.S.C. §9606. None of these sections provide that Indian tribes are to be treated the same as the President for all provisions of CERCLA. In fact, CERCLA does not provide that Indian tribes have the same enforcement authority under CERCLA as the President.

Instead, Congress specified that if the President's designee, EPA, determines that a State or Indian tribe has the capability to carry out certain response actions, including enforcement, EPA may enter into a cooperative agreement with the State or Indian tribe to carry out that action. 42 U.S.C. § 9604(d). Here, however, EPA did not delegate to the Tribes its response or enforcement authority for the UCR Site. ER 180 (EPA has not entered into enforcement

cooperative agreement with the Tribes for the UCR Site). Instead, under the settlement agreement, EPA continues to maintain enforcement authority for the UCR Site. ER 1375, 1383. Thus, while an Indian tribe may acquire the federal government's authority to enforce CERCLA via a delegation from EPA, that did not happen here with respect to the Tribes, or with respect to the UCR Site, where EPA has been, and remains, the lead agency. ER 240-241; ER 1681; *see also* ER 188-189 ("§9601(d)(1) allows the President to enter into a contract or cooperative agreement with...an Indian tribe...No such contract or cooperative agreement exists in this case and the Tribes concedes it is not proceeding pursuant to §9604.").

Despite this statutory framework, the district court found that the Tribes was authorized to recover its litigation expenses as "enforcement" costs because "§ 9607(a)(4)(A) authorizes sovereign governments including the United States Government, States, and Indian tribes to recover 'all costs of removal or remedial actions incurred.'" ER 31. But that section is silent as to the matter of enforcement authority, which is addressed elsewhere in the statute. Section 107(a)(4)(A) provides liability, under certain circumstances, for:

> "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."

42 U.S.C. § 9607(a)(4)(A). Section 107(a)(4)(A) cannot be read as authorizing enforcement activity by an Indian tribe where, as here, EPA has not delegated its enforcement authority to the tribe.

The district court reasoned that "§ 9601(25) of CERCLA makes clear that the terms 'removal' and 'remedial action' include enforcement activities related thereto." ER 31. But that provision simply states that "[t]he terms 'respond' or 'response' means remove, removal, remedy, and remedial action; all such terms (including 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25). It does not state that an Indian tribe has enforcement authority in any given situation or confer that authority where it does not otherwise exist. Rather, it indicates that if there are activities within a tribe's enforcement authority, then those activities would be included in the definition of "respond" or "response."

The district court suggested that its holding "makes sense simply because these are governmental entities with inherent enforcement authority, unlike private parties." ER 174-175. However, an Indian tribe does not have inherent authority to enforce federal statutes: The Supreme Court has explained that "[t]hrough their original incorporation in the United States, as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty, particularly as to relations between a tribe and nonmembers of the tribe." Thus, while "Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members and to prescribe rules for members[,] . . . exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 563 (1981).[1] Here, Congress has specifically delineated the authority of Indian tribes under CERCLA, and Congress did not give Indian tribes the authority to enforce CERCLA, absent a delegation of

[1] Similarly, states lack inherent power to enforce federal law absent "clear expression of congressional purpose." *See, e.g., Hawaii v. Standard Oil*, 405 U.S. 251, 263-64 (1972).

authority by EPA. There is no "inherent authority" for Indian tribes to enforce CERCLA.

Finally, the district court erroneously relied on the "prefatory language of § 9607" (Section 107) to conclude that the Tribes can recover "all costs":

> "[T]he prefatory language of § 9607 emphasizes that it is a stand-alone provision: 'Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section.' Here, this should be read as '[n]otwithstanding' § 9604 or § 9606, an Indian tribe can recover 'all costs of removal or remedial action . . . not inconsistent with the national contingency plan.'"

ER 177. However, that construction of Section 107 goes too far - even if the Tribes could recover attorney's fees for "enforcement activities," and if this lawsuit qualified as such, those enforcement activities must be "related to" the Site removal or remediation action. Pursuant to Section 9601(25), the CERCLA definition of "removal" or "remedial" only includes "enforcement activities related thereto [said removal or remedial activity]." 42 U.S.C. §9601(25). Here, the

alleged enforcement activity – the Tribes' lawsuit – is quite distinct from the actual response action for the UCR Site, which is EPA's RI/FS proceeding under a settlement agreement to which the Tribes is not a party. ER 1388-1389. The Tribes' suit for its own non- RI/FS fees and costs "relates to" that EPA response only in the vague sense that they both relate to the same site. A tribe may be able to recover its attorney's fees and litigation costs where it has authority to enforce CERCLA, and where the enforcement action is related to the actual removal or remedial action for the Site—for example, where EPA has delegated its authority to that tribe for a site within its sovereign boundaries. There is no such authority for the Tribes here 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." Even if the Tribes did have authority to enforce CERCLA for the UCR Site, the Tribes' lawsuit does not constitute an "enforcement activity." For this additional reason, the Tribes' attorney's fees and costs incurred in this lawsuit are not recoverable as "enforcement activities" under CERCLA.

The district court found that the Tribes incurred attorney's fees "proving its claim against Teck for declaratory relief regarding cost recovery [section 107] under CERCLA." ER 31. While discussing at length why the district court believes the declaratory relief action to establish the Tribes' entitlement to the recovery of response costs under CERCLA for the UCR Site was appropriate, only one paragraph of the Phase II Findings of Fact and Conclusions of Law attempts to address why the Tribes' cost recovery lawsuit (to recover the costs of the lawsuit itself) constitutes "enforcement activity":

> "Although the Tribes' pre-litigation response costs ultimately proved unrecoverable, the costs incurred bringing this action to prove CERCLA liability and secure a right of recovery for future response costs are recoverable. *See Foster v. United States,* 922 F. Supp. 663, 664 (D.D.C. 1996). Thus, attorneys' fees and similar costs 'related to' securing the right to recover *future* response costs from Teck are valid 'enforcement costs' under §9601 (25) even though no pre-litigation response costs were recovered."

ER 33 (emphasis added).

The authority cited by the district court, *Foster v. United States,* 922 F. Supp. 663 (D.D.C. 1996), does not support the proposition that tribal attorney's fees and costs incurred "to prove CERCLA liability and secure a right of recovery for future response costs" are recoverable as "enforcement costs." Indeed, there is no basis to assume the Tribes will incur future response costs, as its participation in the UCR Site response action has been and continues to be funded through contracts with EPA. ER 235; ER 250-252; ER 1379; ER 1296. A tribal declaratory relief action to establish a right to the recovery of potential future costs does not, in and of itself, constitute "enforcement activity" — and certainly does not here.

To be a CERCLA "enforcement" activity, the Tribes' lawsuit must seek to compel compliance with a cleanup obligation or order. But here, the Tribes' declaratory relief claim does not seek to actually "enforce" any cleanup obligation. *See* ER 345-348; ER 252, ¶ 83. It certainly does not seek to enforce any past, current or future cleanup order issued by EPA (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.").

Moreover, section 106(a) is the only provision in CERCLA that provides authority to compel responsible parties to clean up or abate releases of hazardous substances, and that authority rests in the federal government. President Reagan delegated broad authority to EPA in Executive Order 12580, 52 Fed.Reg. 2923 (Jan. 23, 1987), and President Clinton extended certain of those powers to other federal agencies in Executive Order 13016, 61 Fed. Reg. 45871 (August 28, 1996). While CERCLA provides for delegation to states and tribes in certain circumstances, no authority under section 106 has been delegated to the Tribes.

In addition, 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 a response action or to enforce a demand for reimbursement of response costs incurred. Teck has been undertaking the action required by EPA, i.e. the RI/FS under EPA oversight, for more than a decade pursuant to the Settlement Agreement. ER 1361; ER 252, ¶83. Insofar as future response action may be warranted beyond the RI/FS, EPA has not yet determined what that will be because that determination will flow from the RI/FS investigatory process. ER 242. Further, there is no finding that Teck

would have to be compelled to undertake such action, i.e., that enforcement action will be necessary. Instead, the record shows that Teck did offer to remediate. ER 1562; ER 1986 ("Whatever the outcome of those studies were, we were committing to resolving any ecological or human health risks that had been identified as part of that process."). Moreover, the record shows that where specific cleanup has been requested, Teck has voluntarily agreed to do it. ER 248. The record also shows that Teck had spent over $74,000,000 on the RI/FS as of the Phase II trial, and EPA has yet to complete the RI/FS and issue a Record of Decision in which EPA will detail what, if any remedial measures should be undertaken for the UCR Site. ER 242, ¶ 30; ER 250, ¶ 73.

In these key respects, the Tribes' lawsuit is far different from prior cases awarding costs of "enforcement activities" under Section 107. In the seminal case from this Circuit, *United States v. Chapman*, 146 F. 3d 1166 (9th Cir. 1998), this Court held that the federal government could recover its reasonable attorney's fees after it had to file suit to compel a responsible party to comply with an EPA cleanup order and to repay EPA's own costs of cleaning up because the site owner refused to do so. Similarly, in *B.F. Goodrich v. Betkoski*, 99

F.3d 505 (2d Cir. 1996), the Second Circuit awarded EPA its litigation costs after it had incurred cleanup costs, had sought from the responsible party, and responsible party refused to pay, forcing EPA to file suit. In contrast, the Tribes' request for declaratory relief is not premised on a refused order or a refusal to fund response costs; it simply is not an "enforcement activity." Accordingly, the Tribes' attorney's fees and litigation costs are not recoverable under CERCLA (even if the Tribes had authority to enforce CERCLA for the UCR Site).

In any event, the Tribes' attorney's fees and costs are not reasonable. In finding that the Tribes' attorney's fees and costs were reasonable, the district court found:

> "The amount of attorneys' fees and litigation costs sought — $4,859,482.22 — is proportionate to the amount of costs sought for 'removal' action — $3,394,194.43 — that being the fees and costs incurred by the Tribes in their investigation and evaluation of the UCR Site [by their litigation experts] to determine whether Teck's slag and effluent were releasing or

threatening to release hazardous substances into the Site."

ER 35.

As discussed below, the awarding the Tribes' litigation experts and consultant costs of $3,394,194.43 as "removal" costs was improper. Thus, the central assumption underlying the determination that the Tribes' attorney's fees and litigation costs were "reasonable" in comparison to its expert costs fails. *Chapman*, 146 F.3d at 1176 (requiring consideration of reasonableness given degree of success, noting the disparity between attorney's fees and actual response costs at issue).

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

The district court awarded the Tribes $3,394,194.43 as costs of litigation expert witness and consultant work in this case[2], which it characterized as "[t]he Tribes' costs of investigation and expert analysis." ER 30. The district court held that "[t]he Tribes'

[2] For clarity, it should be noted that the Tribes also employ some of their litigation experts and consultants on the RI/FS to support their consultation to EPA as a Participating Party; but, as to those activities, the consultants' work is done under the Tribes' contract with EPA, which is funded by Teck under the settlement agreement. ER 250-252.

investigative work [for this lawsuit] identifying hazardous substances in the UCR Site, analyzing releases to the environment, and identifying the responsible party, qualifies as 'removal' action under the statute because it was 'necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances from Teck's slag and effluent, and to 'minimize or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.' 42 U.S.C. § 9601(23)." ER 30-31. The court concluded that the Tribes' litigation expert work was "removal" action because the Tribes "assessed and evaluated releases of hazardous substances, thereby proving Teck's liability" to the Tribes. ER 30. There is no precedent for the notion that proving liability constitutes "removal action."

The Tribes' expert and consultant costs for this lawsuit do not meet the definition of "removal" under CERCLA. Section 101(23) defines "removal" to mean:

> "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be

> necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release…."

42 U.S.C. § 9601(23). The Tribes' litigation expert and consultant costs do not meet this definition.

The Tribes admitted that the expert and consultant work was to "help support the litigation" by proving elements of CERCLA liability, including release of hazardous substances. ER 1722. One of the Tribes' witnesses testified that "all of these costs… were incurred by the Tribes to support a finding of CERCLA liability against Teck." ER 1704. The Tribes' Environmental Planner confirmed that the costs sought by the Tribes are the response costs incurred in the litigation. ER 234; ER 231; ER 1722-1723; ER 1753-1756; ER 1772-1773 (testimony that invoices were for work intended to support this litigation); *see also,* ER 1785-1786 (Tribes' in-house counsel could not identify any non-litigation costs in its claim). Based on this

record, the district court concluded: "The costs sought by the Tribes in this action consist of expenses for investigation and litigation in the course of evaluating and demonstrating Teck's liability as a responsible party under CERCLA." ER 29.

The Tribes cannot reasonably dispute that it is seeking costs of litigation. Indeed the Tribes withheld the bulk of its expert and consultant work from discovery on the basis that it was privileged. ER 1733; ER 1442. To this day, the Tribes has never produced the work product of its non-testifying experts for whom it seeks costs except insofar as that work was relied upon by the Tribes' testifying experts and therefore required to be produced under the discovery rules. ER 1262.

It is not surprising that the Tribes' costs are comprised entirely of costs of this lawsuit. EPA, not the Tribes, oversees the response action for the UCR Site, which Teck funds under the Settlement Agreement. ER 240-241 (¶¶ 23-24), 250-252 (¶¶73-82). In the settlement agreement EPA requires Teck to fund "all work necessary" to "investigate the nature and extent of contamination at the Upper Columbia River Site), provide information for the U.S. Environmental Protection Agency's Baseline Risk Assessment for human health and

the environment and develop and evaluate potential remedial alternatives." ER 1390. That is, the necessary response costs for the UCR Site are funded under the EPA settlement agreement, so what the Tribes seeks is an entirely circuitous remedy, litigation costs to prove entitlement to its litigation costs.

In addition, the Tribes' victory on its "response costs" remedy is premised on the untenable conflation of litigation and removal/remediation activities. That is, the district court's ruling relies on the idea that the Tribes' expert and consultant work for this lawsuit can simultaneously constitute removal or response activities for the UCR Site. Under CERCLA jurisprudence, however, outside of governmental enforcement, costs cannot be both "removal" or "remedial costs" and litigation costs. Costs are either removal/remedial costs *or* litigation costs, but not both. For example, in *Black Horse Lane Assoc., LP, v. Dow Chemical Corp*., 228 F.3d 275, 294 (3d Cir. 2000), the Third Circuit held that expert consulting fees are not recoverable "response costs" where the work was designed to make an assessment for "potential or actual litigation purposes." 228 F.3d at 296. The Third Circuit noted that it would have reached the same result even assuming arguendo that the

"consulting fees were not for strictly 'litigation costs'" (*Id.* at 297): "Indeed, it is significant that neither [the party claiming response costs] nor [its consultant] have played any role in the containment and cleanup of the Property." *Id*. at 297; *see Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F. 3d 827, 850 (3d Cir. 1995) ("The heart of these definitions of removal and remedy are 'directed at containing and cleaning up hazardous releases.'"). Here, too, litigation work cannot double as the removal action underlying the cost recovery action.

In its interrogatory responses, the Tribes specified $589,907.78 in costs 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…may also be characterized as 'remedial' or 'removal' costs."); ER 1684; ER 1762. But, again, even this work, which was for field work to support expert reports, ER 256, the Tribes admitted was for litigation. The Tribes maintained that the work of all of its experts is privileged and work product-protected. *See* ER 1262. Thus, the Tribes' expert and consultant costs– which it admits were all litigation-related – do not meet the definition of "removal." They are not recoverable under CERCLA.

IV. THE DISTRICT COURT ERRED IN ENTERING DISMISSAL AND PARTIAL SUMMARY JUDGMENT AGAINST TECK ON ITS APPORTIONMENT DEFENSE.

Before trial, the District Court entered dismissal and partial summary judgment on Teck's apportionment defense. As discussed below, the apportionment defense has been explained by the Supreme Court and applied in the CERCLA context. The District Court erred in dismissing Teck's apportionment defense, given competing expert opinions on whether there is a reasonable basis for apportionment.

A. Background: The Supreme Court's decision on apportionment 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, instead holding that the defense of "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. In so doing, it adopted the logic of the "seminal opinion on the subject of apportionment," *Chem-Dyne Corp.*, 572 F.Supp. 803, which in turn relied upon the "universal

starting point for divisibility of harm in CERCLA cases," the Restatement (Second) of Torts. *Id*.

The *BNSF* case involved two properties, one owned by Brown and Bryant ("B&B") where it operated an agricultural chemical distribution business, and a second smaller adjacent parcel owned jointly by two railroads, which B&B leased and utilized for a time. A variety of different pesticides and chemicals were spilled over the years, resulting in contamination of soil and groundwater, including a commingled groundwater plume migrating offsite. The government sued under CERCLA for recovery of cleanup costs, and the railroads argued they should only be liable for the share of cleanup costs that could be apportioned to the harm from their parcel. *See* 556 U.S. at 615.

The district court concluded that the commingled site contamination created a single divisible harm, which was subject to apportionment based on a combination of geography, time and volume. It calculated the railroads' apportioned share of liability by multiplying 0.19 (the railroad parcel was 19% of the total surface area of the site) times 0.45 (the railroad parcel was leased for 45% of the total years the site operated) times 0.66 (66% of the contaminants

requiring remediation were found at the railroad parcel). It then added a 50% potential error factor to arrive at a 9% allocation to the railroads. *See* 556 U.S. at 615.

The Ninth Circuit reversed, holding the railroads jointly and severally liable. Although it endorsed the apportionment defense, it rejected it on the facts, reasoning that there was a "lack of sufficient data to establish the precise proportion and rate of contamination that occurred on the relative portions of the [] facility[.]" *See* 556 U.S. at 617. The Ninth Circuit said that apportionment was not proper because neither the duration of the lease nor the size of the leased area alone was a reliable measure of the harm caused by activities on the property. *Id*.

The Supreme Court reversed the Ninth Circuit, affirming the district court's rough apportionment of the commingled contaminant plume. It did so, even though "the evidence adduced by the parties did not allow the court to calculate precisely the amount of hazardous chemicals contributed by the Railroad parcel to the total site contamination, or the exact percentage of harm caused by each chemical…" *BNSF*, 556 U.S. at 618.

In approving the rough apportionment, the Supreme Court set forth a two-step inquiry for the 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 the harm; in other words, it must demonstrate a reasonable way to actually apportion the harm among the various sources. *BNSF*, 559 U.S. at 618. "The preliminary issue of whether the harm to the environment is capable of apportionment among two or more causes is a question of law." *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2001). "Once it has been determined that the harm is capable of being apportioned among the various causes of it, the actual apportionment of damages is a question of fact." *Id.*

B. The alleged harm is capable of apportionment.

When the district court granted partial summary judgment dismissing Teck's apportionment defense in this case, the operative pleadings were the Second Amended Complaints. Plaintiffs alleged that historic discharges of slag and liquid effluent from Teck's smelter in Trail, British Columbia migrated downriver to the UCR Site in the United States. ER 1178; ER 1194. Once present in the site, Plaintiffs alleged that the slag and liquid effluent released metals to the

environment that are hazardous substances under CERCLA. ER 1181-1183; ER 1216-1218. Plaintiffs' Second Amended Complaints alleged that Teck discharged waste containing hazardous substances "including" six metals: arsenic, cadmium, copper, mercury, lead and zinc. ER 1185, 1187; ER 1198, 1199, 1201. They further alleged that five of these six – arsenic, cadmium, copper, lead and zinc – were released from Teck's slag in the Upper Columbia River and that mercury was released from effluent. *Id*.

The threshold question on apportionment is simply concerned with whether, under any set of facts, the harm alleged in the Second Amended Complaints is theoretically capable of division: "When 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." *BNSF*, 558 U.S. at 615 (citing Restatement (Second) Torts §§ 433A, 881). The Restatement uses river contamination as the typical case of a harm that is divisible: "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 Services, Inc.*,

3 F.3d 889, 896 (5th Cir. 1993) (internal citation omitted). Specifically, the Restatement 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 stream, 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 §433 A, 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"). Pollution of a river by multiple sources exemplifies a divisible harm. As recognized by the Supreme Court in *BNSF*, 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.

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)). Such divisibility may be established by volumetric, chronological, geographic, or other types of evidence. *Id.* at 1883. "[A]pproaches to divisibility will vary tremendously depending on the facts and circumstances of each case." *Hercules*, 247 F. 3d at 717.

> "Essentially, the question whether there is a reasonable basis for apportionment depends on whether there is sufficient evidence from which the court can determine the amount of harm caused by each defendant. If the expert testimony and other evidence establishes a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed …"

Bell, 3 F.3d at 903 (emphasis added).

"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)." *Id.* at 896.

Although evidence in support of apportionment must not be arbitrary, a defendant does not need to calculate precisely the amount of hazardous chemicals contributed by a given source, or the exact percentage of harm caused by each chemical, as illustrated by the rough apportionment approved by the Supreme Court in *BNSF*. *BNSF*, 559 U.S. at 618. "[E]vidence sufficient to permit a rough approximation is all that is required under the Restatement." *Bell*, 3 F. 3d at 903, n. 19. "The fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability." *Id.* at 903.

In opposition to the Plaintiffs' motions, Teck cited 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 identified in the Second Amended Complaint as having been released from Trail smelter waste that had come to reside 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. Idaho 2003).

Summary adjudication may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *British Airways*

Bd. v. Boeing Co., 585 F.2d 946, 950-951 (9th Cir. 1978). "In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor." *Kelly v. Billington*, 370 F. Supp. 2d 151, 156 (D.D.C. 2005) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Where, as Plaintiffs did here, the moving party seeks summary adjudication of a claim or defense on which the non-movant bears the burden of proof, summary adjudication is only proper if the movant can either (1) disprove with its affirmative evidence an essential element of the defense, or (2) show an absence of evidence to allow the non-movant to meet its burden on an essential element. *Nissan Fire & Marine Ins. Co., Ltd v. Fritz Cos., Inc.*, 210 F. 3d 1099, 1102 (9th Cir. 2000). "[A]pportionment itself is an intensely factual determination." *United States v. Alcan Aluminum Corp.*, 990 F. 2d 711, 722 (2d Cir. 1992) (citing *United States v. Chem-Dyne Corp.*, 572 F.Supp. 803, 811 (S.D. Ohio 1983)). "[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." *Alcan*, 990 F. 2d at 723.[3]

D. The District Court erred in granting summary judgment.

In granting summary judgment while EPA's RI/FS is still underway, the district court 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. The court said, "It is the Defendant's burden to rule out other types of contamination so that the totality of the harm can be considered in a divisibility/apportionment analysis." ER 102. The court held that, "Simply put, because it [Teck] has failed to account for all of the harm at the Upper Columbia River Site, it cannot prove that harm is divisible ('theoretically capable of apportionment')." ER 106.

The district court's reasoning ignores 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. The Federal Rules of Civil Procedure are clear: a plaintiff must plead the "demand for relief sought," and in

[3] The Tribes and State's motions relied on joint experts; much of the evidence and arguments were the same.

response, a defendant must set forth "its defenses to each claim asserted against it." Fed. R. Civ. Pro. 8 (a)(3), (b)(1)(A). Since the plaintiff is the master of its pleadings, it can specify the scope of the harm for which it seeks to recover, but the scope of the harm to be redressed by the litigation and therefore addressed by the affirmative defense of apportionment, must be bounded by the claim. Fed. R. Civ. Pro. 8(c)(1) (A defendant must set forth any affirmative defenses "[i]n responding to a pleading").

Consistent with these rules, "Federal Rule of Civil Procedure 8(a)(2) requires that the allegations in the complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)). A plaintiff has the responsibility to define the harm for which it seeks to recover. It may plead any such harm that has "evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). Thus, a plaintiff only has standing to redress harms it has claimed in its lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In fact, this Court has concluded it would be "patently absurd" to require "presentment and proof... of all potential affirmative defenses that might be asserted in response to unknown and unasserted claims or actions." *Resolution Trust Corp. v. Midwest Federal Sav. Bank of Minot*, 36 F.3d 785, 793 (9th Cir. 1993). Similarly, "A party cannot… base its affirmative defense on legal theories that are not contained in the pleadings." *Campania Management Co., Inc. v. Rooks, Pitts & Poust*, 290 F.3d 843, 852 (7th Cir. 2002). Contrary to the trial court's analysis, neither CERCLA nor apportionment jurisprudence under CERCLA has changed these rules of procedure.

In apportionment cases, courts have considered the harm subject to apportionment to be the contamination of the type pleaded or proven to be traceable to the defendant (depending on the status of the case) by plaintiff. *See, e.g., Bell*, 3 F.3d at 896 ("[W]hether 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).); *Alcan*, 990 F.2d at 722 (noting defendant can escape or limit its liability if the substances it is alleged

to have released do not contribute to the harm); *O'Neil v. Picillo*, 883 F.2d 176, 180 (1st Cir. 1989) (adopting "basic common law principle that defendants need not be held responsible for those costs traceable to others"); *United States v. Saporito*, 684 F. Supp. 2d 1043, 1062 (N.D. Ill. 2010) (implicitly concluding that the harm was the contamination of the site from an onsite plating process); *ITT Industries, Inc. v. Borgwarner, Inc.*, 700 F. Supp. 2d 848, 878 (W.D. Mich. 2010) ("Non-release may be the basis for divisibility"); *Coeur d'Alene*, 280 F. Supp. 2d 1094 (only considering the harm from tailings alleged to have been released by defendants).

Here, the district court applied a much different and more onerous rule. Under its approach, instead of responding to the harm put at issue by Plaintiffs, the court held that a defendant bears the burden of defining the harm to the Upper Columbia River that *might* exist. Under this standard, the court required Teck to speculate about possible harm to the environment, actual or not, whether Plaintiffs sought response costs or natural resource damages for such harm or not, and to prove the negative of several hypotheticals in order to retain its apportionment defense at trial. There is no authority for the proposition that the defendant has such a burden.

It is a plaintiff's burden to identify the harm for which it seeks to recover, and once it does so in its pleadings and expert reports, neither plaintiffs nor the court may speculate as to additional harms to defeat apportionment. As in *Lujan,* 504 U.S. 555, 560-61 (1992), each element of a plaintiff's case "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Plaintiffs put forward their evidence as to harm through their case-in-chief expert opinions. There is no support for the court's assumption that CERCLA reverses the burden of identifying plaintiffs' claimed injury and places it onto the defendant. The trial court erred when it required Teck to identify all forms and types of contaminants at the 150 mile-long site, including theoretical contamination not put at issue by Plaintiffs, saying "it is the Defendant's burden to rule out other types of contamination so that the totality of the harm can be considered in a divisibility/apportionment analysis." ER 102.

More specifically, the court went beyond the claims advanced by Plaintiffs and supported by their case-in-chief expert reports in three ways.

Air Emissions. The district court held that Teck must analyze the potential impact of Trail smelter air emissions at the UCR Site, even though the trial court had previously rejected Plaintiffs' request to amend to plead alleged contamination from air emissions. ER 105. At the time of the apportionment motions, there were no allegations regarding aerial deposition. Indeed, this Court held in *Pakootas v. Teck Metals* on July 27, 2016, that emissions to air were not a basis for a CERCLA claim against Teck. Nevertheless, the district court determined that air emissions must be considered part of the harm at the UCR Site and held that because Teck did not factor that into its apportionment analysis, Teck had failed to define all "harm" and could not prove apportionment. ER 105.

The Metals at Issue. The district court also erroneously held that defendant must analyze potential effects of metals beyond the seven metals that Plaintiffs' testifying expert said "are the ones that I had information on and I could make a judgment on and an opinion on." ER 88. At the time the court dismissed the apportionment affirmative defense, Plaintiffs' case-in-chief expert reports were completed and served on Teck and Plaintiffs used them to support their motions. Plaintiffs put forth two case-in-chief experts who

specified the metals in the Upper Columbia River they attributed to Teck. Dr. Joel Blum asserted that Teck had discharged mercury in effluent that was released in the Upper Columbia River. ER 538. Dr. Dimitri Vlassopoulos discussed his view that slag from the Trail smelter had released seven specific metals in the Upper Columbia River. ER 420. Neither expert opined as to any other hazardous substance in the Upper Columbia River from the Trail smelter or any other source. Neither expert offered an opinion that other entities had released hazardous substances in the UCR Site that were part of the harm Plaintiffs were concerned with in their claims. ER 868, 877.

Teck deposed Dr. Vlassopoulos about the metals he attributed to the Trail smelter. A focal point of the deposition was Vlassopoulos's opinion that "heavy metals and other potentially toxic constituents present in the slag, including arsenic, antimony, barium, cadmium, copper, lead and zinc are released over time to sediment porewater and the aquatic environment." ER 877. In his deposition testimony, Dr. Vlassopoulos conceded that the only "metals and other potentially toxic constituents" about which he had adequate information and therefore about which he offered an opinion, were those just listed in his Opinion 2:

> "Q: Okay. What are the other potentially toxic constituents present within the slag that you opined or [*sic*] released over time to sediment porewater and then to the aquatic environment?
>
> A: Well, as I mentioned, the reason I used that term 'other potentially toxic' is because arsenic and antimony are not considered heavy metals, so those would be two.
>
> Q: No others?
>
> A: These are the obvious ones. You know, I haven't looked at every single element. There may not be data for every single element. So, these are the ones that I had information on and I could make a judgment on and an opinion on."

ER 879.

Teck challenged both Plaintiffs' expert opinions about releases to the UCR Site allegedly originating from discharges from the Trail smelter in British Columbia. Teck's experts addressed all compounds Plaintiffs' experts asserted were released in the UCR Site. Despite that expert dispute, and despite the fact that Plaintiffs' experts expressly

limited their opinions on release from the specific group of metals, the trial court erroneously held that Teck erred by failing to address contaminants not addressed in Plaintiffs' case-in-chief expert evidence. ER 105. In doing so, the court put an untenable burden on Teck to go beyond the case put forth by Plaintiffs, and affirmatively disprove a hypothetical case.

Potential Synergy. The district court also held that Teck must account for potential synergy between chemicals in the environment, even though Plaintiffs' testifying experts did not raise that as an element of harm in their case in chief. The court ruled that Teck had not shown that the harm was divisible because it had not proved the absence of "synergistic effects." ER 115. Potential synergistic effects of contaminants was not raised in Plaintiffs' case in chief, much less proved, and this determination has the same flaws as the court's determinations as to airborne emissions and chemicals not opined upon by Plaintiffs' experts. The court has gone outside of the bounds of the case before it.

The district court pointed to a quite different site, at issue in *United States v. Monsanto,* 858 F. 2d 160 (4th Cir. 1988). At Monsanto, the contamination consisted of more than 7,000 fifty-five

gallon drums of chemical waste, from which hazardous substances leaked and oozed into the ground, where the substances "comingled with incompatible chemicals that had escaped from other containers. The interplay of unstable chemicals caused "noxious fumes, fires and explosions." No such conditions have been alleged or opined on by Plaintiffs' experts at the UCR Site.

Moreover, the court was inaccurate in saying that Teck had failed to account for potential synergistic effects of contaminants at the UCR Site. While the issue was not a major point since it was not raised by Plaintiffs' experts, two of Teck's experts opined that while Trail smelter slag may be physically co-located with other slag, tailings and sediments from other sources, its co-location with other sediments does not result in increased environmental harm. ER 875. These experts addressed the potential for disproportionate effects resulting from the co-location of Trail smelter slag with other sediments at the UCR Site and found none. The court overlooked a declaration from defense expert Dr. Johns to this effect. The court also overlooked testimony that Dr. Johns had considered the fact that slag from the Trail smelter is located with other slag, tailings and sediments in the UCR Site. ER 875. However, because

apportionment is appropriate only for those metals alleged in the Second Amended Complaint to have been released from slag from the Trail smelter, and given expert opinion concluding that none are, there cannot be a disproportionate harm resulting from the slag. ER 875. The defense experts determined that, because the slag at issue is essentially inert in the river, the alleged harm is proportionate to the mass of metals alleged in the Second Amended Complaint to have released from that waste into the UCR Site. ER 875, 883. Under these circumstances, proportionate volumes of hazardous substances are probative of contributory harm. *Monsanto*, 858 F.2d at 172.

While Plaintiffs attempted, in rebuttal expert opinions, to address the possibility (but not the existence) of chemical synergy, that eleventh-hour attempt simply created a dispute among the experts that precluded summary judgment.

In the face of this evidence, which at a minimum created disputed issues of material fact, the district court erred in dismissing Teck's apportionment defense. The fact that the record was not fully developed as to the potential harm at the UCR Site by the time of the Plaintiffs' motions reflects their strategic choice to pursue this lawsuit even while the RI/FS being overseen by EPA remains in process.

Plaintiffs sought dismissal of Teck's apportionment defense prior to the full development of facts identifying the harm at the site. But that choice did not shift the burden to Teck to speculate about harm beyond that asserted by Plaintiffs' experts. Teck necessarily had to base its defense on the Plaintiffs' case before it. The alleged harm is actually capable of apportionment, and Teck put forth a reasonable basis for apportioning it. Accordingly, the district court erred in dismissing Teck's apportionment defense.

V. APPLICABILITY OF CERCLA: CERCLA DOES NOT APPLY EXTRATERRITORIALLY AND, MOREOVER, "ARRANGER" LIABILITY DOES NOT APPLY WITHOUT A DISPOSAL BY A THIRD PARTY.

In addition, CERCLA should not apply in this case. This is because: (1) CERCLA does not apply extraterritorially, and (2) "arranger" liability under CERCLA does not apply without a disposal by a third party. Teck respectfully believes that this Court's 2006 decision on these issues was incorrect and preserves these issues for future review by this Court en banc or by the U.S. Supreme Court.

A. This case presents an extraterritorial application of CERCLA.

"[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (internal citation omitted). To overcome the presumption against extraterritoriality, the intention of Congress to apply the statute beyond the borders of the United States must be "clearly expressed." *Id*. at 248. The "possibility" that Congress anticipated an extraterritorial application "is not a substitute for the affirmative evidence of intended extraterritorial application that our cases require." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993). Thus, courts must strictly construe statutes in light of the presumption against extraterritoriality. *F. Hoffmann-LaRoche v. Empagran*, 542 U.S. 155, 174 (2004). Nonetheless, this Court held that imposing liability under CERCLA on a Canadian corporation for disposal exclusively in Canada "involves a domestic application of CERCLA," so the presumption against extraterritoriality did not apply. *Pakootas*, 452 F.3d at 1068-9.

The 2006 decision assumed that "the operative event creating a liability under [Section 107(a)(3) of] CERCLA is the release or threatened release of a hazardous substance." *Id*. at 1077. Based on that premise, this Court concluded that "[t]he location where a party arranged for disposal or disposed of hazardous substances is not controlling for purposes of assessing whether CERCLA is being applied extraterritorially." *Id*. at 1078. But CERCLA does not create, upon the release of a hazardous substance, liability in the abstract. CERCLA imposes liability for response costs on "any person" who engages in particular categories of conduct. *See* 42 U.S.C. § 9607(a). To be sure, there can be no liability under CERCLA without a release. *See id*. § 9607(a). But, that a release is necessary for CERCLA liability does not make it sufficient to establish liability, which is triggered only by conduct described in Section 9607(a)(1)-(4), which here, occurred wholly in Canada.

B. Arranger liability requires disposal by a third party.

The district court held that Teck is liable as an "arranger" under CERCLA Section 107(a)(3), which provides for liability of:

> "[A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a

> transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances."

42 U.S.C. § 9607(a)(3). In *American Cyanamid Co. v. Capuano*, the First Circuit concluded, that the term "by any other party or entity" "modif[ies] the words 'disposal treatment,'" and "clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity." 381 F.3d 6, 24 (1st Cir. 2004). Here, Teck cannot be liable as an arranger, as the Trail smelter undertook its own disposal; it did not "arrange" for another entity to do it.

In its 2006 decision, this Court held that, "[t]he text of § 9607(a)(3)" should be "modified" to read, "any person who . . . arranged for disposal or treatment . . . of hazardous substances **owned** or possessed **by such person [or] by any other party or entity** . . ." *Pakootas*, 452 F.3d at 1080. In so doing, the 2006 decision adopted a textual "modifi[cation]" that the First Circuit has rejected. *American Cyanamid*, 381 F.3d at 24.

CONCLUSION

For the foregoing reasons, appellant respectfully submits that the district court's judgment should be reversed.

Dated: March 30, 2017.

PILLSBURY WINTHROP
SHAW PITTMAN LLP
KEVIN M. FONG
CHRISTOPHER J. McNEVIN

By: s/Kevin M. Fong
Kevin M. Fong

Attorneys for Appellant,
Teck Metals Ltd.

STATEMENT OF RELATED CASES

This Court's decision on a previous interlocutory appeal under 28 U.S.C. § 1292(b) from the district court's denial of Teck's Motion to Dismiss the action for lack of personal and subject matter jurisdiction and for failure to state a claim upon which relief could be granted (No. 05-35153) is reported at *Pakootas v. Teck Cominco Metals Ltd.,* 452 F.3d 1066 (9th Cir. 2006).

An appeal (No. 08-35951) pursuant to Fed. R. Civ. P. 54(b) from the district court's order dismissing claims for civil penalties for lack of subject matter jurisdiction under 42 U.S.C. § 9613(h) is reported at *Pakootas v Teck Cominco Metals Ltd.,* 646 F.3d 1214 (9th Cir. 2011).

An appeal (No. 10-35045) pursuant to Fed. R. Civ. P. 54(b) from the district court's order awarding Plaintiffs their attorneys' fees is the subject of an unreported Memorandum Disposition at *Pakootas v. Teck Cominco Metals Ltd.,* 563 Fed. Appx. 526, 2014 U.S. App. LEXIS 3831 (9th Cir. 2014)

An appeal (No. 13-35024) pursuant to Fed. R. Civ. P. 54(b) from the district court's judgment and Findings of Fact and Conclusions of Law on the Phase I issues in this litigation was voluntarily dismissed by Teck after the district court vacated its judgment and certification for immediate appeal pursuant to Fed. R. Civ. P. 54(b).

This Court's decision on a previous interlocutory appeal under 28 U.S.C. § 1292(b) from the district court's denial of Teck's motion to strike allegations pertaining to emissions into air (No. 15-35288) is reported at *Pakootas v. Teck Cominco Metals Ltd.* 830 F.3d 975 (9th Cir. 2016).

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points and contains 13,738 words.

Dated: March 30, 2017.

s/Kevin M. Fong
Kevin M. Fong

ADDENDUM

42 U.S.C. § 9601
(CERCLA section 101)

§ 9601

For purposes of this subchapter—

*****

(23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.].

*****

(25) The terms "respond" or "response" means remove, removal, remedy, and remedial action;, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

*****

42 U.S.C. § 9604
(CERCLA section 104)

§ 9604. Response Authorities

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

(2) Removal Action.—
Any removal action undertaken by the President under this subsection (or by any other person referred to in section 9622 of this title) should, to the extent the

President deems practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned.

(3) Limitations on Response.—The President shall not provide for a removal or remedial action under this section in response to a release or threat of release—

(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or

(C) into public or private drinking water supplies due to deterioration of the system through ordinary use.

(4) Exception to Limitations.—
Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

(b) Investigations, monitoring, coordination, etc., by President

(1) Information; studies and investigations

Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or

investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

(2) Coordination of investigations

The President shall promptly notify the appropriate Federal and State natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to this section and shall seek to coordinate the assessments, investigations, and planning under this section with such Federal and State trustees.

(c) Criteria for continuance of obligations from Fund over specified amount for response actions; consultation by President with affected States; contracts or cooperative agreements by States with President prior to remedial actions; cost-sharing agreements; selection by President of remedial actions; State credits: granting of credit, expenses before listing or agreement, response actions between 1978 and 1980, State expenses after December 11, 1980**, in excess of 10 percent of costs, item-by-item approval, use of credits; operation and maintenance; limitation on source of funds for O&M; recontracting; siting**

(1) Unless (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, or (C) continued response action is otherwise appropriate and consistent with the remedial action to be taken [1] obligations from the Fund, other than those authorized by subsection (b) of this section, shall not continue after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances.

(2) The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section.

(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or

cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; (B) the State will assure the availability of a hazardous waste disposal facility acceptable to the President and in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.] for any necessary offsite storage, destruction, treatment, or secure disposition of the hazardous substances; and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance, or (ii) 50 percent (or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision for the release) of any sums expended in response to a release at a facility, that was operated by the State or a political subdivision thereof, either directly or through a contractual relationship or otherwise, at the time of any disposal of hazardous substances therein. For the purpose of clause (ii) of this subparagraph, the term "facility" does not include navigable waters or the beds underlying those waters. In the case of remedial action to be taken on land or water held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe (if such land or water is subject to a trust restriction on alienation), or otherwise within the borders of an Indian reservation, the requirements of this paragraph for assurances regarding future maintenance and cost-sharing shall not apply, and the President shall provide the assurance required by this paragraph regarding the availability of a hazardous waste disposal facility.

*****

(d) Contracts or cooperative agreements by President with States or political subdivisions or Indian tribes; State applications, terms and conditions; reimbursements; cost-sharing provisions; enforcement requirements and procedures

(1) Cooperative Agreements.—

(A) State applications.—
A State or political subdivision thereof or Indian tribe may apply to the President to carry out actions authorized in this section. If the President determines that the State or political subdivision or Indian tribe has the capability to carry out any or all of such actions in accordance with the criteria and priorities established pursuant to section 9605(a)(8) of this title and to carry out related enforcement actions, the President may enter into a contract or cooperative agreement with the

State or political subdivision or Indian tribe to carry out such actions. The President shall make a determination regarding such an application within 90 days after the President receives the application.

*****

42 U.S.C. § 9606
(CERCLA section 106)

§ 9606. Abatement actions

(a) **Maintenance, Jurisdiction, etc.**

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines; reimbursement

(1) Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

(2)

(A) Any person who receives and complies with the terms of any order issued under subsection (a) may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an

action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2),[1] 1318, 1319, and 1364(a) of title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j–4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of title 15.

42 U.S.C. § 9607
(CERCLA section 107)

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under

this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

*****

42 U.S.C. § 9626
(CERCLA section 126)

§ 9626. Indian Tribes

(a) **Treatment generally**

The governing body of an Indian tribe shall be afforded substantially the same treatment as a State with respect to the provisions of section 9603(a) of this title (regarding notification of releases), section 9604(c)(2) of this title (regarding consultation on remedial actions), section 9604(e) of this title (regarding access to information), section 9604(i) of this title (regarding health authorities) and section 9605 of this title (regarding roles and responsibilities under the national contingency plan and submittal of priorities for remedial action, but not including the provision regarding the inclusion of at least one facility per State on the National Priorities List).

(b) Community relocation

Should the President determine that proper remedial action is the permanent relocation of tribal members away from a contaminated site because it is cost effective and necessary to protect their health and welfare, such finding must be concurred in by the affected tribal government before relocation shall occur. The President, in cooperation with the Secretary of the Interior, shall also assure that all benefits of the relocation program are provided to the affected tribe and that alternative land of equivalent value is available and satisfactory to the tribe. Any lands acquired for relocation of tribal members shall be held in trust by the United States for the benefit of the tribe.

(c) Study

The President shall conduct a survey, in consultation with the Indian tribes, to determine the extent of hazardous waste sites on Indian lands. Such survey shall be included within a report which shall make recommendations on the program needs of tribes under this chapter, with particular emphasis on how tribal participation in the administration of such programs can be maximized. Such report shall be

submitted to Congress along with the President's budget request for fiscal year 1988.

(d) Limitation

Notwithstanding any other provision of this chapter, no action under this chapter by an Indian tribe shall be barred until the later of the following:

(1) The applicable period of limitations has expired.

(2) 2 years after the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this chapter.

9th Circuit Case Number(s) 16-35742

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) Mar 30, 2017 .

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/Kevin M. Fong

****

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) .

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:

Signature (use "s/" format)