APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 16-35742

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

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Defendant-Appellant.

Argued and Submitted
February 5, 2018, Seattle, Washington

Filed September 14, 2018

OPINION

GOULD, Circuit Judge:

This appeal is the latest chapter in a multi-decade dispute centered on Teck Metals' liability for dumping several million tons of industrial waste into the Columbia River. Since we last heard an interlocutory appeal in this case, the district court dismissed Teck's divisibility defense to joint and several liability on summary judgment. At Phase I of the trifurcated bench trial, the court held that Teck was a liable party under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). At Phase II, the court found Teck liable for more than $8.25 million of the Confederated Tribes of the Colville Reservation's response costs. The district court then certified this appeal by entering partial judgment under Federal Rule of Civil Procedure 54(b). We conclude that we have jurisdiction, and we affirm.

I

The Columbia River, the fourth-largest river in North America, begins its 1,200-mile journey to the sea from its headwaters in the Canadian Rockies. The River charts a northwest course in British Columbia before bending south toward Washington. It then widens and forms the Arrow Lakes reservoir until, thirty miles before the international border, it reaches the Hugh Keenleyside Dam. After passing through the dam's outlet, the River is free-flowing until south of the border near Northport, Washington. There it again starts to slow and pool at the uppermost reaches of Lake Roosevelt, the massive reservoir impounded behind the Grand

Coulee Dam. This case concerns the more than 150-mile stretch of river between the Canadian border and the Grand Coulee Dam, known as the Upper Columbia River.

From time immemorial, the Upper Columbia River has held great significance to the Confederated Tribes of the Colville Reservation. These tribes historically depended on the River's plentiful fish for their survival and gave the River a central role in their cultural traditions.[1] And the Colville Tribes continue to use the Upper Columbia River to this day for fishing and recreation. Under the applicable treaties, the Tribes retain fishing rights in the River up to the Canadian border. *See Okanogan Highlands All. v. Williams*, 236 F.3d 468, 478 (9th Cir. 2000) (citing *Antoine v. Washington*, 420 U.S. 194, 196 n.4, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975)). Those treaties draw the Colville Reservation's eastern and southern boundaries "in the middle of the channel of the Columbia River." Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 62-63. The Tribes claim equitable title to the riverbed on their side of the channel, and the United States has long supported this claim. *See Confederated Tribes of Colville Reservation v. United States*, 96 F.2d 1102, 1105 n.7 (Fed. Cir. 1992); *Opinion on the Boundaries of and Status of Title to Certain Lands Within the*

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[1] *See generally* U.S. EPA, *Upper Columbia River Expanded Site Inspection Report Northeast Washington*, app. A (Petition for Assessment of Release), https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100MFOQ.TXT.

Colville and Spokane Indian Reservations, 84 Interior Dec. 72, 75–80, 1977 WL 28859, at *3-5.

For nearly a century, however, the Upper Columbia River has been fouled by Teck Metals' toxic waste.[2] Teck operates the world's largest lead and zinc smelter in Trail, British Columbia, just ten miles upstream of the U.S. border. During smelting, lead or zinc ore is heated to a molten state, during which the desired metal is separated from impurities in the raw ore. These impurities cool to form glassy, granular slag. Between 1930 and 1995, Teck discharged about 400 tons of slag daily—an estimated 9.97 million tons in total—directly into the free-flowing Columbia River. Teck washed this debris into the river using untold gallons of contaminated effluent. These solid and liquid wastes contained roughly 400,000 tons (800 million pounds) of the heavy metals arsenic, cadmium, copper, lead, mercury, and zinc, in addition to lesser amounts of other hazardous substances.[3]

At least 8.7 million tons of the Trail smelter's slag and nearly all of the dissolved and particulate-bound metals in its effluent made the short trip

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[2] Teck was previously named Teck Cominco Metals.

[3] Teck's slag contained 255,000 tons of zinc (510 million pounds) and 7,300 tons of lead (14.6 million pounds). Teck's effluent contained an additional 108,000 tons of zinc (216 million pounds), 22,000 tons of lead (44 million pounds), 1,700 tons of cadmium (3.4 million pounds), 270 tons of arsenic (540,000 pounds), and 200 tons of mercury (400,000 pounds). The district court did not make a finding on how much copper Teck dumped into the river, but Teck previously conceded that about 29,000 tons (58 million pounds) reached the Upper Columbia River.

downstream into the United States. Upon reaching the calmer waters of Lake Roosevelt, Teck's smelting byproducts came to rest on the riverbed and banks, with larger detritus settling upstream and smaller particles settling downstream near the Grand Coulee Dam.[4] Once settled, these wastes began to break down and release hazardous substances into the River's waters and sediment.

In 1999, the Colville Tribes petitioned the U.S. Environmental Protection Agency to assess the threats posed by the contamination of the Upper Columbia River Site. Two years later the Tribes and EPA signed an intergovernmental agreement coordinating a site investigation and assessment. After completing its preliminary assessment, EPA issued a unilateral administrative order against Teck. The order directed Teck to perform a remedial investigation and feasibility study ("RI/FS") of the Site under CERCLA. Teck disputed whether it was subject to CERCLA, however, and EPA decided not to enforce the order during negotiations with the company.

The Colville Tribes then tried to enforce EPA's order by funding a CERCLA citizen suit by two of their tribal government officials in 2004. These plaintiffs were later joined by the State of Washington as a plaintiff-intervenor and eventually by the Colville Tribes as a co-plaintiff.

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[4] Black Sand Beach, for instance, is named after the sand-like slag deposits that have accumulated on the riverbank near Northport, Washington. *See* URS Corp., *Completion Report & Performance Monitoring Plan: Black Sand Beach Project* § 2.2 (2011), https://fortress.wa.gov/ecy/gsp/DocViewer.ashx?did=3783.

Teck moved to dismiss the action. It primarily argued that CERCLA does not apply extraterritorially to its activities and that it cannot be held liable as a person who "arranged for disposal" of hazardous substances. The district court denied this motion to dismiss and certified the issues for immediate appeal under 28 U.S.C. § 1292(b).

While the appeal was pending, Teck and EPA entered a settlement agreement withdrawing EPA's order and committing Teck to fund and conduct an RI/FS modeled on CERCLA's requirements. The study aims to investigate the extent of contamination at the Site, to provide information for EPA's assessment of the risk to human health and the environment, and to evaluate potential remedial alternatives. But the settlement agreement is silent as to Teck's responsibility for cleaning up the Site.

We accepted Teck's interlocutory appeal and affirmed the district court's denial of the motion to dismiss. *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1082 (9th Cir. 2006) (*Pakootas I*). We held that the suit did not involve an extraterritorial application of CERCLA because Teck's pollution had "come to be located" in the United States. *Id.* at 1074 (quoting 42 U.S.C. § 9601(9)). We also held that the complaint had stated a claim for relief because the actual or threatened release of hazardous substances at the Site could subject Teck to "arranger" liability under CERCLA. *Id.* at 1082 (citing 42 U.S.C. § 9607(a)(3)).

On remand, the Tribes and the State each filed amended complaints seeking cost recovery, natural resource damages, and related declaratory relief

under CERCLA.[5] Litigation was ultimately trifurcated into three phases to sequentially determine: (1) whether Teck is liable as a potentially responsible party ("PRP"); (2) Teck's liability for response costs; and (3) Teck's liability for natural resource damages.

Before the first bench trial, the Tribes and the State moved for partial summary judgment on Teck's divisibility defense. The district court granted the motions and dismissed the defense, concluding that Teck did not present enough evidence to create a genuine issue of fact as to whether the environmental harm to the Upper Columbia River was theoretically capable of apportionment or whether there was a reasonable basis for apportioning Teck's share of liability.

In Phase I of trial, the district court concluded that Teck was liable as an arranger under CERCLA section 107(a)(3), 42 U.S.C. § 9607(a)(3). In doing so, the court rejected Teck's argument that Washington courts lack personal jurisdiction over the company. The district court then held that without its divisibility defense, Teck was jointly and severally liable to the Tribes and the State under section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).[6]

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[5] The individual plaintiffs' claims were subsequently dismissed and judgment was entered against them, which we affirmed on appeal. *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1225 (9th Cir. 2011) (*Pakootas II*).

[6] After the Phase I bench trial, the Tribes and the State filed amended complaints adding allegations that the Trail smelter's air emissions also resulted in the discharge of hazardous substances at the Site. The district court denied the motion to strike those allegations, but we reversed on

In Phase II, the State settled its claim for past response costs while the Tribes proceeded to trial. The district court found in favor of the Tribes and awarded them $3,394,194.43 in investigative expenses incurred through December 31, 2013, $4,859,482.22 in attorney's fees up to that date, and $344,300.00 in prejudgment interest. The court then directed the entry of judgment on Teck's liability for these response costs under Federal Rule of Civil Procedure 54(b).

Teck now appeals from the district court's summary judgment order and partial judgment on the first two phases of trial.

II

We first consider whether we have jurisdiction to entertain this appeal.

A

Teck contends, as an initial matter, that Rule 54(b) did not authorize the district court to certify this appeal by entering partial final judgment. Rule 54(b) allows a district court in appropriate circumstances to enter judgment on one or more claims while others remain unadjudicated.[7] To do so, the district court first must render "an ultimate disposition of an individual claim." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7, 100 S.Ct. 1460,

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appeal. *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, 986 (9th Cir. 2016) (*Pakootas III*).

[7] In relevant part, the Rule provides: "When an action presents more than one claim for relief ..., the court may direct entry of a final judgment as to one or more, but fewer than all, claims ... only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b).

64 L.Ed.2d 1 (1980) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436, 76 S.Ct. 895, 100 L.Ed. 1297 (1956)). The court then must find that there is no just reason for delaying judgment on this claim. *Id.* at 8, 100 S.Ct. 1460.

According to Teck, the district court had to await the conclusion of this entire multi-decade litigation before entering judgment on the Tribes' response costs claim. Teck reasons that the Tribes actually raise a single CERCLA claim—for arranger liability—with multiple remedies: recovery of response costs and natural resource damages.

What constitutes an individual "claim" is not well defined in our law. The Supreme Court has expressly declined to "attempt any definitive resolution of the meaning of" the term, *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n.4, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976), and its "judicial crumbs have failed to lead the circuit courts to a consensus as to the handling of this confusing area of law," *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741 (5th Cir. 2000). In this circuit, we have often tried to avoid this jurisprudential quagmire by employing a "pragmatic approach." *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987); cf. 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3914.7 (2d ed. 2018) ("[T]he policies underlying Rule 54(b) are not well served, and certainly are not well explained, by reliance on efforts to define a claim.").

At the doctrine's outer edges, however, our cases have given some guidance. Rule 54(b)'s use of the word "claim" at minimum refers to "a set of facts

giving rise to legal rights in the claimant." *CMAX, Inc. v. Drewry Photocolor Corp.*, 295 F.2d 695, 697 (9th Cir. 1961). Multiple claims can thus exist if a case joins multiple sets of facts. *See, e.g.*, *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979). Conversely, only one claim is presented when "a single set of facts giv[es] rise to a legal right of recovery under several different remedies." *Ariz. State Carpenters Pension Tr. Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991).

In *Arizona State Carpenters Pension Trust Fund*, for example, we identified a single claim under Rule 54(b) because a single set of facts gave rise to both a count for punitive damages and a count for compensatory damages. *Id.* The plaintiff's count for punitive damages required all the same facts as its count for compensatory damages, plus additional proof of an aggravating factor. *Id.* Because the showing required for punitive damages completely encompassed that required for compensatory damages, we considered these counts to be an indivisible claim for Rule 54(b)'s purposes. *See id.* We thus forbade the immediate appeal of a ruling dismissing only the punitive damages claim, which necessarily would have become moot if the lesser-included count for compensatory damages later failed as well. *See id*.

Nevertheless, a challenger "cannot successfully attack the court's finding of multiple claims merely by showing that some facts are common to all of its theories of recovery." *Purdy Mobile Homes*, 594 F.2d at 1316 (internal quotation marks omitted). Claims with partially "overlapping facts" are not "foreclosed

from being separate for purposes of Rule 54(b)." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 881 (9th Cir. 2005). Instead, a district court can enter final judgment on a claim even if it is not "separate from and independent of the remaining claims." *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991) (quoting *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987)). And such a judgment is permissible even if the claim "arises out of the same transaction and occurrence as pending claims." *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 452, 76 S.Ct. 904, 100 L.Ed. 1311 (1956).

Here, the Colville Tribes' counts for response costs and for natural resource damages present multiple claims because each requires a factual showing not required by the other. *See Purdy Mobile Homes*, 594 F.2d at 1316; *cf. also Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (holding that for the purposes of the Double Jeopardy Clause, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not").[8] Both response cost and natural resource damages claims require proof that (1) the defendant falls within one of the four classes of PRPs listed in section 107(a), 42 U.S.C. § 9607(a); (2) the

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[8] *See also Samaad v. City of Dallas*, 940 F.2d 925, 931 n.10 (5th Cir. 1991) (noting that our approach in *Purdy Mobile Homes* "bears a striking similarity to that employed in the double jeopardy context" under *Blockburger*), *abrogated on other grounds by Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 728, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010).

site on which hazardous substances are found is a "facility" within the meaning of section 101(9), *id.* § 9601(9); and (3) a "release" or "threatened release" of a hazardous substance from the facility has occurred. *See id.* § 9607(a); *Pakootas III*, 830 F.3d at 981. But a government's claim for response costs must also show that (4) the government has incurred costs responding to the release or threatened release; and (5) those costs are "not inconsistent with the national contingency plan," which is assumed to be the case absent a defendant's proof to the contrary. 42 U.S.C. § 9607(a)(4), (4)(A). By contrast, a claim for natural resource damages instead must show that (4) natural resources under the plaintiff's trusteeship have been injured and (5) the injury to natural resources "result[ed] from" the release or threatened release of the hazardous substance. 42 U.S.C. § 9607(a)(4)(C); *Pakootas III*, 830 F.3d at 981 n.4. The text of CERCLA elsewhere suggests the conclusion that these two claims are distinct, describing them as separate "[a]ctions for recovery of costs" and "[a]ctions for natural resource damages," and imposing different limitations periods in which those actions may be brought. 42 U.S.C. § 9613(g)(1)-(2).

In situations like this, where a suit involves multiple claims, we leave it to the district court, as "dispatcher," *Curtiss-Wright*, 446 U.S. at 8, 100 S.Ct. 1460 (quoting *Sears, Roebuck & Co.*, 351 U.S. at 435, 76 S.Ct. 895), to evaluate the "interrelationship of the claims" and determine in the first instance "whether the claims under review [are] separable from the others remaining to be adjudicated." *Id.* at 8, 10, 100 S.Ct. 1460. In doing so, "a district court

must take into account judicial administrative interests as well as the equities involved." *Id.* at 8, 100 S.Ct. 1460. We review the district court's decision to enter final judgment under Rule 54(b) for abuse of discretion. *See id.*

Although no party disputes the district court's exercise of discretion in this case, we must review it to satisfy ourselves that we have subject matter jurisdiction to hear this appeal. *See Sheehan*, 812 F.2d at 468. Having done so, we conclude that there was no abuse of discretion. This is a complex case that has been ongoing for fourteen years, and the entry of partial judgment against Teck would help ensure that a responsible party promptly pays for the contamination of the Upper Columbia River, advancing CERCLA's goals and easing the Tribes' burden of financing the litigation effort. *See Wood*, 422 F.3d at 882. We hold that the district court's Rule 54(b) certification here was appropriate.

B

Teck also raises two challenges to the district court's exercise of personal jurisdiction over the company. First, Teck argues that the district court should not have applied the so-called "effects" test of *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). In the alternative, Teck argues that the *Calder* test was not satisfied because the Trail smelter's discharges into the Columbia River were not expressly aimed at Washington.

We assess specific personal jurisdiction using a three-prong test. *See Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006) (en banc). Under the first prong, the Colville Tribes must show either that

Teck purposefully availed itself of the privilege of conducting activities in Washington, or that it purposefully directed its activities toward Washington. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). A "purposeful availment" analysis is used for cases sounding in contract. *Id.* By contrast, a "purposeful direction" analysis under *Calder* "is most often used in suits sounding in tort." *Id.* at 802-03.

The *Calder* test plainly applies here. Claims for recovery of response costs and natural resource damages are "more akin to a tort claim than a contract claim." *Ziegler v. Indian River Cty.*, 64 F.3d 470, 474 (9th Cir. 1995); *see also E.I. Du Pont de Nemours & Co. v. United States*, 365 F.3d 1367, 1373 (Fed. Cir. 2004) ("CERCLA evolved from the doctrine of common law nuisance."). Besides, CERCLA liability for toxic pollution is much closer to the traditional domain of common law torts than several of the other areas in which we have applied *Calder*'s effects test. *See, e.g.*, *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (copyright infringement); *Yahoo! Inc.*, 433 F.3d at 1206 (foreign court order enforcement); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (trademark dilution).

We construe *Calder* as imposing three requirements: "the defendant allegedly 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 (alteration in original) (quoting *Schwarzenegger*, 374 F.3d at 803).

Teck argues only that its waste disposal activities were not "expressly aimed" at Washington. Express aiming is an ill-defined concept that we have taken to mean "something more" than "a foreign act with foreseeable effects in the forum state." *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

Calder illustrates this point. In that case, a California actress sued two National Enquirer employees for an allegedly defamatory article published in the magazine. The article had been written and edited in Florida but the magazine was distributed nationally, with its largest market in California. The Supreme Court upheld the exercise of personal jurisdiction in California because the allegations of libel did not concern "mere untargeted negligence" with foreseeable effects there; rather, the defendants' "intentional, and allegedly tortious, actions were expressly aimed" at the state. 465 U.S. at 789, 104 S.Ct. 1482. Those actions simply involved writing and editing an article about a person in California, an article that the defendants knew would be circulated and cause reputational injury in that forum. *Id.* at 789-90, 104 S.Ct. 1482. Under those circumstances, the defendants should "reasonably anticipate being haled into court there" to answer for their tortious behavior. *Id.* at 790, 104 S.Ct. 1482 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). That was true even though the defendants were not personally responsible for the circulation of their article in California. *Id.* at 789-90, 104 S.Ct. 1482.

We have no difficulty concluding that Teck expressly aimed its waste at the State of Washington. The district court found ample evidence that Teck's leadership knew the Columbia River carried waste away from the smelter, and that much of this waste travelled downstream into Washington, yet Teck continued to discharge hundreds of tons of waste into the river every day. It is inconceivable that Teck did not know that its waste was aimed at the State of Washington when Teck deposited it into the powerful Columbia River just miles upstream of the border. As early as the 1930s, Teck knew that its slag had been found on the beaches of the Columbia River south of the United States border. By the 1980s, Teck's internal documents recognized that its waste was having negative effects on Washington's aquatic ecosystem. And by the early 1990s, Teck's management acknowledged that the company was "in effect dumping waste into another country," using the Upper Columbia River as a "free" and "convenient disposal facility." But still Teck, over and over again, on a daily basis for decades, dumped its waste into the river until it modernized its furnace in the mid-1990s.

It is no defense that Teck's wastewater outfalls were aimed only at the Columbia River, which in turn was aimed at Washington. Rivers are nature's conveyor belts. Teck simply made use of the river's natural transport system throughout the 1900s, much like lumberjacks of that period who would roll timber into a stream to start a log drive. Without this transport system, Teck would have soon been inundated by the massive quantities of waste it

produced—which, it bears repeating, averaged some 400 tons per day. Teck's connection with Washington was not "random," "fortuitous," or "attenuated," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (internal quotation marks omitted), nor would the maintenance of this suit offend "traditional conception[s] of fair play and substantial justice," *id.* at 464, 105 S.Ct. 2174 (alteration in original) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). To the contrary, there would be no fair play and no substantial justice if Teck could avoid suit in the place where it deliberately sent its toxic waste. We hold that personal jurisdiction over Teck exists in Washington.

III

Satisfied that we have jurisdiction, we now turn to Teck's argument that CERCLA does not allow the Colville Tribes to recover their costs of establishing Teck's liability. The district court awarded the Tribes more than $8.25 million in costs incurred through December 31, 2013, consisting of about $3.39 million in investigation expenses plus $4.86 million in attorney's fees and costs. The court deemed the Tribes' investigation to be recoverable as part of a "removal" action, and characterized their attorney's efforts as "enforcement activities." We consider each part of the district court's award below, reviewing its findings of fact for clear error and its conclusions of law *de novo*. *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1174 (9th Cir. 2017).

A

We first review the district court's award of the Colville Tribes' investigation costs.

1

Section 107(a)(4)(A) of CERCLA provides that a PRP is liable for "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). At its core, a "removal" action is defined as "the cleanup or removal" of hazardous substances from the environment.[9] *Id.* § 9601(23). No less important, however, are several associated activities described by the statutory definition.[10] This case concerns two defined categories of related activities: such efforts "as may be necessary to

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[9] To clarify our terminology, we note that "Congress intended that there generally will be only one removal action," of which different activities are just a part. *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994); *see also* Brian Block, *Remediating CERCLA's Polluted Statute of Limitations*, 13 Rutgers J.L. & Pub. Pol'y 388, 400 (2016) (collecting cases).

[10] Section 101(23) defines "removal" as "[1] the cleanup or removal of released hazardous substances from the environment, [2] such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, [3] such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, [4] the disposal of removed material, or [5] 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).

monitor, assess, and evaluate the release or threat of release of hazardous substances," and "as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." *Id.*

Cleanup-adjacent activities face a low bar to satisfying these definitions of "removal." *See United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1238 (9th Cir. 2005) ("The definition of 'removal' is written in sweeping terms."). Section 101(23) covers all activities "as may be necessary" to advance certain threat assessment or abatement goals. This permissive language means qualifying activities need not be performed with the *intent* of achieving the statutory goals; need not be absolutely *necessary* to achieve those goals; and need not *actually* achieve those goals. Rather, taking a cue from the D.C. Circuit's construction of "as may be necessary" in the Communications Act of 1934, we hold that the definitions of "removal" reach all acts that "are not an unreasonable means" of furthering section 101(23)'s enumerated ends. *Cellco P'ship v. FCC*, 357 F.3d 88, 91 (D.C. Cir. 2004) (quoting *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978)).

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The district court concluded that the investigations by the Tribes' expert consultants qualify as recoverable costs of removal. To begin with, the Tribes hired an environmental consultant, Environment International, to plan and implement a study of the Upper Columbia River Site. This consultant collected multiple sediment and pore water samples and sent those samples to

independent labs for testing. An environmental engineering firm, LimnoTech, then compiled the resulting data into a comprehensive database and analyzed the data. The Tribes also employed several subject-matter experts, such as a geochemist and a metallurgist, to review the data. Finally, the Tribes retained a hydrology firm, Northwest Hydraulic Consultants, to sample and analyze upstream sediment cores from the Canadian reach of the Columbia River.

We agree with the district court that the Tribes' data collection and analysis efforts were not an unreasonable means of furthering at least three distinct purposes embraced by CERCLA.

First, the expert consultants investigated the presence and movement of toxic wastes at the Site. We have held that section 101(23) encompasses such studies into the location and migration of materials containing hazardous substances. *See Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 889, 892 (9th Cir. 1986) (allowing cost recovery for "testing ... of the migration of slag particles" as an action that "may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances").

Second, the Tribes' experts tested whether the slag and effluent-contaminated sediment found at the Site leach contaminants into the environment. Section 101(23) on its face covers "asses[ing] ... [the] threat of release of hazardous substances." 42 U.S.C. § 9601(23); *see also Wickland*, 792 F.2d at 889, 892 (allowing cost recovery for "conduct[ing] tests to evaluate the hazard posed by the slag"); *Cadillac*

Fairview/California, Inc. v. Dow Chem. Co., 840 F.2d 691, 692-93, 695 (9th Cir. 1988) (same).

And third, the experts traced the origins of the slag and sediment metals found at the Site. Teck has maintained before and throughout this litigation that many other sources, including other smelters, are to blame for the Upper Columbia River's pollution. The Tribes commissioned a study investigating this claim, but the results show that the wastes match the Trail smelter's isotopic and geochemical "fingerprint."

Efforts to identify the parties responsible for the disposal of toxic wastes at a site are likewise recoverable costs of removal. In *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), the Supreme Court considered whether a PRP could recover fees for work performed by an attorney in searching for other parties that had used a site for hazardous waste disposal. *Id.* at 820, 114 S.Ct. 1960. The Court held that "[t]hese kinds of activities are recoverable costs of response clearly' distinguishable from litigation expenses." *Id.* Indeed, searches for pollution sources are often conducted by non-lawyers, such as "engineers, chemists, private investigators, or other professionals"—much like the Tribes' experts here. *Id.*

Key Tronic appears to have rested its holding on yet another statutory definition, section 101(25). *See id.* at 813, 816-20, 114 S.Ct. 1960. That provision defines removal and remedial actions collectively as "response" actions, and then defines all "response" actions to "include enforcement activities related thereto." 42 U.S.C. § 9601(25). The Court in *Key*

Tronic noted that the search in that case had prompted EPA to initiate an administrative enforcement action against another party that had been identified as disposing of wastes at the site. *Id.* at 820, 114 S.Ct. 1960. The Court also found it significant that "[t]racking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for." *Id.* Although *Key Tronic* did not discuss section 101(23)'s definition of "removal," the benefit of making an effective cleanup more likely also falls within the scope of actions identified by the district court that "may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." Similarly, uncovering evidence that a party is responsible for hazardous waste puts pressure on that party voluntarily to clean up its pollution, which would also advance the goals of that provision. *Cf. E.I. DuPont de Nemours & Co. v. United States*, 508 F.3d 126, 135 (3d Cir. 2007) ("Voluntary cleanups are vital to fulfilling CERCLA's purpose."). And under both provisions, CERCLA's broad remedial purpose "supports a liberal interpretation of recoverable costs" to ensure that polluters pay for the messes they create—including the difficulties of identifying them in the first place. *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1503 (6th Cir. 1989) (quoting *United States v. Northernaire Plating Co.*, 685 F.Supp. 1410, 1419 (W.D. Mich. 1988)).

3

Teck opposes the district court's conclusion, arguing that the Tribes' studies implicitly fall out of the statutory definitions of "removal" because they

are all "litigation-related." To be sure, the studies were commissioned after the Tribes joined this litigation; they were undertaken to help prove Teck's liability; and many of them were presented to the district court in Phase I of trial.

Teck's argument relies on a pair of decisions from the Third Circuit. In *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827 (3d Cir. 1995), the court held that when evaluating the "necessary" costs of response under section 107(a)(4)(B), it looks to "[t]he heart of the[ ] definitions of removal and remedy" and considers whether the costs are "necessary to the containment and cleanup of hazardous releases." *Id.* at 850 (quoting *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992)). The court then applied this rule in *Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000), where it held that "private parties may not recoup litigation-related expenses in an action to recover response costs pursuant to section 107(a)(4)(B)." *Id.* at 294. As Teck points out, the court noted that the work at issue did not "play[ ] any role in the containment and cleanup of the Property," which meant it was not "necessary." *Id.* at 297.

We conclude that those out-of-circuit cases are not persuasive here. The Colville Tribes bring their cost recovery action as a sovereign under section 107(a)(4)(A), so they are entitled to "all costs" rather than merely the "necessary" costs of response. *Compare* 42 U.S.C. § 9607(a)(4)(A), *with id.*

§ 9607(a)(4)(B).[11] And even if the latter standard were applicable, we have never interpreted the term "necessary" as requiring a nexus solely between recoverable costs and on-site cleanup activities. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001) (en banc) (holding that a response action is necessary if it responds to "an actual and real threat to human health or the environment"). We instead read CERCLA's cost recovery provisions as making no distinction between cleanup and investigatory costs. *Wickland*, 792 F.2d at 892. Neither case cited by Teck speaks to the issue presented—whether an activity that would otherwise qualify as removal is disqualified by virtue of having a connection to litigation. *See Black Horse Lane*, 228 F.3d at 298 & n.13 (concluding that "the removal definition ... exclud[es] the sort of 'oversight' costs" sought by plaintiff); *Redland Soccer Club*, 55 F.3d at 850 (concluding that plaintiffs' health risk assessment costs are not " 'response costs' under any of the[ ] definitions" of "removal" and "remedial").

Seeing no supportive authorities on point, we decline to adopt Teck's reading of "removal" as implicitly excluding activities that have a connection to litigation. By its terms, the statute gives no

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[11] For this reason, we need not decide whether the Tribes' cost of fingerprinting wastes at the Site was "necessary" in light of the study yielding a "duplicative identification" of Teck as a polluter. *Syms v. Olin Corp.*, 408 F.3d 95, 104 (2d Cir. 2005). But in any case, we cannot fault the Tribes for paying to learn that Teck disposed of these wastes when Teck disputed that the wastes could be traced back to the company rather than to a number of other potential pollution sources.

weight to the timing, purpose, or ultimate use of covered activities. *See* 42 U.S.C. § 9601(23), (25). A plaintiff's ongoing response action may complicate recovery, but those costs remain recoverable at trial. *See Johnson v. James Langley Operating Co.*, 226 F.3d 957, 963 (8th Cir. 2000) ("[P]laintiffs' response costs in this case are not transformed into litigation costs merely by their timing with respect to their initiation of this action."); *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 908 (5th Cir. 1993) ("With respect to costs, if any, incurred after the complaint was filed, prejudgment interest should be assessed on those costs from the date of the expenditures."). Further, a plaintiff's intent to use the fruits of an investigation in litigation does not excise that activity from the statutory definitions of removal. *See Johnson*, 226 F.3d at 963 ("[T]he motives of the ... party attempting to recoup response costs ... are irrelevant." (quoting *Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc*, 920 F.2d 1415, 1418 (8th Cir. 1990), *abrogated on other grounds by Key Tronic Corp.*, 511 U.S. 809, 114 S.Ct. 1960); *cf. Carson Harbor*, 270 F.3d at 872 (holding that self-serving "ulterior motive[s]" should be disregarded when determining whether response costs are necessary because "[t]o hold otherwise would result in a disincentive for cleanup"). Many, if not most, CERCLA plaintiffs study the contamination at a site with an eye to potential litigation, and it would make little sense to provide these costs only to parties that are disinclined to file suit. Finally, recoverable investigation costs do not transform into unrecoverable costs if the information obtained is later used to help prove a PRP's liability. *See Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 935-36

(6th Cir. 2004) (holding that the plaintiff could recover from the defendant the costs of identifying it as a PRP). Indeed, we would turn *Key Tronic*'s reasoning on its head if we read that opinion as making a defendant liable for all PRP search costs *except* the cost of identifying that defendant once that evidence is used in the plaintiff's case in chief. *See* 511 U.S. at 820, 114 S.Ct. 1960 (lauding the plaintiff's investigation for "uncovering the [defendant's] disposal of wastes at the site").

We instead determine whether an activity amounts to "removal" by comparing the actions taken to the categories defined by statute. *See, e.g.*, *W.R. Grace & Co.*, 429 F.3d at 1246-47; *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1477-79 (9th Cir. 1995); *Durfey v. E.I. DuPont De Nemours & Co.*, 59 F.3d 121, 124-26 (9th Cir. 1995). The statutory language—not extra-textual factors—is controlling.

We conclude that the district court properly awarded the Colville Tribes all investigation expenses as costs of removal, even though many of these activities played double duty supporting both cleanup and litigation efforts.[12]

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[12] We need not decide whether the Tribe's removal costs are "inconsistent with the national contingency plan" because Teck forfeited this argument by not raising it on appeal. 42 U.S.C. § 9607(a)(4)(A). Also, we decline to consider Teck's assertion that the district court "went beyond the evidence" in calculating the amount of the Tribes' removal costs because Teck neither raised this issue in its opening brief, *see United States v. Kelly*, 874 F.3d 1037, 1051 n.9 (9th Cir. 2017), nor provided a sufficient record on which to review this claim, *see* Fed. R. App. P. 10(b)(2); *In re O'Brien*, 312 F.3d 1135, 1137 (9th Cir. 2002).

B

We next consider the district court's award of the Colville Tribes' attorney's fees.

1

Shortly after CERCLA was enacted, several district courts interpreted section 107(a)(4)(A) to mean that the United States could recover its attorney's fees for successfully bringing a response costs action. *See*, *e.g.*, *United States v. Ne. Pharm. & Chem. Co. (NEPACCO)*, 579 F.Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986); *United States v. Conservation Chem. Co.*, 619 F.Supp. 162, 186 (W.D. Mo. 1985); *United States v. S.C. Recycling & Disposal, Inc. (SCRDI)*, 653 F.Supp. 984, 1009 (D.S.C. 1984), *aff'd in part and vacated in part on other grounds sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

In early 1985, Congress began considering legislation that would become the Superfund Amendments and Reauthorization Act ("SARA"). During Congress's deliberations, EPA submitted information to the hearing record accounting for the costs of its "enforcement activities," a term the agency defined as including "litigation costs," "identification of responsible parties" through "records review" and "field investigations," and several other line items. *Reauthorization of Superfund: Hearings Before the Subcomm. on Water Res. of the H. Comm. on Pub. Works and Transp.*, 99th Cong. 666-67 (1985) (statement of Lee M. Thomas, Administrator, Envtl. Protection Agency). At the time, some of those cases providing the

government its attorney's fees were still pending on appeal. *See Monsanto*, 858 F.2d 160 (4th Cir. 1988); *NEPACCO*, 810 F.2d 726 (8th Cir. 1986).

To ensure that these types of expenses could be recovered, Congress amended section 101(25)'s definition of "response" to add the following clause: "all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." Pub. L. No. 99-499, § 101, 100 Stat. 1613, 1615 (1986) (codified at 42 U.S.C. § 9601(25)). SARA's Conference Committee Report summarizes the amendment as "clarif[ying] and confirm[ing] that such costs are recoverable from responsible parties, as removal or remedial costs under section 107." H.R. Conf. Rep. 99-962, at 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278.

The Supreme Court in *Key Tronic* considered whether, in light of SARA's "enforcement activities" amendment, "attorney's fees are 'necessary costs of response' within the meaning of § 107(a)(4)(B)." 511 U.S. at 811, 114 S.Ct. 1960. Specifically, the case concerned whether "a private action under § 107 is one of the enforcement activities covered by that definition [such] that fees should therefore be available in private litigation as well as in government actions." *Id.* at 818, 114 S.Ct. 1960. The Court answered this question in the negative. *Id.* at 818-19, 114 S.Ct. 1960. Given the subject of the appeal, however, the Court offered "no comment" on whether a government could recover its attorney's fees in a "government enforcement action" under section 107(a)(4)(A). *Id.* at 817, 819, 114 S.Ct. 1960. Dissenting in part, Justice Scalia, joined by Justices Blackmun and Thomas, urged that the phrase

"enforcement activities" is best understood "to cover the attorney's fees incurred by both the government and private plaintiffs successfully seeking cost recovery" under either subparagraph. *Id.* at 824, 114 S.Ct. 1960 (Scalia, J., dissenting).

We confronted the question whether section 107(a)(4)(A) allows the federal government to recover its attorney's fees in *United States v. Chapman*, 146 F.3d 1166 (9th Cir. 1998). There we held that CERCLA sufficiently "evinces an intent" to provide the government its reasonable attorney's fees. *Id.* at 1175-76 (quoting *Key Tronic*, 511 U.S. at 815, 114 S.Ct. 1960). We reasoned that section 107(a)(4)(A)'s use of the term "all costs" gives the government "very broad cost recovery rights" standing alone. *Id.* at 1174 (quoting *NEPACCO*, 579 F.Supp. at 850). And we concluded that Congress need not "incant the magic phrase 'attorney's fees' " where it has "explicitly authorized the recovery of costs of 'enforcement activities,' " *id.* at 1175 (quoting *Key Tronic*, 511 U.S. at 823, 114 S.Ct. 1960 (Scalia, J., dissenting)), because "enforcement activities naturally include attorney fees," *id.* (quoting and citing *Key Tronic*, 511 U.S. at 823, 114 S.Ct. 1960 (Scalia, J., dissenting)). We also noted that CERCLA generally must be construed liberally to accomplish its dual goals of promptly cleaning up hazardous waste sites and making polluters, rather than society as a whole, pay. *See id.* Awarding the government its attorney's fees furthers these goals by encouraging responsible parties proactively to clean up pollution, accept responsibility for cleanup costs, and stop running up the government's expenses. *Id.* at 1175-76.

We have since observed that *Chapman*'s holding applies equally to all of the governmental entities listed in section 107(a)(4)(A). *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 953 (9th Cir. 2002). By its terms, that provision makes no distinction between "the United States Government or a State or an Indian tribe." 42 U.S.C. § 9607(a)(4)(A). Each of these sovereigns is entitled to "all costs" of a response action, including related "enforcement activities." *See Reardon v. United States*, 947 F.2d 1509, 1514 (1st Cir. 1991) (en banc) ("We cannot give the definition [in section 101(25)] inconsistent readings within the statute."). It follows that section 107(a)(4)(A) "permits the United States Government or a State or an Indian tribe to recover all 'reasonable attorney fees' 'attributable to the litigation as a part of its response costs' if it is the 'prevailing party.' " *Fireman's Fund*, 302 F.3d at 953 (quoting *Chapman*, 146 F.3d at 1175-76).

2

Teck contends that *Chapman* does not apply here because its holding is tied to the specific facts of that case. In *Chapman*, EPA ordered the defendant to remove hazardous substances from the site, and when the defendant failed to comply, EPA itself initiated a response action. 146 F.3d at 1168-69. EPA then requested repayment for its response costs, and only after the defendant refused to pay did the United States bring a response costs action. *Id.* at 1169. Teck maintains that the Tribes' response costs action is distinguishable because it is "not premised on a refused order or a refusal to fund response costs."

We disagree. Neither background fact identified by Teck was material to the outcome in *Chapman*. *See id.* at 1173-76. Litigation may not be necessary if a defendant is cooperative, but CERCLA does not limit a government's recovery of attorney's fees just to those response costs actions that are absolutely unavoidable. And we follow the other circuits that have considered this issue, which have held that a government's response costs action amounts to an "enforcement activit[y]" without so much as mentioning a requirement that there first be a disobeyed cleanup order or an unsuccessful repayment negotiation. *See United States v. Dico, Inc.*, 266 F.3d 864, 878 (8th Cir. 2001); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 528, 530 (2d Cir. 1996), *overruled on other grounds by United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998); *see also Reardon*, 947 F.2d at 1514 ("[I]f 'enforcement activities' in § 9601(25) is interpreted to exclude the expenses of cost recovery actions, this would have the effect of denying the government significant amounts of attorney's fees—which was certainly not the intent of Congress.").

Because this case is squarely governed by *Chapman*, we conclude that the Colville Tribes are entitled to collect their reasonable attorney's fees for prevailing in their response costs action against Teck. *See* 146 F.3d at 1176; *see also Fireman's Fund*, 302 F.3d at 953.

3

Teck also tries to evade the significance of *Chapman* by raising several novel challenges to the district court's award of attorney's fees.

First, Teck asserts that the Tribes do not have the requisite "enforcement authority" to recover the costs of any enforcement activities connected with the Upper Columbia River Site. Teck reasons that the Tribes lack the response authority bestowed on the federal government by section 104, 42 U.S.C. § 9604, which Teck claims that EPA can—but here did not—"delegate" to a state, political subdivision, or Indian tribe under section 104(d)(1)(A), *id.* § 9604(d)(1)(A). But this provision is irrelevant. Section 104(d)(1)(A) does not address delegation at all; it simply "authorizes EPA to enter into cooperative agreements or contracts with a state, political subdivision, or a federally recognized Indian tribe to carry out [Superfund]-financed response actions." 40 C.F.R. § 300.515(a)(1). EPA's regulations explain that the agency "use[s] a cooperative agreement to transfer funds"—not federal authority—"to those entities to undertake Fund-financed response activities." *Id.* And in any event, the enforcement authority at issue is whether the Tribes can bring a lawsuit to recover their response costs. As Teck conceded at oral argument, the Tribes "clearly can bring a claim for recovery of response costs" under section 107(a)(4)(A), so they have all the authority needed to "enforce [this] liability provision." *Reardon*, 947 F.2d at 1512-13; *see also Washington State Dep't of Transp. v. Washington Nat. Gas Co., Pacificorp*, 59 F.3d 793, 801 (9th Cir. 1995) ("States [and tribes] need not obtain EPA authorization to clean up hazardous waste sites and recover costs from potentially responsible parties.").

Teck next contends that the Tribes cannot recover their attorney's fees because this case is not "related

to" any response action at the Site, as required by section 101(25). In another statutory context, the Supreme Court has explained that the "ordinary meaning of [the] words 'related to' is a broad one," meaning "having a connection with or reference to," though that breadth "does not mean the sky is the limit." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260, 133 S.Ct. 1769, 185 L.Ed.2d 909 (2013) (alterations omitted) (quoting *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008)). Adopting that standard here, we conclude that an enforcement activity falls outside of section 101(25) only if it has an inadequate connection with an existing or potential response action at a given site. Although some enforcement activities can be conducted only after a response action has begun, some can be conducted beforehand. For instance, a cash-strapped property owner may wish to locate solvent polluters to split the tab before incurring response costs, and EPA may well review and approve a party's cleanup plans before any response activities are conducted. *See, e.g.*, *Key Tronic*, 511 U.S. at 820, 114 S.Ct. 1960 (covering PRP searches); *United States v. E.I. Dupont De Nemours & Co. Inc.*, 432 F.3d 161, 163, 173 (3d Cir. 2005) (en banc) (covering EPA's review, approval, and monitoring of proposed cleanup activities). Nothing in section 101(25)'s text or the case law interpreting it requires one activity to come before the other for them to be related. The Tribes have conducted investigative activities during the course of this litigation, so the district court correctly held that this response costs suit is "related to" a response action at the Site.

Last, Teck takes issue with the attorney's fees associated with the Tribes' declaratory judgment claim. CERCLA provides that any court awarding response costs in a section 107(a) action "shall enter a declaratory judgment on liability for response costs ... that will be binding on any subsequent action or actions to recover further response costs." 42 U.S.C. § 9613(g)(2). As a result, the declaration of Teck's liability for future response costs is simply an additional form of relief that the Tribes obtained through the same efforts underlying their successful response costs action. *See City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1007 (9th Cir. 2010). Teck responds that declaratory relief did not need to be granted to compel Teck to fund a response action, but this mandatory relief does not require a showing of necessity. Regardless of whether future response costs are speculative—or even, as Teck insists, affirmatively unlikely—CERCLA requires that a successful plaintiff in a section 107(a) action be awarded both response costs and declaratory relief. *See* 42 U.S.C. § 9613(g)(2).

4

Teck also challenges the reasonableness of the attorney's fees award under the standard set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Teck contends that if we agree that the Tribes were not entitled to any costs of removal, then we should conclude that the district court misjudged the degree of the Tribes' success. But we do not agree with Teck's premise, so we reject its conclusion. The district court did not abuse its discretion in finding the $4.86 million attorney's fees award to be reasonably proportionate to the properly

awarded $3.39 million for investigation expenses. *See Webb v. Ada Cty.*, 285 F.3d 829, 837 (9th Cir. 2002). The ratio between attorney's fees and the degree of success obtained is also reasonable when one considers that the Tribes earned a valuable declaratory judgment, which "confer[s] substantial benefits not measured by the amount of damages awarded." *Hyde v. Small*, 123 F.3d 583, 584 (7th Cir. 1997); *see also In re Dant & Russell, Inc.*, 951 F.2d 246, 249–50 (9th Cir. 1991) (noting that CERCLA plaintiffs often "spend some money responding to an environmental hazard" and then bring a response cost action to recover their "initial outlays" and to obtain "a declaration that the responsible party will have continuing liability for the cost of finishing the job").

In sum, we conclude that the district court properly awarded the Colville Tribes their attorney's fees, and we do not disturb the finding that approximately $4.86 million is a reasonable award in this case.

IV

The final question presented is whether the district court erred in granting summary judgment on Teck's divisibility defense to joint and several liability.[13]

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[13] Teck's closing renews its past contentions that this case presents an extraterritorial application of CERCLA and that Teck cannot be held liable as an "arranger" under section 107(a)(3), 42 U.S.C. § 9607(a)(3). We rejected these very arguments more than a decade ago in *Pakootas I*, 452 F.3d at 1082, and we are bound by that opinion as the law of the case. *See Old Pers. v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002).

We review the district court's grant of summary judgment *de novo*, and we may affirm on any basis supported by the record. *Kohler v. Bed Bath & Beyond of California, LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there is "no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and whether the district court correctly applied the relevant substantive law, *see Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

A

The district court granted summary judgment on Teck's divisibility defense on the ground that Teck did not have enough evidence to establish the defense. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In opposing the motions for summary judgment, Teck relied almost exclusively on the declaration and report prepared by its divisibility expert, Dr. Mark Johns.

Dr. Johns's report set out to estimate the contributions from all of the sources of six heavy metals—arsenic, cadmium, copper, lead, mercury, and zinc—that are found in the Upper Columbia River and that allegedly originated from Teck's smelter. The report began by cataloging many potential pollution sources dating back to the nineteenth century. These sources throughout the River's watershed include 487 mines, eight mills, six smelters, several municipal wastewater treatment plants and industrial operations, urban runoff from the City of Spokane, natural erosion, and landslides. The materials containing heavy metals could range

from waste rock and tailings to particles carried by rainwater, mine water seepage, and liquid effluent; from finely eroded soils to large masses of clay and rock. The report concluded that Teck's slag is concentrated near the U.S.-Canada border and is not found more than 45 miles downriver. By contrast, one smelter dumped slag into the Upper Columbia River a few miles south of the border; other smelter slag, mine waste, and soil erosion could have reached the River at more than ten confluences with its tributaries; some wastewater treatment plants and industrial sources discharged liquid effluent to the River north of the international border; the Spokane River contributed waste from mining, smelting, wastewater treatment plants, industrial sources, and urban runoff about 100 miles south of the border; and landslides occurred on the banks of Lake Roosevelt as far as 150 miles downriver.

The report then identified two methods for apportioning liability for the River's pollution, and Dr. Johns's declaration identified a third possible method not set forth in his report but identified at his deposition.

The primary apportionment method employed a "metals loading approach." This approach was based on the premise that "[t]he harm in this case is the extent of sediment contamination by hazardous substances released at the Site." To calculate the release of hazardous substances from Teck's wastes, Dr. Johns credited a study by another one of Teck's experts concluding that "no verifiable amount of hazardous substances were measured leaching from Teck's slag" and that no dissolved metals from Teck's effluent were even found at the Site. Dr. Johns then

expressed his opinion that because he believed Teck's wastes are harmless, Teck should be apportioned 0% of the liability for the Upper Columbia River's contamination.

As an alternative, Dr. Johns conducted a "flux" apportionment analysis. Unlike the primary apportionment method, this analysis assumed that the relevant harm is contamination of the River's "surface water." Dr. Johns evaluated the six heavy metals' net flux from contaminated sediment into overlying water. This analysis assumed that the "diffusion boundary layer to the sediment-water interface" was limited to the top five centimeters of sediment. Dr. Johns then estimated the mass of Teck's slag present in this top portion of sediment in the northernmost 45 miles of the Site. Using a "theoretical" release rate for zinc—the only metal "measured to even theoretically release from slag"—Dr. Johns calculated a maximum daily release rate for Teck's slag. He compared this rate against the zinc flux rate for all remaining sediment in this area, as estimated by another one of Teck's experts, and concluded that Teck should be apportioned a 0.05% share of liability.

Finally, Dr. Johns testified about a potential mass-based approach to account for Teck's share of metals found at the Upper Columbia River Site. This approach assumed that any "placement of hazardous substances" into the Site is the relevant harm. Dr. Johns estimated the mass of metals found in Teck's slag and materials from other sources at the Site, but he ultimately did not use this method to determine Teck's portion of liability.

B

The threshold issue on appeal is how to review divisibility evidence on summary judgment.

CERCLA liability is ordinarily joint and several, except in the rare cases where the environmental harm to a site is shown to be divisible. *United States v. Coeur d'Alenes Co.*, 767 F.3d 873, 875 (9th Cir. 2014); *see also* Martha L. Judy, *Coming Full CERCLA: Why Burlington Northern Is Not the Sword of Damocles for Joint and Several Liability*, 44 New Eng. L. Rev. 249, 283 (2010) (counting only four decisions finding divisibility out of 160 cases).

In *Burlington Northern*, the Supreme Court confirmed that " '[t]he universal starting point for divisibility of harm analyses in CERCLA cases' is § 433A of the Restatement (Second) of Torts." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009) (*Burlington Northern II*) (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)). Under the Restatement, "when two or more persons acting independently cause a distinct or 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." *Id.* (quoting *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 810 (S.D. Ohio 1983)) (alteration omitted). "But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." *Id.* (quoting *Chem-Dyne*, 572 F.Supp. at 810).

The divisibility analysis involves two steps. First, the court considers whether the environmental harm

is theoretically capable of apportionment. *See* Restatement (Second) of Torts § 434 cmt. *d*. This is primarily a question of law. *See United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 942 (9th Cir. 2008) (*Burlington Northern I*), *rev'd on other grounds*, 556 U.S. 599, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009); *United States v. NCR Corp.*, 688 F.3d 833, 838 (7th Cir. 2012); *Hercules*, 247 F.3d at 718; *Bell Petroleum*, 3 F.3d at 896. Underlying this question, however, are certain embedded factual questions that must necessarily be answered, such as "what type of pollution is at issue, who contributed to that pollution, how the pollutant presents itself in the environment after discharge, and similar questions." *NCR*, 688 F.3d at 838. Second, if the harm is theoretically capable of apportionment, the fact-finder determines whether the record provides a "reasonable basis" on which to apportion liability, which is purely a question of fact. Restatement (Second) of Torts §§ 433A(1)(b), 434 cmt. *d*; *see also Burlington Northern II*, 556 U.S. at 615, 129 S.Ct. 1870; NCR, 688 F.3d at 838; *Hercules*, 247 F.3d at 718; *Bell Petroleum*, 3 F.3d at 896.

At both steps, the defendant asserting the divisibility defense bears the burden of proof. *See* Restatement (Second) of Torts § 433B(2); *see also Burlington Northern II*, 556 U.S. at 614, 129 S.Ct. 1870; *NCR*, 688 F.3d at 838. This burden is "substantial" because the divisibility analysis is "intensely factual." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992) (*Alcan-Butler)*. The necessary showing requires a "fact-intensive, site-specific" assessment, *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*,

714 F.3d 161, 182 (4th Cir. 2013), generating "concrete and specific" evidence, *Hercules*, 247 F.3d at 718. But that is not to say that the defendant's proof must rise to the level of absolute certainty. *See Burlington Northern II*, 556 U.S. at 618, 129 S.Ct. 1870. Rather, the defendant must show by a preponderance of the evidence—including all logical inferences, assumptions, and approximations—that there is a reasonable basis on which to apportion the liability for a divisible harm. *See* Restatement (Second) of Torts § 433A cmt. *d*; *see also, e.g.*, *Hercules*, 247 F.3d at 719; *Bell Petroleum*, 3 F.3d at 904 n.19.

2

In the context of a motion for summary judgment, however, the burdens operate somewhat differently. Teck's answer pleaded divisibility as an affirmative defense for which Teck would bear the burden of proof at trial.[14] To defeat this affirmative defense on summary judgment, the Colville Tribes and the State of Washington took on both the initial burden of production and the ultimate burden of persuasion. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Their burden of production required them to show that Teck did not have sufficient evidence to prove its defense at trial. *See id.* If they carried this burden of production,

[14] The Tribes rightly note that "affirmative defense" is something of a misnomer because divisibility is only a partial defense to liability. But for the purposes of Federal Rule of Civil Procedure 8(c)(1), even a partial defense that introduces new matter into a case must be pleaded affirmatively. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1273 (3d ed. 2018).

then Teck had to produce enough evidence in support of its defense to create a genuine issue of material fact. *See id.* at 1103. The Tribes' and the State's burden of persuasion on their motions required them to persuade the court that despite Teck's evidence, there was no genuine issue of material fact for trial. *See id.* at 1102.

Here, the Tribes and the State pointed to an absence of evidence sufficient to support either step of Teck's divisibility defense. Teck then had to furnish all evidence necessary to show both that the harm is theoretically capable of apportionment and that there is a reasonable basis for apportioning liability. *See, e.g.*, *Chem-Dyne*, 572 F.Supp. at 811. Specifically, Teck had to submit "evidence of the appropriate dividend and divisor"—the overall harm, and Teck's apportioned share. Steve C. Gold, *Dis-Jointed? Several Approaches to Divisibility After Burlington Northern*, 11 Vt. J. Envtl. L. 307, 332 (2009). The Tribes and the State bore the burden of persuading the court that this evidence was inadequate.

3

Teck counters that the first question on the motions for summary judgment is whether the alleged harm could be divided "under any set of facts," which would mean Teck had no burden of production on the overall harm.

We disagree. Even on a Rule 12(b)(6) motion to dismiss—that is, *before* discovery—a non-moving party is held to more than an "any set of facts" standard. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). It is not the court's job to envision hypothetical

scenarios in which a mix of pollution from multiple sources could potentially be divisible. Rather than relying on judicial imagination, Teck was required to "make a showing sufficient to establish the existence of an element essential to" its divisibility defense: that the harm is theoretically capable of division. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

4

Teck then argues that, at most, its burden of production extended only to addressing the harm from the specific pollutants that Teck is alleged to have contributed to the Site. In the operative complaints, the Tribes and the State sought "the costs of remedial or removal actions, natural resource damage assessment costs, and natural resource damages that [plaintiffs] have incurred and will continue to incur at the Upper Columbia River and Lake Roosevelt where hazardous substances have come to be located." The district court read these pleadings as alleging a harm caused by "all of the hazardous substances released or threatened to be released from the Site, from whatever source." But in Teck's view, the harm pleaded is impliedly limited to the six hazardous substances alleged to have originated from the Trail smelter, so Teck contends that it can disregard all other types of pollution found with its wastes at the Site.

The environmental harm in this case is not so limited. Section 107(a) imposes strict liability on all PRPs, even if those persons are in fact not responsible for any pollution at all. *United States v. Atl. Research Corp.*, 551 U.S. 128, 136, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007). That is because "Congress has ... allocated the burden of disproving

causation to the defendant who profited from the generation and inexpensive disposal of hazardous waste." *Monsanto*, 858 F.2d at 170. It certainly is not always an easy task to determine the entire extent of contamination at a site. *See NCR*, 688 F.3d at 841. The Restatement makes clear, however, that "[a]s between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm should fall upon the former." Restatement (Second) of Torts § 433B cmt. *d*.

In line with CERCLA's pleading requirements, the complaints here identified six of Teck's pollutants just to establish the company's liability. The complaints cannot be fairly read as needlessly narrowing this suit to recovery for harm caused solely by those pollutants. As a result, Teck was required to produce evidence showing divisibility of the entire harm caused by Teck's wastes combined with all other River pollution—not just the harm from sources of Teck's six metals alone.[15]

C

With the standards of review thus established, we turn to evaluating the evidence submitted on summary judgment.

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[15] Teck does not contend, nor does the record reflect, that Teck's heavy metals formed an area of pollution that was distinct from areas with non-metal pollutants. And that would be an argument for apportioning liability based on distinct harms, not a single divisible harm. *See* Restatement (Second) of Torts § 433A(1).

1

The district court primarily granted summary judgment on the ground that Teck did not have enough evidence to show that the harm at issue is theoretically capable of apportionment. The court reasoned that Teck's evidence could not establish divisibility because it failed to account for the entire harm at the Site. Reviewing the parties' submissions *de novo*, we agree that there was no genuine dispute of fact for trial on the question whether the harm to the Upper Columbia River is theoretically capable of apportionment.

At the first step of the divisibility analysis, a court cannot say whether a harm "is, by nature, too unified for apportionment" without knowing certain details about the "nature" of the harm. *Burlington Northern I*, 520 F.3d at 942, *rev'd on other grounds*, 556 U.S. 599, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009); *see also Bell Petroleum*, 3 F.3d at 895 ("The nature of the harm is the key factor in determining whether apportionment is appropriate."). As one commentator has explained: "Even if a party's waste stream can be separately accounted for, its effect on the site and on other parties' wastes at the site must also be taken into account." William C. Tucker, *All Is Number: Mathematics, Divisibility and Apportionment Under Burlington Northern*, 22 Fordham Envtl. L. Rev. 311, 316 (2011). That is, "a defendant must take into account a number of factors relating not just to the contribution of a particular defendant *to* the harm, but also to the *effect* of that defendant's waste on the environment." *Id.* Those factors generally include when the pollution was discharged to a site, where the

pollutants are found, how the pollutants are presented in the environment, and what are the substances' chemical and physical properties. *See NCR*, 688 F.3d at 838. Chief among the relevant properties are "the relative toxicity, migratory potential, degree of migration, and synergistic capacities of the hazardous substances at the site." *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (*Alcan-PAS*).

Teck's divisibility expert identified hundreds of heavy metal sources that may have contributed to Upper Columbia River's pollution throughout its watershed over the course of more than a century. At Teck's direction, however, Dr. Johns expressly curtailed his divisibility analysis to the six hazardous substances allegedly "attributable to Teck." But Teck did not claim that these were the only pollutants found at the Site.

Both the Tribes and the State pointed out this deficiency in their motions for summary judgment. The Tribes cited evidence of the Site containing the hazardous substances antimony, beryllium, chromium, nickel, radon, selenium, thallium, 2,3,7,8-tetrachlorodibenzo-pdioxin, polycyclic aromatic hydrocarbons ("PAHs"), polychlorinated biphenyls ("PCBs"), and DDTs. And one of the State's experts submitted a declaration stating that EPA was evaluating the Site for around 199 contaminants of concern, including PAHs, PCBs, dioxins and furans, and pesticides. This declaration further showed that sediment samples found Teck's metals physically mixed with other hazardous substances in the northern stretches of the Site. Zinc, for example, "was detected with other metals like antimony,

arsenic, cadmium, copper, mercury, and lead, and also in several instances with up to 14 reported organic PAH chemicals present, as well as less frequently with pesticides like 2,4-DDT, 4,4 DDE, and 4,4-DDT."

Despite this evidence, Teck's opposition to the motions for summary judgment continued to rely on Dr. Johns's limited analysis. Teck reiterated its assumption that the Site's harm was solely traceable to the specific metals that Teck discharged. While conceding that its slag was "co-located" with "other slag and tailings," Teck made no mention of its pollutants being found alongside non-metal pollutants. And Teck relied on Dr. Johns's view that if Teck's slag "is not leaching," as he believed, then "the location of the slag in sediment is irrelevant to the apportionment analysis."

On these points Teck erred. At the outset, Teck repeatedly misapprehended the harm here. For the purpose of apportioning CERCLA liability, the relevant "harm" is the entirety of contamination at a site that has caused or foreseeably could cause a party to incur response costs, suffer natural resource damages, or sustain other types of damages cognizable under section 107(a)(4). *See, e.g.*, *Burlington Northern II*, 556 U.S. at 618, 129 S.Ct. 1870 (suggesting that the harm is "the overall site contamination requiring remediation" in a response cost action); *NCR*, 688 F.3d at 840-41 ("[T]he underlying harm caused [is] the creation of a hazardous, polluted condition ...."); *Burlington Northern I*, 520 F.3d at 939 (holding that each share of liability for the harm is "the contamination traceable to each defendant"), *rev'd on other grounds*,

556 U.S. 599, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009); *Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 259 (D.C. Cir. 2002) ("[T]he harm at issue was the release or threatened release of hazardous substances into groundwater ...." (internal quotation marks omitted)).

Dr. Johns instead based his apportionment methods on three inconsistent notions of the Site's harm: (1) "the extent of sediment contamination by hazardous substances released at the Site"; (2) "harm [to] the river," namely "the surface water"; and (3) "the placement of hazardous substances" at the Site. Dr. Johns's first and second measures of the harm are incomplete because they look only to the actual releases of hazardous substances from toxic wastes at the Site, ignoring the fact that wastes with a "*threatened* release of hazardous substances" are likewise contamination that could give rise to response costs. *Chem-Nuclear Sys.*, 292 F.3d at 259 (emphasis added); *see also* 42 U.S.C. § 9607(a)(4). Further, the second measure excludes contamination deeper than five centimeters, even though remedial activities like dredging would obviously need to excavate these materials too. Only Dr. Johns's third apportionment method—the approach that he sketched briefly in his deposition rather than outlining in his detailed report—correctly recognized that the presence of contaminants throughout the Site is the relevant harm.

More importantly, all of Dr. Johns's analysis overlooked the fact that "the mixing of the wastes raises an issue as to the divisibility of the harm." *Chem-Dyne*, 572 F.Supp. at 811. Mixing of pollutants "is not synonymous with indivisible

harm," *Alcan-PAS*, 990 F.2d at 722, but it does create a rebuttable presumption of such harm, *see id.*; *see also Monsanto*, 858 F.2d at 172; *Chem-Dyne*, 572 F.Supp. at 811. The State put this presumption at issue by submitting evidence of Teck's metals being found with unrelated pollutants, yet Teck chose not to address the potential for synergistic harm from these pollution hotspots.

Teck responds that the only relevant synergistic effects are from substances that are chemically commingled, not just physically interspersed. To that end, Dr. Johns opined that Teck's slag cannot chemically interact with other substances based on his understanding that the slag does not leach pollutants.

We are not persuaded. Even if pollutants do not chemically interact, their physical aggregation can cause disproportionate harm that is not linearly correlated with the amount of pollution attributable to each source. In *Monsanto*, a key case addressing chemical commingling, the Fourth Circuit explained: "Common sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences." 858 F.2d at 172. Also common sense, however, is the old adage that sometimes dilution is the solution to pollution. *See, e.g.*, Carol M. Browner, *Environmental Protection: Meeting the Challenges of the Twenty-First Century*, 25 Harv. Envtl. L. Rev. 329, 331 (2001). For example, "[i]f several defendants independently pollute a stream, the impurities traceable to each may be negligible and harmless, but all together may render the water

entirely unfit for use." W. Keeton et al., *Prosser and Keeton on Law of Torts* § 52, p. 354 (5th ed. 1984). The Second Circuit thus allowed a PRP to be apportioned no liability if "its pollutants did not contribute more than background contamination and also cannot concentrate," provided that there were no EPA thresholds below those ambient contaminant levels. *Alcan-PAS*, 990 F.2d at 722. And the Third Circuit has held that "the fact that a single generator's waste would not in itself justify a response is irrelevant ..., as this would permit a generator to escape liability where the amount of harm it engendered to the environment was minimal, though it was significant when added to other generators' waste." *Alcan-Butler*, 964 F.2d at 264.

Without knowing more about the accumulation of Teck's wastes with unrelated pollutants, with like materials, and by themselves, a court could not tell whether "their presence is harmful and the River must be cleaned." *NCR*, 688 F.3d at 840. That question is particularly important here because the most likely remedy for the Site will involve cleaning up some, but not all, of the contaminants in the 150-mile long stretch of river. *See* 40 C.F.R. § 300.430(f)(1)(ii)(D) (requiring EPA to select a cost-effective remedy). More intensive remediation will no doubt be prioritized where the level of contamination, and the accompanying danger, is the greatest.

In conclusion, once the State identified mixing of Teck's metals with non-metal pollutants, Teck was required to rebut the presumption that these pollution hotspots caused greater harm than the sum

of the individual pollutants, each of which may be so widely dispersed as to be harmless on its own. Teck did not carry its burden of showing that the harm is theoretically capable of apportionment by simply "considering the effects of its waste in isolation from the other contaminants at a site." *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 187 (2d Cir. 2003) (Alcan-Consolidated).

On a related issue concerning the significance of the buildup of slag, we again reject Teck's contentions. Contrary to Dr. Johns's mistaken assumption, the buildup of Teck's slag with other metal-bearing slag or tailings and even on its own affects the extent of the harm. Disproportionate harm can occur whether or not the slag actively leaches pollutants because, as mentioned, the mere *threat* of leaching can prompt a response action, and the accumulation of materials that pose a potential risk makes a response action more likely. *See* 42 U.S.C. § 9607(a)(4); *Chem-Nuclear Sys.*, 292 F.3d at 259. Teck responds that Dr. Johns's declaration at least creates a disputed issue of fact on this point that precludes summary judgment, but in light of the statutory scheme, no rational trier of fact could believe this unsupported assumption that the distribution of the slag is irrelevant. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). And because Teck's slag itself contains a mixture of pollutants, Teck also had to proffer evidence that the clustering of these pollutants did not create disproportionate environmental harm. No reasonable factfinder could otherwise assume, as Dr. Johns's apportionment methods require, that

rocks and sand from landslides and erosion, for example, are candidates for remediation on par with Teck's toxic slag. *See id.*

Finally, because the divisibility of the Upper Columbia River's contamination turns on the specific facts of that contamination, Teck is also mistaken in arguing that river pollution is categorically divisible under the Restatement. *See NCR*, 688 F.3d at 838. Besides, the Restatement provides dueling examples of river pollution, and the types of harm for which section 107(a) provides damages—and which the Tribes seek—are more akin to the illustration of an indivisible harm than a divisible harm. *Compare* Restatement (Second) of Torts § 433A cmt. *i*, illus. 15 (river pollution poisoning animals is indivisible), *with id.* cmt. *d*, illus. 5 (river pollution depriving a riparian owner of the use of water for industrial purposes is divisible). The Seventh Circuit reached the same conclusion in *NCR*, writing: "The problem here is not that downstream factories were prevented from using the [river] for some period, but that wholly apart from water usage, a toxic chemical in the water causes significant and widespread health problems in both animals and in humans." 688 F.3d at 842.

We hold that Teck did not make a sufficient showing to establish that liability for environmental harm to the Site is theoretically capable of apportionment. We fully agree with the district court that "because [Teck] has failed to account for all of the harm at the [Upper Columbia River] Site, it cannot prove that harm is divisible." And to borrow the apt words of *Alcan-Consolidated*, a case involving a defendant-appellant not carrying its burden of

production at trial rather than on a motion for summary judgment,

> appellant did not satisfy its substantial burden with respect to divisibility because it failed to address the totality of the impact of its waste at [the Site]; it ignored the likelihood that the cumulative impact of its waste [mixture] exceeded the impact of the [mixture's] constituents considered individually, and neglected to account for the [mixture's] ... physical interaction with other hazardous substances already at the site.

315 F.3d at 187. Although Teck must only produce evidence sufficient to create a genuine issue of material fact at the summary judgment stage, for the reasons stated above, it has not done so here.

2

As an additional ground for summary judgment, the Tribes and the State argued that Teck did not have enough evidence to show a reasonable basis for apportioning liability. The district court briefly considered this argument and again sided with the plaintiffs on the ground that Teck did not show that the chosen proxy—volume of hazardous substances deposited in the Upper Columbia River—was proportional to the environmental harm. We agree that the lack of a reasonable factual basis for apportioning Teck's liability provides yet another reason for upholding the district court's grant of summary judgment on Teck's divisibility defense.

A defendant asserting a divisibility defense must show that "there is a reasonable basis for determining the contribution of each cause to a

single harm." *Burlington Northern II*, 556 U.S. at 614, 129 S.Ct. 1870 (quoting Restatement (Second) of Torts § 433A(1)(b)). What is reasonable in one case may not be in another, so apportionment methods "vary tremendously depending on the facts and circumstances of each case." *Hercules*, 247 F.3d at 717. Still, the basis for apportionment may rely on the "simplest of considerations," most commonly volumetric, chronological, or geographic factors. *Burlington Northern II*, 556 U.S. at 617-18, 129 S.Ct. 1870 (quoting *Burlington Northern I*, 520 F.3d at 943). The only requirement is that the record must support a "reasonable assumption that the respective harm done is proportionate to" the factor chosen to approximate a party's responsibility. *Bell Petroleum*, 3 F.3d at 896, 903 (quoting Restatement (Second) of Torts § 433A cmt. *d*).

Here, no rational trier of fact could find that Teck has provided a reasonable basis for apportionment. All three of Dr. Johns's apportionment methods are variants of a volumetric approach in that they are premised on an estimate of the mass of pollutants at the Site. But as the Fourth Circuit has noted, "[v]olumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assumed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment." *Monsanto*, 858 F.2d at 172 n.27. Teck "presented no evidence, however, showing a relationship between waste volume ... and the harm at the site." *Id.* at 172. Instead, the available record undercuts the reasonableness of Teck's assuming a proportional relationship between

waste volume alone and the Site's contamination, for two main reasons.

First, as the Tribes point out, Teck's evidence shows that geographic factors clearly affected the river's contamination throughout this massive site. The Trail smelter's pollution entered the Upper Columbia River at the international border and, according to Dr. Johns, Teck's slag deposits extend only 45 river miles south. But Dr. Johns accounted for the potential contribution of metals from sources as far as 150 miles downriver, many of which were concentrated at more than ten different confluences between the River and its tributaries. Further, conditions varied greatly throughout the Site; the River is free flowing close to the Canadian border, causing less sediment to accumulate, but it eventually slows and forms Lake Roosevelt, preserving more sediment. As discussed above, these differences in pollution hotspots will doubtless entail varying remediation needs and injuries to the natural environment. *See Hercules*, 247 F.3d at 717. But even if the harm from those hotspots is capable of division, the fact that contamination strongly correlates with geography means that this is an independent factor that substantially affects the environmental harm at issue. Any proxy for the harm that did not account for geography thus could not be found reasonable.

Second, Teck's evidence also shows that the passage of time could have a substantial impact on the river's contamination given the long time period under consideration. Dr. Johns accounted for materials deposited into the Columbia River from the late 1800s through the present. He testified in

his deposition that over time, the accumulation of new sediment could bury old contaminants, and in his declaration he said that remediation is not needed if contaminants are buried beneath at least five centimeters of sediment. Further, Dr. Johns acknowledged that over time, slag may slowly release—and thus lose—hazardous substances to the surrounding environment. The upshot is that older wastes may present less of a need for cleanup than more recently disposed wastes. On this record, no reasonable fact-finder could assume that the time at which wastes entered the River is irrelevant to determining the extent of harmful contamination at the Site.

Other independent factors could also affect the environmental harm here, but were similarly ignored by Teck. To take a ready example, some pollutants in the Upper Columbia River may be more toxic than others, like lead compared to zinc. And pollutants may have different migratory potentials based on the media in which they are deposited, such as glassy slag, powdery tailings, or suspended particulates. *See Monsanto*, 858 F.2d at 173 n.26; *see also, e.g.*, *United States v. Manzo*, 279 F.Supp.2d 558, 572-73 (D.N.J. 2003) (rejecting a volumetric apportionment theory where the defendants did not account for relative toxicity and migratory potential).

Absent evidence of how these factors affected the contamination of the Site, any apportionment would have been arbitrary. The district court properly "refused to make an arbitrary apportionment for its own sake." *Burlington Northern II*, 556 U.S. at 614-15, 129 S.Ct. 1870 (quoting Restatement (Second) of Torts § 433A cmt. *i*). But Teck of course can always

bring a contribution action under section 113(f), 42 U.S.C. § 9613(f), against other pollution sources it identified, which "mitigates any inequity arising from the unavailability of apportionment." *PCS Nitrogen*, 714 F.3d at 182.

In holding that Teck did not carry its burden of production, we do not mean to suggest that Teck had to rush the ongoing RI/FS and exhaustively document every contaminant at the Site to save its divisibility defense from summary judgment. That was not required. What was required, however, was that Teck survey the Site, "comprehensively and persuasively address the effects of its waste," and come up with an apportionment method that a rational trier of fact could find reasonable. *Alcan-Consolidated*, 315 F.3d at 187. Teck did not do so here.

V

For the foregoing reasons, we affirm the district court's judgment holding Teck jointly and severally liable for the Colville Tribes' costs of response.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

No. 16-35742
D.C. No. 2:04-cv-00256-LRS
Eastern District of Washington, Spokane

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

Plaintiffs,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiff-Appellee,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant-Appellant.

ORDER

Before: GOULD and PAEZ, Circuit Judges, and MCSHANE,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Gould and Paez voted to deny the petition for rehearing en banc, and Judge McShane has so recommended.

The petition for en banc rehearing has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

Appellant's petition for panel rehearing and petition for rehearing en banc are denied.

* The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

No. 05-35153

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

Plaintiffs-Appellees,

v.

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Defendant-Appellant.

Argued and Submitted December 5, 2005
Filed July 3, 2006

Opinion

GOULD, Circuit Judge:

Joseph A. Pakootas and Donald R. Michel (collectively "Pakootas") filed suit to enforce a Unilateral Administrative Order (Order) issued by the United States Environmental Protection Agency (EPA) against Teck Cominco Metals, Ltd. (Teck), a

Canadian corporation. The Order requires Teck to conduct a remedial investigation/feasibility study (RI/FS) in a portion of the Columbia River entirely within the United States, where hazardous substances disposed of by Teck have come to be located. We decide today whether a citizen suit based on Teck's alleged non-compliance with the Order is a domestic or an extraterritorial application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. Further, we address Teck's argument that it is not liable for having "arranged for disposal" of hazardous substances because it disposed of the hazardous substances itself, rather than arranging for disposal "by any other party or entity." § 9607(a)(3). [1] We hold that because CERCLA liability is triggered by an actual or threatened release of hazardous substances, and because a release of hazardous substances took place within the United States, this suit involves a domestic application of CERCLA. Further, we reject Teck's contention that it is not liable under § 9607(a)(3) because it disposed of the hazardous substances itself.

I

We consider an interlocutory appeal of the denial of Teck's motion to dismiss.[2] In August of 1999, the

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[1] Unless otherwise indicated, statutory citations herein are to Title 42 of the United States Code.

[2] Because this appeal follows denial of a motion to dismiss, we take the facts as stated in the complaint as true and in the light most favorable to Pakootas. *See Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir.1996).

Colville Tribes petitioned the EPA under § 9605 to conduct an assessment of hazardous substance contamination in and along the Columbia River in northeastern Washington state. The EPA began the site assessment in October 1999, and found contamination that included "heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc." *In re Upper Columbia River Site*, Docket No. CERCLA-10-2004-0018, at 2 (Unilateral Administrative Order for Remedial Investigation/Feasibility Study Dec. 11, 2003), *available* at http://yosemite .epa.gov/R10/C LEANUP.NSF/UCR/ Enforcement [hereinafter UAO]. The "EPA also observed the presence of slag, a by-product of the smelting furnaces, containing glassy ferrous granules and other metals, at beaches and other depositional areas at the Assessment Area." *Id.* at 2-3. The EPA completed its site assessment in March of 2003, and concluded that the Upper Columbia River Site (the Site)[3] was eligible for listing on the National Priorities List (NPL).[4]

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[3] The "Upper Columbia River Site" includes "the areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination necessary for implementation of a response action." UAO at 2.

[4] The NPL "is a compilation of uncontrolled hazardous substances releases in the United States that are 'priorities' for long-term evaluation and response." 4 William H. Rodgers, Jr., *Environmental Law: Hazardous Wastes and Substances* § 8.7(C) (Supp.2005). "Inclusion of a site or facility on the list requires no action, assigns no liability, and does not pass judgment on the owner or operator.... [T]he key consequence of being listed is that only NPL sites qualify for [Superfund]-financed remedial action." *Id.*

Teck owns and operates a lead-zinc smelter ("Trail Smelter") in Trail, British Columbia.[5] Between 1906 and 1995, Teck generated and disposed of hazardous materials, in both liquid and solid form, into the Columbia River. These wastes, known as "slag," include the heavy metals arsenic, cadmium, copper, mercury, lead, and zinc, as well as other unspecified hazardous materials. Before mid-1995, the Trail Smelter discharged up to 145,000 tons of slag annually into the Columbia River. Although the discharge took place within Canada, the EPA concluded that Teck has arranged for the disposal of its hazardous substances from the Trail Smelter into the Upper Columbia River by directly discharging up to 145,000 tonnes of slag annually prior to mid-1995. Effluent, such as slag, was discharged into the Columbia River through several outfalls at the Trail Smelter.... The slag was carried downstream in the passing river current and settled in slower flowing quiescent areas.[6] *Id.* at 3. A significant amount of

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[5] This is not the first time the Trail Smelter has been in a dispute over transboundary environmental pollution. *See generally* Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. Envtl. L.J. 233, 241-53 (2006) (describing factual and procedural background of the Trail Smelter Arbitration, which concerned sulfur dioxide emissions from the Trail Smelter that migrated into the United States in the early twentieth century).

[6] The complaint alleges that the Trail Smelter discharged up to 145,000 tons of slag annually, but the EPA alleges that the Trail Smelter discharged up to 145,000 tonnes annually. A "ton" is equivalent to 2,000 pounds. A "tonne," or metric ton, is equivalent to 1,000 kilograms, or 2,205 pounds. Thus, 145,000 tonnes, each with 205 pounds more than an

slag has accumulated and adversely affects the surface water, ground water, sediments, and biological resources of the Upper Columbia River and Lake Roosevelt. Technical evidence shows that the Trail Smelter is the predominant source of contamination at the Site. The physical and chemical decay of slag is an ongoing process that releases arsenic, cadmium, copper, zinc, and lead into the environment, causing harm to human health and the environment.

After the EPA determined that the Site was eligible for listing on the NPL, it evaluated proposing the Site for placement on the NPL for the purpose of obtaining federal funding for evaluation and future cleanup. At that time Teck Cominco American, Inc. (TCAI) [7] approached the EPA and expressed a willingness to perform an independent, limited human health study if the EPA would delay proposing the Site for NPL listing. The EPA and TCAI entered into negotiations, which reached a stalemate when the parties could not agree on the scope and extent of the investigation that TCAI would perform. The EPA concluded that TCAI's proposed study would not provide the information necessary for the EPA to select an appropriate remedy for the contamination, and as a result the EPA issued the Order on December 11, 2003. The

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American "ton," is equivalent to about 160,000 tons. Either way, the Trail Smelter discharged a ton of slag in the colloquial sense, and the difference between the two figures is immaterial for our purposes. Because we take the facts as alleged by Pakootas, we use his figure of 145,000 tons.

[7] TCAI is a wholly-owned American subsidiary of Teck.

Order directed Teck to conduct a RI/FS[8] under CERCLA for the Site. To date Teck has not complied with the Order, and the EPA has not sought to enforce the Order.

Pakootas filed this action in federal district court under the citizen suit provision of CERCLA. § 9659(a)(1). Pakootas sought a declaration that Teck has violated the Order, injunctive relief enforcing the Order against Teck, as well as penalties for non-compliance and recovery of costs and fees. Teck moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for failure to state a cause of action under CERCLA and lack of subject matter jurisdiction, on the ground that the district court could not enforce the Order because it was based on activities carried out by Teck in Canada. Teck also moved to dismiss for lack of personal jurisdiction over Teck, a Canadian corporation with no presence in the United States. After Teck filed its motion to dismiss, the State of Washington moved to intervene as of right as a plaintiff in the action. The district court granted the motion to intervene, and considered Teck's pending motion to dismiss to apply

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[8] "The purpose of the remedial investigation/feasibility study (RI/FS) is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy. Developing and conducting an RI/FS generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives. The scope and timing of these activities should be tailored to the nature and complexity of the problem and the response alternatives being considered." 40 C.F.R. § 300.430(a)(2).

to both Pakootas's complaint and the State of Washington's complaint-in-intervention.

The district court denied Teck's motion to dismiss. It held that because the case arises under CERCLA "there is a federal question which confers subject matter jurisdiction on this court." Because there was a federal question, and because Pakootas's claims were not insubstantial or frivolous, the district court held that dismissal under Federal Rule of Civil Procedure 12(b)(1) was inappropriate. The district court also held that "[t]he facts alleged in plaintiffs' complaints establish this court's specific, limited personal jurisdiction over the defendant."

Much of district court's order was devoted to analyzing Teck's argument that the suit involved an impermissible extraterritorial application of CERCLA, and thus whether dismissal for failure to state a claim under CERCLA was appropriate. The district court first acknowledged that "there is some question whether this case really involves an extraterritorial application of CERCLA." However, the district court assumed that the case involved an extraterritorial application of CERCLA, and considered whether extraterritorial application was permissible here.

In addressing the question of extraterritorial application, the district court acknowledged that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States," but that it is "a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " (quoting *EEOC v. Arabian Am. Oil Co.*

("*Aramco* "), 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)). However, the district court concluded that the presumption against extraterritoriality was overcome here, because

> there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy 'domestic conditions' within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption [against extraterritoriality] is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States, leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.

Further, the district court held that Teck was a "person" under the meaning of § 9601(21), and held that Teck's liability as a "generator" of hazardous waste and/or as an "arranger" of the disposal of hazardous waste could not be ruled out under § 9607(a)(3).[9]

The district court *sua sponte* certified its order for immediate appeal to us pursuant to 28 U.S.C.

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[9] CERCLA defines an arranger as:

> 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.

§ 9607(a)(3).

§ 1292(b). Thereafter, Teck petitioned for permission to appeal, which we granted. While Teck's petition for permission to appeal was pending before us, the district court granted Teck's motion to stay further proceedings in the district court pending the outcome of this interlocutory appeal.[10]

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[10] After this appeal was submitted for decision, Teck filed a request for us to take judicial notice of a settlement agreement between Teck and EPA, in which the EPA agreed to withdraw the Order that is the subject of this appeal. Neither Pakootas nor the State of Washington, who are the plaintiff and plaintiff-intervenor in this litigation, was a party to the settlement agreement. We take notice that the settlement between Teck and the EPA was reached, but we do not take notice of supplemental arguments urged by Teck relating to the agreement.

The parties are agreed that the settlement between Teck and the EPA does not render this action moot. Teck argues that this settlement renders moot Pakootas's claims for injunctive relief to enforce the Order and for declaratory relief that Teck is in violation of the Order, but that Pakootas's claims for civil penalties "for each day" that Teck violated the Order and for attorneys' fees, are not moot. Pakootas disputes that the settlement is self-executing and that it necessarily renders moot the claims for injunctive and declaratory relief. For purposes of this appeal, it is sufficient for us to note that Pakootas's claims for civil penalties and for attorneys' fees are not moot, and that we must proceed to decision of the appeal. On remand, we leave for the district court to decide in the first instance whether the claims for injunctive and declaratory relief are moot.

We further deny Teck's request for us to take judicial notice on this appeal of the following documents: (1) Order Granting Motions to Lift Stay, issued by the district court on October 25, 2005; (2) Plaintiffs' Amended Complaint, filed November 7, 2005; and (3) State of Washington's First

On this appeal, Teck does not challenge the district court's determination that it had personal jurisdiction over Teck. And although Teck "disputes the conclusion" that the district court had subject matter jurisdiction to hear the case, it does not argue in its briefing that the district court was without subject matter jurisdiction. Rather, Teck argues that the district court should have dismissed Pakootas's complaint under Federal Rule of Civil Procedure 12(b)(6) for two reasons. First, Teck argues that to apply CERCLA to Teck's activities in Canada would be an impermissible extraterritorial application of United States law. Second, Teck argues that it is not liable as a person who "arranged for disposal" of hazardous substances under § 9607(a)(3).

II

We review de novo a district court's decision on a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Decker v. Advantage Fund Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004). We review questions of law de novo. *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir.1997).

III

We begin by considering how this litigation fits within the CERCLA statutory framework. CERCLA sets forth a comprehensive scheme for the cleanup of hazardous waste sites, and imposes liability for cleanup costs on the parties responsible for the release or potential release of hazardous substances

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Amended Complaint in Intervention, filed November 4, 2005.

into the environment. *See Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir.1997); *see also Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir.1990) (stating that "two ... main purposes of CERCLA" are "prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party") (cited with approval in *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996)).

To ensure the prompt cleanup of hazardous waste sites, CERCLA gives four options to the EPA:[11] (1) the EPA can investigate and remediate hazardous waste sites itself under § 9604, and later seek to recover response costs from the potentially responsible parties (PRPs) under § 9607; (2) the EPA can initiate settlement negotiations with PRPs under § 9622; (3) the EPA can file suit in federal district court to compel the PRPs to abate the threat if there is an "imminent and substantial" threat to public health or welfare under § 9606(a); or (4) the EPA can issue orders directing the PRPs to clean up the site under § 9606(a). In this case, the EPA chose the fourth approach, and issued the Order to Teck under § 9606(a).

If a party receives an order and refuses to comply, enforcement options are available. *See generally Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 387 (8th Cir.1987). First, the EPA may bring an action in federal district court to compel compliance, using

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[11] CERCLA vests this authority in the President, who in turn has delegated most of his functions and responsibilities to the EPA. *See* 40 C.F.R. § 300.100.

the contempt powers of the district court as a potential sanction for non-compliance. § 9606(a). Second, the EPA may bring an action in federal district court seeking to impose fines of up to $25,000 for each day that the party fails to comply with the order. § 9606(b)(1). Third, the EPA may initiate cleanup of the facility itself under § 9604, and the party responsible for the pollution is potentially liable for the response and cleanup costs, plus treble damages. § 9607(c)(3).

Here, the EPA has not sought to enforce the Order through any of the mechanisms described above.[12] Rather, Pakootas initiated this suit in federal district court under § 9659, the citizen suit provision of CERCLA. Section 9659(a)(1) provides a cause of action for any person to commence a civil action "against any person ... who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter." Section 9659(c) gives the district court the power "to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation." Further, § 9613(h)(2), the "timing of review" provision of CERCLA, grants federal courts jurisdiction to review an order issued under § 9606(a) when a party seeks to enforce the order.

Having placed this litigation in context, we turn to the merits.

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[12] So far as we can tell from the record, the EPA did not take any formal action against Teck between issuing the Order on December 11, 2003 and settling with Teck on June 2, 2006.

IV

Teck's primary argument is that, in absence of a clear statement by Congress that it intended CERCLA to apply extraterritorially, the presumption against extraterritorial application of United States law precludes CERCLA from applying to Teck in Canada. We need to address whether the presumption against extraterritoriality applies only if this case involves an extraterritorial application of CERCLA. So a threshold question is whether this case involves a domestic or extraterritorial application of CERCLA.

Unlike other environmental laws such as the Clean Air Act, 42 U.S.C. §§ 7401-7671q, Clean Water Act, 33 U.S.C. §§ 1251-1387, and Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, CERCLA is not a regulatory statute. Rather, CERCLA imposes liability for the cleanup of sites where there is a release or threatened release of hazardous substances into the environment. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9th Cir. 2001) (en banc) ("CERCLA holds a PRP liable for a disposal that 'releases or threatens to release' hazardous substances into the environment."). CERCLA liability attaches when three conditions are satisfied: (1) the site at which there is an actual or threatened release of hazardous substances is a "facility" under § 9601(9); (2) a "release" or "threatened release" of a hazardous substance from the facility has occurred, § 9607(a)(4); and (3) the party is within one of the

four classes of persons subject to liability under § 9607(a).[13]

CERCLA defines the term "facility" as, in relevant part, "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or

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[13] There is a question whether the elements of CERCLA liability outlined in § 9607(a) are the same elements that the EPA must allege when issuing an order under § 9606(a). That is, § 9606(a) authorizes the EPA to issue "such orders as may be necessary to protect public health and welfare and the environment," but does not specify exactly what the EPA must allege before issuing such orders. Section 9606(b)(1) states that the EPA can seek fines for non-compliance in federal district court unless the person who refuses to comply with the order has "sufficient cause."

The Eighth Circuit, the only federal court of appeals to address the issue, has held that "sufficient cause" includes a defense that "the applicable provisions of CERCLA, EPA regulations and policy statements, and any formal or informal hearings or guidance the EPA may provide, give rise to an objectively reasonable belief in the invalidity or inapplicability of the clean-up order." *Solid State Circuits*, 812 F.2d at 392. We need not here decide whether a party that is not liable under § 9607(a) necessarily has "sufficient cause" to refuse to comply with an order issued under § 9606(a) because, as we hold below, Teck is potentially liable under § 9607(a).

However, one element of § 9607(a) liability does not apply here. In private cost recovery actions under § 9607(a), the claimant must incur response costs that are both "necessary" and "consistent with the national contingency plan." § 9607(a)(4). *See Carson Harbor Vill.*, 270 F.3d at 871-72. Because Pakootas filed a citizen suit under § 9659 rather than a private cost recovery action under § 9607(a), the requirement that a private party incur response costs before filing suit does not apply here.

otherwise come to be located." § 9601(9). The Order defines the "facility" in this case as the Site, which is described as the "extent of contamination *in the United States* associated with the Upper Columbia River." UAO at 2 (emphasis added); *see also* UAO at 5 ("The Upper Columbia River Site is a 'facility' as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).").[14] The slag has "come to be located" at the Site, and the Site is thus a facility under § 9601(a). *See 3550 Stevens Creek Assocs. v. Barclays Bank of California*, 915 F.2d 1355, 1360 n. 10 (9th Cir.1990) ("[T]he term facility has been broadly construed by the courts, such that in order to show that an area is a facility, the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there." (internal quotation marks omitted)). The Order defines the facility as being entirely within the United States, and Teck does not argue that the Site is not a CERCLA facility. Because the CERCLA facility is within the United States, this case does not involve an extraterritorial application of CERCLA to a facility abroad. The theory of Pakootas's complaint, seeking to enforce the terms of the Order to a "facility" within the United States, does not invoke extraterritorial application of United States law precisely because this case involves a domestic facility.

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[14] Because the EPA and Pakootas in seeking enforcement of the EPA's order do not characterize either the Trail Smelter or the Columbia River in Canada as a facility, we need not and do not reach whether these sites are facilities for purposes of CERCLA.

The second element of liability under CERCLA is that there must be a "release" or "threatened release" of a hazardous substance from the facility into the environment. *See* § 9607(a)(4). To determine if there is an actual or threatened release here, we consider the statutory definition of release. CERCLA defines a "release," with certain exceptions not relevant here, as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." § 9601(22).

Here, several events could potentially be characterized as releases. First, there is the discharge of waste from the Trail Smelter into the Columbia River in Canada. Second, there is the discharge or escape of the slag from Canada when the Columbia River enters the United States. And third, there is the leaching of heavy metals and other hazardous substances from the slag into the environment at the Site. Although each of these events can be characterized as a release, CERCLA liability does not attach unless the "release" is from a CERCLA facility.

Here, as noted, the Order describes the facility as the Site; not the Trail Smelter in Canada or the Columbia River in Canada. Pakootas has alleged that the leaching of hazardous substances from the slag that is in the Site is a CERCLA release, and Teck has not argued that the slag's interaction with the water and sediment of the Upper Columbia River is not a release within the intendment of CERCLA. Our precedents establish that the passive migration of hazardous substances into the environment from where hazardous substances have come to be located

is a release under CERCLA. *See A & W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1111 (9th Cir.1998) (holding that wind blowing particles of hazardous substances from a pile of waste was a CERCLA release); *United States v. Chapman*, 146 F.3d 1166, 1170 (9th Cir.1998) (affirming summary judgment where the Government presented evidence that corroding drums were leaking hazardous substances into the soil); *see also Coeur D'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1113 (D.Idaho 2003) ("Th[e] passive movement and migration of hazardous substances by mother nature (no human action assisting in the movement) is still a 'release' for purposes of CERCLA in this case."). We hold that the leaching of hazardous substances from the slag at the Site is a CERCLA release. That release—a release into the United States from a facility in the United States—is entirely domestic.

The third element of liability under CERCLA is that the party must be a "covered person" under § 9607(a). Teck argues that it is not a covered person under § 9607(a)(3) because it has not "arranged for disposal" of a hazardous substance "by any other party or entity" as required by § 9607(a)(3), because Teck disposed of the slag itself, and without the aid of another. Alternatively, Teck argues that if it is an arranger under § 9607(a)(3), then basing CERCLA liability on Teck arranging for disposal of slag in Canada is an impermissible extraterritorial application of CERCLA.

Assuming that Teck is an arranger under § 9607(a)(3),[15] we consider whether the fact that the act of arranging in Canada for disposal of the slag makes this an extraterritorial application of CERCLA. Teck argues that because it arranged in Canada for disposal, that is, the act of arranging took place in Canada even though the hazardous substances came to be located in the United States, it cannot be held liable under CERCLA without applying CERCLA extraterritorially.

The text of § 9607(a)(3) applies to "any person" who arranged for the disposal of hazardous substances. The term "person" includes, *inter alia*, "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity." § 9601(21). On its face, this definition includes corporations such as Teck, although the definition does not indicate whether foreign corporations are covered. Teck argues that because the Supreme Court recently held that the term "any court" as used in 18 U.S.C. § 922(g)(1) does not include foreign courts, we should interpret the term "any person" so as not to include foreign corporations. *See Small v. United States*, 544 U.S. 385, 390-91, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005).

The decision in *Small* was based in part on *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 4 L.Ed. 471 (1818), in which Chief Justice Marshall held for the Court that the words "any person or persons," as

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[15] We address in the next section Teck's contention that it is not a person for § 9607(a) purposes because it has not "arranged for disposal" of hazardous substances "by any other party or entity."

used in a statute prohibiting piracy on the high seas, "must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *Id.* at 631. The Court held that "any person or persons" did not include crimes "committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state." *Id.* at 633-34. However, the Court held that even though the statute did not specifically enumerate foreign parties as "persons," the statute did apply to punish piracy committed by foreign parties against vessels belonging to subjects of the United States. *See id.*

Palmer relied upon two benchmarks for determining whether terms such as "any person" apply to foreign persons: (1) the state must have jurisdiction over the party, and (2) the legislature must intend for the term to apply. *See id.* at 631. Regarding jurisdiction, Teck argued in the district court that there was no personal jurisdiction over it. The district court held that there was personal jurisdiction, and Teck has not appealed that determination. Because a party can waive personal jurisdiction, we are not required to consider it *sua sponte*. *See Smith v. Idaho*, 392 F.3d 350, 355 n. 3 (9th Cir. 2004) (citing the "longstanding rule that personal jurisdiction, in the traditional sense, can be waived and need not be addressed *sua sponte*"). Nevertheless, we agree with the district court that there is specific personal jurisdiction over Teck

here.[16] Because there is specific personal jurisdiction over Teck here based on its allegedly tortious act aimed at the state of Washington, the first *Palmer* benchmark is satisfied, and we can appropriately construe the term "any person" to apply to Teck.

The second *Palmer* benchmark is that the legislature must intend for the statute to apply to the situation. Except for the statutory definition of "any person," CERCLA is silent about *who* is covered by the Act. But CERCLA is clear about what is covered by the Act. CERCLA liability attaches upon release or threatened release of a hazardous substance into

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[16] We do not decide whether there is general personal jurisdiction over Teck. Rather, we adopt the district court's conclusion that there is specific personal jurisdiction over Teck here, based on Washington State's long-arm statute, which applies to "the commission of a tortious act" within Washington, Wash. Rev.Code § 4.28.185, and our case law holding that "personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state." *See Core-Vent Corp. v. Nobel Inds. AB*, 11 F.3d 1482, 1486 (9th Cir.1993).

AT & T v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9th Cir.1996), is not to the contrary. There, AT & T claimed that Compagnie Bruxelles Lambert was liable under CERCLA because its subsidiary operated a site from which hazardous substances were released. *Id.* at 590-91. We held that there was no specific jurisdiction over the parent company because (1) the parent company had insufficient independent contacts with the United States to establish personal jurisdiction, and (2) the subsidiary was not acting as the parent company's alter ego. *Id.* Here, Teck has sufficient *independent* personal contacts with the forum state to justify specific personal jurisdiction.

the environment. CERCLA defines "environment" to include "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air *within the United States or under the jurisdiction of the United States*." § 9601(8) (emphasis added). CERCLA's purpose is to promote the cleanup of hazardous waste sites where there is a release or threatened release of hazardous substances into the environment within the United States. *See ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1096-98 (9th Cir. 2005) (citing legislative history demonstrating that Congress intended CERCLA to apply to cleanup hazardous waste sites in the United States). Because the legislature intended to hold parties responsible for hazardous waste sites that release or threaten release of hazardous substances into the United States environment, the second *Palmer* benchmark is satisfied here.

Although the *Palmer* analysis supports the proposition that CERCLA applies to Teck, *Palmer* of course does not address the distinction between domestic or extraterritorial application of CERCLA. The *Palmer* analysis, however, in what we have termed its second benchmark, brings to mind the "domestic effects" exception to the presumption against extraterritorial application of United States law. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 287-88, 73 S.Ct. 252, 97 L.Ed. 319 (1952) (finding jurisdiction in a trademark suit against a person in Mexico who manufactured counterfeit Bulova watches that then entered and caused harm within the United States). The difference between a domestic application of United States law and a

presumptively impermissible extraterritorial application of United States law becomes apparent when we consider the conduct that the law prohibits. In *Steele* the prohibited conduct, the unauthorized use and reproduction of Bulova's registered trademark, took place in Mexico but the harm, the dilution of Bulova's trademark, took place in the United States. *Id.* at 287, 73 S.Ct. 252. The Court therefore held that there was jurisdiction in that case.

Here, the operative event creating a liability under CERCLA is the release or threatened release of a hazardous substance. *See* § 9607(a)(4). Arranging for disposal of such substances, in and of itself, does not trigger CERCLA liability, nor does actual disposal of hazardous substances.[17] A release must occur or be threatened before CERCLA is triggered. A party that "arranged for disposal" of a hazardous

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[17] The terms "disposal" and "release" are each defined in CERCLA. "Disposal" is defined by reference to RCRA § 6903(3), which defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." CERCLA defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment ...." § 9601(22). "[F]rom these definitions, we can conclude that 'release' is broader than 'disposal,' because the definition of 'release' includes 'disposing' (also, it includes 'passive' terms such as 'leaching' and 'escaping,' which are not included in the definition of 'disposal')." *Carson Harbor Vill.*, 270 F.3d at 878.

substance under § 9607(a)(3) does not become liable under CERCLA until there is an actual or threatened release of that substance into the environment. Arranging for disposal of hazardous substances, in itself, is neither regulated under nor prohibited by CERCLA. Further, disposal activities that were legal when conducted can nevertheless give rise to liability under § 9607(a)(3) if there is an actual or threatened release of such hazardous substances into the environment. *See Cadillac Fairview/California, Inc. v. United States (Cadillac Fairview/California I)*, 41 F.3d 562, 565-66 (9th Cir.1994) (holding that a party that sold a product to another party "arranged for disposal" of a hazardous substance); *Cadillac Fairview/California, Inc. v. Dow Chem. Co. (Cadillac Fairview/California II)*, 299 F.3d 1019, 1029 (9th Cir. 2002) (characterizing the conduct at issue in *Cadillac Fairview/California I* as "legal at the time").

The 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, because CERCLA imposes liability for releases or threatened releases of hazardous substances, and not merely for disposal or arranging for disposal of such substances.[18] Because

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[18] CERCLA is a strict liability statute, and liability can attach even when the generator has no idea how its waste came to be located at the facility from which there was a release. *See O'Neil v. Picillo*, 883 F.2d 176, 183 & n. 9 (1st Cir.1989). The three statutory defenses enumerated in § 9607(b), including defenses for "an act of God," "an act of war," or "an act or omission of a third party other than an employee or agent of the defendant," are "the only [defenses]

the actual or threatened release of hazardous substances triggers CERCLA liability, and because the actual or threatened release here, the leaching of hazardous substances from slag that settled at the Site, took place in the United States, this case involves a domestic application of CERCLA.

Our conclusion is reinforced by considering CERCLA's place within the constellation of our country's environmental laws, and contrasting it with RCRA:

> Unlike [CERCLA], RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. RCRA's primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, "so as to minimize the present and future threat to human health and the environment."

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available, and ... the traditional equitable defenses are not." *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 672 (9th Cir. 2004). There is no requirement that the generator of hazardous substances intend that the waste come to be located at a CERCLA facility. "In the case of an actual release, the plaintiff need only prove that the defendant's hazardous materials were deposited at the site, that there was a release at the site, and that the release caused it to incur response costs." *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1186 (C.D.Cal.2003) *aff'd sub nom. Carson Harbor Vill., Ltd. v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006).

Meghrig, 516 U.S. at 483, 116 S.Ct. 1251 (quoting § 9602(b)) (internal citation omitted). RCRA regulates the generation and disposal of hazardous waste, whereas CERCLA imposes liability to clean up a site when there are actual or threatened releases of hazardous substances into the environment. It is RCRA, not CERCLA, that governs prospectively how generators of hazardous substances should dispose of those substances, and it is the Canadian equivalent of RCRA, not CERCLA, that regulates how Teck disposes of its waste within Canada.

Here, the district court assumed, but did not decide, that this suit involved extraterritorial application of CERCLA because "[t]o find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the 'releases' of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into the Columbia River at the Trail Smelter." However, what the district court dismissed as a "legal fiction" is the foundation of the distinction between RCRA and CERCLA. If the Trail Smelter were in the United States, the discharge of slag from the smelter into the Columbia River would potentially be regulated by RCRA and the Clean Water Act. And that prospective regulation, if any, would be legally distinct from a finding of CERCLA liability for cleanup of actual or threatened releases of the hazardous substances into the environment from the disposal site, here the Upper Columbia River Site. That the Trail Smelter is located in Canada does not change this analysis, as the district court recognized.

CERCLA is only concerned with imposing liability for cleanup of hazardous waste disposal sites where there has been an actual or threatened release of hazardous substances into the environment. CERCLA does not obligate parties (either foreign or domestic) liable for cleanup costs to cease the disposal activities such as those that made them liable for cleanup costs; regulating disposal activities is in the domain of RCRA or other regulatory statutes.

We hold that applying CERCLA here to the release of hazardous substances at the Site is a domestic, rather than an extraterritorial application of CERCLA, even though the original source of the hazardous substances is located in a foreign country.

V

We next address Teck's only other argument—that it is not covered by § 9607(a)(3) because it has not "arranged for disposal ... of hazardous substances ... by any other party or entity" because, if the facts in the complaint are taken as true, Teck disposed of the slag itself. Preliminarily, we note that neither Pakootas, nor the Order, specifically allege that Teck is an arranger under § 9607(a)(3). Rather, the Order states that Teck is a "responsible party under Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607, and 9622." UAO at 6. The parties have, however, focused in their arguments solely on § 9607(a)(3).[19]

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[19] The parties have not briefed or argued whether Teck may be liable under § 9607(a)(1), (2), or (4). We accordingly express no opinion on whether Teck may be liable under these subsections.

Section 9607(a)(3) holds liable parties that arranged for the disposal of hazardous substances. It states, in relevant part, the following:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for the 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 substances ... shall be liable for ...

certain costs of cleanup. § 9607(a)(3). We have previously said that "neither a logician nor a grammarian will find comfort in the world of CERCLA," *Carson Harbor Vill.*, 270 F.3d at 883, a statement that applies with force to § 9607(a)(3). Section 9607(a)(3) does not make literal or grammatical sense as written. It is by no means clear to what the phrase "by any other party or entity" refers. Pakootas argues that it refers to a party who owns the waste; and Teck argues that it refers to a party who arranges for disposal with the owner. To make sense of the sentence we might read the word "or" into the section, which supports Pakootas's position, or we might delete two commas, which supports Teck's position. Neither construction is entirely felicitous.

Section 9607(a)(3)'s phrase "by any other party or entity" can be read to refer to "hazardous substances owned or possessed by such person," such that parties can be liable if they arranged for disposal of their own waste or if they arranged for disposal of

wastes owned "by any other party or entity." This would mean that a party need not own the waste to be liable as an arranger. But it would require reading the word "or" into the provision, so that the relevant language would 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**...." We followed this approach in *Cadillac Fairview/California* I, where we said with forcible reasoning:

> Liability is not limited to those who own the hazardous substances, who actually dispose of or treat such substances, or who control the disposal or treatment process. The language explicitly extends liability to persons "otherwise arrang[ing]" for disposal or treatment of hazardous substances whether owned by the arranger or "by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity."

41 F.3d at 565 (quoting § 9607(a)(3)) (alteration in original); *see also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 659 (6th Cir. 2000) (holding that defendant was potentially liable as an arranger when it discharged hazardous substances into a river).

The text of § 9607(a)(3) can also be modified to support a different meaning, the one that Teck advances on this appeal. Teck argues that the phrase "by any other party or entity" refers to "or otherwise arranged for disposal or treatment," and so, the argument runs, arranger liability does not attach unless one party arranged with another party to dispose of hazardous substances. If we accept this

position, then a generator of hazardous substances who disposes of the waste alone and with no other participant may defeat CERCLA liability, because the generator had not "arranged" with a second party for disposal of the waste. But this interpretation would appear to require the removal of the two commas that offset the phrase "by any other party or entity," so that the relevant language would read "any person who ... **arranged for disposal** or treatment ... of hazardous substances owned or possessed by such person[ ] **by any other party or entity**[ ]." In *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir.1992) we perhaps implicitly, albeit summarily, suggested that this reading might be appropriate, stating: "Nor has [Plaintiff] alleged that [Defendant] Ferry arranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3). Ferry disposed of the soil itself by spreading it over the uncontaminated areas of the property." *Id.* at 1341; *see also Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 24 (1st Cir. 2004) ("The clause 'by any other party or entity' clarifies that, for arranger liability to attach, the disposal or treatment must be performed by another party or entity, as was the case here."). Thus it can be argued that an implication from *Kaiser Aluminum* supports Teck's view.

Teck's argument relying on implication from *Kaiser Aluminum* would create a gap in the CERCLA liability regime by allowing a generator of hazardous substances potentially to avoid liability by disposing of wastes without involving a transporter as an intermediary. If the generator disposed of the waste

on the property of another, one could argue that the generator would not be liable under § 9607(a)(1) or (a)(2) because both subsections apply to the owner of a facility; as we described above the relevant facility is the site at which hazardous substances are released into the environment, not necessarily where the waste generation and dumping took place. Liability as a transporter under § 9607(a)(4) might not attach because transporter liability applies to "any person who accepts or accepted any hazardous substance for transport." Although we do not here decide the contours of transporter liability, one could argue that a generator who owns hazardous substances cannot "accept" such hazardous substances for transport because they are already held by the generator. We hesitate to endorse a statutory interpretation that would leave a gaping and illogical hole in the statute's coverage, permitting argument that generators of hazardous waste might freely dispose of it themselves and stay outside the statute's cleanup liability provisions. We think that was not what was intended by Congress's chosen language and statutory scheme.

The ambiguous phrase "by any other party or entity" cannot sensibly be read to refer both to the language urged by Pakootas and to that urged by Teck in their differing theories of statutory interpretation. In interpreting the turbid phrase and punctuation on which the parties have vigorously pressed contradictory theories, we necessarily navigate a quagmire. Yet, in the face of statutory ambiguity, § 9607(a)(3) "must be given 'a liberal judicial interpretation ... consistent with CERCLA's overwhelmingly remedial statutory scheme.' "

Cadillac Fairview/California I, 41 F.3d at 565 n. 4 (quoting *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir.1989) (alteration in original)).

Pakootas and the State of Washington suggest that we can resolve the inconsistent and mutually-exclusive language in *Cadillac Fairview/California I* and *Kaiser Aluminum* by dismissing as ambiguous or as dicta the statement in Kaiser Aluminum that "[n]or has [Plaintiff] alleged that Ferry arranged for the contaminated soil to be disposed of 'by any other party or entity' under 9607(a)(3)." 976 F.2d at 1341. The argument is that it is unclear whether we meant in *Kaiser Aluminum* that we did not need to reach the question because Plaintiff had not alleged that Ferry was an arranger, or instead that Plaintiff had alleged that Ferry was an arranger but that we rejected that interpretation.

We conclude that Pakootas and the State of Washington are correct. The two sentences from *Kaiser Aluminum* quoted above are the only two sentences in that opinion to discuss arranger liability. The opinion contains no analysis of the text of § 9607(a)(3), and does not discuss arguments for or against interpreting § 9607(a)(3) to require the involvement of another party or entity for arranger liability to attach. The ambiguous discussion of § 9607(a)(3) liability was not in our view a holding, but rather a prelude to discussing why the defendant in *Kaiser Aluminum* was potentially liable as an owner of a facility under § 9607(a)(2) or as a transporter under § 9607(a)(4). And perhaps most importantly, the statement in question may be

simply a description of what was not alleged by a party, rather than our court's choice of a rule of law.

Further, the statement in *Kaiser Aluminum* bears the hallmarks of dicta. *See United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) ("Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case.").[20]

Because we view the statement in *Kaiser Aluminum* as offhand, unreasoned, and ambiguous, rather than as an intended choice of a rule, we consider the Ninth Circuit's law to be represented by *Cadillac Fairview/California I*. And under *Cadillac Fairview/California I*, the phrase "by any other party or entity" refers to ownership of the waste, such that one may be liable under § 9607(a)(3) if they arrange for disposal of their own waste or someone else's waste, and that the arranger element can be

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[20] Moreover, a characterization of the statement in *Kaiser Aluminum* as a dictum, or as merely reflecting the absence of an allegation by the plaintiff, is consistent with our preexisting circuit authority, not addressed in *Kaiser Aluminum*, which had suggested that a generator could be liable under § 9607(a)(3) even if a second party was not involved. *See Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1156 (9th Cir.1989) (reversing the district court's dismissal of Ascon's complaint for failure to state a claim because Ascon alleged that "the eleven oil company defendants and four transporter defendants deposited hazardous waste onto the property").

met when disposal is not arranged "by any other party or entity." We hold instead that Teck is potentially liable under § 9607(a)(3), and we reject Teck's argument that it is not liable under § 9607(a)(3) because it did not arrange for disposal of its slag with "any other party or entity."

VI

In conclusion, we hold that the district court correctly denied Teck's motion to dismiss Pakootas's complaint for failure to state a claim, and reject Teck's arguments to the contrary. Applying CERCLA to the Site, as defined by the Order issued by the EPA, is a domestic application of CERCLA. The argument that this case presents an extraterritorial application of CERCLA fails because CERCLA liability does not attach until there is an actual or threatened release of hazardous substances into the environment; the suit concerns actual or threatened releases of heavy metals and other hazardous substances into the Upper Columbia River Site within the United States. We reject Teck's argument that it is not liable under § 9607(a)(3) because it did not arrange for disposal of hazardous substances "by any other party or entity."

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT WASHINGTON

No. CV-04-256-LRS

December 14, 2012

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

Plaintiffs,

and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LONNY R. SUKO, District Judge.

I. BACKGROUND

Defendant Teck Cominco Metals, Ltd. (Teck) has stipulated that it discharged slag and effluent into the Columbia River from its smelter located in Trail, British Columbia, Canada, and that some portion of its slag and effluent has come to be located in the Upper Columbia River (UCR) Site, a "facility" as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601(9). The UCR Site includes the reaches of the Columbia River from immediately downstream of the international border to the Grand Coulee Dam.

Furthermore, Teck has stipulated that its slag which has come to be located in the UCR Site has leached and continues to leach hazardous substances into the waters and sediments from and at the UCR Site; and that hazardous substances in Teck's effluent have come to be located and continue to move into and through the waters and sediments from and at the UCR Site. Teck has stipulated that this release or threatened release of hazardous substances at the UCR Site has caused Plaintiff, Confederated Tribes of the Colville Reservation (Tribes), and Plaintiff-Intervenor, the State of Washington (State), to incur at least $1 each in response costs which were necessary and not inconsistent with the National Contingency Plan. These stipulations satisfy three of the four elements for liability for response costs under CERCLA, 42 U.S.C. § 9607(a).

Teck contests whether it is within one of the four classes of persons subject to the liability provisions of § 9607(a). Specifically, it contends that it cannot be

held liable as an "arranger" because it did not arrange with another party or entity for the disposal or treatment of its hazardous substances, and that holding it liable as an "arranger" would constitute an improper extraterritorial application of CERCLA. Furthermore, Teck contests whether this court has specific personal jurisdiction over it.

The parties designated the portions of the record they requested the court consider in adjudicating these disputed issues (ECF Nos. 1940, 1946 and 1947). On October 10, 2012, they presented oral argument to the court. The court has considered the entirety of the designated record in formulating its Findings Of Fact. The Findings Of Fact are based on a preponderance of the evidence submitted by the parties and are otherwise based on the parties' Stipulation (ECF No. 1928). All objections to exhibits cited in the Findings Of Fact are **OVERRULED** for the reasons specified in Ex. A to ECF No. 1946. All objections to deposition testimony cited in the Findings Of Facts are **OVERRULED** for the reasons specified in Ex. 1 to ECF No. 1699 (ECF Nos. 1699-1, 1699-2 and 1699-3). To the extent objections have been registered to those portions of expert declarations cited in the Findings Of Fact, ECF Nos. 1726 (Bierman); 1728 (McLean); 1732 (Queneau); 1746 (Vlassopolous); and Higginson (ECF Nos. 1744 and 1765), those objections are **OVERRULED**.

At the October 10, 2012 oral argument, the Plaintiffs and Defendant registered objections to certain Findings of Fact and Conclusions of Law proposed by the other. The court has considered those objections and it should be apparent which

objections the court has sustained and which it has overruled.

II. FINDINGS OF FACT

A. PERSONAL JURISDICTION AND COVERED PERSON/ ARRANGER STATUS

1. Teck is a Canadian corporation registered as an extra provincial company under the laws of British Columbia. All references to "Teck" incorporate its predecessor entities. ECF 1928 ¶ 10.

2. Teck's metal and fertilizer production facilities are collectively referred to herein as the "Trail Smelter" and are located in Trail, B.C., Canada, approximately 10 miles upstream from the U.S.-Canada border. ECF 1928 ¶ 11.

3. Teck and its predecessors have operated metal and/or fertilizer production facilities at Trail since 1896. ECF 1928 ¶ 12.

4. The Trail Smelter produced slag as a by-product of high-temperature recovery of metals. Teck's slag consists primarily of silica, lime and iron, as well as base metals, including zinc, lead, copper, arsenic, cadmium, barium, antimony, chromium, cobalt, manganese, nickel, selenium and titanium. ECF 1928 ¶ 13.

5. Between 1930 and 1995, Teck discharged at least 9.97 million tons of slag directly into the Columbia river via outfalls at its Trail smelter. This discharge was intentional. ECF 1928 ¶ 14. According to Teck's General Manager of Lead Operations, Wayne Wyton, Teck discarded approximately 400 tons of slag directly into the Columbia River every day. Dep. of Wyton, 6/30/10,

at 23-24, 69. *See* Ex. 150 (Dep. of William Duncan, 7/22/10, at 239, referring to dep. ex. 248) (Teck scientist estimates discharges of 400 tons per day). *See also*, Ex. 185, p. 1. (Kenyon dep. at 172, referring to dep. ex. 176.) Teck concedes the 9.97 million tons of slag discarded into the river contained 7,300 tons of lead and 255,000 tons of zinc. (Higginson, ECF 1631, ¶¶ 15, 118). Teck knew that the waste slag contained metals. Ex. 138 at 2, 5 & 6 (Duncan dep. at 59-69 (referring to dep. ex. 224); Ex. 175 at 9 (Kenyon dep. at 99-101, referring to dep. ex. 165); Ex. 185 (Kenyon at 172, referring to dep. ex. 176); Ex. 189, (Kenyon at 208-210, referring to dep. ex. 187).

6. At least 8.7 million of the at least 9.97 million tons of slag discharged by Teck from its Trail Smelter has been transported by the Columbia River downstream of the international border into Washington, and some portion of that slag has come to be located at the UCR Site. ECF 1928 ¶ 17.

7. In addition to slag, Teck's Trail Smelter generated waste as effluent. The term "effluent" means all non-slag discharges of waste by Teck, excluding air emissions. Effluent was generated by numerous processes over a century of operation, including copper smelting and refining, lead smelting and refining, silver refining, an antimonial lead plant, a bismuth refinery, zinc operations (which included roasting, calcine leaching, fume leaching, electrolysis, melting and casting, cadmium recovery, and the acid plants) and production of fertilizer. ECF 1928 ¶ 15.

8. Teck discharged effluent via outfalls at the Trail Smelter directly into the Columbia River. The

discharged effluent contained lead, zinc, cadmium, arsenic, copper, mercury, thallium, and other metals, as well as a variety of other chemical compounds. The components of effluent were discharged in dissolved, colloidal, and particulate form. This discharge was intentional. ECF 1928 ¶ 16. Teck concedes the effluent discarded into the Columbia River from 1923-2005 contained approximately 132,000 tons of hazardous substances, including 108,000 tons of zinc, 22,000 tons of lead, 200 tons of mercury, 1,700 tons of cadmium, and 270 tons of arsenic. Higginson, ECF 1631, ¶ 118. Teck knew that its discarded effluent contained at least lead, zinc, cadmium, arsenic, copper, and mercury. Wyton dep. at 34. *And see* Ex. 178 (identifying metals in outfalls), (Kenyon dep. at 139-146, referring to dep ex. 158). Ex. 152 (Duncan dep. at 241-245, referring to dep. ex. 250); Ex. 169 at 39-48, (Kenyon dep. at 40, referring to dep. ex. 159); Ex. 175, (Kenyon dep. at 99-101, referring to dep. ex. 165).

9. Nearly all of Teck's effluent that was discharged via its outfalls at the Trail Smelter has been transported by the Columbia River downstream of the international border into Washington, and at least some portion of it has come to be located at the UCR Site. ECF 1928 ¶ 18.

10. There is a single flow path directly from Teck's Trail smelter to the United States. Bierman, ECF 1624, ¶ 17. The Columbia River between Trail and the international border has ample power to mobilize and suspend slag particles even at moderate, average flows. McLean, ECF 1635, ¶ 52. The river has the capacity to transport slag, either in suspension or as bed load, in a wide range of flow

conditions. McLean, ECF 1635, ¶ 53. Based on the river water's velocity in this reach, most sand-sized sediment (including most slag) behaves as wash load, maintained continuously in suspension without depositing on the river bed until it reaches a point of repose in the UCR Site. See McLean, ECF 1635, ¶ 50. The river's capacity to transport slag means that the river also has the capacity to transport Teck's sewer effluent. McLean, ECF 1635, ¶ 36.

11. The transport of slag-sized sediment in the Columbia River at Trail is supply-limited because the river's capacity to transport the material is much greater than the amount that is being supplied. As a result, the slag has been swept off the river bed surface, exposing the coarse natural cobble and gravel river bed material. McLean, ECF 1635, ¶ 54.

12. During sediment transport in the gravel and cobble environment of the Upper Columbia River, slag particles are subject to the same abrasive forces and break down creating smaller particles that are more easily transported and creating new fresh surfaces that are exposed to the flow. McLean, ECF 1635, ¶ 48. Teck's own slag study in 1991 confirmed this. Ex. 217 (Kuit dep. at 194, referring to dep. ex. 22; Ex. 244 (McKay dep. in LMI, 7/16/10 at 94, referring to dep. ex. 70). In some locations, river dynamics in the UCR Site cause slag to float on the river surface. Exs. 643, 646.

13. The Grand Coulee Dam has an impact on sedimentation within the Upper Columbia River. As the river transforms from free-flowing to reservoir, Teck's slag and effluent are deposited in the downstream direction, with the sand-sized and silt-sized particles deposited near the upstream end and

the finer silt-sized and clay-sized deposited near the dam. McLean ECF 1635, ¶ 30. Bierman, ECF 1624, ¶¶ 13, 44. Vlassopoulos, ECF 1664, ¶ 164.

14. Teck's Trail leadership assumed that both slag and effluent went downstream, across the border and into Lake Roosevelt. Dep. of Wayne Wyton, 6/30/10, at 74-75, 137. Unlike Mr. Wyton, Teck employees generally claimed that they did not know where the slag went after it was discarded into the Columbia River, e.g. Dep. of Kenyon at 218-219. Teck's documents indicate otherwise. They confirm that for decades its leadership knew its slag and effluent flowed from Trail downstream and are now found in Lake Roosevelt and, nonetheless, Teck continued discharging wastes into the Columbia River.

15. As early as the Trail arbitration in the 1930s, Teck knew that the United States had observed slag on the beaches of the Columbia River north of Northport (near the Canadian border). Ex. 226, pp. 5,6,11-14 ((Dep. of Walter Kuit in insurance coverage law suit ("LMI"), 2/23/11, at 46-49, referring to dep. ex. 3)) The United States explained in its filing that "[t]he trail smelter disposes of slag in such a manner that it reaches the Columbia river and enters the United States in that stream." Ex. 225, (Kuit dep., 2/23/11, at 44:10-12, referring to dep. ex. 2). Walter Kuit, testifying in a Rule 30(b)(6) deposition described these allegations by the U.S. government as "a description of "the practice" and confirmed that it is "consistent with [Teck's[1]] understanding of Teck's and its predecessor's practice." *Id.* 45:5-10.

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[1] Kuit was testifying as Teck's speaking agent.

16. In 1974, Teck documents confirmed its understanding that its disposal of granulated slag in the Columbia River "settles out" in Lake Roosevelt. Ex. 212, (Kuit dep., 6/8/10 at 124, referring to dep. ex. 9) ("The action of the river will reduce the slag to silt which will carry down to Roosevelt Lake and accumulate in the lake bottom together with naturally occurring silt.") Studies done in the 1970s by Canadian regulatory authorities (and known to Teck) found elevated content in the Columbia River. See Exs. 241 (Kootenay Air and Water Quality Study Phase I and II). (Dep. of Douglas McKay in LMI, 7/16/10, at 57-59, 63, 64, 66, referring to dep. ex. 64) and 242.

17. By the 1980's, Teck recognized its discharges were having impacts in the Upper Columbia River. Teck's Manager of Environmental Control, Nigel Doyle, authored a summary of Environmental Control at Cominco Ltd. and noted that samples taken downstream of the Trail facility showed that metals were leaching from Teck's slag. He also noted an absence of aquatic life and observed that may in part be due to metals in Teck's slag and the abrasive effect of "constantly moving slag." Ex. 163, pp. 43-44. See also table 8-16, p. 161. (Dep. of Mark Edwards in LMI, 6/17/10, at 141-142, referring to dep. ex. 8.)

18. At approximately the same time, in 1981, Teck recognized that it faced potential claims based on its disposal of its wastes in the Upper Columbia River and Lake Roosevelt. A risk analyst employed by Teck, Jeffrey T.G. Scott, commented in a written memorandum:

> [t]he primary potential for environmental damage and subsequent claims [at Trail] is the

> discharge of pollutants to the Columbia River....
>
> Any increase in the quantities of mercury or other heavy metals found in the aquatic environment downstream from Trail would most likely be assumed to have originated from Cominco, Ltd. operations.

Ex. 544 at p. 48.

19. Teck's Environmental Control Manager, Nigel Doyle, was "pleased with the overall accuracy and objectivity of Mr. Scott's report" and specifically agreed with "Scott's comments concerning mercury." He observed that "[t]here is no question in my mind that this is the single most vulnerable area if Americans ever find the time and money to do exhaustive research on the lake sediments in FDR Lake." In his view, Teck was "at risk in terms of the deposition of heavy metals which has taken place over the last 70-80 years." Ex. 213, pp. 1-2. (Kuit dep., 6/8/10, at 132-139, referring to dep. ex. 11.)

20. David Godlewski, Teck's current Vice President, Environment and Public Affairs, testifying as a speaking agent in a Rule 30(b)(6) deposition, confirmed that in 1982 the Trail smelter was discarding effluents and solids to the Columbia River containing known quantities of heavy metals and those materials were transported downriver ending up in the Upper Columbia River in Washington State. Dep. of David Godlewski in LMI, 6/24/10, at 150:25-151:9. Teck's senior management understood that movement of slag down stream was the only logical conclusion. Dep. of Charles Sutherland in LMI, 7/30/10, at 76:9-21 ("[J]ust

seemed logical it [Teck slag from Trail smelter] would end up along with all the other sediments in Lake Roosevelt"). *See also Id.* at 52:2-5. *See also* Dep. of George Yurko in LMI, 8/5/10, pp. 56, 67-68.

21. By 1984, Graham Kenyon had taken over Nigel Doyle's job and he shared Doyle's concerns. Canadian government organizations were beginning to take notice of Teck's waste disposal practices. Carl Johnson was the Province of British Columbia Ministry of Environment's (MOE's) liaison with Teck. Dep. of Johnson, 12/15/10, at 8-9. He had many interactions with Teck in the 1980s regarding efforts to improve its mercury disposal practices. Johnson dep. at 89-93. *E.g.* Ex. 106 (referred to as dep. ex. 300.) In a meeting in 1984, MOE (identified as W.M.B. here) expressed a need to collect cores in Lake Roosevelt to track disposition of mercury. Ex. 103 (Johnson dep. at 78-81, referring to dep. ex. 297).

22. Teck knew what would be found in the sediments of Lake Roosevelt. Teck's environment briefing notes authored by Graham Kenyon on April 25, 1990, said "[h]istorical discharges have presumably accumulated in Lake Roosevelt sediments." Ex. 177 (Kenyon dep. at 127, referring to dep. ex. 167). By 1991, Kenyon recognized substantial community concern regarding "the effects of accumulated slag in Lake Roosevelt" and, in particular, the international dimension resulting from the fact that "we are in effect dumping waste into another country—a waste that they classify as hazardous material." Ex. 180 (Kenyon dep. at 161, referring to dep. ex. 172). Indeed, Kenyon later recognized that Trail had, essentially, been using

Lake Roosevelt as a "free" "convenient disposal facility" for its wastes. Kenyon dep. at 218-219. *See* Ex. 192 (referred to as dep. ex. 193 at p. 215-216).

23. In Teck's 1988 Environment Report, it had labeled Lake Roosevelt water quality a "sleeper issue" as U.S., EPA and Washington State agencies were becoming interested, having noted "above normal metal levels in sediments and fish." Ex. 169 (Kenyon dep. at 40, referring to dep. ex. 159). By 1989, it had become a "current concern" as various U.S. interest groups were focused on "Cominco slag and gypsum/phosphate discharges as particular concerns." Ex. 170 (Kenyon dep. at 47-50, referring to dep. ex. 160). In 1990, Teck knew that "Citizens in the Northport [WA] area [had become] increasingly incensed with [Teck's] historical disposal practices in the Columbia River." Ex. 175, p. 7. (Kenyon dep. at 99-101, referring to dep. ex. 165.) By 1991, Kenyon knew that Washington State and EPA officials were committed to stopping Teck's discarding of slag into the Columbia River. Ex. 180 (Kenyon at 161, referring to dep. ex. 172). Teck did not stop then, however. Profits were "excellent"—$100 million per year, Ex. 175, p. 7—and it continued to discard slag at a rate of 400 tons per day and sewer effluent flowed from its facility 24 hours a day. Ex. 185. (Kenyon dep. at 172, referring to dep. ex. 176.)

24. Teck never conducted any studies to confirm the presence of its wastes in Lake Roosevelt, but Mr. Kuit did travel to the Upper Columbia River with Carl Johnson, a senior official at BC MOE responsible for liaison with the Teck smelter. Johnson reports that he and Rick Crozier, another

MOE employee, traveled to the Upper Columbia River with Mr. Kuit and took samples at various beaches along the Columbia River in the United States. Dep. of Johnson at 52. They compared samples taken from the beaches to Teck samples under a microscope and confirmed that it looked like the same material. Dep. of Johnson at 54-55. In conversations with Mr. Kuit and Mr. Mike Walker (also with Teck) "it is pretty well agreed that what we were seeing was slag." Dep. of Johnson at 55.

25. Teck also knew that metals from its non-slag effluent were transported to the UCR. Those metals are now found in the sediments of the UCR. Some scientists used events in which effluent was spilled from the Trail smelter to measure movement to a testing station adjacent to the Canadian border and confirmed that it reached the border in approximately two hours. Dep. of Duncan at 210-213. *See* Ex. 142 (Duncan at 210-213, referring to dep. ex. 230). An expert retained by Plaintiffs, Dr. Victor Bierman, has reviewed this data and confirmed that it proves the transport of metals contained in effluent from the Trail smelter to the UCR. Decl. of Bierman, ECF 1624, ¶¶ 30,

26. The British Columbia Ministry of Environment (MOE) also concluded that mercury spilled from Trail was moving into downstream sediments, including sediments in the United States. Ex. 21 (Beatty Spence dep. at 31-33, 41-44, referring to dep. ex. 278). Reducing mercury discharges was "one of the highest priorities" for MOE. Ex. 22 (Beatty Spence dep. at 45-48, referring to dep. ex. 279).

27. Walter Kuit, who served under Mr. Doyle, in an e-mail discussing mercury discharges, confirmed the assessment of Mr. Doyle twenty years earlier, commenting that "if the chickens come home to roost, the non-slag contributions over time, particularly from the early 80s back, would be more of a factor than slag." Ex. 220 (Kuit dep., 6/8/10 at 217, referring to dep. ex. 28). It was that very potential liability Mr. Kenyon sought to head off decades later when he recognized Teck had treated Lake Roosevelt as a "free" disposal facility and urged that Teck fund measures to improve conditions in the river, rather than face potential extended litigation under the U.S. Superfund Law. Ex. 192 (Kenyon dep. at p. 215-216, referring to dep. ex. 193).

28. Leachability of Teck slag was known to Teck since at least the 1970s. Teck conducted slag leaching tests during the 1970s and 1980s. A Teck memorandum authored December 16, 1983, documented that "over the past 10 years a number of tests have been conducted in which granulated smelter slag has been leached with water. The object of the tests has been to assess contamination of the water with heavy metals." Ex. 234 (McKay dep., 6/9/10 at 58, referring to dep. ex. 31). The test results invariably indicated increased levels of metals in the granulated water. *Id.* Plaintiffs' expert Dimitri Vlassopoulos comments, "in none of these past studies—including Teck's own—was Teck slag ever shown not to leach under the conditions tested." ECF 1663 at ¶ 109.

29. These results were consistent with Canadian government reports, which Teck had received (and later referenced in its 1990s leaching report

discussed below), and which also showed that Teck slag leached in the Columbia River. Trial Ex. 241 and 242 (Kootenay Air and Water Quality Study Phase I and II). Teck defended its practice of slag river deposition, but conceded that slag did leach. *See, e.g.*, Sutherland in LMI, 7/30/10, 27:15-17; Yurko in LMI, 8/5/10, 26:24-27:2; 62:24-63:3; Fletcher, 7/27/10, 41:16-23.

30. Teck was forced to cease slag river discharge when the government of Canada investigated the toxicity of its slag and demanded that it stop. Beginning in the 1990s the Canadian federal government investigated the impact of Teck's waste discharges. In a study completed in July 1992, "Survival and Water Quality Results on Bioassays on Five Species of Aquatic Organisms Exposed to Slag from Cominco's Trail Operations," the Canadian Department of Fisheries and Oceans (DFO) studied the impact of slag on aquatic systems to determine if it was a deleterious substance. Dep. of Nener, 9/29/10, at 20. Ex. 624 (Dep. of Stephen Walden, 6/10/10 at 138-139, referring to dep. ex. 46).

31. Water Quality Biologist for DFO, and primary author of the 1992 study, Jennifer Nener, explained "[t]he study came about because Cominco was discharging slag to the Columbia River, and there had been some preliminary pieces of work that raised questions about the effects of that slag on the river ... [b]ecause there were questions about the effects of the slag on the river, we undertook this work to determine whether or not the slag could potentially be a deleterious substance." Nener, 20:3-19. The study showed that slag leached

hazardous substances and was toxic to fish. Ex. 624. Nener at 45-47, 53-54, 55-57.

32. On November 18, 1991, Walter Kuit and Graham Kenyon were informed of the results of Nener's study: Fish exposed to slag died. "Toxicity seems attributable to elevated total copper and zinc vs. dissolved metals." Ex. 219 (Kuit dep. at 207, referring to dep. ex. 24).

33. Teck recognized the government's work indicated "that slag samples were apparently toxic to several species of aquatic life ranging from burrowing insects to rainbow trout" and the "[e]ffect was either chemical (zinc/ copper) or physical (sharp particles damaging gills) or both." Ex. 629 (Teck's Summary of Meeting with Provincial and Federal Government People on June 16, 1992). (Wyton dep. at 113-114, referring to dep. ex. 80.) Ex. 187. (Tail Slag Fact Sheet authored by Graham Kenyon). (Kenyon dep. at 189, referring to dep. ex. 182.) Teck did no studies of its own to evaluate Nener's conclusions.

34. Another study conducted for the DFO noted that granulated slag discarded from Teck's Trail facility is "transported downstream, and deposits have been found as far south as Marcus Island and Roosevelt Lake." Ex. 208 (Kuit dep. at 74-75, referring to dep. ex. 5). Based on these studies, Canadian environmental regulators demanded that Teck terminate slag discharge to the River "as soon as is practicable." Ex. 111 (Johnson dep. at 103, referring to dep. ex. 305.) Environmental Quality Section Head for the MOE, Julia Beatty-Spence explains, "even prior to the results of the DFO report on the toxicity of slag and the leachability of slag,

there was an understanding that the slag would be removed from the river. However, following those studies, it was more clearly understood that it was a more urgent priority, and so that's why our agency in the 1992 permit put in those requirements for the company to find the technology or the means to finally cease the discharge of slag to the river." Dep. of Beatty Spence, 12/13/10, 82:6-16.

35. In view of this, as a condition of a permit expiring December 31, 1991, the Canadian Government required Teck to report on "the effect of continuing slag disposal into the river." Ex. 180. See also exs. 181, 182, 217. (Kenyon dep. at 161, referring to dep. ex. 172; Kenyon dep. at 167 referring to dep. ex. 173; Kenyon dep. at 169, referring to dep. ex. 174; Kuit 6/8/10 dep. at 194, referring to dep. ex. 22, respectively.) In judging how to respond, Graham Kenyon, Teck's Environmental Manager recognized that "we are in effect dumping waste into another country—a waste that they classify as a hazardous material." Ex. 180. Teck requested permission to include in its study the effects of continued river disposal, to "potentially justify" continued disposal of slag in the river. Kenyon dep., 163:3-6. The Ministry of Environment, according to Kenyon, "reluctantly agreed." *Id.* at 162:24-163:2; *see also* Ex. 180. Teck advised the Government of Canada that it would conduct a study of slag disposal options, as required. Teck stated that the study would: "assess the environmental impacts of disposing of the barren slag including: (a) leachability and chemical stability of slag." Ex. 181; Ex. 182 (Canadian Govt. response); *see also* Ex. 183 (Teck note outlining the scope of work

addressing environmental issues). (Kenyon dep. at 170-171, referring to dep. ex. 175.) As a result, Teck undertook extensive slag leaching studies under the direction of Douglas McKay, Ph.D. (Metallurgical Engineering). McKay dep., 7/16/10, 52:13-25.

36. In 1991, McKay was primary author of a report analyzing slag leachability. McKay dep., 7/16/10, 52:13-25. McKay confirmed that his studies showed metals leaching from Trail slag: "My report showed that small amounts of metals leached or were released from the slag under the various conditions that ... we tested for in the report." McKay 1, 7/16/10, 66:13-15. McKay's Preliminary Report noted that "fines" were yielding results higher than accepted limits as defined by the SWEP [Special Waste Extraction Procedure] criteria and were "***NOT*** inert" (emphasis in original, Ex. 244 (LMI dep. ex. 70 at p. 94)); McKay, 7/16/10, 97:22-99:6). Teck's own work confirmed its slag was not chemically stable and was being transported well into Roosevelt Lake. McKay dep ., 7/16/10 at 66. *See* Ex. 244 (McKay dep. in LMI, 7/16/10 at 94-99, referring to dep. ex. 70). *See* Kuit memorandum to senior management, Ex. 217. (Kuit dep., 6/8/10 at 194, referring to dep. ex. 22.)

37. The report findings, that Teck's slag in fact leached, became common sense to William Duncan, Senior Biologist for Teck, whose work included assessment of biological impact of Teck slag on the aquatic environment of the Columbia River. Duncan dep., 7/22/10, 15:23-18:17. Duncan commented on the 2005 USGS study of Lake Roosevelt by Stephen Cox pertaining to slag leachability and stated, "[s]lag work was interesting and quite well done; no

surprises that we didn't already know. We knew slag would leach copper and zinc in the columns and in the river." Ex. 145 (Duncan dep. at 192, referring to dep. ex. 243). The McKay studies were definitive for Teck and established that Teck slag does, indeed, leach.

38. After the McKay studies, arguments that slag is inert were deemed indefensible. Walter Kuit, who held the title of Project Manager, Environment, reported to the Operating Vice President at Trail, Roger Watson, on September 19, 1991, that Teck's work showed "[s]lag fines are not chemically stable and this is particularly significant if the slag discharge is viewed in the context of river conditions. Currents will induce a gradient of deposition by particle size with the fines being transported well into Roosevelt Lake." Kuit 6/8/10, 194:7-195:15. See Ex. 217 (Kuit dep. at 194, referring to dep. ex. 22). Based on this conclusion, Kuit questioned how Teck could report these results to MOE yet defend continued river discharge of slag. He concluded that the results could be reported only if Teck "implement[ed] land disposal." *Id.* Yet, Teck continued to discard slag directly into the River for four more years—on average 400 tons per day.

39. Slag discharge to the Columbia was nearly entirely eliminated in July 1995 after start up of the KIVCET furnace implementation. Only a few hundred tons were discharged in 1996-1997 as Teck stabilized the closed granulation system. Queneau, ECF 1661, ¶ 115. KIVCET furnace implementation has not led to elimination of all of the effluent discharges. As admitted by Teck, "a treatment process has been devised but not implemented due to

its high cost, both capital and operating, and cannot be justified as long as we meet our permit." Queneau, ECF 1661, ¶ 120.

B. FACILITY

1. CERCLA hazardous substances, as that term is defined in 42 U.S.C. § 9601(14), have been identified in the Upper Columbia River (UCR), which includes the reaches of the Columbia River from immediately downstream of the international border to Grand Coulee Dam. The UCR Site includes that portion of the Upper Columbia River where certain hazardous substances have come to be located. ECF No. 1928, ¶ 8 (Order on parties' stipulation).

2. The boundaries of the UCR Site are still under investigation, but the Environmental Protection Agency (EPA) has identified the Site as a "facility" under CERCLA and initially defined its boundaries as "the areal extent of contamination in the United States associated with the Upper Columbia River, and all suitable areas in proximity to the contamination necessary for implementation of a response action." ECF No.1928, ¶ 9 (Order on parties' stipulation).

C. RELEASE

1. Teck slag that has come to be located in the UCR Site has leached and continues to leach hazardous substances, including but not limited to lead, zinc, arsenic, and cadmium, into the waters and sediments from and at the UCR Site. This leaching occurs into the environment from the UCR Site. ECF No. 1928, ¶ 19 (Order on the parties' stipulation).

2. Hazardous substances in Teck's effluent, including, without limitation, mercury, cadmium, and zinc, have come to be located at and continue to move into and through the waters and sediments from and at the UCR Site. ECF No. 1928, ¶ 20 (Order on the parties' stipulation)

3. Hazardous substances in Teck's effluent that moved into UCR Site sediments have subsequently leached or otherwise moved via desorption or another geochemical and/or biogeochemical process into and within the waters and sediments from and at the UCR Site. These processes are a leaching or escaping of hazardous substances into the environment from the UCR Site. ECF No. 1928, ¶ 21 (Order on the parties' stipulation).

D. INCURRENCE OF RESPONSE COSTS

1. The release or threatened release of hazardous substances at the UCR Site has caused the Tribes and State to incur at least $1 each in response costs. These response costs were necessary and are not inconsistent with the National Contingency Plan. ECF No. 1928, ¶ 22 (Order on the parties' stipulation).

III. CONCLUSIONS OF LAW

A. SUBJECT MATTER JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter under 28 U.S.C. § 1331. ECF No. 1928, ¶ 1 (Order on parties' stipulation).

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) and 42 U.S.C. § 9613 because the claims arise from, and the releases of hazardous substances occurred at, the UCR Site located in the

Eastern District of Washington, Yakima Division. ECF No.1928, ¶ 2 (Order on parties' stipulation).

3. The Tribes and the State makes their claims under 42 U.S.C. § 9607. ECF No. 1928, ¶ 3 (Order on parties' stipulation).

B. PERSONAL JURISDICTION

1. The burden of establishing personal jurisdiction rests with the Plaintiffs. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

2. A federal district court must look to the law of the forum state in determining whether it may exercise personal jurisdiction over an out-of-state defendant. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir.1993).

3. Washington's long-arm statute, found at RCW 4.28.185, provides:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person ... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:
>
> ….
>
> (b) The commission of a tortious act within this state;
>
> ….
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

4. Washington's long-arm statute imposes "no limitations beyond those imposed by due process." *Chan v. Society Expeditions*, 39 F.3d 1398, 1404-05 (9th Cir.1994). Thus, the Court "need only determine whether personal jurisdiction in this case would meet the requirements of due process." *Core-Vent*, 11 F.3d at 1484 (citation omitted).

5. Specific jurisdiction is analyzed according to a three-prong test: (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, in that it must be reasonable. *Schwarzenegger*, 374 F.3d at 802.

6. 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'Antisemitisme*, 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, while the "effects"—releases of hazardous substances from the wastecreate liability under CERCLA. *Pakootas I*, 452 F.3d at 1078 ("actual or threatened release of hazardous substances triggers CERCLA liability").

7. The "effects" test, which is based on the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 789, 104 S.Ct. 1482, 79 L.Ed.2d 804 (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. See also *Core-Vent*, 11 F.3d at 1486.

8. An "intentional act" has a specialized, limited meaning in the context of the *Calder* effects test. "We construe 'intent' in the context of the 'intentional act' test as referring to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." *Schwarzenegger*, 374 F.3d at 806. Teck intentionally disposed of waste into the Columbia River, thereby satisfying the first element of the *Calder* effects test.

9. " '[S]omething more' than mere foreseeability [is required] in order to justify the assertion of personal jurisdiction, ... and that 'something more' means conduct that is expressly aimed at the forum." *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1129 (9th Cir. 2010). 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. Teck knew that repose of its

waste in Washington State was a natural consequence of river disposal. Teck persisted in river disposal well past its acknowledgment that its waste reposed in Washington State. Such conduct is "expressly aimed" at Washington State and satisfies the second element of the *Calder* effects test. Teck's actions do not amount to untargeted negligence with effects in the Washington State. Teck's intentional actions were specifically targeted at Washington State. The impact of its actions was not "local or undifferentiated." *Fiore v. Walden*, 688 F.3d 558, 578 (9th Cir. 2012).[2]

10. The third element of the *Calder* effects test requires that the defendant's conduct cause harm which the defendant knows is likely to be suffered in the forum state, interpreted as foreseeability that harm resulting from defendant's conduct would occur in the forum state. *Mavrix Photo, Inc. v. Brand Techs., Inc.* ., 647 F.3d 1218, 1232 (9th Cir. 2011); *Brayton*, 606 F.3d at 1131. "[T]his element does not require that the brunt of the harm be suffered in the forum, ... [it] may be established even if 'the bulk of the harm' occurs outside the forum." *Brayton*, 606 F.3d at 1131. The harm Teck caused in the forum state was foreseeable. It was foreseeable that the effects of Teck's discarding of waste would be felt in the United States in Washington State.

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[2] It may be that "purposeful availment" is also established here in that Defendant chose to send its waste on a one-way journey to the UCR Site, constituting a decision to avail itself of the benefits of the UCR Site as a disposal market. *Violet v. Picill*o, 613 F.Supp. 1563, 1577 (D.R.I. 1985).

11. Teck knew its disposal of hazardous waste into the UCR was likely to cause harm. It was told by the Canadian government that its slag was toxic to fish and leached hazardous metals. It acknowledged its effluent settled to sediments in the UCR and that its slag leached hazardous metals into the aquatic environment, yet persisted with river disposal. Teck has not been haled into the courts of the Eastern District of Washington solely as the result of "random, fortuitous or attenuated" contacts over which it had no control. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

12. The second prong for the test for specific jurisdiction requires that the claim be one that arises out of or relates to the defendant's activities in the forum. *Panavision v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir.1998). This requires a showing of "but for" causation. *Id.* at 1322. Plaintiffs seek relief based on the fact that Teck's intentional disposal of waste resulted in contamination of the UCR. "But for" this intentional disposal, Plaintiffs would not have been injured. Teck's disposal of waste which caused a release of hazardous substances in the UCR is a "forum-related" activity upon which Plaintiffs' claims rest.

13. The third prong of the test for specific jurisdiction provides that the exercise of jurisdiction must comport with fair play and substantial justice, i.e., that it is reasonable. In determining the "reasonableness" of exercising personal jurisdiction, the following factors are considered: (1) the extent of defendant's purposeful interjection; (2) the burden on defendant in defending in the forum; (3) the extent of

conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution to the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent*, 11 F.3d at 1487-88. No one factor is dispositive and the court must balance all of the factors. *Id.* at 1488. There is a presumption that the exercise of jurisdiction is reasonable when the first two prongs of the specific jurisdiction test have been met. After the plaintiff meets its burden to satisfy the first two prongs, the burden then shifts to the defendant to present a "compelling case" that jurisdiction is unreasonable. *Schwarzenegger*, 374 F.3d at 802.

14. Teck's purposeful interjection is extensive in terms of sheer volume and duration (millions of tons of waste over many years).

15. Teck is not unfairly burdened by having to defend itself in the Eastern District of Washington. The unavailability to it of a "federally permitted release" defense to liability under CERCLA because it is a non-U.S. entity reflects the reality that the contamination in the UCR Site located in the United States can only be cleaned up pursuant to a U.S. statute. Canadian laws and regulations will not compel Teck to clean up contamination it has created in the United States. Moreover, the "federally permitted release," 42 U.S.C. § 9607(j), is not a "free pass to pollute" for U.S. entities because they remain potentially liable for such pollution under other statutes, including the Clean Air Act and the Clean Water Act.

16. This court previously ruled that an Indian Tribe is not a "person" under CERCLA and therefore, the Tribes are not subject to a counterclaim by Teck regardless of the extent to which they contributed to the contamination of the UCR Site. (ECF No. 357). This too does not unfairly burden Teck. The fact there may be no rule in Canadian environmental jurisprudence sheltering indigenous tribes from liability for pollution, while allowing them to recover against others for the same conduct, is irrelevant since at issue is the clean up of pollution in the United States. Furthermore, Teck had an opportunity to prove that the harm in the UCR Site was divisible and apportionable under CERCLA, but failed to do so. (ECF No. 1340).

17. The exercise of personal jurisdiction over Teck does not conflict with the sovereignty of Canada because there is no extraterritorial application of CERCLA. At issue is the clean up of pollution located wholly within the United States due to releases of hazardous substances occurring in the United States.[3]

18. The Boundary Waters Treaty Act of 1909 which establishes an International Joint Commission (IJC) for examination and resolution of disputes does not represent an adequate alternative forum for the dispute in this case. There is no indication an IJC could provide the kind of extensive relief available to Plaintiffs under CERCLA.

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[3] The court takes judicial notice of the existence of the documents identified in, and appended to, Teck's "Request For Judicial Notice" (ECF No. 1941). To that extent, the "Request For Judicial Notice" is **GRANTED**.

19. Given the proximity of its corporate offices, and especially its smelter, to the Eastern District of Washington, the burden on Teck was not great eight years ago when this litigation commenced. Denying jurisdiction now, after eight years of litigation, could not be more inefficient to judicial resolution of the parties' dispute.

20. Washington's interest in adjudicating the dispute remains profound, as it pertains to pollution of its natural resources. This forum remains paramount to the Tribes' and the State's interests in convenient and effective relief.

21. Plaintiffs have proven by a preponderance of evidence the elements of specific personal jurisdiction. Said jurisdiction existed when this action was filed in 2004. *Kaiser Alum. & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir.1992); *Sher v. Johnson*, 911 F.2d 1357, 1365-66 (9th Cir.1990). Defendant has failed to establish a "compelling case" that the exercise of jurisdiction is unreasonable. Teck's conduct and connection with Washington State are such that it should have reasonably anticipated being haled into court here. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). This court has specific personal jurisdiction over Teck.

C. CERCLA LIABILITY

1. CERCLA is a broad, remedial statute enacted by Congress in order to enable the quick and effective response, by governments, to hazardous waste spills that threaten the environment, and to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S.Rep. No. 848, 96th

Cong., 2d Sess. 13 (1980), U.S.Code Cong. & Admin. News 1980, 6119, reprinted in 1 CERCLA Legislative History at 320.

2. The Tribes is a sovereign Indian Tribe whose government is recognized by the United States. The Colville Reservation borders the Upper Columbia River and Lake Roosevelt on its western and southern boundaries. A portion of the Upper Columbia River Site is located within the Colville Reservation. The Tribes has an interest in: a) the health of both Tribal members and non-members who either reside on or do business within the exterior boundaries of the Reservation; and b) the environmental quality of the Reservation's reserved natural resources and those resources within areas of the Columbia River subject to the Tribes' management and control, and areas within the former reservation boundaries in which the Tribes have reserved rights and entitlement of which the resources in and about the Upper Columbia River and Lake Roosevelt are of paramount importance.

3. The State of Washington has a substantial interest in protecting the health, safety, and welfare of its citizens, and its natural environment, from contamination of the Upper Columbia River and Lake Roosevelt with hazardous substances. The State also has a significant interest in ensuring the prompt and thorough cleanup of hazardous wastes within the State.

4. In enacting CERCLA, Congress established four groups of responsible parties, all of whom are subject to strict liability, with only a limited number of narrowly construed defenses. *See* 42 U.S.C. § 9607(a) and (b).

5. Responsible parties generally include: (1) owners or operators of facilities; (2) past owners or operators at the time of disposal of hazardous waste; (3) transporters of hazardous wastes: and (4) arrangers, those who arrange for the disposal or treatment of hazardous waste. *See* 42 U.S.C. § 9607(a).

6. The Ninth Circuit has held that the application of CERCLA here to Teck is a domestic application of the statute because the claim addresses a facility in the United States from which releases and threatened releases of hazardous substances occurred in the United States. *Pakootas I*, 452 F.3d at 1078 ("Because the actual or threatened release here ... took place in the United States, this case involves a domestic application of CERCLA"). The Ninth Circuit's holding is law of the case. *See Ins. Group Comm. v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612, 67 S.Ct. 583, 91 L.Ed. 547 (1947) ("When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court"). The decision in *Pakootas I* has not been reversed, or otherwise invalidated, by the Ninth Circuit or the Supreme Court. *See Morrison v. Nat. Australia Bank Ltd.*, —— U.S. ——, 130 S.Ct. 2869, 2884, 177 L.Ed.2d 535 (2010) (applying extraterritorial versus domestic application inquiry similar to that in *Pakootas I*); *Boumediene v. Bush*, 553 U.S. 723, 798, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (extraterritorial extension of the United States Constitution was warranted); *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 456, 127 S.Ct. 1746, 167 L.Ed.2d 737 (2007) (extending the Patent Act to products made

abroad would not be a domestic application of the law; the location of production is material); *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 954-55 (9th Cir. 2008) (favorably citing *Pakootas I* for the proposition that "when a statute regulates conduct that occurs within the United States, the presumption [against extraterritoriality] does not apply").

7. The four elements that Plaintiffs must establish to sustain their claims under 42 U.S.C. Section 9607(a) are:

> (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, 42 U.S.C. Section 9601(9);
>
> (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred, 42 U.S.C. Section 9607(a)(4);
>
> (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. Section 9607(a)(4) and (a)(4)(B);[4] and
>
> (4) the defendant is within one of four classes of persons subject to the liability provisions of Section 9607(a).

Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 870-71 (9th Cir. 2001) (en banc). ECF No. 1928, ¶ 23 (Order on the parties' stipulation).

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[4] For the Tribes and State, the response costs must only be not inconsistent with the national contingency plan. 42 U.S.C. § 9607(a)(4)(A).

Three of these four liability elements are established by the parties' stipulation. As described below, the Plaintiffs have proved the fourth element by preponderance of the evidence.

8. The UCR Site is a facility. ECF No. 1928, ¶ 24 (Order on the parties' stipulation). The boundaries of the UCR Site have not yet been settled because the investigation of the geographical extent of where hazardous substances have come to be located is ongoing in the Remedial Investigation / Feasibility Study process.

9. There have been "releases" and "threatened releases" of hazardous substances into the environment from slag and effluent from Teck's Trail smelter that have come to be located at the UCR Site. ECF No. 1928, ¶ 25 (Order on the parties' stipulation).

10. Releases and/or threatened releases of hazardous substances at the UCR Site have caused the Tribes and the State to incur response costs, of which at least $1 for each party was necessary and not inconsistent with the National Contingency Plan. ECF No. 1928, ¶ 26 (Order on the parties' stipulation).

11. Section 107(a)(3) of CERCLA, 42 U.S.C. 9607(a)(3), provides that:

> any person who by contract, agreement, or otherwise arranged for disposal ... of hazardous substances owned or possessed by such person ... at any facility ... owned or operated by another party or entity and containing such hazardous substances ..., from which there is a release, or a threatened

> release which causes the incurrence of response costs, of a hazardous substance ... shall be liable....

12. Teck is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). CERCLA defines a "person" to include "corporation[s]" and "commercial entit[ies]." There is no dispute that Teck is a "corporation." The Ninth Circuit held the CERCLA definition of "person" extends to Teck, a Canadian corporation, under a two-part test: (1) the state must have jurisdiction over the party, and (2) the legislature must intend for the term to apply. *Pakootas I*, 452 F.3d at 1076. The Ninth Circuit held the second part of the test is satisfied because Congress intended to reach all parties responsible for releases of hazardous substances in the United States. 452 F.3d at 1077 ("Because the legislature intended to hold parties responsible for hazardous waste sites that release or threaten release of hazardous substances into the United States environment, the second [part of the test] is satisfied here"). The first part of the test is also satisfied because this court holds has specific personal jurisdiction in this matter over Teck.

13. Congress used broad language for arranger liability, reaching persons who "by contract, agreement, or otherwise arranged for" the disposal of hazardous substances. *United States v. A & F Materials*, 582 F.Supp. 842, 845 (S.D.Ill.1984). Arranger liability "must be given 'a liberal judicial interpretation ... consistent with CERCLA's overwhelmingly remedial statutory scheme.' " *Cadillac Fairview/California Inc. v. United States*, 41 F.3d 562, 565 n. 4 (9th Cir.1994) (quoting *United*

States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380 (8th Cir.1989)). An arranger need not know where its hazardous substances ultimately end up, so long as it was the source of the hazardous substances. *See Missouri v. Independent Petrochemical Corp.*, 610 F.Supp. 4, 5 (E.D.Mo.1985).

14. CERCLA does not define "arrange for disposal," but it defines "disposal" by adopting a definition from another federal environmental statute. 42 U.S.C. § 9601(29). "The term 'disposal' ... shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C. §§ 6903]." In turn, section 1004 of the Solid Waste Disposal Act defines "disposal" as: the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters. 42 U.S.C. § 6903(3).

15. As the Ninth Circuit held, and as is binding on this court as law of the case, CERCLA's arranger liability phrase by "any other party or entity" refers to ownership of the waste at issue. 452 F.3d at 1082. Thus, a person will be liable as an arranger if it arranged for the disposal of its own wastes or wastes owned by "any other party or entity." The Ninth Circuit rejected Teck's argument that a CERCLA plaintiff must prove that "any other party or entity" arranged with the owning party for the disposal of wastes.

16. Addressing arranger liability, the Supreme Court has explained that when a waste (rather than

a useful product or potentially useful product) is discarded, intent to dispose need not be proved. *Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599, 609-10, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009) ("It is plain from the language of the statute that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance," and further proof of intent is unnecessary).

17. Federal courts applying *Burlington Northern* have inquired whether a generator intended to dispose of waste, as distinguished from intending to sell a useful product. *See, e.g.*, *Team Enterprises., LLC v. Western Investment Real Estate Trust*, 647 F.3d 901, 907-08 (9th Cir. 2011) (no arranger liability for designer/manufacturer of equipment used to ultimately dispose of waste but not intended or exclusively designed for such). Here, Teck's discarding of its slag and effluent in an unrecoverable manner via sewer outfalls into a river is clear intent to dispose of a waste. No court has held that a generator must intend to dispose of its wastes at a *particular* location to be held liable as an arranger under CERCLA. *See, e.g.*, *O'Neil v. Picillo*, 883 F.2d 176, 183 & n. 9 (1st Cir.1989)). Even if the Tribes were required to prove Teck's intent to dispose of its wastes particularly at the UCR Site, the plainly obvious power of the Columbia River for transport, the absence of slag stockpiling in the river at the point of discard, and Teck's belief and knowledge that some of its wastes had come to a point of repose in the United States, satisfies the inquiry. By no later than the 1930s, Teck had

knowledge or should have known that at least some portion of its slag had deposited in the United States between the international border and Northport. Ex. 225 at p. 15 (Kuit dep. in LMI, 2/23/11, at 40, referring to dep. ex. 2; Ex. 226 at p. 5-6 (*id.* at 46, referring to dep. ex. 3); Ex. 227 at p. 5, (*id.* at 54, referring to dep. ex. 4). It "was not only the inevitable consequence, but the very purpose" of Teck's disposal practices that the substances would come to be located at the UCR Site. *Cadillac Fairview*, 41 F.3d at 566.

18. Disposal at the UCR Site occurred when, after Teck actively and intentionally discarded its slag and effluent as waste into the Columbia River at Trail, at least some portion of that slag and effluent came to a point of repose at the UCR Site. *See Carson Harbor*, 270 F.3d at 870-71 (analyzing term "disposal"). *See also State of Colorado v. Idarado Mining Co.*, 707 F.Supp. 1227, 1241 (D.Colo.1989), *amended by* 735 F.Supp. 368 (1990), *rev'd on other grounds*, 916 F.2d 1486 (defendant "arranged" for disposal of mine tailings by discarding them into river, which brought them downstream to a CERCLA "facility"). *And see Appleton Papers, Inc. v. George A. Whiting Paper Co.*, 2012 WL 2704920 (E.D.Wis. July 3, 2012) (potential arranger liability for the locations where waste product had come to be located in the Fox River and not limited to the location of the original introduction to the river).

19. Pursuant to CERCLA, 42 U.S.C. § 9607(a)(4)(A), Teck is jointly and severally liable to the Tribes and the State in any subsequent action or actions to recover past or future response costs at the UCR site.

20. This Court retains jurisdiction to consider assessment of reasonable attorney fees, together with other past and future response costs, following entry of the final judgment in *Phase I* holding Teck liable under CERCLA, 42 U.S.C. § 9607(a)(3).

21. The following questions are not at issue in Phase I and this Court makes no finding of fact or conclusion of law regarding the following: (a) whether a release or threatened release of hazardous substances to the environment has occurred as a result of aerial emissions from the Trail smelter; (b) the extent to which any party has incurred response costs, if any, as the result of a release or threatened release of hazardous substances; (c) whether any response costs above $1.00 incurred by any party are consistent or not inconsistent with the National Contingency Plan; and (d) whether any release or threatened release has caused damages or injury to, destruction of, or loss of natural resources.

IV. RULE 54(b) CERTIFICATION

Pursuant to Fed. R. Civ. P. 54(b), the court directs the District Executive to enter a final judgment pursuant to these Findings Of Fact and Conclusions Of Law which declare that Teck is jointly and severally liable in any subsequent action or actions to recover past or future response costs under § 9607(a)(4)(A) at the UCR site. This will allow for a prompt appeal of this award of declaratory relief. There is no just reason for delay because Phase I of this litigation regarding liability for response costs is now concluded. Phase II will concern liability for natural resource damages. Efficiency is best served by full appellate resolution of response cost liability,

including the availability of the divisibility/apportionment defense, before commencement of *Phase II* litigation.

IT IS SO ORDERED. The District Court Executive is directed to enter these Findings of Fact and Conclusions of Law, enter judgment accordingly, and forward copies of the same to counsel of record.

APPENDIX E

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT WASHINGTON

No. CV-04-256-LRD

Signed August 12, 2016

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

Plaintiffs,

and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Defendant.

PHASE II FINDINGS OF FACT AND CONCLUSIONS OF LAW

LONNY R. SUKO, Senior U.S. District Court Judge

I. Background

1. In Phase I of this case, the Court determined that pursuant to the Comprehensive Environmental Response and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(4)(A), Teck Metals Ltd., f/k/a Teck Cominco Metals, Ltd. (Teck), is liable to the Confederated Tribes of the Colville Reservation (the Tribes) and the State of Washington (the State) in any subsequent action or actions to recover past or future response costs. ECF No. 1955, p. 43.

2. The Court also determined that Teck is liable as an "arranger" under CERCLA, 42 U.S.C. § 9607(a)(3), and that the Tribes and State each incurred response costs which were necessary and not inconsistent with the National Contingency Plan (NCP). ECF No. 1955, p. 2.

3. In its Phase I Findings of Fact and Conclusions of Law, the Court determined that it had subject matter and personal jurisdiction and that venue was proper in this court. ECF No. 1955. That determination is incorporated herein.

II. Findings of Fact

A. History of Tribes' Efforts to Evaluate and Cause Cleanup of Hazardous Substances Disposed of in the Upper Columbia River.

4. The Tribes is a sovereign Indian Tribe whose government is recognized by the United States. The Tribes' Reservation borders the Upper Columbia River (UCR) Site, and includes a portion of the river bed. The Tribes also has reserved rights to off-Reservation resources located in the northern reach of the UCR and adjacent uplands. ECF No. 2345, Written Testimony of Passmore at ¶ 2.

5. In 1999, the Tribes petitioned the federal government pursuant to 42 U.S.C. § 9605(d) of CERCLA to "conduct a preliminary assessment of potential hazards to public health and the environment associated with the release or threatened release of hazardous substances in the Upper Columbia River Basin from the Canadian border southward through Lake Roosevelt, to the Grand Coulee Dam (UCR site)." ECF No. 2345, Passmore Written Testimony, ¶ 2; ECF No. 2309, Joint Pretrial Order at 2. EPA completed preliminary assessments as of January, 2001. Exh. 5040, p. 2.

6. In 2001, the Tribes entered into an agreement with the U.S. Environmental Protection Agency (EPA) regarding government-to-government coordination of a site investigation to be conducted at the UCR Site. Exh. 5040. The Tribes and EPA also executed Amendment 1 to that agreement. Exh. 5039. Among other things, that amendment recognized the Tribes as "the appropriate non-federal party for making decisions and carrying out program responsibilities affecting the Reservation, the Reservation Environment and health and welfare of the Reservation Populace." It also provided the Tribes an important role in conducting site investigations under CERCLA, including, *inter alia*, work on "reconnaissance and sampling visits," scoping and sampling strategy development, reviewing and commenting on draft sampling and quality assurance plans, and reviewing and commenting on draft Site Investigation reports. Exh. 5040 at pp. 2-3. Gary Passmore testified that the Tribes had in fact participated in this

preliminary assessment work. Passmore Trial Testimony ("TT"), ECF No. 2368, at 115:9-12.

7. With this assistance from the Tribes, and based on its preliminary assessment, EPA determined that further action was warranted. In 2003, EPA issued a Unilateral Administrative Order (UAO) to Teck pursuant to 42 U.S.C. § 9606 of CERCLA "directing Teck to perform a Remedial Investigation and Feasibility Study (RI/FS) for the UCR site pursuant to an attached Statement of Work." ECF No. 2309, Joint Pretrial Order at 2; Exh. 7020, p. 2. The UAO contained EPA's findings that Teck had deposited hazardous substances at the UCR Site leading to release or threatened release into the environment sufficient to establish CERCLA liability. Exh. 7020 at pp. 3-7. Passmore TT at 118-119. Teck refused to comply, arguing that as it discharged its wastes in Trail, B.C., it was not subject to United States environmental law. See Edwards TT, ECF No. 2370, at 441-44; Exh, 7279. Teck rejected application of U.S. environmental law then and it continues to hold that view to the present day. Edwards TT at 443:10-11; 443:21-444:18. EPA did not commence an action to compel Teck to comply with the UAO and its RI/FS requirements. Passmore Written Testimony, ECF No. 2345, ¶ 4.

B. Tribes Fund Suit to Force Teck to Comply With UAO.

8. In 2004, the Chairman of the Tribes' Business Council, Joseph A. Pakootas, and the Chair of its Natural Resources Committee, Donald R. Michel, brought a citizen suit pursuant to 42 U.S.C. § 9659(d)(1) to enforce the UAO against Teck. This suit was funded by the Tribes. Joint Pretrial Order

at 8; Passmore Written Testimony, ECF No. 2345, ¶ 4.

9. Teck moved to dismiss the citizen suit, denying that it was subject to CERCLA because it discharged its wastes in Canada. ECF No. 2309, Joint Pretrial Order at 3. This court denied Teck's motion to dismiss, finding that CERCLA applied to Teck's UCR disposals alleged in this suit. *Id.* Teck appealed this decision and lost in the court of appeals, *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006), *cert. denied*, 522 U.S. 1095 (*Pakootas I*). Teck sought *en banc* review (ECF Nos. 115, 133) and ultimately a writ of certiorari from the Supreme Court. These efforts failed, and the outcome was that CERCLA was determined to apply to Plaintiffs' allegations that Teck disposed of its hazardous substances at the UCR site. *Pakootas I*, 452 F.3d at 1082.

10. In June 2006, during pendency of the appeal, Teck's U.S. subsidiary, Teck American, Inc. ("TCAI"), and EPA executed a Settlement Agreement providing for a remedial investigation and feasibility study patterned after CERCLA. RI/FS Agreement, Exhibit 7112; ¶¶ 3, 6.[1] In this agreement, Teck denied that it had liability under CERCLA. *Id.* at ¶ 2. The RI/FS Agreement provided that EPA would withdraw its UAO, but expressly stated that the agreement did not release any claim the United States or any "entity other than a Party" may have against TCAI [or Teck]." Exhibit 7112, ¶ 70. Thus,

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[1] Teck acknowledges this RI/FS Agreement is "not considered to be part of CERCLA." Edwards TT at 447:23-24.

Teck's CERCLA liability remained an issue for adjudication.

11. Pursuant to the Settlement Agreement, Teck agreed to fund and conduct the RI/FS under EPA oversight consistent with the National Contingency Plan (NCP) and EPA guidance, and to fund participation of the Department of the Interior, State of Washington, Colville Tribes and Spokane Tribes in the same. Exh. 7112, XIII. Costs; ECF No. 2222 at ¶¶ 73-76 (K. McCaig) (TCAI has funded RI/FS costs in excess of $74 million as of September 2015, including participation costs for the Colville Tribes and others). EPA is the Lead Agency for the RI/FS at the UCR Site. Passmore TT 115:9-10; ECF No. 2222 at ¶23 (K. McCaig).

12. Upon entry into the Settlement Agreement, EPA withdrew the UAO. Exh. 7019 (EPA letter confirming withdrawal of the UAO); ECF No. 2280 at 18 (Passmore Dep. at 51:2-4).

13. The RI/FS Agreement provided that TCAI would conduct an RI/FS at the UCR Site that, "while not carried out under an administrative or judicial order issued pursuant to the provisions of CERCLA, will be consistent with the [NCP]." Exh. 7112, ¶ 3. The RI/FS Agreement obligated TCAI to "perform a RI/FS for the Site as outlined in the Statement of Work ('SOW')." Exh. 7112, ¶ 3. Although the RI/FS Agreement provided that EPA would withdraw its UAO, Teck continued with its appeal of this court's decision denying its motion to dismiss the UAO enforcement action, and specifically told the Ninth Circuit that the appeal was not moot. Passmore Written Testimony, ECF 2345, at ¶ 6; Exh. 7019; *Pakootas I*, 452 F.3d at 1071-1072, at n. 10.

C. Tribes and State Sue to Determine Teck's Liability for Investigation and Cleanup Under CERCLA (Phase I).

14. In 2008, the State and Tribes filed Second Amended Complaints alleging Teck's liability under CERCLA and seeking declaratory relief establishing its responsibility for their response costs. Exh. 7032, Tribes' Second Amended Complaint. In defense of this litigation, Teck persisted in its claim that it was not subject to U.S. environmental law. In answer to the Second Amended Complaints filed by the State and the Tribes, Teck denied that its slag and effluent had released hazardous substances to the UCR environment. *See* Exh. 7032 at ¶ 4.3, and Exh. 5176, Teck's Answer to Second Amended Complaint, at ¶¶ 16-17; see also Teck's Memorandum of Law in Support of Motion to Stay, ECF No. 211, at 14 ("Teck Cominco's position is that its slag is not a hazardous substance."). In addition, Teck denied that it was a liable party under § 9607(a) of CERCLA. *See* Exh. 7032 at ¶¶ 6.1-6.3, and Exh. 5176 at ¶¶ 48-50. As well, Teck asserted a defense of apportionment/divisibility, arguing that all or virtually all of the hazardous substances found in the UCR Site were deposited by others and it was financially responsible for only a miniscule amount. ECF No. 1127 at 22-25; ECF No. 1872 at 22-28.

15. Teck then moved for stay of all proceedings pending completion of the RI/FS it was performing under agreement with EPA. ECF Nos. 210, 211. It argued that litigation was unnecessary as the ongoing RI/FS would adequately address conditions at the Site. ECF No. 211 at 15. EPA rejected Teck's claim in a letter to Teck in which it stated that it

would "welcome expeditious resolution of the liability portion of the litigation so that the parties can focus more clearly on studies that will lead to the cleanup plan for the Site, and so that cleanup is not delayed by litigation when the RI/FS is completed." Exh. 5139 at 2. The Court noted EPA's view and denied Teck's motion for stay and issued a scheduling order that provided for trial of the declaratory relief claim. *See* Order Denying Defendant's Motion to Stay, Exh. 5151.

D. Tribes' Evaluation of Presence of Hazardous Materials in the UCR Site.

16. Beginning in 2009, the Tribes' consultant, Environment International (EI), designed and implemented studies of UCR sediment and pore water. Fraser Written Testimony, ECF No. 2321, ¶ 2. This included sampling and quality assurance plans, work plans and other documents that documented the investigation and assured its quality. Fraser TT, ECF No. 2368, at 139-140, 197. EI collected multiple core samples of Columbia River sediments within the UCR Site, and also collected pore water samples from the UCR Site for analysis, all intended to collect "validated empirical data" that was ultimately provided to EPA and used to identify and fingerprint hazardous substances found in the UCR Site. Fraser Written Testimony, ECF No. 2321, ¶¶ 2-3, 15; Fraser TT 150, 156-157.

17. Once the sediment and pore water samples were collected, they were provided to labs for analysis of their metals concentrations, concentration of organic carbon, and their particle size profiles. Fraser Written Testimony, ECF No.2321, ¶ 4. The Tribes provided the data results of

these analyses to other independent experts to determine whether hazardous substances were present in the UCR Site and from where they originated. Fraser Written Testimony, ECF No. 2321, ¶ 6-7; Fraser TT, 187-190.

18. Dr. Dimitri Vlassopoulos, a geochemist, reviewed the data and results derived from these analyses, along with other available UCR Site data. Fraser Written Testimony, ECF No. 2321, ¶ 7; Exhibit 5053, pp. 76, 80. Dr. Vlassopoulos determined that slag located in the UCR Site possessed a unique lead isotope "fingerprint," which matched that of slag produced by the Trail Smelter. Fraser Written Testimony, ECF No. 2321, ¶ 7-9. Dr. Vlassopoulos also analyzed pore water samples collected by EI to identify hazardous substances released in UCR sediments. Fraser Written Testimony, ECF No. 2321, ¶ 9. This analysis demonstrated Teck was responsible for the presence of slag and effluent containing hazardous substances in the UCR Site. Fraser Written Testimony, ECF No. 2321, ¶ 7-9; Exh. 5053, pp. 7-8. Dr. Vlassopoulos' opinions relied on data analyzed by independent labs, including work done by Bruce Nelson at the University of Washington. Fraser Written Testimony, ECF No. 2321, ¶ 4, 6-7, 9.

19. The Tribes funded expert analysis from Dr. Paul Queneau of the quantities and characteristics of the slag and effluent discharged from Teck's Trail Smelter. Exhs. 5146, 7256, 7260. His analysis quantified the outputs from Teck's Trail Smelter, as well as providing information on ore used by the smelter necessary for isotope analysis employed to fingerprint the source of hazardous

substances in the UCR Site. Fraser Written Testimony, ECF No. 2321, ¶ 14; *See also* Vlassopoulos reports, Exh. 5053 at pp. 9-12, 24, and Exh. 7265 at pp. 19, 56.

20. The Tribes also retained experts to determine the movement of Teck's slag and effluent within the Columbia River. In April 2010, the Tribes' hydrology expert, Northwest Hydraulic Consultants (NHC), conducted extensive subsurface and shoreline sampling of sediments along 55 kilometers of the Canadian reach of the Columbia River. Fraser Written Testimony, ECF No. 2321, ¶ 10-11; Exh. 5055, pp. 4-5, 90. NHC analyzed samples to evaluate metals concentrations and particle size, which enabled it to determine the movement of slag to the United States border. Fraser Written Testimony, ECF No. 2321, ¶ 10-11; Exh. 5055, pp. 4-5, 90. The Tribes retained another expert, LimnoTech, to review available data and determine whether once slag crossed the border, it would have moved within the UCR Site. Fraser Written Testimony, ECF No. 2321, ¶ 11; Exh. 5056, pp. 17, 27. This led to a report from LimnoTech demonstrating that Teck's slag had moved into the UCR Site, as well as an extensive database used by other experts to locate the signal for Teck slag in the UCR. LimnoTech report, Exh. 5056 at pp. 17-37.

21. Dr. Vlassopoulos and Dr. Joseph Ryan also analyzed sediment and pore water samples to determine whether metals are released from Teck's slag and effluent under conditions comparable to those of the UCR Site. Fraser Written Testimony, ECF No. 2321, ¶ 12. Dr. Vlassopoulos' work demonstrated hazardous substances are released

from Teck's slag into the UCR environment. Fraser Written Testimony, ECF No. 2321, ¶ 12; Exh. 5053, ¶ 2.2. Dr. Ryan's analysis demonstrated effluent discharged by Teck into the UCR Site released mercury into the UCR environment. Fraser, ECF No. 2321, ¶ 13; Exh. 5054, pp. 3-4.

22. The Tribes' field investigations and laboratory analyses, taken together with expert scientific review of data derived from those analyses, demonstrated Teck's slag and effluent had moved into the UCR Site and had released hazardous substances to the environment. Passmore Written Testimony, ECF No. 2345 at ¶¶ 9-10, 12; Fraser Written Testimony, ECF No. 2321 at ¶¶ 2-14.

E. Tribes Presents Results of Scientific Investigation to EPA and Uses It to Prove Teck's Liability Under CERCLA.

23. In Phase I, the Tribes and State presented the results of their investigation of UCR Site conditions in the form of expert reports. Exhs. 5053-5056. These reports included copies of the coring and pore water studies funded by the Tribes and all of the materials the experts considered. Fraser TT, ECF No. 2368 at 190-191. The Tribes' expert reports, including the field investigation, were also presented to EPA in 2010. Fraser TT at 202-204. Presentation included the sampling and quality assurance plans used in collecting the information. Fraser TT at 196-97. This information will be valuable in future analysis of the fate and transport of hazardous substances in the UCR Site. It is kept in a SharePoint site and is eligible for inclusion in the Administrative Record that will be prepared at the end of the RI/FS. Fraser TT, ECF No. 2370, at 469-

470. It has also been used to guide and improve ongoing EPA RI/FS studies, Fraser TT at 471-472, and may be used to judge the nature and extent of contamination at the Site. Fraser TT at 472-473.

24. Teck identified its own expert witnesses who testified that while Teck's slag and effluent may have moved into the UCR Site, none of it released any hazardous substances to the environment. Riese Declaration, ECF No. 1626, p. 2, ¶ 6. Teck's expert, Dr. Riese, opined that "metals either were not leaching or being released from Teck barren slag, or simply were not measureable." ECF No. 1131-1, at ¶ 7. Dr. Johns further claimed that all of Teck's effluent had passed through the river system and has not come to be located in the sediment of the UCR where it could release [hazardous] metals." ECF No. 1140-1, at ¶ 17. As a result, Dr. Johns apportioned zero percent of the harm in the UCR Site to Teck's slag and effluent. ECF No. 1140-1, at ¶¶ 16-17. Had the opinions of Drs. Riese and Johns prevailed, it would have resulted in several – not joint and several – liability for Teck between zero and 0.05% of cleanup costs. *See* Exh. 5162, pp. 7-8.

25. This clash of expert witnesses regarding the presence of Teck's slag and effluent in the UCR Site and release to the environment became the subject of protracted litigation, including depositions and motion practice. Summaries of this litigation are presented in Exhs. 5136-5138.

26. The State and the Tribes answered Teck's liability and divisibility experts with rebuttal reports from its existing experts, Drs. Vlassopoulos, Queneau, Bierman and McLean, and new experts, Drs. Hennet, Kendall, Blum, Haney, Kern, Medine

and Stevens, retained to address Teck's divisibility defense. Their opinions are reported in Exhs. 5053-5056, 7257-7267.

27. The State and the Tribes moved for summary judgment dismissal of Teck's affirmative defense of apportionment/divisibility and this court granted that motion. ECF No. 1340. As a result, and as stated in this court's subsequent Findings of Fact and Conclusions of Law, ECF No. 1955, Teck was found to be jointly and severally liable under CERCLA.

28. The costs of investigation and evaluation of Site conditions and rebuttal of Teck's divisibility affirmative defense totaled $3,483,635.90. Exh. 5110. Summaries supporting this exhibit are found at Exhs. 5029-5031.

29. One month before trial, Teck stipulated that the UCR Site was a facility, that it deposited 9.97 million tons of slag in the UCR Site (ECF No. 1955 at 5, ¶ 5) and 132,000 tons of hazardous substances in effluent, and those deposits resulted in releases to the environment—the elements of CERCLA liability. (*Id.* at 6, ¶ 8.) Teck also stipulated that the Tribes and State had each incurred at least one dollar of response costs. ECF No. 1407, ¶ 2; ECF No. 1955, at p. 24. Teck refused to stipulate to personal jurisdiction and that issue was tried to the court.

F. The Tribes Proved that Teck's Disposals in the UCR Established Personal Jurisdictions Necessary for Enforcement in this Court.

30. Proof of personal jurisdiction required evidence of Teck's knowledge of foreseeable injury in

the U.S. resulting from its discharges of wastes at its Trail Smelter. Teck steadfastly denied knowledge of the fate of its discharges. In the Phase II trial, Mark Edwards, Teck's Manager of Environment Health and Safety for Trail Operations—a member of Teck's three person UCR team—reaffirmed to this Court his testimony that he "did not know the fate of slag released from Trail operations." Edwards TT, ECF No. 2370, at 453: 11-19. Thus, the State and Tribes engaged in extensive document production and located evidence contradicting Teck's denials. This work yielded key evidence, including the statement of Teck's Environmental Control Manager, Graham Kenyon, in 2003, that Teck had used Lake Roosevelt as a free disposal site for its wastes. Findings of Facts and Conclusions of Law, ECF No. 1955 at pg. 13, ¶ 22; see generally Findings of Fact and Conclusions of Law, ECF No. 1955, ¶¶ 5-39.

31. Plaintiffs prevailed and this court entered Findings of Fact and Conclusions of Law finding Teck is a covered person under CERCLA and that it is liable to the Tribes and State for their response costs. ECF No. 1955. This adjudication that Teck was jointly and severally liable under CERCLA will require Teck to participate in any EPA required cleanup at the Site. Such a cleanup will minimize or mitigate any damage to the environment resulting from deposit of hazardous substances to the UCR Site.

G. After Court Determines Teck is Liable Under CERCLA, Teck Agrees to First Cleanup Under CERCLA.

32. In 2015, EPA engaged in discussions with Teck regarding the need for removal action on

properties in the UCR Site with excessive lead levels. Supplemental Sworn Declaration of Bailey at 2, ECF No. 2362. This would include soil sampling and removal from private property and tribal allotments located within the UCR Site. By letter of June 16, 2015, Exh. 5186, EPA requested that Teck "enter into a CERCLA agreement with the EPA for the performance of the removal action." EPA advised of its hope to reach agreement with Teck on removal action in order to avoid the need to take "an enforcement action against Teck." *Id.*

33. On August 10, 2015, Teck and EPA executed an Administrative Settlement Agreement and Order on Consent For Removal Action, Docket No. CERCLA-10-2015-0140 (AOC), Exh. 5177. It provides, *inter alia*, that "EPA is entering into this Settlement Agreement pursuant to its authority vested in the President of the United States by Sections 104, 106, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980," and includes EPA's findings of fact and conclusions of law determining that Teck is a responsible party under CERCLA and jointly and severally liable for the response action and response costs that are the subject of the agreed removal action.

34. The form of the AOC—expressly issued under CERCLA—contrasts with the RI/FS Agreement, Exh. 7112, entered into in 2006 before the liability finding in this case. It was a private agreement and expressly excluded application of CERCLA: "The Parties intend that this RI/FS process, while not carried out under an administrative or judicial order issued pursuant to the provisions of CERCLA ...."

H. Tribes Accounting of Response Costs.

35. Teck has stipulated that the Tribes' claimed response costs totaling $8,253,676.65 were accurately calculated, ECF No. 2363, and has withdrawn its defense of NCP non-compliance based on the accurate accounting requirement. *Id.* at 3. Thus, disputes over accurate accounting as required by the NCP are no longer before the court.

I. Computation of Tribes' Costs.

36. The Tribes' response costs include costs of assessment and evaluation of hazardous substances in the UCR Site and identification of Teck as a responsible party, as well as expert and legal fees incurred in proving Teck's liability under CERCLA. The Tribes has disclosed its response costs claim in Fed. R. Civ. P. 26(a)(1) disclosures. Exhs. 5034, 5035, 5184, 7113-7117, 7121-7123. These disclosures compile the costs for which the Tribes claim recovery. They include invoices (including descriptions of work performed) from, and payments to, its environmental consultant, testifying experts, other non-testifying experts, vendors, and attorneys. They were also provided to Teck. The Tribes' current—11th Disclosure—is Exh. 5184. This disclosure is reformatted as summaries in Exhs. 5027-5033. The evidence of costs and payments on which that disclosure and summaries thereof are based is compiled in Exhs. 5001-5026.

37. The Tribes incurred $8,253,676.65 in past response costs through 2013. The Tribes' collection and data analysis of UCR sediment cores and pore water totaled $589,907.77. Exh. 5110. The Tribes' total cost of investigating, evaluating and assessing

the source of hazardous substances at the UCR Site was $3,483,635.90. Exh. 5110. This figure includes the Tribes' testifying experts, non-testifying experts and qualifying vendors.

38. Broken down into constituent categories, response cost subtotals are as follows: (a) Employee Labor and Travel ($20,567.09); (b) Testifying Experts ($1,785,973.61); (c) Consulting Expert and Investigation Services ($1,219,237.87); (d) Other Non-Testifying Experts/Consultants ($278,233.52); (e) Vendors ($465,046.92); (f) Attorney's Fees ($5,032,410.35); and (g) Miscellaneous Costs ($179,755.81).[2] Exhs. 5027-33, 5184.

39. As described above, these response costs include expenditures for investigation and evaluation of hazardous substances in the UCR Site. Exh. 5110 compiles these costs as provided below:

Collection of Cores and Porewater at UCR Site and Data Analysis[3]	
Expert / Consulting Expert	**Amount**
Dimitri Vlassopoulos	$38,991.60
Northwest Hydraulic Consultants, Ltd	220,018.34
Environment International, Ltd.	330,897.83
TOTAL	**$589,907.77**

[2] For whatever reason, the total of these figures is $8,981.225.17. The figures in Exh. 5184 do, however, total $8,253,676.65.

[3] Through 2013, not including air pathway work.

Total Cost for Investigation, Evaluation and Assessment of Source of Hazardous Substances at UCR Site[4]	
Testifying Experts	$1,785,973.62
Non-testifying Experts	$1,567,934.37
Qualifying Vendors	
Fremont Analytical: $49,423.75	
TEG Oceanographic Services: $80,274.00	
University of Washington Lab: $30.16	$129,727.91
TOTAL	**$3,483,635.90**

40. The Tribes has withdrawn the following non-testifying expert costs:

AECOM	**$39,155.88**
Jim Ebert	**$39,994.24**
Jim Thomas	**$112.50**
Stan Church	**$22,832.04**
TOTAL COSTS WITHDRAWN	**$102,094.66**

41. The Tribes retained Short Cressman & Burgess ("SCB") to provide legal services related to addressing the contamination in the UCR Site. This includes, without limitation: (1) the Tribes' 1999

[4] Through 2013, not including air pathway work

petition to EPA for assessment of hazardous substance contamination along the Columbia River extending 150 river miles from the United States-Canadian border; (2) preparation and litigation of the 2004 citizen suit filed by Joseph Pakootas and D.R. Michel and funded by the Tribes, seeking enforcement of the 2003 UAO issued by the EPA against Teck, including appellate review in the Ninth Circuit and Supreme Court; (3) preparation and litigation of the amended complaint seeking declaratory relief, cost recovery and natural resource damages filed by the Tribes in 2005; and (4) preparation and litigation of the Second Amended Complaint filed in 2008 which culminated in Findings of Fact and Conclusions of Law from this court establishing that Teck is a liable party under CERCLA, and that the Tribes are entitled to recover past and future response costs. Sinha Written Testimony, ECF Nos. 2218 and 2253. SCB's rates are reasonable and consistent with prevailing rates in the community. *Id.* The amounts charged by SCB were also reasonable. *Id.*

42. Teck does not contest the reasonableness of the rates charged or the time expended by the Tribes' counsel. Joint Pretrial Order at 15, ¶ 27.

43. The Tribes' claim for attorneys' fees and costs may be reduced to three discrete categories. Exh. 5109 compiles those costs as shown below:

Tribes' Attorneys' Fees and Costs Claim[5]	
Time Period	**Amount**
Request for EPA Action through Judgment on UAO Enforcement[6]	$427,996.92
Phase I Declaratory Relief Action	$3,663,900.02
Phase II through December 2013	$411,699.18
Total	**$4,503,596.12**

44. The first category includes fees incurred before the Phase I litigation attempting to persuade EPA to take action addressing hazardous substances at the Site. The remainder were incurred attempting to move forward with EPA-directed investigation and cleanup at the Site. The second category corresponds to fees incurred during Phase I of trial. These fees were incurred exclusively proving Teck's liability and refuting its divisibility defense.

45. The third category compiles costs incurred in Phase II proving the Tribes' recoverable response costs. These fees were incurred compiling and disclosing the Tribes' response cost claim to Teck,[7]

[5] Not including air pathway work.

[6] Based on the Court's summary judgment ruling (ECF No. 2288), fees incurred in relation to the UAO enforcement action have been removed from the claimed amount.

[7] *See, e.g.*, Exh. 5014 at p.115 (December 16, 2013 invoice for "Redact G. Passmore's 2013 timesheets and organize set to produce").

and defending against Teck's motion practice and depositions challenging recoverability of these sums.[8]

46. The work related to the Tribes' response at the UCR Site performed by SCB and the consultants, expert witnesses, and vendors, and the amounts charged for that work, is described in detail in Exhs. 5003-5007, 5012-5014, 5016 and 5020.

47. The Tribes' Second Amended Complaint demanded prejudgment interest. ECF No. 148 at p. 14, ¶ 4. As of the start of trial, the amount of interest claimed on the Tribes' response costs was $294,694.00. ECF No. 2363, ¶ 1.

III. Conclusions of Law

A. Subject Matter Jurisdiction and Venue.

1. The Court has previously determined that it has jurisdiction over this matter and that venue is proper in this district. See Findings of Fact and Conclusions of Law, ECF No. 1955 at p. 25.

2. This Court has previously determined that the Tribes is entitled to recover its past and future response costs at the UCR Site, pursuant to 42 U.S.C. § 9607(a)(4)(A). ECF No. 1955 at p. 43, ¶ 19.

3. This Court has previously determined that it has personal jurisdiction over Teck. Findings of Fact and Conclusions of Law, ECF No. 1955 at pp. 25-44.

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[8] *See, e.g.*, Exh. 5014 at p. 118 (December 30, 2013 invoice for "Work on response to motion to compel and cross motion").

B. Based on This Court's Determination of Teck's Liability for Response Costs Under Section 9607(a), the Burden of Proof Shifts to Defendant to Demonstrate that the Tribes' Costs are Inconsistent with the National Contingency Plan (NCP). *United States v. Chapman*, 146 F.3d 1166, 1170 (9th Cir. 1988).

4. Having established liability under § 9607(a)(4)(A), the Tribes need not prove that its response costs were "necessary" or "consistent" with the NCP. The Tribes is required to prove its response costs are within the CERCLA definition of those terms and then the burden of proof shifts to Teck to prove any affirmative defenses of NCP noncompliance. *United States v. Chapman*, 146 F.3d 1166, 1170 (9th Cir. 1998). Teck originally interposed an affirmative defense of NCP noncompliance based on the accurate accounting requirements of the NCP. Teck has since withdrawn that defense and agreed that the Tribes has met any burden it has to prove accurate accounting, Stipulation Regarding Costs Claimed By Plaintiff the Confederated Tribes of the Colville Reservation—Phase II, ECF No. 2363. Teck has asserted other NCP noncompliance affirmative defenses which are discussed below.

C. The Actions for Which the Tribes Seeks Response Costs Meet the Definition of "Removal" Action Or Are "Enforcement Activities" Related To "Removal" Action and therefore, are Recoverable.

5. The Tribes' claim arises under 42 U.S.C. § 9607(a)(4)(A) which provides that a responsible

party is liable for "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." Governments have "very broad cost recovery rights," Chapman, 146 F.3d at 1174, *citing U.S. v. Northeastern Pharmacy & Chemical Co.*, 579 F. Supp. 823, 850 (W.D. Mo. 1984) (*NEPACCO*). Such rights include the recovery of "attorney's fees" as part of a § 9607(a) claim for "all costs of removal or remedial action." *Id.* Recoverable costs also include "costs of investigating, testing, sampling, and analyzing hazardous substances to determine whether a disposal and release has occurred." *NEPACCO*, 579 F. Supp. at 850.

6. 42 U.S.C. § 9601(25) of CERCLA provides that "[t]he terms 'respond' or 'response' means (sic) remove, removal, remedy and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."

7. CERCLA further provides at § 9601(23) that the "[t]erms 'remove' or 'removal' means (sic) ... such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances," as well as "such other actions as may be necessary to minimize or mitigate damage to the public health or welfare."

8. The Tribes' response actions originated with its 1999 petition to the EPA pursuant to § 9605 of CERCLA seeking an assessment of hazardous substances contamination along the Columbia River extending 150 river miles from the United States-Canadian border. This petition was accepted and

EPA advised the Tribes that it intended to involve it throughout the process. The Tribes' response activities continued under agreement with EPA to participate in site sampling activities and advance the interests of the Tribes' members in connection with remediation of the UCR Site. The 1999 petition was "enforcement activity" by the Tribes related to "removal" action in which the Tribes participated.

9. After EPA withdrew its UAO, the Tribes commenced scientific investigation and evaluation of the presence of hazardous substances in the UCR Site, proving that Teck's disposal of hazardous substances at the UCR Site made it a liable party under CERCLA. This investigation and successful litigation led to a determination by this court that Teck is jointly and severally liable for any cleanup of the UCR Site under CERCLA, and any subsequent agreement with EPA to engage in cleanup activities is an agreement governed by CERCLA.

10. Teck has stipulated that the Tribes has incurred response costs at the Site. ECF No. 1407; See Phase I Findings of Fact and Conclusions of Law at p. 24, ECF No. 1955.

11. This court has previously ruled that the Tribes' funding of the citizen suit to enforce the UAO is not recoverable as response costs. (See ECF No. 2288 at pgs. 20-21). This is because the UAO enforcement action was not the Tribes' "enforcement activity," but the "enforcement activity" of Pakootas and Michel.

12. 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.

13. The Tribes' investigative work 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). The Tribes' experts and consultants investigated the presence and movement of hazardous substances in the UCR Site, used sophisticated technology to "fingerprint" slag present in the UCR Site and identify its source as the Trail Smelter, and tested whether contaminants are released from Teck's slag into the environment via leaching. Those actions assessed and evaluated releases of hazardous substances, thereby proving Teck's liability. They are therefore, "removal" actions.

14. The Tribes' costs of investigation and expert analysis are costs of "removal" as defined in § 9601(23) and these amounts total $3,394,194.43.[9]

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[9] Included in this figure are the amounts for Testifying Experts ($1,785,973.61), for Environment International, Ltd. ($1,219,237.87), for Other Non-Testifying Experts/Consultants ($259,255.04), and for $129,727.91 of the total amount listed for Vendors ($465,046.92). (Exh. 5184). $129,727.91 represents the amount the Tribes paid to "qualifying vendors" who participated in the investigation, evaluation and assessment of the source of hazardous substances at the UCR Site: Fremont Analytical, TEG Oceanographic Services and University of Washington Lab. (Exh. 5110).

The Tribes is entitled to recover this amount as response costs under § 9607(a)(4)(A).

15. The Tribes' legal fees and other litigation costs are for "enforcement activities" related to the Tribes' costs of "removal" and therefore, recoverable under § 9601(25). These amounts total $4,859,482.22.[10] The Tribes is entitled to recover these costs as response costs under § 9607(a)(4)(A).

16. The Tribes is statutorily authorized to recover enforcement costs, including attorneys' fees. § 9607(a)(4)(A) authorizes sovereign governments including the United States Government, States, and Indian tribes to recover "all costs of removal or remedial action incurred." § 9601(25) of CERCLA makes clear that the terms "removal" and "remedial action" include enforcement activities related thereto. (See "Order Re Reconsideration," ECF No. 2392, and "Order Denying Motion For Reconsideration," ECF No. 2409, explaining court's conclusion that the Tribes, as a sovereign entity, is statutorily authorized, unlike private parties, to recover enforcement costs, including attorneys' fees and litigation costs).

17. The Tribes' response costs were incurred investigating site conditions and proving its claim against Teck for declaratory relief regarding cost recovery under CERCLA. ECF No. 1955. Proof of

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[10] Included in this figure are the amounts for Tribes' Attorneys' Fees ($4,393,260.99), Miscellaneous Costs ($110,335.13), and Employee Labor and Travel ($20,567.09). (Exhs. 5184). The latter two categories have been treated as litigation costs for "enforcement activities" related to "removal" action.

"removal" or "remedial" expense is a prerequisite of such a claim and this court found that the Tribes (and State) incurred "removal" or "remedial" costs as a part of its Phase I Findings of Fact and Conclusions of Law finding Teck liable for past and future response costs under CERCLA. The court's findings were based on Teck's stipulation to one dollar of response costs, but by the time of trial, the Tribes had incurred more than three million dollars in costs of investigation and evaluation of site conditions which fit within the CERCLA definition of "removal." Additionally, the Tribes had engaged in response actions seeking and participating in site investigation and assessment since its 1999 petition to EPA for a site evaluation.

18. Case law on CERCLA declaratory relief actions demonstrates that declaratory relief is commonplace in this circumstance. "[S]o long as there has been a release of hazardous substances, and the plaintiff spends some money responding to it, a claim for declaratory relief is ripe for review." *City of Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1004-05 (9th Cir. 2010); *see also Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 668 n.4 (9th Cir. 2004) (explaining that, in a § 9607(a)(4)(A) action, "[a]s soon as [the plaintiff-State] expended its first dollar, it could have sued [the defendant] for this dollar and sought a declaratory judgment of [defendant's] liability for future response costs").

19. The Tribes need only have incurred expense responding at the UCR Site—regardless of its recoverability—before bringing this action to establish Teck's liability for past and future response

costs. *City of Colton v. American Promotional Events*, 614 F. 3d 998 (9th Cir. 2010) (no requirement that a party incur *recoverable* response costs before its claim is ripe); *see also In re Dant & Russell, Inc.*, 951 F. 2d 246 (9th Cir. 1991), and *Wicklund Oil Terminals v. Asarco, Inc.*, 792 F. 2d 887 (9th Cir. 1986). The Tribes nominally satisfied this requirement by expending $1 in response costs as stipulated by the parties, but it substantively met its burden by taking various pre-litigation response actions. The costs of bringing this action to establish Teck's liability relate to such pre-litigation response actions and are therefore recoverable enforcement costs.

20. Although the Tribes' pre-litigation response costs ultimately proved unrecoverable,[11] 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.

21. The Tribes undertook pre-litigation response action to which its enforcement activities relate, in addition to the scientific response work it performed

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[11] Tribes' pre-litigation response activities were funded with grants and recovery thereof would result in double recovery inconsistent with the NCP. The Tribes' therefore removed all grant-funded costs from its claim by the time of trial.

during pendency of litigation to which its enforcement action also relates. The Tribes' 1999 petition to EPA prompted the agency to investigate the UCR Site and was therefore necessary to "monitor, assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23). In addition, the Tribes worked alongside EPA on the preliminary assessment, including influencing development of sampling and quality assurance plans, physically conducting Site sampling with EPA, and ultimately influencing the Site Investigation report that concluded a problem existed and that further CERCLA action was warranted. Exh. 5039 at p. 2-4; Exh. 5040 at p. 2-4; Passmore TT, ECF No. 2368, at 115:9-12.

22. As a result of the Preliminary Assessment, EPA issued a UAO to Teck in 2003 ordering it to address Site contamination. The UAO concluded that the "RI/FS required by this Order is necessary to abate an imminent and substantial endangerment because of an action or threatened release of hazardous substances from the Site and protect the public health or welfare or the environment ... and will expedite effective remedial action." Exh. 7020, p. 7.

23. The Tribes' § 9607(a)(4)(A) cost recovery action therefore "relates to" these pre-litigation response activities. 42 U.S.C. § 9601(25). Accordingly, attorneys' fees and litigation costs incurred in this cost recovery action are recoverable under 42 U.S.C. § 9607(a)(4)(A).

24. The Tribes' § 9607(a)(4)(A) cost recovery action constitutes "enforcement activity" related to "removal" actions consisting of the 1999 Preliminary

Assessment and the investigation and evaluation by the Tribes' experts during the course of this cost recovery action as to whether Teck's slag and effluent were releasing or threatening to release hazardous substances in the UCR Site. Those "removal" actions were "necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances" and "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."

D. The Tribes' Attorneys' Fees and Costs are Reasonable.

25. The Tribes' claim for attorneys' fees and costs is subject to the reasonableness requirements of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *Chapman*, 146 F. 3d at 1176. "The most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Multiplying the number of hours reasonably expended by the reasonable hourly rate yields the "lodestar" figure. *Carter v. Caleb Brett LLC*, 757 F.3d 866, 868 (9th Cir. 2014).

26. Teck does not challenge the reasonableness of hours worked or the hourly rates. ECF No. 2309 at p. 15, ¶ 27. The Tribes seeks to recover attorneys' fees invoiced to it by SCB based on hours worked at its reasonable hourly rates. The Tribes submitted attorney invoices documenting hours worked and rates charged by SCB, Exh. 5020, and testimony regarding their reasonableness, ECF Nos. 2218 and 2253. The lodestar in this case therefore totals $8,253,676.65. This amount and the rates charged

are reasonable. 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 to determine whether Teck's slag and effluent were releasing or threatening to release hazardous substances into the Site.

27. The Tribes' sustained and successful efforts to cause investigation and evaluation of hazardous substances in the UCR Site and prove Teck's joint and several responsibility to clean up such hazardous substances warrants recovery of attorneys' fees and costs incurred in that effort. Where a plaintiff wins the relief requested, it may not be challenged as being disproportionate to the recovery sought, provided the fees were reasonably incurred. *Hensley*, 461 U.S. at 440. Teck had the option of admitting liability from the beginning or at any point during the investigation, evaluation or litigation. Instead, as was its right, it resisted responsibility under CERCLA and litigated in support of its position, necessitating the Tribes to incur the attorneys' fees and costs sought herein. Under *Hensley*, all of the Tribes' fees and costs claimed herein are recoverable.

28. Teck has challenged various portions of the attorneys' fees and costs claimed, arguing that such legal work was not necessary to the outcome. The Ninth Circuit has explained that the general rule is "plaintiffs are to be compensated for attorneys' fees incurred for services that contribute to the ultimate victory in the lawsuit." *Cabrales v. Cnty. of Los Angeles*, 935 F.2d 1050, 1052 (9th Cir. 1991) (citing

Hensley). Losing parties cannot "scalpel out attorney's fees for every setback, no matter how temporary, regardless of its relationship to the ultimate disposition of the case." *Cabrales*, 935 F.2d at 1053. Applying these principles, Teck has not established that any of the costs sought by the Tribes were extrinsic or unrelated to the claims it pursued. To the contrary, the Tribes has established that the fees sought contributed to the ultimate victory in the lawsuit.

29. The Tribes may recover fees incurred successfully defending against Teck's sanctions motion. *Cabrales*, 935 F.2d at 1052. Teck forced the Tribes to incur these costs by filing the motion. Having lost, it cannot now complain about the costs the Tribes incurred. *Id.*

E. NCP Defenses.

30. Teck alleges two violations of the NCP: (1) failure to provide public notice of the Tribes' scientific work; and (2) failure to provide a Quality Assurance and Sampling Plan to EPA concerning its scientific work. Preliminarily, even if a response action is shown to be inconsistent with the NCP, "defendants have the burden of demonstrating that the [response activities], because of some variance of the Plan, resulted in demonstrable excess costs." *U.S. v. American Cyanamid Co.*, 786 F. Supp. 152, 161 (10th Cir. 1999). Teck has not proved that the Tribes incurred demonstrably excess costs because of either variance from the NCP that Teck alleges.

31. The NCP, promulgated by EPA as required by CERCLA, 42 U.S.C. § 9605, guides government response activities. *Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793,

799 (9th Cir. 1994) (WSDOT), citing *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 894 (5th Cir. 1993). NCP "provide[s] the organizational structure and procedures for preparing for and responding to ... releases of hazardous substances ...." 40 C.F.R. § 300.1. It "identifies methods for investigating the environmental and health problems resulting from a release or threatened release and criteria for determining the appropriate extent of response activities." *WSDOT*, 59 F.3d at 799, quoting *Bell*, 3 F.3d at 894. 42 U.S.C. § 9605(b), provides that "[t]he portion of such [National Contingency] Plan known as 'the National Hazardous Substance Response Plan' [40 C.F.R. §§ 300.400-440] shall ... provide procedures and standards for remedial actions undertaken pursuant to [CERCLA]."

32. Teck has failed to carry its burden of proving the Tribes' "removal" actions were inconsistent with the NCP. As the defendant in a § 9607(a)(4)(A) action, Teck bears the burden of proving the Tribes' actions were inconsistent with the NCP. *WSDOT*, 59 F.3d at 799-800. To carry its burden, Teck must prove the Tribes' response was arbitrary and capricious. *Chapman*, 146 F.3d at 1171. In WSDOT, the Ninth Circuit made clear that an affirmative showing of NCP inconsistency is required. That a party did not actively attempt to comply with NCP provisions does not preclude recovery. *WSDOT*, 59 F.3d at 802-03.

33. Every NCP provision cited by Teck provides that the "lead agency shall" undertake certain

action.[12] Teck has stated in multiple places that EPA is the Lead Agency at the UCR Site and the Tribes is not. The Tribes, in Teck's view, is a participating party. *See* ECF No. 2309, p. 13 ¶ 8; ECF No. 2222, ¶ 23-24. The NCP provisions Teck relies upon are therefore applicable to EPA—not the Tribes. As a result, the Tribes' actions cannot be inconsistent with these provisions because they do not govern the Tribes' actions.

34. The provisions cited by Teck, i.e. 40 C.F.R. § 330.430(b)(8), apply to work in furtherance of a remedial investigation and feasibility study. The Tribes was not leading or implementing an RI/FS. No NCP provision applies to scientific work in aid of enforcement action. It would make little sense to require public comment or EPA review of sampling plans as a condition to work supporting legal action. Such scientific work is tested in the litigation process.

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[12] *See* 40 C.F.R. § 300.415(n)(1) ("a spokesperson shall be designated by the **lead agency**"); 40 C.F.R. §§ 300.415(n)(2)-(4) ("the **lead agency** shall..."); 40 C.F.R. § 300.430(c)(1)-(3) ("the **lead agency** shall..."); 40 C.F.R. § 300.430(c)(4) ("the **lead agency** may"); 40 C.F.R. § 300.415(b)(4)(ii) ("If environmental samples are to be collected, the **lead agency** shall develop sampling and analysis plans ..."); 40 C.F.R. § 300.430(b) ("Specifically, the **lead agency** shall..."); 40 C.F.R. § 300.430(d)(1) ("The purpose of the [RI] is to collect data necessary to adequately characterize the site for the purpose of developing and evaluating effective remedial alternatives. To characterize the site, the **lead agency** shall..."); 40 C.F.R. § 300.430(d)(2) ("The **lead agency** shall...").

35. The Tribes did not act arbitrarily and capriciously regarding its scientific work. It prepared quality assurance and sampling plans and it provided all of its scientific work to EPA, making it available for public review. Fraser TT, ECF No. 2368 at 196:9-13; 197:17-19; ECF No. 2370 at 474:20-475:21. This is in substance what the rules required. Unlike the remedial work in question in the Ninth Circuit's *WSDOT* decision, which was a precursor and basis for remedial action, the scientific work at issue here had no impact warranting public or EPA review.

36. The relevant NCP provisions do not apply to scientific work performed as part of an action to enforce CERCLA liability against a recalcitrant party.

37. The existence of Teck's ongoing non-CERCLA RI/FS does not preclude the Tribes from recovering costs incurred investigating Site conditions to minimize or mitigate release. Teck misplaces its reliance on certain cases for the proposition that once EPA commences Site investigation, costs incurred in any other investigation may not be recovered. *See U.S. v. Hardage*, 750 F. Supp. 1460, 1514 (W.D. Okla. 1990); *Fallowfield Dev. Corp. v. Strunk*, 1991 U.S. Dist. LEXIS 1699 at *53-54 (E.D. Pa. 1991); *Louisiana-Pacific Corp. v. Beazer Materials & Serv., Inc.*, 811 F. Supp. 1421, 1423-25 (E.D. Cal. 1993). First, whereas these cases all involved CERCLA actions, the 2006 RI/FS Agreement is not undertaken pursuant to CERCLA. The logic that CERCLA effectively preempts all non-EPA site investigations has no bearing on a non-CERCLA action. Second, every case cited involves *private*

PRPs seeking to recover costs, and § 9607(a)(4)(B) limits private cost recovery to "necessary costs of response." Thus, where the government begins response investigations, any private investigation is not "necessary" and therefore, barred from cost recovery. *Fallowfield Dev. Corp.*, 1991 U.S. Dist. LEXIS 1699 at *53-54; *Louisiana-Pacific Corp.*, 811 F. Supp. at 1423-25 (once EPA began conducting its own investigation, the PRP investigation was "duplicative and thus unnecessary, and accordingly, not recoverable under 42 U.S.C. § 9607(a)(4)(B)"). CERCLA authorizes the Tribes, unlike private parties, to recover "all costs" and imposes no necessity requirement. No provision in CERCLA explicitly bars governments from recovering costs in parallel investigations, and no case has precluded a *government*—not private party—from recovering "all costs" incurred responding to a site. In fact, courts reject PRPs' claims that government costs are "duplicative, improper, excessive, and not cost effective." *U.S v. Kramer*, 913 F. Supp. 848, 862-64 (D.N.J. 1995). There is no limitation upon government cost recovery "other than the costs having to arise from removal or remedial actions that are not inconsistent with the NCP, and no reasonableness or necessity of individual costs is explicitly or implicitly required." *Id.* at 863. Furthermore, the Tribes' scientific work was provided to EPA for use in the RI/FS, and has been utilized to achieve greater results. Fraser TT, ECF No. 2370, at 471:6-472:5, 474:2-19. If anything, the Tribes' work supplemented, rather than duplicated, EPA's work.

38. "Removal" actions, because of their nature, are treated differently than "remedial" actions. *Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 934 (6th Cir. 2004). "[C]onsistency with the NCP is not required for recovery of monitoring and investigation costs." *Id.*, citing *Donahey v. Bogle*, 987 F.2d 1250, 1255 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1201, 114 S.Ct. 2668 (1994). To the extent, however, that NCP compliance by the Tribes was necessary with regard to its "removal" actions, it substantially complied and Teck has failed to establish the expert scientific work performed by the Tribes was "arbitrary and capricious." Teck has failed to rebut the presumption of consistency.

F. Prejudgment Interest.

39. CERCLA mandates prejudgment interest be included on amounts recovered under 42 U.S.C. § 9607(a). Interest accrues from the latter of: (1) the date payment of a specified amount is demanded in writing, or (2) the date of the expenditure concerned. Filing a complaint to recover response costs is a sufficient "demand" to trigger interest accrual. *Halliburton Energy Servs. v. NL Indus.*, 553 F. Supp. 2d 733, 769 (S.D. Tex. 2008); *United States v. Hardage*, 750 F. Supp. 1460, 1505-06 (W.D. Okla. 1990). A complaint need not specify an exact dollar figure of claimed response costs to constitute a written demand sufficient to trigger interest accrual. *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1019 (8th Cir. 2007) (plaintiff's demand need only give a defendant "full knowledge of their contaminating activities which gave rise to the response costs"); *In re Bell*, 3 F.3d 889, 908 (5th Cir. 1993); *Pentair Thermal Management, LLC v. Rowe*

Industries, Inc., 2013 WL 1320422 (N.D. Cal. 2013) (court awarded prejudgment interest from the date the defendant was served with the First Amended Complaint, even though this pleading did not include a dollar amount and simply requested "all necessary Response Cost incurred by Plaintiff in responding to the released Hazardous Substances" under 42 U.S.C. § 9607(a)). The Tribes filed its First Amended Complaint on November 7, 2005, ECF No. 111, but only claims interest accruing since June 1, 2008, when it filed its Second Amended Complaint, Exh. 7032.

40. Subsequent revisions to amounts claimed do not alter the demand date from which interest is calculated. *Raytheon Aircraft Co. v. United States*, 556 F. Supp. 2d 1265, 1296-97 (D. Kan. 2008). The Tribes has supplemented its Rule 26(a)(1) disclosures regarding response costs multiple times during Phase II. These supplementations do not affect the 2008 demand date from which interest is calculated.

41. CERCLA prejudgment interest is calculated on the outstanding unpaid balance of the amounts recoverable and is based on the rate of interest on investments of the Hazardous Substance Superfund. 42 U.S.C. § 9607(a). EPA publishes the applicable rate on its website annually. The Tribes is entitled to an award of prejudgment interest beginning June 1, 2008 after the Tribes filed its Second Amended Complaint, Exh. 7032, to the date of Judgment.

G. Tribes' Recoverable Costs.

42. The Tribes is hereby awarded $8,253,676.65 in past response costs incurred through 2013, along with prejudgment interest to the date of Judgment.

H. Questions Not At Issue.

The following questions are not at issue in Phase II of the trial and this Court makes no finding regarding the following:

(a) whether a release or threatened release of hazardous substances to the environment has occurred as a result of aerial emissions from the Trail smelter; and

(b) whether any release or threatened release has caused damages or injury to, destruction of, or loss of natural resources.

DATED this 12th day of August, 2016.

APPENDIX F

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT WASHINGTON

No. CV-04-256-LRS

Filed August 12, 2016

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

Plaintiffs,

and

THE STATE OF WASHINGTON,

Plaintiff-Intervenor,

vs.

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Defendant.

ORDER DIRECTING ENTRY OF FINAL JUDGMENT PURSUANT TO FRD. R. CIV. P. 54(b), *INTER ALIA*

This order is entered simultaneously with the court's Phase II Findings of Fact and Conclusions of

Law entered following the bench trial of December 7-9, 2015, the court's "Order Re Reconsideration" (ECF No. 2393) filed April 1, 2016, and the "Order Denying Motion For Reconsideration" (ECF No. 2409) filed June 24, 2016.

The following observations are consistent with what is reflected in the court's Phase II Findings of Fact and Conclusions of Law.

Teck has expended a tremendous sum of money for a non-CERCLA RI/FS of the UCR Site. However laudable that is, this RI/FS will not determine who is responsible for any cleanup of the Site that may be necessary. Teck has understandably taken the position that it intends to only clean up contamination in the UCR Site for which it is responsible (which is attributable to its slag and effluent). The Tribes' cost recovery action has determined Teck will be responsible to pay for any cleanup that is necessary. The Tribes' investigation and expert analysis of the UCR Site, undertaken as part of its cost recovery action, has established that Teck's slag and effluent is present in the UCR Site and is releasing or threatening to release hazardous substances. This was never an aim of the non-CERCLA RI/FS. Therefore, the Tribes' cost recovery action does not duplicate what the RI/FS seeks to accomplish.

As a sovereign bringing a cost recovery action under 42 U.S.C. § 9607(a)(4)(A), the Tribes does not have to prove that its costs were "necessary" as is required of private parties bringing a cost recovery action under 42 U.S.C. § 9607(a)(4)(B). The Tribes is entitled to "all costs" not inconsistent with the NCP. Nevertheless, the Tribes' costs were "necessary" to

establish Teck's liability and insure that it will pay for any cleanup of contamination in the UCR Site attributable to its slag and effluent.

Teck has advocated a position that, if adopted, would result in the Tribes receiving no response costs. According to Teck, the Tribes does not have CERCLA enforcement authority akin to EPA's authority pursuant to 42 U.S.C. §9604 and therefore, cannot recover costs for "enforcement activities" related to "removal" and/or "remedial" action. Because all of the costs for which the Tribes seeks recovery were incurred during the litigation, Teck's position is that all of those costs are for "enforcement activities" and therefore, not recoverable. The result of the court's change in position regarding the Tribes' ability to recover costs for "enforcement activities" is the Tribes is being awarded all of the costs for which it seeks recovery, with the exception of the costs it incurred in funding the citizen suit brought by Plaintiffs Pakootas and Michel to enforce the UAO.[1]

While the Tribes' cost recovery action does not duplicate what the non-CERCLA RI/FS is seeking to accomplish, the investigation and expert analysis undertaken as part of that action has benefitted and will continue to benefit the RI/FS. That investigation and expert analysis will advance any cleanup of the UCR Site deemed necessary. Accordingly, had the court maintained the position set forth in its November 16, 2015 "Order Granting

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[1] Although enforcement of the UAO was arguably a "removal" action as defined in 42 U.S.C. §9601(23), it was not the Tribes' "removal" action, but the "removal" action of Pakootas and Michel.

Motion For Summary Adjudication, In Part," (ECF No. 2288), it is likely it would have at least awarded the Tribes the approximately $3.4 million incurred for the investigation and expert analysis on the basis that it was "removal" action in its own right, even though incurred during litigation. Although the Tribes' investigation and expert analysis was litigation-related, it was also related to response action at the UCR Site intended to prevent further releases of hazardous substances and to benefit any cleanup action eventually taken at the Site.

The Tribes' investigation and expert analysis is not like the health risk assessments and expert witness fees at issue in *Redland Soccer Club v. Department of the Army*, 55 F.3d 827, 850 (3rd Cir. 1995), which "were all litigation-related expenses **unrelated** to any remedial or response action at the property itself . . . and therefore, "not response costs because they are not 'monies . . . expended to clean up sites or to prevent further releases of hazardous chemicals.'" (Emphasis added). By establishing that Teck's slag was not inert and had released hazardous substances in the UCR Site, and by establishing that Teck's effluent remained in the UCR Site and had released hazardous substances, the Tribes' investigation and expert analysis will assist in defining what may need to be cleaned up and how. The Tribes' efforts were "directed at containing and cleaning up hazardous releases" from Teck's slag and effluent. *Redland Soccer Club*, 55 F.3d at 850.

It is noted that in *Sealy Connecticut, Inc. v. Litton Industries, Inc.*, 93 F.Supp.2d 177, 194 (D. Conn. 2000), the court there awarded plaintiff nearly $500,000 for services of an environmental consultant

"as necessary costs for activities closely tied and beneficial to the actual cleanup, **apart from any benefit they may have also had for [plaintiff] for purposes of this litigation.**" (Emphasis added). It also awarded plaintiff the $12,000 it paid for a historical study of the site which "helped . . . ascertain potential contamination sources and locations based on the past industrial activities which were conducted on the [site]" because this cost was "closely tied to the actual cleanup **notwithstanding any coincidental litigation benefit or purpose such study might have had.**" *Id.* (Emphasis added).

RULE 54(b) CERTIFICATION

Pursuant to Fed. R. Civ. P. 54(b), the court **DIRECTS** the District Executive to enter a final judgment pursuant to the Phase I Findings Of Fact and Conclusions Of Law (ECF No. 1955) and the Phase II Findings of Fact and Conclusions of Law declaring Defendant Teck Metals, Ltd. is jointly and severally liable for past and future response costs under § 9607(a)(4)(A) incurred with regard to the UCR site and determining the amount of past response costs for which Teck is liable. This allows for a prompt appeal of the Phase I and Phase II findings and conclusions. Judgment will be entered for the Tribes and against Teck for the sum of $8,253,676.65, plus prejudgment interest from June 1, 2008 to the date Judgment is entered.

There is no just reason for delay in entering final judgment because Phase I and Phase II are now concluded, and Phase III will concern liability for natural resource damages assessment costs and natural resource damages. Cost recovery litigation is

completed in this court. Before commencement of Phase III litigation, efficiency is best served by full appellate resolution of response cost liability and the amount of recoverable response costs.

DEPOSITION TRANSCRIPTS AND EXHIBITS (ECF No. 2383)

Teck asks the court to enter into evidence the depositions of David Osenga and Erica DeLeon on the basis that "their testimony serves to characterize the nature of the fees and costs paid by the Tribes . . . as litigation or litigation support costs." Any relevancy in this regard has been rendered moot by the court's determination that the Tribes are entitled to recover costs for "enforcement activities" related to "removal" and/or "remedial" action, including attorney's fees and litigation costs. For the same reason, there is no need to consider Teck's Exhs. 7250, 7251, 7271 which Teck contends show that expert work performed by the Tribes was litigation-related.

As to Exhs. 7272, 7273 and 7274, Teck acknowledges they were not addressed at trial and not presented through any witness. For that reason, the court will not enter them into evidence. No foundation was laid for them at trial and no witness at trial explained their significance.

TECK'S MOTION TO STRIKE TRIBES' PROPOSED SUPPLEMENTAL FINDINGS OF FACT AND PORTIONS OF POST-TRIAL BRIEF (ECF No. 2384)

This motion was filed and fully briefed before the court issued its "Order Re Reconsideration" finding the Tribes were entitled to recover costs for

"enforcement activities" related to "removal" and/or "remedial" action. To the extent this motion has not been rendered moot by that order and has any continuing relevance to the Tribes' Second Supplemental Phase II Findings Of Fact And Conclusions Of Law (ECF No. 2411) and the Tribes' Supplemental Memorandum Re Cost Recovery (ECF No. 2410) filed July 14, 2016, it is **DENIED** for the reasons set forth in the Tribes' opposition at ECF No. 2387.[2]

TRIBES' MOTION TO REOPEN RECORD FOR NEWLY DISCOVERED EVIDENCE (ECF No. 2385)

This motion was filed and fully briefed before the court issued its "Order Re Reconsideration" finding *Keytronic*'s litigation/non-litigation costs analysis does not apply to the Tribes' cost recovery action. As such, the motion is DENIED as moot.

PREJUDGMENT INTEREST

Within seven (7) days of the date of this order, the Tribes will serve and file a document calculating prejudgment interest from June 1, 2008 to the date that Judgment was entered. Teck will have seven (7) days thereafter to file any objection to the calculation. The Tribes may serve and file any reply within (3) days thereafter. The prejudgment interest

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[2] In light of Teck's stipulation (ECF No. 1928) that it discharged slag and effluent into the Columbia River which came to be located in the UCR Site and released hazardous substances in the Site, Teck's objection to the Tribes' citation of expert reports regarding the same, are not valid. This stipulation was incorporated into this court's Phase I Findings of Fact and Conclusions of Law. (ECF No. 1955).

amount will be included in an Amended Judgment to be filed by the District Executive.

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

DATED this 12th day of August, 2016.

/s/Lonny R. Suko
LONNY R. SUKO
Senior United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT WASHINGTON

No. CV-04-256-AAM

November 8, 2004

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

Plaintiffs,

v.

TECK COMINCO METALS, LTD.,
a Canadian corporation,

Defendant.

ORDER DENYING MOTION TO DISMISS

MCDONALD, Senior J.

BEFORE THE COURT is the defendant's Motion To Dismiss (Ct.Rec.6). The motion was heard with oral argument on November 4, 2004. Paul J. Dayton, Esq., argued on behalf of plaintiffs Pakootas and Michel. Steven J. Thiele, Esq., argued on behalf of intervenor-plaintiff, State of Washington. Gerald F. George, Esq., and Thomas A. Campbell, Esq., argued on behalf of defendant.

I. BACKGROUND

Plaintiffs Joseph A. Pakootas and Donald R. Michel are enrolled members of the Confederated Tribes of the Colville Reservation who, under the "citizen suit" provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. Section 9601 et seq., have commenced this action to enforce the Unilateral Administrative Order for Remedial Investigation/Feasibility Study (UAO) issued to defendant Teck Cominco Metals, Ltd., (TCM), on December 11, 2003 by the United States Environmental Protection Agency (EPA). The State of Washington is also a plaintiff, having intervened in the litigation as a matter of right under CERCLA.

The defendant TCM is a Canadian corporation which owns and operates a smelter in Trail, British Columbia, located approximately 10 Columbia River miles north of the United States-Canada border. The UAO directs TCM to conduct a Remedial Investigation/Feasibility Study (RI/FS) to investigate and determine the full nature of contamination at the "Upper Columbia River Site" due to materials disposed of into the Columbia River from defendant's smelter. The "Upper Columbia River Site" includes "all areas within the United States where hazardous substances from [defendant's] operations have migrated or materials containing hazardous substances have come to be placed." (UAO at p. 7, Ex. A to Defendant's Memorandum).

Defendant moves to dismiss this action, contending the court does not have subject matter jurisdiction (Fed.R.Civ.P. 12(b)(1)), does not have personal jurisdiction (Fed.R.Civ.P. 12(b)(2)), and that

plaintiffs' complaints fail to state claims upon which relief can be granted (Fed.R.Civ.P. 12(b)(6)). Specifically, defendant contends the provisions of CERCLA cannot be applied to a Canadian corporation for actions taken by that corporation which occur within Canada.

II. DISCUSSION

A. Subject Matter Jurisdiction

This case arises under CERCLA and therefore, there is a federal question which confers subject matter jurisdiction on this court. See 42 U.S.C. § 9613(b) and § 9659(c).

A claim that a right exists under federal law is enough for jurisdiction unless the claim is insubstantial or frivolous. A substantial claim that a remedy may be implied from a federal statute is enough for jurisdiction. If it is held that federal law does not provide for the remedy, the dismissal should be on the merits rather than for want of jurisdiction. *ARC Ecology*, 294 F.Supp.2d 1152, 1156 (N.D.Cal.2003). Whether the complaint states a cause of action upon which relief could be granted is a question of law and just like issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. *Id*. In *ARC Ecology*, the district court found it had subject matter jurisdiction to adjudicate the novel claim that CERCLA applies extraterritorially. *Id*.

Plaintiffs' CERCLA claims are not insubstantial or frivolous. This court has subject matter jurisdiction to determine whether plaintiffs' claims seek to apply CERCLA extraterritorially and if so, whether that is

permissible under CERCLA. That determination is made *infra* under Fed.R.Civ.P. 12(b)(6).

B. Personal Jurisdiction

Absent one of the traditional bases for personal jurisdictionpresence, domicile, or consentdue process requires a defendant have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The forum state must have a sufficient relationship with the defendants and the litigation to make it reasonable to require them to defend the action in a federal court located in that state. The purpose of the "minimum contacts" requirement is to protect a defendant against the burdens of litigating at a distant or inconvenient forum and insure that states do not reach out beyond the limits of their sovereignty imposed by their status in a federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

The extent to which a federal court can exercise personal jurisdiction, absent the traditional bases of consent, domicile or physical presence, depends on the nature and quality of defendant's "contacts" with the forum state. If defendant's activities in the forum state are "substantial, continuous and systematic," a federal court can, if permitted by the state's long-arm statute, exercise jurisdiction as to any cause of action, even if unrelated to defendant's activities within the state. *Perkins v. Benguet*

Consolidated Mining Co., 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952)

Even if a non-resident defendant's "contacts" with the forum state are not sufficiently "continuous and systematic" for general jurisdiction, the defendant may still be subject to jurisdiction on claims related to its activities there. This "limited" or "specific" personal jurisdiction requires a showing that: (1) the out-of-state defendant purposefully directed its activities toward residents of the forum state or otherwise established contacts with the forum state; (2) plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) the forum's exercise of personal jurisdiction in the particular case must be reasonable in that it must comport with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The defendant must have purposefully directed its activities at forum residents, or purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of local law. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). This protects against a non-resident defendant being haled into local courts solely as the result of "random, fortuitous or attenuated" contacts. *Burger King*, 471 U.S. at 475. "[T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

Washington's long-arm statute, found at RCW 4.28.185, provides:[1]

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person ... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts:
>
> (b) The commission of a tortious act within this state;
>
> ...
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

If a non-resident, acting entirely outside of the forum state, intentionally causes injuries within the forum state, local jurisdiction is presumptively reasonable. Under such circumstances, the defendant must "reasonably anticipate" being haled into court in the forum state. *Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Personal jurisdiction can be established based on: (1) intentional actions; (2) expressly aimed at the forum state; (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered in the forum state. *Core-Vent*

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[1] A federal district court must look to the law of the forum state in determining whether it may exercise personal jurisdiction over an out-of-state defendant. *MacDonald v. Navistar International Transp. Corp.*, 143 F.Supp.2d 918 (S.D.Ohio 2001).

Corp. v. Nobel Inds. AB, 11 F.3d 1482, 1486 (9th Cir.1994). The "express aiming" requirement is satisfied when it is alleged the non-resident engaged in "wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

The facts alleged in the individual plaintiffs' complaint and the State of Washington's complaint-in-intervention satisfy this three-part test.[2] The complaints allege that from approximately 1906 to mid-1995, defendant generated and disposed of hazardous substances directly into the Columbia River and that these substances were carried downstream into the waters of the United States where they have eventually accumulated and cause continuing impacts to the surface water and ground water, sediments, and biological resources which comprise the Upper Columbia River and Franklin D. Roosevelt Lake. The allegation is that disposing of hazardous substances into the Columbia River is an intentional act expressly aimed at the State

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[2] Although defendant is the moving party on a motion to dismiss for lack of personal jurisdiction, plaintiffs are the ones who invoked the court's jurisdiction and bear the burden of proving the necessary jurisdictional facts. *Flynt Distrib. Co., Inc., v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). Motions to dismiss under Rule 12(b)(2) may test either the plaintiff's theory of jurisdiction or the facts supporting the theory. In evaluating plaintiffs' jurisdictional theory, the court need only determine whether the facts alleged, if true, are sufficient to establish jurisdiction. No evidentiary hearing or factual determination is necessary. *Credit Lyonnais Securities (USA), Inc. v. Alc*antara, 183 F.3d 151, 153 (2nd Cir.1999).

Washington in which the Upper Columbia River and Franklin D. Roosevelt Lake are located. This disposal causes harm which defendant knows is likely to be suffered downstream by the State of Washington and those individuals, such as Pakootas and Michel, who fish and recreate in the Upper Columbia River and Lake Roosevelt.

The burden is on the defendant to prove the forum's exercise of jurisdiction would not comport with "fair play and substantial justice." *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851-52 (9th Cir.1993). If a non-resident has deliberately engaged in significant activities within the forum state, "it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King*, 471 U.S. at 476. Furthermore, if defendant "purposefully had directed his activities at forum residents ... he must present a compelling case" that the exercise of jurisdiction would in fact be unreasonable. *Id.* at 477.

In determining the "reasonableness" of exercising personal jurisdiction, the following factors must be considered: (1) the extent of defendant's purposeful interjection; (2) the burden on defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution to the controversy; (6) the importance of the forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent*, 11 F.3d at 1487-88. No one factor is dispositive and the court must balance all of the factors. *Id.* at 1488. The "reasonableness" requirement may defeat

local jurisdiction even if defendant has purposefully engaged in forum-related activities. *Burger King*, 471 U.S. at 477-78.

The exercise of jurisdiction over defendant TCM does not offend traditional notions of fair play and substantial justice. The burden on defendant in defending in this forum is not great. Trail, B.C. is located approximately 10 miles from the Eastern District of Washington. For reasons discussed below, the court finds the exercise of personal jurisdiction over defendant does not create any conflicts with Canadian sovereignty. It is obvious the State of Washington has a significant interest in adjudicating this dispute, as evidenced by its intervention as a plaintiff, and venue is proper here under CERCLA (42 U.S.C. § 9613(b) and § 9659(b)(1)).

The facts alleged in plaintiffs' complaints establish this court's specific, limited personal jurisdiction over the defendant.

C. Failure To State A Claim

A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). In reviewing a 12(b)(6) motion, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from such allegations. *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir.1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). The sole issue raised by a 12(b)(6) motion is whether the facts pleaded, if established, would support a claim for relief; therefore, no matter how

improbable those facts alleged are, they must be accepted as true for purposes of the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

Defendant contends the UAO cannot be enforced against a Canadian corporation based on conduct which occurred in Canada. At the outset, there is some question whether this case really involves an extraterritorial application of CERCLA, notwithstanding that defendant is a Canadian corporation and its Trail, B.C. smelter is allegedly the source of hazardous substances which have by means of the Columbia River migrated into the Upper Columbia River and Lake Roosevelt. "CERCLA's legislative history reflects a decidedly domestic focus." *ARC Ecology v. U.S. Dept. of the Air Force*, 294 F.Supp.2d at 1156. CERCLA provides a mechanism for cleaning up hazardous waste sites and imposes the cost of clean-up on those responsible for the contamination. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). "CERCLA ... addresses the cleanup of hazardous substances released into the environment...." *Westfarm Assoc. Ltd. P'ship v. Int'l Fabricare*, 846 F.Supp. 422, 434 (D.Md.1993).

The Upper Columbia River Site, including Lake Roosevelt, is entirely within the United States. "The Site will include all areas in the United States where hazardous substances from Respondent's Trail operations have migrated or materials containing hazardous substances have come to be placed." (UAO at pp. 7-8). CERCLA is concerned with the "release" of hazardous substances into the Upper Columbia River Site. According to the UAO at pp. 5-

6: "The presence of hazardous substances at the Site or the past, present, or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and or threatened 'releases.' ' Under CERCLA, a "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment...." 42 U.S.C. § 9601(22). CERCLA's definition of "environment" is limited to waters, land, and air under the management authority of the United States, within the United States, or under the jurisdiction of the United States. 42 U.S.C. § 9601(8).

It is of course true, however, that these "releases" in the United States would not exist without the activity at the smelter located in British Columbia, prompting defendant to argue that what plaintiffs effectively seek to do here with CERCLA is regulate the discharge of hazardous substances from the Trail smelter. To find there is not an extraterritorial application of CERCLA in this case would require reliance on a legal fiction that the "releases" of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into the Columbia River at the Trail smelter. The court is hesitant to do that and therefore, will assume this case involves an extraterritorial application of CERCLA to conduct occurring outside U.S. borders. In doing so, however, the court does not find that said application is an attempt to regulate the discharges at the Trail smelter, but rather simply to deal with the effects thereof in the United States.

Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("*Aramco*"). It is, however, a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.*, quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949). This "canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285. "It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id*.

In applying this canon of construction, courts look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285 (emphasis added). It is assumed Congress legislates "against the backdrop of the presumption against extraterritoriality." *Id.* Unless the affirmative intention of Congress is clearly expressed, it must be presumed Congress "is primarily concerned with domestic conditions." *Id.*, quoting *Foley Bros.*, 336 U.S. at 285 (emphasis added).

In *Aramco*, the Supreme Court held Title VII of the 1964 Civil Rights Act did not apply extraterritorially to regulate the employment practices of U.S. firms

that employ American citizens abroad. 499 U.S. at 259. The discriminatory conduct that allegedly violated Title VII occurred within the jurisdiction of another sovereign (Saudi Arabia), although perpetrated by a U.S. firm. Since the petitioners advanced a construction of Title VII that would have logically resulted in the statute's application to foreign as well as American employers, the Supreme Court held the presumption against extraterritoriality was necessary to avoid the inevitable clash between foreign and domestic employment laws. *Id.* at 255-56.

"Extraterritoriality is essentially, and in common sense, a jurisdictional concept concerning the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons outside its borders." *Environmental Defense Fund v. Massey*, 986 F.2d 528, 530 (D.C.Cir.1993). The extraterritoriality principle provides that "[r]ules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States." *Id.*, quoting *Restatement (Second) of Foreign Relations Law of the United States* § 38 (1965), and *Restatement (Third) of Foreign Relations Law of the United States* § 403, Com. (g) (1987). (Emphasis added).

In *Massey*, the D.C. Circuit discussed those situations when the presumption against extraterritorial application of a statute does not apply. According to the court, the Supreme Court's decision in *Aramco* made explicit that the presumption does not apply where there is an

" 'affirmative intention of the Congress clearly expressed' to extend the scope of the statute to conduct occurring within other sovereign nations." 986 F.2d at 531. Second, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.* The court noted that two prime examples of this exception are the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1976), and the Lanham Trade-Mark Act, 15 U.S.C. § 1051 et seq. (1976), which "have both been applied extraterritorially where the failure to extend the statute's reach would have negative economic consequences within the United States." *Id.* The presumption against extraterritoriality also does not apply when the conduct regulated by the government occurs within the United States. *Id.*[3] "By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders." *Id.*

In *Massey*, the D.C. Circuit concluded there was no issue of "extraterritoriality" regarding the application of the National Environmental Policy Act (NEPA) to agency actions in Antarctica. The court found that "since NEPA is designed to regulate conduct occurring within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad, the presumption against extraterritoriality" did not

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[3] These "conduct" and "effects" tests are fundamental principles of foreign relations law. See *Tamari v. Bache & Co.*, 730 F.2d 1103, 1107-08 and n. 11 (7th Cir.1984), citing *Restatement (Second) Foreign Relations Law* §§ 17 and 18 (1965).

apply. 986 F.2d at 533. Antarctica's unique status in the international arena as a "global commons" rather than a sovereign foreign nation supported the circuit's conclusion. The court noted that where the U.S. "has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker." *Id.* And where there is no potential for conflict between U.S. laws and the laws of other nations, the purpose behind the presumption is eviscerated, and the presumption against extraterritoriality applies with significantly less force. *Id.* According to *Massey*:

> Applying the presumption against extraterritoriality here would result in a federal agency being allowed to undertake actions significantly affecting the human environment in Antarctica, an area over which the United States has substantial interest and authority, without ever being held accountable for its failure to comply with the decisionmaking procedures instituted by Congresseven though such accountability, if it was enforced, would result in no conflict with foreign law or a threat to foreign policy. NSF [National Science Foundation] has provided no support for its proposition that conduct occurring within the United States is rendered exempt from otherwise applicable statutes merely because the effects of its compliance would be felt in the global commons.

Id. at 536-37.

Although defendant TCM takes a dim view of *Massey*, contending much what is says is mere dicta, the Ninth Circuit apparently does not share that

view. In *In re Simon*, 153 F.3d 991, 995 (9th Cir.1998), the Ninth Circuit noted that "[i]f Congressional intent concerning extraterritorial application cannot be divined, then courts will examine additional factors to determine whether the traditional presumption against extraterritorial application should be disregarded in a particular case."[4] First, "the presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.*, quoting *Massey*, 986 F.2d at 531. Furthermore, the presumption against extraterritoriality is not applicable when the regulated conduct "is intended to and results in, substantial effects within the United States." *Id.*, quoting *Laker Airways, Ltd., v. Sabena Belgian World Airlines*, 731 F.2d 909, 925 (D.C.Cir.1984). In *Simon*, the Ninth Circuit found the district court had properly concluded that as to actions against a bankruptcy estate, Congress had clearly intended extraterritorial application of the Bankruptcy Code. *Id.* at 996.

In *Subafilms v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir.1994), the Ninth Circuit

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[4] Intent is analyzed by first examining the language of the act for indications of intent regarding extraterritorial application. In addition to the plain statutory words, intent may be discerned with reference to similarly phrased legislation or the overall statutory scheme. If these inquiries are inconclusive, examination of legislative history is appropriate. Resort to administrative interpretations of the law may be employed if the legislative history is inconclusive. *Simon*, 153 F.3d at 995, citing *Aramco*, 499 U.S. at 248, 250-51, and *Foley Bros.*, 336 U.S. at 286-88.

considered whether a claim for infringement can be brought under the Copyright Act when the assertedly infringing conduct consists solely of the authorization within the territorial boundaries of the United States of acts that occur entirely abroad. The circuit held that such allegations did not state a claim for relief under the copyright laws of the United States.

The plaintiffs in *Subafilms* contended the copyright laws extended to extraterritorial acts of infringement when such acts result in adverse effects within the United States. The circuit disagreed. It noted there was an "undisputed axiom" that the copyright laws of the United States had no application to extraterritorial infringement, that said axiom predated the 1909 Copyright Act, that this principle of territoriality had been consistently reaffirmed, and that there was no clear expression of congressional intent in either the 1976 Copyright Act or other relevant enactments to alter the preexisting extraterritoriality doctrine. *Id.*, at 1095-96. Furthermore, in 1976, Congress chose to expand one specific extraterritorial application of the Act by declaring that the unauthorized importation of copyrighted works constitutes infringement even when the copies lawfully were made abroad. Thus, "[h]ad Congress been inclined to overturn the preexisting doctrine that infringing acts that take place wholly outside the United States are not actionable under the Copyright Act, it knew how to do so." *Id.* at 1096. Accordingly, the presumption against extraterritoriality was fortified by the language of the statute as set against its consistent historical interpretation. *Id.* Obviously, because the

case at bar presents a legal issue of first impression, there is not an "undisputed axiom," consistently reaffirmed by the courts, that CERCLA does not apply to extraterritorial conduct.

The *Subafilms* court discussed the fact that the "presumption is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in [adverse] domestic effects." *Id.*, quoting *Massey*, 986 F.2d at 531. The Ninth Circuit observed that "[i]n each of the statutory schemes discussed by the *Massey* court, the ultimate touchstone of extraterritoriality consisted of an ascertainment of congressional intent; courts did not rest solely on the consequences of a failure to give a statutory scheme extraterritorial application." *Id.* And the circuit further observed that even "[m]ore importantly, as the *Massey* court conceded, ... application of the presumption is particularly appropriate when 'it serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 1096-97, quoting *Aramco*, 499 U.S. at 248. In a footnote, however, the circuit also conceded that this was not the sole source of the presumption against extraterritorial application because the presumption "is rooted in a number of considerations, not the least of which is the common-sense notion the Congress generally legislates with domestic concerns in mind." *Id.* At 1097, n. 13, quoting *Smith v. United States*, 507 U.S. 197, 113 S.Ct. 1178, 1183 n. 5, 122 L.Ed.2d 548 (1993) (emphasis added).

In *Subafilms*, the circuit found the "international discord" factor decisive in the case of the Copyright

Act, fully justifying application of the presumption against extraterritoriality, even assuming *arguendo* that "adverse effects" within the United States "generally" would require a plenary inquiry into Congressional intent. *Id.* at 1097. According to the circuit:

> [B]ecause an extension of the extraterritorial reach of the Copyright Act by the courts would in all likelihood disrupt the international regime for protecting intellectual property that Congress so recently described as essential to furthering the goal of protecting the works of American authors abroad ... we conclude that the *Aramco* presumption must be applied.

Id. at 1098.

Here, defendant TCM contends the presumption against extraterritorial application is not defeated because CERCLA is "bare of any language affirmatively evidencing any intent to reach foreign sources." There is no dispute that CERCLA, its provisions and its "sparse" legislative history, do not clearly mention the liability of individuals and corporations located in foreign sovereign nations for contamination they cause within the U.S. At the same time, however, there is no doubt that CERCLA affirmatively expresses a clear intent by Congress to remedy "domestic conditions" within the territorial jurisdiction of the U.S. That clear intent, combined with the well-established principle that the presumption is not applied where failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States,

leads this court to conclude that extraterritorial application of CERCLA is appropriate in this case.[5]

Under CERCLA, a "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. 42 U.S.C. § 9601(21). Defendant notes that "State" is expressly defined to include the "several States of the United States" and other possessions or territories of the United States, § 9601(27), and that "Indian tribe" is defined as a tribe recognized by the United States, § 9601(36). Plaintiffs, however, are not seeking to enforce the UAO against the Canadian government. They are attempting to enforce it against a "corporation," albeit a Canadian corporation. "Corporation" is defined generically. There is no language which excludes foreign corporations from the definition.[6]

42 U.S.C. § 9607(a) lists the categories of persons who can be liable under CERCLA for response costs and damages. They include: (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

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[5] This case is distinguishable from the situations in *Aramco* and *Asplundh Tree Expert Company v. National Labor Relations Board*, 365 F.3d 168 (3rd Cir. 2004), involving American employees working and physically located in foreign lands (Saudi Arabia and Canada).

[6] There is no question that a Canadian corporation can be held liable under CERCLA for conduct occurring in the United States. See *United States v. Ivey*, 747 F.Supp. 1235 (E.D.Mich.1990).

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 substance for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release which causes the incurrence of response costs, of a hazardous substance."

The "Conclusions Of Law And Determinations" section of the UAO (at p. 5) says the "Upper Columbia River Site is a 'facility' as defined in Section 101(9) of CERCLA, 42 U.S.C. § 6901(9)." The definition of "facility" under that section includes "(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located...." Because the "Upper Columbia River Site" is the "facility" in this case, that would appear to rule out 42 U.S.C. § 9607(a)(1) or (2) as a basis for defendant's potential liability under CERCLA. Clearly, the defendant is not the "owner and/or operator" of the Upper Columbia River Site. Furthermore, no one argues that defendant has "transporter" liability under § 9607(a)(4). That leaves "generator" or "arranger" liability under § 9607(a)(3) with defendant being "any person who ... otherwise arranged for disposal ... of hazardous substances owned or possessed by such person ... at any facility [the Upper Columbia River Site

including Lake Roosevelt] owned or operated by another party or entity [the United States] and containing such hazardous substances."[7]

Defendant points out that the UAO does not specifically cite § 9607(a)(3) as the basis for defendant's potential liability under CERCLA. This is not surprising, however, since the UAO was issued pursuant to § 9606(a).[8] This is an "abatement action" which directs defendant to conduct a "Remedial Investigation/Feasibility Study" regarding the Upper Columbia River Site. The UAO reserves EPA's right to bring an action against defendant under § 9607 for recovery of any response costs incurred by the United States related to the Site and not reimbursed by the defendant. (UAO at p. 18).[9] If

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[7] "To accord CERCLA's liability provisions any meaning at all, the language 'containing such hazardous substances found in Section [9607(a)(3)] must be construed as referring to facilities that have been, by a depositor's actions, contaminated by waste." *State of New York v. General Elec. Co.*, 592 F.Supp. 291, 296 n. 9 (N.D.N.Y.1984).

[8] § 9606(b)(1) provides:

> Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section 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.

Of course, this is precisely what plaintiffs are attempting to do in this case.

[9] The individual plaintiffs could also seek response costs under the "citizen suit" provision at 42 U.S.C. Section 9659(a).

defendant were to comply with the UAO, it could seek reimbursement from the United States for doing so, provided it established by a preponderance of the evidence that it was not liable for response costs under § 9607(a). See 42 U.S.C. § 9606(b)(2)(A) and (C). § 9606(b)(2)(A) refers to "any person." As noted, the definition of "person" in § 9601(21) does not distinguish between domestic and foreign corporations or individuals.

Defendant asserts it could not be an "arranger" because it did not "otherwise arrange" for disposal of hazardous substances "by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances...." (Emphasis added). The "plain language" of § 9607(a)(3) would appear to require another party, other than just the defendant, be involved in the disposal of the hazardous substances.[10] Defendant, however, does not cite a single case or any legislative history that has held that the involvement of another party or entity in the disposal is required for there to be "generator" or "arranger" liability. Indeed, defendant acknowledges that case law has declared the definition of "arranger" in CERCLA to be "inartful." *U.S. v. Iron Mountain Mine, Inc.*, 881 F.Supp. 1432, 1451 (E.D.Cal.1995). "Arranger" is undefined in CERCLA.[11]

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[10] Another party will be involved when there is a "contract" or an "agreement" for disposal. There is, however, the catch-all phrase "otherwise arranged for disposal."

[11] "Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability." *United States v. New Castle*

There is authority supporting the proposition that a third-party is not required for "arranger" liability. In *State of Colorado v.. Idarado Mining Co.*, 707 F.Supp. 1227 (D.Colo.1989), the defendants were held liable because they "otherwise arranged ... for disposal" of hazardous waste by placing their contaminated tailings in the San Miguel River and those tailings "[had] come to be located" at the Society Turn area. *Id.* at 1241. In *National Railroad Passenger Corp. v. New York Housing Authority*, 819 F.Supp. 1271, 1277 (S.D.N.Y.1993), the court found there was "arranger" liability where asbestos-containing material was flaking from the defendant's buildings onto the railroad tracks located below.

Courts have construed "generator" and "arranger" liability expansively. Thus, in *EPA v. TMG Enterprises*, 979 F.Supp. 1110, 1122-23 (W.D.Ky.1997), the court stated:

> Although the phrase 'arranged for' is not defined in the statute and CERCLA's legislative history sheds scant light on its intended meaning, courts have concluded that a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme. [Citation omitted]. Furthermore, courts consistently have construed this phrase so as to promote CERCLA's dual goals: to allow the

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County, 727 F.Supp. 854, 871 (D.Del.1989). Legislative history "sheds little light" on the intended meaning of the phrase. *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1380 (8th Cir.1989).

> government to respond promptly and effectively to problems resulting from hazardous waste disposal and to allow recovery of clean-up costs from those responsible for creating the problem.

To that end, "[i]n the absence of a contract or agreement, the court must look to the totality of the circumstances, including any 'affirmative acts to dispose' to determine whether a transaction involved an arrangement for disposal." *Id.* at 1123. A defendant cannot escape generator liability simply because it does not choose the ultimate destination of its waste. *Acme Printing Ink Co. v. Menard*, 881 F.Supp. 1237, 1250 (E.D.Wis.1995). Furthermore, arranger liability "may attach even though the defendant did not know the substances would be deposited at a particular site or in fact believed they would be deposited elsewhere." *Pierson Sand & Gravel Inc. v. Pierson Township*, 851 F.Supp. 850, 855 (W.D.Mich.1994). "[C]ontrol is not a necessary factor in every arranger case [and][t]he Court must consider the totality of the circumstances ... to determine whether the facts fit within CERCLA's remedial scheme." *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F.Supp.2d 1094, 1131 (D.Idaho 2003). Congress did not limit the definition of "disposal" to the initial introduction of hazardous material into the environment. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir.1992). Based on these authorities, "generator" and/or "arranger" liability under CERCLA cannot be ruled out for defendant. That, however, is, not a finding this court needs to make at

this time and which can be litigated, if necessary, at a later date.

Defendant contends that if plaintiffs' "arranger" interpretation is extended to foreign corporations, it would produce the "absurd" result that the same conduct by the same corporation would, while not resulting in liability to that corporation as an "owner or operator," result in liability as an "arranger" and no coverage for that corporation under the "federally permitted release" provision of CERCLA at 42 U.S.C. § 9607(j). The court is not persuaded that the language of CERCLA or its legislative history is conclusive that a foreign corporation cannot be liable as an owner and/or operator under either § 9607(a)(1) and /or § 9607(a)(2). Nor is the court persuaded that the lack of coverage under § 9607(j) for a foreign corporation manifests congressional intent that CERCLA was not intended to apply to foreign corporations whose conduct has adverse effects within the United States.

§ 9607(a)(1) refers to "the owner and operator of a vessel or a facility." The term "owner or operator" means "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." § 9601(20)(A). "Offshore facility" means "any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel." § 9601(17). "Onshore facility" means "any facility of any kind located in, on, or under, any land or non-navigable waters within the United States." § 9601(18). Although § 9607(a)(1),

pertaining to current owners and operators, does not contain the "any person" language, § 9607(a)(2), pertaining to past owners or operators, contains that language and also refers to "any facility" ("any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"). Defendant concedes the definition of "facility" at § 9601(9) includes no geographical limitation, but asserts its component terms "on-shore facility" and "offshore" facility "appear to exhaust the possibilities for that category" and are separately defined in the statute as being limited to facilities located in or subject to the jurisdiction of the United States" (emphasis added). One has to ask that if "on-shore facility" and "offshore facility" are the only possible "facilities" under § 9607(a)(1) and/or (2), why have a separate definition of "facility" at § 9601(9) which makes no reference to the definitions of "offshore facility" and "on-shore facility" found at §§ 9601(17) and (18) and instead broadly defines "facility" without geographical limitation?

Even assuming Congress intended a geographic limitation on "facility" for current owner/operator liability under § 9607(a)(1) and perhaps also for past owner/operator liability under § 9607(a)(2), while not for "arranger" liability under § 9607(a)(3), the court is not convinced that is an "absurd" result considering CERCLA is concerned with "domestic conditions" in the United States.[12] The case at bar is a prime example. What plaintiffs seek to remedy by

[12] This is quite a large assumption considering CERCLA's language and sparse legislative history.

way of the UAO is not what is happening right now and what has happened in the past at defendant's "facility" in Canada with regard to the disposal of hazardous substances into the Columbia River at that location. What plaintiffs seek to remedy is the result of that practice which has manifested itself at a "facility" within the territorial boundaries of the United States. Certainly, it is true this remedy may have the incidental effect of altering defendant's future disposal practices at its "facility" in Trail, B.C., but that does not change the essential fact that what plaintiffs are attempting to do is remedy an existing condition at a "facility" (the Upper Columbia River Site) wholly within the U.S. In other words, plaintiffs are not attempting to tell Canada how to regulate defendant's disposal of hazardous substances into the Columbia River, simply that they expect defendant to assist in cleaning up a mess in the United States which has allegedly been caused by those substances. Plaintiffs' use of CERCLA is not intended to supercede Canadian environmental regulation of the defendant. Canada's environmental laws are intended to protect Canadian territory, including the 10 miles from Trail, B.C. to the U.S. border. Those laws do nothing to remedy the damage that has already occurred in U.S. territory as a result of defendant's disposal of hazardous substances into the Columbia River.

Plaintiffs assert Congress' intent that foreign polluters of U.S. territory be held liable under CERCLA is apparent from legislative history of amendments made to the definition of liable parties. Plaintiffs note that as originally enacted, CERCLA provided that the owner and operator of a vessel was

liable under CERCLA only if "otherwise subject to the jurisdiction of the United States," but that the Superfund Amendments and Reauthorization Act of 1986 ("SARA") deleted the language "otherwise subject to the jurisdiction of the United States.," "making it clear that liability under CERCLA applies to releases from foreign vessels." *A & P H.R. Conf. Rep.* 99-962 (Oct. 3, 1986). "[F]oreign flag vessels not otherwise under United States jurisdiction are subject to liability under section 107 of CERCLA." *A & P House. Rep.* 99-253(I) (August 1, 1985). Defendant notes, however, that the amendment simply clarified that "foreign vessels not otherwise under United States jurisdiction that release hazardous substances in areas subject to United States jurisdiction are subject to liability under section 107 of CERCLA*." SARA Leg. History 32, Section by Section Analysis at 72 (House Energy and Commerce Committee Report*, 99-253, Part I)(emphasis added). According to defendant, the amendment made it clear that a foreign ship in U.S. waters could be held liable under CERCLA for a spill which "is no different than the liability finding for the Canadian owner of a Michigan waste site."

Defendant, however, cites no legislative history indicating Congress specifically limited liability to foreign vessels in U.S. waters that spill hazardous substances in those waters, as opposed to foreign vessels located outside U.S. waters who spill hazardous substances which eventually make their way into U.S. waters. The language quoted above ("foreign vessels not otherwise under United States jurisdiction that release hazardous substances in areas subject to United States jurisdiction") could

just as logically refer to a foreign vessel outside U.S. waters that releases hazardous substances which eventually make their way into "areas (waters) subject to United States jurisdiction." That is no different than the situation here with a facility located on Canadian soil dumping hazardous substances into the Columbia River which eventually make their way downstream into an area (the "Upper Columbia River Site") subject to United States jurisdiction.

42 U.S.C. § 9607(j), the "federally permitted release" provision, addresses a situation where the release of contaminants is the subject of regulation under another federal statute (i.e., the Clean Air Act, the Clean Water Act, etc.) and provides that if a facility is operating in compliance with its permit, recovery of response costs or damages, if any, with respect to such releases will be dealt with under existing law (the permit regime rather than CERCLA). § 9607(j) states: "Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section."

Defendant notes that its Trail smelter is not and could not be regulated under U.S. statutes (such as the Clean Air Act, the Clean Water Act, etc.) and therefore, would not be able to obtain an EPA permit for discharges to the Columbia River. Instead, the Trail smelter is regulated by Canadian environmental agencies under permits issued by Canadian statutes, and CERCLA does not provide for recognition of the regulatory regime governing the operation of the smelter or any other regulatory

regime adopted by a foreign country. Thus, defendant asserts that under CERCLA, a U.S. facility discharging metal-bearing waste into a river in the U.S. in compliance with its Clean Water Act permit "could avoid any CERCLA liability," while a facility in Canada or Mexico, "even if operating under the same or more stringent permit standards, would continue to be subject to CERCLA joint and several liability for the whole cleanup if even a small amount of its discharges should reach the same river in the United States." According to defendant, "the vast net of CERCLA liability would supplant the source country's regulation of its industrial and municipal waste, wherever and however, such waste reached or threatened to reach the U.S. side of the United States/Canada border."

Plaintiffs observe that having a "federally permitted release," while a defense to an action for response costs and damages, is not a defense to a CERCLA clean-up order such as in the case at bar. With regard to liability for response costs and damages under CERCLA, there may indeed be circumstances where there is unequal treatment of a facility in the U.S. discharging waste into the river versus a facility located in Canada discharging waste in the river which happens to make its way to the U.S.[13] There is not, however, unequal treatment as a general matter because even if the U.S. facility with

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[13] As the amici point out, there would not be unequal treatment with regard to hazardous waste deposited before the existence of the permit regime. Plaintiffs allege defendants' discharge of hazardous waste since 1906 has resulted in the contamination of the Upper Columbia River Site.

the "federally permitted release" is not subject to CERCLA liability, it still is potentially liable under another statute such as the Clean Air Act or the Clean Water Act. As defendant admits, 42 U.S.C. 9607(j) is not a "free pass to pollute." The facility located in Canada is rightly subject to liability under CERCLA to clean up contamination it has caused within the United States because Canada's own laws and regulations will not compel the Canadian facility to clean up the mess in the United States which it has created. As plaintiffs aptly put it: "EPA is not, through issuance of the UAO, attempting to control [defendant's] ongoing operations, or address any hazardous substances attributable to its operations which may be found in Canadian soil, water, air or sediment." Furthermore, "[a]ny Canadian discharge permit issued to [defendant] for its Trail operations necessarily considers only the impact on the approximately ten miles of river between [defendant's] facility and the Canadian border, and not the impacts on territory located in the US, where the impacts of [defendant's] past releases [are] most significant."

Defendant asserts that CERCLA treats foreign claimants to the Superfund less favorably than domestic claimants and therefore, this evidences that Congress did not intend extraterritorial application of CERCLA. As noted above, 42 U.S.C. § 9606(b)(2)(A) provides that "any person" who complies with an order issued under § 9606(a) may petition for reimbursement from the Superfund for the reasonable costs of such action, plus interest.[14]

[14] If the petition is not granted, the "person" can sue the President in the appropriate United States district court

The definition of "person" in CERCLA (§ 9601(21)) does not distinguish between foreign and domestic individuals or corporations.

Defendant submits that foreign claimants are limited to submitting their claims pursuant to 42 U.S.C. § 9611(1), but the court is not persuaded. § 9611(1) provides:

> To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if-
>
> (1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;
>
> (2) the claimant is not otherwise compensated for his loss;
>
> (3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended ... or the Deepwater Port Act of 1974, as amended ...; and
>
> (4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the

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seeking reimbursement from the Superfund. 42 U.S.C. § 9606(b)(2)(B).

> Attorney General and other appropriate officials certifies that such country provides a comparable remedy for United States claimants.

§ 9611(1) pertains to a different situation than under § 960 6(b)(2). § 9611(1) provides a mechanism for foreign claimants, who are not in any way "responsible" for a release of hazardous substances, to seek reimbursement from the Superfund for costs incurred in responding to the release of such substances in the navigable waters or in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident, where the release was from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under U.S. law (the Outer Continental Shelf Lands Act or the Deepwater Port Act). § 9611(1) pertains to releases outside the U.S. as opposed to releases within the U.S. which, of course, is the situation in the case at bar. See *ARC Ecology*, 294 F.Supp.2d at 1158.

Defendant observes that CERCLA's "citizen suit" provision did not require the individual plaintiffs to give notice to Canada or British Columbia of intent to sue, although it did require them to give such notice to the United States and the State of Washington. 42 U.S.C. § 9659(d)(1). Furthermore, pursuant to § 9659(g), only the United States or the State, if not a party, may intervene as a matter of right in a "citizen suit."[15] The court does not consider

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[15] "United States" and "State" include the several States of the United States, the District of Columbia, the

that significant in determining whether Congress intended extraterritorial application of CERCLA. There is no dispute that Canada and British Columbia have been made aware of the subject UAO and this subsequent litigation, presumably because defendant told them of these matters. While CERCLA does not allow British Columbia or Canada to intervene as a matter of right, they could seek permissive intervention. CERCLA's limiting intervention as a matter of right to the United States and the States makes sense because the contamination at issue is within the United States and the State of Washington.

There is no direct evidence that Congress intended extraterritorial application of CERCLA to conduct occurring outside the United States. There is also no direct evidence that Congress did not intend such application. There is, however, no doubt that Congress intended CERCLA to clean up hazardous substances at sites within the jurisdiction of the United States. That fact, combined with the well-established principle that the presumption against extraterritorial application generally does not apply where conduct in a foreign country produces adverse effects within the United States, leads the court to conclude that extraterritorial application of CERCLA is not precluded in this case. The Upper Columbia River Site is a "domestic condition" over which the United States has sovereignty and legislative

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Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction. 42 U.S.C. § 9601(27).

control. Extraterritorial application of CERCLA in this case does not create a conflict between U.S. laws and Canadian laws.

In *Tamari v. Bache & Co.*, cited supra at fn. 3, the Seventh Circuit found nothing in the Commodities Exchange Act (CEA) or its legislative history to indicate Congress did not intend the CEA to apply to foreign agents, but recognizing there also was no direct evidence that Congress intended such application, relied on the "conduct" and "effects" tests in discerning whether it had subject matter jurisdiction over the dispute. The court concluded it did have jurisdiction over causes of action arising from trading on U.S. exchanges, even though the parties were nonresident aliens (Lebanese) and the contacts between them occurred in a foreign country (Lebanon). Said the court:

> The transmission of commodity future orders to the United States would be an essential step in the consummation of any scheme to defraud through futures trading on United States exchanges. Further, when transactions initiated by agents abroad involve trading on United States exchanges, the pricing and hedging functions of the domestic markets are directly implicated, just as they would be by an entirely domestic transaction. If transactions are the result of fraudulent representations, unauthorized trading or mismanagement of trading accounts, prices and trading volumes in the domestic marketplace will be artificially influenced, and public confidence in the markets could be undermined.

> By asserting jurisdiction under the conduct and effects rationales, the purposes of the Act are advanced. Were we to construe the CEA as inapplicable to the foreign agents of commodity exchange members when they facilitate trading on domestic exchanges, the domestic commodity futures market would not be protected from the negative effects of fraudulent transactions originating abroad. Because the fundamental purpose of the Act is to ensure the integrity of the domestic commodity markets, we expect that Congress intended to proscribe fraudulent conduct associated with any commodity future transactions executed on a domestic exchange, regardless of the location of the agents that facilitate the trading.

730 F.2d at 1108.

The same rationale applies here. Because the fundamental purpose of CERCLA is to ensure the integrity of the domestic environment, we expect that Congress intended to proscribe conduct associated with the degradation of the environment, regardless of the location of the agents responsible for said conduct.

III. CONCLUSION

The court has subject matter jurisdiction under CERCLA. The court has personal jurisdiction over the defendant and the exercise of said jurisdiction is reasonable. Plaintiffs' complaints state claims under CERCLA upon which relief can be granted. Therefore, defendant's Motion To Dismiss (Ct.Rec.6) is DENIED.

THE COURT CERTIFIES THIS MATTER FOR AN IMMEDIATE APPEAL TO THE NINTH CIRCUIT COURT OF APPEALS ON THE BASIS THAT THE ORDER ISSUED BY THIS COURT "INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THAT AN IMMEDIATE APPEAL FROM THE ORDER MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION." 28 U.S.C. § 1292(b).

IT IS SO ORDERED. The District Executive is directed to enter this order and forward copies to counsel.