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Pakootas v. Teck Cominco Metals, Ltd.

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Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565 (9th Cir. 2018)

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Throughout the twentieth century, Teck Cominco Metals leaked metal pollutants into the Upper Columbia River that ultimately entered the United States and the Colville Indian Reservation. In 2004, after almost a decade of working with the United States Environmental Protection Agency, the Colville Tribes initiated a citizen suit under CERCLA against Teck for damaging the ecosystem of the Upper Columbia River. In 2018, the Ninth Circuit affirmed judgment against Teck for recovery costs and attorney's fees.

I. INTRODUCTION

In *Pakootas v. Teck Cominco Metals, Ltd.*,[1] the United States Court of Appeals for the Ninth Circuit upheld the United States District Court for the Eastern District of Washington's decision finding the defendant, Teck Cominco Metals, Ltd. ("Teck"), a Canadian mining corporation, jointly and severely liable under the Comprehensive Environmental Response, Compensation, and Liability Act[2] ("CERCLA").[3] The initial plaintiffs who served on the Colville tribal council—and were later joined by the Colville Tribes ("Tribes") and the State of Washington—brought a CERCLA citizen suit against Teck, claiming that Teck's slag significantly damaged the Upper Columbia River.[4] Teck argued that it was not liable under CERCLA[5] and the district court lacked jurisdiction in certifying the appeal by entering partial judgment.[6] Teck also contested the awards of recovery costs and attorney's fees and challenged whether the Tribes could recover those costs under CERCLA's "removal"[7] costs provision.[8] Finding those arguments unpersuasive, the Ninth Circuit held it had jurisdiction over Teck,[9] upholding summary judgment against the company in rejecting all its claims and defenses[10] and declaring Teck fully liable under CERCLA for the Tribes' recovery costs and attorney's fees.[11]

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1. 905 F.3d 565, 566 (9th Cir. 2018).
2. 42 U.S.C. §§ 9601–9675 (2018).
3. *Pakootas*, 905 F.3d at 596.
4. *Id.*
5. *Id.* at 574.
6. *Id.* at 574, 577 (referencing FED. R. CIV. P. 54(b)).
7. 42 U.S.C. § 9607(a)(4)(A).
8. *Pakootas*, 905 F.3d at 578 (relying on United States v. Chapman, 146 F.3d 1166, 1174 (9th Cir. 1998)).
9. *Id.* at 587.
10. *Id.* at 587, 594, 596.
11. *Id.* at 586, 596.

II. FACTUAL AND PROCEDURAL BACKGROUND

Years prior to the suit, the Tribes petitioned the Environmental Protection Agency ("EPA") to conduct testing on the Upper Columbia River to determine if Teck damaged the river system.[12] In 1999, the EPA completed its investigation and ordered Teck to perform "a remedial investigation and feasibility study"[13] on the site in accordance with CERCLA.[14] Teck disputed the findings of the investigation, and the EPA chose not to enforce the order after negotiating with Teck.[15] In response, tribal council members filed a CERCLA citizen suit, to which the State of Washington intervened and the Tribes later joined as co-plaintiffs.[16]

Seeking to dismiss the claim, Teck argued that CERCLA did not apply extraterritorially to its foreign activities and that it did not "arrange[] for disposal" of its pollutants into the Upper Columbia River.[17] The district court denied Teck's motion to dismiss and certified an interlocutory appeal, seeking to advance the ultimate termination of litigation on the question of whether CERCLA applied extraterritorially.[18] While the interlocutory appeal progressed, Teck and the EPA settled, agreeing that Teck would conduct an investigation and feasibility study on the site; however, the agreement did not require Teck to clean up the site.[19]

In 2006, the Ninth Circuit accepted Teck's interlocutory appeal and upheld the districts court's rejection of Teck's motion to dismiss.[20] The court then held that the case did not involve an extraterritorial application of CERCLA, as "Teck's pollution had 'come to be located' in the United States."[21] On remand, the case was trifurcated into three phases to ascertain: "(1) whether Teck [was] liable as a potentially responsible party ('PRP'); (2) Teck's liability for response costs; and (3) Teck's liability for natural resource damages."[22] Teck sought a divisibility defense under CERCLA.[23] Prior to the first bench trial, both parties filed cross motions for partial summary judgment as to Teck's defense; the district court granted the motion,[24] while the State of Washington settled its dispute with Teck before trial in the second phase.[25] On summary judgment, the district court found Teck liable as a PRP under CERCLA's arranger liability

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12. *Id.* at 573.
13. *Id*.
14. 42 U.S.C. § 9604 (2018).
15. *Pakootas*, 905 F.3d at 573.
16. *Id*.
17. *Id.* (quoting 42 U.S.C. § 9607).
18. *Id*.; *see* 28 U.S.C. § 1292(b).
19. *Pakootas*, 905 F.3d at 573.
20. *Id.*; *see* Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006)
21. *Pakootas*, 905 F.3d at 573 (citing Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006) (quoting 42 U.S.C. § 9601(9))
22. *Id.*
23. *Id.*
24. *Id.* at 573–74.
25. *Id*. at 574.

provision, while also holding Teck responsible for response costs and interest totaling $8,597,976.65 after the phase two trial.[26] Teck then appealed the district court's summary judgment order dismissing of its divisibility defense, as well as the partial judgment from the first two trial phases..[27]

III. ANALYSIS

On appeal, the Ninth Circuit held that: (1) partial judgment against Teck for liability under CERCLA's response cost provision was proper;[28] (2) the State of Washington correctly exercised specific personal jurisdiction upon Teck because the company aimed waste into the Upper Columbia River slightly north of the United States and Canada border;[29] (3) the Tribes could recover investigation costs under CERCLA's definition of pollutant "removal";[30] (4) the Tribes' attorney fees award was correct;[31] and (5) summary judgment against Teck's divisibility defense was proper.[32]

A. Jurisdiction

First, Teck argued that partial judgment on response costs under Rule 54(b) was not allowable until the conclusion of the "entire . . . litigation" because the multiple remedies arose under one CERCLA claim.[33] Second, Teck argued the district court lacked personal jurisdiction over it because the court did not correctly apply the *Calder v. Jones* "'effects' test"[34] and, alternatively, because Teck's pollution was not "expressly aimed at Washington."[35]

With respect to the first challenge, Teck argued that the district court incorrectly adjudicated the Tribes' response costs.[36] Teck asserted that adjudicating the Tribes' response costs claim cannot occur until the completion of the entire litigation.[37] However, the Ninth Circuit determined that a claim consists of "a set of facts giving rise to legal rights in the claimant."[38] The court further reasoned that the Tribes' claims for response costs and natural resource damages require proof of different sets of facts, thus constituting separate claims.[39] Therefore, the circuit court

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26. *Id*. (citing 42 U.S.C. § 9607(a)(3)).
27. *Id.*
28. *Id.* at 576.
29. *Id.* at 577–78.
30. *Id.* at 582 (relying on 42 U.S.C. §§ 9601(23), (25)).
31. *Id.* at 586.
32. *Id.* at 596.
33. *Id.* at 574.
34. *Id.* at 576 (citing Calder v. Jones, 465 U.S. 783 (1984)).
35. *Id.* at 577.
36. *Id.* at 574.
37. *Id.*
38. *Id.* at 575 (quoting CMAX, Inc. v. Drewry Photocolor Corp., 295 F.2d 695, 697 (9th Cir. 1961)).
39. *Id.* at 576.

upheld the district court's certification under Rule 54(b), finding no abuse of discretion.[40]

On the personal jurisdiction challenge, Teck argued that the district court erred in applying the *Calder* test[41] because Teck did not aim its slag at the state of Washington.[42] The court stated that the *Calder* test consists of three prongs: "(1) [the defendant] . . . committed an intentional act, (2) [the act was] expressly aimed at the forum state, [and] (3) [the act] caus[ed] harm that the defendant kn[ew] [wa]s likely to be suffered in the forum state."[43]

Further, the court reasoned that it must liberally interpret the language "expressly aimed" and that Teck could have anticipated being brought to court within Washington.[44] Based on the evidence in the record, the court determined Teck knew that the Columbia River carried its waste into Washington—and that the waste had damaged Washington since the 1980s—yet Teck continued to dump waste into the river.[45] Accordingly, the Ninth Circuit held the district court correctly applied the *Calder* test to find personal jurisdiction over Teck.[46]

B. Investigatory Cost Recovery and Attorney's Fees

Teck then challenged the district court's decision allowing the Tribes to recover both investigatory costs and attorney's fees.[47] The district court determined that the Tribes' investigation costs were a removal action and thus awardable.[48] Teck also argued that the investigation costs established their initial liability, thus making them "litigation-related," implicitly outside of "removal" under CERCLA, and not rewardable.[49] On appeal, Teck argued that CERCLA does not allow for the direct recovery of attorney's fees. [50]

Finding Teck's argument unpersuasive, the Ninth Circuit disagreed with Teck's interpretation of a removal action, stating CERCLA defines it as "'the cleanup or removal' of hazardous substances."[51] Further, the court stated that what constitutes removal faces a "low bar."[52] The court then determined that the Tribes' investigation to assess the damage

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40. *Id.*
41. *Id.*
42. *Id.* at 577.
43. *Id.* (internal citations omitted).
44. *Id.* at 578.
45. *Id.* ("[T]here would be no fair play and no substantial justice if Teck could avoid suit in the place where it deliberately sent its toxic waste.").
46. *Id.*
47. *Id.* at 578, 582.
48. *Id.* at 579.
49. *Id.* at 581 (internal quotations omitted).
50. *Id.* at 582–84.
51. *Id.* at 578–79, 581–82 (quoting 42 U.S.C. § 9601(23)).
52. *Id.* at 579 (citing United States v. W.R. Grace & Co., 429 F.3d 1224, 1238 (9th Cir. 2005) (acknowledging Congress defined "removal" as a "sweeping" term under CERCLA)).

was necessary in removing the hazardous materials.[53] The court further determined the research integral to the application of CERCLA and held that the costs, while partially "litigation-related[,]"[54] met various purposes of CERCLA and were rightfully awarded.[55]

Next, Teck argued the district court erred in awarding the Tribes' attorney's fees.[56] Teck maintained that CERCLA does not permit recovery of attorney's fees and that the Tribes did not have the power to enforce attorney's fees as CERCLA's enforcement activities.[57] The Ninth Circuit disagreed[58] and opposed Teck's interpretation of "enforcement activities," instead determining that most PRPs do not agree to a CERCLA order, which leads to litigation.[59] The court also stated that its holding in *United States v. Chapman*[60] applies equally to all government entities,[61] further reasoning that since a CERCLA order requires litigation, that makes it an enforcement activity and awardable under CERCLA.[62]

Notwithstanding *Chapman*'s applicability, Teck further argued that even if attorney's fees fall under enforcement, the Tribes do not have the authority to enforce a CERCLA action.[63] The court stated "an Indian tribe [can] recover all reasonable attorney fees attributable to the litigation as a part of its response costs" in a CERCLA action.[64] The court further reasoned that CERCLA clean ups need not follow a certain order or initially use the EPA for cleanup and thus, because the Tribes cleaned the site, they could enforce a CERCLA action and recover all associated costs.[65] Further, under *Webb v. Ada County*,[66] the court rejected Teck's argument that the award of attorney's fees was unreasonable, instead holding that the $4.86 million award was "reasonably proportionate" to the awarded investigation expenses of $3.39 million.[67]

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53. *Id*.
54. *Id.* at 581.
55. *Id.* at 582.
56. *Id.* at 582–83.
57. *Id.* at 584–85.
58 *Id.* at 583, 586.
59. *Id.* at 586 (relying on United States v. Chapman, 146 F.3d 1166 (9th Cir. 1998) (holding CERCLA "evinces an intent" to cover reasonable attorney's fees)).
60. 146 F.3d 1166 (9th Cir. 1998).
61. *Pakootas*, 905 F.3d at 584 (quoting Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 953 (9th Cir. 2002) (quoting *Chapman*, 146 F.3d at 1175–76)) (holding CERCLA's attorneys' provisions apply equally to government entities including Indian Tribes)).
62. *Id.*
63. *Id*.
64. *Id.* (internal quotations and citations omitted).
65. *Id.* at 584–85 (citing 42 U.S.C. § 9601(25)).
66. 285 F.3d 829, 837 (9th Cir. 2002)
67. *Pakootas*, 905 F.3d 586 (acknowledging 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") (internal quotation omitted)).

C. Divisibility Defense

Finally, the court addressed Teck's argument that the district court erred in granting the Tribes' motion for summary judgment against Teck's divisibility defense.[68] Teck relied "almost exclusively" on a report submitted by its divisibility expert, Dr. Mark Johns, as its evidence opposing the Tribes' motion.[69] The Ninth Circuit determined *de novo* that Dr. Johns' report did not present a genuine issue of material fact and did nothing to dissuade the district court away from the overwhelming evidence submitted by the Tribes.[70] The court held that aggregation of Teck's slag alone was enough to damage the Upper Columbia River's ecosystem and that Teck provided no basis for apportionment.[71] Further the court, using *United States v. Burlington Northern & Santa Fe Railway Company*,[72] stated that ordinarily the divisibility defense required that Teck show: (1) the environmental harm was "theoretically capable of apportionment";[73] and (2) there is a "reasonable basis" to apportion liability, while on summary judgment the plaintiff carries the burdens of production and persuasion to defeat divisibility pleaded as an affirmative defense.[74] The court held that the Tribes proved Teck did not have enough evidence to support a divisibility defense on both prongs.[75]

IV. CONCLUSION

The claims argued within this case present important questions pertinent to the extraterritorial applicability of CERCLA, CERCLA's provisions on attorney's fees, and what constitutes a divisibility defense under CERCLA. With the evolution of CERCLA expanding its reaches across borders, international environmental law becomes stronger. The future of environmental litigation will begin to center around international and transboundary litigation as climate change progresses and as courts begin to hold foreign companies liable for their hand in pollution.

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68. *Id.* at 586–96.

69. *Id.* at 587.

70. *Id.* 589, 591 (determining that Teck's reliance on other environmental factors showed only a possible cause of slag deposits and did not excuse Teck's failure to recognize various geographical factors that caused the pollution to Lake Roosevelt and the Upper Columbia River).

71. *Id.* at 595.

72. 520 F.3d 918, 942 (9th Cir. 2008), *rev'd on other grounds*, 556 U.S. 599 (2009).

73. *Pakootas*, 905 F.3d at 588 (citing RESTATEMENT (SECOND) OF TORTS § 434 cmt. d (AM. LAW. INST. 1965)).

74. *Id.* at 589 (citing RESTATEMENT (SECOND) OF TORTS §§ 433A(1)(b), 434 cmt. d (AM. LAW. INST. 1965)).

75. *Id.* at 596.