UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

and

THE STATE OF WASHINGTON,

Plaintiff-Intervenor,

vs.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant.

No. CV-04-256-LRS

ORDER DIRECTING ENTRY OF FINAL JUDGMENT PURSUANT TO FED. 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 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

[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.

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

[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).

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 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