

Ninth Circuit Creates New Challenge for Divisibility in Complex CERCLA Sites

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The Ninth Circuit Court of Appeals in *Pakootas v. Teck Cominco Metals, Ltd.*, affirmed the Eastern District of Washington's decision to find Teck liable for more than \$8.25 million in damages to the Colville Confederated Tribes, including \$4.8 million in attorney's fees, related to its liability under CERCLA for contamination to the Upper Columbia River. *Pakootas*, -- F.3d --, 2018 WL 4372973 (2018). The court held that Teck's divisibility of harm defense failed because Teck did not account for all of the harm at the site, and thus it failed to show that the harm was theoretically capable of apportionment. The Court also held that costs of investigations by the Tribe's expert consultants and attorney fees both qualified as recoverable costs of response and removal under CERCLA § 107(a).

Background

The Colville Tribe has traditionally used the Upper Columbia River, and through treaty rights retains the right to fish the River up to the Canadian border. Teck operates the world's largest lead and zinc smelter in Trail, British Columbia. The smelter is located ten miles upstream of the U.S. border. Between 1930 and 1995, Teck is estimated to have discharged almost ten million tons of metal slag directly into the Columbia River.

In 1999, the Colville Tribe petitioned the EPA to investigate contamination into the River. As a result, the EPA issued a unilateral administrative order against Teck. However, after Teck contested whether it was subject to CERCLA, the EPA chose not to enforce the order. Instead, the Colville Tribe initiated a CERCLA action against Teck.

The District Court, in a trifurcated trial, dismissed Teck's divisibility defense to joint and several liability on summary judgment. The court found that Teck had not presented sufficient evidence to create a genuine issue of fact as to whether the harm could be found divisible. That issue, as well as considerations about the amount of damages and award of attorney's fees to the Tribe, were certified for appeal to the Ninth Circuit.

Raising the Bar for Divisibility

CERCLA liability is typically joint and several, except where the harm can be shown to be divisible. Divisibility analysis proceeds in two steps. First, the court considers whether the environmental harm

is theoretically capable of apportionment. Second, if the harm is theoretically capable of apportionment, the factual question arises whether the record provides a “reasonable basis” to apportion liability. At both steps, the party asserting the divisibility defense bears the burden of proof.

The Ninth Circuit, in *Pakootas*, emphasized a high burden of proving divisibility. The court noted that a party must make a “fact-intensive, site-specific assessment,” complete with “concrete and specific” evidence, and that shows divisibility by a preponderance of the evidence. *Pakootas*, at *16. The court held that for the purposes of apportionment, the relevant harm is the entirety of the contamination at a site that has or foreseeably could cause a party to incur response costs. The Ninth Circuit found that Teck’s failure to account for the interaction and mixing of hazardous substances, meant Teck failed to carry its burden showing that the harm is theoretically capable of apportionment.

Additionally, the Ninth Circuit held that Teck also failed to show a reasonable basis for apportioning liability. The Court found that Teck’s expert failed to show a connection between his volumetric analysis and the harm at the site. The Court noted that Teck’s own evidence showed the importance of geographic effects, as well as the passage of time on the River’s contamination, but did not account for these factors in its divisibility analysis.

As such, the Ninth Circuit found that Teck failed both steps of its divisibility defense and affirmed the District Court.

Teck’s Challenge of Costs Awarded to the Tribe

In the second phase of trial, after finding Teck liable as an arranger under CERCLA 107(a)(3), the District Court found Teck liable for \$8.25 million of the Colville Tribes’ response costs, including over \$4 million in attorney’s fees. The Ninth Circuit held that these costs were recoverable given that they helped advance the purposes of CERCLA in: “asses[ing] ... [the] threat of release of hazardous substances”; investigating the presence and movement of toxic wastes; and tracing the origins of the slag and sediment metals found at the Site. 42 U.S.C. § 9601(23).

Additionally, the Circuit upheld that efforts to identify parties responsible for the disposal of toxic wastes at a site are recoverable costs. Despite Teck’s argument that many of the Tribe’s studies should not be recoverable as a removal action because they are litigation-based, the court found that since the Colville Tribes bring their cost recovery action as a sovereign under section 107(a)(4)(A), they are entitled to all costs rather than just the necessary costs of response. 42 U.S.C. § 9607(a)(4)(A), § 9607(a)(4)(B). Moreover, the Ninth Circuit took a very broad reading of CERCLA’s cost recovery provisions, and found it makes no distinction between cleanup and investigatory costs.

The Ninth Circuit also upheld the District Court’s grant of the Tribe’s attorney’s fees. The Court focused on the Superfund Amendments and Reauthorization Act amendment of 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)).

Implications for CERCLA Parties

The opinion underscores the difficulty of establishing divisibility of harm at a large, complex CERCLA site with numerous sources and contaminants, particularly for many of the sediment mega-sites around the country.

The Ninth Circuit's finding that parties must account for all harm at the site, not just the harm caused by the parties to the litigation, adds to the complexity of the divisibility analysis for parties at these sites. The parties seeking allocation then need to show that the harm is theoretically capable of apportionment and that a reasonable basis for apportionment exists through a rigorous expert assessment. By requiring a detailed assessment of the numerous independent factors at play in a site, this decision emphasizes the high standard within the Ninth Circuit for proving a reasonable basis to apportion liability.

For parties seeking to apportion liability in the Ninth Circuit, be prepared to account for all harm at the site, as well as to provide a fact-specific analysis for each independent factor bearing on the site's contamination to meet the bar set in this case.

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