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 GRANTING MOTION FOR SUMMARY ADJUDICATION, IN PART**

BEFORE THE COURT is Defendant's Motion For Summary Adjudication Of The Tribes' Claim For Past Response Costs (ECF No. 2173). Telephonic argument was heard on November 10, 2015.

I. BACKGROUND

Defendant Teck Cominco Metals, Ltd. (Teck) contends The Confederated Tribes Of The Colville Reservation (Tribes) cannot recover its alleged response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601 *et seq.*, which consist entirely of attorneys' fees and litigation expenses, as well as the attorney's fees and costs previously claimed by now-dismissed and separate plaintiffs, Joseph A. Pakootas and Donald R. Michel, incurred in pursuing their separate causes of action under CERCLA's citizen suit provision. According to Teck: (1) the American Rule does not permit recovery of attorney's fees and litigation costs in this instance; (2) the Tribes lacks CERCLA enforcement authority over the Upper Columbia River (UCR) Site and cannot recover "enforcement costs;" (3) the attorneys' fees and litigation costs the Tribes seek are not "response costs" because they are not related to removal or remedial costs the Tribes has incurred; and (4) the Tribes never brought a citizens' suit claim to enforce the Environmental Protection Agency's (EPA's) Unilateral Administrative Order (UAO)- rather, that claim was brought by Pakootas and Michel.

II. SUMMARY ADJUDICATION STANDARD

Fed. R. Civ. P. 56 allows a court to grant summary adjudication on a claim or defense. The standard that applies to a motion for summary adjudication is the same as that which applies to a motion for summary judgment. Fed. R. Civ. P. 56(a); *Mora v. ChemTronics*, 16 F.Supp.2d 1192, 1200 (S.D. Cal. 1998).

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R.

Civ. P. 56, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v. Weidner*, 780 F.2d 727, 732 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id*. The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986). In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322-23.

III. DISCUSSION

A. Procedural Bar

In Phase I of this litigation, this court found that "[p]ursuant to CERCLA, 42 U.S.C. § 9607(a)(4)(A), Teck is jointly and severally liable to the Tribes and

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the State [of Washington][1] in any subsequent action or actions to recover past or future response costs at the UCR Site." (Conclusion Of Law No. 19 at p. 43 re "CERCLA Liability," ECF No. 1955). Per stipulation of the parties, one of this court's "Findings Of Fact" was "[t]he release or threatened release of hazardous substances at the UCR Site has caused the Tribes and the State to incur at least $1 each in response costs" and "[t]hese response costs were necessary and are not inconsistent with the National Contingency Plan [NCP]." (Finding Of Fact No. 1 at p. 24 re "Incurrence Of Response Costs"). This was also reiterated as a "Conclusion Of Law" regarding "CERCLA Liability." (No. 10 at pp. 38-39). The incurrence of response costs not inconsistent with the NCP is one of the four elements of CERCLA liability pursuant to § 9607(a)(4)(A) . (See Conclusion Of Law No. 7 at p. 37).

Plaintiffs argue that:

> As the Court has determined that the Tribes has incurred "response costs" (defined to include "remedial" or "removal" costs), even if all of the current claimed costs are "enforcement costs"- as Teck alleges- they undeniably relate to "remedial" or "removal" costs adjudicated in Phase I and are recoverable in this action. Thus, Teck's argument comes too late and cannot prevail in Phase II.[2]

(ECF No. 2199 at p. 15).

All Teck stipulated to, as reflected in the court's Findings of Fact and Conclusions of Law, is that the Tribes incurred at least $1 in response costs. This stipulation certainly does not constitute an admission that all of the Tribes' claimed costs are recoverable as response costs. Conclusion of Law No. 21 re "CERCLA Liability" (ECF No. 1955 at p. 44) states "[t]he following questions are

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[1] The State has settled with Teck regarding the State's cost recovery claim.

[2] Phase II is the "cost recovery" phase.

not at issue in Phase I and this Court makes no finding of fact or conclusion of law regarding the following: . . . (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 . . . ."

B. Recoverable Response Costs

1. Costs For Enforcement Activities

42 U.S.C. § 9607(a) permits the United States Government, or a State or an Indian Tribe or a private person to bring an action to recover costs incurred in responding to a release or a threatened release of a hazardous substance. The United States, a State or an Indian Tribe is entitled to recover "all costs of removal or remedial action incurred [which are] not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). "[A]ny other person" is entitled to recover "any other necessary costs of response incurred [which are] consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

What constitutes a recoverable response cost is largely determined with reference to CERCLA's definition of "response." 42 U.S.C. § 9601(25) provides:

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

(Emphasis added).

"Removal action" is defined in 42 U.S.C. § 9601(23) as follows:

> The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal

> of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, **action taken under section 9604(b) of this title**, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

(Emphasis added).

"Remedial action" is defined in 42 U.S.C. Section 9601(24) as follows:

> The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes . . . any monitoring reasonably required to assure that such actions protect the public health and welfare of the environment.

The United States Supreme Court has held that 42 U.S.C. § 9607 "does not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action" pursuant to § 9607(a)(4)(B). *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960 (1994). The Court noted that attorney's fees are generally not recoverable "absent explicit congressional authorization," *Id*. at 814, and while § 9607(a)(4)(B) allows private parties to recover the "necessary costs of response," this does not explicitly authorize a cause of action for the recovery of attorney's fees. *Id*. at 813. The Court indicated it would "stretch the plain terms of the phrase 'enforcement activities'[in § 9601(25)] too far to construe it as encompassing the kind of private cost recovery action at issue in this case." *Id*. at 819. In its decision, however, the Court did not address whether a government's attorney's fees, as opposed to a private party's attorney's fees, are recoverable as part of response costs, stating "we offer no comment" on

whether "enforcement activities" entitles the government to recover its attorney's fees under § 9607. *Id*. at 819.

Subsequently, courts have held that attorney's fees are recoverable by the government as response costs under § 9607(a)(4)(A). This includes the Ninth Circuit Court of Appeals in *U.S. v. Chapman*, 146 F.3d 1166, 1176 (9th Cir. 1998), which held the federal government's attorney's fees are recoverable, provided they are reasonable. It is apparent from a reading of *Chapman*, however, that the government's recovery of attorney's fees is premised on it acting in an enforcement capacity pursuant to specific statutory authority:

> CERCLA § 107(a)(4)(A) allows for the recovery of "all costs" of a removal or remedial action. **Section 104(b) allows the government to recover costs for all of its investigation and activities, including legal work. Additionally, section 101(25) specifically states that a response action includes "enforcement activities."** We conclude that statutory authority permits the government, which is the prevailing party in this litigation, to recover attorney fees attributable to the litigation as part of its response costs.

146 F.3d at 1175 (emphasis added).

§ 9604 authorizes the President of the United States, through the EPA, to undertake certain response actions. The definition of "removal action" in § 9601(23) includes an action pursuant to § 9604(b). § 9604(b) allows the EPA to "undertake such planning, **legal**, fiscal, economic, engineering or architectural, and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." (Emphasis added).

In *Chapman*, the Ninth Circuit was persuaded by the Second Circuit's reasoning in *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2nd Cir. 1996), and by the Missouri District Court's analysis in *United States v. Northeastern Pharm. & Chem. Co. ("NEPACCO")*, 579 F.Supp. 823 (W.D. Mo. 1984). 146 F.3d at 1175.

NEPACCO "held that the government is entitled to recover its litigation costs from a liable party pursuant to section 107(a)(4)(A) and 104(b)." *Id*. at 1174. The Ninth Circuit noted that another district court in *United States v. South Carolina Recycling and Disposal, Inc. ("SCRDI")*, 653 F.Supp. 984 (D. S.C. 1986), had concluded the same based on the analysis in *NEPACCO*. *Id*. at 1175. In *Chapman*, the Ninth Circuit rejected Chapman's argument that the Supreme Court's analysis in *Key Tronic* should be applied to §9607(a)(4)(A) in a manner consistent with the private party recovery analysis of §9607(a)(4)(B). According to the circuit:

> The two sections . . . are distinguishable. First, as the court noted in *Key Tronic*, in the SARA amendments [Superfund Amendments and Reauthorization Act, effective October 17, 1986] redefining the term response to include "enforcement activities," Congress arguably endorsed the holdings in *SCRDI* and *NEPACCO*. *Key Tronic*, 511 U.S. at 817 & n. 9, 114 S.Ct. 1960. The Court stated: "According to the House Committee Report on this Amendment, §101(25)'s modification of the definition of 'response action' to include the related enforcement activities **'will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.'**" *Id*. at 818 n. 10, 114 S.Ct. 1960 (citing H.R. Rep. No. 99-253, p. 66-67 (1985).

146 F.3d at 1175 (emphasis added).

Although the Second Circuit's *Betkoski* decision does not contain a reference to §9604(b), that case did involve the federal government as a response costs claimant, 99 F.3d at 527-30, and it is apparent the Ninth Circuit in *Chapman* considered the federal government's enforcement authority under §9604(b) to be an essential component of the analysis resulting in its conclusion that "statutory authority permits the government, which is the prevailing party in this litigation, to

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recover attorney fees attributable to the litigation as part of its response costs."[3] The District of Idaho recognized this in *Nu-West Mining, Inc. v. United States*, 2011 WL 2604740 (D. Idaho), where the court discussed the interplay of *Key Tronic* and *Chapman*:

> The Supreme Court has not had occasion to directly address the Government's right to attorney fees under CERCLA since *Key Tronic*.
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> However, five years after *Key Tronic*, the Ninth Circuit did address the issue in *Chapman*. There, the Circuit noted *Key Tronic's* dicta implying that the Government could get fees under the "enforcement activities" language. *Chapman*, 146 F.3d at 1174. **But purely as a matter of interpretation, what language in CERCLA warranted giving the Government more rights to attorney fees than a private party? The Circuit answered that question by citing §9604(b). That provision applies only to the Government . . . .**
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> **Reading this provision [Section 9604(b)] with §9607(a)(4)(A), *Chapman* concluded that the Government is entitled to attorney fees for its enforcement activities.**

2011 WL 2604740 at *2 (emphasis added).

§ 9604(d)(1) allows the President to enter into a contract or cooperative agreement with the State or a political subdivision or an Indian tribe to carry out such action. No such contract or cooperative agreement exists in this case and the

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[3] In *United States v. E.I. Du Pont De Nemours & Co., Inc.*, 341 F.Supp.2d 215, 241 and n. 14 (W.D. N.Y. 2004), the court found "*Betkoski* stands for the proposition that the *Key Tronic* distinction between the recoverability of litigation and non-litigation costs does not apply to claims for enforcement costs brought by the **federal government**" and that the Ninth Circuit in *Chapman* had interpreted *Betkoski* in the same way. (Emphasis added).

Tribes concedes it is not proceeding pursuant to § 9604.[4] The Tribes contends, however, that § 9601(25), by itself, authorizes it to recover attorney's fees attributable to the litigation (aka "enforcement costs") as part of its response costs. This court is not so persuaded.

While *Washington State Department of Transportation v. Washington Natural Gas Company, Pacificorp*, 59 F.3d 793 (9th Cir. 1995), held that the Washington State Department of Transportation (WSDOT) did not need to act pursuant to authorization obtained from the federal government, i.e., the EPA, in order to seek recovery of response costs pursuant to §9607(a)(4)(A), it did not address whether WSDOT, without such authorization, could recover attorney's fees attributable to litigation (enforcement costs) as part of it response costs. Like WSDOT, the Tribes did not need authorization from EPA to commence a §9607(a)(4)(A) cost recovery action against Teck, but *Chapman* indicates it does need such authorization in order to recover enforcement costs as part of its response costs.

Every other case cited by the Tribes for the proposition that "section 107(a)(4)(A) permits the United States government, states, and Indian Tribes to

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[4] If it were, then it appears it could recover its fees and costs for "enforcement activities." This is something the Ninth Circuit seems to have implicitly acknowledged in *Fireman's Fund Insurance Company v. City of Lodi, California*, 302 F.3d 928, 953 (9th Cir. 2003), when it stated that in *Chapman* "we held that CERCLA § 107(a)(4) permits the United States Government or a State **or an Indian tribe** to recover all 'reasonable attorney fees' 'attributable to the litigation as part of its response costs' if it is the 'prevailing party.'" (Emphasis added).

recover attorneys' fees" involves the federal government exercising specific statutory enforcement authority. *United States v. Dicos, Inc.*, 266 F.3d 864 (8th Cir. 2001) (EPA issued cleanup order pursuant to 42 U.S.C. § 9606(a))[5]; *United States v. E.I. Du Pont De Nemours & Co., Inc.*, 341 F.Supp.2d 215, 231 (W.D.N.Y. 2004)(EPA issued UAO pursuant to 42 U.S.C. § 9606(a)) and court noted that "[u]nder CERCLA, federal government may either remediate hazardous wastes itself or require responsible parties to conduct the cleanup," citing 42 U.S.C. §§ 9604(a) and 9606); *United States v. Northernaire Plating Co.*, 685 F.Supp. 1410 (W.D. Mich. 1988)(EPA sought to recover cost of removing hazardous substances after having acted pursuant to the President's authority under §9604(a) which has been delegated to EPA Administrator pursuant to Executive Order)[6]; and *United States v. Rohm and Haas Company*, 790 F.Supp. 1255 (E.D. Pa. 1992)(United States brought declaratory judgment action under CERCLA to recover EPA oversight costs).

Furthermore, the definition of "response" in § 9601(25) applies to private cost recovery actions under §9607(a)(4)(B) just as much as it applies to government cost recovery actions, yet the Supreme Court in *Key Tronic* did not deem that sufficient to allow private parties to recover enforcement costs as part of their response costs. As the Ninth Circuit found in *Chapman*, the only reason a government can recover such costs is because it is also exercising authority pursuant to another statutory provision of CERCLA, be that §9604(a) or §9606 or something else. Enforcement authority is the relevant distinction, not the fact that

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[5] As explained in *Dicos v. Diamond*, 35 F.3d 348 (8th Cir. 1994).

[6] As explained in *U.S. v. Northernaire Plating Co.*, 670 F.Supp. 742 (W.D. Mich. 1987).

§9607(a)(4)(A) states "all costs of removal or remedial action incurred [which are] not inconsistent with the national contingency plan," whereas §9607(a)(4)(B) says "any other necessary costs of response incurred [which are] consistent with the national contingency plan."[7]

In sum, the Tribes can recover response costs pursuant to §9607(a)(4)(A), but cannot recover enforcement costs as a component of those costs, enforcement costs being attorney's fees attributable to litigation.

2. Costs As "Removal" or "Remedial" Action

Without enforcement authority, the Tribes' cost recovery action becomes like a private cost recovery action in some respects, and therefore, further discussion of *Key Tronic* is warranted. In *Key Tronic*, the Supreme Court also held that "the conclusion we reach with respect to litigation-related fees does not signify that all payments that happen to be made to a lawyer are unrecoverable expenses under CERLCA," and "some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response **in and of itself** under the terms of § [9607](a)(4)(B)." 511 U.S. at 819-20 (emphasis added). As such, "[t]he component of Key Tronic's claim that covers work performed in identifying other potentially responsible parties falls in this category," and "these efforts might well be performed by engineers, chemists, private investigators or other

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[7] Response costs incurred by the Tribes must be "not inconsistent" with the NCP as opposed to "consistent" with the NCP. In other words, the Tribes gets what is referred to as the "presumption of consistency." *Fireman's Fund Insurance Company v. City of Lodi, California*, 302 F.3d 928, 953 (9th Cir. 2003).

professionals who are not lawyers." *Id*. at 820. According to the Court, the American Rule requiring statutory authority for fee-shifting does not bar such costs "because they are not incurred in pursuing litigation." *Id*. at 820. Said the Court:

> Tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for. [Plaintiff] is therefore quite right to claim that such efforts significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs. These kinds of activities are recoverable costs of response clearly distinguishable from litigation costs.

Id.

In *Key Tronic*, the Court held attorney's fees could not be recovered for work that was "primarily protecting Key Tronic's interest as a defendant in the proceedings that established the extent of its liability."[8] *Id*. This category included attorney's fees associated with negotiations with the EPA regarding the consent decree, and studies prepared or supervised by counsel during negotiations with the EPA, even if those studies ultimately aided the cleanup. *Id*.

This court does not read *Key Tronic* to stand for the proposition that any costs incurred during the pendency of a lawsuit are not recoverable in a private cost recovery action. This court is unaware of any other court reading *Key Tronic* in that fashion. And Teck does not, at least explicitly, make such an argument, perhaps, in part, because of its previous stipulation that the Tribes have incurred at least one dollar in response costs. Rather, to be recoverable in a private cost recovery action, costs must be closely tied to the actual cleanup, must benefit the entire cleanup and not cost allocation or liability shifting, and cannot primarily be

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[8] Key Tronic was one of several parties responsible for contaminating a landfill.

protective of the interests of the party seeking the fees. Since *Key Tronic*, courts have addressed the question of what costs incurred during litigation are recoverable and what costs are not recoverable.

In *Black Horse Lane Assoc., L.P. v. Dow Chemical Corporation*, 228 F.3d 275, 290 (3rd Cir. 2000), the district found the appellants had not incurred any compensable costs of response because the only costs they claimed to have incurred were the fees they paid to their environmental consultant and "had nothing to do with any effort by plaintiffs to detoxify the Property or to prevent or minimize the release of hazardous substances." The district court explained that the environmental consultant merely reviewed quarterly reports and "never visited the Property, monitored the contamination or cleanup of the Property, or gathered data related to the investigation or remediation of the Property" and therefore, its fees were those of an ordinary expert witness and represented litigation costs, not environmental monitoring costs. *Id*. at 291.

On appeal, appellants argued the amounts paid to their environmental consultant (ESI) were "necessary costs of response" because they fell within the scope of either "removal" or "remedial" action as defined in §9601(23), (24). *Id*. at 292. The Third Circuit disagreed and affirmed the district court:

> Given the totality of the information in the record, we agree with the district court's assessment of the nature of ESI's consulting responsibilities to its client during the time period for which appellants seek reimbursement. We believe that the record requires the conclusion that ESI's work was designed to assess, for potential or actual litigation purposes, the extent of Essex's remediation efforts and its progress in that regard.

228 F.3d at 296.

In reaching its conclusion, the Third Circuit relied on one of its previous decisions, *Redland Soccer Club, Inc. v. Department of the Army*, 55 F.3d 827, 850

(3rd Cir. 1995), in which it determined that the Redland plaintiffs' litigation costs, which included attorney's fees, health risk assessments and expert witness fees, were not "response costs" under any of the statutory definitions in §9601. The Third Circuit explained that in *Redlands*, it found that because "the costs incurred were all litigation-related expenses **unrelated to any remedial or response action at the property itself**," that the district court did not err in determining plaintiffs' costs were not response costs because they were not expended to clean up sites or to prevent further releases of hazardous chemicals. *Black Horse*, 228 F.3d at 294 (emphasis added).

In *Bonneview Homeowners Ass'n v. Woodmont Builders, L.L.C.*, 655 F.Supp.2d 473, 493 (D. N.J. 2009), a district court decision from the Third Circuit, the court found the plaintiffs had not incurred response costs under CERCLA. The plaintiffs did not explain how their counsel's meetings and discussions with the New Jersey Department of Environmental Protection (NJDEP) were "closely tied to the actual cleanup," as required by *Key Tronic*, or how it was "necessary to the containment and cleanup of hazardous releases," as required by *Redland Soccer Club*. *Id*. at 497. And "just as in *Black Horse*, the Plaintiffs here did not perform any investigation or remediation but, rather, retained a consultant and lawyers to review work performed by others and provide expertise in litigation." *Id*. at 497. Furthermore, the district court noted that:

> [A]ll of the claimed response costs by the Plaintiffs were incurred years after the discovery of the contamination on the property and years after the litigation commenced. One of the purposes behind CERCLA is to encourage the prompt clean-up of environmental contamination. [Citation omitted]. Allowing the Plaintiffs to claim that their costs in this case were response costs would not further the purposes of CERCLA because there is no evidence that the actions of their consultants or counsel furthered the cleanup of the Residential Lots.

Id. at 497-98.

Not all of the cases that have wrestled with this issue of whether expenses incurred during litigation are sufficiently related to "removal" or "remedial" action so as to be recoverable response costs arise out of the Third Circuit. In *BNSF Railway Company v. California*, 2009 WL 55911 (E.D. Cal.), the Railroad Defendants/Counterclaimants asserted they were entitled to recover $23,579.50 in attorney's fees because the fees were incurred to identify potentially responsible parties ("PRPs") and were therefore, recoverable pursuant to the Supreme Court's decision in *Key Tronic*. The district court disagreed:

> After carefully considering Railroads' requested fees, the Court cannot distinguish Railroads' efforts expended in searching for PRPs from their own litigation expenses. The declaration provided by Railroads demonstrates that the fees Railroads claims as "necessary costs of response" are in fact litigation-related and not closely tied to an actual cleanup as required by the Supreme Court's decision in *Key Tronic*. For example, Railroads supporting declaration claims that compiling and reviewing information about the french drain and conducting research regarding the Stockton property, construction of the drainage pipe, and railroad right of way are necessary response costs recoverable under CERCLA. However, these costs do not fall within the recoverable response costs identified in the *Key Tronic* decision.
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> Here, although Railroads, while litigating the issue of liability for the french drain, may have identified other parties with a possible connection to either the release of petroleum or installation of the french drain, their work does not amount to non-litigation nor does it meet the *Key Tronic* requirement of being closely tied to an actual cleanup. Railroads' work in identifying potentially responsible parties was not a necessary cost of response because it did not arise during, nor does it appear to benefit, any cleanup process. *See Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 953 (9th Cir. 2002)(noting that the ability to recover litigation-related attorney's fees does not necessarily advance the pace of the cleanup because it may encourage ambitious litigation). Railroads expended significant attorney's fees in an attempt to avoid liability for the contamination

> released from the french drain. These efforts were expended to protect Railroads' interests as a defendant and have not advanced the cleanup of the Stockton site. Thus, the fees were incurred as "litigation expenses" or "in pursuing litigation" and therefore, are not properly included in recoverable CERCLA costs. *Key Tronic*, 511 U.S. at 820.

2009 WL 55911 at *2-3.

In the *Fireman's Fund* case, the Ninth Circuit held the City of Lodi could not recover its attorney fees under CERCLA. According to the circuit:

> Under the peculiar facts of this case, it does not follow from the fact that Lodi is entitled to the presumption of consistency [under Section 9607(a)(4)(A)], that it is also entitled to recover "all costs."
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> Lodi has expended significant attorney's fees in an attempt to escape liability through the enactment and defense of its municipal ordinance. These efforts, so far as we can tell, have not advanced the cleanup of the Lodi Site. **Litigation costs may indeed be part of recovering funds that are needed to advance the cleanup.** However, the ability to recover litigation-related attorney's fees does not necessarily advance the pace of cleanup because it may encourage ambitious litigation. We do not interpret the Cooperative Agreement to allow Lodi to recover its attorney's fees, nor do we necessarily believe that it could bestow on Lodi the right to recover all of its attorney's fees under the circumstances of this case.

302 F.3d at 953-54 (emphasis added).[9]

Here, the Tribes commenced this litigation not to avoid or escape liability, but rather to establish Teck's liability. "Liability shifting" among PRPs (Potentially Responsible Parties) is not an issue. This litigation commenced in 2004, but it did not shift into high gear until 2008 following conclusion of the

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[9] It appears that because the city was not acting in an enforcement capacity, but as a Potentially Responsible Party (PRP), its litigation costs were not recoverable as "enforcement activities" under §9604(b).

appellate proceedings resolving the question of whether the litigation constituted an impermissible extraterritorial application of CERCLA. In June 2006, the EPA and Teck's American subsidiary, Teck Cominco American, Inc. (TCAI), entered into a non-CERCLA agreement to conduct a Remedial Investigation/Feasibility Study (RI/FS) patterned after CERCLA. Most, if not all, of the costs claimed by the Tribes were incurred after this litigation commenced, and particularly beginning in 2008 and thereafter.[10] As such, they are litigation-related in the sense that they were incurred after a lawsuit was filed to initially enforce the UAO and then later to establish Teck's liability under CERCLA.

While the work of the Tribes' experts has determined what hazardous substances are in the UCR Site, how much of it there is, and who is legally responsible for cleaning it up (Teck), no one (the Tribes or EPA) has yet to actually remove any hazardous substances or otherwise remedy the conditions at the UCR Site. Indeed, the non-CERCLA RI/FS is precisely for the purpose of determining what is the best way to clean up the UCR Site.[11] On the other hand, there is evidence suggesting the Tribes' efforts have benefitted and advanced the pace of cleanup. In a December 5, 2008 letter to Defendant, EPA Regional Administrator Elin D. Miller wrote:

> Unfortunately, the postponement of litigation that Teck Cominco seeks is not likely to improve relations as parties

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[10] The Tribes did not become a party until September 2005, as the original citizens' suit complaint was filed by individual tribal members, Pakootas and Michel.

[11] The court understands it is Teck's assertion that none of the work performed by the Tribes' experts has been used by the EPA thus far in performing the non-CERCLA UCR RI/FS.

> will continue to view the RI/FS through the lens of their litigation stances. **EPA 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 a cleanup plan for the Site, and so that cleanup is not delayed by litigation when the RI/FS is completed.**

(Ex. attached to Ct. Rec. 243)(emphasis added). The court cited this letter in denying Defendant's motion to stay the litigation for three years to allow for sufficient progress to be made on the RI/FS. (ECF No. 260 at p. 3).

There would appear to be little doubt that some of the activities undertaken by the Tribes' experts constitute "removal actions" as defined in 42 U.S.C. Section 9601(23), in particular "actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." It is not clear that the phrase "actual cleanup" used in *Key Tronic* is limited to actual removal of hazardous substances from a site and remediation of a site. The cases cited above suggest the phrase is broad enough to encompass the monitoring, assessing, and evaluating of the release or threat of release of hazardous substances- in other words, that "actual cleanup" is a process that includes these types of activities (i.e., investigation, prevention of future releases, containment, etc.). The Tribes' action may well be an instance where litigation has "advanced" the cleanup of the UCR Site. *Fireman's Fund*, 302 F.3d at 953. By "tracking down the responsible solvent polluter[]" through the establishment of Teck's liability, and "increas[ing] the probability that a cleanup will be effective and get paid for," the Tribes' action has arguably "benefitted the entire cleanup effort." *Key Tronic*, 511 U.S. at 820. Therefore, it may be that some of the Tribes' claimed response costs "serve a statutory purpose apart from the reallocation of costs." *Id.*

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The Tribes' claimed costs fall into three categories: 1) its attorney's fees and costs incurred during the course of the Phase I litigation establishing Teck's liability; 2) expert fees and costs incurred in Phase I; and 3) the attorney's fees and costs of Pakootas and Michel incurred in the effort to enforce the EPA's UAO which the Tribes says it paid. With regard to the first two categories, the court concludes the Tribes are entitled to an opportunity at the upcoming bench trial to establish that some of these costs are recoverable because they are "recoverable costs of response clearly distinguishable from litigation costs" per *Key Tronic* in that they are related to "removal" or "remedial" action.

Problematic, however, is allowing the Tribes an opportunity to recover the fees and costs it says it paid on behalf of Pakootas and Michel in their efforts to enforce the UAO. The citizen suit brought by Pakootas and Michel under 42 U.S.C. Section 9659(f) also arguably "advanced" the cleanup of the UCR Site, the theory being that it prompted the TCAI-EPA settlement agreement and the non-CERCLA RI/FS that is currently taking place. Indeed, this court previously awarded attorney's fees and costs to Pakootas and Michel, finding they were "'prevailing' parties because they effectively obtained the injunctive relief they and EPA sought, which was compelling [Teck] to perform an RI/FS for the UCR Site." (ECF No. 295 at p. 9). The Ninth Circuit Court of Appeals, however, rejected that reasoning and reversed this court's decision. (ECF Nos. 2020, 2088 and 2102).

The Tribes says because 42 U.S.C. § 9607(a)(4)(A), unlike § 9659(f), does not include any "prevailing party" requirement, it should be able to recover the fees and costs it advanced to Pakootas and Michel. In light of the language in *Chapman* and *Fireman's Fund* quoted above which refers to the government as a "prevailing party," it is debatable that there is no "prevailing party" requirement in

§ 9607(a)(4)(A) cost recovery actions. In any event, if there is such a distinction, it is not a material one. While it is unclear that the circuit's decision denying fees and costs to Pakootas and Michel is binding on this court as a matter of *res judicata* with regard to recovery of response costs under § 9607(a), awarding those fees and costs to the Tribes would be contrary to and inconsistent with the circuit's decision. By virtue of its decision, the circuit effectively found the fees and costs incurred in the UAO enforcement portion of this litigation did not advance the cleanup. Furthermore, that portion of the litigation did not establish Teck as a "responsible solvent polluter" and did not involve any activity by Pakootas and Michel that can be categorized as "removal" or "remedial" action under CERCLA (i.e., no monitoring, assessing, evaluating of release or threat of release of hazardous substances).

IV. CONCLUSION

Defendant's Motion For Summary Adjudication Of The Tribes' Claim For Past Response Costs (ECF No. 2173) is **GRANTED in part**. As a matter of law, the Tribes cannot recover as CERCLA response costs the fees and costs it advanced to Pakootas and Michel.

The motion is otherwise **DENIED**. There are genuine issues of material fact regarding whether some of the fees and costs incurred by the Tribes in Phase I of this litigation constitute recoverable response costs under CERCLA because they are not attributable to litigation, but instead are related to "removal" or "remedial" action. At the upcoming bench trial, the Tribes will bear the burden of making that distinction, whereas Teck will bear the burden of proving the Tribes

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did not comply with the NCP because it did not accurately account for its claimed response costs. [12]

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

DATED this 16th day of November, 2015.

s/Lonny R. Suko

LONNY R. SUKO
Senior United States District Judge

[12] The Tribes have filed a declaration from Whitney Fraser (ECF No. 2201) in opposition to Teck's motion for summary adjudication. Teck has filed evidentiary objections and a request to strike this declaration. (ECF No. 2210-1). The Tribes have filed a similar but more detailed declaration from Fraser which constitutes her "Written Trial Testimony" for trial purposes. (ECF No. 2199). Teck has filed objections to this declaration (ECF No. 2227) which are similar to the objections filed to Fraser's declaration submitted in opposition to summary adjudication.

Because the court intends to rule on the objections to Fraser's "Written Trial Testimony," it finds no need to rule on the objections to her declaration filed in opposition to summary adjudication. It has not been necessary for the court to rely on Fraser's declaration to reach its decision on the motion for summary adjudication. Because of prior proceedings in this matter, particularly those relating to divisibility and apportionment, the court is independently very familiar with the Tribes' expert evidence and how it was developed.