

# Environmental Justice and the Upper Columbia River Basin: How the United States Failed the Confederated Tribes of the Colville Indian Reservation

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## I. INTRODUCTION

For more than a decade, executive agencies of the United States government have expressed a commitment to achieving environmental justice “to the greatest extent practicable and permitted by law.” However, agency commitment in practice has often fallen short of the mark and environmental justice is rarely, if ever, truly achieved. This article examines the failure of the U.S. Environmental Protection Agency (EPA) to carry out its environmental justice mission in the Upper Columbia River Basin of Washington State, thereby leaving the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the investigation of more than a century of transboundary contamination of the river to two members of the Confederated Tribes of the Colville Indian Reservation.

## II. ENVIRONMENTAL JUSTICE

On February 11, 1994, President Clinton issued Executive Order 12,898 (EO 12,898) entitled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.”<sup>2</sup> Section 1-101 of EO 12,898 states:

To the greatest extent practicable and permitted by law . . .  
. . . each Federal agency shall make achieving environmental

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<sup>2</sup> Exec. Order No. 12,898, 69 Fed. Reg. 32 (Feb. 11, 1994), available at <http://www.epa.gov/fedrg-str/eo/eo12898.pdf>.

justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.<sup>3</sup>

EO 12,898 further defines the process by which federal agencies are to achieve this mandate:

[E]ach Federal agency shall develop an agency-wide environmental justice strategy . . . that should . . . at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations.<sup>4</sup>

Environmental justice policies adopted by executive agencies in compliance with EO 12,898 serve as internal guidance documents only, to aid in agency decision-making and in the investigation of environmental justice complaints. By its very terms, EO 12,898 is not enforceable against the federal government for noncompliance: “This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.”<sup>5</sup> Consistent with

<sup>3</sup> *Id.* at § 1-101.

<sup>4</sup> *Id.* at § 1-103.

<sup>5</sup> *Id.* at § 6-609. Numerous litigants have attempted to invoke EO 12898 in challenging federal actions. *See, e.g.*, ACORN v. U.S. Army Corps of Eng’rs, 2000 WL 433332 (E.D. La. 2000); Morongo Band of Mission Indians v. FAA, 161 F.3d 569 (9th Cir. 1998); *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *Citizens Concerned About Jet Noise v. Dalton*, 48 F. Supp. 2d 582 (E.D. Va. 1999).

that language, every agency administrative review board to consider the issue has routinely concluded that “the Order affords no right, enforceable by any member of the public against [the agency], should [the agency] fail to live up to this mandate.”<sup>6</sup>

Some agencies, such as the Federal Energy Regulatory Commission, simply deny that they are bound by EO 12,898.<sup>7</sup> Still others claim to have made a commitment to environmental justice and the incorporation of environmental justice considerations in decision-making, but in practice fail to carry out the mandate of EO 12,898 or the agency’s own policies.<sup>8</sup> The EPA is one such agency that has failed to carry out this mandate.<sup>9</sup>

#### A. Environmental Justice as Interpreted by the U.S. Environmental Protection Agency

The EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>10</sup> The EPA affirms that it has made environmental justice a “goal for all communities and persons across this Nation”<sup>11</sup> and asserts that environmental justice “will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”<sup>12</sup>

The EPA has been sharply criticized by its own Inspector General for its definition of environmental justice because it fails to focus on minority and low-income populations that are disproportionately impacted by environmental harms as EO 12,898 requires:

<sup>6</sup> Antonio J. Baca, 144 IBLA 35, 39 (Apr. 30, 1998) (citing Mendiboure Ranches, Inc., 90 IBLA 360, 365-70 (1986)).

<sup>7</sup> E. Tenn. Natural Gas Co., 101 F.E.R.C. P61188, 61762 (2002).

<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> See *infra* Part III.

<sup>10</sup> EPA, ENVIRONMENTAL JUSTICE: FREQUENTLY ASKED QUESTIONS, <http://www.epa.gov/compliance/resources/faqs/ej/index.html> (last visited Apr. 10, 2009).

<sup>11</sup> EPA, ENVIRONMENTAL JUSTICE, <http://www.epa.gov/environmentaljustice/> (last visited Apr. 10, 2009).

<sup>12</sup> *Id.*

EPA has not identified minority and low-income, nor [sic] identified populations addressed in the Executive Order, and has neither defined nor developed criteria for determining disproportionately impacted. Moreover, in 2001, the Agency restated its commitment to environmental justice in a manner that does not emphasize minority and low-income populations, the intent of the Executive Order. . . .

. . . .

We believe the Agency is bound by the requirements of Executive Order 12898 and does not have the authority to reinterpret the order. The Acting Deputy Administrator needs to reaffirm that the Executive Order 12898 applies specifically to minority and low-income populations that are disproportionately impacted. After 10 years, there is an urgent need for the Agency to standardize environmental justice definitions, goals, and measurements for the consistent implementation and integration of environmental justice at EPA. . . .

. . . . The Agency believes the Executive Order ‘instructs the Agency to identify and address the disproportionately high and adverse human health or environmental effects of it [sic] programs, policies, and activities.’ The Agency does not take into account the inclusion of the minority and low-income populations, and indicated it is attempting to provide environmental justice for everyone. While providing adequate environmental justice to the entire population is commendable, doing so had already been EPA’s mission prior to implementation of the Executive Order; we do not believe the intent of the Executive Order was simply to reiterate that mission. We believe the Executive Order was specifically issued to provide environmental justice to minority and/or low-income populations due to concerns that those populations had

been disproportionately impacted by environmental risk.<sup>13</sup>

The EPA's administrative tribunal, the Environmental Appeals Board (EAB) "has considered a broad range of environmental justice issues in the permitting context, and has examined the effects of proposed permits on a number of communities' natural resources."<sup>14</sup>

[Although] the EAB has remanded only one permit based on Environmental Justice concerns, relating to the sufficiency of the record upon which EPA based its decision, the EAB has not overturned a single permit based on a finding of disproportionate impact.<sup>15</sup>

Because EO 12,898 is not judicially enforceable, the party seeking a permit is well-positioned to argue successfully that any denial of a permit by EPA based on environmental justice considerations is arbitrary and capricious, and contrary to law.<sup>16</sup> Thus, it seems unlikely that the EAB will ever deny a permit based on environmental justice concerns.

## B. Environmental Justice and Indian Tribes

In general, Indian tribes are susceptible to environmental injustices because of the close ties between their sovereignty, culture, sustenance, and economic well being and the environmental health of their land. While "[t]he impoverishment of nature affects every American citizen...it poses particularly severe threats to Native America because tribal populations today are not mobile. [The tribes'] [s]overeignty and culture are tied to a fixed, remnant land base."<sup>17</sup>

Tribes are beneficiaries of the Executive order because the occupants of Indian reservations comprise minority and (with few exceptions) low-

<sup>13</sup> EPA OFFICE OF THE INSPECTOR GENERAL, EVALUATION REP. NO. 2004-P-00007, EPA NEEDS TO CONSISTENTLY IMPLEMENT THE INTENT OF THE EXECUTIVE ORDER ON ENVIRONMENTAL JUSTICE, i-ii (2004), available at <http://www.epa.gov/oig/reports/2004/20040301-2004-P-00007.pdf>.

<sup>14</sup> Barry E. Hill, *The Link Between Protecting Natural Resources and the Issue of Environmental Justice*, 28 B.C. ENVTL. AFF. L. REV. 1, 12 (2000).

<sup>15</sup> *Id.*

<sup>16</sup> *See infra*, Part III.

<sup>17</sup> Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 375 (2008).

income populations and Indian reservations are remotely located and limited in size.<sup>18</sup> Therefore, impacts to reservation resources caused by environmental contamination—and the health risks posed to these minority and low-income populations as a result—disproportionately affect Indian tribes and give rise to environmental justice issues.<sup>19</sup> Because reservations were set aside as permanent homelands and tribal cultures are rooted in the natural world, we can say that the federal government’s trust responsibility includes a duty to protect the environments of the reservations.<sup>20</sup> Accordingly, agencies, as has the EPA, have expressly recognized that the federal trust responsibility imposes a duty on an agency to protect the environmental interests of Indian tribes.<sup>21</sup> Not protecting a tribe’s interest could be seen as a matter of environmental justice because if an agency’s action overlooks adverse impacts on trust resources, a tribe would necessarily suffer disproportionate impacts.<sup>22</sup> Indeed, these agency oversights and tribal dependency on their land base manifest in a variety of injustices.

One example of an unjust oversight, often cited by environmental justice advocates, is the failure of risk assessors to address differing consumption patterns of fish in determining human health risks.<sup>23</sup> A number of studies support the claim that minority populations like Indian tribes are significantly more likely to consume fish as a source of subsistence protein, in significantly larger quantities and in greater frequency than non-minority populations.<sup>24</sup> Additionally, most risk assessments assume that tribal populations consume skinless, trimmed fillets, yet “[t]he evidence suggests that ethnic minorities are more likely to eat fish with

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<sup>18</sup> EPA OFFICE OF THE INSPECTOR GENERAL, EVALUATION REP. NO. 2004-P-00035, *TRIBAL SUPERFUND PROGRAM NEEDS CLEAR DIRECTION AND ACTIONS TO IMPROVE THE TRIBAL SUPERFUND PROGRAM* 3 (2004), available at <http://www.epa.gov/oig/reports/2004/20040930-2004-P-00035.pdf>.

<sup>19</sup> *Id.* at 1, 4–5. The report also notes at page i that EPA must form partnerships with state and tribal governments to accomplish cleanup of superfund sites around the country, and with regard to tribes, “[f]ormidable challenges in EPA’s partnership efforts with tribes include the large number and wide dispersion of tribes and a ‘close to the land’ lifestyle that results in disproportionate impacts to tribes.”

<sup>20</sup> *Id.* at 4–5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Brian D. Israel, *An Environmental Justice Critique of Risk Assessment*, 3 N.Y.U. ENVTL. L.J. 469, 501 (1995).

<sup>24</sup> *Id.*

the skin.”<sup>25</sup> This distinction is crucial, because toxins in fish are concentrated in the skin and fatty tissues, neither of which are eaten as part of a fillet, the cut of choice for most non-ethnic minority diners.<sup>26</sup> Because human health assessments often fail to take into account additional fish consumption or the additional parts of the fish that are consumed, they underestimate the level of contamination in the bodies of tribal members.<sup>27</sup>

Tribal territories are also disproportionately impacted by global environmental issues. A report by the Natural Resources Law Center at the University of Colorado Law School documents the disproportionate impact of the effects of global warming on Indian tribes and tribal communities.<sup>28</sup> These effects include threats to traditional hunting and gathering practices of Pacific Northwest tribes,<sup>29</sup> destruction of native villages in Alaska,<sup>30</sup> increased pressure on tribal reserved rights to water in the arid Southwest,<sup>31</sup> and inundation of reservation lands in Florida.<sup>32</sup> Because of their cultural and economic dependency on the land, climate changes are yet another example of a tribe’s susceptibility to adverse treatment from environmental impacts.<sup>33</sup>

In addition to global issues, the placement and lack of regulation of

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<sup>25</sup> *Id.* (quoting 2 EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 12 (1992)).

<sup>26</sup> *Id.* Scientists at the University of Michigan performed an illustrative study based on a Michigan rule that assumes an average fish consumption of 6.5 grams/person/day and regulates water quality accordingly. The study concluded that the average consumption of fish by Whites was 17.9 grams/day/person, while the average consumption for African Americans and Native Americans respectively was 20.3 grams/day/person and 24.3 grams/day/person. Not only was the Michigan rule assuming far too low of an exposure level but also that there are significant exposure differences among sub-groups within the Michigan population. See Patrick C. West et al., *Minority Anglers and Toxic Fish Consumption: Evidence from a Statewide Survey of Michigan*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 100–113 (Paul Mohai & Bunyan Bryant eds., 1992).

<sup>27</sup> See Israel, *supra* note 23, at 501. For an excellent discussion of the failure of human health assessments to address the differences in fish consumption, see Catherine A. O’Neill, *Environmental Justice in the Tribal Context: A Madness to EPA’s Method*, 38 ENVTL. L. 495, 509 (Spring 2008).

<sup>28</sup> See JONATHAN M. HANNA, NATURAL RESOURCES LAW CENTER, NATIVE COMMUNITIES AND CLIMATE CHANGE: PROTECTING TRIBAL RESOURCES AS PART OF NATIONAL CLIMATE POLICY (2007), [http://www.colorado.edu/Law/centers/nrlc/publications/ClimateChangeReport-FINAL%20\\_9.16.07\\_.pdf](http://www.colorado.edu/Law/centers/nrlc/publications/ClimateChangeReport-FINAL%20_9.16.07_.pdf)

<sup>29</sup> *Id.* at 8.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> *Id.* at 20.

<sup>32</sup> *Id.* at 26.

<sup>33</sup> *Id.* at 29.

hazardous waste sites has resulted in reservations with more than their fair share of environmental impacts. Because of the remoteness of many reservations, there are the hundreds of hazardous waste sites impacting tribes across the county.<sup>34</sup> One reason for a lack of federal enforcement is the Superfund Site Cleanup Program.<sup>35</sup> Empirical observations suggest that the representation of minority and low-income populations in this program is lower than would be expected, and these populations may not benefit in proportion to other populations.<sup>36</sup> The process of moving a hazardous waste site to the federal Superfund list should be related solely to the severity of hazard posed to the surrounding populations.<sup>37</sup> However, some commentators suggest that other social forces shape the listing decision.<sup>38</sup>

A site could be listed because of its hazardousness, or conversely it could be listed because it is less hazardous and therefore easier to clean. Moreover, a site could also move more quickly through the listing process because it is in a community perceived to have more power through access to resources because individuals residing in the area have higher incomes or because of racial or ethnic composition of the area. This environmental cleanup injustice has been supported by research demonstrating that representation of minorities and low-income populations is lower in areas with Superfund sites, indicating these populations are not benefiting equally from the Superfund program.<sup>39</sup>

A striking example of this Superfund issue, and the EPA's failure to meet the broad mandate set out by EO 12,898 to address environmental justice in

<sup>34</sup> EPA OFFICE OF THE INSPECTOR GENERAL, *supra* note 18, at 3.

<sup>35</sup> Sandra George O'Neil, *Superfund: Evaluating the Impact of Executive Order 12898*, 115 ENVTL. HEALTH PERSPECTIVES 1087, 1087 (2007) <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1913562>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

minority and low-income populations, is the historic and ongoing contamination of the Upper Columbia River basin, the home of the Colville Confederated Tribes.

### III. THE UPPER COLUMBIA RIVER BASIN AS AN EXAMPLE OF AN ENVIRONMENTAL JUSTICE FAILURE

In implementing EO 12,898 the EPA pledged to use its enforcement discretion to focus on environmental justice issues.<sup>40</sup> The EPA also pledged to work with other federal agencies, state, tribal, and local governments to address environmental problems involving jurisdictional disputes and gaps in environmental laws.<sup>41</sup> Finally, the EPA pledged to work with Canada and Mexico to address cross-border pollution.<sup>42</sup> Had the EPA fulfilled even one of its pledges, the outcome of the Teck Cominco case could have been far different. For that reason, the Colville Confederated Tribes' long and frustrating battle to compel the cleanup of the Upper Columbia River Basin serves as a clear demonstration of the EPA's failure to comply with its internal environmental justice policies or the broad mandate of EO 12,898.

#### A. Background

Teck Cominco owns and operates the world's largest lead-zinc smelter, on the Columbia River in Trail, British Columbia (the Trail Smelter), approximately ten river miles north of the border between Canada and Washington.<sup>43</sup> Between 1906 and 1995 Cominco generated and disposed of hazardous substances, both liquid and solid, into the Columbia River.<sup>44</sup> These hazardous materials included untreated effluent and "slag," a by-product of the smelting process which contains heavy metals including arsenic, cadmium, copper, mercury, lead, and zinc.<sup>45</sup> Until

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<sup>40</sup> EPA, THE ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL JUSTICE STRATEGY 13 (1995), available at [http://www.epa.gov/compliance/resources/policies/ej/ej\\_strategy\\_1995.pdf](http://www.epa.gov/compliance/resources/policies/ej/ej_strategy_1995.pdf).

<sup>41</sup> *Id.* at 15.

<sup>42</sup> *Id.*

<sup>43</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 (9th Cir. 2006); see also, 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, 243 (2006).

<sup>44</sup> *Pakootas*, 452 F.3d at 1069.

<sup>45</sup> *Id.* at 1070.

mid-1995 the Trail Smelter discharged hundreds of tons of slag each day, up to 145,000 tons of slag per year, into the Columbia River.<sup>46</sup> The Columbia River carried the Trail Smelter's slag south, across the border into the United States, where it was deposited on the bed and banks of the Upper Columbia River and Franklin D. Roosevelt Lake (Lake Roosevelt).<sup>47</sup>

The reservation of the Colville Confederated Tribes ("Tribes"), located in remote, northeastern Washington, is bounded on the east and the south by the Columbia River.<sup>48</sup> The Tribes' headquarters is approximately 114 miles from the city of Spokane, and the northern edge of the reservation lies approximately 54 river miles south of the Canadian border.<sup>49</sup> The reservation covers 1.4 million acres, or approximately 2,100 acres, inhabited by only 5,000 residents of small communities.<sup>50</sup>

The Tribes have long participated on regional water quality boards and councils concerned with the health of the Columbia River and its resources.<sup>51</sup> When these boards and councils failed to investigate river contamination, the Tribes convened a meeting of the tribal, state, and federal CERCLA Natural Resource Trustees and the EPA in November 1998.<sup>52</sup> The Tribes proposed the formation of a Trustee Council and the execution of a Memorandum of Agreement among the Trustees. The Tribes implored the EPA to assess the environmental and human health risks posed by the contamination of the Upper Columbia River Basin. All of the tribal, state, and federal attendees at that initial meeting acknowledged that

<sup>46</sup> *Id.* at 1070 n.6.

<sup>47</sup> *Pakootas*, 452 F.3d at 1069–70. A map of the Columbia River basin can be found at [http://yosemite1.epa.gov/r10/ECOCOMM.NSF/0/a9c0d90ecbf9e57a882571e2006d4abe/\\$FILE/Columbia-Basin.jpg](http://yosemite1.epa.gov/r10/ECOCOMM.NSF/0/a9c0d90ecbf9e57a882571e2006d4abe/$FILE/Columbia-Basin.jpg) (last visited Apr. 10, 2009).

<sup>48</sup> A map of the Upper Columbia River basin and the reservation can be found at [http://yosemite1.epa.gov/R10/ECOCOMM.NSF/0/283aecf9fce1f5c7882571d4006b5ecc/\\$FILE/Upper\\_Columbia\\_Project\\_Area.jpg](http://yosemite1.epa.gov/R10/ECOCOMM.NSF/0/283aecf9fce1f5c7882571d4006b5ecc/$FILE/Upper_Columbia_Project_Area.jpg) (last visited Apr. 10, 2009).

<sup>49</sup> *Id.*

<sup>50</sup> Confederated Tribes of the Colville Indian Reservation, Facts & Information, <http://www.colvilletribes.com/facts.htm> (last visited Apr. 10, 2009).

<sup>51</sup> See EPA, UPPER COLUMBIA RIVER EXPANDED SITE INSPECTION REPORT NORTHEAST WASHINGTON TDD: 01-02-0028, at 16 (2003), available at <http://www.epa.gov/r10earth/offices/sf/UCR/Upper%20Columbia%20River%20ESI.pdf>; *Living on Earth, U.S. Indian Tribes Challenge Canadian Company's Legacy of Waste* (NPR radio broadcast Feb. 10, 2006), transcript available at <http://www.loe.org/shows/shows.htm?programID=06-P13-00006#feature7> (last visited Apr. 10, 2009).

<sup>52</sup> The following paragraph is based upon the author's recollection of events as they took place.

the contamination of the Upper Columbia River Basin was a problem that needed to be addressed. Much to the frustration of the Tribes, however, the state and federal agencies believed it was too large a problem to be addressed with the limited funding and personnel in their respective budgets.

Dissatisfied by the response, the Tribes sought the assistance and support of the Bureau of Indian Affairs (BIA) and the Department of Interior's Solicitor's office in raising the profile of the Basin's problems at the federal level. The Tribes held numerous meetings with the EPA's Region 10 office, which was sympathetic to the issue, but needed the support of the EPA's Headquarters Office because of the transboundary source of the contamination.<sup>53</sup> The Tribes made several trips to Washington, D.C., for informational meetings with the EPA's Headquarters, the Bureau of Reclamation (BOR),<sup>54</sup> and all of the members of Washington State's congressional delegation.

In August 1999 the Tribes petitioned the EPA under CERCLA § 105<sup>55</sup> to conduct a preliminary assessment of hazardous substance contamination in and along the Columbia River for 150 miles of river from the Canadian border south to the Grand Coulee Dam.<sup>56</sup> The EPA performed its site assessment between October 1999 and March 2003, finding slag on beaches and other depositional areas in the Upper Columbia River, as well as heavy metals contamination including arsenic, cadmium, copper, lead, mercury and zinc.<sup>57</sup> The EPA concluded that the Upper Columbia River Site was eligible for listing on the

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<sup>53</sup> See Les Blumenthal, *Did politics trump law in case of polluting Canadian smelter?* McCLATCHY NEWSPAPERS (Feb. 17, 2008), <http://www.mcclatchydc.com/homepage/story/27836.html> (comments by former EPA staff regarding Region 10 EPA being overruled by EPA Headquarters).

<sup>54</sup> The BOR is the U.S. Department of Interior's bureau that operates Grand Coulee Dam.

<sup>55</sup> *Pakootas*, 452 F.3d at 1069; see also 42 U.S.C. § 9605(d) (2002).

<sup>56</sup> See Brief in Opposition for Respondents Joseph A. Pakootas and Donald R. Michel at 2, *Teck Cominco Metals, Ltd. v. Pakootas*, No. 06-1188 (May 2, 2007), 2007 WL 1319339, at \*2 [hereinafter Brief in Opposition].

<sup>57</sup> *Id.*

National Priorities List (NPL) as a so-called Superfund Site.<sup>58</sup>

The EPA assessment found that prior to 1995 Teck Cominco had arranged for the disposal of hazardous slag and heavy metals from the Trail Smelter by directly discharging up to tens of thousands of tons of slag annually into the Canadian portion of the Upper Columbia River.<sup>59</sup> Under CERCLA a person may be strictly liable for the costs of cleanup of hazardous substances and for natural resource damages arising from the discharge of hazardous substances, when they are (1) the current or past owner or operator of a facility from which these substances have been released, (2) a person who accepted hazardous substances for disposal at a facility, (3) or a person who arranged for the disposal of a hazardous substance at a facility.<sup>60</sup> The EPA concluded that discharging hazardous materials into a river, which carried those substances across the border, was no different from arranging to have those same hazardous substances loaded onto a truck, driven over the border, and dumped into the Upper Columbia River.<sup>61</sup>

#### B. The Unilateral Administrative Order

While the EPA contemplated whether to propose the clearly eligible site for NPL listing, Teck Cominco's wholly-owned American subsidiary<sup>62</sup> approached the agency and expressed a willingness to perform an independent human health study if the EPA would delay proposing the site for NPL listing.<sup>63</sup> Subsequent negotiations were unsuccessful, and in December 2003 the EPA issued a Unilateral Administrative Order (UAO) directing Teck Cominco to conduct a CERCLA Remedial Investigation/Feasibility Study (RI/FS) of the Upper Columbia River.<sup>64</sup> The UAO, which asserted jurisdiction under CERCLA over a foreign company operating in a foreign country for environmental harms in

<sup>58</sup> See *Pakootas*, 452 F.3d at 1070.

<sup>59</sup> Brief in Opposition, *supra* note 55, at 13 n.6.

<sup>60</sup> 42 U.S.C. § 9607(a) (2002).

<sup>61</sup> See Brief for the United States as Amicus Curiae at 4, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188), 2007 WL 4142586, at \*4 (citing to the Settlement Agreement, available at <http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter>) [hereinafter Brief for the United States].

<sup>62</sup> Teck Cominco American, Inc.

<sup>63</sup> Brief in Opposition, *supra* note 55, at 3.

<sup>64</sup> Brief for the United States, *supra* note 60, at 16.

the United States, was the first of its kind issued by the EPA in CERCLA's twenty-seven-year history.<sup>65</sup>

However, Teck Cominco never complied with the UAO, and the EPA did not enforce it. Hence, in July 2004 two members of the Tribes, Joseph Pakootas and D.R. Michel,<sup>66</sup> filed a citizen suit in United States district court under CERCLA's citizen suit provision,<sup>67</sup> seeking to enforce the UAO.<sup>68</sup>

### C. The Citizen Suit

Pakootas and Michel sought a declaration that Teck Cominco violated the UAO; injunctive relief compelling Teck Cominco to comply with the UAO; statutory penalties for non-compliance; and their attorneys' fees and costs.<sup>69</sup> Teck Cominco moved to dismiss the suit, alleging that CERCLA was not intended to reach actors whose conduct occurred outside the borders of the United States.<sup>70</sup> Teck Cominco argued that while the EPA had defined the "site" subject to the UAO entirely within the United States, the source of the hazardous materials attributed to Teck Cominco was in Canada, subject to Canadian law.<sup>71</sup> Thus, Teck Cominco's position was that application of CERCLA to the Trail Smelter mess would constitute an impermissible, extraterritorial application of the law.<sup>72</sup> Teck Cominco also asserted that the transboundary application of CERCLA to its operations in Canada would interfere with Canadian law and was contrary to reasonable foreign policy.<sup>73</sup> Finally, Teck Cominco argued that it could not face "arranger" liability under CERCLA for arranging for the disposal of hazardous

<sup>65</sup> Brief for the United States, *supra* note 60, at 16.

<sup>66</sup> At the time of the lawsuit, Joseph Pakootas was the Chairman of the Colville Tribal Business Council (the "Tribal Council"), the governing body of the Tribes. D.R. Michel was a member of the Tribal Council and chaired the Council's Natural Resources Committee.

<sup>67</sup> CERCLA § 310(a)(1), 42 USC § 9659(a)(1) (2002).

<sup>68</sup> Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM (E.D. Wash., Nov. 8, 2004), 2004 WL 2578982.

<sup>69</sup> Complaint for Injunctive and Declaratory Relief and for Civil Penalties, Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-0256-AAM (E.D. Wash. Jul. 12, 2004), 2004 WL 2646770.

<sup>70</sup> Memorandum in Support of Motion to Dismiss, Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-0256-AAM (Aug. 26, 2004), 2004 WL 2046726.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

substances at a site in the United States.<sup>74</sup> This is because, the Canadian mining interest argued, the plain language of CERCLA required the participation of another party to constitute an “arrangement for disposal,” and there was no such third party.<sup>75</sup>

The State of Washington moved to intervene as a matter of right and joined in the plaintiffs’ opposition to Teck Cominco’s motion to dismiss.<sup>76</sup> The plaintiffs argued, in opposing Teck Cominco’s motion to dismiss, that the presumption against the extraterritorial application of United States law did not apply in this case, because the effects of Teck Cominco’s conduct in Canada were felt in the United States.<sup>77</sup> “[A] broad remedial statute such as CERCLA was intended to apply to a foreign entity whose actions cause cross-border pollution that adversely affects U.S. lands and waters.”<sup>78</sup> Additionally, neither the application of CERCLA nor the enforcement of the UAO would conflict with Canadian law<sup>79</sup> because CERCLA is a remedial statute and does not regulate ongoing operations. Moreover, the UAO addressed contamination only in the United States and did not seek to compel any investigation or remediation of releases in Canada.

During oral argument on Teck Cominco’s motion to dismiss, the district court inquired into why the EPA was not enforcing its own order.<sup>80</sup> The Ninth Circuit Court of Appeals repeated this question when talking about the historic and on-going contamination of the Upper Columbia River basin.<sup>81</sup> The question has always been—where is the EPA?

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Memorandum of Points and Authorities in Support of State of Washington’s Motion to Intervene, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM (E.D. Wash. Sep. 2, 2004), 2004 WL 2647288.

<sup>77</sup> Response of Plaintiffs in Opposition to Defendants’ Motion to Dismiss at 7, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM (E.D. Wash. Sept. 7, 2004), 2004 WL 2646714.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Transcript of Proceeding at 53–54, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM, (E.D. Wash. Nov. 4, 2004).

<sup>81</sup> *Id.*

#### D. The District Court Decision

In ruling on Teck Cominco's motion to dismiss, the district court concluded that the extraterritorial application of CERCLA was appropriate, reasoning that the failure to extend the scope of the statute to Teck Cominco's operations would result in adverse effects in the United States.<sup>82</sup> "The facility located in Canada is rightly subject to liability under CERCLA to clean up the mess in 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."<sup>83</sup> The district court held that enforcement of the UAO would not conflict with Canadian law, holding that the plaintiffs' use of CERCLA was not intended to supersede Canadian environmental regulation of Teck Cominco, but rather, to compel the cleanup of contamination in the United States, an area not subject to protection under Canadian law.<sup>84</sup>

Finally, in addressing Teck Cominco's argument that arranger liability required another party's involvement in the disposal of the hazardous substance, the district court concluded that, while "generator" or "arranger" liability or both could not be ruled out for Teck Cominco, the court did not need to rule on the issue because it could be litigated, if necessary, at a later date.<sup>85</sup> The district court denied Teck Cominco's motion to dismiss in November 2004 and certified the matter for immediate appeal to the Ninth Circuit Court of Appeals.<sup>86</sup>

#### E. The Appeal

In 2005, while the appeal was still pending, the Tribes joined in the suit. The State and the Tribes amended their complaints to assert additional claims for response costs and natural resource damages under CERCLA.<sup>87</sup>

<sup>82</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM, 2004 WL 2578982 at \*9 (E.D. Wash. Nov. 8, 2004) (order denying motion to dismiss).

<sup>83</sup> *Id.* at \*14.

<sup>84</sup> *Id.* at \*12.

<sup>85</sup> *Id.* at \*11.

<sup>86</sup> *Id.* at \*17.

<sup>87</sup> See Plaintiffs' Amended Complaint at 1, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM (E.D. Wash. Nov. 7, 2005), 2005 WL 3287245 at \*1; State of Washington's First Amended Complaint in Intervention at 1, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM (E.D. Wash. Nov. 4, 2005), 2005 WL 3287242 at \*1.

Then, in June 2006, the United States (which was not participating in the citizen suit) and Teck Cominco executed a settlement agreement under which Teck Cominco's American subsidiary agreed to fund and perform an RI/FS, subject to EPA oversight but outside the CERCLA framework.<sup>88</sup> In exchange, the EPA agreed to withdraw the UAO and not to seek civil penalties.<sup>89</sup> Neither Pakootas, Michel, the State, nor the Tribes were a party to the settlement agreement.<sup>90</sup> In notifying the Ninth Circuit of the settlement agreement and withdrawal of the UAO, Teck Cominco stated that neither the settlement nor the withdrawal of the UAO rendered the proceedings moot.<sup>91</sup>

The Ninth Circuit affirmed the district court a month later in July 2006, concluding not only that the UAO was enforceable against Teck Cominco, but that Teck Cominco was potentially liable as an arranger.<sup>92</sup> Unlike the district court, however, the Ninth Circuit concluded that the release of hazardous substances had occurred wholly within the United States and thus involved a domestic application of CERCLA, rather than an extraterritorial application.<sup>93</sup> The Ninth Circuit found that 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."<sup>94</sup>

After the Ninth Circuit denied Teck Cominco's request for rehearing, Teck Cominco petitioned the United States Supreme Court for certiorari.<sup>95</sup> The Canadian government and the British Columbia provincial government supported Teck Cominco's petition, in addition to several trade associations, including the United States Chamber of Commerce and the Mining Association of Canada, who also submitted amicus briefs.<sup>96</sup> Teck Cominco asserted that the Ninth Circuit's

<sup>88</sup> Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1071 n.10 (9th Cir. 2006).

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1078, 1082.

<sup>93</sup> *Id.* at 1077-78.

<sup>94</sup> *Id.* at 1078.

<sup>95</sup> Petition for a Writ of Certiorari, Teck Cominco Metals, Ltd. v. Pakootas, 128 S. Ct. 858 (2007) (No. 06-1188) [hereinafter Petition for a Writ of Certiorari].

<sup>96</sup> Brief of Amicus Curiae Her Majesty the Queen in Right of the Province of British Columbia in

decision disregarded core principles of international comity, upset a “century-old tradition of [diplomatic] solutions to transboundary pollution problems,” and threatened “to disrupt the foreign policy of the United States.”<sup>97</sup> Teck Cominco urged the Court to accept review on the grounds that, because the United States is “a net exporter of certain types of pollution . . . U.S. interests would suffer gravely under the Ninth Circuit regime.”<sup>98</sup>

After the parties and the amici submitted their briefs, the Court invited the United States to file an amicus brief articulating the government’s position on the matter.<sup>99</sup> As prior courts had done before, the Supreme Court wondered what the EPA had to say about the matter. The United States complied. Asserting that certiorari should be denied,<sup>100</sup> the United States noted, “[w]hile international pollution can be diplomatically sensitive,” the comity concerns raised by Teck Cominco are “unusually weak here” and the case “would provide a particularly poor vehicle for considering the comity issue” in light of the fact that Teck Cominco “dumped millions of tons of slag into a river just upstream of the border.”<sup>101</sup>

The United States also asserted, likely unnecessarily, that the citizen suit claims were rendered moot by the June 2006 settlement agreement. In this agreement the United States resolved the government’s claims for injunctive relief

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Support of Petitioner, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188); Brief of the Government of Canada as Amicus Curiae in Support of Petitioner, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188); Brief of Amici Curiae the Canadian Chamber of Commerce and the Mining Association of Canada in Support of Petition for Writ of Certiorari, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188); Amicus Curiae Brief of Consumer Electronics Association in Support of Petitioner, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petition for a Writ of Certiorari, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188); Brief for Amici Curiae National Mining Association and National Association of Manufacturers in Support of Petitioner, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188).

<sup>97</sup> Petition for a Writ of Certiorari, *supra* note 94, at 21 (“The Ninth Circuit’s decision, if allowed to stand, would usurp the foreign-relations powers of the political branches and could provoke retaliatory actions against American interests by Canada or her courts.”).

<sup>98</sup> Petition for a Writ of Certiorari, *supra* note 94, at 24.

<sup>99</sup> Brief for the United States as Amicus Curiae at 1, *Teck Cominco Metals, Ltd. v. Pakootas*, No. 06-1188 (Nov. 20, 2007), 2007 WL 4142586 at \*1.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 6.

and civil penalties, the same relief sought in the citizen suit.<sup>102</sup> When the matter was remanded to the district court this seemingly superfluous observation made by the United States helped to end claims for civil penalties by Pakootas, Michel and the State of Washington, and quite possibly their fee awards.

Finally, the United States asserted that the question of the propriety of litigating transboundary pollution in U.S. courts lacks both the likelihood for recurring and sufficient importance to warrant the Court's review.<sup>103</sup> Instead, such disputes should be "permitted to percolate in the lower courts."<sup>104</sup> In doing so, however, the United States explicitly acknowledged that the courts, rather than the executive branch, may be the appropriate forum for resolving transboundary pollution cases: "[w]hile Canada and British Columbia would prefer to resolve this dispute through diplomatic channels and negotiation rather than litigation in United States courts—a preference the United States strongly shares—Canada correctly 'recognizes the possibility that some cases involving transboundary pollution may appropriately be resolved in the domestic courts of Canada or the United States.'"<sup>105</sup>

On January 7, 2008, the U.S. Supreme Court denied certiorari without comment and let the Ninth Circuit's ruling stand.<sup>106</sup> The matter was remanded to the District Court on March 3, 2008.<sup>107</sup>

#### F. The Remand

Just three short months after the matter was remanded to the District Court, Teck Cominco filed a motion seeking the dismissal of all claims based on the UAO. Teck Cominco asserted that the withdrawal of the UAO by the EPA in its settlement with Teck Cominco left the court without subject matter jurisdiction over the claims:

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<sup>102</sup> *Id.* at 6–7.

<sup>103</sup> *Id.* at 14–15.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 16, citing Brief of the Government of Canada as Amicus Curiae in Support of Petitioner, *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008) (No. 06-1188).

<sup>106</sup> *Teck Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008).

<sup>107</sup> Defendant *Teck Cominco Metals, Ltd.*'s Status Conference Report, *Pakootas v. Teck Cominco Metals, Ltd.*, No. 204CV00256 (E.D. Wash. Mar. 3, 2008), 2008 WL 2379640.

The continuance of plaintiffs' causes of action based on alleged violations of the now-withdrawn UAO constitutes a challenge to removal actions selected by the EPA under 42 U.S.C. § 9604, and is barred under § 9613(h). Since at least 2000, EPA has been engaged in removal and remedial actions selected under § 9604 at the Upper Columbia River site ("UCR site"). This program continues today, with EPA overseeing the conduct of a Remedial Investigation/Feasibility Study ("RI/FS") by Teck Cominco, pursuant to their 2006 settlement agreement. That settlement agreement incorporates EPA's decision to withdraw the UAO, waive any penalties [for] non-compliance, and adopt a cooperative approach to site investigation. Plaintiffs now seek to substitute their judgment for that of EPA's and pursue citizen suit claims based on alleged violations of the UAO despite the fact that EPA exercised its discretion to withdraw that Order without imposition of penalties or costs, and expressly covenanted not to seek penalties or costs. These claims constitute an impermissible challenge to EPA's exercise of its removal authority, for which this Court lacks subject matter jurisdiction, and these claims should be dismissed pursuant to FRCP 12(b)(1).<sup>108</sup>

Teck Cominco also relied on those superfluous words of the Solicitor General in the United States' brief to the Supreme Court as yet another basis for dismissing the UAO claims: "Additionally and alternatively, Teck Cominco invites the Court to examine whether plaintiffs' UAO claims are moot, in light of an opinion on that express issue presented to the United States Supreme Court by the United States Solicitor General."<sup>109</sup>

At stake for Teck Cominco within its motion was the potential cost of civil penalties for 892 days of noncompliance with the UAO prior to its

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<sup>108</sup> Teck Cominco Metals, Ltd.'s Motion to Dismiss Claims Pursuant to FRCP 12(b)(1), *Pakootas v. Teck Cominco Metals, Ltd.*, No. 204CV00256 (June 9, 2008).

<sup>109</sup> *Id.*

withdrawal by the EPA,<sup>110</sup> penalties that conceivably could tally up to \$32,500 per day, payable to the United States Treasury.<sup>111</sup> At stake for the plaintiffs was the continuing viability of a prevailing party's fee award.<sup>112</sup> Under CERCLA's citizen suit provision, a party that successfully enforces an environmental law or an administrative order is entitled to recover its attorney's fees and costs of litigation.<sup>113</sup> For the Colville Confederated Tribes, the prevailing-party's fee award would have amounted to more than \$1.3 million for filing suit in 2004 through September 30, 2008.<sup>114</sup> This is a substantial sum to any litigant, let alone a tribe that declared a financial emergency in October 2007, and perennially faces layoffs and budget cuts.<sup>115</sup>

A citizen suit that does not achieve "actual relief on the merits" will result in no recovery of attorney's fees.<sup>116</sup> Additionally, if a party voluntarily comes into compliance with an environmental law or administrative order, a citizen suit seeking compliance with that law or order may be rendered moot because there is no ongoing injury to be redressed.<sup>117</sup> With no ongoing injury, there may also be no "actual relief on the merits" and the citizen-plaintiff in the end may be foreclosed from the recovery of attorney's fees.<sup>118</sup>

On September 19, 2008, the District Court granted Teck Cominco's

<sup>110</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, (E.D. Wash. Sept. 19, 2008) (order granting defendants' 12(b)(1) motion to dismiss).

<sup>111</sup> *See* 40 C.F.R. § 19.4 (2009). Because civil penalties under CERCLA are awarded to the Treasury, the loss of those penalties would not impact the plaintiffs. *Roe v. Wert*, 706 F. Supp. 788, 792 (W.D. Okla. 1989).

<sup>112</sup> 42 U.S.C. §9659(f) (2009).

<sup>113</sup> *Id.*

<sup>114</sup> Declaration of Plaintiffs Pakootas and Michel in Support of Motion for Award of Costs of Litigation Including Attorneys' Fees, *Pakootas v. Teck Cominco Metals, Ltd.*, No. 204CV00256 (E.D. Wash. Oct. 31, 2008).

<sup>115</sup> Colville Confederated Tribes, Colville Business Council, Resolution Index, (Oct. 4, 2007), <http://www.colvilletribes.com/resolutionindex/2007/oct4.doc> (Resolution 2007-608).

<sup>116</sup> *Sierra Club v. City of Little Rock*, 351 F.3d 840, 845-46 (8th Cir. 2003) (citizen group not entitled to fee award despite court's concluding that the City had violated its NPDES permit because, the citizen's group failed to achieve any actual relief on the merits, and the court refused to order an injunction or order any other remedy against the City).

<sup>117</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66-67 (1987).

<sup>118</sup> *Sierra Club*, 351 F.3d at 845.

motion to dismiss the UAO claims.<sup>119</sup> Pakootas and Michel thereafter moved for an award of their litigation costs.<sup>120</sup> They argued that plaintiff's "substantially prevailed" under 42 U.S.C. § 9659(f): by entering into the settlement agreement under which the UAO was withdrawn, Teck Cominco accepted substantially all of the conditions the plaintiffs sought in enforcing the UAO.<sup>121</sup> The district court heard argument on the motion on January 30, 2009, and granted Pakootas and Michel's motion.<sup>122</sup> As of this writing, the amount of the award has not been determined.

#### IV. CONCLUSION

The EPA adopted its environmental justice policy more than a decade ago, and has reaffirmed its commitment to environmental justice several times since then. The EPA pledged to implement the mandate of EO 12,898: (1) by using its enforcement discretion to focus on environmental justice issues; (2) by working with federal, state, tribal, and local agencies to address environmental problems involving jurisdictional disputes and gaps in environmental laws and examining jurisdictional hurdles that might pose obstacles to achieving environmental justice; and (3) by working with Canada and Mexico to address cross-border pollution.<sup>123</sup>

The Upper Columbia River site was a perfect test case for putting the EPA's commitment to environmental justice into action, but the EPA failed. If not for the tireless work of the Tribes, it seems unlikely that the EPA would have investigated the pollution of the river. It was the Tribes who insisted that the problem that the state and federal governments initially considered was too big to be tackled head-on. And it was the Tribes who found a way to compel the assessment of the river, lake beds, and banks for almost 150 river miles from the

<sup>119</sup> *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM (E.D. Wash. Sept. 19, 2008) (order granting defendants' 12(b)(1) motion to dismiss).

<sup>120</sup> Motion of Plaintiffs Pakootas and Michel for Award of Costs of Litigation Including Attorneys' Fees, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM (E.D. Wash. Oct. 31, 2008).

<sup>121</sup> *Id.*

<sup>122</sup> Order Granting Plaintiffs' Motion for Award of Costs of Litigation Including Attorney Fees, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS (E.D. Wash. Mar. 9, 2009).

<sup>123</sup> THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK 118 (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

Grand Coulee Dam to the Canadian border. The EPA failed the interests of environmental justice when it refused to enforce the Unilateral Administrative Order against Teck Cominco, and again when it refused to intervene in *Pakootas v. Teck Cominco Metals, Ltd.*, leaving the Tribes—through two tribe members—and the State of Washington to enforce the only UAO ever issued against a foreign polluter for contamination found in the United States. Finally, the EPA allowed Teck Cominco to evade the UAO and CERCLA liability by entering into a settlement agreement outside the CERCLA framework to the detriment of the citizens who were compelled by the threat of a staggering toxic mess to enforce the UAO when the EPA refused to do so.

Since the EPA settled with Teck Cominco, very little has been done by Teck Cominco to complete the Remedial Investigation and Feasibility Study of the site,<sup>124</sup> and the Tribes have no way to compel compliance with the EPA's settlement agreement.<sup>125</sup> Withdrawing the UAO and agreeing not to seek fees

<sup>124</sup> Teck Cominco submitted a draft Work Plan in December, 2006. The purpose of the Work Plan is to identify additional work that is needed to support future cleanup decisions by the EPA, and develop a schedule for sampling and analysis. In general, the plan did not adequately address several important requirements, such as how gaps in existing data will be evaluated and what new studies will be needed to fill those gaps. Some of these include: determining the bioavailability of the slag in sediments; studying how contaminated sediments are transported within the river system and their potential effects to surface water; assessing impacts from wind-blown dust. That is, information that the EPA could use in allocating responsibility for cleanup costs, and that the Natural Resource Trustees could use in prosecuting natural resource damage claims. The EPA spent several months "working closely with Teck Cominco and our tribal, federal, and state partners to identify what changes were needed and determine how to best incorporate them into the revised Work Plan. The EPA, in consultation with the Colville and Spokane Tribes, Washington Department of Ecology, and U.S. Department of Interior, provided extensive technical comments on the draft Work Plan." EPA, ENVIRONMENTAL FACT SHEET: UPPER COLUMBIA RIVER SITE, NORTHEAST WASHINGTON (Oct. 2007), <http://yosemite.epa.gov/R10/CLEANUP.NSF> (follow "UCR" link; then follow "Fact Sheets" link; then follow "Teck Cominco submits revised Work Plan" link). On August 22, 2007, the EPA formally disapproved the plan and gave Teck Cominco 30 days to provide a revised plan. Teck Cominco delivered its revised plan on September 21, 2007.

<sup>125</sup> Under the terms of the 2006 Settlement Agreement, the EPA agreed that "[n]othing in this Agreement shall be construed to create any rights in, or grant any cause of action to or establish a basis for jurisdiction in local, state or federal courts in the United States for, any person not a Party to this Agreement. The Parties reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto, and against any agency of the United States other than the EPA." Settlement Agreement for Implementation of Remedial Investigation and Feasibility Study at the Upper Columbia River Site, ¶ 75 (June 2, 2006), [http://yosemite.epa.gov/R10/CLEANUP.NSF/7780249be8f25153882565f0070bd8b/f0e551fb8a69dcd288256fac00064739/\\$FILE/TeckCominco\\_SettlementAgreement.pdf](http://yosemite.epa.gov/R10/CLEANUP.NSF/7780249be8f25153882565f0070bd8b/f0e551fb8a69dcd288256fac00064739/$FILE/TeckCominco_SettlementAgreement.pdf).

and penalties for its violation served no one's interests but Teck Cominco's, potentially caused substantial harm to the Tribes, and failed to serve the interests of environmental justice.

The EPA's failure to enforce its UAO against Teck Cominco is not entirely surprising. Congress created the right to bring citizen suits to enforce environmental statutes because it recognized that there are circumstances when the government is either unable or unwilling to enforce such laws itself:

[T]he right to bring citizen suits is deliberately redundant of other statutory protections: Congress believed that by giving citizens themselves the power to enforce these provisions by suing violators directly, they could speed compliance with environmental laws, as well as put pressure upon a government that was unable or unwilling to enforce such laws itself.<sup>126</sup>

What is surprising and perhaps ironic is the action the EPA took after Pakootas, Michel, and the State of Washington prevailed against Teck Cominco in district court. The court's ruling established the EPA's authority to issue the UAO against a foreign entity and the jurisdiction of the court to enforce the UAO.

Rather than allowing the citizen suit to proceed, the EPA inserted itself in the process, withdrew the UAO, and waived all penalties.<sup>127</sup> The EPA then entered into a contract outside the CERCLA process that is unenforceable by the very parties who were compelled by the EPA's inaction to file suit to compel compliance with the UAO.<sup>128</sup> After all this, the EPA called the outcome a success.<sup>129</sup> But with no real progress toward answering the questions that spurred the Tribes to petition the EPA for a preliminary assessment of the Upper Columbia River Basin in 1999—that is, is it safe to swim in the river, play along the riverbanks, and eat the river's fish?—the withdrawal of the UAO cannot be considered a success. And the same can be said of the EPA's environmental justice policy.

<sup>126</sup> *Greenpeace, Inc. v. Waste Tech. Indus.*, 9 F.3d 1174, 1179 n.2 (6th Cir. 1993).

<sup>127</sup> U.S. DEP'T OF JUSTICE: ENV'T AND NATURAL RES. DIV., SUMMARY OF LITIGATION ACCOMPLISHMENTS: FISCAL YEAR 2006, at 10 (2007) available at [http://www.usdoj.gov/enrd/ENRDFiles/ENRD\\_2006\\_Accomplishments\\_Report.pdf](http://www.usdoj.gov/enrd/ENRDFiles/ENRD_2006_Accomplishments_Report.pdf).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

Perhaps the dawning of a new administration, with a departure from so-called “smart enforcement” policies that resulted in a steady and substantial decline in federal enforcement of environmental laws,<sup>130</sup> will also result in a renewed commitment to environmental justice. If an expression of a commitment to environmental justice by the Obama Administration is sufficient, then the signs are hopeful.<sup>131</sup> But the lessons from the last decade urge caution until the true measure of environmental justice can be assessed.

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<sup>130</sup> There was a 70% reduction in civil lawsuits against polluters between 2002 and 2006. Seth Borenstein, *Far Fewer Polluters Punished Under Bush Administration, Records Show*, COMMONDREAMS.ORG, Dec. 9, 2003, <http://www.commondreams.org/headlines03/1209-02.htm>; John Solomon & Juliet Eilperin, *Bush's EPA is Pursuing Fewer Polluters: Probes and Prosecutions Have Declined Sharply*, THE WASHINGTON POST, Sept. 30, 2007, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/29/AR2007092901759.html>.

<sup>131</sup> Barack Obama And Joe Biden: Promoting A Healthy Environment, <http://www.barackobama.com/pdf/issues/EnvironmentFactSheet.pdf> (last visited Mar. 28, 2009).