

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 15, 2022

SEAN F. MCAVOY, CLERK

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 COVILLE RESERVATION,

Plaintiffs,

and

THE STATE OF WASHINGTON,
Plaintiff-Intervenor,

v.

TECK COMINCO METALS, LTD., a
Canadian corporation,
Defendant.

No. 2:04-CV-00256-SAB

**ORDER DENYING
DEFENDANT’S MOTION FOR
PARTIAL SUMMARY
JUDGMENT ON TIME-BARRED
CLAIMS**

**ORDER DENYING DEFENDANT’S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON TIME-BARRED CLAIMS *1**

1 Before the Court is Defendant’s Motion for Partial Summary Judgment on
2 Plaintiffs’ Time-Barred Claims, ECF No. 2506. The Court heard oral argument on
3 the motion by Video Conference on August 11, 2022. Defendant Teck Cominco
4 Metals, Ltd.’s (“Teck”) was represented by Deborah Baum, Amanda Halter,
5 Deanna Willman, and Bryce Wilcox. Plaintiffs Joseph A. Pakootas, Donald L.
6 Michel, and the Confederated Tribes of the Colville Reservation (collectively,
7 “CCT”) were represented by Paul Dayton. Plaintiff-Intervenor the State of
8 Washington (“Washington State”) was represented by Andrew Fitz, Joshua
9 Osborne-Klein, Dylan Stonecipher, and Kara Tebeau.

10 Teck’s metallurgical smelter in Trail, British Columbia discharged millions
11 of tons of slag and liquid effluent directly to the Columbia River. This case
12 concerns cleanup of that environmental pollution in, and recovery of natural
13 resource damages for, the upper Columbia River and surrounding lands (the
14 “Site”). The following facts are pertinent to the present motion for partial summary
15 judgment and derive from the parties’ respective statements of material facts.

16 On April 14, 1986, the Washington State Department of Ecology
17 (“Ecology”) developed a preliminary plan for an investigation of metals
18 contamination in the upper Columbia River and Roosevelt Lake. An investigation
19 pursuant to the plan identified Teck’s smelter as being the primary source of
20 contamination at the Site and possibly in sediment. Ecology conducted several
21 additional studies on the issue between 1990 and 2001.

22 On August 2 and 5, 1999, CCT submitted Petitions for Assessment of
23 Release to the U.S. Environmental Protection Agency (“EPA”) asking that the
24 EPA conduct a preliminary assessment under the Comprehensive Environmental
25 Response, Compensation, and Liability Act (“CERCLA”) of hazards to public
26 health and the environment associated with slag from Canadian smelters.

27 In December 2003, the EPA issued a unilateral administrative order to Teck,
28 requiring Teck to perform a Remedial Investigation & Feasibility Study (“RI/FS”)

1 for the Site. This action was filed in 2004 to enforce that order. In November 2005,
2 Plaintiffs amended their complaints to assert claims for natural resource damages
3 (“NRD”) under CERCLA. ECF Nos. 109, 111. In 2006, Teck entered into a
4 settlement agreement with the EPA to fund and conduct the RI/FS, including
5 funding of participation of Plaintiffs and other interested parties.

6 Teck moves to dismiss Washington State and CCT’s natural resource
7 damages (“NRD”) claims on the theory that they are time-barred under Section
8 107(a)(4)(C) of CERCLA. 42 U.S.C. § 9613(g)(1)(A).¹ Teck argues that
9 Washington State and CCT had knowledge of the connection between the alleged
10 natural resource losses and Teck’s release of hazardous substances as early as 1986
11 and 1999, respectively. Therefore, Teck asserts Plaintiffs’ NRD claims, which
12 were pled in this action on 2005, are barred by the three-year statute of limitations.

13 Meanwhile, Washington State argues that the statute of limitations under
14 § 9613(g)(1) applies to its claims, because a remedial action is scheduled.² Since a
15 remedial action is being analyzed pursuant to an RI/FS, Washington State contends
16 the statute of limitations has not started running, and thus, its claims are not time
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20 ¹ 42 U.S.C. § 9613(g)(1)(A) provides that an action for NRD must be
21 commenced within 3 years after the later of the following—“(A) The date of the
22 discovery of the loss and its connection with the release in question. (B) The date
23 on which regulations are promulgated under section 9651(c) of this title.”

24 ² 42 U.S.C. § 9613(g)(1) states that, for any facility listed on the National
25 Priorities List, any Federal facility, or any vessel or facility “at which a remedial
26 action under this chapter is otherwise scheduled, an action for damages under this
27 chapter must be commenced within 3 years after the completion of the remedial
28 action . . . in lieu of the dates referred to in subparagraph (A) or (B).”

1 barred. Meanwhile, CCT argues yet a different statute of limitations applies—42
2 U.S.C. § 9626(d)—due to its status as an Indian tribe.³

3 In this case, the applicable statute of limitations is 42 U.S.C. § 9613(g)(1),
4 because a remedial action “is otherwise scheduled” at the Site. *City of Moses Lake*
5 *v. United States*, 416 F. Supp. 2d 1015, 1023–24 (E.D. Wash. 2005) (citing *Razore*
6 *v. Tulalip Tribes of Wash.*, 66 F.3d 236 (9th Cir. 1995)); *see also Pakootas v. Teck*
7 *Cominco Metals, Ltd.*, 646 F.3d 1214, 1220, 1223–25 (9th Cir. 2011)
8 (acknowledging that a remedial action, and remediation of the Site, were
9 “ongoing”). The applicable statute provides that an action “must be commenced
10 within 3 years after the completion of the remedial action.” 42 U.S.C.
11 § 9613(g)(1). The statute of limitations has not started running, because the final
12 remedial action has not been completed and is still under study pursuant to the
13 RI/FS. This statute of limitations is also applicable to CCT pursuant to § 9626(d).
14 Therefore, Plaintiffs’ NRD claims are not barred.⁴

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21 ³ 42 U.S.C. § 9626(d) provides that no action “by an Indian tribe shall be
22 barred until the later of the following: (1) The applicable period of limitations has
23 expired. (2) 2 years after the United States, in its capacity as trustee for the tribe,
24 gives written notice to the governing body of the tribe that it will not present a
25 claim or commence an action on behalf of the tribe or fails to present a claim or
26 commence an action within the time limitations specified in this chapter.”

27 ⁴ The Court does not address the issue of ripeness, as it is not properly before
28 the Court.

**ORDER DENYING DEFENDANT’S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON TIME-BARRED CLAIMS *4**

1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion for Partial Summary Judgment on Plaintiffs'
3 Time-Barred Claims, ECF No. 2506, is **DENIED.**

4 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
5 this Order and to provide copies to counsel.

6 **DATED** this 15th day of September 2022.



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11 Stanley A. Bastian

12 Chief United States District Judge