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

Feb 17, 2023

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 COLVILLE 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
SUMMARY JUDGMENT ON
RIPENESS**

**ORDER DENYING DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ON RIPENESS *1**

1 Before the Court is Defendant Teck Cominco Metals, Ltd.'s Motion for
2 Summary Judgment on Ripeness, ECF No. 2597. The motion was considered
3 without oral argument.

4 Defendant argues Plaintiffs' claims for natural resource damages are unripe,
5 because Plaintiffs have not provided a 60-day notice of their intent to sue and a
6 remedial action has not been selected, as required by 42 U.S.C. § 9613(g)(1).

7 The Court finds there are no disputes of material fact that preclude summary
8 judgment. Having considered the parties' briefing, case record, applicable law, the
9 Court concludes the statutory requirements are met and Plaintiffs' claims are ripe.
10 The motion for summary judgment is denied.

11 **FACTS**

12 This phase of litigation pertains to Plaintiffs' claims for natural resource
13 damages under the Comprehensive Environmental Response, Compensation, and
14 Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Plaintiffs allege Defendant is
15 liable for natural resource damages at a location known in this action as the Upper
16 Columbia River Site (the "Site"). As the parties are intimately familiar with the
17 case's background, the Court does not recite this action's extensive factual and
18 procedural history here.

19 On August 2, 1999, Plaintiff, the Confederate Tribes of the Colville
20 Reservation (the "Colville Tribes"), submitted a petition to the EPA requesting
21 assessment of alleged releases of hazardous waste at the Site. The EPA accepted
22 the petition. After a preliminary assessment, the EPA requested a written proposal
23 from Defendant on how it would be involved in cleanup at the Site. In a letter
24 dated July 24, 2003, the EPA requested that Defendant agree to an Administrative
25 Order on Consent ("AOC") to conduct a Remedial Investigation/Feasibility Study
26 ("RI/FS") and tolling agreement for natural resource damages. Defendant
27 responded on August 1, 2003, requesting any studies be conducted without an
28 RI/FS.

1 On October 10, 2003, the EPA issued a Special Notice Letter to Defendant,
2 repeating its request for Defendant to sign an AOC. The same day, an email from
3 Defendant's Vice President of Environmental Affairs expressed that, if the Site
4 was not listed on the National Priorities List, it would be "much much harder" for
5 the tribal trustees to pursue natural resource damages.

6 On October 22, 2003, Defendant responded to the Special Notice Letter,
7 declining the EPA's request to sign an AOC and instead proposing that the parties
8 execute a private contractual agreement. The proposal included an offer to toll the
9 statute of limitations period affecting the natural resource trustees' claims.

10 The EPA denied this proposal on November 7, 2003 and again asked
11 Defendant to sign an AOC. The EPA's Assistant Regional Counsel informed
12 Defendant that it had "waited almost a year to move forward with studying the
13 site" in hopes they could reach an agreement. Defendant reiterated it would not
14 sign the AOC.

15 On December 11, 2003, the EPA issued a final and Unilateral
16 Administrative Order ("UAO") to Defendant, finding Defendant a potentially
17 responsible party and directing it to perform an RI/FS for the Site. Defendant
18 responded on January 12, 2004, objecting to the EPA's effort to impose CERCLA
19 liability and indicating it would not comply.

20 On February 24, 2004, the Colville Tribes provided Defendant, the EPA, and
21 U.S. Department of Justice a notice of intent to sue under CERCLA's citizen suit
22 provision and for all violations. On July 21, 2004, Plaintiffs filed this lawsuit to
23 enforce the UAO.

24 On July 29, 2005, both Plaintiffs requested, in writing, that Defendant agree
25 to waive any defense to natural resource damages liability and sign a tolling
26 agreement for the statute of limitations on their natural resource damages claims.
27 While an agreement was never reached, Defendant responded on August 30, 2005,
28 stating:

1 Teck Cominco is willing to enter into a Tolling Agreement with the Tribes
2 State and other Trustees that provides the Statute of Limitations for natural
3 resource damage claims will be tolled until a mutually-agreed upon date.

4 On November 4, 2005, Plaintiff the State of Washington amended its
5 complaint to add claims for natural resource damages under CERCLA, and
6 Plaintiff the Colville Tribes followed on November 7, 2005.

7 **LEGAL STANDARD**

8 Summary judgment is appropriate “if the movant shows that there is no
9 genuine dispute as to any material fact and the movant is entitled to judgment as a
10 matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless
11 there is sufficient evidence favoring the non-moving party for a jury to return a
12 verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
13 (1986). The moving party has the initial burden of showing the absence of a
14 genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
15 If the moving party meets its initial burden, the non-moving party must go beyond
16 the pleadings and “set forth specific facts showing that there is a genuine issue for
17 trial.” *Anderson*, 477 U.S. at 248.

18 In addition to showing there are no questions of material fact, the moving
19 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
20 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
21 to judgment as a matter of law when the non-moving party fails to make a
22 sufficient showing on an essential element of a claim on which the non-moving
23 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party
24 cannot rely on conclusory allegations alone to create an issue of material fact.
25 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). When considering a
26 motion for summary judgment, a court may neither weigh the evidence nor assess
27 credibility; instead, “the evidence of the non-movant is to be believed, and all
28 justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

1 **DISCUSSION**

2 As a threshold issue, the Court must determine whether there are questions
3 of material fact. The parties disagree on how evidence should be interpreted;
4 however, this alone does not create a genuine dispute of fact. Having reviewed the
5 record, the Court concludes there are no disputes of fact.

6 The issue is whether Plaintiffs’ natural resource damages claims are ripe.
7 Defendant argues Plaintiffs failed to meet two pre-suit conditions of CERCLA,
8 under 42 U.S.C. § 9613(g)(1). That section states:

9 In no event may an action for damages under this chapter with respect to such
10 a vessel or facility be commenced (i) prior to 60 days after the Federal or State
11 natural resource trustee provides to the President and the potentially
12 responsible party a notice of intent to file suit, or (ii) before selection of the
13 remedial action if the President is diligently proceeding with a remedial
14 investigation and feasibility study under section 9604(b) of this title or section
15 9620 of this title (relating to Federal facilities).

16 Defendant and the EPA were provided notice of Plaintiffs’ intent to sue for
17 natural resource damages. Section 9613(g)(1) prohibits the filing of an action for
18 natural resource damages “prior to 60 days after the Federal or State natural
19 resource trustee provides to the President and the potentially responsible party a
20 notice of intent to file suit[.]” 42 U.S.C. § 9613(g)(1). Courts should interpret
21 words in a statute pursuant to their “ordinary, contemporary, common meaning,”
22 unless they are otherwise defined. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*,
23 710 F.3d 946, 958 (9th Cir. 2013) (quoting *Perrin v. United States*, 444 U.S. 37, 42
24 (1979)).

25 CERCLA does not define “notice” or specify the way notice should be given
26 for natural resource damages claims. In contrast, the EPA has promulgated
27 regulations on how notice should be provided for cost recovery claims under the
28 statute. 42 U.S.C. § 9659(d)(1) (“Notice under this subsection shall be given in
such manner as the Administrator shall prescribe by regulation.”); 40 C.F.R.

1 § 374.1 *et seq.* (establishing procedures for providing notice of cost recovery
2 actions). The regulations are unambiguously limited to cost recovery actions; thus,
3 absent a controlling definition, the Court applies the plain and ordinary meaning of
4 “notice.”

5 In this case, Defendant and the EPA had actual notice of Plaintiffs’ intent to
6 sue for natural resource damages. Plaintiffs provided written notice to Defendant.
7 On July 29, 2005, Plaintiffs the Colville Tribes and State of Washington
8 transmitted a letter to Defendant regarding their natural resource damages claims,
9 requesting Defendant agree to toll the statute of limitations for filing suit. On
10 August 30, 2005, Defendant responded and unequivocally acknowledged
11 Plaintiffs’ intent to sue for natural resource damages. While the parties did not
12 reach an agreement, in its response, Defendant offered to toll the statute of
13 limitations with Plaintiffs for their natural resource damages claims.

14 The EPA also plainly had notice. In a letter dated July 24, 2003, from the
15 EPA to Defendant, the EPA similarly requested Defendant enter into a tolling
16 agreement with the natural resource trustees. This is not a case where the EPA and
17 Defendant could not ascertain the identities of the natural resource trustees. The
18 record demonstrates the agency had actual notice of Plaintiffs’ intent to sue for
19 natural resource damages at the Site.

20 Accordingly, the Court agrees with Plaintiffs that there can be no question
21 that Defendant—and the EPA—had actual notice of their intent to sue for natural
22 resource damages. This notice was provided long before Plaintiffs filed their
23 amended complaints in November of 2005 and satisfies the 60-day notice
24 requirement of § 9613(g)(1).

25 Since § 9613(g)(1)’s pre-suit conditions are disjunctive, the Court declines
26 to consider Defendant’s remaining argument regarding the selection of a remedial
27 action.

28 //

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

2 1. Defendant's Motion for Summary Judgment on Ripeness, ECF
3 No. 2597, 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 17th day of February 2023.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

12 Stanley A. Bastian
13 Chief United States District Judge
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