

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 STANDING**

**ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON STANDING *1**

1 Before the Court is Defendant’s Motion for Partial Summary Judgment on the
2 Colville Tribes’ Natural Resource Damages Claims for Lack of Standing, ECF
3 No. 2504. The Court heard oral argument on the motion by Video Conference on
4 August 11, 2022. Defendant Teck Cominco Metals, Ltd.’s (“Teck”) was represented
5 by Deborah Baum, Amanda Halter, Deanna Willman, and Bryce Wilcox. Plaintiffs
6 Joseph A. Pakootas, Donald L. Michel, and the Confederated Tribes of the Colville
7 Reservation (collectively, “CCT”) were represented by Paul Dayton. Plaintiff-
8 Intervenor the State of Washington (“Washington State”) was represented by
9 Andrew Fitz, Joshua 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 concerns
12 cleanup of that environmental pollution in, and recovery of natural resource damages
13 for, the upper Columbia River and surrounding lands (the “Site”). The following
14 facts are pertinent to the present motion for partial summary judgment and derive
15 from the parties’ respective statements of material facts. For purposes of this motion,
16 the Court concludes there is no dispute of material fact.

17 CCT is a federally recognized Indian tribe. The United States has granted CCT
18 reservation lands adjacent to the upper Columbia River and preferred hunting and
19 fishing rights in the north half of those lands, including the western half of the
20 Columbia River and paramount rights in Lake Roosevelt adjacent to its current
21 reservation boundaries. CCT’s reservation abuts the western bank of a portion of
22 Lake Roosevelt approximately fifty-six river miles downstream of the international
23 border of Canada, in the southern halves of Okanogan and Ferry Counties.

24 In this phase of litigation, CCT alleges injuries to natural resources it holds in
25 trust, to wit: (1) sediments in portions of the Upper Reach (*i.e.*, river miles 700–745,
26 the uppermost riverine portion of the UCR Site); (2) benthic macroinvertebrates in
27 portions of the Upper Reach; (3) fish, including specific injury to Sturgeon,
28 throughout the Upper Columbia River/Lake Roosevelt; and (4) tribal services. ECF

**ORDER DENYING DEFENDANT’S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON STANDING *2**

1 No. 2511-5 at 27–35. CCT is a member of a four-party Trustee Council in
2 Washington, which is comprised of the U.S. Department of Interior, the State of
3 Washington, and the Spokane Tribe of Indians, and in practice, CCT manages
4 fisheries and restoration efforts in the Upper Columbia River and Lake Roosevelt.

5 Teck argues that CCT lacks standing to sue for natural resource damages
6 because it is not a trustee authorized to sue under the Comprehensive Environmental
7 Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607 *et seq.* It contends
8 that none of the damages sought by CCT are for natural resources “belonging to,
9 managed by, controlled by, or appertaining to” CCT, in part because Congress
10 revoked CCT’s right, title, and interest in the lands in question.

11 Alongside the Plaintiff-Intervenor State of Washington, CCT responds that it
12 is a co-trustee of the natural resources because the resources are “managed by,
13 controlled by, or appertaining to” CCT. 42 U.S.C. § 9607(f)(1). CCT contends its
14 trusteeship derives from its reserved fishing right to a portion of harvestable fish in
15 the north half of those lands, including the western half of the Columbia River, and
16 paramount rights in Lake Roosevelt adjacent to its reservation boundaries.

17 Teck’s motion for partial summary judgment is denied. CERCLA provides
18 that, for injury to natural resources, “liability shall be to . . . any Indian tribe for
19 natural resources belonging to, managed by, controlled by, or appertaining to such
20 tribe[.]” 42 U.S.C. § 9607(f)(1). CERCLA does not define “manage,” “control,” or
21 “appertain,” and authority on the meaning of the terms in § 9607(f)(1) is scarce.
22 However, the Court finds persuasive that “appertaining to” may include off-
23 reservation usufructuary rights, such as hunting and fishing rights or paramount use
24 granting a right of benefit. *See Confederated Tribes and Bands of the Yakama Nation*
25 *v. Airgas USA, LLC*, 435 F. Supp. 3d 1103 (D. Or. 2019).

26 The Court concludes CCT is a trustee under § 9607(f)(1), because the
27 resources in question implicate and “appertain[] to” CCT’s fishing and paramount
28 use rights in its sovereign capacity as an Indian tribe. CCT also oversees and

1 manages the natural resources in fact through, for example, its restoration efforts of
2 fisheries in Lake Roosevelt and white sturgeon in the Upper Columbia River. ECF
3 No. 2540 at 3–6. These natural resources are similarly “managed by” or “controlled
4 by” CCT. Relatedly, CCT is the only sovereign entitled to recover damages for and
5 engage in restoration of its alleged tribal service losses. Granting all reasonable
6 inferences in favor of CCT, Teck is not entitled to summary judgment.

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

8 1. Defendant’s Motion for Partial Summary Judgment on the Colville
9 Tribes’ Natural Resource Damages Claims for Lack of Standing, ECF No. 2504, is
10 **DENIED.**

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

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



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is fluid and cursive, written over a horizontal line.

19 Stanley A. Bastian
20 Chief United States District Judge
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