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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 L. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs,

And

STATE OF WASHINGTON,

Plaintiff-

Intervenor,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant.

No. CV-04-256-LRS

**ORDER GRANTING
PLAINTIFF'S 12(b)(6)
MOTION TO DISMISS,
INTER ALIA**

BEFORE THE COURT are the Plaintiff's Fed. R. Civ. P. 12(b)(6) Motion To Dismiss Defendant's Counterclaims (Ct. Rec. 262), and Plaintiff's Request For Judicial Notice In Support Of Its 12(b)(6) Motion (Ct. Rec. 265).

Oral argument was heard on June 4, 2009. Paul J. Dayton, Esq., argued

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1 on behalf of Plaintiff Confederated Tribes Of The Colville Reservation
2 (“Tribes”). Mark E. Elliott argued on behalf of Defendant Teck Cominco
3 Metals, Ltd. (“Teck”).

4 5 **I. BACKGROUND**

6 In its Answer to the Second Amended Complaint of the Tribes (Ct. Rec
7 194), Defendant Teck asserts two CERCLA¹ counterclaims against the Tribes,
8 contending the Tribes caused and contributed to the hazardous substances
9 contamination of Lake Roosevelt. As part of its counterclaims against the
10 Tribes for cost recovery, contribution and declaratory relief, Teck alleges the
11 Tribes “are covered ‘persons’ within the meaning of that term as it is used in
12 CERCLA, 42 U.S.C. Section 9601(21).” The Tribes move to dismiss the
13 counterclaims, asserting they are not “person[s]” subject to liability under
14 CERCLA, 42 U.S.C. Section 9607(a), and therefore, that Teck’s counterclaims
15 are not based on “a cognizable legal theory.”

16 **II. DISCUSSION**

17 **A. 12(b)(6) Standard/Judicial Notice**

18 A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a
19 cognizable legal theory" or "the absence of sufficient facts alleged under a
20 cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699
21 (9th Cir. 1990). In reviewing a 12(b)(6) motion, the court must accept as true
22 all material allegations in the complaint, as well as reasonable inferences to be
23 drawn from such allegations. *Mendocino Environmental Center v. Mendocino*

24
25 ¹ Comprehensive Environmental Response, Compensation, and Liability
26 Act, 42 U.S.C. Section 9601 *et. seq.*

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1 *County*, 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d
2 896, 898 (9th Cir. 1986). The sole issue raised by a 12(b)(6) motion is whether
3 the facts pleaded, if established, would support a claim for relief; therefore, no
4 matter how improbable those facts alleged are, they must be accepted as true for
5 purposes of the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct.
6 1827 (1989).

7 Unless the court converts the Rule 12(b)(6) motion into a summary
8 judgment motion, or the defense is apparent from matters of which the court
9 may take judicial notice, the court cannot consider material outside the
10 complaint (e.g. facts presented in briefs, affidavits or discovery materials).
11 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).
12 A matter that is properly the subject of judicial notice (Fed. R. Evid. 201) may
13 be considered along with the complaint when deciding a 12(b)(6) motion to
14 dismiss without converting the motion to one for summary judgment. *MGIC*
15 *Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). The court may
16 properly consider matters of public record (e.g. pleadings, orders and other
17 papers on file in another action pending in the court; records and reports of
18 administrative bodies; or the legislative history of laws, rules or ordinances) as
19 long as the facts noticed are not subject to reasonable dispute. *Intri-Plex*
20 *Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

21 **B. Statutory Language**

22 42 U.S.C. Section 9607 imposes liability upon certain “persons” (i.e.,
23 owner/operator, arranger, transporter) for costs incurred in responding to a
24 release of hazardous substances. “Person” is defined in Section 9601(21) as “an
25 individual, firm, corporation, association, partnership, consortium, joint venture,
26 commercial entity, United States Government, State, municipality, commission,

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1 political subdivision of a State, or any interstate body.” “Indian tribe” is not
2 expressly included in this list and indeed, is defined separately at Section
3 9601(36).

4 “[W]hen the statute’s language is plain, the sole function of the courts- at
5 least where the disposition required by the text is not absurd- is to enforce it
6 according to its terms.” *Hartford Underwriters Insurance Co. v. Union*
7 *Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942 (2000). In *Hartford*, the
8 U.S. Supreme Court reiterated what it had previously said in *Connecticut*
9 *National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146 (1992):

10 [I]n interpreting a statute a court should always turn first to
11 one, cardinal canon before all others. We have stated time and
12 again that courts must presume that a legislature says in a statute
13 what it means and means in a statute what it says there. [Citations
14 omitted]. When the words of a statute are unambiguous, then,
15 this first canon is also the last: “judicial inquiry is complete.”
16 [Citation omitted].

17 CERCLA’s definition of “person” is plain. It does not include “Indian
18 tribes.” Finding that CERCLA liability cannot be imposed on Indian tribes per
19 the terms of the statute is not an “absurd” result. Whereas CERCLA
20 specifically provides for liability to an Indian tribe, 42 U.S.C. Section
21 9607(a)(4)(A) and 9607(f), it contains no specific provision for the liability of
22 an Indian tribe.² Furthermore, sovereigns will not be read into the term
23 “person” unless there is affirmative evidence that Congress intended to include

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26 Under the canon of statutory construction *expressio unius est exclusio*
27 *alterius*, the express mentioning of one thing implies exclusion of another.
28 Thus, to the extent it is necessary to rely on any additional canons of statutory
construction beyond “plain meaning,” *expressio unius est exclusio alterius*
supports the conclusion that Indian tribes are not “persons” subject to
CERCLA liability.

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1 sovereigns. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S.Ct. 2529
2 (1979); *Fayed v. CIA*, 229 F.3d 272, 274 (D.C. Cir. 2000). Congress can waive
3 a tribe's immunity from suit, but that waiver must be clearly expressed.
4 Congress has plenary power over tribal sovereignty, but must make clear its
5 intent to limit that sovereignty. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,
6 56, 98 S.Ct. 1670 (1978); *Fletcher v. United States*, 116 F.3d 1315, 1328 (10th
7 Cir. 1997).³

8 Defendant Teck, as it must, acknowledges CERCLA is silent on the issue
9 of whether tribes are covered as "persons." Defendant acknowledges there is no
10 legislative history regarding whether Congress intended Indian tribes to be
11 subject to liability under CERCLA. Nevertheless, Defendant asserts this is of
12 no consequence since it is clear what CERCLA is intended to address, that
13 being holding parties responsible for cleaning up hazardous substances
14 contamination caused by them. Defendant, a foreign (Canadian) corporation,
15 which the Ninth Circuit in *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d
16 1066, 1079 (9th Cir. 2006) found was subject to CERCLA liability despite the
17 fact that its disposal activity occurred in Canada, says there is no reason why an
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21 Absent clear Congressional intent and an analysis of such intent, it
22 matters not that courts may have somehow inadvertently "implied" that Indian
23 tribes are "persons" subject to CERCLA liability. Defendant's reliance on
24 *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S.Ct. 2331, 2336
25 (2007), and *United States v. Friedland*, 152 F.Supp.2d 1234, 1247 (D. Colo.
26 2001), is not persuasive. Those cases did not specifically deal with the
27 question of whether Indian tribes are subject to liability under CERCLA.

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1 Indian tribe should be treated any differently.⁴ This, however, ignores the fact
2 that “corporations” are specifically among the enumerated entities included
3 within the definition of “person” in 42 U.S.C. Section 9601(21), whereas Indian
4 tribes are not, and do not fall neatly into the definition of any of the other
5 enumerated entities. Furthermore, a foreign corporation is not generally entitled
6 to sovereign immunity, unlike an Indian tribe which has been recognized by the
7 United States Government. An Indian tribe simply is not just any other party for
8 the purpose of ascertaining whether liability is authorized by CERCLA.

9 Defendant Teck argues that CERCLA’s use of the term “municipality”
10 should be read *in pari materia* with other federal environmental statutes,
11 including the Resource Conservation and Recovery Act of 1976 (RCRA), 42
12 U.S.C. §§ 6901 *et seq.*, the Safe Drinking Water Act (SDWA), 42 U.S.C. §§
13 300f *et seq.*, and the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.* Each
14 of those other environmental statute defines “person” to include
15 “municipalities,” and in turn, defines “municipalities” to specifically include
16 “Indian tribes.” 42 U.S.C. § 6903(13)(A); 42 U.S.C. § 300(f)(10); and 33
17 U.S.C. § 1362(4). In other words, the argument is that even though CERCLA
18 does not define the term “municipality,” the fact CERCLA defines “person” to
19 include municipalities should lead the court to conclude that CERCLA’s
20 definition of “person” includes Indian tribes.

21 The *in pari materia* canon of statutory construction is only employed

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23 Although the “disposal activity” occurred in Canada, “releases” of
24 hazardous substances as a result of that “disposal activity” occurred in the
25 United States (specifically in Lake Roosevelt). Accordingly, in *Pakootas*, the
26 Ninth Circuit found Teck was subject to CERCLA and that CERCLA was not
27 being applied “extraterritorially.”

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1 where a statute is ambiguous. For reasons set forth above, CERCLA is not
2 ambiguous with respect to whether Indian tribes are covered “persons” subject
3 to CERCLA liability. Moreover, application of *in pari materia* is problematic
4 because: 1) waiver of tribal sovereign immunity requires an expression of clear
5 intent on the part of Congress; and 2) even without regard to sovereign
6 immunity, CERCLA is distinct from other environmental statutes- RCRA, the
7 SDWA, and the CWA- and does not address precisely the same subject matter.
8 In *Pakootas*, the Ninth Circuit pointed out the distinction between CERCLA
9 and RCRA:

10 CERCLA is only concerned with imposing liability for
11 cleanup of hazardous waste disposal sites where there has
12 been an actual or threatened release of hazardous substances
13 into the environment. CERCLA does not obligate parties
14 (either foreign or domestic) liable for cleanup costs to cease
15 the **disposal activities** such as those that made them liable for
16 cleanup costs; regulating **disposal activities** is in the domain
17 of RCRA or other regulatory statutes.

18 452 F.3d at 1079 (emphasis added). RCRA regulates “disposal activities,”
19 whereas CERCLA concerns itself with liability for cleaning up hazardous
20 substances which have already been “disposed” and which have now been
21 released or are threatened to be released into the environment. See also
22 *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 1255 (1996)
23 (RCRA allows landowner to seek relief for present “imminent and substantial”
24 threats to health and/or environment; RCRA has an “immediate action” stance,
25 where CERCLA has a more traditional tort liability stance).

26 Furthermore, CERCLA treats an Indian tribe differently from a
27 municipality. For example, an Indian tribe is entitled to costs of a removal or
28 remedial action “not inconsistent with the national contingency plan,” 42 U.S.C.
Section 9607(a)(4)(A), whereas “any other person” (i.e., a municipality) must
prove that costs incurred are “consistent with the national contingency plan,” 42

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1 U.S.C. Section 9607(a)(4)(B). The latter contains a more rigorous evidentiary
2 burden. The costs associated with response action undertaken by an Indian tribe
3 can be avoided by the defendants only if the defendants can show they are not
4 consistent with the national contingency plan (NCP), whereas response action
5 costs incurred by “any other person” require that “other person” to show his
6 action is consistent with the NCP before he will be allowed to recover his costs.
7 *Town of Bedford v. Raytheon, Co.*, 755 F.Supp. 469, 472 (D. Mass. 1991).

8 Finally, Defendant Teck contends an Indian tribe qualifies as either an
9 “association” or as a “consortium” under the definition of “person” in 42 U.S.C.
10 Section 9601(21). As with the term “municipality,” the terms “association” and
11 “consortium” are not specifically defined in CERCLA. CERCLA has existed
12 for nearly 30 years, and RCRA, with its definition of “municipalities” including
13 “Indian tribes,” has existed in excess of 30 years. In that time, Congress has had
14 more than an adequate opportunity to address any oversight regarding liability
15 of Indian tribes under CERCLA. If Congress intended to make Indian tribes
16 liable under CERCLA, one has to ask why it did not specifically include “Indian
17 tribes” among the entities covered by the term “person” in Section 9601(21),
18 nor specifically define “municipality,” “association,” or “consortium” to include
19 “Indian tribes.” It seems extremely implausible that Congress would simply
20 leave it to chance that some court would conclude an Indian tribe qualifies as
21 one of those entities subject to CERCLA liability.

22 There may be some very compelling policy reasons why Indian tribes
23 should not be exempt from CERCLA liability, but that is something Congress
24 needs to address, not this court. Defendant asserts that “[u]nder the Tribes’
25 interpretation of CERCLA, an Indian tribe could never, under any
26 circumstances, be found to be a responsible party under CERCLA,” and “[a]s a
27 result, an Indian tribe could literally operate a dump for the disposal of

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1 hazardous substances, with complete impunity under CERCLA.” However,
2 such a conclusion is of dubious validity inasmuch as a tribe’s disposal activities
3 would clearly be subject to regulation under RCRA as well as SDWA and the
4 CWA.

5 There is authority that when an Indian tribe files suit, it waives its
6 immunity as to counterclaims of a defendant that sound in recoupment. *Berrey*
7 *v. ASARCO Incorporated*, 439 F.3d 636, 643-45 (10th Cir. 2006); *Rosebud Sioux*
8 *Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995); and *Jicarilla*
9 *Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). Claims in
10 recoupment arise out of the same transaction or occurrence, seek the same kind
11 of relief as the plaintiff, and do not seek an amount in excess of that sought by
12 the plaintiff. *Berrey*, 439 F.3d at 643. Sovereign immunity is waived because
13 “recoupment is in the nature of a defense arising out of some feature of the
14 transaction upon which the [sovereign’s] action is grounded.” *Id.*, quoting *Bull*
15 *v. United States*, 295 U.S. 247, 262, 55 S.Ct. 695 (1935). Waiver under the
16 doctrine of recoupment does not depend on prior waiver by the sovereign or an
17 independent congressional abrogation of immunity. *Id.* at 644. In *Berrey*, the
18 Tenth Circuit held the defendants’ counterclaims for **common law** contribution
19 and indemnity against the Quapaw Tribe were not waived because those
20 counterclaims sounded in recoupment. The Tribe also argued for dismissal of
21 defendants’ CERCLA counterclaims for contribution, contending the
22 counterclaims were not permitted because CERCLA’s definition of “person”
23 does not include Indian tribes. The Tenth Circuit held it did not have
24 jurisdiction over the issue and declined to address the argument. *Id.* at 646.

25 In *Berrey*, the Quapaw Tribe sought dismissal of CERCLA counterclaims
26 based on statutory interpretation, not tribal sovereign immunity. So too here,
27 the Confederated Tribes Of The Colville Reservation seek dismissal of
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1 Defendant's CERCLA counterclaims based on statutory interpretation, not
2 sovereign immunity. As is apparent, however, the court's interpretation of
3 CERCLA is necessarily colored by sovereign immunity principles.

4 5 **C. EPA Interpretation and Indian Canons of Construction**

6 Because the plain language of CERCLA reveals that Indian tribes are not
7 subject to liability under that statute, there is no reason for the court to consider
8 how EPA has interpreted CERCLA as it pertains to tribal liability. CERCLA is
9 not silent or ambiguous on this issue and accordingly, there is no reason for the
10 court to consider and give deference to EPA's interpretation. *Chevron U.S.A.*
11 *Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104
12 S.Ct. 2778 (1984). Congressional intent to exclude Indian tribes from liability
13 is clear from the language of the statute, a conclusion that is reinforced by the
14 fact there is no affirmative evidence that Congress intended to include
15 sovereigns in the definition of "person."

16 For the same reasons, the court need not consider application of Indian
17 law canons of construction in determining whether there is tribal liability under
18 CERCLA.

19 **III. CONCLUSION**

20 The Colville Confederated Tribes' Fed. R. Civ. P. 12(b)(6) Motion To
21 Dismiss Defendant's Counterclaims (Ct. Rec. 262) is **GRANTED**. Defendant's
22 CERCLA counterclaims against the Tribes are **DISMISSED with prejudice** as
23 they are not premised on a cognizable legal theory. The legal deficiency of
24 these counterclaims cannot be cured by an amended complaint or by any other
25 means. The Tribes' Request For Judicial Notice In Support Of Its 12(b)(6)
26 Motion (Ct. Rec. 265) is **DISMISSED as moot** since it is unnecessary to

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1 consider EPA's interpretation of CERCLA in arriving at a resolution of the
2 issue presented to the court.

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

5 **DATED** this 19th day of June, 2009.

6 *s/Lonny R. Suko*

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8 LONNY R. SUKO
9 United States District Judge
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