

Jan 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 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 GRANTING DEFENDANT'S
MOTION FOR RECONSIDERATION**

Before the Court is Defendant's Motion for Reconsideration, ECF No. 2573. The motion was considered without oral argument. Defendant Teck Cominco Metals, Ltd. ("Teck") is represented by Deborah Baum, Amanda Halter, Thomas Campbell, Mark

ORDER GRANTING DEFENDANT'S MOTION FOR RECONSIDERATION *1

1 Elliot, and Bryce Wilcox. Plaintiff-Intervenor the State of Washington (the “State”) is
2 represented by Andrew Fitz, Joshua Osborne-Klein, Kelly Wood, Dylan Stonecipher, and
3 Kara Tebeau.

4 Teck moves the Court to reconsider its Order Denying Defendant’s Motion to
5 Dismiss, ECF No. 2564. Reconsideration of the Order is appropriate pursuant to Federal
6 Rule of Civil Procedure 60(b). The Court finds the State has failed to plead a cognizable
7 claim under the Model Toxics Control Act. Accordingly, the claim is dismissed.

8 **BACKGROUND**

9 The Court granted the State’s request to file a Fifth Amended Complaint on March
10 31, 2022. The Fifth Amended Complaint added a Seventh Cause of Action for natural
11 resource damages and costs under Washington State’s Model Toxics Control Act.

12 In the Fifth Amended Complaint, the State alleges Teck is liable under the state statute
13 as a present or former owner, operator, and/or arranger of a facility: the Upper Columbia
14 River (UCR). *Id.* ¶¶ 11.7–11.9. It claims Teck has discharged hazardous substances in the
15 form of emissions from its smelter, and these airborne contaminants were disposed of at the
16 UCR. *Id.* ¶ 11.4.

17 The State alleges that Teck intentionally directed its airborne contaminants to the
18 UCR as a means to dispose of its wastes, and these discharges were not passive. The State,
19 in its response brief, indicated Teck constructed and over time modified its smokestacks for
20 the purpose of ensuring the contaminants were carried away by the valley’s air currents to
21 Washington. *Id.*

22 On April 14, 2022, Teck moved to dismiss the claim. The Court denied Teck’s motion
23 to dismiss on September 15, 2022, finding the State had plausibly alleged that Teck was an
24 arranger under the statute. Teck timely filed this motion on October 13, 2022.

25 **LEGAL STANDARD**

26 Federal courts have discretion to reconsider and vacate prior orders pursuant to
27 Federal Rules of Civil Procedure 59(e) and 60(b). *See Barber v. Hawai‘i*, 42 F.3d 1185,
28 1198 (9th Cir. 1994); *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255,

1 1262 (9th Cir. 1993). A district court may provide relief from a judgment or order under
2 Rule 60(b) for any reason “that justifies relief.” Fed. R. Civ. P. 60(b)(6). This clause “gives
3 the district court power to vacate judgments ‘whenever such action is appropriate to
4 accomplish justice.’” *Henson v. Fid. Nat’l Fin., Inc.*, 943 F.3d 434, 443 (9th Cir. 2019)
5 (citing *United States v. Sparks*, 685 F.2d 1128, 1130 (9th Cir. 1982)).

6 DISCUSSION

7 The Court concludes the State has not pled a plausible claim under MTCA, and the
8 deficiency cannot be remedied. As a result, the state-law claim is dismissed.

9 To establish a claim for natural resource damages under MTCA, a plaintiff must
10 allege four elements. First, the plaintiff must allege that the defendant falls within a class of
11 persons that is subject to liability. RCW § 70A.305.040(1)(a)–(e). Second, the plaintiff must
12 assert that the contaminated site in question is a “facility,” as defined by the statute. *Id.*
13 § 70A.305.020(8). Third, there must have been a “release” or “threatened release” of a
14 hazardous substance at the facility. *Id.* § 70A.305.040(2). Fourth, the plaintiff must allege
15 the release or threatened release caused natural resource damages. *Id.*

16 The chief issue is whether Teck is a person subject to plausible liability under the
17 statute. The State alleges that Teck is liable as an “owner,” “operator,” and/or “arranger”
18 under MTCA. The statute provides that an owner or operator is “any person with any
19 ownership interest in the facility or who exercises any control over the facility.”
20 *Id.* § 70A.305.020(22)(a). An arranger is:

21 *[a]ny person who owned or possessed a hazardous substance and who by contract,*
22 *agreement, or otherwise arranged for disposal or treatment of the hazardous substance*
23 *at the facility, or arranged with a transporter for transport for disposal or treatment of*
24 *the hazardous substances at the facility, or otherwise generated hazardous wastes*
disposed of or treated at the facility can be liable.

25 *Id.* § 70A.305.040(1)(c) (emphasis added).

26 In this case, the State has failed to state sufficient facts to show Teck may plausibly
27 be an owner, operator, or arranger of the UCR. The State provides a conclusory assertion
28 that Teck owned and operated the UCR, but it proffers no factual statements to demonstrate

1 Teck had ownership of or control over any portion of the site. The State claims Teck’s
2 control is demonstrated by its ability to direct aerial pollution to the UCR from another
3 location. Absent plausible factual assertions to show Teck holds or held a management role
4 or ownership interest in or at the UCR, the State has not alleged Teck is an owner or operator
5 under MTCA.

6 The Court also finds Teck cannot be an arranger on the facts alleged by the State. The
7 State argues Teck can be liable because it intentionally and purposefully directed emissions
8 to the UCR. The State claims Teck’s emissions were not “passive,” and thus it does not rely
9 on a theory of passive migration.

10 The pertinent language under § 70A.305.040(1)(c) provides that a person is liable as
11 an arranger if they “generated hazardous wastes disposed of . . . at the facility.” Teck’s intent
12 to direct waste to the UCR does not demonstrate that any disposal to air occurred at the
13 UCR. The facts do not indicate Teck’s disposal of waste to the environment occurred at the
14 facility itself, despite the contaminants arriving there, and the State’s argument creates a
15 theory of arranger liability with no apparent limiting principle. Absent a clear definition of
16 “disposal” that expands arranger liability in the way purported by the State, the Court finds
17 the State has failed to state a plausible claim under MTCA.

18 For these reasons, the motion for reconsideration is granted. As the motion can be
19 resolved as a matter of statutory interpretation, the Court declines to rule on the parties’
20 remaining arguments. Since the prior Order is vacated, Teck’s motion to certify the Order
21 for interlocutory appeal is moot.

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

2 1. Defendant's Motion for Reconsideration, ECF No. 2573, is **GRANTED.**

3 2. Plaintiff State of Washington's Seventh Cause of Action under the Model
4 Toxics Control Act is **DISMISSED, with prejudice.**

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

7 **DATED** this 17th day of January 2023.



12 *Stanley A. Bastian*

13 Stanley A. Bastian
14 Chief United States District Judge
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