

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

Jul 09, 2024

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 GRANTING RENEWED
MOTION FOR
INTERLOCUTORY APPEAL**

Pending before the Court is Plaintiff CCT’s Renewed Motion for Immediate Interlocutory Review Pursuant to 28 U.S.C. § 1292, ECF No. 2905. Upon review, and being fully informed, Plaintiff CCT’s motion is granted.

**ORDER GRANTING RENEWED MOTION FOR INTERLOCUTORY
APPEAL # 1**

FACTS AND PROCEDURAL HISTORY

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2 The facts of this case are well established. Similar to the other claims in this
3 dispute, Plaintiff's cultural resource damage/service loss¹ claims arise from
4 discharges of slag and effluents from Defendant's Trail, British Columbia smelter
5 along the Upper Columbia River and Lake Roosevelt. Plaintiff CCT asserts that
6 their altered relationship with the Columbia River is a specific cultural resource
7 damage unto themselves. Therefore, Plaintiff CCT's claims are in addition to their
8 CERCLA natural resource damage claims which are jointly sought with Plaintiff
9 State of Washington. This matter involves the potential of over \$1 billion in
10 damages. Plaintiff CCT's assessment of cultural resources damages are a
11 significant portion of this matter's overall damages.

12 On February 6, 2024, this Court granted Defendant's motion granting partial
13 summary judgment as to cultural resource damages, ECF No. 2831. This Court
14 then denied Plaintiff CCT's motion to reconsider concerning this issue on April 10,
15 2024, ECF No. 2869. On June 20, 2024, the Ninth Circuit of Appeals denied
16 appeal without prejudice and requested findings by this Court as required by
17 *Couch*, ECF No. 2896.

LEGAL STANDARD

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19 28 U.S.C. § 1292(b) provides a process for immediate interlocutory appeal
20 of a courts order(s). The party pursuing the interlocutory appeal bears the burden
21 of demonstrating appeal is appropriate. *Couch v. Telescope Inc.*, 611 F.3d 629, 633
22 (9th Cir. 2010). Certification under § 1292(b) requires the district court to
23 expressly find in writing that all three § 1292(b) requirements are met, as follows:
24 (1) it involves a controlling question of law; (2) it has a substantial ground for a
25 difference of opinion; and (3) immediate review will materially advance the
26 ultimate termination of this litigation. *Id.*

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28 ¹ The parties disagree about the characterization of these claims. For clarity and efficiency, this Order will refer to them as cultural resource damages.

1 “To determine if a “substantial ground for difference of opinion” exists
2 under § 1292(b), courts must examine to what extent the controlling law is unclear.
3 *Id.* “Courts traditionally [] find that a substantial ground for difference of opinion
4 exists where the circuits are in dispute on the question and the court of appeals of
5 the circuit has not spoken on the point, if complicated questions arise under foreign
6 law, or if novel and difficult questions of first impression are presented.” *Id.* A
7 party’s strong disagreement with the Court’s ruling or whether settled law might be
8 applied differently does not establish a substantial ground for difference of
9 opinion. *Id.* Substantial grounds for a difference of opinion on a controlling
10 question of law are present where an order “involves an issue over which
11 reasonable judges might differ and such ‘uncertainty provides a credible basis for a
12 difference of opinion’ on the issue,” *Reese v. BP Exploration (Alaska) Inc.*, 643
13 F.3d 681, 688 (9th Cir. 2011).

14 **DISCUSSION**

15 This case involves the Comprehensive Environmental Response,
16 Compensation, and Liability Act (“CERCLA”), commonly known as Superfund,
17 which provides courses of action for environmental remediation. CERCLA is
18 controlling law in this matter as it forms the foundation of Plaintiff CCT’s claims.

19 There is a conflict between the holding in *State of Ohio* which claims
20 ‘nonuse’ services are actionable under CERCLA and this Court’s Order
21 determining that such claims are not cognizable under CERCLA if they involved
22 damages with a cultural component. *See State of Ohio v. United States Dep’t of*
23 *Interior*, 880 F.2d 432, 464 (D.C. Cir. 1989). This Court’s order granting partial
24 summary judgment did not address the D.C. Circuit’s ruling in *State of Ohio*. This
25 Court instead relied on district court cases from within the Ninth Circuit finding
26 that found there are no express or implied references to cultural resource damages
27 in the language of CERCLA. *See Couer d’Alene Tribe v. Asarco*, 280 F. Supp 2d
28

1 1094 (D. Idaho 2003) and *In re Gold King Mine*, 669 F. Supp. 3d 1146 (D.N.M.
2 2023).

3 The scope of CERCLA's applicability will materially affect the outcome of
4 this litigation in district court. This matter involves the potential for over \$1 billion
5 in environmental damage. Clarity will not only provide an understanding of
6 CERCLA's applicability related to cultural resource damages, but also allows the
7 parties to properly assess their risk in this litigation. Furthermore, a potential Ninth
8 Circuit order can have broader significance on the viability of similar claims.

9 Immediate review will hasten completion of this long-running litigation.
10 This Court is concerned that this matter could fragment into multiple trials. A
11 singular trial will best promote judicial efficiency and serves the interests of
12 justice. Determining the parameters of that singular trial will benefit the parties and
13 this Court.

14 Plaintiff CCT has demonstrated a need for interlocutory appeal pursuant to §
15 1292(b).

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**ORDER GRANTING RENEWED MOTION FOR INTERLOCUTORY
APPEAL # 4**

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

2 1. Plaintiff CCT's Renewed Motion for Immediate Interlocutory Review
3 Pursuant to 28 U.S.C. § 1292, ECF No. 2905, is **GRANTED**.

4 2. The cultural resource damages dispute under CERCLA meets the
5 three-factor test outlined in *Couch v. Telescope Inc.* Therefore, the issues related to
6 this Court's Order Granting Defendant's Motion for Partial Summary Judgment on
7 Cultural Resource Damages, ECF No. 2831, is **certified for immediate**
8 **interlocutory appeal** pursuant to 28 U.S.C. § 1292(b).

9 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to file
10 this Order and provide copies to counsel.

11 **DATED** this 9th day of July 2024.



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

17 Stanley A. Bastian
18 Chief United States District Judge
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