

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

**Feb 06, 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  
DEFENDANT’S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT ON CULTURAL  
RESOURCE DAMAGES**

Before the Court is Defendant Teck Cominco Metals, Ltd.’s Motion for  
Partial Summary Judgment on the Colville Tribes’ “Tribal Service Loss” Claim,

**ORDER GRANTING DEFENDANT’S MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON CULTURAL RESOURCE DAMAGES #1**

1 ECF No. 2777. The Court held oral argument on the motion on December 14, 2023  
2 in Spokane, Washington.

3 Plaintiff Confederated Tribes of the Colville Reservation (“Plaintiff”)  
4 proposes three “tribal service loss”<sup>1</sup> damage measurements under the  
5 Comprehensive Environmental Response, Compensation, and Liability Act  
6 (“CERCLA”). Defendant argues Plaintiff’s claims for cultural resource damages  
7 fail as a matter of law and are thus not recoverable under CERCLA. The Court  
8 finds there are no disputes of material fact that preclude partial summary judgment  
9 as to cultural resource damages and, having considered the parties’ briefing, case  
10 record, applicable law, the Court concludes that the cultural resource damages are  
11 not recoverable as a matter of law. Therefore, Defendant’s motion for partial  
12 summary judgment is granted.

### 13 **FACTS**

14 The facts of this case are well established. Similar to the other claims in this  
15 dispute, Plaintiff’s cultural resource damage claims arise from discharges of slag  
16 and effluents from Defendant’s Trail, British Columbia smelter along the Upper  
17 Columbia River and Lake Roosevelt (“the Columbia River”). Plaintiff asserts that  
18 their altered relationship with the Columbia River is a specific cultural resource  
19 damage unto themselves. Therefore, Plaintiff’s claims are in addition to their  
20 CERCLA natural resource damage claims which are jointly sought with Plaintiff  
21 State of Washington.

22 Plaintiff utilized three separate approaches to develop monetary proof of  
23 cultural resource damages. Plaintiff’s first damage measure is a \$114.6 million  
24 “Restoration Plan” which seeks to address erosion of Plaintiff’s culture. The  
25 Restoration Plan seeks to, among other initiatives, fund new cultural facilities,  
26 programs, and purchase land adjacent to the Columbia River. Second, Plaintiff’s

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27 <sup>1</sup> The Court will refer to ‘tribal service loss’ as “Cultural Resource Damages”  
28 throughout this Order.

1 experts conducted a survey of damages concerning “cultural disconnection from  
2 the [Columbia] River” which asked respondents to choose between two  
3 hypothetical options (a given amount of sediment removal or the purchase of a  
4 given amount of land. The survey concluded that the value of the “service losses”  
5 is between \$165 million and \$525 million. Finally, Plaintiff proposes damages of  
6 \$9 million to \$13.6 million for alleged cultural fishing losses.

### 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 CERCLA creates a right to recover natural resource damages for “injury to,  
3 destruction of, or loss of natural resources, including the reasonable costs of  
4 assessing such injury, destruction, or loss resulting from such a release.” 42 U.S.C.  
5 § 9607(a)(4)(C). Natural resource damages, under CERCLA, are to compensate the  
6 public by providing for the recovery of the funds that are necessary – and by law  
7 must actually be used – to restore or replace injured natural resources. 42 U.S.C. §  
8 9607(f)(1).

9  
10 CERCLA defines natural resources as the following:

11  
12 *Natural resources or resources* means land, fish, wildlife, biota, air, water,  
13 ground water, drinking water supplies, and other such resources belonging  
14 to, managed by, held in trust by, appertaining to, or otherwise controlled by  
15 the United States (including the resources of the fishery conservation zone  
16 established by the Magnuson Fishery Conservation and Management Act of  
17 1976), any State or local government, any foreign government, any Indian  
18 tribe, or, if such resources are subject to a trust restriction on alienation, any  
19 member of an Indian tribe. **These natural resources have been categorized  
20 into the following five groups: Surface water resources, ground water  
21 resources, air resources, geologic resources, and biological resources.**

22 43 C.F.R. § 11.14(z) (emphasis added).

23 The only courts to speak directly to the recovery of cultural resource  
24 damages, rejected the concept. *See Coeur d’Alene Tribe v. Asarco, Inc.*, 280 F.  
25 Supp. 2d 1094, 1107 (D. Idaho 2003) (“cultural uses of water and soil by the tribe  
26 are not recoverable as natural resource damages”); *see also In re Gold King Mine  
27 Release in San Juan Cnty., Colorado, on Aug. 5, 2015*, No. 16-CV-931, ---F. Supp.  
28 3d ---, 2023 WL 2914718 (D.N.M. Apr. 12, 2023) (finding that cultural resource  
damage claims, such as the lost confidence in a river, are not natural resource  
damages and therefore not recoverable by CERCLA).

1 There is no express or implied reference to cultural resources in the language  
2 of CERCLA. Whether reviewing CERCLA itself or relevant regulations or case  
3 law, there is no reference to ‘cultural’ or ‘tribal service’ damages. Neither the  
4 statute nor the regulations reference a cultural or tribal ‘connection’ or  
5 ‘relationship’ with a particular resource, let alone possible recovery from loss or  
6 damage to that connection or relationship. Though the impacts of Defendant’s  
7 smelter facility’s environmental contamination on the Columbia River are serious,  
8 cultural resource damages are simply not recoverable under CERCLA. Therefore,  
9 the Court grants Defendant’s motion for partial summary judgment as to cultural  
10 resource damages.

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

12 1. Defendant’s Teck Metal Ltd.’s Motion for Partial Summary Judgment  
13 on the Colville Tribes’ “Tribal Service Loss” Claim, ECF No. 2777, is  
14 **GRANTED.**

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

17 **DATED** this 6th day of February 2024.



21  
22

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

23 Stanley A. Bastian  
24 Chief United States District Judge