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18 Attorneys for Defendant Teck Metals Ltd. (f/k/a Teck Cominco Metals Ltd.)

19 UNITED STATES DISTRICT COURT
20 EASTERN DISTRICT OF WASHINGTON

21 JOSEPH A. PAKOOTAS, an individual and
22 enrolled member of the Confederated Tribes of
23 the Colville Reservation; and DONALD R.
24 MICHEL, an individual and enrolled member of
25 the Confederated Tribes of the Colville
26 Reservation, and THE CONFEDERATED
27 TRIBES OF THE COLVILLE RESERVATION,
28 Plaintiffs,
29
30 *and*
31 STATE OF WASHINGTON,
32 Plaintiff/Intervenor,
33
34 v.
35 TECK COMINCO METALS LTD., a Canadian
36 corporation,
37 Defendant.

NO. 2:04-cv-00256-SAB

TECK METALS LTD.'S
MOTION TO EXCLUDE
OPINIONS ON CCT'S
CULTURAL
RESTORATION PLAN
AND CULTURAL SERVICE
LOSSES

1 Pursuant to Federal Rule of Evidence 702, Teck Metals Ltd. (“Teck”) hereby
2 moves to exclude the testimony of Gerald Taiaiake Alfred, Ph.D., Martina Whelshula,
3 Ph.D., Elizabeth Hoover, Ph.D., John E. Sirois, and Adam M. Domanski, Ph.D.
4 regarding CCT’s proposed restoration-based damages model, and their related
5 qualitative opinions regarding alleged “cultural” or “tribal service losses” (“TSL”),
6 particularly insofar as they rely for their factual underpinning on an intentionally non-
7 representative summary of interviews of select tribal members, including even some
8 participants in this litigation.

9 This Motion relates only to the opinions regarding the \$114.6 million in
10 damages CCT alone claims for alleged “cultural” or “tribal service losses,” separate
11 and apart from the claims for ecological and recreational damages CCT jointly seeks
12 with the State, and separate and apart from CCT’s independent claim for damages
13 allegedly resulting from its members’ “lost use” of the UCR. This Motion assumes as
14 a threshold matter that CCT’s “tribal service loss” claim is legally cognizable under
15 CERCLA; Teck will demonstrate that is not so in a forthcoming dispositive motion.

16 As to the alleged “cultural” and “tribal service losses,” the opinions offered by
17 each of the five experts are inadmissible because they lack relevance to the claims and
18 defenses in this case, they are based on uncontrolled and unscientifically gathered
19 hearsay, and because the experts’ methodologies lack scientific rigor and are therefore
20 wholly unreliable. Because the experts’ opinions on CCT’s TSL and “restoration”-
21 based damages model are largely duplicative, and because each of their opinions are
22 similarly flawed and inadmissible for largely the same reasons, and in the interest of
23 judicial economy, Teck has consolidated this into a single motion.

24 INTRODUCTION

25 Earlier in this case, Judge Suko laid out plainly what Plaintiffs would have to
26 prove to establish liability for natural resource damages (“NRD”):

1 Liability for, and recovery of, natural resource damages requires proof
2 that: 1) natural resources within the trusteeship of the Plaintiffs have been
3 injured and 2) injury to natural resources “resulted from” a release of
4 hazardous substances (causation). . . . These are additional liability
5 elements, not merely damages elements. The trustee must show what
6 resource was injured, at what specific locations of the natural resource
7 the injury occurred, when the injury occurred, which release of what
8 substance caused the injury, and by what pathway the natural resource
9 was exposed to the substance.

10 *Pakootas v. Teck Cominco Metals Ltd.*, No. CV-04-256-LRS, 2011 WL 13112570, at
11 *2 (E.D. Wash. Feb. 14, 2011) (citing *Coeur d’Alene Tribe v. Asarco Inc.*, 280 F. Supp.
12 2d 1094, 1102-03, n.6 (D. Idaho 2003)). Any NRD recovered must then be targeted to
13 restore or replace that injured natural resource or the services arising from that specific
14 natural resource. 42 U.S.C. § 9607(f)(1). In making this ruling, Judge Suko defined
15 the parameters of what is relevant to Plaintiffs’ NRD claims, and therefore the
16 necessary foundation of any expert testimony proffered.

17 CCT sidestepped that directive, and first developed a \$114.6 million
18 “Restoration Plan”, a wish list of cultural priorities for CCT, and worked retroactively
19 from there, selectively soliciting stories to support the alleged lost cultural connection
20 to the UCR and hiring experts to place their *post hoc* imprimaturs on the Plan and
21 opine as to why it would compensate CCT for alleged cultural losses. Quite literally,
22 CCT began the process by identifying out what some members wanted, and then
23 worked backward to try to “justify end goals,” as the notes of the project’s primary
24 quarterback revealed. Ex. 1, Whitney Fraser’s Notes; Ex. 2, Fraser Dep. at 420:19-
25 422:5. Indeed, the Restoration Plan was modeled directly after the plan CCT’s expert
26 Dr. Alfred previously developed for his own tribe in upstate New York, the St. Regis

1 Mohawk Tribe at Akwesasne, which was fully funded with an \$8.4 million settlement.¹
2 Ex. 3, Alfred Dep. 116:6-22. As described herein, Dr. Alfred readily admits that this
3 type of “Restoration Plan” is a “novel” way to address contamination claims:

4 . . . [T]his was a novel kind of approach in terms of focusing on restoring
5 the connection and the use and the reintegration of the land and the
6 people, as opposed to looking at it as a contaminated site and looking for
7 replacements or compensation for that. And so trying to conceptualize
8 reconnection as opposed to valuation and compensation.

8 Alfred Dep. 166:9-16.

9 Accordingly, rather than determine what natural resources were injured and
10 quantify damages resulting from such injury, CCT’s damages expert, Dr. Domanski,
11 readily conceded the “damages” he attempted to quantify were not injuries to natural
12 resources, but an attempted measure of “cultural injury.” Ex. 4, Domanski Dep. I
13 196:12-198:8, 202:5-203:1, 240:20-21. Dr. Domanski explained that CCT seeks
14 \$114.6 million not to address an injury to natural resources, but the “perception” of
15 injury by *some* CCT members. *Id.* The Restoration Plan thus cannot be in any way
16 scaled to the magnitude of the alleged contamination, and it in no way even purports
17 to relate to the benthic macroinvertebrate (“BMI”) population that Plaintiffs contend
18 were injured by releases from sediments related to Trail smelter discharges.

19 CCT’s three cultural experts, Drs. Alfred, Whelshula, and Hoover, who provide
20 the foundation for Dr. Domanski’s damages report, also acknowledge that their
21 opinions as to the qualitative nature of the alleged cultural losses are *not* tied to injuries
22 to natural resources, but are instead simply the result of broad tribal “perceptions” of

23 _____
24 ¹ The St. Regis Mohawk Tribe’s claims arose from contamination with much greater
25 implications than those alleged here. Among other things, the PCB contamination in
26 the river in that case necessitated multiple “do not eat” fish consumption advisories.

1 contamination—regardless of whether there is in fact contamination on the beaches or
2 in the water and regardless of whether it in fact prevents anyone from engaging in the
3 kinds of cultural practices they contend have been eroded. (CCT’s own representative,
4 Cindy Marchand, testified unequivocally that she understood the beaches and river
5 were safe, and had tried to get the word out to tribal members. Ex. 5, Marchand Dep.
6 24:5-26:11, 58:3-10.) The precedential implications of allowing NRD recovery based
7 on “perceptions” of contamination, right or wrong, are obvious—and staggering.

8 Without identifying the natural resource injury, showing that *that* natural
9 resource injury is responsible for CCT’s cultural losses and establishing a baseline
10 against which the alleged loss can be measured, CCT’s experts’ opinions are irrelevant
11 to the issues that must be decided under Judge Suko’s directive. These experts’
12 opinions do not even seriously purport to address baseline conditions, as required,
13 though they readily admit that erosion of native languages and culture is a global
14 problem fed by myriad factors (and thus prompting the development of native
15 language and cultural revitalization programs by tribes around the country and the
16 globe). Moreover, their qualitative opinions are based almost exclusively on hearsay
17 statements obtained in a profoundly unscientific manner.

18 From those irrelevant and unreliable qualitative opinions, Drs. Alfred,
19 Whelshula, and Hoover and Mr. Sirois then jump to an opinion on damages,
20 contending the \$114.6 million Restoration Plan would remedy CCT’s unquantified
21 TSL, but they have no methodology to show that the Plan is necessary to remedy TSL
22 caused by a natural resource injury resulting from the releases at issue. Though they
23 quite uniformly concede that most of the elements of the Restoration Plan would be
24 useful to address pervasive erosion of tribal culture, regardless of whether
25 contaminants had ever been released into the UCR, they seek millions of dollars from
26 Teck to fund language and cultural programs and to buy land and build structures to

1 house those programs. They also concede that the U.S. government’s taking of the
2 North Half of the Reservation deprived CCT of its most culturally sacred sites, yet
3 they ask Teck to fund the reacquisition of roughly \$6.5 million worth of the seized
4 land. They simply have no methodology to link the benefits of the Plan to Teck.

5 Lastly, even if the Restoration Plan were targeted at restoring or replacing an
6 injured natural resource, CCT’s own witness explained that there is no way CCT can
7 ensure that any funds recovered in this litigation would be used on the Restoration
8 Plan. *Id.* 80:15-81:13. This is not idle theorizing or speculation: when CCT recovered
9 \$193 million from the U.S. in settlement claims the U.S. had mismanaged natural
10 resources on the Reservation, CCT members voted to distribute half of the recovery to
11 the individual tribal members rather than spend it on the targeted environmental
12 initiatives. Ex. 6, *Colville Tribal Members Vote for More Money* (Aug. 22, 2012).

13 **I. BACKGROUND**

14 **A. Overview of the Restoration Plan**

15 CCT’s \$114.6 million Restoration Plan (2023 USD) is comprised of various
16 components it contends address the erosion of CCT’s culture: 1) \$32 million to build
17 and operate a longhouse, greenhouse, retreat, pit house, and other facilities;
18 2) \$49.1 million to implement and operate cultural and language programs, including
19 an immersion school; 3) \$6.5 million to purchase land that was taken from CCT by
20 the U.S. government; 4) more than \$500,000 per year for 100 years for CCT to monitor
21 the UCR for hazardous substances, regardless what the ongoing testing and monitoring
22 by EPA and the State show or the actions they take; and 5) \$19 million for primary
23 restoration to remove “visible” slag from unspecified UCR beaches, but only if EPA
24 does not order the removal of slag from those beaches. Ex. 7, *Domanski Supp.*; Ex. 8,
25 CCT’s Second Supp. Disclosures. Drs. Alfred, Whelshula, and Hoover purport to
26

1 opine on the appropriateness of the elements of the Plan to address the alleged cultural
2 losses. Mr. Sirois is expected to opine that the Plan’s cost, as estimated by CCT’s
3 consultant and fact witness, Whitney Fraser, is a reasonable estimate. And Dr.
4 Domanski, an economist, is being offered to opine that in 2023 dollars, it will cost
5 \$114.6 million to implement and operate the Plan, which he puts forward as the
6 measure of CCT’s damages for cultural losses.

7 **B. Development of the Restoration Plan**

8 CCT’s Environmental Trust Department (“ET”), and specifically Patti Bailey,
9 an ET member and a project manager on the RI/FS, began working on a cultural
10 restoration plan in 2008 or 2009. Fraser Dep. 305:3-307:7. Ultimately, Ms. Fraser, an
11 environmental consultant working for CCT, coordinated the effort to develop CCT’s
12 TSL claim. Ex. 9, Fraser, Alfred & Boyd, *Assessment of Services Lost* (2018) (“TSL
13 Report”). Ms. Fraser and CCT’s attorneys² worked on the plan along with Ms. Bailey,
14 drafting its components and later refining them for inclusion in the TSL Report that
15 Ms. Fraser coordinated, and most of which she authored. *See id.*; *see also* Fraser Dep.
16 308:11-311:9; 314:21-315:11, 317:4-318:1. They brought Dr. Alfred on board in 2013
17 as the “Principal Investigator,” but ultimately, he authored only one and a half pages
18 of the 86-page report. *See* Ex.10, Alfred Rpt. at 2; Alfred Dep. 175:16-176:15. Fraser’s
19 goals were to “[j]ustify [the] end goals” and “tie [them] back to the harm caused.” Ex.
20 1, Fraser’s Notes. The “end goals” were the programs they had already developed.
21 Fraser Dep. 420:19-424:6.

22 _____
23 ² At Ms. Fraser’s deposition, Ms. Fraser declined, or CCT’s counsel instructed Ms.
24 Fraser not to answer numerous questions on the development of the TSL claims and
25 components of the Restoration Plan because they were developed in consultation
26 with counsel. *See, e.g.*, Fraser Dep. at 240-241, 319-321, 436-437, 440-442, 448.

1 Ms. Fraser and Dr. Alfred directed a series of oral history interviews of 43 tribal
2 members hand-selected because they would likely be able to share helpful information
3 that would support the cultural programs (“TSL interviews”). *Id.* These interviews
4 were “not intended to be representative of the entire tribe.” *Id.* 157:23-158:4, 420:4-7;
5 Alfred Dep. 83:2-8. Indeed, Ms. Fraser and Dr. Alfred “targeted” specific people to
6 interview—those with a “unique level” of knowledge about or involvement with UCR
7 resources and their “importance” to CCT’s culture—and even included some of CCT’s
8 fact witnesses in this case; one of the interviewers herself was interviewed. *See* Ex.
9 11, Compilation of Tribal Service Loss Interview Responses (“Summary”) at 1; *see*
10 *also* Ex. 12, “TC” Interview; Ex. 13, “KQ” Interview. In 2022, Ms. Fraser created
11 what was referred to as a “summary” of those interviews. *See* Summary. But at Dr.
12 Alfred’s direction, Ms. Fraser’s Summary mostly captures only those responses
13 attributing cultural impacts to Teck. Alfred Dep. 88:21-89:8, 206:20-209:6. “It was
14 not meant to present the entire range of answers from all respondents.” Fraser Dep.
15 418:14-419:18; *see also* TSL Report at 19 (“There is no simple way to summarize the
16 responses provided to interview questions[.]”). That selective Summary of the
17 selective interviews was provided to CCT’s cultural experts as the factual basis for the
18 case-specific opinions they are being asked to provide. *See* Alfred Rpt. at 2-8, 10-11;
19 Ex. 14, Whelshula Rpt. at 22, 25-26, 29-30; Ex. 15, Hoover Rpt. at 5-9, 21-22, 25.

20 C. The Interviews

21 CCT really could not suggest that the TSL interviews were a remotely
22 representative or scientifically controlled survey of the views or experiences of the
23 tribal members, nor that Fraser’s Summary was representative even of the views
24 provided in the interview responses. The interview subjects were made aware that they
25 were providing information to be used for CCT’s damages claim against Teck in this
26

1 case, primed with information about the litigation and supposed “contamination” from
2 the Trail smelter, and asked leading questions intended to elicit helpful responses.

3 The TSL interviews were ultimately conducted in four “rounds” between
4 August 2014 and November 2017. Summary at 1. Ms. Fraser and Ms. Bailey
5 conducted twenty interviews in Rounds 1 & 2 in 2014 and 2015. Fraser Dep. 416:17-
6 417:2. Dr. Alfred, the Principal Investigator of the study, did not know whether the
7 interviewers were trained or given instructions of any kind, because he “didn’t interact
8 with the interviewers at all.” Alfred Dep. 80:11-83:1. He did not know why additional
9 interviews were done beyond the first round. *Id.* at 114:1-4.

10 The interviewees were informed of the purpose of the interviews:

11 We are here today to talk about the ways people use resources in or near
12 the Columbia River and Lake Roosevelt today, how they used to use
13 them, and how pollution may have affected how people use them. . . . We
14 are focused on the effects of pollution from the smelter and paper mill in
Canada. . . .

15 Ex. 9 (TSL Report) at Appx. A (CCTIII947209). The transcripts reveal that at least
16 some respondents were provided additional, unscripted information before the
17 recording of the interview began (from which the transcripts of the interviews were
18 created). Before any questions have been asked, in one video, the interviewee states,
19 “this is the first time I’m really hearing about this, I’ve heard about it vaguely and
20 talked about with other people but it was a more like a gossipy feel kind of to it. Being
21 here today and seeing the numbers and the statistics put in front of me is really
22 shocking.” Ex. 16, “KN” Interview. This surprising approach is apparently consistent
23 with the way the interviewers viewed their task. As one interviewer remarked during
24 an interview: “it’s our job to make sure that we educate everybody about industrial
25 pollution and the impacts it’s having on the membership, so thank you.” Ex. 17, “D”
26 Interview. Yet the selected “results” from these “interviews” are the backbone of the

1 TSL claim and form the factual bases of CCT’s experts’ opinions. *See* Summary at 1-
2 2 (“Transcripts were examined and coded for common themes, which guided the
3 findings of which services were lost that had the strongest nexus to injured
4 resources.”); TSL Report at 13 (“Key excerpts directly from the coded interview
5 transcripts are woven into Section 4 [‘Results’] and Section 5 [‘Restoration of Lost
6 Tribal Services’] of this report to provide the basis for the findings therein.”), 19-85
7 (quotes from interviews throughout Sections 4 and 5).

8 **D. The Estimated Costs of the Restoration Plan**

9 The costs of the Restoration Plan’s components were estimated by Ms. Fraser
10 beginning in 2018. Fraser Dep. 310:1-10, 431:14-432:19; *see* TSL Report at 80-85.
11 Around 2019, CCT and its attorneys decided to allocate the total cost of the
12 Restoration Plan to two of its components on a percentage basis; ultimately, they
13 landed on allocating 10% to land acquisition (to acquire approximately 600 acres) and
14 15% to primary restoration (to remove slag from approximately a half mile of
15 shoreline), with the other components calculated as fixed costs. Fraser Dep. 471:10-
16 473:15, 484:1-486:11; *see* Ex. 18, Email from Ms. Fraser to Ms. Marchand, Jan. 31,
17 2019. In 2022, Fraser memorialized the descriptions and costs of the components in
18 the “Restoration Plan Summary,” which was attached to CCT’s disclosures and in a
19 memorandum, resulting in a total cost of \$112.8 million: 1) \$8.66 million for the
20 monitoring program; 2) \$16.92 million for primary restoration (15% of \$112.8
21 million); 3) \$11.28 million for land acquisition (10% of \$112.8 million); 4) \$27.15
22 million to build and operate a longhouse, cultural center, greenhouse, retreat, and pit
23 house; and 5) \$48.79 million for cultural and language programs. Ex. 19, Restoration
24 Plan Summary; Ex. 20, Restoration Plan Budget Research (“Restoration Plan Memo”).
25 Other than reducing the size of the primary restoration component and increasing the
26

1 timeframe of the monitoring component from 30 to 100 years, the Restoration Plan in
 2 Fraser's memorandum and CCT's disclosures is substantially the same as the one
 3 drafted in 2015 and costed in 2018, including the Plan's total cost (\$112.8 million) and
 4 the allocation of the costs of the land acquisition and primary restoration components
 5 on percentage bases. *See* Restoration Plan Summary; Restoration Plan Memo; *see also*
 6 Fraser Dep. 318:25-322:6, 431:14-432:8.

7 **E. CCT's Cultural Experts**

8 CCT's experts, Mr. Sirois, and Drs. Alfred, Whelshula, and Hoover, relied on
 9 Ms. Fraser's Restoration Plan Summary and/or her Restoration Plan Memo in opining
 10 that the Restoration Plan was necessary and would be effective to restore CCT's
 11 alleged TSL. *See* Alfred Rpt. at 2, 9; Hoover Rpt. at 19. Mr. Sirois also relies on Ms.
 12 Fraser's material in opining that the Plan's estimated costs are reasonable and accurate.
 13 Ex. 21, Sirois Rpt. at 2, 9-17; *see* Ex. 22, Sirois Dep. 81:3-6, 206:12-13. Dr. Domanski
 14 in turn took the cost inputs determined by others, calculated the costs of the
 15 components for their full duration (through 2096 and 2121), discounted the dollars to
 16 bring the Plan to 2022 dollars (\$112.8 million), and opines that the total cost of the
 17 Plan is a valid measure of damages for CCT's alleged TSL. Ex. 23, Domanski Rpt.;
 18 Ex. 24, Domanski Dep. II 7:21-8:14, 10:10-11:19, 16:11-17:1; Domanski Dep. I
 19 214:12-215:13. In a supplemental report, Dr. Domanski inflated the cost of the Plan to
 20 2023 dollars (\$114.6 million through 2097 and 2122). Domanski Supp.

21 Curiously, though the costs of the individual components differ between Ms.
 22 Fraser's Restoration Plan Summary and Dr. Domanski's initial expert report, both
 23 calculate the total cost of the Plan to be the exact same amount: \$112.8 million.
 24 *Compare* Restoration Plan Summary, *with* Ex. 25, Cultural Service Loss Restoration
 25 Package, provided with Domanski Rpt.; Domanski Dep. II 10:22-11:8. Neither Dr.
 26

1 Domanski nor Ms. Fraser was able to explain this coincidence—at least not without
 2 revealing information they claimed to be privileged. Domanski Dep. II 7:2-8, 18:25-
 3 21:13; Fraser Dep. 434:14-437:16. After the Plan was developed and costed, CCT’s
 4 experts commissioned a survey of CCT members living on the Reservation, the
 5 Community Opinions Survey, to *post hoc* justify the Plan’s components. Domanski
 6 Dep. II 37:21-39:1, 58:22-59:18; Domanski Rpt. at 14-15.

7 **II. LEGAL STANDARD**

8 “Federal Rule of Evidence 702 provides that expert testimony is admissible if
 9 scientific, technical, or other specialized knowledge will assist the trier of fact to
 10 understand the evidence or to determine a fact in issue, the witness is qualified by
 11 knowledge, skill, experience, training, or education; and (1) the testimony is based
 12 upon sufficient facts or data, (2) the testimony is the product of reliable principles and
 13 methods, and (3) the witness has applied the principles and methods reliably to the
 14 facts of the case.” *Avila v. Willits Env’t Remediation Trust*, 633 F.3d 828, 836 (9th Cir.
 15 2011) (quoting Fed. R. Evid. 702) (internal quotations and alterations omitted). The
 16 trial court’s gatekeeping function extends to all experts, not just scientific experts.
 17 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). The proponent of the expert
 18 testimony has the burden to establish its admissibility. *Henricksen v. ConocoPhillips*
 19 *Co.*, 605 F. Supp. 2d 1142, 1154 (E.D. Wash. 2009).

20 **III. ARGUMENT**

21 **A. Expert Opinions Based on the Interviews are Unreliable.**

22 Drs. Alfred, Whelshula, and Hoover all predicate their opinions on the factual
 23 context they learned by reviewing Fraser’s Summary of the interviews. *See* Alfred Rpt.
 24 at 2-8, 10-11; Whelshula Rpt. at 22, 25-26, 29-30; Hoover Rpt. at 5-9, 21-22, 25. The
 25 interviews were put forward as the factual foundational backbone of the Restoration
 26

1 Plan. *See* TSL Report at 13 (“Key excerpts directly from the coded interview
 2 transcripts are woven into . . . Section 5 [‘Restoration of Lost Tribal Services’] of this
 3 report to provide the basis for the findings therein.”); Summary at 1-2 (“Transcripts
 4 were examined and coded for common themes, which guided the findings of which
 5 services were lost that had the strongest nexus to injured resources.”). The interviews,
 6 however, reflect only hearsay statements by, and gathered by, interested parties. They
 7 provide no reliable insight into the character and level of potential service losses
 8 because of the unscientific and biased methods used to gather the information. As
 9 such, they are inadmissible. Fed. R. Evid. 104, 702, 801; *In re Autozone, Inc.*, No.
 10 3:10-MD-02159, 2016 WL 4208200, at *15 (N.D. Cal. Aug. 10, 2016), *aff’d sub nom.*
 11 *In re AutoZone, Inc., Wage & Hour Emp’t. Practices Litig.*, 789 F. App’x 9 (9th Cir.
 12 2019) (“The survey fails Plaintiffs because it is not a proper use of representational
 13 evidence, and because its fundamental lack of scientific rigor makes it inadmissible.”).

14 As unreliable as the full interviews are, the Summary that Ms. Fraser prepared
 15 to provide to the experts is even worse. By relying only on the double-hearsay
 16 Summary, the experts base their opinions on an unreliable foundation and failed to
 17 review sufficient facts and data to form the basis of a valid expert opinion. *See, e.g.,*
 18 *Rhine v. Buttigieg*, No. 2:20-CV-01761, 2022 WL 7729817, at *4 (W.D. Wash. Sept.
 19 15, 2022) (finding expert’s opinions unreliable because he “did not obtain and review
 20 all relevant material”). For example, the Summary quotes the interviewee referred to
 21 as “BG” as saying that she does not like eating fish from the Columbia River because
 22 “[i]t’s too polluted.” Summary at 18. But the Summary omits BG’s other comments
 23 that make it clear she was referring to pollution having nothing to do with Teck:

24 But as far as actually pinpointing any particular cause for pollution, I
 25 think it’d have to be a whole combination of things. From farming,
 26 orchards . . . they use so darn much spray, I mean it’s sickening. . . . Cows
 poop, cows pee, horse whatever.

1 ...
2 ... now the only thing that I heard was that when the people went up there
3 to do their bathing, they actually seen human poop floating by. And that
4 was enough to get them out of the water.

4 Ex 26, “BG” Interview.

5 Dr. Alfred, the “principal investigator” of the TSL study, did absolutely nothing
6 to ensure the integrity of the data on which he and the other experts would rely. In his
7 report, he quotes one interviewee, who, unbeknownst to him, is a former employee of
8 CCT’s Environmental Trust Department involved in the effort to compile the TSL
9 claim, and who had even conducted the “Round 4” interviews for the TSL study.
10 Alfred Rpt. at 3; Alfred Dep. 130:19-25; Ex. 27, Phillips Dep. 26:20-27:2. When asked
11 about this interviewee/interviewer’s background, Dr. Alfred said that did not change
12 his perspective, since she is a tribal member, and he was not concerned about bias
13 because his “experience working with these people is that they have a high degree of
14 integrity.” Alfred Dep. 131:1-7. Reflexive reliance on such highly interested tribal
15 members as the basis for their causation and damages opinions renders Dr. Alfred’s
16 opinions, and those of the other experts who relied on the interview study he oversaw,
17 highly suspect and unreliable. *See, e.g., Intrex Corp. v. FMC Corp.*, 124 F.3d 211 (9th
18 Cir. 1997) (affirming expert report and testimony exclusion because it “could be based
19 on nothing more than the speculation and opinion of an interested party.”); *Call*
20 *Delivery Sys., LLC v. Morgan*, No. 2:20-CV-04637, 2022 WL 1252412, at *1 (C.D.
21 Cal. Mar. 7, 2022) (excluding expert who “failed to conduct an independent evaluation
22 of the evidence and independently verify the underlying facts of th[e] case”); *Baker v.*
23 *Firstcom Music*, No. 16-CV-08931, 2018 WL 2676636, at *2 (C.D. Cal. May 8, 2018)
24 (“[E]xperts are expected to verify the reliability of the data underlying their
25 conclusions independently instead of simply adopting the representations of an
26 interested party.”); *cf. Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502-03 (9th Cir.

1 1994) (“[S]cientists whose conviction about the ultimate conclusion of their research
2 is so firm that they are willing to aver under oath that it is correct prior to performing
3 the necessary validating tests could properly be viewed by the district court as lacking
4 the objectivity that is the hallmark of the scientific method.”).

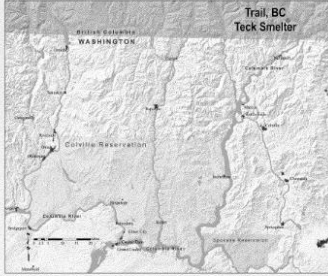
5 CCT’s experts cannot come close to showing the TSL interviews—or the
6 Summary they relied upon—are representational evidence, were collected according
7 to established, scientifically rigorous methods, and would be relied on by other experts
8 in their fields. *M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1087 (9th Cir.
9 2005) (survey properly rejected when its creator “did not qualify as an expert on
10 designing or analyzing consumer surveys” and proponent “failed to show that the
11 survey was conducted in accordance with generally accepted survey principles and
12 that the results were used in a statistically correct manner”). Indeed, to say that these
13 interviews “suffer from serious methodological flaws” would be an understatement.
14 *Jimenez v. Allstate Ins. Co.*, No. LA-CV-1008486, 2019 WL 13088814, at *23 (C.D.
15 Cal. May 13, 2019) (quoting *Obrey v. Johnson*, 400 F.3d 691, 696 (9th Cir. 2005));
16 *see also Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d 866, 878 (C.D. Cal. 2013)
17 (“Unless survey evidence is conducted according to accepted principles, it is not
18 admissible in the first instance.”) (citing *Fortune Dynamic, Inc. v. Victoria’s Secret*
19 *Stores Brand Mgm’t, Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010)).

20 Most notably, “the survey respondents’ knowledge of the purpose of the survey
21 was inconsistent with accepted principles of survey methodology.” *Casey v. Home*
22 *Depot*, No. ED-CV-142069, 2016 WL 7479347, at *21 (C.D. Cal. Sept. 15, 2016)
23 (excluding survey where questionnaire started by informing respondents that the
24 survey was related to a class action lawsuit to which they were parties). Here, as
25 described above, the interviewees were told the purpose of the TSL interviews. By the
26 third round, the interviewers even showed the respondents a poster describing the

1 purpose of the interviews as investigating the impacts of “industrial metals pollution”
 2 next to a map calling out the location of the Trail smelter:




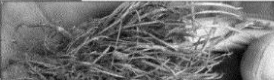
**The Confederated Tribes of the Colville Reservation
 are stewards of the land and water.**

For decades, the Colville Tribes have led the way in investigating industrial pollution in the Upper Columbia River – specifically, the section of river between Grand Coulee Dam and the US-Canada border.



We are working together with the federal government (the Environmental Protection Agency and Department of the Interior), the state Department of Ecology, and the Spokane Tribe to measure the impact of pollution on the land, water, fish, and wildlife.











Part of the investigation today is studying all the ways that Colville people use resources from the river and nearby uplands, and learning about which uses have and have not been affected by industrial metals pollution.

We are interested in hearing your point of view – what have you heard about industrial pollution in the river? Is today your first time hearing about it? If not, do you remember when and where you first heard about it? Where do you get your information about the river?

19 Ex. 9 (TSL Report) at Appx. A, Round 3 Interview Outline and Poster (CCTIII936592-
 20 93). The poster also contains images of fish consumption advisories (“FCA”) and
 21 assertions that the slag has injured various resources, including mussels:

The state Department of Health has issued “advisories” telling people to limit how much they eat of several species of fish caught in the UCR/Lake Roosevelt. These advisories are based on how much mercury has been measured in the flesh of each type of fish.

HEALTHY CHOICE	LIMIT	CAUTION
 Kokanee	 Burbot	 Largescale Sucker
 Lake Whitefish	 Longnose Sucker	 Smallmouth Bass
 Rainbow Trout	 Mountain Whitefish	 Walleye
		 Largemouth Bass

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There used to be beds of “pearlshell” mussels in the Columbia River, and in the past they were a staple food source for Tribal members. Today there are no live pearlshells found in the UCR, while healthy populations of the mussels are still found in the Kettle and Okanogan Rivers. Although the link has not been proven, it is suspected that slag caused or contributed to their extinction from the river, because mussels are sensitive to metals.



Id. There is no claim in this case that the mussel population has been injured and nothing of the sort has any scientific support. This poster is facially inconsistent with any notion that the interviews were a neutral effort to capture and understand the ways in which, and extent to which, CCT’s culture has been impacted by the presence of slag in the UCR apart from impacts from other causes.

B. Expert Opinions Regarding the Restoration Plan and the Underlying Qualitative TSL Assessment Do Not Satisfy Rule 702.

1. CCT’s experts performed result-driven analyses.

CCT’s experts followed no accepted methodology in reaching their opinions that the Restoration Plan is a valid measure of, and is necessary to, restore CCT’s alleged TSL, much less any injury to a natural resource. Instead of establishing baseline or quantifying CCT’s losses attributable to a natural resource injury caused by Teck’s releases, CCT developed a laundry list of cultural priorities and programs, utterly untethered to the allegedly injured natural resources. Then, CCT hired experts to opine that those programs would help address long-standing cultural injuries and that their cost constitutes a valid damage determination. In this results-driven exercise, they began with the premise that CCT was entitled to the Restoration Plan that had been developed seven years prior and then worked backwards to “justify” it.

An expert who begins with a goal or conclusion and works backward to support

1 it cannot survive a *Daubert* challenge. *See Claar*, 29 F.3d at 502-03 (“Coming to a
 2 firm conclusion first and then doing research to support it is the antithesis of th[e
 3 scientific] method.”) (citation omitted); *see also Flagstar Bank, FSB v. Freestar Bank,*
 4 *N.A.*, 687 F. Supp. 2d 811, 820 (C.D. Ill. 2009) (“Preparation by an expert which
 5 involves beginning with a goal . . . and working backwards to meet the goal . . . is the
 6 antithesis of reliable and scientific.”) (citing *Castellow v. Chevron USA*, 97 F. Supp.
 7 2d 780 (S.D. Tex. 2000) (excluding expert testimony due to unreliable methodology
 8 which was “result-driven” and “anathema to both science and law”)); *In re Lipitor*
 9 *(Atorvastatin Calcium) Mktg., Sales Practices and Prods. Liab. Litig.*, 892 F.3d 624,
 10 634 (4th Cir. 2018) (“Result-driven analysis, or cherry-picking, undermines principles
 11 of the scientific method and is a quintessential example of applying methodologies
 12 (valid or otherwise) in an unreliable fashion.”).

13 2. The Restoration Plan is not scaled to address TSL caused by a
 14 natural resource injury attributable to Teck or sized to the injury.

15 CCT’s experts claim that the Restoration Plan “is the best-conceived and most
 16 appropriate response to the Tribe’s losses and will directly address the cultural impacts
 17 due to natural resource injuries caused by the release of Teck’s metals.” Alfred Rpt. at
 18 8-9; *see also* Sirois Rpt. at 5; Hoover Rpt. at 19-26; Whelshula Rpt. at 26-31. But they
 19 admit the Plan is not tied to any specific natural resource injury, Sirois Dep. 81:17-21;
 20 Domanski Dep. I 202:5-203:1, and that it is not dependent on—and would be desirable
 21 regardless of—contamination of the UCR. *See* Ex. 28, Hoover Dep. 97:4-98:17
 22 (acquiring land in the North Half, a longhouse and cultural center, and “a language
 23 and culture program would be helpful to the tribe, with or without contamination”);
 24 *see also* Ex. 29, Whelshula Dep. 141:22-143:1; Sirois Dep. 144:23-145:22.

25 CCT’s experts’ opinions regarding the alleged TSL and the Restoration Plan are
 26 therefore unreliable and irrelevant as a threshold matter because they do not link the

1 alleged losses to any natural resource injury caused by Teck’s releases, a foundational
2 requirement for proof of NRD. *See Pakootas*, 2011 WL 13112570, at *2. In this case,
3 CCT claims injury to BMI and, possibly, white sturgeon (though no NRD are sought
4 for sturgeon). But, contrary to Judge Suko’s express admonition, CCT’s experts never
5 identify, and do not even know, what natural resource is alleged to have been injured.
6 *See, e.g., Whelshula Dep. 74:17-75:3, 108:3-22; Alfred Dep. 191:10-192:2.* They
7 therefore performed no analysis to ascertain which of CCT’s alleged losses flow
8 therefrom. *See Alfred Dep. 194:5-18; Whelshula Dep. 74:17-75:3; Sirois Dep. 81:17-*
9 *82:21.* Certainly, none of their analyses ever even mentions the fly larvae that are the
10 specific resource Plaintiffs claim has been injured by Teck’s releases, or the river-
11 bottom sediments where those fly larvae live. And to the extent they are based on fish,
12 Plaintiffs together, and CCT again independently, are also additionally seeking
13 damages for losses allegedly arising from the fish consumption advisory,
14 notwithstanding CERCLA’s prohibition on double recovery. 42 U.S.C. § 9607(f)(1).

15 Unsurprisingly then, CCT’s experts have no methodology to—and did not—
16 scale the Restoration Plan to the natural resource injury (whether BMI or
17 “contamination” in the UCR in general). *See Domanski Dep. I 216:4-217:8* (“there’s
18 no mathematical link between measured contamination and this restoration package”);
19 *see also Domanski Dep. II 37:21-39:1; Whelshula Dep. 75:15-20; Hoover Dep. 79:12-*
20 *80:5.* Even the Community Opinion Survey, which Dr. Domanski purports validates
21 the desirability and costs of the Plan, was not used in its development; it was not even
22 conducted until after the Plan was developed and costed. *Domanski Dep. II 37:21-*
23 *39:1, 59:22-18* (“The survey did not influence the earlier design of the program. It was
24 the other way around. The program influenced the questions we put in the survey.”).

25 As CCT itself has said, “One uniform rule in cultural resource management is
26 scaling cultural studies, investigations, and treatments to the scope of the undertaking

1 and the impacts. Scope means both the nature and the size of the project and nature
 2 and the size of the impacts.” Ex. 30, CCT National Point Discharge Elimination
 3 System Cultural Resource Assessment. Dr. Domanski likewise agrees that “a
 4 restoration program must provide services of equivalent or known relational value to
 5 those that were lost as a result of the injury.” Domanski Rpt. at 9-10 (“While
 6 restoration scaling is generally applied to determine restoration requirements for
 7 ecological service losses, the same fundamental concepts carry over when identifying
 8 the appropriate type and magnitude of cultural restoration.”). But in this litigation,
 9 CCT’s experts did not adhere to this “uniform rule” and instead worked backwards to
 10 retroactively endorse a Restoration Plan without ever attempting to scale it to the
 11 nature and size of the alleged impacts of Teck’s releases. *See Rink v. Cheminova, Inc.*,
 12 400 F.3d 1286, 1293 n.7 (11th Cir. 2005) (“In evaluating the reliability of an expert’s
 13 method, however, a district court may properly consider whether the expert’s
 14 methodology has been contrived to reach a particular result.”).

15 3. The Restoration Plan is not premised on any actual contamination
 16 or harm, but on tribal members’ “perceptions.”

17 No doubt because there is no evidence that the beaches and waters of the UCR
 18 are unsafe for human use—indeed, former CCT Business Councilmember, Cindy
 19 Marchand, admitted they were safe, Marchand Dep. 24:5-25:9—CCT instead
 20 premises its TSL damages on tribal members’ alleged “perception” that UCR beaches
 21 and water are “contaminated” and unsafe and “choice” to avoid using the UCR. Alfred
 22 Rpt. at 3, 5-6; Hoover Rpt. at 8-9, 21; Whelshula Rpt. at 16, 31; Whelshula Dep.
 23 108:23-109:7; Domanski Dep. I 196:12-200:6, 202:5-203:1. In other words, certain
 24 individual tribal members do not *believe* the water and beaches are safe—despite data
 25 showing they are indeed safe for recreation and that the fish are safe for consumption
 26

1 with some exceptions for sensitive populations³—so they have *chosen* not to use them.

2 CCT’s damage model is thus based on a need to “restore confidence” in the
3 UCR and “reduce the apprehension about river use.” Hoover Rpt. at 21; Whelshula
4 Rpt. at 31; *see also* Alfred Rpt. at 9-10; Sirois Dep. 82:22-83:3; Domanski Dep. I at
5 196:18-197:20, 202:5-203:1, 240:20-21. This perceived need exists independent of
6 any actual injury to a specific natural resource (BMI or sturgeon) or whether the UCR
7 is actually contaminated or unsafe for human use. *See* Alfred Dep. 57:17-59:2;
8 Whelshula Dep. 182:15-183:7; Domanski Dep. I 196:12-200:6; *see, e.g.*, Alfred Dep.
9 127:9-14 (“Q. Did you do anything to try to find out whether, in fact, the doing sweats
10 and using the river would, in fact, be harmful or unsafe? A. No, because what I was
11 looking at was, again, their perception of and their changed behavior because of their
12 knowledge of slag being on the shoreline.”).

13 Even the components of the Restoration Plan that are ostensibly connected to
14 the environmental condition of the UCR are not dependent on the presence or extent
15 of harmful contamination. The Plan proposes \$19 million to remove “visible” slag
16 from unspecified beaches—not to remedy any identified risk to human health or the
17 environment—but to make tribal members “feel more comfortable” by addressing
18 “aesthetic” concerns. Sirois Dep. 83:13-18, 153:8-12; *see also* Hoover Rpt. at 21;
19 Hoover Dep. 92:10-25. CCT’s experts claim that every speck of slag must be removed
20 even if it poses no health concerns, because “it’s visually upsetting to have the slag on
21 the beaches.” Hoover Dep. 53:10-54:15; *see also* Domanski Rpt. at 18 (“[T]he targeted
22 removal of visible slag on shorelines . . . is . . . independent of general concerns about
23 fish consumption advisories or water quality.”). In fact, this component is specifically

24 _____
25 ³ *See* Ex. 31, UCR FCA (setting limits for children and women who are or might
26 become pregnant).

1 intended to remove slag from beaches whose metal “concentration is *below* EPA’s
 2 designated human health risk levels” and that EPA thus deems unnecessary to
 3 remediate. Restoration Plan Memo at 2 (emphasis added); *see* Hoover Dep. 102:3-
 4 106:15, 108:24-109:22 (“it’s important to remove as much [slag] as humanly possible
 5 from the environment” because tribal members “are not going to feel comfortable with
 6 [governmental] bodies telling them it’s an okay amount of contamination”).
 7 Furthermore, none of the experts could even identify any beach in particular from
 8 which slag would or should be removed. *See* Whelshula Dep. 190:21-193:4; Sirois
 9 Dep. 155:5-157:8; Domanski Dep. I 211:16-19, 282:24-283:11; Hoover Dep. 115:13-
 10 23; Fraser Dep. 322:25-323:10. *Cf. City of Modesto Redevelopment Agency v. Dow*
 11 *Chem. Co.*, No. 999345, 2005 WL 1171998, at *20 (Cal. Super. Ct. Apr. 11, 2005)
 12 (excluding expert’s testimony regarding future environmental remediation costs under
 13 CERCLA “based on legally impermissible speculation” finding “plaintiffs cannot
 14 possibly predict with reasonable certainty, or based on anything more than speculation,
 15 what remediation decisions will be made by the environmental authorities”).

16 And CCT’s experts contend that CCT needs a tribal-run monitoring program
 17 because its members will never trust⁴ the monitoring already being conducted by EPA
 18 and the State, and that it must be funded at a cost of over \$500,000 per year for *100*
 19 *years even if* the results confirm EPA’s showing the water and beaches are safe.
 20 Domanski Dep. I 273:8-275:8. Dr. Domanski did not even consider whether the

21
 22 ⁴This distrust has nothing to do with Teck: “Tribal members are hesitant to trust state
 23 and federal public health officials to look out for the health and safety of the
 24 community due to historical conflicts in the government-to-government
 25 relationship.” Whelshula Rpt. at 30; *see also* Hoover Rpt. at 22; Whelshula Dep. at
 26 81:20-84:24; Hoover Dep. 111:16-113:1; Sirois Dep. 186:12-187:4.

1 monitoring could be more readily included in water quality monitoring the State and
 2 CCT already do. Domanski Dep. II 100:11-104:11. Indeed, it was clear that neither he
 3 (nor counsel for that matter⁵) had any information about the extensive monitoring that
 4 both the State and CCT have been doing for years. *See id.* Perhaps demonstrating better
 5 than anything that the Plan is completely untethered to the extent of alleged
 6 contamination, even if every ounce of slag were removed from the UCR, and even if
 7 CCT’s own tribal-run monitoring program confirmed no harmful levels of
 8 contaminants, CCT’s experts would still opine that \$500,000 per year must be spent
 9 on monitoring to quell the unease that they assert, without any valid scientific basis,
 10 individual members of CCT feel.

11 The Restoration Plan is not tied to the existence or extent of contamination, and
 12 there is an analytical gap between the facts of the injury and the experts’ opinions of
 13 the amount required to restore CCT’s alleged cultural losses. Moreover, the only
 14 natural resource allegedly injured is the BMI. There is no claim (and no evidence) that
 15 the UCR water is in fact unsafe for recreation or cultural activities. There is no claim
 16 (and no evidence) that the UCR beaches are in fact unsafe for recreation or cultural
 17 activities. CCT fails to tie the Restoration Plan to any actual harm, and instead ties it
 18 to the perceptions of some individual tribal members, of which CCT’s experts have no

19 _____
 20 ⁵ Though counsel for CCT repeatedly objected to questions asking about ongoing
 21 water monitoring on the basis of “lack of foundation” and admonished Teck’s
 22 counsel that there was not “any evidence of any existing monitoring,” Domanski
 23 Dep. I 100:11-104:21, CCT and the State do plainly each have ongoing water quality
 24 monitoring programs. *See, e.g.*, Ex. 32, CCT Water Quality Assessment Report at 9;
 25 [https://ecology.wa.gov/research-data/monitoring-assessment/river-stream-](https://ecology.wa.gov/research-data/monitoring-assessment/river-stream-monitoring/water-quality-monitoring)
 26 [monitoring/water-quality-monitoring](https://ecology.wa.gov/research-data/monitoring-assessment/river-stream-monitoring/water-quality-monitoring).

1 reliable evidence is representative of CCT's population. This results in an unreliable
2 and impermissible “analytical gap” that the Restoration Plan is scaled to address the
3 impacts of Teck's releases. *Gen. Elec. Co. v. Joiner*, 552 U.S. 136, 146 (1997). And,
4 their opinions that the Plan will restore TSL allegedly caused by Teck’s releases are
5 inconsistent with the law of this case, where Judge Suko plainly ruled that the damages
6 sought must be tied to a specific injured natural resource.

7 4. The Restoration Plan is not scaled to address only the impacts
8 caused by Teck’s releases versus baseline factors.

9 CCT’s experts’ opinions are unreliable for the additional reason that they
10 employed no methodology to establish the baseline condition of CCT’s culture or to
11 measure the alleged diminution in culture and language. NRD are recoverable for “the
12 reduction from the baseline condition” of the resource, *i.e.*, its but-for condition. 43
13 C.F.R. § 11.70(a)(1). Here, assuming the claimed TSL are recoverable at all as NRD
14 under CERCLA, CCT would have to prove how much its culture had eroded relative
15 to its status absent Teck’s releases (*e.g.*, how many CCT members would be speaking
16 its native language or participating in cultural activities today had Teck not historically
17 released materials from the Trail smelter). Its experts fail to provide this foundational
18 information and, without it, their opinions are flatly unreliable and unscientific.

19 Drs. Hoover and Whelshula admittedly made no effort to establish baseline.
20 Hoover Dep. 76:3-20; Whelshula Dep. 77:23-78:10. Dr. Alfred claims to have
21 considered it, but the only factor he considered was the presence of FCAs unrelated to
22 mercury from Teck’s releases. Alfred Rpt. 2. There are numerous other factors that
23 each expert admits have profoundly affected tribal culture,⁶ all of which should have
24

25 ⁶ Other factors relevant to the baseline condition of CCT’s culture not discussed in this
26 (continued...)

1 been considered. Indeed, Dr. Whelshula testified that CCT’s negative perceptions and
 2 “widespread apprehension” of consuming fish from the UCR were triggered by the
 3 very first FCA. Whelshula Dep. 97:17-98:3, 123:13-124:14. But the first FCA had
 4 nothing to do with mercury or Teck’s releases (rather, dioxin/furan) and was issued
 5 several years before any mercury-based FCA (1991 versus 1997). *See* Ex. 33, Health
 6 Advisory; Ex. 34, Chronology of Activities; Ex. 35, McBride Dep. 41:19-42:10,
 7 52:11-56:4, 87:2-7. Dr. Alfred admitted to knowing little about other FCAs, even
 8 though he claims to have considered the “but for” baseline to which these are directly
 9 relevant. Alfred Dep. 69:1-70:21 (“I can’t say that I have a great degree of knowledge
 10 of general advisories[.]”), 72:17-73:6 (unsure whether statewide FCAs predated the
 11 UCR mercury-based FCA), 57:1-23 (“Do you know what the level of the fish
 12 advisories are in the Columbia River, the Upper Columbia River? A. Presently, no.”).
 13 Dr. Alfred also could not explain how he separated the impacts of the statewide FCAs
 14 from those Plaintiffs allege flow from the UCR’s mercury-based FCAs they attribute
 15 to Teck. *Id.* 70:22-73:6. Drs. Hoover and Whelshula did not consider unrelated FCAs
 16 at all. Hoover Dep. 58:12-17, 65:23-66:11; Whelshula Dep. 85:15-20, 94:16-95:9.

17 Dr. Domanski admits he did not scale the Plan’s language component to only
 18 “offset the impact from the perception of contamination on language as opposed to
 19 _____

20 Motion include climate change, other sources of pollution, tribal members moving
 21 off-Reservation for work, and the modernization of society (*e.g.*, television and the
 22 Internet). *See* Hoover Dep. 49:3-11, 52:4-8, 62:19-63:13, 96:8-12, 98:14-18; Alfred
 23 Dep. 72:1-7, 77:14-25, 100:13-101:3, 136:1-9; Whelshula Dep. 24:4-26:19, 36:25-
 24 38:2, 44:10-47:4, 66:6-21, 127:3-16; Sirois Dep. 72:10-74:7, 124:17-126:4, 127:5-
 25 128:11, 160:13-162:11; Domanski Dep. I 222:24-223:3; Boyd Dep. 50:6-53:6, 58:7-
 26 25, 87:8-88:10.

1 any other impact.” Domanski Dep. I 223:20-224:1. He also admitted he did not ask
 2 any questions to ascertain whether the Plan was necessary to address harm caused by
 3 perceived contamination as opposed to other factors.⁷ *Id.* CCT’s experts simply failed
 4 to distinguish the cultural impacts stemming from several highly relevant baseline
 5 factors in assessing CCT’s losses. As a result, they sanctioned a Plan that would
 6 address losses they admit stem, at least in part, from other causes. *See* Hoover Dep.
 7 79:12-80:1 (“My job was to . . . look at programs that are designed to help people
 8 preserve and revitalize that language and culture which has been damaged by factors,
 9 including environmental contamination.”), 97:4-98:18 (“[A] number of factors have
 10 contributed to language and culture loss, contamination being one of them, and as
 11 such, construction of the longhouse would be useful for any community.”).

12 Much has been written about the dire impact of the construction of the Grand
 13 Coulee Dam on CCT, due largely to the destruction of the salmon runs and elimination
 14 of that keystone species. “As stated by Colville Tribal elder Mary Marchand, *If you*
 15 *bring back our salmon, you will bring back our culture.*” Ex. 36, CCT Fish & Wildlife
 16 Dpt., Reintroducing Salmon Upstream of Chief Joseph and Grand Coulee Dams. CCT
 17 has published videos about the salmon reintroduction program it is currently
 18 implementing and the importance of salmon to its culture on its website. Salmon &
 19 People Video, <https://www.cct-fnw.com/video> (“Salmon is our blood; we were was
 20 raised on salmon, salmon is spiritual, it’s a food, it’s a way of life. . . . Salmon fishing
 21

22 ⁷ This testimony undermines Dr. Domanski’s earlier opinion that the Plan has “an
 23 appropriate nexus, magnitude, and uniqueness to the mechanistic cultural losses
 24 associated with the Defendant’s release of contaminants” and “only restore[s]
 25 cultural services that have a direct nexus to the contamination in the UCR.”
 26 Domanski Rpt. at 12.

1 is very important to our culture. . . . The traditional way of life began to end as the
2 treaties with the US Government were signed, pushing people off their historic lands
3 onto reservations.” The construction of the Grand Coulee Dam in 1939 “had a
4 devastating effect on tribal members. . . . [It] just wiped out a big fishery on the
5 Columbia River. . . . It’s a disaster. . . . It’s like telling you ok you don’t get to eat any
6 more....it changed a whole way of life for our people.”). But CCT’s experts made no
7 effort to exclude the impacts of the Dam and loss of salmon from their analyses of the
8 impacts of Teck’s releases on CCT’s culture. For example:

9 Q. ... [D]id you make any effort to quantify the loss due to fish
10 consumption advisories relative to the loss due to the elimination of the
11 salmon runs when the dam was constructed?

12 A. No.

13 Whelshula Dep. 123:2-7.

14 Q. . . . [I]n terms of the creation of the dam, did you attempt to understand
15 what the impact was on cultural practices and other language loss and so
16 forth of the construction of the dam?

17 A. No. That would be a separate study in my view.

18 Alfred Dep. 83:24-84:3. Indeed, Dr. Alfred was not even aware of the importance of
19 salmon to CCT, *Id.* 40:5-6, one of the “salmon tribes.” Whelshula Dep. 121:19-122:2.

20 This failure renders their qualitative and restoration-based damage opinions
21 unreliable. The \$31.4 million component for establishing schools to revive CCT’s
22 language is a prime example. This does not address an injury caused by Teck; as its
23 experts admit, the fact that CCT’s (like so many other tribes’) language is endangered
24 is due primarily to federal actions aimed at forcing assimilation of tribes and
25 eradicating native languages, including forcing children into boarding schools, which
26 led to tribal members not passing the language to their children. *See Ex. 37, Boyd Dep.*

1 52:20-53:2, 87:8-88:10; Whelshula Dep. 46:16-47:4, 127:3-16. Shelly Boyd, CCT
 2 member and a co-author of the TSL Report, has written that the Colville “people of
 3 the North Columbia have undergone a diaspora. . . . The displacement of people from
 4 the land has played a big part in the decline of nsrxcin (Colville Salish language), such
 5 that nsrxcin is now a very highly endangered language.” Ex. 38, A Plan for Indigenous
 6 Cultural Restoration on the North Columbia River at 2.

7 The Restoration Plan also includes many millions for reacquiring some
 8 unidentified parcels of what was formerly CCT’s land in the North Half, which was
 9 seized by the U.S. government long ago. This was a “huge” and “significant” loss.
 10 Whelshula Dep. 90:13-92:5; Boyd Dep. 68:11-18. Plainly, it and CCT’s longstanding
 11 desire to reacquire this land have nothing to do with Teck. *See* Hoover Dep. 98:5-9
 12 (reacquiring the North Half would be useful “totally apart from contamination”);
 13 Fraser Dep. 336:3-24 (“[I]t has been a perennially important goal that fulfills many . .
 14 . priorities of the tribal council to acquire land and in particular, land within their
 15 traditional territories of which the north half is a key component.”). As Mr. Sirois
 16 wrote, “Most of our River gathering sites were taken by nefarious means or through
 17 legislation by the federal government in the name of development. Historically, the
 18 loss of control of those sacred lands continues to interfere with the Tribal members’
 19 ability to conduct cultural activities along the River.”). Sirois Rpt. at 8; *see* Sirois Dep.
 20 129:19-132:6, 161:14-163:5, 168:11-17, 182:10-184:1; Whelshula Dep. 89:22-92:22.
 21 But CCT’s experts nevertheless contend, with no scientific basis, that Teck should be
 22 responsible for returning this land to CCT. *See* Domanski Dep. I 256:25-257:25 (it
 23 does not matter why that land is currently unable to provide the cultural services).

24 CCT’s experts did not assess the extent to which CCT’s alleged TSL for which
 25 it seeks to recover millions from Teck were caused by these or other baseline factors:
 26

1 Q. (BY MS. BAUM) Could you describe, first, what you understand the
2 impact was, if any, on the tribes and their cultural practices relating to the
3 taking of the north half?

4 A. I didn't – I didn't factor that in.

5 Alfred Dep. 83:19-23; *see also id.* 208:14-209:6.

6 Q. BY MS. BAUM: Can you quantify the significance of that loss [of
7 the North Half]?

8 A. No.

9 Whelshula Dep. 90:20-22.

10 Q. BY MS. BAUM: Have you made any effort to compare the extent
11 of injury to the tribes from colonization, genocide, boarding schools and
12 the things you talked of this morning with the injuries to the tribes from
13 the perception of contamination in the river?

13 ...

14 [DR. WHELSHULA]: No. No. I just focused on the river and the
15 perception of the contamination of the river.

16 *Id.* 80:12-21; *see also id.* 77:23-80:5 (“So the loss of the language and the culture
17 around the river is just a cumulative loss.”).

18 By not distinguishing between impacts caused by baseline factors versus Teck's
19 releases, CCT's experts' opinions that the Plan is scaled to restore—and that its cost
20 provides a measure of damages for—TSL caused by Teck are based on insufficient
21 facts and data and should be excluded as unreliable. *Cf. Comcast Corp. v. Behrend*,
22 569 U.S. 27, 35 (2013) (“a model purporting to serve as evidence of damages in this
23 class action must measure only those damages attributable to that theory”).

24 5. CCT's experts have not analyzed whether the Restoration Plan
25 would be effective to remedy the alleged losses.

26 CCT's experts fail to reliably measure the effectiveness of their proposed Plan

1 to restore tribal members’ “confidence” in the UCR and CCT’s traditional knowledge,
 2 language, and practices. In addition to reliably measuring baseline, a restoration-based
 3 damage model requires an analysis of the proposed programs to ensure that they will
 4 be effective to cure the injury. *See Garvin v. Greenback*, 856 F.2d 1392, 1401 (9th Cir.
 5 1988) (“Sufficient evidence must be introduced so that the court can arrive at an
 6 intelligent [damages] estimate without speculation and conjecture.”) (citation
 7 omitted); *Leese v. Lockheed Martin Corp.*, 6 F. Supp. 3d 546, 553 (D. N.J. 2014)
 8 (excluding damages testimony based on cost-to-cure methodology because there was
 9 insufficient proof that the proposed programs were “required” to cure the injury).

10 Because CCT’s experts cannot describe CCT’s baseline condition or the cultural
 11 losses due to the releases in measurable terms, they have no method to determine
 12 whether the restorative measures they propose are sufficient to return CCT to a
 13 baseline condition. Rather, according to Sirois, the effectiveness of the Restoration
 14 Plan cannot be evaluated until it is implemented. Sirois Dep. 68:25-69:12, 82:22-
 15 83:18. Only then can its effectiveness be measured by whether people are utilizing the
 16 structures, participating in cultural activities, and “feeling confident” at the river, and
 17 “the number of different names that are being passed down through different families.”
 18 *Id.* This does not provide sufficient evidence to arrive at the conclusion that the cost
 19 to restore (or the measure of) CCT’s alleged TSL is \$114.6 million.

20 **C. Dr. Domanski should be precluded from giving an impermissible**
 21 **legal opinion or speculating about the duration of Plan elements.**

22 Dr. Domanski, an economist, opines that for the tribal-run monitoring “program
 23 to be effective, it must operate for the anticipated extent of future contamination,”
 24 which he believes to be “at least for the next 100 years.” Domanski Rpt. at 12-13. He
 25 does not cite any evidence or expert authority for this statement, *id.*, but instead is
 26 relying on himself. Domanski Dep. II 49:24-50:7. But Dr. Domanski is an economist;

1 he has no expertise to determine the necessity of environmental monitoring or the
 2 projected duration of any “contamination.” He thus lacks the qualification to offer
 3 admissible views on this topic. Further, even on the economic side, he is not aware of
 4 any research supporting the concept of a “stigma” lasting even 50 years, let alone 100
 5 years. *Id.* 39:6-12. As Ms. Fraser admits, the opinion that the monitoring components
 6 needs to last 100 years is based on pure speculation: “the different lengths of time were
 7 tied to discussions about speculating how long fish consumption advisories may be in
 8 effect.” Fraser Dep. 448:9-23. Thus, Dr. Domanski’s opinion of the projected duration
 9 of the monitoring and cultural programs, which drives the cost of over \$57 million of
 10 the Restoration Plan, is based on pure speculation.

11 Dr. Domanski’s opinion that “[a] measure of [CCT’s] damages is the cost to
 12 implement and operate” the Restoration Plan is an impermissible legal opinion.
 13 Domanski Rpt. at 11. “[A]n expert witness cannot give an opinion as to her legal
 14 conclusion, i.e., an opinion on an ultimate issue of law.” *Nationwide Transp. Fin. v.*
 15 *Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008). “[T]he correct measure of
 16 damages is a legal question for the Court to determine.” *Ngethpharat v. State Farm*
 17 *Fire & Cas. Co.*, No. C20-454, 2021 WL 2823245, at *3 (W.D. Wash. Jul. 7, 2021)
 18 (excluding economist’s opinion of the correct measure of damages). Thus, Domanski’s
 19 opinion should be excluded as an unhelpful and impermissible legal opinion.

20 **REQUEST FOR RELIEF**

21 For these reasons, Teck requests the Court exclude from trial the opinions and
 22 testimony of Drs. Alfred, Whelshula, Hoover and Domanski and Mr. Sirois regarding
 23 CCT’s alleged cultural or tribal service losses and the cultural restoration plan.

24 DATED this 25th day of August, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system.

/s/ Deanna M. Willman
Deanna M. Willman