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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 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

STATE OF WASHINGTON,

Plaintiff/Intervenor,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant.

NO. 2:04-CV-0256-SAB

PLAINTIFF'S RESPONSE TO TECK METALS LTD.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE COLVILLE TRIBES' "TRIBAL SERVICE LOSS" CLAIM

NOTED FOR HEARING:
DECEMBER 14, 2023 AT 1:30 P.M.

WITH ORAL ARGUMENT

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I. INTRODUCTION

Teck Metals Ltd. ("Teck") seeks dismissal of CCT's tribal service loss claim arguing (1) even though CERCLA authorizes recovery of damages by a tribal trustee, and even though relevant regulations and caselaw provide for recovery of service losses, CCT, acting as a natural resource trustee, cannot recover them; (2) CCT's claim for cultural losses are not cognizable as service losses; (3) CCT's service losses due to Teck's contamination of the UCR are unrelated to the natural resource injuries alleged herein; and (4) CCT cannot prove its claim because it has not addressed "scaling" and "baseline" even though these terms are not mentioned in the elements of the claim and reside only in regulations that Teck concedes are not binding. None of this persuades, as we explain below. In short, CERCLA authorizes CCT's recovery of damages, and such damages include service losses, including use and nonuse values due to natural resource injuries. We observe at the outset that other than its first argument whether service losses by Tribes are cognizable, Teck's arguments target CCT's restoration plan approach to damages and did not address two of the three damages formulations offered by CCT (total value and lost river use) and consequently its motion fails on these points.

II. STATEMENT OF FACTS

1. Background.

This Phase III adjudication of natural resource damages follows the Court's Phase I adjudication of Teck's responsibility for releases of hazardous substances in the UCR based on its acknowledged use of the UCR as a free waste dump for

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millions of tons of slag and effluent generated at its Trail smelter. ECF 1955 at 4. In Phase II, this Court determined that Teck is a responsible party under CERCLA based on releases of its hazardous substances in the UCR and ordered Teck to pay CCT's response costs in the amount of $8,253,676.65. ECF 2417 at 34.

Section 9607(f) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) authorizes recovery of natural resource damages (NRD) by Indian tribes as well as the federal government and states. The Confederated Tribes of the Colville Reservation (CCT) and the State of Washington (State), acting as natural resource trustees, have asserted such claims. CCT is one of four trustees who, in 2007, formed a trustee council to investigate and assess natural resource injuries in the UCR. The trustees have developed joint claims identifying natural resource injuries and resulting service losses and Plaintiffs have asserted them in this action. They include compelling evidence that Teck's hazardous substances are toxic to benthic organisms (or "benthos") in the UCR sediment and have resulted in elevated mercury in fish leading to fish advisories. These opinions are described in detail in the previously-submitted reports and declarations of Joel Blum, Dimitri Vlassopoulos, William Clements, and Jesse Sinclair. ECF Nos. 2685, 2698, 2700, 2703; *see also generally* ECF Nos. 2667, 2673, 2684. Teck does not deny that its metals are toxic to benthos and it concedes that mercury in the UCR have led to fish advisories. Morrison

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Deposition[1] at 367-68; Teck's Statement of Undisputed Material Facts, ECF 2778 ("SMF") ¶ 14. Plaintiffs employed a habitat equivalency analysis to calculate the cost of restoration of damaged habitat as well as calculation of lost fishing trips due to elevated mercury in fish. *See* Domanski Report, ECF 2679-23. On review of this evidence, Teck's expert conceded that natural resource damages have been proved. *See* Morrison Dep. at 367-68.

2. CCT's tribal service loss claims.

Along with the joint claims asserted with the State, CCT also has investigated and assessed natural resource service losses specific to the Tribes as authorized by 42 USC § 9607(f) ("liability…to an Indian Tribe…"). Such claims for lost services to tribes have featured in many natural resource damage assessments.[2] Declaration of Adam Domanski in Support of Response to Teck Metals Ltd.'s Motion for Partial Summary Judgment on the Colville Tribes' "Tribal Service Loss" Claim ("Domanski Decl.") ¶¶ 9, 13-14.

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[1] All cited deposition excerpts are attached as exhibits to the accompanying Declaration of Paul J. Dayton in Support of Response to Teck Metals Ltd.'s Motion for Partial Summary Judgment on the Colville Tribes' "Tribal Service Loss" Claim ("Dayton Decl.") unless otherwise indicated.

[2] Indeed, Teck's Motion cites a tribal service loss settlement in the Akwasasne claim which was larger than the physical remediation settlement. ECF 2777 at 9-10, ECF 2679-10 (Alfred Report) at 1. And, in some respects the work in that case was a model for CCT's approach here. Teck SMF, ECF 2778 at ¶ 45.

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CCT has invoked Plaintiffs' proof concerning toxicity to benthos and elevated mercury in fish to satisfy Section 9607's requirement of injury. ECF 2779-2; *see also* ECF 2679-10 (Alfred Report), 2720 (Alfred Decl. ¶ 10), and 2679-23 (Domanski Report). Relying on these experts' evidence of injury, CCT experts developed proof of natural resource damages—specifically cultural service losses due to Teck's contamination of the river, the total value of an uncontaminated river and the lost river trips due to elevated mercury in fish.

CCT took three approaches to developing its proof of tribal service losses. First, it conducted a tribal service loss investigation to identify service losses resulting from Teck's contamination of the UCR and developed a restoration plan to redress such losses; second, it retained Dr. David Layton and Mr. Robert Paterson to design and conduct a contingent valuation study determining the total value of an uncontaminated river; and third, it retained Mr. Robert Unsworth to calculate the value of lost river trips specific to CCT members resulting from Teck's contamination, particularly elevated mercury prompting fish advisories.[3]

Taking the tribal service loss investigation first, in 2013, CCT engaged Dr. Gerald Taiaiake Alfred, Ph.D, to serve as Principal Investigator for tribal service

[3] Teck has argued that this claim overlaps Plaintiffs' joint claim for lost fishing trips, but CCT's expert took account of such an overlap in his opinion. SMF ¶ 17; CCT's Statement of Disputed Material Facts ("SDF") ¶ 9. Quantification of any overlap is an issue for trial.

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loss study based on his work on the Akwasasne tribal service loss claim and extensive expertise in indigenous cultural issues. SMF ¶ 38. In 2013, with funding from the Department of Interior (DOI) and in consultation with DOI, CCT developed an approach to such an investigation, culminating in a Final Quality Assurance Project Plan (QAPP) to conduct a tribal service loss investigation. *Id*. at ¶ 43; Fraser Dep. at 480-81.

Implementing the QAAP, the investigation encompassed oral history research, literature review and review of an extensive survey of UCR resources jointly conducted by CCT and EPA (Westat Survey). Assessment of Services Lost by the Confederated Tribes of the Colville Reservation as a Result of Injuries to Natural Resources at the Upper Columbia River Site (October 23, 2018), ECF 2679-9, 2679-10 ("TSL Report") at 9-13. The oral history component included interviews of 45 tribal members selected for their knowledge of the impact of Teck's contamination. Alfred Dep. at 19-20, 76-77, 80; Fraser Dep at 157-58; Declaration of Whitney Fraser in Support of Response to Teck Metals Ltd.'s Motion for Partial Summary Judgment on the Colville Tribes' "Tribal Service Loss" Claim ("Fraser Decl.") ¶ 4. The investigation did not attempt assessment of all members' experience or representative experience, because CCT was attempting to understand the extent of CCT's service loss for the purpose of restoring such loss as such restoration is a central goal of natural resource recovery. Alfred Dep. at 20, 76-77; Fraser Dep. at 157-58; Fraser Decl. ¶ 5. CCT was not attempting to derive a "per capita" injury as might be done in a class

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action or mass tort claim, so there was no reason to attempt to understand the experience of each or all tribal members. Fraser Decl. ¶ 5.

Dr. Alfred reviewed and approved the features of the investigation and the questions to be asked. TSL Report at 14-19; Alfred Dep. at 33-37. Whitney Fraser, a tribal consultant, implemented the interview process with help from tribal employees. Fraser Dep. at 416-17. All of the interviews were transcribed and they were later summarized by Ms. Fraser. *Id*. at 417-418; TSL Report at 12-13. These interviews demonstrated extensive cultural disruption resulting from Teck's contamination of the UCR. *See* TSL Report at 19-79.

In addition to interviewing tribal members and reviewing the Westat Survey results, the tribal service loss investigation included an extensive consultation with a tribal expert, Shelley Boyd, on cultural issues, particularly the necessity of incorporating language learning as part of cultural reconnection. *See* TSL Report at 19-79; Fraser Dep. at 310-11, 387. After this work was complete, a draft report was completed – authored by Dr. Alfred, Ms. Fraser and Ms. Boyd – and submitted to DOI. Fraser Dep. at 460-62. The report identified specific accounts of disruption in the CCT members' cultural experience. ECF 2679-10 (Alfred Report) at 8-11; Alfred Dep. at 71-79. To be clear, neither the TSL Report nor Dr. Alfred's opinions in the case claimed that Teck's contamination had caused loss of specific cultural attributes such as language. Instead, it described disrupted cultural connection to the river that might be restored by language programs as

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well as other responses. ECF 2679-11 (Alfred Report) at 8-11; Fraser Dep. at 310-11, 335.

The TSL Report also included a proposed restoration plan to redress the cultural losses it had identified. TSL Report at 80-85, Fraser Dep. at 373-74.[4] The plan had four components, each directed at restoring cultural loss from contamination of the river: (1) monitoring of the UCR to confirm water and sediment conditions; (2) selected slag removal to remove visual indicators of contamination; (3) cultural programs and buildings to enable restoration of cultural attributes, including language leading to improved connection to the river; and (4) acquisition of land. TSL Report at 80-85, Fraser Dep. at 373-74

Dr. Alfred reviewed the restoration plan developed by CCT and opined that "it is the best conceived and most appropriate response to the Tribe's losses and will directly address the cultural impacts due to natural resource injuries caused by the release of Teck's metals." *Id*. at 8. In reaching this opinion, Dr. Alfred noted that "Tribal members do not view financial compensation as an acceptable substitute for the restoration of the natural environment and cultural restoration." *Id*. This is confirmed by the work of Dr. Layton and Mr. Paterson discussed below. The CCT restoration plan was also reviewed and validated by Mr. Sirois. He explained that the plan aligned with the CBC resolution identifying tribal

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[4] This plan was based on concepts developed for a 2015 settlement discussion with Teck. Fraser Dep. at 373-374.

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restoration goals and "directly addresses the cultural losses and experiences as a result of Teck's slag contamination." ECF 2679-22 (Sirois Report) at 5-7. He reviewed each category of the restoration plan, validated their costs and their effectiveness in reaching restoration goals. *See id*. at 9-17.

This plan was reviewed by John Sirois, a CCT leader with extensive experience in Tribal governance and chairman of the Colville Business Council and many roles in Tribal programs implementing cultural goals. He opined that it would be effective in redressing cultural loss. Sirois Dep. at 40-42, 176-77. Teck quibbles that he could not know if it was effective until it was implemented (which is logical), but based on his experience he had substantial reason to expect that it would redress cultural loss. *Id*. at 68-69.

Based on this work and his expertise in the field, Dr. Alfred has offered his opinions in this case. He concluded that "injuries to natural resources have had widespread detrimental "non-use" effects on Tribal members who because of their understanding of the injuries caused specifically by the release of Teck's metals, chose not to engage in practices that were central to the Tribes' cultural life." ECF 2679-11 (Alfred Report) at 3. In particular, he observed that "in analyzing the information presented to me on the views of CCT Tribal members, it is clear to me that the injuries caused by the release of Teck's metals have affected Tribal members' ability to continue being who they are in the internal and inter-tribal frame of reference that defines their existence…" *Id*. at 4. Specific to use values, Dr. Alfred explained that "because of the injuries to natural resources caused by

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Teck's releases, Tribal members have chosen not to relate to the riverine environment and have discontinued cultural practices central to their ancestral way of being and identity as a nation." *Id*. at 6.

In offering these opinions, Dr. Alfred took account of baseline conditions. He noted that more than a generation has passed since the Grand Coulee Dam was constructed and Tribal members have adapted to changes in the natural environment caused by other factors. *Id*. at 2; Alfred Dep. at 76-77. And, he observed that responses to the TSL study questions were specific to injury caused by Teck. *See* ECF 2679-11 (Alfred Report) at 3; Alfred Dep. at 71-79.

Dr. Alfred's tribal service investigation employed qualitative research methods to identify cultural loss. ECF 2720 (Alfred Decl.) ¶¶ 6-10. CCT also retained experts to undertake a quantitative analysis of damages resulting from Teck's contamination. Dr. Layton and Mr. Paterson designed and conducted a stated preference study intended to identify the total value of the loss due to Teck's contamination. ECF 2670-1 (Layton & Paterson Report) at 3; Declaration of David Layton, Ph. D. in Support of Response to Teck Metals Ltd.'s Motion for Partial Summary Judgment on the Colville Tribes' "Tribal Service Loss" Claim ("Layton Decl.") ¶ 4. The survey form explained that contamination of the river had caused injury to some creatures living in the sediment. ECF 2670-1 (Layton & Paterson Report), Att. B. The results showed the minimum value associated with an uncontaminated river – a lower bound – in the amount of $165,000,000. ECF

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2670-1 (Layton & Paterson Report) at 14; Layton Decl. ¶ 6. Teck has not challenged this approach to damages on this motion.

CCT also employed Mr. Unsworth to calculate a specific use value—the value of river trips not taken because of elevated mercury causing fish advisories. Plaintiffs have presented a joint claim on this subject, but Mr. Unsworth's work focuses on the specific loss to the CCT members. ECF 2672-2 (Unsworth Report) at 1-2. Teck has not challenged this calculation of damages on this motion.

Dr. Domanski, an economist with substantial experience in NRDA assessments, has reviewed this expert work and underlying information and opined on CCT's damages in this case. With respect to the restoration plan approach to damages, Dr. Domanski's report explains how cultural services can be restored through a set of programs designed to replicate community cultural and spiritual linkages. ECF 2679-24 (Domanski Report) at 4; *see* Domanski Dep. (Vol. 1) at 68; Domanski Decl. ¶¶ 11-16.[5] Damages are calculated based on the cost of the restoration package needed to replace lost services. Domanski Dep at (Vol. 1) at 188-189. Dr. Domanski explained that "Compensation through cultural restoration programming is a type of service-to-service scaling." ECF 2679-24 (Domanski

[5] CCT has provided a declaration from Dr. Domanski because use of deposition excerpts alone provides disjointed account of this issue. Dr. Domanski's declaration is consistent with his deposition testimony in all respects.

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Report) at 9. In Opinion 4, he explains his use of a "restoration-scaling approach. *Id*. at 18; *see* Domanski Dep. (Vol II) at 67.

This approach identifies cultural loss resulting from the presence of Teck's contaminants in the river. Domanski Dep. (Vol. 1) at 196-197. "It's a cultural service injury that led to changes in behavior in connection with the river because of contamination in the river." *Id*. at 196; *see also* Domanski Decl. ¶ 13. The cultural resource that is injured is persons' connection with the river and series of cultural services that it provides." Domanski Dep. (Vol. 1) at 196.

III. ARGUMENT AND AUTHORITY

A. Summary Judgment Standard.

Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden of establishing the absence of a genuine issue of material fact is on the party seeking summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). If the moving party satisfies their burden, the non-moving party may defeat summary judgment by identifying "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn" in favor of the non-movant. *Id*. at 255.

The party seeking summary judgment also must show that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322-23; *Western Chance #2, Inc. v. KFC Corp*., 957 F.2d 1538, 1540 (9th Cir. 1992). The moving party is entitled

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to judgment as a matter of law only when the non-moving party fails to make a sufficient showing on an essential element of a claim on which the moving party bears the burden of proof. *Celotex*, 477 U.S. at 323.

B. CERCLA Permits Recovery Of Damages For Tribal Service Loss.

Teck's sweeping assertion that "tribal service losses" are not recoverable under CERCLA is simply wrong. Service losses resulting from injury to natural resources are widely available to trustees such as the United States or a State and the result is no different when the trustee is a Tribe. Natural resource damages include the "compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of baseline." 43 C.F.R. § 11.80(b) (emphasis added); *see also* 43 C.F.R. § 11.83(c)(1) (defining compensable value as "the amount of money required to compensate the public for the loss in services provided by the injured resources between the time of the discharge or release and the time the resources are fully returned to their baseline conditions, or until the resources are replaced and/or equivalent natural resources are acquired."); *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1122 n.22 (D. Idaho 2003) (courts grant due deference to DOI regulations). As a trustee, CCT has the same right to recover such losses as other trustees. 42 U.S.C. § 9607(f). Teck offers no interpretation of CERCLA supporting a distinction between a Tribe and the other trustees, nor does it offer

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any decision from any court supporting this interpretation of CERCLA and there is none.[6]

Tribal service claims based on natural resource injury are a common part of settlements. Domanski Decl. ¶¶ 8-9; *see also, e.g., In re Exxon Valdez*, No. A89-095 CIV, 1993 WL 735037, *3-4 (D. Alaska July 8, 1993) (noting that settlement provided government with "damages for loss of all public uses," including both active use and nonuse) (emphasis in original). Damages to the cultural practices of Native American tribes as a result of the injured resources are commonly part of such settlements. *See* Domanski Decl. ¶ 9. Even Teck concedes that the Akwasasne, with Dr. Alfred's help, recovered a multi-million dollar tribal service loss settlement. ECF 2777 at 9-10.

Although its motion is framed to target "tribal service loss," its brief quickly shifts ground to target "cultural service loss." Once again, it has no authority for its position and the regulations are to the contrary.

1. CERCLA permits recovery of use and nonuse service losses.

CERCLA NRD liability for damages for injury to, destruction of, or loss of natural resources," 42 U.S.C. § 9607(a)(4)(C), includes "both **public use and nonuse values** such as existence and bequest values." 43 C.F.R. § 11.83(c)(1)

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[6] As explained below, the *Coeur d'Alene* case made a factual finding that no tribal service loss was proved but did not analyze the availability of such damages under CERCLA.

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(emphasis added). "Nonuse value is the economic value the public derives from natural resources that is independent of any direct use of the services provided." 43 C.F.R. § 11.83(c)(1)(ii). Contrary to Teck's assertion here, such damages are expressly contemplated by CERCLA itself. *State of Ohio v. U.S. Dept. of the Interior*, 880 F.2d 432, 464 (D.C. Cir. 1989) (noting that DOI's failure to include damages for nonuse value in initial draft of implementing regulations "erroneously construe[s] the statute" and that CERCLA's "command is expressly not limited to use value.") (citing 42 U.S.C.§ 9651(c)(2). Teck's averment that CERCLA "does not permit such 'loss of use' or existence value claims," ECF 2777 at 14 n.13, thus is flatly contradicted by the case law, including *State of Ohio* on which Teck elsewhere relies. 880 F.2d at 464 ("[E]xistence values may represent 'passive' use, but they nonetheless reflect utility derived by humans from a resource, and thus, prima facie, ought to be included in a damage assessment."). This is no surprise, as DOI regulations expressly recognize that claims for such damages are cognizable under CERCLA. *See* 73 Fed. Reg. 57259, 57264 (acknowledging that nonuse values of "cultural, religious, and ceremonial losses that rise from the destruction of or injury to natural resources continue to be cognizable").

2. Teck Misrepresents CERCLA's Legislative History, Which Supports CCT.

Teck's contention that a "cultural loss claim cannot be implied in the statute" because "Congress *rejected* an amendment in 1995 to allow the recovery of NRD for so-called non-use values," ECF 2777 at 15 (internal quotations omitted, emphasis in original), is based on a wholesale misreading – whether

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intentional or inadvertent[7] – of the cited legislative history. The truth is directly contrary to Teck's position: the proposed amendment at issue, which did not pass, was intended to **prohibit** recovery of nonuse values for natural resource damages under CERCLA. The bill at issue, H.R. 3000, would have amended 42 U.S.C. § 9607(f) to **add** the following provision:

> "(B) NONUSE VALUES. – **There shall be no recovery under this Act based on non-use values**."

H.R. 3000, 105th Cong. (1997) at 137 (emphasis added). By Teck's own logic, such an amendment obviously would not have been necessary if CERCLA already

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[7] The journal article relied upon by Teck – written by a then-associate attorney at a law firm touting its industry-side environmental practice – makes the same mischaracterization. *See* Sarah Peterman, *CERCLA's Unrecoverable Natural Resource Damages: Injuries to Cultural Resources and Services*, 38 Ecology L.Q. (2011); FARELLA BRAUN & MARTEL OVERVIEW: ENVIRONMENTAL LAW, https://www.fbm.com/environmental-law/ (last visited October 26, 2023). In particular, the article mischaracterizes testimony by Representative Furse regarding tribal salmon ceremonies, claiming that such testimony was offered in support of an amendment she had proposed to "allow" damages for such losses, when in fact Representative Furse was questioning a proposed amendment to create a $50 million "cap" on natural resource damages. *Compare* 38 Ecology L.Q. (2011) *with* ECF 2777-2 at 401-03.

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prohibited recovery of nonuse damages, as they now insist. To the contrary, such damages were (and are) plainly allowed.

Teck misleadingly quotes a truncated excerpt from the hearings on the proposed amendment, ECF 2777 at 15, to argue that the Congressional subcommittee considered and rejected an amendment to CERCLA to **allow** recovery of nonuse damages, when in fact the surrounding language – omitted in Teck's brief – makes it clear that the amendment at issue would **bar** such recovery:

> I live, and I represent a district that heavily depends upon natural resources for economic viability. When these resources are damaged, my constituents experience a direct financial loss. If responsible parties are not to pay to fix the damage they've done, then the American taxpayer will have to pay instead. But they'll have to pay not once, but twice.
>
> In addition to those concerns, I want it noted, for the record, that I completely oppose **a prohibition on compensation for nonuse values**. These are the [aesthetic] cultural and religious values attached to natural resources that have been destroyed or damaged by toxic contaminants.
>
> The National Congress of American Indians, as well as individual tribes including the Umatilla Tribe in my State of Oregon, have submitted testimony opposing **the elimination of nonuse value**.

The Superfund Act, Hearings Before the Subcomm. On Finance and Hazardous Materials of the H. Commerce Comm., 105th Cong. at 24 (1998) (ECF 2777-3) (bolded emphasis added; underlined portion quoted in Teck's Motion at 15).

Teck's assertion that CERCLA's legislative history shows that a "cultural loss" cannot be recovered in connection with natural resource damages is simply false. The legislative history Teck has identified instead supports the opposite

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conclusion: that nonuse damages **are** recoverable under the statute, and that Congress rejected an attempt to eliminate them. Such a reading is, of course, perfectly aligned with the holding in *State of Ohio*, for just as did the Department of Interior's initial draft of CERCLA's implementing regulations, Teck's position that CERCLA does not provide for recovery of nonuse values "rests on an erroneous construction of the statute." 880 F.2d at 464. The Court should reject Teck's baffling attempt to turn the evidence of Congressional intent in passing CERCLA on its head.

3. The Cases On Which Teck Relies Do Not Support Its Position.

In an effort to stitch together a categorical statutory bar on "tribal" or "cultural" losses where none exists, Teck relies on a handful of cases which do not support its position – much less compel summary judgment in its favor. In particular, Teck avers that the "only courts to speak squarely" on the question of tribal services "have rejected the concept," ECF 2777 at 14-15, relying on the opinions in *Coeur d'Alene Tribe* 280 F. Supp. 2d 1101 and *In re Gold King Mine Release in San Juan County, Colorado, on August 5, 2015*, No. 1:18-md-02824-WJ and 16-cv-931-WJ-LF, 2023 WL 2914718 (D.N.M. Apr. 12, 2023). Teck, however, has distorted the holdings of these cases beyond their bounds, and neither supports the weight Teck would place upon it.

As an initial matter, the language of *Coeur d'Alene Tribe* quoted and bolded by Teck – that the "cultural uses of water and soil by the tribe are not recoverable as natural resource damages," ECF 2777 at 14 – was (1) a finding of **fact**, not a

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conclusion of **law**; (2) entered after a 78-day trial involving hundreds of witnesses, not on a defense motion; and (3) not otherwise discussed in the opinion **at all**.[8] 280 F. Supp. 2d at 1101, 1107. The fact that the *Coeur d'Alene Tribe* court found based on the evidence presented at trial that the plaintiff could not recover a particular set of damages says absolutely nothing about what CERCLA does or does not permit and Teck does not quote any language from the opinion indicating otherwise. That Teck would seek to extrapolate a binding rule of law based on such a single finding, bereft of any explanation, reasoning, or even discussion of the relevant evidence, speaks volumes about the frailty of its legal position.[9]

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[8] The opinion's only other reference to the plaintiff tribe's "cultural" activities appears in the court's analysis of whether the tribe was a "trustee" under the statute, something which is not at issue here. 280 F. Supp. 2d at 1117.

[9] Teck's claim that the tribe in *Coeur d'Alene Tribe* "even sought damages for lost cultural uses of the same injured resources for which [they] sought NRD," ECF 2777 at 14 n.13, appears to be nothing but speculation based on the court's finding that evidence supported its finding that the release in question had caused injury to soils. 280 F. Supp. 2d at 1123. The court itself did not discuss any such connection. In any event, as discussed herein, CCT's tribal service losses are based on an injury to natural resources despite Teck's unsupported protestations to the contrary.

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Teck's reliance on *In re Gold King Mine* fares no better. There, the defendant polluter sought dismissal at summary judgment of the plaintiff tribe's state tort claims for cultural injury, arguing that such state law claims were preempted by CERCLA. 2023 WL 2914718 at *5. The court rejected the defendant's argument, holding that it "[had] not shown that the restorative programs damages claims are natural resource damages claims the recovery of which would be subject to the restriction that they be used only to restore, replace or acquire the equivalent of the damaged resource." *Id*. at *7. Notably, although the defendant "characterizes the [plaintiff's] restorative damages claims as 'natural resource damage' claims, [it] also states "[the plaintiff] has not yet filed a claim for natural resource damages." *Id*. Based on the evidence presented, the court concluded that the particular "restorative damages" sought by the plaintiff sought to remedy "injuries that are distinct from the injury to the River." *Id*. Once again, far from announcing some rule of law regarding CERCLA's scope or even "squarely" considering the issue of tribal service losses generally, *In re Gold King Mine* is an opinion based solely on the evidence before that court; it is confined to its facts, and of no guidance here.

In an attempt to discredit the Department of the Interior's expressions of approval for tribal service loss claims, Teck also mischaracterizes the holding in *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191 (D.C. Cir. 1996). Teck contends that when DOI's commentary to its 1994 NRDA Rule stating that damages for "archaeological and other cultural services" could be recovered as

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natural resource damages "was challenged, the DC Circuit held the question was unripe for review precisely *because* such commentary [in a preamble] 'does not represent an interpretation of an identified statutory provision, nor a clarification of an otherwise binding regulation.'" ECF 2777 at 15-16 (emphasis in original). That is false. Instead, *Kennecott* held that "reviewability [of a preamble] hinges upon whether the preamble has independent legal effect, which in turn is a function of the agency's intention to bind either itself or regulated parties. Absent an express statement to that effect, **we may yet infer that the agency intended the preamble to be binding if what it requires is sufficiently clear**." 88 F.3d at 1223 (emphasis added). The question was unripe, however, because the preamble suggested only that a trustee "could" recover damages for cultural services:

> The guidance offered is hypothetical and non-specific … Interior has merely advised that recovery could be available for injury to non-natural resources, and illustrated one type of injury that would qualify. For all we can tell, under the preamble some consequential damages arising from an injury to land may be per se non-recoverable; others may generally be recoverable, but too remote to warrant recovery on the facts of a specific case; still others may be reconcilable with the statute and its regulations. In short, the Industry Petitioners have not demonstrated that the 1994 preamble has a direct and immediate rather than a distant and speculative impact upon them … [w]e must await a concrete case where we can probe the limits of the rule in the context of a live controversy involving actual events.

Id. In sum, *Kennecott* held that the issue of the preamble was unripe because the petitioners could not show a live case or controversy – not because preambles are unenforceable as a matter of law, as Teck would have this Court accept.

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Accordingly, Teck's request that this Court rule as a matter of law that CCT's tribal service loss claims are unrecoverable under CERCLA runs directly contrary to CERCLA itself, its regulations, and its legislative history. There is no such bar to CCT's recovery, and the cases on which Teck relies to effectively invent one are unavailing. The Court should deny Teck's motion.

C. CCT's Tribal Service Loss Claims Are Based On Teck's Contamination of the UCR and Resulting Injury.

Targeting CCT's proposed Restoration Plan,[10] Teck argues that dismissal of CCT's claimed tribal service losses is warranted because the claims are "disconnected from a specific, identified natural resource injury." ECF 2777 at 16. As explained below, Teck is again wrong as a matter of law and fact.

1. CCT's Claim Is Based On Injury To Natural Resources.

On this motion, Teck does not contest Plaintiffs' proof that that Teck's constant contamination of the UCR with toxic metals over a period of more than

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[10] Teck does not address the Layton/Paterson contingent valuation study in connection with this argument, nor could it because the survey form answered by CCT members specifically describes one of the natural resource injuries in this case as the toxicity of Teck's contamination to benthos. Nor does Teck apply this argument to Mr. Unsworth's lost river use study either, because Mr. Unsworth calculated lost trips specifically linked to elevated mercury causing fish advisories. Thus, Teck's motion must be denied even without consideration of its points on the Restoration Plan.

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eighty years – perhaps predictably – caused injury to natural resources. Such injuries include but are not limited to the destruction of habitat for benthic microinvertebrates and elevated mercury in fish. Domanski Decl. ¶ 12; SMF ¶ 105. This proof of injury is a predicate for liability. This is the point in 5 Environmental Practice Guide §32B.05 (2023) (Michael B. Gerrard ed., Matthew Bender), cited by Teck. But, neither this treatise nor any other authority cited by Teck takes the next step to identify the scope of recoverable damages.

Teck claims that, as a matter of law, lost services in the form of avoidance of the river are not recoverable because such loss was not connected to a resource injury. ECF 2777 at 20. On a motion for summary judgment, however, Teck cannot dispute CCT's expert testimony demonstrating that CCT lost services in the form of disrupted cultural connection to the river as described by Drs. Domanski and Alfred, and CCT is entitled to all reasonable inferences therefrom. Dr. Domanski explained that Teck's contamination of the UCR and the resultant damages to natural resources reduced the services provided by those resources to the public, and CCT in particular, while Dr. Alfred opined that Teck's contamination of the UCR led CCT members to avoid engaging in practices that were central to the Tribes' cultural life. *See* § II, ¶ 2, *supra*. Thus, CCT claims lost cultural services based on the actionable presence of Teck's contaminants in the river. Domanski Dep. at 196-197. "It's a cultural service injury that led to changes in behavior in connection with the river because of contamination in the river." *Id*.

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Teck offers no expert testimony to the contrary and offers only the arguments of lawyers; at best, this results only in disputed issues of fact.

Teck complains about this injury because it contends that CCT's avoidance of the river and resulting cultural loss is based on tribal members' "perceptions" ECF 2777 at 17. Of course, all human actions are based on our perceptions. Assuming that Teck means that CCT members' avoidance of the river is based on Teck's contamination of the river and not specifically the injury its contamination caused to benthos in the sediment, no caselaw either in CERCLA or general tort law allows a wrongdoer such an escape from the consequences of its wrongful acts. The wrongful act here was Teck's contamination of the resource leading to releases of hazardous substances to the environment of the UCR.

Proof of damage must flow from the wrongful act, but it need not specifically tie to the actionable injury. For example, a claim for fear of developing a latent disease is compensable if that fear is reasonably related to an exposure and accompanied by a physical injury (caused by the tortfeasor's breach of a duty). *See* 50 A.L.R.4th 13 (1986). Consistent with this, in *Norfolk & Western Railway Company v. Ayers*, 538 U.S. 135, 140 (2003) the United States Supreme Court held that former railroad employees, who had developed asbestosis from asbestos exposure while working for the defendant railroad, could recover for their fear of developing cancer under the Federal Employers' Liability Act. Teck dumped its wastes in the UCR for decades, resulting in releases in the UCR, and on this motion Teck does not contest CCT's proof of cognizable injury, nor that its

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members avoid the river as a consequence. That proves a lost service and Teck has no basis to refuse compensation for its acts.[11]

2. CERCLA authorizes recovery of lost services provided by an uncontaminated UCR, including non-use and existence values.

Teck claims that CCT's damages based on the cost of its Restoration Plan are not recoverable because they will not be spent on restoration of the injured resource. Use of proceeds is not an element of an NRD claim. As explained now multiple times, 43 C.F.R. §11.83 explains that "damages may include…the compensable value of all or a portion of the services lost to the public…" Total damages include "the costs of restoration and the value of tall the lost uses of the damaged resources…from the time of the release up to the time of restoration. *New Mexico v. General Elec. Co.* 467 F. 3d 1223, 1244-45 (10th Cir. 2006). CCT's Restoration Plan does exactly that. Teck's complaints about CCT's use of a damage award based on the Layton/Paterson stated preference study fare no better. Such a form of damage calculation is recognized in the regulations without any limitation on how the funds are spent. *See, e.g.*, 43 C.F.R. §11.83; *State of Ohio*,

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[11] Teck's contention that CCT and its experts "admit" that the tribal service loss claim reflects "a cultural injury, that exists independent of any actual injury to a specific natural resource" illustrates the error in its analysis ECF 2777 at 17. CCT's experts are clear in describing cultural loss resulting from contamination of the river. *See* § II, ¶ 2, *supra*. Teck simply refuses to take responsibility for it, much as it has refused responsibility since the outset of these proceedings.

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880 F.2d at 464. To be clear, CERCLA's provisions governing use of NRD proceeds will guide use of any recovery in this case.

Even though its argument that use of funds is an element of the claim has no anchor in the statute or the regulations, Teck makes much of a statement by a CCT council person that she could not guarantee what a future council would do with a damage recovery in this case, but Ms. Marchand's unwillingness to predict what a future council would do is only common sense. The same can be said for a current U.S. Senator's prediction of what the next Senate will do – we cannot predict the future, but it is reasonable to assume that the U.S. Senate will act within the law. Teck also complains about how the CCT spent funds received in settlement of a different case. The settlement in question did not involve a CERCLA claim or any claim with restrictions on use of funds so it has no relevance here.

Teck also insists that the Restoration Plan is simply a "wish list of cultural revitalization programs that have nothing to do with restoring or replacing any injured public *natural resources*." ECF 2777. Here, Teck forgets that natural resources includes the services they provide. *See supra* at § III.B. Even a cursory review of the evidence proffered by CCT's experts proves Teck wrong. As explained by Dr. Domanski, the service losses caused by Teck's harm to the natural resources included the loss of "practices that were central to the tribe's cultural life including fishing, cultural contact, and ceremonial interactions with the UCR." Domanski Decl. ¶¶ 14-16. The Restoration Program was developed to "mechanically replace components of lost cultural services associated with the

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UCR." *Id*. Teck is free to challenge whether it adequately does so at trial based on the evidence, but its febrile criticisms of CCT's methodology here are not a basis for summary judgment.

D. Teck Fails to Cite Any Standards Supporting its Position that Compliance with NRD Assessment regulations is Condition of Suit and CCT has Proffered evidence on CERCLA's NRD elements

Teck's motion treats CCT's claims under 42 U.S.C. § 9607 as if they are tested under the regulatory standards to obtain a rebuttable presumption for a natural resource damage assessment, not the statute itself. That is not the case and there is nothing else to Teck's argument on this claim. Applying the elements of a NRD claim, CCT has ample evidence supporting the points Teck has targeted.

CCT has explained above that its claim for service losses is based on 42 U.S.C. § 9607 (a), (f), and these provisions do not impose any standards such as scaling or baseline in their elements. These terms are taken from DOI regulations and they are not mandatory. *See* 42 U.S.C. § 9607(f)(2)(C); 43 C.F.R. § 11.10. Nor does any other provision of CERCLA require adherence to DOI regulations as a condition of suit. Thus, the regulations are not elements of the claim and cannot be standards against which a 9607(f) claim may be judged. Teck cites no authority to the contrary and there is none. Nor does Teck cite any other standards against which CCT's service loss claim should be judged.

1. Scaling is not an Element of NRD Proof, but Plaintiffs' Experts Nevertheless Applied Scaling Principles.

Teck claims that the "Restoration Plan is not in any way scaled or measured to the level of any natural resource injury—substantively or in its cost." ECF 2777

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at 23. This argument ignores the expert opinion of Dr. Domanski in which he explained that the cultural restoration plan is a type of "service-to-service scaling." ECF 2679-24 (Domanski Report) at 109; Domanski Dep. (Vol. II) at 67. Teck ignores the substance of Dr. Domanski's opinion and offers no counter opinion from its own expert, stating only that Dr. Domanski did not provide a "mathematical link" between measured contamination and the restoration package. But no such mathematical certainty is required, as Teck's own authority makes clear. *See Garvin v. Greenbank*, 856 F. 2d 1392, 1401 (9th Cir. 1988) (damages need not be proven to a mathematical certainty; intelligent estimate without speculation and conjecture is sufficient). Dr. Domanski provided extensive analysis explaining that the restoration plan was scaled to injury from Teck's contamination. Domanski Dep. at 67. Teck may disagree, but it has no expert testimony on point and, in any event, such a dispute must be resolved at trial.

Instead of taking up Dr. Domanski's opinion, Teck bases its contention on the fact that the plan was developed independently of the work of proving releases of Teck's hazardous substances and resulting injury to natural resources. ECF 2777 at 20-21; SMF ¶ 62. Teck's position is unavailing, for CCT's approach was reasonable and proves nothing probative of the validity or effectiveness of the restoration plan. Indeed, Teck has no evidence on that subject, expert or otherwise, and has no basis for dispute. The history of development of the Restoration Plan is described above. Any criticisms of its development clash with expert opinion on its value and effectiveness and create only an issue for trial, at best.

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Teck's complaint seems more directed at the nature of the injury to which the restoration plan responds. Teck cites Dr. Domanski's explanation that "the cultural resource that is injured is persons' connection with the river and series of cultural services that it provides." ECF 2777 at 23. Given Teck's confusion on this point, Dr. Domanski has provided a declaration explaining how economic principles are applied in this context. *See* Domanski Decl. ¶¶ 10-17; *see also supra* at § II, ¶ 2 (discussing applicable damage theory).

Teck goes on to argue that the Community Opinion Survey led by Dr. Domanski and others cannot validate the provisions of the restoration plan because it was done after the plan was created. Teck offers no explanation for this claim, and it has no basis. The survey confirms choices made in the restoration plan and is probative on that point. Domanski Dep. (Vol. II) at 21-25. Notably, Teck does not claim that the survey results are not consistent with the restoration choices.

Teck generally complains that the restoration plan would be helpful to the Tribes even if Teck had not released its metals at the site, but this does not persuade. That CCT cultural restoration may respond to other wounds as well does not undermine its value in responding to Teck's contamination. Having said this, most of the CCT restoration plan targets specific consequences of Teck's contamination. Monitoring will confirm water and sediment quality to enable

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restoration of cultural connection of the river.[12] Slag removal will provide concrete evidence of improved river condition also responding to apprehension based on Teck's contamination. Cultural programs and land acquisition enable cultural restoration and reconnection to the river, and they plainly respond to cultural disruption from Teck's contamination.

We observed earlier that Teck made no scaling argument concerning the work of Layton/Paterson or Mr. Unsworth. Such a claim would have been unavailing because provisions on scaling do not apply to compensatory damages. *See* 43 C.F.R. 11.83(c). Moreover, Mr. Unsworth explains that his methodology conformed to the regulations. Declaration of Robert Unsworth ¶¶ 2-5.

2. Baseline is not a liability standard, but it was considered.

Teck's arguments about baseline are also based in DOI regulations and have the same flaws as its scaling points addressed above. It is not an element of a 9607 (a), (f) NRD claim and neither the statute nor any court indicates otherwise.

Framed as a defense to the elements of the claim, Teck may contend that baseline is synonymous with proof that CCT's damages were caused by Teck's contamination. This is a fact intensive question that is rarely susceptible to summary judgment. This case is no exception because CCT has extensive evidence

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[12] Teck claims that existing monitoring programs are sufficient citing websites. This was covered in the deposition of Whitney Fraser and she explained that existing programs did not provide the monitoring called for in the restoration plan. Fraser Dep. at 81-82, 247-49. Teck does not address Ms. Fraser's testimony.

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that its restoration plan responds to cultural loss due to Teck's contamination and not other historical conditions such as the Grand Coulee Dam construction in the 1940s, or the loss of the north half of the reservation in 1891. *See* ECF 2679-11 (Alfred Report) and TSL Report; *see also* Domanski Dep. (Vol. II) at 75-77.

Teck's argument on "baseline" consists only identifying the various historical problems the CCT have confronted. Yes, the Grand Coulee Dam caused substantial cultural loss, the loss of the north half was damaging, and the CCT have had other challenges. None of that, however, gives Teck a free pass to dump its wastes in the UCR and argue, in effect, that the CCT have suffered so much injury that they cannot be hurt any more. It did not offer testimony from any expert with familiarity with CCT cultural issues and has no credible, competent basis to dispute the cultural loss CCT has proved.

Dr. Alfred has explained that the Tribal Service Loss investigation targeted the consequence of Teck's contamination. ECF 2679-11 (Alfred Report) at 3; Alfred Dep. at 206-08. And Teck did not attempt to prove otherwise. That Dr. Alfred did not investigate the impact of the Grand Coulee Dam is not surprising. He was focused on the injury at issue. That CCT has suffered other injuries, cannot be denied. But, the CCT TSL claim targets the impact of Teck's contamination and not other—much earlier—injuries. To the extent Teck disagrees with Dr. Alfred, Dr. Domanski, or Ms. Fraser, all it has is a dispute of fact for trial.

IV. CONCLUSION

For the reasons stated herein, the Court should deny Teck's Motion.

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DATED this 31st day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF System that 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.

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