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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-00256-SAB

TECK METALS LTD.'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE COLVILLE TRIBES' "TRIBAL SERVICE LOSS" CLAIM

CCT's Response to Teck's Motion for Summary Judgment on CCT's "Tribal Service Loss" Claim refutes several arguments Teck did not make. For example, CCT discusses the statutory basis for tribes' standing as natural resource damages ("NRD") trustees. ECF 2797 at 17. Teck does not dispute that a tribe may recover NRD for injury to specific *natural resources* over which it has trusteeship.[1] So, for example, if a specific natural resource on tribal lands (or over which it otherwise has trusteeship) is injured, the tribe may in theory recover for *injury to that resource* in the same way that a state or federal trustee could if the resource were on state or federal lands.

Indeed, CCT seeks to do just that as co-plaintiff with the State for alleged injury to BMI in some areas of the upper reaches of the UCR: Plaintiffs contend these damages arise from exposure of BMI to certain metals in the sediments, which metals it attributes to the Trail smelter (*i.e.*, a *specific* natural resource injury (lost BMI biomass) which it attempts to tie to *specific* contaminants (copper and zinc) it alleges it can tie to *specific* releases (leaching from slag)). And CCT similarly claims recreational fishing damages jointly with the State that they allege arise from mild fish consumption advisories in place due to mercury in fish tissue, which Plaintiffs attribute to effluent discharges from the Trail smelter (*i.e.*, a *specific* natural resource injury (a fish consumption advisory) which it attempts tie to a *specific* contaminant (mercury) it alleges it can tie to *specific* releases (releases from smelter effluents)).[2]

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[1] Relatedly, Teck would hope it goes without saying that it certainly does *not* contend, as CCT gratuitously submits is Teck's position, that "CCT have suffered so much injury that they cannot be hurt anymore." ECF 2797 at 35.

[2] To be clear, there are a host of legal deficiencies in these claims, but they at least allege a *natural resource injury* and attempt to tie it to specific contaminants they allege came from the Trail smelter.

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But a tribe does not have *greater* rights or claims than a state or federal trustee, and no trustees have a statutory right to recover for "cultural" or "tribal service losses." *See* 42 U.S.C. § 9607(f). CCT attempts to focus the discussion on DOI's NRDA regulations, and whether "non-use" damages were or were not contemplated. Whether couched as "use" or "non-use", the central issue is that CERCLA has never provided for cultural losses, and no court has ever recognized such a claim.

Even if such a claim were theoretically cognizable, the claims CCT asserts here do not meet the basic requirements of a claim for NRD under CERCLA or the law of this case. As often as Plaintiffs would like to remind the Court how many tons of slag the Trail smelter [lawfully] discharged from permitted outfalls in Canada, the Ninth Circuit has ruled that liability does not attach to the discharges of slag into the Upper Columbia, but only to any *re*-release of metals from that slag in the U.S.[3] Thus, here in Phase III, Plaintiffs' burden is to prove that *re*-releases resulted in actual injury to natural resources. Moreover, Judge Suko described exactly what the trustees would have to prove to their claims for NRD, and made clear that "[t]hese are additional liability elements, not merely damages elements":

> The recovery of [NRD] under CERCLA, 42 U.S.C. Section 9607(a)(4)(C), has a causation element. Liability for, and recovery of, natural resource damages requires proof that: 1) natural resources within the trusteeship of the Plaintiffs have been injured and 2) injury to natural resources "resulted from" a release of hazardous substances (causation). . . . The trustee must show what resource was injured, at what specific locations of the natural resource the injury occurred, when the injury occurred, which release of what substance caused the injury, and by what pathway the natural resource was exposed to the substance.

[3] Plaintiffs contend that such re-releases result in injuries to BMI in the sediments of certain areas of the uppermost reaches of the Upper Columbia.

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Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256, 2011 WL 13112570, *2 (E.D. Wash. Feb. 14, 2011) (citing *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1102-1103 & n.6 (D. Idaho 2003)).

Yet despite this clear roadmap to state a claim for NRD, CCT over and over describes its "tribal service losses" as an independent claim that broadly results simply from "contamination of the river"—the antithesis of what Judge Suko articulated as the kind of proof and connection *any* trustee would need to make out *any* NRD claim. *See, e.g.*, ECF 2797 at 9 ("CCT experts developed proof of natural resource damages—specifically cultural service losses due to Teck's contamination of the river"), 27 ("CCT claims lost cultural services based on the actionable presence of Teck's contaminants in the river. . . . 'It's a cultural service injury that led to changes in behavior . . . because of contamination in the river.'" (quoting Domanski Dep.)).

Moreover, as to the Layton & Paterson measure of damages, which purports to broadly compensate CCT "for the value of an uncontaminated river," there is no suggestion at all that those funds would be used to restore anything. That measure of damages, in particular, highlights the incongruity of any claim that would allow different types of "cultural losses" depending upon the public served, to be layered on top of damages purporting to restore the resource allegedly injured for the entire public. In its joint claim with the State, Plaintiffs seek to recover hundreds of millions of dollars for restoration that they contend would redress the only injured natural resources they identify: BMI in the river sediments and some species of fish due to the mild advisory. To permit a second, separate claim for the "value of an uncontaminated river" based on the purported cost to remove the slag that Plaintiffs contend caused the benthic injury would effectively allow a double recovery, which CERCLA explicitly precludes. 42 U.S.C. § 9607(f)(1) ("There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or

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restoration, rehabilitation, or acquisition for the same release and natural resource.”).

CCT does not contest that it cannot commit that any funds it may recover from Teck will be used for restoration of natural resources. Instead, CCT says it will carry out projects to “restore members’ connection to the river” or “confidence in the river.” But it was *precisely* this kind of project proposed in a directly analogous “restoration program” in the *Gold King Mine* case that caused that court to hold that the claims would not be actionable as NRD claims under CERCLA—*precisely because they did not seek to restore an injured natural resource*. CCT’s efforts to distinguish that decision notwithstanding, the analysis is spot on, and addresses a “cultural restoration program” that is the mirror image of the CCT’s proposal in this case.

For the reasons described herein, the formulation of CERCLA that CCT would have this Court adopt is unprecedented and contrary to existing precedent. It would throw wide open the door to claims by any population, tribal or otherwise, seeking to recover for unmeasurable and essentially unlimited “cultural” injuries once any resource is perceived as contaminated, just by pointing to fears of any number of handpicked people who claim to fear engaging in some cultural practice, even where (as is indisputably the case here) those practices are actually safe. Nothing in CERCLA even suggests that tribes may recover for “cultural injuries” that are different in kind from the natural resource injuries for which state and federal trustees may recover. In short, tribes are on equal, but not preferred, footing with other governmental trustees when it comes to recovery of NRD. There are sound policy reasons why CERCLA and the cases interpreting it—including earlier decisions in this case—require strict proof *by any trustee* that NRD are directly tied to and caused by an actual proven (not “perceived”) injury to a specific natural (not “cultural”) resource. CCT does not even attempt to do so, and its “TSL” claim fails as a matter of law.

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I. Cultural or "tribal service losses" are not recoverable as NRD.

There is no provision in CERCLA for "cultural" or "tribal service losses."[4] Instead, the only damages for which CERCLA creates a right to recover are "*damages for injury to, destruction of, or loss of natural resources*, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(C) (emphasis added). Neither the statute nor the regulations contains any mention of "cultural" or "tribal service" losses or any reference to restoration of a trustee's "connection" or "relationship" with a resource.

Nor has any court ever awarded such damages. Indeed, the only two to even address such a claim have rejected them as unavailable under CERCLA. CCT tries to distinguish both of those cases, but the "tribal service" or "cultural" claims in each are directly analogous to those made here. The *Coeur D'Alene* holding is a direct statement that "[c]ultural uses of water and soil by Tribe are not recoverable as natural resource damages." 280 F. Supp. 2d at 1107. The "cultural uses" the tribe alleged were damaged—consumption of fish, tribal sweats, and swimming—are virtually the same as the uses of the UCR that CCT claims were impacted. *See* No. 96-cv-00122, ECF 1233. While CCT argues that this was a finding as to the sufficiency of the evidence, the opinion never analyzes or even mentions the sufficiency of the evidence. And one can only assume that, if the court had wanted to say that the Tribe had not proven the damages, it would have known how to say that the damages were "not proven" instead of "not recoverable." Indeed, before issuing its opinion, the court requested briefing on "legal issues," including, "Is the Tribe's alleged loss of use and enjoyment of

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[4] CCT and its experts use "tribal service loss" and "cultural service loss" interchangeably: Dr. Domanski's report is titled "Damages Associated with Cultural Service Losses," but Dr. Alfred calls the claim "Tribal Service Loss."

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natural resources recoverable under CERCLA?" No. 96-cv-00122, ECF 1222.

CCT also tries to distinguish the holding in *In re Gold King Mine* that the Navajo Nation's claims for cultural losses, including for "loss of confidence" in a river, were not NRD that could be recovered under CERCLA (and therefore the claim, which had been brought under state law, was not preempted by CERCLA). Contrary to CCT's assertion that the decision was "based solely on the evidence" and "confined to its facts," (ECF 2797), the decision did not turn on any specific facts other than what the tribe was seeking to restore, which was almost exactly what CCT seeks here. In *Gold King Mine*, the Navajo Nation sought, as CCT does here, funding for a "long-term monitoring plan" for the river; a "Cultural Preservation Program"; and "community involvement and education" programs, among others. No. 16-CV-931, 2023 WL 2914718, at *5 (D.N.M. Apr. 12, 2023). The court held that it was that very form of relief sought, analogous to CCT's claims here, which were inconsistent with, and not recoverable under, CERCLA: "[T]he restorative programs *seek to **restore confidence*** *in the resource* and . . . the Navajo Nation *does not seek to **restore***, replace or acquire the equivalent of ***the damaged resource***." *Id*. at *7 (emphasis added). This is exactly what CCT is seeking: not damages to restore the BMI or the fish, but its members' "confidence" in and "cultural connection" to the UCR.

CCT's expert Mr. Sirois described CCT's "Cultural Restoration Plan," the cost of which CCT used to measure its alleged damages, in language that mirrors that used in the *Gold King Mine* case: "compensation that will **restore** that vital **cultural and language river connection**." ECF 2679-22 at 7 ("A basis of trust in the River as a safe place needs to be re-established"); *see also* ECF 2798 at ¶12 (The Plan "can better inform and ease those fears or lack of trust in those river sites through that monitoring and through the aesthetic nature of making people feel more comfortable going to the river."). CCT's Dr. Hoover opined that the Plan would "**restore confidence** in the

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environment," "**increase confidence** in the ability to safely swim and conduct sweatlodge ceremonies," "**reduce apprehension** about River use," "**repair the trust**," "**restore the ability of the people** to understand, describe and appreciate the natural environment," and "**restore** and revitalize **traditional cultural practices** associated with the River." ECF 2679-16 at 22-24; *see also* ECF 2798 at ¶12 (she "look[ed] at programs that are designed to help people preserve and revitalize that language and culture"). Dr. Whelshula described it as a means "to **restore river culture** and lifeways for the Tribal community" and to "**restore the cultural knowledge and language** lost." ECF 2679-15 at 28-29. And Dr. Domanski testified to his understanding that the Plan was "designed . . . to **increase confidence** or at least reduce that stigma resulting from the river." ECF 2679-4 at 276:20-276:23; *see also* ECF 2679-25 at 102:24-103:4 (monitoring component "would be designed to increase confidence"); ECF 2798 at ¶28 ("the cultural resource that is injured is persons' connection with the river"). And even the Layton and Paterson alternative measure of damages allegedly represents the value of CCT's "diminished traditional and **cultural connections** to those [natural] resources." ECF 2670-1 at 6. Even accepting as true all the underpinnings of its TSL analysis, CCT's claim for damages not to restore any injured natural resource but rather its members' "confidence in" or "cultural connection to" the resource, is not cognizable as a claim for NRD under CERCLA.

Absent any statutory basis for its claims, and with only contrary case support, CCT looks primarily to DOI's use of the term **"nonuse value"**[5] in one of its regulations

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[5] CCT also accuses Teck of "intentionally or otherwise" misciting legislative history. Teck was correct that an amendment in 1995 was rejected that would have *allowed* recovery of NRD for nonuse value losses. This is why not only Teck made the

(continued…)

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providing guidance for assessing NRD. *See* ECF 2797 at 18 (quoting 43 C.F.R. § 11.83(c)(1)[6]). Yet CCT's own expert was not even sure whether the "cultural" losses claimed were "non-use" damages at all. ECF No. 2679-4 at 48:17-50:21. And even if they were, CERCLA simply does not contain any language suggesting "cultural" injuries, as opposed to natural resource injuries, were to be compensated. Even the term "nonuse" is nowhere in CERCLA. Section 11.83(c) is the only regulation that uses the term. Of course, "[l]anguage in a regulation may *invoke* a private right of action that Congress through statutory text created, but it may not *create* a right that Congress has not. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (emphasis added) ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.") (citation omitted).

II. CCT has not shown its claimed damages "resulted from" an actionable "release" or a resulting "natural resource injury."

Even if CERCLA provided a remedy for "cultural losses," the losses would still have to be tied to an actionable release that injured a natural resource. CERCLA provides for recovery of NRD "for injury to . . . natural resources . . . resulting from .

argument in this case, but the article Teck cited noted the same. It is also true that, a few years later, as CCT notes, an amendment was rejected that would have expressly *prohibited* such recovery. As a result, the statute *still* does not provide for such damages at all. Candidly, the legislative history is complicated and there were multiple requested amendments that went in both directions. Teck ascribes no ill intention to CCT for its confusion.

[6] Though CCT disclaims that it was required to (and admits it did not) follow these regulations in assessing its NRD, it nevertheless relies on them to *create* its claim.

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1 . . a release." 42 U.S.C. § 9607(a)(C) (emphasis added). Totally apart from the viability
2 of *any* claim for "cultural" losses, CCT's own description of its claims in this case
3 shows they do not even purport to arise out of a) an actionable release; or b) an injury
4 to a specific natural resource.

5 The Ninth Circuit has already held that the actionable "release" in this case is
6 "the leaching of hazardous substances from the slag at the [UCR] Site." *Pakootas v.*
7 *Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1075 (9th Cir. 2006). To recover NRD,
8 then, CCT must prove that the *leaching* injured a "natural resource," and that *that*
9 *injury* resulted in the damages CCT seeks. *See Pakootas*, 830 F.3d at n.4 ("To win
10 natural resource damages, a plaintiff . . . must show that 'natural resources within the
11 [plaintiff's] trusteeship . . . have been injured' and 'that the injury to natural resources
12 'resulted from' a release of a hazardous substance.'") (quoting *Coeur D'Alene*, 280 F.
13 Supp. 2d at 1102); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d
14 1191, 1224 (D.C. Cir. 1996) ("[T]he statutory language requires some causal
15 connection between the element of damages and the injury—the damages must be 'for'
16 an injury 'resulting from a release of oil or a hazardous substance[.]'").

17 Nothing whatsoever in any of the evidence CCT proffers in opposition ties the
18 claimed tribal service loss to any leaching of metals from slag, or any alleged injury
19 to benthos or fish. Rather, the repeated reference is simply to "contamination" and
20 more specifically, as their experts repeatedly state, to the "perception of
21 contamination," not even actual contamination. To the extent CCT points to anything
22 more specific than "contamination," it reverts to a refrain that tons of slag were
23 discharged into the river—which the Ninth Circuit already held is not the actionable
24 release. *Pakootas*, 452 F.3d at 1075. CCT writes: "The presence of contaminants in
25 the river is the injury that leads to changes in behavior and losses in cultural services."
26 ECF 2798 at ¶15 (quoting Domanski Dep.). Under the Ninth Circuit's holding, the

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discharge of slag from Trail, and the mere *presence* of slag in the UCR as a result, cannot be the actionable "release" or the injury. *Pakootas*, 452 F.3d at 1075.

More specifically, CCT has not tied its alleged damages to the leaching of metals from the slag or effluents or to any specific natural resource injury (*e.g.*, to BMI or fish). Instead, in its Response, CCT describes its experts' opinions of loss as all premised on the fact that some tribal members have *seen* slag on some (unspecified) UCR beaches, which it refers to as simply "contamination." *See, e.g.*, ECF 2797 at 9 ("CCT experts developed proof of natural resource damages—specifically cultural service losses due to Teck's contamination of the river"), 27 ("It's a cultural service injury that led to changes in behavior . . . because of contamination in the river."), 12-13 (Mr. Sirois "explained that the [restoration] plan . . . addresses the cultural losses and experiences as a result of Teck's slag contamination."), 14 (CCT's experts "conducted a stated preference study intended to identify the total value of the loss due to Teck's contamination."), 16 (Dr. Domanski's "approach identifie[d] cultural loss resulting from the presence of Teck's contaminants in the river."); ECF 2800 (Domanski Decl.) at ¶ 13 ("The presence of contamination and any individual's response to that contamination – or even simply their risk-averse response to uncertainty – reflects the mechanism by which Colville tribal members are harmed."). *See also* ECF 2778 at SMF ¶¶23-26, 29. There is no basis in anything CCT presents in opposition to Teck's motion that would properly tie the alleged TSL to any specific natural resource injury, even if such "tribal losses" were in theory recoverable.

III. Perceived contamination does not prove a natural resource injury.

Not only is CCT's claim based on amorphous "contamination" rather than a specific release or injury, CCT's experts are clear that the loss resulted not from actual contamination but from members' *"perceptions" of contamination*." *See* ECF 2778 at

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1 SMF ¶¶22-26, 63. But perceptions do not equate to or prove injury. CCT attempts to
2 support its claim by observing that "all human actions are based on our perceptions."
3 ECF 2797 at 28. That strange contention is contrary to the vast body of law providing
4 recovery for *demonstrable* injuries that *in fact* result in, for example, lost wages
5 because the plaintiff is physically unable to work, died and can no longer support their
6 family, or lost a limb and can no longer engage in the same activities. By contrast,
7 does not contend its losses arise from prohibitions on swimming in the UCR or use of
8 water from the UCR for sweats, because those practices are not prohibited.

9 Even if perceptions were relevant, they should be held *at least* to a standard of
10 objective reasonableness or plausibility similar to that required of plaintiffs seeking
11 CERCLA response costs arising from environmental threats. *Cf. Ca. Dep't of Toxic*
12 *Substances Control v. NL Indus., Inc.*, 636 F. Supp. 3d 1092, 1103, 1112 (C.D. Cal.
13 2022) ("Plaintiffs must establish a 'plausible,' … 'objectively reasonable,' … or
14 'justified,' … theory of contamination to satisfy CERCLA's causation requirement"
15 and show that the release caused them to incur response costs) (citations omitted);
16 *Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 458 n.2 (1st
17 Cir. 1992) ("A plaintiff would first have to prove that it possessed a good-faith belief
18 that some action was desirable in order to address a particular environmental threat.
19 The plaintiff would then have to demonstrate that its response to the perceived threat
20 was objectively reasonable.").

21 But CCT's claimed "perceptions of contamination" and resulting avoidance of
22 the UCR cannot be reasonable or have a plausible basis when there is ample evidence
23 that the UCR is safe for human use. Indeed, CCT Business Councilmember Cindy
24 Marchand testified that she and others involved in CCT's Environmental Trust
25 Department understand and have tried to communicate to the tribe that the UCR
26 beaches and water are safe for fishing and other recreation. ECF 2778 at SMF ¶21.

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That some number of the 43 interviewed tribal members (who CCT admits are not representative of the tribe or any segment thereof) nevertheless maintain a "perception of contamination" despite the objective unreasonableness of that belief, largely predicated on the refrain that the Tribes do not trust what EPA says, cannot satisfy CCT's burden of proving NRD.[7] *See* ECF 2678 at n.4.

As further proof that its claim is completely untethered to any specific natural resource injury or even to the amorphous "contamination," CCT's experts have also made clear that CCT's damage models are not dependent on the extent of "contamination." *See id.* at SMF ¶¶62, 64, 67; *see also* ECF 2798 at ¶29. And CCT's alternative measure of damages (the "value of an uncontaminated river") is based only on a survey that asked respondents to choose between some sediment removal or the purchase of some forest land, with the hypothetical amounts posed completely unrelated to the number of "contaminated" acres. *See* ECF 2669, 2749.

To award compensation to a tribe of 9,500 for the apprehensions of a few, based not on actual warnings, prohibitions, or test results, but on seeing particles on some beaches and forming a belief that the river is therefore "contaminated," without objective evidence of reasonableness, would open the floodgates to CERCLA NRD

[7] CCT's contention that "[p]roof of damage must flow from the wrongful act, but it need not specifically tie to the actionable injury," ECF 2797 at 28, is counter to the law of the case, CERCLA, and the tort case CCT cites. Far from holding that a claimant can recover damages based on a fear of developing cancer disconnected from any actionable injury, the Supreme Court held that such damages may be recovered "by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos," but *not* "by disease-free asbestos-exposed workers." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 141 (2003).

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1 litigation completely unconstrained by standards for causation and damages.

2 **IV. CCT has not proved damages with reasonable certainty.**

3 Even if cultural losses were recoverable as NRD, and even if CCT had attempted
4 show how losses were caused by a specific natural resource injury resulting from
5 metals leached from the slag and effluents, it has insufficient evidence to prove
6 causation and the amount of damages.[8] CCT has no evidence that its "community" or
7 any segment thereof was harmed. Its only evidence comes from 43 tribal members
8 who claim they or someone they know used to do more with the river. ECF 2797 at
9 10. But CCT's consultant who conducted these interviews admits that "[b]ecause the
10 CCT ultimately assesses cultural loss and deploys cultural restoration at the
11 community level rather than at the individual level, the study did not aim to develop a
12 generalized per capita calculation of service loss to each member of the worldwide
13 CCT population." ECF 2801 at 3. Thus, even if CCT could show that these 43
14 members suffered a cultural loss from a natural resource injury resulting from leached
15 metals, there is no way to know (and no one tried to find out) whether that loss is felt
16 only by these 43 or by all 9,500 members (or somewhere in between). Extrapolating a
17 "community level" loss when CCT does not even *purport* to have representative
18 evidence does not prove damages with reasonable certainty and provides no means to
19 avoid over- and under-compensation.

20 While CCT complains that damages need not be proved with "mathematical
21 certainty," they must be shown with "reasonable certainty," and to do that, CCT must
22 have *some* evidence to show that the amount it seeks is quantitatively anchored to its
23 losses. But its experts have disclaimed *any* mathematical link *whatsoever* between the

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25 [8] CCT takes issue with Teck's use of the terms "baseline" and "scaling," but these are
26 simply the regulatory equivalents of causation and quantifying damages.

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degree of "contamination" and the amounts of damages sought. *See* ECF 2778 at SMF ¶64. Further, CCT's restoration-based damages would necessarily overcompensate, as it contains nearly $50 million to restore *generally* CCT's culture and language, not just that allegedly lost due to "contamination," *id*. at SMF ¶66, and, moreover, *CCT does not even allege that its language loss was caused by Teck*. ECF 2797 at 11 ("[N]either 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."). Finally, though CCT and its experts have repeatedly admitted that its losses were caused by multiple factors, *see* ECF 2797 at 35; ECF 2778 at SMF ¶¶86-89, they made no attempt to segregate which losses are attributable to (and potentially compensable by) Teck versus all those other causes. ECF 2797 at 35.

CCT claims, "Dr. Alfred account took account of baseline conditions" because "[h]e noted that more than a generation has passed since the Grand Coulee Dam was constructed." ECF 2797 at 14. But "noting" this temporality does not *prove* that, or the degree to which, losses were caused by an actionable release and not the Dam. And a temporal relationship, insufficient to establish causation, should similarly be insufficient to rule out an alternative cause. *Cf. Hardt v. Heidweyer*, 152 U.S. 547, 558 (1894) ("the rule of causation implies some other sequence than that of time"). Indeed, the D.C. Circuit found DOI attempted to guard against such a *post hoc ergo propter hoc* fallacy—"the fallacy of assuming that, simply because a biological injury occurred after a spill, it must have been caused by the spill"—in the NRDA regulations' requirement for scientific literature corroborating evidence of biological injury. *State of Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 472-73 (D.C. Cir. 1989) ("Interior correctly recognizes that attaching liability to injuries that bear only a speculative causal relationship to a particular substance release would run counter to Congress' desire for a 'fair' damage assessment mechanism.")

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Teck is not attempting to sidestep liability for actual injuries and damages CCT *proves were caused* by actionable Trail smelter-related releases, but it would be manifestly unjust to hold Teck responsible for restoring all of CCT's language and culture lost at the hands of others. Teck seeks only to hold CCT to the same standard of causation all litigants must meet. But despite investigating its alleged tribal service losses for a decade-plus, CCT has failed to even *attempt* to segregate the various causes of those losses or to calculate its alleged damages with reasonable certainty. It may be true that "[t]hat Dr. Alfred did not investigate the impact of the Grand Coulee Dam is not surprising," to CCT, ECF 2797 at 35, but that is fatal to its claim.

CONCLUSION

Each component of CCT's independent "tribal service loss" claim fails as a matter of law. All three ($114.6M Restoration Plan; $165M - $525M for "cultural disconnection from the River"; and $13.6M for alleged fishing losses) purport to quantify claims for "cultural losses" over and above what the State or a federal trustee could seek, and are not recoverable under CERCLA. But the Court need not even decide whether the claim in theory exists, because in this case, each category of CCT's damages fails as a matter of law based on the nature of the damages sought and their basic premise: the "Restoration Plan" claim fails because it is neither predicated on, nor seeks to restore, any specific injury to a natural resource; the "value of the uncontaminated River" claim (among other reasons) does not even purport to be caused by, or to restore, any specific injured resource and does not account for the fact that Plaintiffs jointly seek damages to restore the only allegedly injured natural resources; and the "fishing" losses are redundant of the "lost use" damages already claimed jointly with the State on behalf of the entire public based on the same advisories. And CCT cannot commit in any event to use any recovery for restoration.

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1 DATED this 14th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 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.

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