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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

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE COLVILLE TRIBES' NRD CLAIMS FOR LACK OF STANDING

Date: August 11, 2022 at 2:30 pm

With Oral Argument

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I. INTRODUCTION

Teck Metals Ltd. ("Teck") moves for partial summary judgment pursuant to Fed. R. Civ. P. 56 on the claims of the Confederated Tribes of the Colville Reservation ("CCT") for natural resource damages ("NRD") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 103 *et seq.*, because the CCT does not have statutory standing to bring NRD claims for alleged injuries to natural resources not on tribal lands and otherwise outside the CCT's management or control.

CERCLA's NRD provisions, which are separate and distinct from its cost recovery provisions at issue in prior Phases, have distinctly different, much stricter standing requirements under which only the United States, a State, or an Indian Tribe, in their respective sovereign capacities as natural resource trustees for the resources at issue, may seek NRDs. This dovetails with the statutory requirement in 42 U.S.C. § 9607(f)(1) that NRDs are only available to allow the sovereign to "restore, replace, or acquire the equivalent" of the injured resources for the public for whom they were held in trust. As a matter of law, the CCT is not a trustee for the natural resources allegedly injured, which are public resources wholly outside the CCT's tribal lands.[1]

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[1] In this motion Teck does not challenge the CCT's Article III standing. Teck did not challenge the CCT's Article III or statutory standing to seek response costs in Phase II of this case under CERCLA Section 107(a)(4)(A)/(B), which does not contain the same statutory standing limitations that are an integral part of CERCLA's NRD provisions. *Cf., Confederated Tribes and Bands of the Yakama Nation v. City of Yakima,* CV-03156 (ECF No. 59) (Order Denying

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Simply put, as described herein, by statute, the CCT can only seek damages for alleged injuries to those natural resources that it has sovereign authority to manage or control. Teck has the greatest respect for what the CCT refers to as its "inherent interest in" (*e.g.*, CCT Fourth Am. Comp. (ECF No. 2099) ¶2.2) lands over which the tribe has a historic connection. But the issue here is different: even the deepest and most profound historic connection to lands does not equate to having today the necessary sovereign authority over any of the public natural resources for purposes of a claim under CERCLA for NRD.

More specifically, the CCT's remaining NRD claims are for alleged injuries to aquatic resources within the Upper Columbia River ("UCR") and Lake Roosevelt, over which the CCT has no control or other sovereign rights since the United States revoked all of its "right, title and interest" in those lands in two separate Acts of Congress: one in 1892 when it took the "North Half," *see* 27 Stat. 62, § 1 (July 1, 1892); and the other in 1940 when it took all remaining land under what is now Lake Roosevelt in order to construct the Grand Coulee Dam, *see* 16 U.S.C. § 835d. Per Plaintiffs' Rule 26(a)(1) disclosures, the CCT's "ecological" claims are based on alleged injuries to natural resources within the Upper Reaches (River Miles "RM" 745-700), which do not abut and are in fact geographically remote from the CCT's Reservation. The CCT's claim for "recreational damages" is predicated on alleged injuries to the fish in Lake Roosevelt.

To be clear, Teck does not dispute that the State and the United States each have sovereign interests, and thus the required statutory basis for trusteeship,

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Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's Article III standing) (Bastian, J.).

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over natural resources within the Upper Columbia River and Lake Roosevelt for the public at large (including members of the CCT).[2] Of the three categories of NRDs sought, the State's and CCT's claims are coextensive for two: "ecological damages" and "recreational damages," for which the CCT merely incorporated by reference the State's Rule 26 Disclosures as to damages. In this motion, Teck does not seek dismissal of those claims altogether; only to the extent they are asserted by the CCT.

The CCT alone seeks a third category of NRDs – "tribal service losses," which the CCT also calls "cultural damages" for alleged "diminished cultural connections to [the] resources" – a claim not recognized in the statute or the NRD jurisprudence.[3] Like the CCT's other NRD claims, this third claim is based on alleged losses of aquatic resources that the CCT neither owns nor has any sovereign rights to control or manage. The CCT has nevertheless already identified nine experts and 34 fact witnesses on this topic alone.

In sum, dismissal of the CCT's NRD claims for lack of standing would not affect the State's ability to pursue the CERCLA claims for ecological and

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[2] Though the United States is likely the primary trustee for the natural resources at issue in this case since the Upper Columbia River and Lake Roosevelt is not only a navigable water of the U.S. but also owned and managed by various bureaus within the U.S. Department of the Interior, the U.S. is not a party to this litigation.

[3] *See Coeur d'Alene Tribe v. Asarco*, 280 F. Supp. 2d 1094, 1107 (2003) ("Cultural uses of water and soil by Tribe are not recoverable as natural resource damages.").

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recreational damages to the very same resources (at least through the court's consideration of the timeliness of those claims), and would eliminate from this case an additional claim (and associated expert and fact witness discovery), which the CCT has neither standing nor legal basis to pursue.

II. CONTEXT: PLEADINGS AND DISCLOSURES

The CCT's Fourth Amended Complaint (ECF No. 2099) ("CCT Comp.") sought NRDs arising out of two different discharge pathways – aerial emissions from stacks, and discharges to the river. (*See* CCT Comp. ¶4.2). The aerial emissions-based claims were foreclosed by the Ninth Circuit's decision in *Pakootas v. Teck Cominco Metals Ltd*., which held that – even if such allegations could be proved – Teck was not a responsible party. 830 F.3d 975, 985 (9th Cir. 2016). The CCT's remaining NRD claim is that, via the water pathway, prior to mid-1995, discharges of slag into the Columbia River in British Columbia impacted river sediments downstream, causing harm to benthic macroinvertebrates ("BMI")[4], and that discharges of effluents resulted in fish consumption advisories. CCT Comp. ¶4.1; *see also* Statement of Material Facts Not In Dispute ("SMF") ¶11).

In Phase I, the Court articulated exactly what Plaintiffs would have to prove to support their respective NRD claims, including the trusteeship and causation elements absent in CERCLA cost recovery actions:

> 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

[4] BMI are invertebrates such as mussels, clams or other organisms that live in or on the sediments at the bottom of a river, which for most of the Upper Reaches is more than 50 feet deep and for many miles is well over 100 feet deep.

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> of hazardous substances (causation). *See Coeur d'Alene Tribe v. Asarco Incorporated*, 280 F.Supp.2d 1094, 1102-1103 and fn. 6 (D. Idaho 2003).[5] These are additional liability elements, not merely damages elements. 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.

Pakootas v. Teck Cominco Metals Ltd., No. CV-04-256-LRS, 2011 WL 13112570, *2 (E.D. Wash. Feb. 14, 2011) (emphasis added).

The CCT's Fourth Amended Complaint did not state which specific natural resources are alleged to have been injured, nor at what location or when the injury was alleged to have occurred, much less which releases caused what injury. Eleven years after the 2011 decision quoted above, however, the CCT's Phase III Rule 26(a)(1) disclosures ("CCT Disclosures") now purport to provide required damages calculations. *See* SMF ¶¶7-10 and Ex. 2 (CCT Disclosures) at 18-19. Those damages, as noted, must be tied to *specific resources* and *specific locations where the injury occurred*. The CCT Disclosures now demonstrate that

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[5] *Coeur d'Alene Tribe v. Asarco*, 280 F.Supp.2d 1094, 1101 (D. Idaho 2003) ("*Coeur d'Alene I*"), the case the court cited in support of its articulation of the required trusteeship element, involved a similar situation in Idaho's "Silver Valley." As discussed in more detail below, the court in *Coeur d'Alene I* held that fishing rights in the lake in question were not sufficient to provide the required "control" over the resources for purposes of establishing trusteeship for an NRD claim. That court also observed, "The economic livelihood provided by mining … cannot be ignored when considering the legal issues before the Court. Mining provided jobs and materials needed both in times of peace and war."

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the NRD claims (even as broadly described and "preliminarily" quantified) arise from alleged injuries to aquatic natural resources at locations that are not within the CCT's trusteeship. SMF ¶¶8-12 and Ex. 2 at 18-19. This is necessarily so, as a general matter, given that none of the UCR or Lake Roosevelt (wherein all the aquatic resources at issue reside) is owned by, or under any form of sovereign control of, the CCT. And, as this court has already observed (ECF No. 2492 at 12), the fish and wildlife are the property of the State, in trust for the general public.

The CCT's recent disclosures do now identify the basis for the three categories of damages claimed. They describe the "ecological damages" as based on alleged injuries to benthic macroinvertebrates in the sediments of the Upper Reaches (RM 700-745), the southern end of which is approximately 10 miles north of the CCT Reservation's northernmost boundary, on a river over which the State and U.S. Department of the Interior have jurisdiction and control, and bordering land that the federal government reclaimed from the CCT in 1892. A map depicting the relevant boundaries and the portions of the River (Miles 700-745) at which the CCT (and State) have described the injured natural resources for their "ecological damages" claim, is included in the SMF at Appendix A, Fig. 2; *compare* State's Rule 26(a)(1) disclosures ("State Disclosures") (SMF ¶12 and Ex. 3 (State Disclosures), Appx. A, p. 10 (Fig. 1).[6] Both Plaintiffs also seek

[6] Plaintiffs also purport to "reserve the right to modify damages computations to reflect [expert analysis of injury to 'portions of the UCR below River Mile 700']." SMF Ex. 3 (State Disclosures), Appx. A, p. 1. No such injury has yet been described, however.

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"recreational damages" they attribute to area-wide State-issued fish consumption advisories for Lake Roosevelt, parts of which do abut the Reservation; but the entire Lake is open to the public, and is neither owned, managed nor controlled by the CCT. *See Cassidy v. United States*, 875 F. Supp. 1438, 1452-1455 (E.D. Wash. 1994) SMF ¶¶41-43.

Beyond that, the CCT alone seeks damages for "Tribal Service Losses," a category, as noted above, with no statutory basis or known legal precedent in the CERCLA NRD jurisprudence. Ex. 2 (CCT Disclosures), p. 19 and Appx. B. This claim is also untethered to any natural resource over which the CCT has any sovereign authority. Indeed, curiously (and tellingly), the "Restoration Plan" that the CCT describes in its Disclosures as the basis for its lost "Tribal Services" claim, includes $11.28 million to fund the cost of proposed acquisition by the CCT of land adjacent to the UCR "to enable access" to the Upper Reaches of the River. Ex. 2 (CCT Disclosures) at Appx. B, p. 1. In short, the CCT ask this Court to award NRDs to fund its acquisition of land reclaimed by Act of Congress (for reasons having nothing to do with Teck), for which the CCT has been compensated, to give tribal members access *that they do not presently have* to the part of the River whose alleged contamination is the basis for CCT's claims of "tribal service" losses.

The CCT's own Complaint (and the State's) acknowledge that the Upper Columbia River/Lake Roosevelt is not within the Reservation at all, instead merely border it in some places.[7] Teck does not contest the CCT's historic

[7] *See* SMF ¶13. Both Plaintiffs allege in ¶2.2 of their Complaints that "The Colville Reservation borders the Upper Columbia River and Lake Roosevelt on

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connection to the River and the lands bordering the northern parts of the Upper Reaches of the Upper Columbia River as well. But, as described in more detail below, the federal government eliminated all of the CCT's sovereign rights over those lands in 1892 and any remaining "right, title and interest" in the River and riverbed, and what is now Lake Roosevelt, in 1940.

III. BACKGROUND FACTS NOT IN DISPUTE

A. The UCR and Lake Roosevelt, and Teck's Role Today

Since 2006, Teck has been performing and funding a Remedial Investigation & Feasibility Study ("RI/FS") under EPA oversight pursuant to the 2006 UCR RI/FS Settlement Agreement. *See* SMF ¶4 and Exhibit 1 (Settlement Agreement). Although the Trail Smelter's discharge of slag had stopped by mid-1995 and effluents were also substantially diminished following Teck's enormous investment in new technology, and in the UCR RI/FS Settlement Agreement, the United States "acknowledged that other entities may have contributed to the contamination," Teck remains the sole funder of the UCR RI/FS, supporting numerous field programs and human use surveys, with agency oversight, and participation by Plaintiffs, as well as the U.S. Department of the Interior, the Spokane Tribe of Indians, civic groups, and various other interested persons. *See id.*

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its [the Site's] western and southern boundaries." (In fact, the River and Lake border the Reservation on the Reservation's *eastern* and southern boundaries (and the River/Lake's western and northern boundaries); this was no doubt an inadvertent error; but it is correct that the River borders the Reservation and does not pass through it.). *See* CCT Comp. ¶2.2; State Fifth Amended Complaint (ECF No. 2495) ("State Comp.") ¶2.2.

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B. Congress' Actions Relative to the Colville Tribes and the River.

The United States reclaimed – in two tranches – all of the land on which the resources at issue in the CCT's NRD claims are located. *See* SMF ¶24. The Colville Reservation was created by an Executive Order issued by President Grant on July 2, 1872. SMF ¶22. Its original boundaries also included an additional approximately 1.5 million acres north of the current reservation boundary, extending to the Canadian border. SMF ¶23. That territory, referred to in later court decisions as the "North Half" of the reservation, borders the Upper Reaches of the River. *Id.*

In 1892, Congress decreed that the "North Half" of the Colville Reservation should be "vacated and restored to the public domain" and "open[ed] . . . to settlement." Act of July 1, 1892, 27 Stat. 62, § 1 (July 1, 1892). SMF ¶26. Congress later authorized the appropriation of $1.5 million as compensation to the CCT; and though it affirmed tribal members' "right to hunt and fish in common with all other persons on lands not allotted to said Indians" in the reclaimed "North Half" which "shall not be taken away or anywise abridged," any and all other rights were forfeited. *See* SMF ¶28; *Antoine v. Washington*, 420 U.S. 194, 205 (1975).

In 1940, Congress directed the reclamation of further lands "in aid of the construction of the Grand Coulee Dam project[.]" 54 Stat. 703 (June 29, 1940) ("1940 Act"), codified at 16 U.S.C. § 835d-835h. SMF ¶31. Pursuant to the 1940 Act, the United States reclaimed "all the right, title, and interest of the Indians in and to the tribal and allotted lands" within the Colville reservation abutting the UCR below an elevation of 1310 feet, which included a freeboard margin above the high-water mark (1290 feet) of what is now Lake Roosevelt. 16 U.S.C. §

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835d; SMF ¶¶32-33. The federal government further compensated the CCT for the taking of these additional Reservation lands. *See* 16 U.S.C. § 835e.

The 1940 Act further provided that "in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this section . . . , [DOI] shall set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians . . . for hunting, fishing, and boating purposes, which rights shall be subject only to such reasonable regulations as the Secretary may prescribe for the protection and conservation of fish and wildlife: *Provided*, That the exercise of the Indians' rights shall not interfere with project operations." 16 U.S.C. § 835d (emphasis in original); SMF ¶34. That part of the River in which the CCT has protected, though *non-exclusive*, fishing rights borders the Reservation (all of which is south of RM 700), and is referred to as the "Reservation Zone." *See* SMF ¶¶35-36 and Appendix A, Fig. 4. As a matter of law, however, as discussed below, the CCT have no "right, title [or] interest" in that area per 16 U.S.C. § 835d.[8]

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[8]The federal government legally revoked all of CCT's legal rights and interests in such lands, but did not technically adjust the Reservation's boundaries, so there are some small areas technically within the Reservation boundaries (i.e., those lands that are within the "Reservation Zone"), which are no longer "tribal lands," and over which the CCT no longer has sovereign rights. The CCT is well aware of its lack of sovereign authority over the "Reservation Zone" because courts have stated as much conclusively. *See Cassidy v. United States*, 875 F. Supp. 1438, 1452 (E.D. Wash. 1994) ("[B]y enacting section 835d, Congress broadly opened the Reservation Zone to the general public. The

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As a result of the U.S. government's appropriation of the CCT's right, title and interest in those tribal lands, and related construction of the Grand Coulee Dam, Congress approved settlements that paid the CCT over $50 million, plus annual payments (ranging from $14 million to $22 million) in perpetuity. *See* SMF ¶¶40-42 (citing Pub. L. 103-436, 108 Stat. 4577 (Nov. 2, 1994), *The Confederated Tribes of the Colville Nation vs. U.S.*, 964 F.2d 1102 (Fed. Cir. 1992)).

IV. LEGAL FRAMEWORK

NRDs 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)(4)(C). As a threshold matter, CERCLA defines a "natural resource" as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or *otherwise controlled by* the United States . . . any State or local government, any foreign government, [or] any Indian tribe[.]" 42 U.S.C. § 9601(16) (emphasis added); *see also* 43 C.F.R. § 11.14(z). NRDs are thus by definition public resources, and they can only be

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Tribes, which arguably had regulatory control over the land under the Reservation Zone prior to its acquisition by the United States, lost this control when Congress acquired the lands underlying Lake Roosevelt. ... [U]nder *Bourland*, the court finds that when Congress acquired the Reservation Zone, the Tribes lost their inherent right of absolute and exclusive use and occupation of the area[,] and '[t]he abrogation of this greater right ... implies the loss of regulatory jurisdiction over the use of the land by others.'") (quoting *S. Dakota v. Bourland*, 508 U.S. 679, 689 (1993)). *See also* SMF ¶¶ 41-43.

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used "to restore, replace, or acquire the equivalent of such natural resources." 42 U.S.C. § 9607(f)(1).

Therefore, to recover NRDs, a plaintiff "must show that 'natural resources *within the [plaintiff's] trusteeship* . . . have been injured' and 'that the injury to natural resources "resulted from" a release of a hazardous substance.'" *Pakootas v. Teck Cominco Metals Ltd.*, 830 F.3d 975, 981 n.4 (9th Cir. 2016) ("*Pakootas III*") (quoting *Coeur d'Alene I*, 280 F. Supp. 2d at 1102 (citing § 9607(a)(4)(C)) (emphasis added).[9] And because "natural resources" are by definition *public* resources, CERCLA limits trusteeship over them—and thus standing to recover NRDs—to either "the United States Government, any State, or any Indian tribe to which the natural resources at issue belong, are managed by, controlled by, or to which the resources appertain." 42 U.S.C. § 9607(f)(1); 43 C.F.R. § 11.83(c)). The Secretary of the Interior promulgated regulations for the assessment of damages for injuries to natural resources ("NRDA" regulations) and in the preamble to the final "NRDA" regulations described the intended limitations on trusteeship:

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[9] A claim for NRD under CERCLA § 107(a)(4)(C) is thus materially different from a claim for response costs under CERCLA §107(a)(4)(A)/(B), in that it requires trustees to prove, *inter alia*, a causal relationship between the alleged natural resource injury and the defendant's release. (ECF No. 716 at 4). A trustee claiming NRD has the burden to prove that the defendant's release of hazardous substances caused the natural resource injuries for which the damages are sought. 42 U.S.C. § 9607(a)(4)(C) ("damages for injury to, destruction of, or loss of natural resources . . . *resulting from such release*") (emphasis added).

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> CERCLA provides that trustee officials can only recover damages for injuries to those resources that are related to them through ownership, management, trust, or control.

Final Rule, 59 Fed. Reg. 14262, 14268 (Mar. 25, 1994), included at Appendix B, Tab B-7.

By limiting a trustee's potential damages to those "for injuries to those resources that are related to them through ownership, management, trust, or control," the statute establishes that trusteeship is to be determined based on the sovereign's legal relationship to the resources at issue. *Id*.; *see also Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166,1181-82 (N.D. Okla. 2009) ("NRD are limited to only those damages sustained by the natural resources trustee in its sovereign capacity . . . '[and] *must be tailored to redress specific injury to the State's role as trustee*[.]'") (emphasis in original) (quoting *New Mexico v. General Electric Co*., 467 F.3d 1223, 1243 n.39 (10th Cir. 2006)).

The uniquely public character of NRDs means that trusteeship over a resource belongs solely to the government (or governments) with sovereign legal authority over the resources at issue, which in turn, comes with fiduciary obligations to the public for stewardship of those particular resources. It is also a practical necessity under CERCLA since NRDs can only be used to restore, rehabilitate, or replace those specific resources for the benefit of the public served by the trustee. *See* 42 U.S.C. § 9601(16) (defining "natural resources"); 43 CFR §11.14(l) (defining damages). NRDs "are not fines or penalties, and the measure of damages is calculated by the cost to restore or replace the injured or destroyed natural resources. . . . The statute requires trustees to spend restoration recoveries 'only to restore, replace, or acquire the equivalent' of injured natural resources pursuant to a publicly reviewed restoration plan." *Natural Resource Damages*

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for Hazardous Substances, 83 Fed. Reg. 43611, 43612 (Aug. 27, 2018) (Proposed Rule), included at Appendix B, Tab B-8 (also available at https://www.federalregister.gov/d/2018-18498/p-11); *see also* 42 U.S.C. § 9607(f)(1). CERCLA's legislative history supports this interpretation. *See, e.g.*, 141 Cong. Rec. S9827, S9875 (Daily Ed. July 13, 1995), included at Appendix C, Tab C-2 (stating that "the sole purpose of [NRD] is to provide for the rapid restoration and replacement of significant natural resources[.] ... [Such] damages should be used solely for the purpose of restoring or replacing these resources, and should not serve as a means of seeking retribution or punitive damages from potentially responsible parties."). Requiring actual sovereign authority and concomitant control over the public resource as the basis for trusteeship ensures that any plaintiff that recovers NRDs will have the actual authority to expend them as CERCLA requires. *Asarco*, 471 F. Supp. 2d at 1068 ("Under CERCLA the recovery, if any, is not for the benefit of a given party, but goes to the trustee as the fiduciary to accomplish the stated goals.").

The natural resources for which the CCT claims losses, as described in its Disclosures – primarily benthic macroinvertebrates, in the Upper Reaches (RM 745-700) and fish throughout Lake Roosevelt (to the Grand Coulee) – are in waters owned and managed by the federal government, with some regulatory rights belonging to the State, for use and enjoyment of the general public. And the "[w]ildlife, fish, and shellfish are the property of the state." Wash. Rev. Code § 77.04.012; ECF No. 2494 at 12, *also citing Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wash.App. 566, 569, 103 P.3d 203 (2004) (finding that "[t]itle to animals ferae naturae belongs to the state in its sovereign capacity and the state holds this title in trust for the peoples' use and benefit," while declining

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to apply the public trust doctrine)). The upshot is that, even if the CCT were allowed to pursue ecological and recreational damages allegedly associated with these public natural resources, the CCT would have no legal right, as the statute requires, to then restore or replace those resources for the benefit of the general public.

V. SUMMARY JUDGMENT STANDARD

"A party may move for summary judgment, identifying each claim . . . or the part of each claim . . . on which summary judgment is sought. The court shall grant summary judgment if the movant shows that 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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing of an essential element or a claim in the case on which the non-moving party has the burden of proof. *Id.* at 323. When the moving party meets its burden, the adverse party may not rest upon mere allegations or denials, but must, by affidavit or otherwise, set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

VI. ARGUMENT: THE CCT LACKS STANDING TO RECOVER NRDs FOR RESOURCES OUTSIDE ITS SOVEREIGN AUTHORITY

None of the resources for which the CCT seeks damages is "within the [CCT's] trusteeship" as the court has held must be established. *Pakootas v. Teck Cominco Metals Ltd.*, No. CV-04-256-LRS, 2011 WL 13112570, *2 (E.D. Wash.

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Feb 14, 2011). The CCT's sovereign authority, which is the defining requirement of CERCLA natural resource trusteeship, may well extend to natural resources on its tribal lands, but it does not extend beyond that to resources belonging to the general public over which the CCT has no legal right of ownership, management, or control.[10] Lesser interests, such as, for example, contractual rights, short of authority necessary to control these public resources—however well-established—are not a substitute for the sovereign interest required by the statute; moreover, an "interest" that might well establish one element of Article III standing cannot justify the effective appropriation of public rights in public resources by a subset of the broader population.

The CCT's NRD claims are focused on alleged injuries to benthic macroinvertebrates in the Upper Reaches, and fish in the Upper Reaches and Lake Roosevelt subject to consumption advisories. But as a matter of law, the CCT has no sovereign authority over these waters, the submerged lands beneath them, or the resources within them. The CCT's historical ties, present activities and interests, and even "paramount" usage rights in certain of the waters nearby simply do not come close to the requisite sovereign legal authority as would give the CCT standing as a trustee for these resources. The lack of such sovereign control is fatal to the CCT's claim to trusteeship with respect to UCR and Lake Roosevelt natural resources, and therefore, to its standing in this case.

A. The CCT Has No Sovereign Authority Outside Tribal Land

[10] Just as Idaho or Oregon could not pursue NRDs for these natural resource injuries because those states have no sovereign jurisdiction or control over these specific resources and therefore no standing here, neither can the CCT, however interested in those resources CCT tribal members may be.

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Although tribes "exercise many of the powers and prerogatives of self-government," tribal sovereignty "is of a unique and limited character" that "centers on the land held by the tribe and on tribal members within the reservation." *Plains Com. Bank v. Long Fam. Land & Cattle Co*., 554 U.S. 316, 327 (2008). More simply, "[t]he sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Id.* at 340. And, plainly, tribal sovereignty is not *greater* than State or federal authority such that it can extend beyond its own jurisdiction.

The CCT's claim of trusteeship over a given natural resource turns on whether the resource is within the scope of its tribal sovereignty, based on the tribe's rights in the land. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) ("This Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty."). Here, although some of the resources at issue may be on now-submerged *former* tribal lands, when land is conveyed "to non-Indians [including the government], the tribe loses any former right of absolute and exclusive use and occupation of the conveyed lands." *Bourland*, 508 U.S. at 689. This necessarily entails "the loss of regulatory jurisdiction over the use of the land by others." *Id*.

As described above, over the last 150 years, the federal government has changed the boundaries of the CCT's Reservation, reducing its size and transferring ownership of significant portions to the federal public domain, and out of the regulatory control or management of the CCT. The U.S. Supreme Court, the Ninth Circuit, the Eastern District of Washington, and Washington State courts have each addressed the nature of the CCT's present rights in its former lands in the North Half and/or in Lake Roosevelt. *See, e.g.*, *Cassidy*, 875

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F. Supp. at 1447, 1452 (when U.S. government reclaimed "all right, title, and interest" in lands condemned under 1940 Act, the CCT and Spokane Tribe lost all rights to regulate or control those lands or others' use of them); *State v. Boyd*, 109 Wash. App. 244, 252-53 (2001) (irrespective of having occurred within the Colville Reservation boundary, crime took place on land under the authority and control of the U.S. government pursuant to the 1940 Act, which is no longer tribal land under tribal jurisdiction); *Antoine*, 420 U.S. at 206-207 (CCT's "preserved rights" to hunt and fish in the North Half "are not exclusive and are to be enjoyed 'in common with all other persons,'" do not give the tribe any authority over non-tribe members on those lands, and are subject to the state's regulatory authority); *Okanogan Highlands All. v. Williams*, 236 F.3d 468 (9th Cir. 2000) (federal government has the right to regulate and decide usage of resources on "North Half" even when challenged by CCT as interfering with its reserved rights to hunt and fish); *Confederated Tribes of Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187, 1196-98 (E.D. Wash. 2011).

As to its former reservation lands (such as the North Half), consistent with established case law concerning other tribes, the CCT lost all sovereign authority to regulate those lands, and – absent an express act of Congress – the CCT's authority cannot be resurrected. *See, e.g.*, *Bourland*, 508 U.S. 679 at 689; *Hagen v. Utah*, 510 U.S. 399, 414 (1994) (the 1892 Act by which North Half lands were "vacated and restored to the public domain" is "an example" of "express termination" of tribal rights) (internal citations omitted); *Nevada v. Hicks*, 533 U.S. 353, 359 (2001) (even on tribal lands, except to the limited extent "necessary to protect tribal self-government or to control internal relations," tribes have no authority over usage of the land by nonmembers of the tribe "without express

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congressional delegation."); *accord Cassidy*, 875 F. Supp. at 1452 (*citing Bourland*, 508 U.S. at 690 n.11).

To the extent that the CCT has attempted to characterize its rights to use its former lands for hunting, fishing, or other purposes as an "inherent interest" in the resources (CCT Compl. ¶ 2.2), those non-exclusive usage rights are insufficient for CERCLA trusteeship. In *Coeur d'Alene I*, the court rejected essentially the same argument. There, the court held that trusteeship was based on the "actual control and management of the natural resource," 280 F. Supp. 2d at 1116, and "depend[s] on who the resource belongs to, who is it managed by, who controls the same and how the resource appertains to other resources," *id.* at 1115. The court rejected the Coeur d'Alene Tribe's claim that former tribal lands (including water) over which the tribe retained fishing rights "appertained to" the tribe for purposes of conferring trusteeship over those resources because the tribe's rights did not amount to actual authority or control over the resources:

> While the Tribe may use certain natural resources in the exercise of their cultural activities, such use does not rise to the level of making a natural resource 'belong or be connected as a rightful part or attribute' for purposes of trusteeship analysis. ... **CERCLA is a broad remedial statute, but the statute itself creates reasonable limits on trusteeship that this Court will enforce.**

Id. at 1117.[11] (emphasis added).

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[11] The court in *U.S. v. Asarco*, 471 F. Supp. 2d 1063, 1067 (D. Idaho 2005), reversed its own holding in *Coeur d'Alene I,* but only insofar as it required plaintiffs to prove the co-trustees' respective percentage of trusteeship over the natural resources at issue. The court did not disturb its prior holdings regarding the basis for finding trusteeship in the first place (i.e., that the federal, state, and

(continued…)

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B. Aquatic Resources in the Upper Reaches

In its Disclosures, the CCT claims NRDs based on alleged injury to aquatic natural resources: namely benthic macroinvertebrates in the Upper Reaches, comprised of River Mile 745 at the international border to River Mile 700. The southern boundary of this portion of the River is more than ten miles away from the northern boundary of the Reservation. *See* SMF ¶12 and Appx. A, Fig. 2. As a matter of law, the CCT cannot successfully assert trusteeship over aquatic resources, such as sediments and biota in the Upper Reaches, which are general public resources located outside and many miles north of CCT's Reservation, definitively outside the CCT's sovereign authority to manage or control them.

Although Congress and/or the State legislature presumably *could* grant the CCT some measure of sovereign authority or regulatory control over the Upper Reaches of the River, thereby diminishing federal and/or state authority in favor of the Tribes, neither has actually done so. Unless and until either government is willing to cede some or all of its sovereign control over the resources at issue to the CCT, the CCT does not have the authority required for trusteeship and statutory standing over the resources at issue here. The state and federal

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tribal governments each had a basis for trusteeship over at least some of the resources at issue), and indeed, observed in its later decision that, "the parties agree the Plaintiffs should not be allowed to recover damages for injury to natural resources over which they are not a trustee." *Id*. But in that case – unlike this one – the federal government was a party and undisputed trustee, and the Tribes had granted the federal government the right to represent its interests in the litigation (as CERCLA expressly permits); thus, the Tribe's trusteeship was not at issue and did not need to be decided. *Id.*

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governments may well have good reason to continue to consult with the CCT regarding plans to restore or replace natural resources, which its members enjoy or regard in ways that may be different from the non-tribal public, but the ultimate decision-making authority—and standing—lies with the state and federal governments.[12]

C. Lake Roosevelt and the Fish in It

The CCT also asserts NRD claims for alleged injuries to the fish in the UCR and Lake Roosevelt, in the form of "recreational damages" arising from fish State-issued consumption advisories. The fish, of course, are in the River and Lake Roosevelt, and not on Reservation lands. The CCT asserts its members' federally protected fishing rights as a basis for trusteeship. By express act of Congress, however, the Lake and River are no longer "tribal" lands held in trust for CCT members and are no longer under CCT authority or control. And, the fishing rights are non-exclusive; they do not as a matter of law amount to the kind of management or control over the resource as is necessary for NRD standing under CERCLA.

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[12] The CCT could presumably challenge any federal or state action it believes infringes its protected usufructuary rights, as it has done in the past. *See, e.g.*. *Anderson*, 903 F. Supp. 2d at 1196-98 (challenging State right to regulate tribe members' exercise of hunting and fishing rights in North Half); *Okanogan Highlands All.*, 236 F.3d at 479 (challenging U.S. Forest Service project on basis that protected tribal usage rights not adequately considered). But having protectable rights to use a resource is not the equivalent of control or sovereign authority over the resource, which is what CERCLA requires for standing.

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Teck does not challenge the CCT's allegation (CCT Compl. ¶2.2) that is has an "inherent interest" in the fish in Lake Roosevelt and the UCR based on its federally guaranteed "reserved right and entitlement" to fish in those waters. Arguably, that "inherent interest" in resources off the Reservation would be sufficient to support one prong of the much broader elements of Article III standing as articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), but it cannot suffice for CERCLA statutory standing to recover NRDs. *See, e.g., Yakama Nation v. City of Yakima, supra.* at 9 (finding "particularized injury" for purposes of Article III standing insofar as Yakama Tribe incurred response costs related to the contamination of a site where it had treaty fishing rights).[13]

Statutory standing under CERCLA's NRD provisions is another matter entirely, and is determined not by whether a plaintiff has an "interest" – even a particularized interest – in the resource. Rather, it is "determined on a case by case basis depending on who the resource belongs to, who is it managed by, who controls the same and how the resource appertains to other resources. Resources must be under the stewardship of a trustee before damages can be assessed for their injury, loss or destruction." *Coeur d'Alene I*, 280 F. Supp. 2d at 1115.

Today, Lake Roosevelt is part of a federally managed, national public recreation area, and is also crucial to the operation of integrated hydroelectric facilities that provide 35% of the entire power supply of the Pacific Northwest. *See* SMF ¶¶15-19. Congress has not disclaimed federal authority over these lands

[13] In this case, the CCT's response costs have already been satisfied and Teck is not in this motion challenging its prudential, Article III standing to recover those costs.

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or waters, nor ceded any authority to the CCT, although it has ceded certain conservation authorities to the State by statute (e.g., issuance of fishing and hunting licenses and regulations). And, as noted above, the State holds title to all wildlife in the State in trust for the public. Wash. Rev. Code § 77.04.012; ECF No. 2494 at 12.

Although portions of what is now the "Reservation Zone" of Lake Roosevelt was at one time land under the authority of the CCT or the Spokane Tribe before the Grand Coulee Dam was built, that all changed in 1940. *See* SMF ¶¶ 31-33. The 1940 Act specified that "in lieu of reserving rights of hunting, fishing, and boating to the Indians in the areas granted under this section . . . , [DOI] shall set aside approximately one-quarter of the entire reservoir area for the paramount use of the Indians . . . for hunting, fishing, and boating purposes." 16 U.S.C. § 835d; SMF ¶34. Both federal and Washington courts have determined that the Colville and Spokane Tribes' "paramount use" of Lake Roosevelt's "Reservation Zone" does not—and cannot without further act of Congress—include any authority to regulate the resources on that land or assert authority over those who are not members of their tribes.

For example, in *Cassidy*, this Court held that the Colville and Spokane Tribes lost all regulatory power when Congress acquired what is now the "Reservation Zone" for construction and operation of the Grand Coulee Dam. 875 F. Supp. at 1452 (*citing Bourland*, 508 U.S. at 690 n.11). Although that was the area designated by statute for tribes' "paramount use," the *Cassidy* court pointed out it was not for their *exclusive* use. The so-called "Reservation Zone" lands remain open to the general public, and the federal government has the authority and responsibility to manage the Lake Roosevelt public recreation area

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for the benefit of the general public, which includes members of the CCT (and the Spokane Tribe). *Cassidy*, 875 F. Supp. at 1453.

Moreover, even if it wanted to do so, the government cannot delegate management authority in such areas, absent an act of Congress, which has not happened. The court in *Cassidy* invalidated a 1990 Cooperative Agreement (among the CCT, the Spokane Tribe and the three federal agencies associated with Lake Roosevelt) to the extent it *purported* to permit the tribes to "manage" respective portions of the "Reservation Zone," holding that this was not a valid delegation of authority to the tribes. *Id*. at 1455 (noting that the Government had conceded that there could not be a valid delegation of its regulatory authority to tribal governments absent an act of Congress, which the Cooperative Agreement was not). Following *Cassidy*, the Spokane Tribe lobbied Congress to affirm that DOI has authority to delegate regulatory or management authority in Lake Roosevelt to the tribes. *See* SMF ¶¶41-43. Those efforts have not been successful. *Id.*

Cassidy relies on, and is in accord with, the Supreme Court's ruling in *Bourland*, involving similar facts. In *Bourland*, the Court considered whether the Cheyenne River Sioux Tribe could regulate non-Indian fishing and hunting on reservation lands that the United States purchased for the Oahe Dam and Reservoir project, and which it later opened to the public as a recreation area. 508 U.S. at 687-88. The Cheyenne River Sioux Tribe's treaty had guaranteed the tribe "absolute and undisturbed use and occupation" of the reservation, but Supreme Court held that a later act of Congress could (and did) alter the terms of the treaty, allowing Congress to reclaim its rights in the land. *Id.* By doing so (as here relative to the "North Half," river and riverbed), Congress revoked any and

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all rights the tribe had to regulate the land: "Congress, through the Flood Control and Cheyenne River Acts[,] eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe." *Id.* at 689. The Court rejected the argument that tribal regulation of non-Indian use of the lands for hunting/fishing was consistent with Congressional goal of that statute: "what is relevant ... is the effect of the land alienation" and that "the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Id*. In other words, *Bourland* held that a tribe's authority to regulate lands is a matter of legal right – one that cannot be conferred on, or restored to, a tribe except by express leave of Congress.

The CCT no longer has any regulatory authority at all in any of Lake Roosevelt or the UCR since the 1940 Act – whether to own, manage, or "otherwise control" the resources. Despite its broad purposes, CERCLA should not be interpreted to implicitly grant the CCT sovereign rights to resources that the prior Acts of Congress expressly revoked.

VII. REQUEST FOR RELIEF

For these reasons, Teck requests that the Court grant summary judgment in favor of Teck on the CCT's NRD claims because the off-Reservation natural resources that are the subject of its claims are not within the legal scope of its trusteeship.

DATED this 10 day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2022, 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/Bryce J. Wilcox
Bryce J. Wilcox

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