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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 SUMMARY JUDGMENT ON PLAINTIFFS' TIME-BARRED CLAIMS 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 both plaintiffs, the State of Washington ("State") and the Confederated Tribes of the Colville Reservation (the "CCT"), for natural resource damages ("NRD") under CERCLA Section 107(a)(4)(C), which claims are to be considered for the first time in this Phase III.[1] As a matter of law, those claims are time-barred by CERCLA's three-year statute of limitations for NRD claims in 42 U.S.C. § 9613(g)(1)(A). Extensive, irrefutable evidence demonstrates that both the State and the CCT were making allegations that releases from the smelter in Trail, British Columbia, which Teck now owns, were connected to contamination of the Upper Columbia River/Lake Roosevelt ("UCR") in Washington State, arguably more than a decade – and certainly well over three years – before they brought their actions for natural resource damages in November 2005.

Teck has long maintained that the NRD claims that the State and CCT added November 4 and 7, 2005, respectively, are stale. They are subject to an entirely different limitations period than Plaintiffs' previously adjudicated Section 107(a)(4)(A) claims. CERCLA's three-year limitations period for NRD claims runs from the date on which the plaintiff discovers a loss to natural resources and a "connection" between the alleged loss and the defendant's release of hazardous substances. 42 U.S.C. § 9613(g)(1)(A). As described in more detail herein, as early as the 1980s, the State was investigating the connection between discharges of slag

[1] As to the CCT, this Motion is submitted as an alternative basis for dismissal, and need only be considered in the event the Court were to conclude that the CCT has standing to pursue these claims.

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and effluents containing metals from the Trail Smelter, and elevated metals in the UCR. One could arguably question the specific point in time during the 1980s and through the mid-1990s at which Plaintiffs were each making the connection between the alleged losses to natural resources for which they now seek damages and the Trail Smelter discharges that are the basis for their allegations in this case. By 1999, however, there can be no question: the CCT was making virtually the same contentions it is making here; and the State had been doing so since 1986.

Teck is not attempting to wash its hands of responsibility to address potential adverse impacts in the U.S. of the Trail Smelter's legacy discharges in British Columbia. Teck has been and continues performing and fully funding a Remedial Investigation & Feasibility Study ("RI/FS") – including Plaintiffs' and others' participation – not pursuant to CERCLA, but under U.S. EPA oversight and regulations per a 2006 UCR RI/FS Settlement Agreement.

Since then, Teck has funded approximately $150 million for numerous field programs, human use surveys, 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 and members of the public. Teck has also voluntarily completed various removal actions at the State's or EPA's request. It did so despite the fact that, by mid-1995, the Trail Smelter had stopped discharging slag (CCT's Fourth Amended Complaint ¶4.1, State's Fifth Amended Complaint ¶4.1), and effluents were also substantially diminished following enormous investments in new technology. Even the United States "acknowledged that other entities may have contributed…" to the elevated metals in the UCR, including the now-defunct and separately-owned Le Roi/Northport Smelter in Northport, WA. Teck, however, is the only party funding the UCR RI/FS.

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To be clear, Teck maintains significant challenges to Plaintiffs' allegations regarding the losses for which each seeks additional compensation in this Phase III. [2]

[2] For example, while not material to the decision on this motion, much of Plaintiffs' claims center on mercury contamination (indeed, all of their "recreational damages" claims, as they are predicated on Fish Consumption Advisories ("FCAs") that are based entirely on mercury levels in the fish in Lake Roosevelt). There are extensive EPA and other data tracking mercury levels in fish tissue, both from the ongoing RI/FS and other studies predating the RI/FS. Those data conclusively show that the mercury levels in fish in Lake Roosevelt and the UCR are not materially different from those levels throughout the Pacific Northwest (consistent with the many statewide FCAs in Washington State and nearby states), and indeed are much lower than many reference sites with no impact from Trail. There is no material level of mercury in slag. For context, the mercury levels found in the fish in Lake Roosevelt and the UCR (even dating back 25 or more years) are a small fraction of the US limit on the levels of mercury permitted in canned tuna. *Columbia River Basin: State of the River Report for Toxics, EPA 910-R-08-004*, U.S. Env't Prot. Agency (Jan. 2009); *Action Levels for Mercury in Commercial Seafood*, U.S. Food & Drug Admin, *available at* https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-action-levels-poisonous-or-deleterious-substances-human-food-and-animal-feed; D.C. Depew, N.M. Burgess, M.R. Anderson, R. Baker, S.P. Bhavsar, R.A. Bodaly, C.S. Eckley, M.S. Evans, N. Gantner, J.A. Graydon, & K. Jacobs, *An overview of mercury concentrations in freshwater fish species: a national fish mercury dataset for Canada*, 70(3) Can. J. of Fisheries & Aquatic Sci. 436–451 (2013); C.A. Eagles-Smith, J.T. Ackerman, J.J. Willacker, M.T. Tate, M.A. Lutz, J.A.

(continued…)

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Plaintiffs contend the losses arise from continued releases from metals that were discharged by the Trail Smelter many decades ago, and remain in sediments largely beneath the floor of the extremely deep UCR, which averages well over 100 feet deep for most of its length. Plaintiffs will no doubt contend that, to this day, both they and EPA are continuing to investigate, and further evidence is being gathered. But that misses the point: as detailed herein, in a wide range of contexts,[3] the law on limitations consistently provides that plaintiffs do not have to "discover" conclusive proof of every element of their claims, which could effectively mean that the limitations period could be deferred indefinitely; rather, it begins to run when a plaintiff is on notice of the alleged loss, and (here) its "connection" to the release in question, to the point that it would cause a reasonable person to inquire.

In fact, in this case, CCT did just that in 1999, petitioning EPA to investigate the alleged contamination in the River and specifying the Trail Smelter as more than just "connected" to the alleged contamination, but its "primary source," just as alleged in this suit. And the State included the same language in a 1988 Report. The CCT should have filed any NRD claims by 2002 at the very latest, and the State should have filed any NRD claims by more than ten years before that.

Fleck, A.R. Stewart, J.G. Wiener, D.C. Evers, J.M. Lepak, & J.A. Davis, *Spatial and temporal patterns of mercury concentrations in freshwater fish across the Western United States and Canada*, 568 Sci. Total Env't 1171–1184 (2016).

[3] A challenge in the NRD context is the relative dearth of opinions in cases in which NRDs have been sought under CERCLA. The same limitations issues, however, arise in myriad different contexts and are quite well-settled.

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II. UNDISPUTED FACTS

On April 14, 1986, the Washington Department of Ecology ("WDOE")[4] issued a "Preliminary Plan for an Investigation of Metals Contamination in the Upper Columbia River/Franklin D. Roosevelt Lake." The plan was based on a "substantial amount of evidence" that the UCR was "contaminated" by metals that are predominantly from historic discharges from the Trail Smelter. Statement of Material Facts Not in Dispute ("SMF") No. 11. The State's plan indicated that a "substantial amount of evidence has now accumulated showing the upper Columbia River (Grand Coulee [Dam] to international border [RM 745-RM 597]) is contaminated by several metals." *Id.* After detailing specific findings of contamination and impacts to natural resources, such as elevated metals concentrations in fish tissue and sediments, the Plan states, "[t]he predominant source of metals is thought to be historical discharges by Cominco Limited's [Teck's predecessor] metallurgical plant at Trail, British Columbia." *Id.*

In 1988, WDOE conducted, pursuant to the 1986 Plan, "An Assessment of Metals Contamination in Lake Roosevelt," completed in June 1988 (and revised December 1989). SMF No. 12. The Assessment identified the Trail Smelter as the "primary source" of "contamination" in the UCR, noting that sediment in the upper reaches contained elevated metals concentrations "attributed to the presence of slag which is discharged from Cominco in the form of coarse-grained sand." *Id.*

Shortly thereafter, CCT's Environmental Trust Division conducted a "Border Site Investigation" near Northport, Washington on August 13, 1991. SMF No. 16. The

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[4] Pursuant to 42 U.S.C. § 9607(f) and 40 C.F.R. § 300.605, the WDOE serves as the Natural Resources Trustee for the State (Fifth Amended Complaint at ¶2.1).

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investigation report states contamination had been observed in the UCR and in sediments dredged from the riverbed and banks of a tributary thereto believed to be from the Trail Smelter. *Id.* It also referenced prior studies, and recommended EPA conduct a site assessment. *Id.*

On August 2, 1999, the CCT formally petitioned EPA to perform an assessment of the UCR, noting that concern about slag from the Trail Smelter dated back to the 1980s. SMF No. 24. Its Petition, supported by a unanimous resolution of the Colville Business Council, specified that releases of metals had affected "critical tribal resources," and identified the Trail Smelter as the "primary source of the contamination." *Id.*

The Petition recounted history demonstrating that the matter had been studied since the early 1980s, and that "Follow up studies identified the primary source of the contamination to be a lead-zinc smelter on the Columbia River in British Columbia…" *Id.* It cited a 1992 U.S. Geological Survey study, which CCT described as showing that riverbed sediments, which are the principal focus of this case, were "contaminated, as indicated by elevated concentrations of metals (arsenic, cadmium, copper, lead, mercury, and zinc), laboratory toxicity, and altered benthic invertebrate communities", and also, that "mercury in sportfish was elevated to levels high enough to trigger a Washington Department of Health consumption advisory." *Id.*; *see also* SMF No. 18. The Petition describes CCT's position as to the contamination and its effects in terms strikingly similar to those used over six years later in its Complaint in this case:

> Critical tribal resources, governance processes, and inter-governmental agreements have been and continue to be affected by these releases. . . . Based upon information and belief, Petitioner asserts that the following hazardous substances have impacted the study area and should be included in the Assessment process: . . . metals (arsenic, cadmium,

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> copper, lead, mercury, and zinc); primary source of the contamination appears to be a lead-zinc smelter on the Columbia River in British Columbia. . .
>
> In the early 1980s, concerns about water quality in Lake Roosevelt and the upper Columbia River were first reported in a U.S. Fish and Wildlife study that reported elevated concentrations of arsenic, cadmium, lead, and zinc in fish. Follow up studies identified the primary source of the contamination to be a lead-zinc smelter on the Columbia River in British Columbia . . .
>
> At the request of the U.S. Environmental Protection Agency (EPA) and Lake Roosevelt Water Quality Council (LRWQC), the U.S. Geological Survey (USGS) initiated a large-scale sediment quality study in 1992. The USGS reported that bed sediments were contaminated as indicated by elevated concentrations of metals (arsenic, cadmium, copper, lead, mercury, and zinc), laboratory toxicity, and altered benthic invertebrate communities. In addition, a 1994 USGS study determined that mercury in sportfish was elevated to levels high enough to trigger a Washington Department of Health consumption advisory.
>
> SMF No. 24; *see also* SMF No. 18.

The State did not amend its complaint until November 4, 2005, to add, among others, NRD claims under CERCLA Section 107(a)(4)(C). ECF No. 109 (State's First Amended Complaint). The CCT amended its complaint immediately thereafter on November 7, 2005, to likewise add its own CERCLA NRD claims. ECF No. 111 (CCT's First Amended Complaint). In short, neither plaintiff asserted an NRD claim until November 2005 – at least three years too late in the case of the CCT (who had petitioned EPA on this very topic in 1999), and more than a decade too late in the case of the State. Neither the CCT nor the State filed its NRD claim within the three-year period following their respective discoveries of the losses alleged and the "connection" between those losses and Trail Smelter discharges – as documented in Plaintiffs' own written material.

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III. 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, 322-23 106 S. Ct. 2548, 91 L. Ed. 2d 265 (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, 106 S. Ct 1348, 89 L. Ed. 2d 538 (1986).

IV. PLAINTIFFS' NRD CLAIMS ARE TIME-BARRED BY CERCLA SECTION 113(g)(1)'s THREE-YEAR LIMITATIONS PERIOD.

CERCLA has a three-year limitations period for causes of action to recover for NRD, which commences "from the date of discovery of the loss and its connection with the release in question." 42 U.S.C. § 9613(g)(1)(A) ("[N]o action may be commenced for damages . . . unless that action is commenced within 3 years after the later of the following: (A) The date of discovery of the loss and its connection with

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the release in question. (B) The date on which regulations are promulgated[5] under section 9651(c) of this title."). [6]

A. "Discovery" includes both actual and constructive knowledge.

"Discovery" occurs when the trustee "discovered or should have discovered" damages to natural resources through actual or constructive knowledge of damage. *Mathes v. Century Alumina Co., LLC*¸ 2010 WL 2772695, at *6 (D.V.I. July 13, 2010), opinion amended on other grounds on reconsideration sub nom. *Mathes v. Century*

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[5] The limitations provision under CERCLA § 133(g)(1)(B) started to run on March 20, 1987, when DOI completed promulgation of the NRDA regulations. *See California v. Montrose Chem. Corp.*, 104 F.3d 1507 (9th Cir. 1997). Therefore, even though the State was arguably on notice of its claims by 1986, the action would not have accrued until March 20, 1987.

[6] CERCLA § 113(g)(1) also contains the following three exceptions, none of which applies here:

"With respect to any facility listed on the National Priorities List (NPL) [*this site is not on the NPL* (SMF No. 7)], any Federal facility identified under section 120 (relating to Federal facilities) [*this site is not a Federal facility* (SMF No. 8)], or any vessel or facility at which a remedial action under this Act is otherwise scheduled [*although removal actions have been undertaken, no remedial action under CERCLA has been scheduled* (SMF Nos. 9-10)], an action for damages under this Act must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the date referred to in subparagraph (A) or (B)."

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Alumina Co., No. 05-0062, 2010 WL 3310726 (D.V.I. Aug. 20, 2010) (citing *Merck*, 559 U.S. 633, 645-46, 130 S. Ct. 1784, 1794-95 (2010) for the holding that "discovery" under CERCLA § 113(g)(1)(A) follows the common law "knew or should have known" standard). The Ninth Circuit has explained that a plaintiff is on notice of a claim in the CERCLA context when a "reasonable person in Plaintiffs' situation would have been expected to inquire about the cause of his or her injury," and if an inquiry "would have disclosed the nature and cause of plaintiffs' injury so as to put him on notice of his claim." *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002). Thus, a plaintiff is "charged with knowledge of facts that [it] would have discovered through inquiry." *Id.*

B. A "connection" to the release does not require conclusive proof of causation.

Section 9613(g)(1)(A) turns on discovery of the alleged loss and its "connection" to the release in question. That "connection" requirement does not necessitate that causation be proven before the limitations period begins to run. Rather, consistent with application of limitations rules that turn, for example, on discovery of a claim against a particular defendant, notice that losses possibly resulted from the release is sufficient to trigger the statute of limitations. *Hajek v. Burlington N. Santa Fe R.R. Co.*, 14 Fed. App'x 974, 975-76 (9th Cir. 2001) (citing *U.S. v. Kubrick*, 444 U.S. 111, 123 (1979) (finding "it [was] enough that Hajek knew his work was a *possible cause* of his injury to trigger a duty to investigate his work conditions and pursue potential claims") (emphasis added); *Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("But in applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock."); *Ouellette v. Beaupre*, 977 F.3d 127, 136 (1st Cir. 2020) ("[P]ursuant to the federal discovery rule, accrual is delayed until the plaintiffs knows, or should

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know, of those acts. Specifically, a plaintiff must, or should, be aware of both the fact of his or her injury and the injury's *likely* causal connection with the *putative* defendant.") (emphasis added).

Courts have explained that, if limitations rules were construed to require knowledge that an injured party could conclusively prove all elements of a cause of action, the accrual of the cause of action could be delayed indefinitely, and would to some degree be within the control of the plaintiff. For example, in *Beard v. King County*, 889 P.2d 501, 504 (Wash. Ct. App. 1995) (discussing Washington discovery rule), the court held: "[T]he limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, whether or not the party can then conclusively prove the tortious conduct has occurred. . . . If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time-barred."). In the context of alleged contamination-related losses, the "lack of specificity regarding a pinpoint source" does not bar a plaintiff from discovering the loss and will not prevent the NRD claim from accruing. *Mathes*, 2010 WL 2772695, at *6 (holding that a reasonable trustee should have connected knowledge of arsenic being released from a refinery and the detection of arsenic in nearby groundwater to its presence on an adjacent property, even though the specific source from the refinery was not pinpointed). Of course, in this case, not only had Plaintiffs each connected the alleged losses to releases from the Trail Smelter by 1999 at the very latest, each had by then also claimed it was the primary cause of the very damages they waited until 2005 to assert in each of their Complaints.

The United States has recognized these issues in the context of CERCLA NRD in particular. DOI has explained that discovery is not contingent upon the findings in any particular phase of the NRD Assessment ("NRDA"), but rather, as under common

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law, when a reasonable person would be expected to inquire. 43 C.F.R. §§ 11.60-11.84 (explaining the NRDA Type B procedures); *see* 51 Fed. Reg. 27,674, 27,698 (Aug. 1, 1986) (DOI's preamble to the original NRDA regulations explaining the trigger for the § 113(g)(1) statute of limitations is not the injury determination phase of the NRDA, otherwise a trustee "could preserve its cause of action indefinitely by unduly delaying that portion of the assessment process."); *see also U.S. v. Montrose Chem. Corp.*, 883 F. Supp. 1396, 1405 (C.D. Cal. 1995) (rejecting the argument that the "date of discovery" for purposes of §113(g)(1) means the date on which the trustees sign the formal Preliminary Assessment Screen Determination, explaining that "Congress clearly intended to tie one of the statute of limitations prongs to the discovery of the harm, which does not depend on the formal signing or acknowledgment of any particular type of determination," otherwise the date of discovery could be "suspended indefinitely . . . despite the fact that the agency may have had full knowledge of the harm and its connection with the releases many years prior to that date), *rev'd on other grounds by,* 104 F.3d 1507 (9th Cir. 1997).

C. The State discovered discharges from the Trail Smelter and connected those discharges with the alleged losses nearly 20 years prior to filing its NRD claim.

The State connected the discharges from the Trail Smelter to the alleged losses that now make up its NRD claims at least 18 years prior to intervening in the original individual plaintiffs' CERCLA citizen suit in 2004 and 19 years prior to amending its complaint to add NRD claims in November 2005. This is true whether the court applies an actual knowledge standard, or the common law "known-or-should-have-known" constructive knowledge standard.

As described above, the State indisputably had knowledge of discharges from the Trail Smelter and potential damages to natural resources in the Upper Columbia

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River as early as 1986. On April 14, 1986, the WDOE developed a "Preliminary Plan for an Investigation of Metals Contamination in the Upper Columbia River/Franklin D. Roosevelt Lake." SMF No. 11. The plan indicated that a "substantial amount of evidence has now accumulated showing the upper Columbia River (Grand Coulee to international border) is contaminated by several metals." *Id.* After detailing specific findings of contamination and impacts to natural resources, such as elevated metals concentrations in fish tissue and sediments, the Plan states, "[t]he predominant source of metals is thought to be historical discharges by Cominco Limited's metallurgical plant at Trail, British Columbia." *Id.* Thus, by this point (1986), the State was aware of facts that could support the very NRD claim it did not assert until 2005.

Moreover, DOE then undertook an investigation in accordance with the Plan, which it completed in June 1988 (revised December 1989), "An Assessment of Metals Contamination in Lake Roosevelt." SMF No. 12. The Assessment identifies the Trail Smelter as the "primary source" of contamination in the UCR, noting that sediment in the upper reaches contained elevated metals concentrations "attributed to the presence of slag which is discharged from Cominco in the form of coarse-grained sand." *Id.*

The State thus had connected Trail Smelter discharges and damages to UCR natural resources well more than three years before it filed its NRD claim in November of 2005. Its NRD claims are therefore time-barred.

D. The CCT discovered discharges from the Trail Smelter and connected those discharges with the alleged losses 14 years prior to filing its NRD claim.

The CCT connected the discharges from the Trail Smelter to the alleged losses that now make up its NRD claims at least 14 years prior to the State filing its NRD claims in 2005. Eight years prior to its 1999 petition to EPA, the CCT's Environmental Trust Division had conducted a "Border Site Investigation" near Northport,

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Washington on August 13, 1991. SMF No. 16. A report from that investigation concluded that contamination had been observed in the UCR and in sediment dredged from the riverbed and banks of a tributary thereto believed to be from the Trail Smelter. *Id*. The CCT report also referenced the State's 1986 and 1988 studies and the findings therein of elevated metals concentrations in sediments and fish and that the contamination was attributed to slag from the Trail Smelter. *Id*. (citing the reports in SMF Nos. 11-12). The report concluded with the recommendation that EPA conduct a site assessment of the UCR and an attempt be made to "reduc[e], if not eliminat[e], Cominco's discharges into the Columbia." *Id*.

Additionally, in April of 1991, the Tribes also inquired to the Washington State Department of Health (DOH) as to the "possible human health impacts of slag contaminated beaches on upper Lake Roosevelt," after which the DOH undertook a review of existing data and studies of Trail Smelter discharges. SMF No. 17. The CCT's 1991 findings and inquiry alone demonstrate sufficient knowledge to trigger the CERCLA § 113(g)(1) limitations period because, with such observations, the CCT had discovered potential damages to natural resources and connected them with Trail Smelter releases.

At the very latest, by 1999, the CCT had detailed knowledge of the losses it later alleged in this case, and had connected them to the Trail Smelter discharges when the CCT petitioned the EPA to conduct a CERCLA preliminary assessment of the UCR for "hazards to public health and the environment", following a unanimous resolution by the Colville Business Council. SMF No. 24.

Therefore, at the very latest, the CCT had until August 2002 to raise its NRD claims. Because the CCT did not assert its NRD claims until November 2005, the claims are time-barred under CERCLA § 113(g)(1).

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V. REQUEST FOR RELIEF

For these reasons, Teck requests that the Court DISMISS the State's and the Tribes' NRD claims as time-barred under CERCLA § 113(g)(1).

DATED this10th 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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