Paul J. Dayton
OGDEN MURPHY WALLACE, PLLC
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

Attorneys for Plaintiff The Confederated Tribes of the Colville Reservation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

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

RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS

Oral argument: August 11, 2022

I. INTRODUCTION

The Confederated Tribes of the Colville Reservation ("CCT") opposes Teck Metals Ltd.'s (Teck) motion for partial summary judgment based on the statute of limitations stated in 42 U.S.C. §9613(g)(1)(A). Teck's motion fails for multiple

reasons. First, it relies on the wrong statute of limitations for claims by Tribes under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Teck did not even attempt to address 42 U.S.C. §9626(d), the operative statute.

Second, §9613(g)(1) requires the Court to determine whether the statute of limitations for natural resource damages claims is deferred until three years after completion of remedial action at the Upper Columbia River Site (UCR). Teck attempted to deflect this point in a single sentence in a footnote claiming that there is "no remedial action scheduled," Teck's Motion at 9, n. 6, but it has said otherwise in prior briefing, and its position cannot be squared with *Pakootas v. Teck Cominco Metals, Ltd*, 646 F.3d 1214 (9th Cir. 2011) or the statute.

Third, Teck failed to heed the Supreme Court's clear direction that a constructive knowledge argument must start with discovery of the loss, *Rotella v. Wood*, 528 U.S. 549, 555 (2000), and instead started with alleged knowledge of release of metals and gave only passing reference to when CCT discovered the loss. Fourth, it characterizes the loss at issue as "contamination," which is not an actionable loss under CERCLA. The alleged losses here are (1) benthic injury in sediment, (2) reduced sturgeon recruitment, and (3) reduced fishing due to mercury-based state-issued fish advisories. *See* Rule 26(a)(1) disclosures.

Fifth, in its analysis of the alleged release, it erroneously focused on discharges from its Trail smelter when it has been clear since *Pakootas v. Teck Cominco Metals, Ltd.* , 452 F. 3d 1066 (9th Cir. 2006), that actionable releases must occur in the UCR. Sixth, Teck argued that CCT was on notice of its potential claim in 1999, but Teck failed to analyze the period of reasonable investigation

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

following such notice and consequently did not address EPA's investigation and issuance of its 2003 Unilateral Order identifying Teck as a source of hazardous substances released at the UCR Site and requiring its participation in a Remedial Investigation and Feasibility Study ("RI/FS") to identify the extent of such releases and necessary remediation. And finally, Teck ignored that the release of metals from its slag is an ongoing violation, which tolls the statute of limitations until the last release.

Having made all these errors, Teck also failed to address the fact that constructive knowledge is an issue of fact and is rarely amenable to summary judgment. *See Seggos v. Datre*, 17-CV-2684 (MKB), 2022 WL 219960, at *13–18 (E.D.N.Y. Jan. 25, 2022) (denying motion for summary judgment under 42 U.S.C. § 9613(g)(1)(A), despite applying constructive knowledge standard and despite plaintiffs' knowledge, more than three years before filing their claim, that defendants had dumped a large amount of debris at the site).

Teck's statute of limitations analysis treats this case as an ordinary tort and does not attempt to address the complexity of evaluating a 150-river-mile site in a mineral rich region and the difficulty presented in identifying releases of metals from slag (which is not itself a CERCA hazardous substance and which Teck claims is inert) in the UCR and the fate of mercury that is functionally invisible by the time it travels ten miles downriver to the UCR site.[1] And, Teck ignores that CCT does not have the resources of an international mining company or the U.S.

[1] Teck took full advantage of these difficulties in proof in Phase I of this case when it told this court that its wastes had caused no releases in the UCR and any elevated metals were due to other mines, mills and smelters in the region. *See*, ECF #1636.

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

government and may invoke CERCLA processes to address conditions at the UCR. Nonetheless, CCT did what it could and persuaded the U.S. to investigate the UCR. EPA's investigation and 2003 order are the foundation for the litigation to date in which Teck has been found responsible under CERCLA, has agreed with EPA to perform an RI/FS at the Site, has paid CCT and the State more than $10 million in response costs, and will now pay natural resource damages to be determined by this Court.

II. FACTS

A. The Colville Tribes live on the UCR. Teck Metals operates the largest lead-zinc smelter in the world ten miles north of the Canadian border.

CCT is comprised of 12 Tribes who have lived and fished on the UCR since time immemorial. ECF #2507-14. It is a small tribe with limited resources. In 2000, it had 8,741 members. Its per capita income was $27,826 and unemployment exceeded 20%. Declaration of Cindy Marchand in Support of Plaintiff CCT's Response to Defendant's Motion for Summary Judgment on Statute of Limitations.

Teck is a multinational mining company. It has operated a lead-zinc smelter in Trail for more than 100 years. ECF #1955 at 4. Until 1995 it discharged 400 tons of slag per day into the Columbia River as well as liquid effluent containing mercury. *Id.* at 5. Its Manager of Environmental Affairs testified that Teck did not know where its wastes went after they entered the Columbia River. *Id.* at 9. It did not conduct any studies to evaluate the presence or impact of its wastes south of the Canadian Border. *Id.* at 14. In 1991, when pressed by the public and government agencies regarding the consequences of its river discharges, Teck insisted that its slag "had a high degree of chemical stability and is essentially inert

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
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in the river environment." Exh. 18, Declaration of Ashleigh K. Myers at 2-9. It concluded that land disposal of slag was not "an immediate priority and could be delayed without significant environmental consequences…" *Id.* CCT members lived and fished south of the Canadian border, but Teck never warned them—or anyone else—that its discharges were releasing hazardous substances to the UCR environment. To the contrary, it denied any such releases until it was forced to concede otherwise in this litigation. *E.g.*, ECF # 966-1, at 16

B. Elevated metals have been measured in the UCR, but identifying the sources, the location of release and any resulting damage required extensive and expensive investigation and was not accomplished until after the Plaintiffs' filed suit.

By the 1990's, CCT and the State had learned that elevated metals were found in the UCR sediment. The UCR is a mineral rich region and there were many potential sources of metals and other hazardous substances. These included Teck's smelter in Trail, BC, a smelter in Northport, WA that operated earlier in the 20th Century, the municipality of Trail sewage treatment facility, a fertilizer plant in Celgar and at least seven mines and mills located in or adjacent to the UCR. ECF #2507-14 at 7.[2] *See also*, Exh. 1, Declaration of Paul J. Dayton; and Exh. 2, Dayton Dec. Attention focused on Teck because slag was prevalent in the beaches of the UCR and other visible locations.

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[2] Later in attempting to deny responsibility for any of the metals in the UCR, Teck hired experts who claimed the Northport smelter as well as "literally hundreds of mines and mills" as sources of CERCLA hazardous substances now found in the UCR. *See*, ECF #1645 at 2; *See also*, ECF #1611; ECF #1623; ECF #1615.

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Although slag had been observed, it is not a CERCLA hazardous substance and its presence does not, of itself, indicate actionable contamination. Slag is a form of glass generated in high-heat smelter operations, and Teck's experts contend it is inert and does not release metals. ECF #1140-1 at ¶¶16,18,25. *See also,* ECF #1131-1 at 4. It was not until 2010 that experts disproved Teck's claim and demonstrated that its slag is not inert and releases metals in the UCR. *See,* ECF #966-1 at 14; ECF #1995 at 23, 24.

Teck had also disposed of mercury in liquid effluent at the Trail facility. Teck's experts insisted that all such mercury moved through the UCR and denied that any of its mercury remained in the UCR. ECF #1140-1 at ¶18. This was also disproved in 2010, and thereafter Teck conceded that mercury from its Trail discharges has released in the UCR. *See,* ECF #1928, ¶¶13-21.

C. After federal and state studies showed elevated metals in the UCR, CCT Petitioned EPA to investigate and identify responsible parties and determine appropriate remedial measures.

Teck has presented various studies and analyses done by the state or federal government in the 1990s showing elevated metals in the UCR and indicating concern that Teck's smelter was one of the sources of these metals. *See, e.g.* Exhs. 2, 3, 4, 6, 7, 9, 10, 11, Myers Dec. Its motion is based on CCT's 1999 petition to EPA and does not claim prior notice to CCT based on these documents.[3] To the extent relevant

[3] Teck cited excerpts of the deposition of Donald Hurst discussing the report and claimed he is the Tribal Response Program Manager of the Office of Environmental Trust for CCT. That was accurate in 2010 when the deposition was taken, but in 1992-1994, when the survey discussed in his deposition took place, Hurst was a

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901 5th Ave, Suite 3500
Seattle, WA 98164
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herein, these studies do not prove the source of such metals, their location[4] within the 150-river-mile site or resulting injury in such locations. Much more was required to identify the sources of elevated metals and any related resulting injury. For that reason, in 1999, CCT petitioned EPA to conduct a "Preliminary Assessment of the hazards to public health and the environment which are associated with the release or threatened release of a hazardous substance, pollutant or contaminant on lands which include the Reservation."[5] ECF #2507-14. CCT's Petition to EPA was authorized by

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principal at Bison Environmental Consulting, Inc., or the founding member of Fulcrum Consulting, and not an employee of CCT. Exh. 3, Dayton Dec. at 7-8. He had no contact with CCT until 1999. *Id.* at 18. Thus, his knowledge prior to that time may not be imputed to CCT.

[4] Teck cites a newspaper article dated July 26, 2001, Exh. 15, Myers Dec., to claim that in 2001, CCT was told of a pool of mercury approximately 12 feet across. The article is inadmissible hearsay. The quotation of Passmore in the article is also inadmissible hearsay. CCT requests that the article be stricken. In any event the allegation that someone named Carol Uribe (not employed by CCT) claims to have seen a pool of mercury does not prove CCT's notice of injury in the UCR or even knowledge of Teck's release of metals in the UCR. Elsewhere in the article, Patti Stone exclaims that she wants answers to questions about whether people are being harmed by pollution and what can be done. That was the reason for CCT's petition to EPA.

[5] Teck claims CCT conducted its own "investigation" in 1991, but its proof falls short. The cited document, Exh. 8, Myers Dec., does not bear the CCT letterhead or any identifiable mark. A fax transmittal line with the name Environmental Trust (a

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
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CERCLA, §105(d). If the assessment indicates that a release or threatened release may pose a threat to the environment, §105(d) requires the President to evaluate the priority of the Site for remedial action. 42 U.S.C. § 9605(a)(8)(A). Thus, by taking this action CCT had commenced a process that would lead to evaluation and, if necessary, remediation of the UCR.

CCT's petition identified eight bases for concern about potential releases. One was discharges from Teck's facility, but the petition also identified potential industrial contributions from the Spokane River; dioxins, furans and PCBs from a pulp mill in Canada; and metals released from smelter operations in LeRoi, WA. The LeRoi smelter was a source of particular concern because the State had ranked it as the most serious site on the state Hazardous Substances list. The petition also identified seven

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CCT department) is dated ten years later in 2001. The deposition testimony from Don Hurst provided as purported foundation does not identify the document as authored by CCT and states merely that he read it without any indication of when. Exh. 3, Dayton Dec. at 99. On the following page of his deposition, not provided by Teck, he states that he had no knowledge of investigation described therein. *Id.* at 100. In any event, as noted earlier, Hurst had no contact with CCT until 1999, so any knowledge he had of reading it before then cannot be imputed to CCT. Contrary to Teck's suggestion of CCT involvement in this "investigation," other materials provided by Teck indicate that Gary Passmore, a senior CCT representative, expressed surprise ("Whoa") when seeing it in 2001. Exh.15, Myers Dec. Thus, the document lacks identifying foundation, and is inadmissible hearsay. For these reasons it must be stricken.

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
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mines and mills as potential sources of metals including lead and zinc with a map showing their location adjacent to the UCR or its tributaries. *See*, ECF #2507-14.

CCT's petition requested identification of releases to the environment and resulting injury, but it did not identify releases or injuries. In 2001, CCT continued to press for such identification by providing comment on the Washington State Department of Ecology's Draft Reassessment of Toxicity of Lake Roosevelt Sediments. Exh. 16, Myers Dec. at 8. The State's reassessment provided information on overall metals concentrations and related toxicity and gave reason for further investigation, but it did not yield the requisite levels of toxicity for inclusion in the State's section 303(d) list. Exh. 17, Myers Dec. at 23. Nor did it purport to identify specific loss or injury at the site.

D. EPA investigates and in 2003 issues a unilateral administrative order finding Teck to be a potentially responsible party and directing implementation of an RI/FS.

Teck's motion cites the Upper Columbia River Expanded Site Inspection Report done by EPA in October 2002. Exh. 18, Myers Dec. This was work performed as part of the EPA investigation leading up to its 2003 Unilateral Administrative Order ("UAO"), Exh. 4, Dayton Dec., and was intended to evaluate the site's inclusion on the National Priorities List (NPL). The report explicitly stated that the assessment process "did not include extensive or complete site characterization, contaminant fate determination or quantitative risk assessment." Exh. 18, Myers Dec. at 1-1. It was comprehensive, though, in identifying and investigating potential sources, including 60 mines and mills in Stevens and Pend Oreille Counties. *Id.* at 1-2.

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Seattle, WA 98164
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It also investigated the Le Roi smelter, Teck's facility, and contributions from the Celgar pulp mill in Canada.

Teck offers no evidence that the Site Inspection Report was provided to CCT. To be sure, its conclusions were reflected in the 2003 UAO finding that the UCR was eligible for inclusion on the NPL, that hazardous substances as defined in section 101(14) of CERCLA were present at the UCR, actual or threatened release of one or more hazardous substances may present an imminent and substantial endangerment to the public health or welfare or the environment, and Teck is a "responsible party under sections 104, 107, and 122 of CERCLA. Exh. 4, Dayton Dec.

The UAO required Teck to conduct an RI/FS under CERCLA. In 2004, after Teck refused, EPA did not enforce its order, and two CCT leaders, Joseph Pakootas and D.R. Michel, commenced a citizen suit to compel Teck's compliance with the UAO. ECF #1. Teck moved for dismissal claiming that it operated wholly in Canada and was not subject to CERCLA or other U.S. environmental law. Teck lost, ECF #58, and appealed. The U.S. did not intervene or file any pleading in the district court or court of appeals.[6] After EPA did not take action to enforce its order, CCT joined the suit in 2005 and, with the State, alleged six causes of action including the natural resource damages claims at issue here.

On June 2, 2006, EPA and Teck executed the Settlement Agreement for Implementation of Remedial Investigation and Feasibility Study at the Upper Columbia River Site (RI/FS Agreement), Exh. 1, Myers Dec. This agreement

[6] When the case reached the Supreme Court, the United States responded to the Court's inquiry regarding the merits of Teck's Petition for Writ of Certiorari. The Petition was ultimately denied.

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
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implemented the RI/FS required in the 2003 UAO and provided for extensive examination of site conditions. This investigation continues to this date. It has involved extensive scientific study of contamination of the UCR and the need for remediation. Teck claims to have spent more than $130 million on the investigation. Declaration of Whitney J. Fraser in Support of Plaintiff CCT's Response to Defendant's Motion for Summary Judgment on Statute of Limitations.. This work has been a foundation for Plaintiffs' expert work proving Teck's releases in the UCR and resulting damages. Fraser Dec.

As part of the RI/FS Agreement, EPA withdrew its 2003 UAO. Penalties totaling more than $24 million had accrued during Teck's non-compliance with the UAO. Pakootas and Michel asked the district court to award those penalties (for payment to EPA). *Pakootas*, 646 F.3d at 1221. Teck moved to dismiss this claim, invoking the CERCLA section 113(h) pre-enforcement bar and arguing that the RI/FS Agreement was a form of "removal or remedial" action. Thus, EPA's decision not to collect penalties deprived the court of jurisdiction over claims by other parties directed at such penalties. *Id.* at 1218. The court of appeals agreed, observing that EPA and Teck had entered into a "contractual agreement…to perform remediation," *Id.* at 1217, and concluded that suit to recover penalties reserved in that agreement was a "challenge[] to removal or remedial action" and thus barred by section 113(h).

E. In Phase I of this litigation, Teck employed experts to deny any releases of metals from its slag or liquid effluent. CCT and the State developed expert testimony refuting Teck's claims.

Phase I went forward, and Plaintiffs developed an extensive expert case with original scientific work to prove Teck's releases of hazardous substances in the

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UCR—both metals from slag and mercury in effluent. This included lead isotope analysis and PCA multi-factor statistical analysis, fingerprinting Teck as the source of metals released at the UCR. This work was based substantially on work done in the RI/FS. Fraser Dec. Teck contested this case with its own experts and denied any release at the UCR Site. *Id.* In the months before trial, Teck stipulated to releases of metals in the UCR as more fully described in the Phase I Findings of Fact and Conclusions of Law.

F. In 2007, a Trustee Council comprised of Department of Interior, State of Washington, Spokane Tribe of Indians and CCT was formed to identify and develop proof of natural resource damages.

Employing experts to conduct original research, the Trustee Council identified and quantified injury to benthic organisms in sediment in specific locations based on exposure to metals in Teck's slag, injury to sturgeon recruitment as well as reduced fishing in the UCR due to fish advisories because of mercury discharged at Teck's smelter and released to the environment in the UCR. Fraser Dec.; see also, Exh. 5, Dayton Dec. These claims are described in Plaintiffs' Rule 26(a)(1) disclosures.

III. ARGUMENT

On a motion for summary judgment, the court views the facts, and all rational inferences therefrom, in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The moving party bears the initial burden of showing the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To carry this burden, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an

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901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (citation omitted). The moving party must persuade the court that there is no genuine issue of material fact. *Id.*

When the moving party bears the burden of proof on the dispositive issue at trial, however, "its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisf[y] those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing." *Degon v. USAA Cas. Ins. Co.*, 511 F. Supp. 3d 1144, 1154 (D. Or. 2021) (quoting Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2727.1 (4th ed.)). If the movant fails to successfully carry this initial burden, "the nonmoving party has no obligation to produce anything" and "may defeat the motion for summary judgment without producing anything." *Nissan Fire*, 210 F.3d at 1102–03.

CERCLA's statute of limitations is an affirmative defense. *California v. Neville Chem. Co.*, 213 F. Supp. 2d 1115, 1126 (C.D. Cal. 2002). As such, Teck "must establish beyond peradventure *all* of the essential elements" of the defense to warrant judgment in its favor. *Vasquez v. City of Bell Gardens*, 938 F. Supp. 1487, 1494 (C.D. Cal. 1996) (citing *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986)). As the party with the burden of persuasion, Teck "must establish 'beyond controversy every essential element of its [claim or defense]' to satisfy its burden at summary judgment." *BlackBerry Ltd. v. Facebook, Inc.*, 487 F. Supp. 3d 870, 876 (C.D. Cal. 2019) (alteration in original) (quoting *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003)). To defeat Teck's motion, conversely, CCT "need only raise a genuine issue of dispute on a single element…." *Id.*

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

Teck has not met its burden, both because it has not addressed all the elements of the statute of limitations and because questions of fact remain as to whether and when the applicable limitations period began running. This court should therefore deny Teck's motion.

A. By failing to address the governing statute of limitations, Teck fails to shift the burden on summary judgment.

In a motion focused entirely on the statute of limitations, Teck fails to address the operative statute. Teck discusses the three-year limitations period in 42 U.S.C. § 9613 but does not even mention 42 U.S.C. § 9626(d), which applies specifically to CERCLA claims brought by Indian tribes:

> Notwithstanding any other provision of this chapter, ***no action under this chapter by an Indian tribe shall be barred until the later of*** the following:
>
> (1) The applicable period of limitations has expired.
>
> (2) ***2 years after*** the United States, in its capacity as trustee for the tribe, gives written notice to the governing body of the tribe that it will not present a claim or commence an action on behalf of the tribe or fails to present a claim or commence an action within the time limitations specified in this chapter.

42 U.S.C.A. § 9626(d) (emphasis added).

This statute prescribes a two-part analysis. Under part (1), the court must analyze when the period in 42 U.S.C. § 9613 would have expired if applied directly to the Tribe. Under part (2), the court must identify a timeframe based on action (or inaction) of the United States and then add two years to that timeframe. The applicable limitations period is whichever of the two calculated dates expires later.

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901 5th Ave, Suite 3500
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Teck's analysis, however, addresses only part (1). Teck devotes its entire motion to arguing that the three-year period in 42 U.S.C. § 9613 expired before CCT filed its claim. But Teck does not even mention—let alone analyze—when, if at all, the two-year period in part (2) began running. It has not, for example, even contended that the United States ever gave written notice to CCT "that it will not present a claim or commence an action on behalf of the tribe." 42 U.S.C. § 9626(d). Nor has it offered any evidence or argument addressing when the statute of limitations would have begun running as to the United States. Without such analysis, this court cannot begin to consider when the limitations period began to run. *See id*.

Because Teck failed to present any evidence or argument on an essential element of its defense, CCT "may defeat the motion for summary judgment without producing anything." *Nissan Fire*, 210 F.3d at 1102–03. On this basis alone, the court should deny Teck's motion.

B. Questions of fact remain about when a reasonable inquiry would have connected CCT's injury to the actionable releases.

CERCLA's discovery rule requires a claim for damages to be brought within three years after the date the plaintiff discovers "the loss and its connection with the release in question." 42 U.S.C. § 9613(g)(1)(A). Again, however, for Indian tribes, this statute must be analyzed together with 42 U.S.C. § 9626(d). This inquiry raises questions of fact here.

1. Teck fails to shift the burden regarding the discovery rule as applied to the United States.

One of the events that can trigger CCT's two-year period is the United States' failure "to present a claim or commence an action within the time limitations

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901 5th Ave, Suite 3500
Seattle, WA 98164
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specified in this chapter." 42 U.S.C. § 9626(d)(2). Thus, to prevail under the discovery rule, against CCT, Teck must establish two dates: (1) five years after the date the United States discovered CCT's loss and its connection with releases from Teck's slag (the United States' three-year period under 42 U.S.C. § 9613(g)(1)(A) plus CCT's two-year period under 42 U.S.C. § 9626(d)(2)); and (2) three years after CCT discovered the loss and its connection with releases from Teck's slag. 42 U.S.C. § 9613(g)(1)(A). Teck's motion fails unless it proves that both these dates occurred before CCT commenced its action.

Teck has not even attempted to establish when the United States knew about CCT's loss and its connection to the release in question. Teck has thus, again, not shifted the burden, and CCT may defeat its motion "without producing anything." *Nissan Fire*, 210 F.3d at 1102–03. But even if the court were to consider Teck's motion, the factors discussed below establish questions of fact about when either the United States or CCT should have connected CCT's loss to the actionable releases.

2. How long it should have taken to resolve highly technical questions involved in identifying damage to benthic organisms and tying it to releases from Teck's slag is a fact-intensive question.

As explained above, the court need not reach the discovery rule because Teck failed to carry its initial burden on other components of the statute of limitations. CCT, however, offers the following discussion of the discovery rule in the interest of completeness. There are questions of fact about when CCT's cause of action accrued, based on the highly technical and complex questions presented in this case.

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901 5th Ave, Suite 3500
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a. Teck bears the burden of proving both when CCT (or the U.S.) should have inquired about the cause of its loss and when a reasonable inquiry would have revealed the connection between that loss and Teck's releases.

The Ninth Circuit mandates a two-step analysis "to evaluate when a reasonable person would have connected his or her symptoms to their alleged cause." *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002) (citing *Bibeau v. Pac. N.W. Research Found. Inc.*, 188 F.3d 1105, 1109 (9th Cir. 1999)). The first step asks "whether a reasonable person in Plaintiffs' situation would have been expected to inquire about the cause of his or her injury." *Id*. The second is "whether [an inquiry] would have disclosed the nature and cause of plaintiff's injury so as to put him on notice of his claim." *Id*. (alteration in original) (quoting *Bibeau*, 188 F.3d at 1109).

Teck's motion focuses entirely on the first step. Teck argues at length that plaintiffs had information that put them on inquiry notice. But it never discusses what a reasonable inquiry would have involved or when such an inquiry would have given plaintiffs notice of their claims. There are questions of fact on both steps.

b. Teck fails to identify when CCT knew about its loss.

Again, the first step asks whether reasonable persons would have inquired about the cause of their injury. *O'Connor*, 311 F.3d at 1150. This necessarily means that the plaintiff must know about the injury. Indeed, knowledge of injury is a crucial question in any statute of limitations analysis. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000). In a statutory scheme that is silent on the issue (unlike CERCLA), it is discovery of the injury that triggers the limitations period. *Id*. The analysis here is more complicated because CERCLA specifies that it is the discovery of both the loss and its connection to the release that starts the clock. 42 U.S.C. § 9613(g)(1)(A)). But

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the point remains that the discovery rule cannot be analyzed without first identifying what the loss is and when the plaintiff knew about it.

Teck's conclusory analysis on this point is telling. Teck argues for knowledge of loss by claiming the plaintiffs knew about elevated metals concentrations in the UCR. But Teck fails to show that the presence of metals would be an actionable loss, and there is no basis for such a claim under CERCLA.

Here, CCT alleges injury (loss) to the benthos in specific locations, reduced Sturgeon yield, and elevated mercury in fish, which have restricted CCT's members' ability to fish. Teck has not identified any information showing when CCT (or the U.S.) knew about these losses. Nor has Teck offered any argument about when a reasonable person in CCT's position should have known about this damage in a 150-river-mile facility.

Because Teck has not even tried to explain when CCT (or the U.S.) knew about the injury to the benthos or the elevated mercury in fish, this court cannot even begin to analyze whether a reasonable person in CCT's position would have inquired about the cause of that injury. *O'Connor*, 311 F.3d at 1150. As such, Teck fails to shift the burden on the first step of the discovery rule analysis.

c. Teck fails to identify when a reasonable inquiry would have connected CCT's loss to releases from Teck's slag.

Questions of fact remain, as well, regarding the second step, i.e., whether and when an inquiry "would have disclosed the nature and cause of plaintiff's injury so as to put him on notice of his claim." *O'Connor*, 311 F.3d at 1150. The Ninth Circuit's analysis in *O'Connor* is instructive. There, the plaintiffs alleged that hazardous substances released from the Rocketdyne facilities caused them to incur

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

various illnesses. *Id*. at 1143. They filed their claims in 1997. *Id*. at 1145. They all became sick more than one year before filing. *Id*. They claimed that the one-year limitations period, at issue in that case, did not begin running until September 1997, when a UCLA study alerted them to the connection between the Rocketdyne facilities and their illnesses. *Id*.

The district court dismissed the claims as untimely, applying both California's one-year statute of limitations and California's rules for determining when the limitations period commences. *Id*. at 1144. Under those rules, "a plaintiff discovers a claim when the plaintiff 'suspects or should suspect that her injury was caused by wrongdoing.'" *Id*. at 1147 (quoting *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 245 Cal.Rptr. 658, 751 P.2d 923, 927 (1988)). The district court found that publicity about releases of potentially hazardous substances from the Rocketdyne facilities should have led the plaintiffs to suspect, before the UCLA study, that the defendants caused their injuries. *Id*. at 1145.

The Ninth Circuit reversed. The court began by finding that the federal discovery rule is more lenient than the California rule. *Id*. at 1145–46. The court *rejected* "an interpretation of the federal discovery rule that would commence limitations periods *upon mere suspicion* of the elements of a claim" and explained that such a rule would result in a "legal cascade" of "preventative and often unnecessary claims, lodged simply to forestall the running of the statute of limitations." *Id*. at 1148 (emphasis added) (quoting *McGraw v. United States*, 281 F.3d 997, 1003 (9th Cir.2002)). As such, the federal rule preempted the California rule. *Id*. at 1146 (citing 42 U.S.C. § 9658(a)(1)).

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

Applying the statute of limitations applicable to claims under CERCLA for personal injury, the Ninth Circuit found that there were questions of fact on both steps of the discovery rule analysis. *Id*. at 1150–55. Regarding the second step, the court explained that it "focuses on whether, if the Plaintiffs had inquired about the cause of their illnesses, the result of that inquiry would have provided Plaintiffs with knowledge of the connection between the injury and its cause." *Id*. at 1155–56 (citing *Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1029 (5th Cir. 1984)). There may be "barriers to knowledge of causation when 'the facts about causation [are] in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain.'" *Id*. at 1156 (alteration in original) (quoting *U. S. v. Kubrick*, 444 U.S. 111, 122, 100 S. Ct. 352, 355, 62 L. Ed. 2d 259 (1979)).

The court then identified several barriers that affect plaintiffs who are forced to rely on potential corporate defendants and the government to establish causation:

> In addition, even if he attempts to determine the cause of the disease, he is confronted with a mass of complex, controversial and rapidly changing scientific data and opinions. Lacking the resources and knowledge necessary to carry out their own research into causation, ***potential plaintiffs must rely on potential defendants—the government and large commercial enterprises—which have the resources to carry out the necessary studies***.

Id. (emphasis added) (quoting *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381, 1385 (10th Cir. 1985)). "An average plaintiff alleging a connection between latent disease and exposure to hazardous substances does not have the means to conduct the type of comprehensive epidemiological study necessary to bridge the causation gap." *Id*.

"If Plaintiffs could not have discovered that Defendants caused their injuries prior to the study's release despite duly inquiring," the court explained, "then they

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

timely filed their claims." *Id*. The court then noted that there was conflicting evidence "as to ***when Plaintiffs had the means to test*** the potential causes of their diseases in a way that would 'disclose[ ] the nature and cause' of their injuries so as to put them on notice of their claims." *Id*. (alteration in original) (emphasis added) (quoting *Bibeau*, 188 F.3d at 1109).

This conflict raised "issues of fact regarding whether, assuming Plaintiffs were on inquiry notice of their claims, they could have discovered their claims through reasonable investigation." *Id*. Because material issues of fact existed "regarding when, under the federal discovery rule, Plaintiffs knew or should have known that Defendants' contamination caused their injuries, the district court erred in concluding that Plaintiffs had discovered all of the essential facts constituting their cause of action prior to release of the 1997 UCLA study." *Id*. at 1156–57. The court concluded that a jury must decide "***when Plaintiffs had the means to discover*** the facts to support their claim." *Id*. at 1157 (emphasis added).

Although this case involves a different statute of limitations under CERCLA, the complex causation questions require the same analysis. Teck downplays the complexity of these questions by claiming that the plaintiffs knew it was dumping slag into the UCR. But that is not the actionable release in this case. Rather, it has been well established that the actionable release is the leaching of metals from Teck's slag after it settles on the riverbed. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1075 (9th Cir. 2006) ("*Pakootas I*") (quoting 42 U.S.C. § 9607(a)(4)). Thus, the facts necessary to support CCT's claim included the facts that metals leach from Teck's slag and that these same metals have killed the benthic organisms that fish in the UCR depend on for food.

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

These questions are at least as complex—and costly to answer—as the causation questions in *O'Connor*. Indeed, Teck represents that it has spent more than $130 million on EPA's study of the UCR. Fraser Dec. at ¶ 24. If Teck cannot establish "beyond controversy" (*BlackBerry*, 487 F. Supp. 3d at 876) that CCT could have answered these questions through reasonable inquiry before November 7, 2002, then Teck's motion fails. *O'Connor*, 311 F.3d at 1156. This analysis must account for the high cost involved in such an inquiry and the need to depend on the government's resources and Teck's cooperation. *See, Id.*

On this point, it is worth noting Judge Suko's observation in a similar action against Teck, albeit on a Rule 12 motion, that the complaint "reasonably suggests it was not until after 2010 that individuals residing in the Upper Columbia River Region (UCRR), or who once resided there, knew or had reason to know that emissions from Teck's smelter could be responsible for their specific health problems and that the same was susceptible of proof so that they had a legal right to maintain an action against Teck." *Anderson v. Teck Metals, Ltd.*, CV-13-420-LRS, 2015 WL 59100, at *2 (E.D. Wash. Jan. 5, 2015).

In this case, the earliest document that Teck cites, purporting to reflect CCT's knowledge about damage caused by Teck's waste, is CCT's 1999 letter requesting an EPA investigation. ECF #2507-14. Although Teck proffers earlier documents, it has not presented evidence that CCT knew about any of them before 1999.

What the 1999 letter shows is that CCT was making reasonable efforts to inquire about its potential claim. The letter is sent "in furtherance of" an "Environmental Agreement" between EPA and CCT. *Id.* at 2. It requests that the EPA assess "the hazards to public health and the environment which are associated

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

with" a "release or threatened release of a hazardous substance, pollutant, or contaminant…." *Id.* at 6. It identifies several substances of concern, including "metals," and states that the "primary source" of the metals "appears to be a lead-zinc smelter" in British Columbia, but also notes that the contamination could come from the Spokane River. *Id.* at 7. It goes on to identify studies that had been done so far and states that these revealed contamination of the bed sediments. *Id.* at 8. It concludes by asking EPA to initiate a "preliminary assessment" of the described releases. *Id.* at 11.

The 1999 letter and the other exhibits to Teck's motion demonstrate that, throughout the 1990s and into the 2000s, CCT and the State were trying to ascertain whether Teck's slag was causing harm. They knew that Teck was dumping slag into the river. They also knew that slag is a relatively inert, glass-like substance, and Teck's experts were insisting that it does not leach metals. The fact that there was slag in the river, therefore, does not on its own establish that releases from the slag are causing damage to natural resources.

As described above, establishing that causal connection was an expensive, time-consuming process—made costlier and longer by Teck's obstreperous conduct. EPA concluded its preliminary assessment in 2000 and proceeded to conduct an expanded site investigation that was completed in 2003. The conclusion from these four years of study was that metal contamination was present in the lake and river sediments and that a more detailed investigation was needed to evaluate possible risks to human health and the environment. Fraser Dec. at ¶ 6.

Notably, the December 2003 UAO does not state definitively that Teck's slag is causing damage to natural resources. Rather, it orders Teck to undertake the RI/FS

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

"to determine the nature and extent of contamination and the threat to the public health or welfare or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants." Exh. 4, Dayton, Dec. at 2. Thus, even with the studies conducted in the 1990s as background, EPA's four-year preliminary assessment and expanded site investigation arrived only so far as requiring Teck to conduct additional studies to determine what loss it had caused. Teck refused to comply until it reached an agreement with EPA in 2006. Fraser Dec. at ¶ 7. And CCT's expert testified as late as 2015 that scientists were still "firmly in the middle" of the RI/FS. Fraser Dec. at ¶ 10.

In the years after CCT's request to EPA in 1999, an "enormous amount of data" has been required to establish the basic facts regarding Teck's liability under CERCLA and the extent of human health and ecological risk, natural resource injuries, and lost natural resource services. Fraser Dec. at ¶ 11. As CCT's expert explains, it is a complex matter to prove that metals from Teck's smelter waste streams, discharged into the Columbia River in Canada, have come to be located in the United States and are being released from the sediment in bioavailable forms that cause toxicity to organisms. *Id*. This work has required statistical analyses that rely on hundreds of samples of various types, such as sediment, surface water, and invertebrate toxicity bioassays. *Id*. Indeed, expert witnesses relied heavily on sediment sampling conducted by EPA as part of the expanded site investigation, from 2001 to 2003, to establish the presence of Teck's hazardous substances in the U.S., and the forms in which these are released into the environment, in Phase 1 of this litigation. Fraser Dec. at ¶ 18.

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

Under these facts, *O'Connor* controls this case and mandates denial of Teck's motion. Considering the enormous effort, over many years and especially from 1999 to 2003, that went into identifying a specific loss and the connection to Teck's releases, there is at least a question of fact whether a reasonable inquiry could have established that connection before November 7, 2002.

C. The statute of limitations was reset when a remedial action was scheduled in December 2003.

The 2003 UAO exposes another defect in Teck's motion. 42 U.S.C. § 9613(g)(1) contains two prongs, denoted as (A) and (B), and then an exception to the limitations set forth in those prongs. The exception provides that, for "any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or *facility at which a remedial action under this chapter is otherwise scheduled*," the action "must be commenced within 3 years after the completion of the remedial action…." 42 U.S.C. § 9613(g)(1) (emphasis added).

Teck addressed this exception in a footnote. Regarding facilities "at which a remedial action … is otherwise scheduled," Teck simply avers that "although removal actions have been undertaken, no remedial action under CERCLA has been scheduled." Nowhere does Teck even attempt to grapple with the meaning of these terms. Nor does it offer any explanation, in fact or law, for why the work that occurred should be characterized as "removal" as opposed to "remedial." This is yet another failure by Teck to shift the burden on summary judgment.

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

CCT joins in the arguments submitted by the State regarding why the UCR was a facility at which a remedial action was "otherwise scheduled" and offers the following additional observations.

A "remedial action" was "otherwise scheduled," for purposes of this statute, in 2003 when EPA issued its UAO. The Ninth Circuit adopted that interpretation when it affirmed this court's dismissal of the plaintiffs' claim for penalties against Teck. *See Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214 (9th Cir. 2011) ("*Pakootas II*"). Teck had violated the UAO for 892 days, until it reached a settlement with EPA in June 2006. *Id*. at 1217–18. As part of that settlement, EPA agreed not to seek penalties for Teck's 892 days of noncompliance, conditioned on Teck's satisfactory performance of its cleanup obligations. *Id*. at 1218. Teck then moved to dismiss the plaintiffs' claim for such penalties. *Id*.

The Ninth Circuit held that the plaintiffs' claim for penalties was barred by 42 U.S.C. § 9613(h). That statute bars "challenges to removal or remedial action…." *Pakootas*, 646 F.3d at 1220 (quoting 42 U.S.C. § 9613(h)). It "withholds federal jurisdiction to review ... claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute 'challenges' to ongoing CERCLA cleanup actions." *Id*. (alteration in original) (quoting *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 329 (9th Cir. 1995)).

The plaintiffs asserted jurisdiction under subsection (h)(2), which allows an "action to enforce an order issued under section 9606(b)(2) of this title." *Id*. at 1219 (quoting 42 U.S.C. § 9613(h)(2)). The court held, however, that (h)(2) applies to suits brought by the federal government and that a separate subsection, (h)(4), applies to citizen suits for penalties. *Id*. at 1225. And the court explained that a suit under (h)(4)

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

cannot be brought "where a *remedial action is to be undertaken* at the site." *Id*. at 1224 (emphasis added) (quoting 42 U.S.C. § 9613(h)(4)). The court then opined that this careful statutory structure "would be gutted" if the plaintiffs could escape the limitation in (h)(4) by seeking penalties under (h)(2). *Id*.

The Ninth Circuit's ruling in Teck's favor thus hinged on a "remedial action" being set "to be undertaken at the site." 42 U.S.C. § 9613(h)(4)). But for that factor, subsection (h)(4) would have precluded Teck's motion on the penalties claim. The pendency of a remedial action is thus the law of the case. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) ("a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case") (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)).

Teck appears to argue that a "remedial action" being "otherwise scheduled" refers to sites for which a record of decision for remedial action has been issued. That interpretation conflicts with the structure of 42 U.S.C. § 9613(g)(1).

Congress placed facilities "at which a remedial action under this chapter is otherwise scheduled" as the third item in a three-item list. The first two items are *types* of sites: sites on the NPL and "any Federal facility identified under section 9620 of this title (relating to Federal facilities)." NPL sites are "top priorities for cleanup and are eligible for CERCLA-financed remedial action." *Pakootas II*, 646 F.3d at 1217. The portion of § 9620 relating to "Federal facilities" discusses facilities owned or operated by the United States and provides that they are subject to all guidelines, rules, regulations, and criteria applicable to other sites that are the subject of preliminary assessments, evaluations, remedial actions, or inclusion on the NPL. 42 U.S.C. § 9620(a)(2). The third item must be read as likewise referring to types of

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

facilities—sites that are the subject of assessment, evaluation, or cleanup efforts—rather than as sites identified by a specific stage in the administrative proceedings.

Under the *ejusdem generis* rule, "where general words follow an enumeration of specific terms, the general words are read as applying only to other items akin to those specifically enumerated." *Sacramento Reg'l Cnty. Sanitation Dist. v. Reilly*, 905 F.2d 1262, 1269 (9th Cir. 1990) (quoting *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588 (1980)). In *Sacramento Reg'l*, for example, the Ninth Circuit construed a statute that defined "construction" as including preliminary studies, structural or legal or financial investigations, and field testing, "or other necessary actions." *Id*. at 1269. Applying *ejusdem generis*, the court concluded that "other necessary actions" referred "to actions which constitute a part of the planning and preparation stage, actions similar to those listed in the part of the statutory definition that precedes the use of the phrase." *Id*. By adding the phrase, Congress established that it did not intend to limit the statute's applicability "to the specific activities listed in [the statute], and that the costs of other steps within that category" were included in the definition. *Id*.

Likewise, here, by identifying NPL-listed sites, Federal facilities, and facilities at which remedial action is otherwise scheduled, Congress intended that being listed on the NPL or identified as a federal facility under § 9620 is not the only way a site can qualify for the exception in 42 U.S.C. § 9613(g)(1). Sites can also qualify if they are the subject of efforts like those applicable to NPL sites and federal facilities.

Because the UAO demanded that Teck undertake an RI/FS, the UCR was such a facility as of December 2003. From that point, CCT has until three years after the

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

remedial action is completed to commence this action. Because the remedial action has not been completed, the limitations period still has not expired.

D. The continuing violation doctrine tolls the statute of limitations until the last release from Teck's slag.

Another factor that prevents the limitations period from expiring, even now, is the fact that metals continue to leach from Teck's slag. "Under the continuing violation doctrine, 'repeated instances or continuing acts of the same nature, as for instance, repeated acts of sexual harassment or repeated discriminatory employment practices[,]' toll the accrual of a claim until the last unlawful act." *Cardona v. United States*, 16-CV-0546-AJB-BGS, 2017 WL 3337144, at *3 (S.D. Cal. Aug. 4, 2017) (alterations in original) (quoting *Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir. 1995)). As the Supreme Court explains, statutes of limitations "are intended to keep stale claims out of the courts," but where "the challenged violation is a continuing one, the staleness concern disappears." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380–81 (1982).

This doctrine has been applied in actions involving environmental cleanup. *See, e.g.*, *Harmon Indus., Inc. v. Browner*, 19 F.Supp.2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999). In *Harmon*, for example, a manufacturing company disposed of spent solvents by throwing them out its assembly plant's back door, onto the ground, every one to three weeks. This went on from 1973 to 1987. *Id*. at 990. The EPA filed an administrative complaint in 1991. *Id*. at 998. The company claimed that the action was untimely, under the five-year statute of limitations. *Id*. The court rejected this argument, finding that "the continuing

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

violation doctrine applies" and "the statute of limitation runs from the date of the most recent violation." *Id*. at 999.

CERCLA liability arises from "a 'release' or 'threatened release' of a hazardous substance from the facility into the environment." *Pakootas I,* 452 F.3d at 1074 (quoting 42 U.S.C. § 9607(a)(4)). The Ninth Circuit has already determined that "the leaching of hazardous substances from the slag at the Site is a CERCLA release." *Id*. at 1075. As such, every time hazardous substances leach from the slag, there is a new CERCLA violation because there is a new "release."

Teck does not contend that it has removed all its slag from the UCR. To use the Supreme Court's words, Teck's "wooden application" of § 9613(g)(1), "which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act…." *Havens Realty*, 455 U.S. at 380. The limitations period is tolled until the last occurrence of leaching from Teck's slag. *Harmon*, 19 F.Supp.2d at 999. And because the day that Teck's slag stops leaching has not yet arrived, the limitations period has not yet even begun to run.

E. Equitable tolling is justified.

Finally, CCT agrees with the State that, if the court finds that the statute expired before CCT filed its claim, equitable tolling should apply. This court may equitably toll the statute of limitations where the plaintiff "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). CCT pursued its rights diligently when it reasonably relied on EPA to investigate its concerns. Had the UCR been listed on the NPL, consistent with the UAO, there would be no

OGDEN MURPHY WALLACE, P.L.L.C.
901 5th Ave, Suite 3500
Seattle, WA 98164
Tel: 206-447-7000/Fax: 206-447-0215

question that this action is timely. Extraordinary conduct by Teck to block that listing, combined with EPA's failure to enforce its own order, forced the plaintiffs to bring this action. Dismissing the action as untimely would improperly reward Teck for its obstreperous conduct.

IV. CONCLUSION.

The court should deny Teck's motion, both because it fails to shift the burden of production to CCT and because questions of fact preclude summary judgment.

DATED this 21st day of June, 2022.

OGDEN MURPHY WALLACE, P.L.L.C.

By: */s/ Paul J. Dayton*

Paul J. Dayton, WSBA #12619
Attorneys for Plaintiff The Confederated Tribes of the Colville Reservation
Ogden Murphy Wallace, PLLC
901 5th Ave, Suite 3500
Seattle, WA 98164
Telephone: 206-447-7000
Fax: 206-447-0215
Email: pdayton@omwlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2022, I caused the foregoing document 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/ Paul J. Dayton

PAUL J. DAYTON, WSBA #12619
901 Fifth Avenue, Suite 3500
Seattle, Washington 98164-2008
Telephone: (206) 447-7000
Fax: (206) 447-0215