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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,

Defendants.

v.

TECK COMINCO METALS LTD., a  
Canadian corporation,

Defendant.

NO. 2:04-CV-00256-SAB

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

Date: August 11, 2022 at 2:30 pm

With Oral Argument

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## I. INTRODUCTION

The Confederated Tribes of The Colville Reservation (CCT or the Colville Tribes or Colvilles) have lived on the banks of the upper Columbia River and fished its waters since time immemorial. The United States has granted CCT reservation lands adjacent to the upper Columbia River (UCR) and preferred hunting and fishing rights in the north half of those lands including the western half of the Columbia River (collectively the “North Half”) and paramount rights in Lake Roosevelt adjacent to its current reservation boundaries.

Implementing and protecting these rights, CCT has been an active part of river management for itself and in coordination with the State of Washington. And, it has been a leading actor in decades of work with the United States Environmental Protection Agency (EPA) and the State of Washington and litigation in this Court all directed to identifying parties responsible for contamination of the UCR and ultimately demonstrating Teck Metals Ltd’s (Teck) legal responsibility to investigate and remediate its releases of hazardous substance and for resulting damages in that river.

As a member of the four party Trustee Council comprised of CCT, the United States Department of the Interior, the State of Washington and the Spokane Tribe of Indians, CCT has developed natural resource damages claims against Teck for injuries in the upper Columbia River and its own unique resulting tribal service losses, as authorized by the Comprehensive Environmental Compensation and Liability Act, 42 U.S.C. §9607 (CERCLA).

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1 Section 9607(f) of CERCLA gives the Colville Tribes the right to proceed  
 2 with these natural resource damages claims as co-trustee with the State and for its  
 3 own account with respect to tribal service losses for all resources “belonging to,  
 4 managed by, controlled by, or appertaining to” the Colville Tribes. Teck now  
 5 moves to dismiss the Colvilles’ natural resource damages claims including its tribal  
 6 service loss claims for lack of standing. On this mixed question of law and fact,  
 7 there is ample evidence demonstrating the Colvilles’ trusteeship so Teck’s motion  
 8 must be denied.

9 Teck’s motion misunderstands how trusteeship is analyzed under CERCLA.  
 10 It focuses on the question of sovereignty and control over the riverbed and the fish  
 11 as if a trustee must have such attributes and once ownership or control is found the  
 12 inquiry is ended. While these concepts are relevant, CERCLA cases apply  
 13 trusteeship more broadly to ensure that all affected parties are before the court—and  
 14 no double recovery occurs. “[T]rusteeship is not an all or nothing concept. In fact,  
 15 in many instances co-trustees are the norm and not the exception.” *Coeur d’Alene*  
 16 *Tribe v. Asarco*, 280 F. Supp 2d 1094, 1115 (D. Idaho 2003), *as reconsidered*, 471  
 17 F. Sup 2d 1063 (D. Id. 2005) (*Coeur d’Alene I*). This is implicit in CERCLA’s  
 18 identification of alternate bases of trusteeship and the trustees’ fiduciary  
 19 responsibility to use any natural resource damage recoveries to restore injured  
 20 resources. 42 U.S.C. §9607(f)(1). The four trusteeship criteria are alternatives so  
 21 one is enough and necessarily multiple parties may satisfy the standard.  
 22

23 Recognizing this, Judge Lodge, in the Couer d’Alene case addressing the  
 24 consequences of mining contamination, *U.S v. Asarco, Inc.*, 471 F. Supp. 2d 1063  
 25 (D. Idaho 2005) (*Coeur d’Alene II*), ruled that all plaintiffs including the United  
 26

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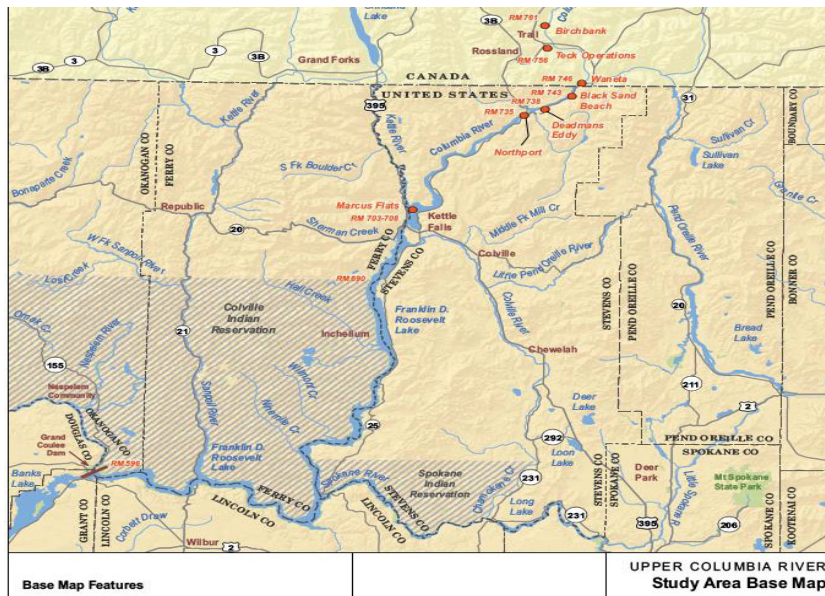
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States and a Tribe were co-trustees over the natural resources in question. He reasoned that the natural resource damages recovery, if any, is not “for the benefit of a given party, but goes to the trustee as the fiduciary to accomplish the stated goals.” The court in *Confederated Tribes and Bands of the Yakama Nation v. Airgas USA, LLC*, 435 F. Supp. 3d 1103 (D. Or. 2019) (*Yakima*) analyzed the necessary parties to a natural resource damages claim and applied a similar approach; “Plaintiff could recover on behalf of its joint trustees. Because the joint trustees share the same interest—as long as the trustee who recovers restores the natural resource--the interests of the other joint trustees will not be jeopardized.” *Id.*, at 1110.

This means that the State and CCT acting as co-trustees as to jointly held claims may prosecute these claims and it will be for them, in concert with the remaining members of the Trustee Council, to determine use of any damage award to address damages to the affected natural resources.

## II. History of the Colvilles’ Relation to the Land and Waters of the UCR.



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1           **A. Colville Indian Reservation History and CCT Hunting and**  
2           **Fishing Rights**

3           The Colville Indian Reservation (Reservation) was established by Executive  
4           Order of July 2, 1872, attached hereto as Appendix A. As originally established,  
5           the Reservation was “bounded on the east and south by the Columbia River, on the  
6           west by the Okanagan River, and on the north by the British possessions...”  
7           *Antoine v. Washington*, 420 U.S. 194, 194 n. 3 (1975) (*Antoine*) (quoting Exec.  
8           Order of July 2, 1872). A public land decision dated May 29, 1914, held that the  
9           Reservation boundary was located at the middle of the channel of the Columbia  
10          River where it bordered the Reservation. *J. H. Seupelt*, 43 I.D. 267, attached hereto  
11          as Appendix B. This decision rested in part on the language of the 1872 Executive  
12          Order and the general rule that for boundaries of states, “the boundary extends to  
13          the thread of the stream where a stream forms the boundary.” *Id.* at 268. This was  
14          confirmed in a 1974 Department of Interior Solicitor Opinion. Appendix C,  
15          Opinions of the Solicitor of the Department of the Interior Relating to Indian  
16          Affairs, pp. 2063-71.

17                 In 1890, Congress enacted a statute authorizing a commission to negotiate  
18          the withdrawal of a portion of the Reservation. The commission and Tribes  
19          reached an agreement in 1891 (1891 Agreement) whereby the Tribe would cede  
20          the northern portion of the Reservation in consideration for payment of \$1.5  
21          million and certain rights. See Appendix D. Article 6 of the 1891 Agreement  
22          expressly provided that “the right to hunt and fish in common with all other  
23          persons on lands not allotted to said Indians shall not be taken away or in anywise  
24          abridged.” *Id.* The 1891 Agreement was ratified by Congress through a series of  
25          

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1 statutes. *See*, Appendix E, Act of July 1, 1892, 27 Stat. 62; Appendix F, Act of  
 2 June 21, 1906, 34 Stat. 325, 377-78 (statute “carr[ied] into effect the [1891]  
 3 agreement,” and authorized appropriation of \$1.5 million)

4 Federal legislation implementing the 1891 agreement described the ceded  
 5 area with a point of beginning located “in the middle of the channel of the  
 6 Columbia River.” Appendix E. In addition, a 1974 Department of Interior Solicitor  
 7 Opinion again affirmed that the Reservation’s boundaries extend to the middle of  
 8 the River, and that the Tribes therefore hold “title to those portions of the original  
 9 riverbed within the boundaries of [the] reservation[.]” Appendix C.

10 Relevant attributes of CCT’s reserved rights in the ceded North Half can be  
 11 understood through several court decisions. First, CCT members have a superior  
 12 right to hunt and fish in the North Half compared to non-Indians. In *Antoine*, the  
 13 Supreme Court held that CCT’s reserved “right to hunt and fish in common”  
 14 precluded Washington State from regulating tribal members’ hunting activities—  
 15 and by the same logic, its fishing activities<sup>1</sup>—in the North Half, unless the  
 16 regulation was a reasonable and necessary conservation measure. *Antoine*, 420  
 17 U.S. at 205, 206–207. Conversely, the state may regulate or outright prohibit  
 18 hunting and fishing by non-Indians for any reason whatsoever. *Id.*

19  
 20  
 21  
 22  
 23 <sup>1</sup> Although *Antoine* concerned the state’s ability to regulate CCT members’ right to  
 24 hunt in the North Half, *Antoine* also recognized its analysis would apply to the right  
 25 to fish—that is, the state may only regulate CCT’s right to fish in the North Half  
 26 when necessary for conservation. *See Antoine*, 420 U.S. at 207

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1 The Supreme Court interpreted treaty language with Washington Indian  
 2 tribes that stated they had the “right of taking fish, at all usual and accustomed  
 3 grounds and stations . . . in common with all citizens of the Territory” as securing  
 4 “a right to harvest a share of each run of anadromous fish that passes through tribal  
 5 fishing areas.” *Washington v. Washington State Commercial Passenger Fishing*  
 6 *Vessel Ass’n*, 443 U.S. 658, 661–62, *modified sub nom. Washington v. United*  
 7 *States*, 444 U.S. 816 (1979). *See also, Protecting Habitat for Off-Reservation*  
 8 *Tribal Hunting and Fishing Rights: Tribal Comanagement As A Reserved Right*,  
 9 30 Env’tl. L. 279, 281–82 (2000) (“Critical to the exercise of such rights is the  
 10 existence, health, and vitality of the resources on which such rights depend—fish  
 11 to be harvested, game to be hunted, and plants to be gathered”).

12 Therefore, with respect to the reserved fishing right, CCT has the right to a  
 13 portion of the harvestable fish in the North Half, which encompasses the Columbia  
 14 River.  
 15

16 **B. The Grand Coulee Dam Land Acquisition and CCT’s**  
 17 **Paramount Use for Hunting, Fishing and Boating Purposes.**

18 Pursuant to the Act of 1940, codified at 16 U.S.C. § 835d, the United States  
 19 acquired all right, title, and interest of the Tribes in the Spokane and Colville  
 20 Reservations underlying Lake Roosevelt adjacent to reservation lands for the  
 21 construction, operation, and maintenance of the Columbia Basin Project. *Id.*  
 22 Congress also provided that in lieu of reserving rights of hunting, fishing, and  
 23 boating to the Tribes, the Secretary of Interior was directed to “set aside  
 24 approximately one-quarter of the entire reservoir for the paramount use of the  
 25 Tribes for hunting, fishing, and boating purposes.” 16 U.S.C. § 835d (emphasis  
 26

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1 added). This “paramount use” is “subject only to such reasonable regulations as the  
 2 Secretary may prescribe for the protection and conservation of fish and wildlife.”  
 3 *Id.*; *Cassidy v. United States*, 875 F. Supp. 1438, 1447 (E.D. Wash. 1994).

4 The term “paramount” indicates “Congress intended that the Tribes be  
 5 accorded more than just equal access to the Reservation Zone for fishing, hunting,  
 6 and boating. Rather, the Tribes' access to the Reservation Zone for the designated  
 7 purposes was to be chief among all users of the area.” *Cassidy*, 875 F. Supp. at  
 8 1450–51. The court reasoned that “Congress' intent to accord the Tribes' supreme  
 9 access to the Reservation Zone for hunting and fishing is further illustrated by its  
 10 command that the Tribes' right of access be subject only to reasonable regulations  
 11 implemented by the Secretary of Interior to protect and conserve fish and wildlife.”  
 12 *Id.* Like CCT’s reserved fishing rights in the North Half, CCT’s paramount use of  
 13 Lake Roosevelt for fishing is subject only to reasonable conservation regulations,  
 14 which would include “the take” of fish. *See Antoine*, 420 U.S. at 207.

### 16 **C. The Colvilles’ Management of UCR Fisheries.**

17 In 1990, the Tribes signed the Lake Roosevelt Cooperative Management  
 18 Agreement (“LRMA”) along with the Spokane Tribe of Indians, and several  
 19 Department of Interior bureaus, including the National Park Service (“NPS”),  
 20 Bureau of Reclamation (“BOR”), and Bureau of Indian Affairs (“BIA”).  
 21 Declaration of Cody Desautel In Support of Response to Defendant’s Motion For  
 22 Partial Summary Judgment at ¶4 and Exhibit A. The LRMA recognizes that some  
 23 of the land acquired by BOR for the Grand Coulee dam is located within the  
 24 Colville Indian Reservation boundaries, that those boundaries were not changed by  
 25 this acquisition, and that the Tribes retain certain governmental authority and  
 26

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1 responsibility within the exterior boundaries of the Reservation. *Id.* The LRMA  
2 created a Reservation Zone (comprised of the area of Lake Roosevelt overlying the  
3 Reservation) within which CCT “shall manage, plan, and regulate all activities,  
4 development, and uses that take place within that portion of the Reservation Zone  
5 within the Colville Reservation in accordance with applicable provisions of federal  
6 and tribal law....” *Id.*, Exhibit A §IV.D.3.a.

7  
8 Since the LRMA was signed, CCT has developed and managed resident  
9 fisheries in Lake Roosevelt. Desautel Dec. at ¶5. Mr. Desautel, the Natural  
10 Resources Department Director, has provided a detailed account of this and other  
11 CCT management efforts in his supporting Declaration. In particular, CCT has  
12 expended considerable resources in furtherance of restoration efforts, including but  
13 not limited to restoration of resident native redband trout, white sturgeon, burbot,  
14 and kokanee populations in Lake Roosevelt. *Id.*

15 These restoration efforts include the Lake Roosevelt Fishery. The Lake  
16 Roosevelt Fishery is co-managed by the Lake Roosevelt Management Team  
17 (“LRMT” or “co-managers”), which is comprised of CCT, Washington  
18 Department of Fish and Wildlife (“WDFW”), and the Spokane Tribe of Indians.  
19 Desautel Dec. at ¶8. The monitoring and evaluation of the Lake Roosevelt fishery  
20 is a coordinated effort by the co-managers. *Id.*

21 The co-managers designed the Northern Pike Suppression and Monitoring  
22 Project to address the Northern Pike colonization of Lake Roosevelt. Desautel Dec.  
23 at ¶9. CCT leads several of the Project’s initiatives. *Id.* CCT provides vessel and  
24 crew personnel to do this. *Id.* CCT also developed and leads in the management of  
25 the Northern Pike Reward Program, which incentivizes anglers to remove Northern  
26

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1 Pike from Lake Roosevelt. *Id.* CCT secured funding, which includes CCT internal  
2 funds, to support the Reward program. *Id.*

3 The co-managers also created the Upper Columbia White Sturgeon  
4 Recovery Plan. Desautel Dec. at ¶10. The main directive of the plan is to is to  
5 ensure the persistence and viability of naturally-reproducing populations of white  
6 sturgeon in the upper Columbia River and restore opportunities for subsistence use  
7 by the CCT and recreational use by the citizens of Washington State if feasible. *Id.*  
8 As part of this program, the co-managers have monitored annual sub-yearling  
9 recruitment, conducted periodic population assessments, continued implementation  
10 of conservation aquaculture program, and periodic re-assessment of conservation  
11 aquaculture program policies and protocols. *Id.*

12 Moreover, there are a series of projects for which CCT is solely responsible  
13 for implementation or is the sole lead co-manager of the project. Desautel Dec. at  
14 ¶11. These projects include (1) the White Sturgeon Enhancement project, which is  
15 intended to complement the existing Upper Columbia White Sturgeon Recovery  
16 Plan; (2) the Chief Joseph Kokanee Enhancement Project overseeing the testing of  
17 a strobe light system to help mitigate fish entrainment; and (3) Phase III of the  
18 Lake Roosevelt Rainbow Trout: Habitat/Passage Improvement Project. *Id.* at  
19 ¶11(a); (d); (f).

20  
21 **D. CCT's Management Initiatives in the UCR.**

22 CCT and the WDFW entered into an agreement on April 4, 1998, ("WDFW  
23 Agreement") in order to improve and protect the fish and wildlife on the Colville  
24 Indian Reservation and in the North Half. *Id.* at ¶12 and Exhibit D. In accordance  
25  
26

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1 with this agreement, CCT and WDFW work in closely coordinated efforts each  
2 year to set fishing regulation in the entirety of the North Half. *Id.* at ¶13.

3 CCT and WDFW meet annually in order to assess the status of natural  
4 resources in the Colville Indian Reservation and the North Half and make  
5 necessary action plans, such as creating a targeted fishing action plan for one  
6 cohort of sturgeon to reduce genetic over-representation. *Id.*

7 Additionally, the WDFW Agreement gives CCT the ability to work with the  
8 WDFW to enforce fishing regulations. *Id.* at ¶16. Under this agreement, CCT can  
9 stop any angler regardless of Tribal status and check if there has been a fishing  
10 regulation violation. *Id.* CCT works with WDFW to enforce the fishing regulations  
11 both in the Colville Indian Reservation and the North Half. *Id.* at ¶16.  
12

13 Finally, CCT is part of the Upper Columbia United Tribes (“UCUT”), which  
14 is an intertribal organization including CCT, Coeur d’Alene Tribe of Indians,  
15 Kalispel Tribe of Indians, Kootenai Tribe of Idaho and Spokane Tribe of Indians,  
16 that is working on many notable projects in the Upper Columbia River. *Id.* at ¶  
17 ¶17–19; Exhibit E. One such project is reintroduction of salmon in the Upper  
18 Columbia River. *Id.* at ¶19. CCT coordinated with other UCUT Tribes to develop  
19 the Phase I Report, which confirms the reintroduction of salmon to the U.S. portion  
20 of the upper Columbia River upstream of Chief Joseph Dam is likely to achieve  
21 identified tribal goals. *Id.* CCT funded their personnel, equipment, and sub-  
22 contracts for Colville tasks within the Phase I Report. *Id.*  
23

24 In May of 2008 CCT entered into the 2008 Columbia Basin Fish Accords  
25 Memorandum of Agreement (2008 Accords) with the three federal agencies  
26 responsible for operation and management of the fourteen federal dams and

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reservoir projects in the Federal Columbia River Power System. Desautel Dec. at ¶20; Exhibit F. Examples of such projects include the White Sturgeon Enhancement project, Chief Joseph Kokanee Enhancement Project, and Lake Roosevelt Rainbow Trout: Habitat/Passage Improvement Project. *Id.* at ¶¶11; 20.

**E. The Intangible Consequences of Contamination of the Colvilles' Homeland.**

The Colvilles' land and its hunting and fishing territory run for 150 river miles along the Columbia River. That river has defined the Tribes experience on its land since time immemorial. Contamination of it by metals on the beaches and in the river sediment and impairment of fishing appertains the sovereign experience of the Tribes. While the other governments may have taken title to the river bed, none has been more affected by the actions of Teck in this case.

**III. ARGUMENT**

**A. Trusteeship Over Natural Resources Is A Question Of Fact And Law**

Summary judgment is appropriate only when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). The burden of establishing the nonexistence of a “genuine issue” is on the party moving for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). The evidence proffered by the non-moving party must be accepted as true together with all reasonable inferences from such evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

Whether CCT meets trustee standard in 42 U.S.C §9607 is a question of fact and law. *Coeur D'Alene I*, 280 F. Supp. 2d at 1115. In *Coeur d'Alene I*, the court explained that “the factual predicate of trusteeship . . . is to be determined on a

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1 case-by-case basis depending on which trustee the resource belongs to, who it is  
 2 managed by, who controls the same and how the resource appertains to other  
 3 resources.” *Id.* Granting CCT all reasonable inferences from the evidence, there is  
 4 no basis to grant Teck’s motion.

5 **B. 42 U.S.C. § 9607(f)(1) Standard**

6 CERCLA identifies the United States Government, the States and Indian  
 7 tribes as potential trustees who may assert liability for natural resource damages.  
 8 42 U.S.C § 9607(f). Indian tribes have the same scope of trusteeship as the other  
 9 sovereigns. Section 9607(f) is clear: an Indian Tribe is a trustee for natural  
 10 resources belonging to, managed by, controlled by or appertaining to such tribe. 42  
 11 U.S.C. § 9607(f); *cf.* 43 CFR 11.14(z) (defining natural resources to include “land,  
 12 fish, wildlife, biota, air, water, ground water, drinking water supplies, and other  
 13 such resources belonging to, managed by, held in trust by, appertaining to...any  
 14 Indian tribe....”).

16 CERCLA does not define “manage” or “control.” The ordinary meaning of  
 17 “manage” includes “to handle or direct with a degree of skill: such as . . . to  
 18 exercise executive, administrative, and supervisory direction of.”

19 *Manage, Merriam-Webster.com Dictionary, Merriam-Webster,*  
 20 <https://www.merriam-webster.com/dictionary/manage>. Authority on the meaning  
 21 of the terms in section 9607(f) is scarce.

22 CERCLA does not define “appertain” either. When interpreting undefined  
 23 terms in CERCLA, courts seek to give them their ordinary meaning and turn to  
 24 dictionaries for guidance. *See Burlington N. & Santa Fe Ry. Co. v. United States,*  
 25 556 U.S. 599, 610 (2009) (using *Merriam-Webster* dictionary for assistance in  
 26

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1 defining the phrase “arrang[e] for” within CERCLA). Merriam-Webster defines  
2 “appertain” as “to belong or be connected as a rightful part or attribute.” *Merriam-*  
3 *Webster.com Dictionary*, Merriam-Webster, [https://www.merriam-](https://www.merriam-webster.com/dictionary/appertain)  
4 [webster.com/dictionary/appertain](https://www.merriam-webster.com/dictionary/appertain). A long-standing rule of statutory interpretation  
5 is to give every word some operative effect and to avoid rendering any portion  
6 superfluous. *See ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th  
7 Cir. 2015). Thus, because CERCLA includes the terms “belonging to” and  
8 “appertaining to” as alternate ways to establishing trusteeship, Congress must have  
9 intended the term “appertaining to” to be more than a mere synonym of “belonging  
10 to.” In this context, “appertaining to” within 42 U.S.C. § 9607(f) would be  
11 redundant and superfluous if it only meant “belonging to.” Accordingly, the only  
12 reasonable interpretation of “appertain,” consistent with its ordinary meaning, is  
13 “to be connected as a rightful part or attribute.”  
14

15 This understanding of “appertaining to” includes usufructuary rights, such as  
16 hunting and fishing or paramount use granting a right of benefit. The court in *Yakima*  
17 applied this approach to find trusteeship for the Yakama tribe based on, among other  
18 things, its fishing rights in the Columbia River. *Yakama*, 435 F. Supp. 3d at 1124.  
19 The Court found the following persuasive in resolving the issue of trusteeship:  
20 “resources managed by, controlled by, or appertaining to the tribe may include not  
21 only resources held in trust or restricted status for tribal members, but additional  
22 resources over which the tribe exercises governmental control or areas on which  
23 tribes retain usufructuary rights outside reservation boundaries ....” *Id* at 112–25  
24 (internal quotations omitted). Fishing rights, in addition to the fishery management  
25  
26

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1 efforts support trusteeship because the natural resources are managed by or appertain  
2 to CCT. See Desautel Dec. at ¶¶5–11.

3  
4 **C. Teck Attempts to Rewrite 42 U.S.C. § 9607(f)(1) And Ignores Applicable Case Law**

5 Citing the preamble to NRDA regulations but not the statute and ignoring  
6 the applicable regulation, Teck claims that trustee officials “can only recover  
7 damages for injuries to those resources that are related to the through ownership,  
8 management, trust, or control” and implicitly excludes those appertaining to tribes.  
9 Teck’s Motion at 12-13 (citing Final Rule 59 Fed. Reg. 14262,14268 (March. 25,  
10 1994)). The Department was not attempting to define the scope of trusteeship in  
11 section 9607(f), rather it was addressing the scope of natural resources subject to  
12 such trusteeship as defined in section 9601(16)—which it concluded was best  
13 addressed on a “case by case” basis. *Id.* And, Teck ignored the applicable  
14 regulation defining natural resources to include those “appertaining to...any Indian  
15 Tribe.” 43 CFR §11(z).  
16

17 Teck uses its construction of trusteeship to emphasize sovereignty as a  
18 predicate, but the cases relied upon address sovereignty in use of natural resource  
19 damages, not the scope of trusteeship. As an example, Teck’s citation of *New*  
20 *Mexico v. General Electric Co.*, 467 F. 3d 1223 (10<sup>th</sup> Cir. 2006) is off point  
21 because the court was concerned with use of natural resource damages, rather than  
22 the scope of the trusteeship definition. Teck fails to recognize Judge Lodge’s point  
23 in *Coeur d’Alene II* that the natural resource damages recovery, if any, is not “for  
24 the benefit of a given party, but goes to the trustee as the fiduciary to accomplish  
25 the stated goals” and the conclusion in *Yakama* that the court assumes the trustees  
26

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1 will adhere to their fiduciary responsibilities to use NRD proceeds for the benefit  
2 of the injured resource. There is no reason to believe that CCT and the State, as co-  
3 trustees will do otherwise.<sup>2</sup>

4 In protesting that natural resource damages must be used for public benefit,  
5 Teck seems to forget that Indian tribes are sovereigns and act for the benefit of  
6 their public. Teck cites *Quapaw Tribe of Okla. V. Blue Tee Corp.*, 653 F. Supp.  
7 1166 (N.D. Okla 2009) to exclaim with italics that injuries must be sustained in a  
8 sovereign capacity and redress sovereign injury. Indeed, that is what is alleged  
9 here. Teck's citation of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136  
10 (1980) and *South Dakota v. Bourland*, 508 U.S. 679 (1993) are similarly off point  
11 because they concern uncontested attributes of sovereignty and regulatory  
12 jurisdiction over non-tribal members. The Colvilles do not claim trusteeship based  
13 on regulatory authority over non-tribal members, but it is relevant that the Colvilles  
14 possess the authority regulate tribal members' fishing, a point that Teck did not  
15 address. *See, Antoine* 420 U.S. at 205, 206–207.

17 To the extent sovereignty applies to the trusteeship analysis here, it is as a  
18 basis of demonstrating the Colvilles ownership of the land next to the UCR and its  
19 ownership of fishing rights in the UCR. These rights also demonstrate that natural  
20 resources in question “appertain” to the Colvilles.

21 Teck also neglects to address CCT's tribal service losses for which it is the  
22 only sovereign entitled to recover damages and engage in restoration. A Tribe's  
23

---

24 <sup>2</sup> In the case of tribal service losses, the damages compensate for injury specific to  
25 the Tribes and may be used as the Tribes determines for the benefit of its members.  
26

1 entitlement to recover service losses is well established. For this purpose,  
2 “services” provided by natural resources include: “The physical and biological  
3 functions performed by the resources including the human uses of those  
4 functions.” 43 C.F.R §11.80(b). These services also include non-use values. *Ohio*  
5 *v. U.S. Dep’t of Interior*, 880 F. 2d 432,464 (D.C. Cir. 1989). See 73 Fed. Reg.  
6 57259, 57264. (Non-use value include “cultural, religious and ceremonial losses  
7 that rise from the destruction or injury to natural resources continue to be  
8 cognizable”). Such service losses are recoverable in addition to loss of the natural  
9 resource itself. No case holds otherwise and Teck cited none. The Colvilles have  
10 presented a substantial claim for service losses. See, Appendix G, Rule 26(a)(1)  
11 disclosures.  
12

13 Teck brushes off CCT’s claims for tribal service losses arguing that it is  
14 foreclosed by *Couer d’Alene I*. Teck’s motion at 3. Teck’s reliance on *Couer*  
15 *d’Alene I* is overstated as the court did not analyze or reject the availability of tribal  
16 service losses generally and ruled only that certain claimed losses were not proved  
17 in the pending case. *Couer d’Alene I* at 1107.

18 The flaws in Teck’s approach are not limited to its failure to apply all the  
19 terms of 42 U.S.C. § 9607(f). Teck’s reasoning that only the State owns the affected  
20 resources and therefore is the only party with the ability restore or replace such  
21 resources is flawed because multiple trustees have a stake in restoration, including  
22 the Department of the Interior and the Spokane Tribe of Indians. Certainly, the  
23 State’s alleged ownership would not prevent restoration action by the Tribes  
24 addressing conditions in the UCR. Indeed, CCT is currently engaged in extensive  
25 projects involving fisheries generally and restoration of salmon in the UCR. Desautel  
26

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Dec. at ¶¶5–20. This is another instance of Teck’s failure to recognize that multiple affected parties act as co-trustees to address river conditions.

**1. CCT’s Trusteeship over Natural Resources**

**a. Within Reservation Boundaries.**

CCT is a trustee over natural resources located within the extant boundaries of the Reservation as they are formed by the bank of the Columbia River. See *Coeur D’Alene Tribe I*, 280 F. Supp. 2d 1094 at 1117, (“the Tribe is trustee over 100% of the lands within the reservation boundaries”). Teck does not contend otherwise. Teck’s motion at 11; 17; 20–21. This land adjacent to the upper Columbia River forms the basis for management rights, and fishing rights relevant to control, management and “appertaining to” elements of trusteeship.

As explained below, CCT’s reserved fishing rights in the North Half and its paramount right in Lake Roosevelt, give it an ownership interest in fish. See *infra* at III, C, 2.

**b. Trusteeship Over Natural Resources Appertaining to the Colvilles.**

CCT asserts trusteeship over fish in the UCR Site because the fish in the UCR “appertain” to the Tribes’ reserved hunting and fishing rights in the North Half, its use of its reservation lands and its “paramount rights” to use of one-quarter of Lake Roosevelt. As explained above, Article 6 of the 1891 Agreement expressly provided that “the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.” Appendix D. The implementing statutes “unqualifiedly, ‘carr(ied) into effect’ and ‘ratif(ied)’ the explicit and unqualified provision of Art. 6 that ‘the right

1 to hunt and fish...shall not be taken away or in anywise abridged.” *Antoine*, 420  
 2 U.S. at 205. CCT therefore possess “federally guaranteed rights” to hunt and fish  
 3 in the North Half. The same is true of CCT’s paramount rights in Lake Roosevelt.  
 4 See section II, 2, *supra*.

5 Fish in the North Half of the Columbia River and Lake Roosevelt are a  
 6 “rightful part or attribute” of CCT’s reserved fishing right and right of paramount  
 7 use. The Ninth Circuit has recognized that tribal rights to hunt and fish would be  
 8 worthless without harvestable fish and game. *United States v. Washington*, 853 F.3d  
 9 946, 965 (9th Cir. 2017) (“[T]he Tribes’ right of access to their usual and accustomed  
 10 fishing places would be worthless without harvestable fish.”); *see also Protecting*  
 11 *Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal*  
 12 *Comanagement As A Reserved Right*, 30 Env’tl. L. 279, 281–82 (2000) (“Critical to  
 13 the exercise of such rights is the existence, health, and vitality of the resources on  
 14 which such rights depend—fish to be harvested, game to be hunted, and plants to be  
 15 gathered.”).

17 Teck’s argument that fishing rights and fishery initiatives are not sufficient  
 18 for trusteeship was rejected in *Yakama*. There, the Defendant contended that  
 19 “Plaintiff’s off-reservation fishing rights [did] not give Plaintiff the ability to act as  
 20 a natural resource trustee” because “fishing rights are not a ‘natural resource’ as  
 21 defined by CERCLA” and because “fishing rights are ‘a tribe’s right to enjoyment  
 22 of a resource,’ which ‘is nothing more than an assertion that it has a legally-  
 23 recognized right to try and enjoy a certain natural resource: fish.’” 435 F. Supp. 3d  
 24 at 1124. The district court disagreed and determined “[b]ecause Plaintiff holds off-  
 25 reservation treaty fishing rights, under § 9607(f)(1) salmon and other fish in the  
 26

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1 Lower Willamette River, the Multnomah Channel, and the Columbia River are  
 2 managed by or appertain to Plaintiff. Plaintiff therefore has statutory standing as a  
 3 trustee to bring a claim for natural resource damages.” *Id.* at 1124–1125.

4 Here, CCT has holds both reserved fishing rights in the North Half and the  
 5 right to paramount use of Lake Roosevelt. Just as the off-reservation fishing rights  
 6 in *Yakama* gave the tribe statutory standing as a trustee to bring a claim for natural  
 7 resource damages, CCT’s fishing rights in the North Half and paramount use in Lake  
 8 Roosevelt gives it standing as a trustee. Moreover, as set forth below, CCT has the  
 9 authority to manage and regulate its Tribal member’s use of their fishing and hunting  
 10 rights off-reservation and CCT actively does so. See Desautel Dec. at ¶13. This  
 11 exercise of control over the natural resources serves as an additional basis for  
 12 trusteeship. Accordingly, Teck’s Motion for Partial Summary Judgment should be  
 13 denied in full.  
 14

15 **c. CCT’s Reserved Fishing Rights Provide CCT**  
 16 **The Authority To Regulate and Manage Off-**  
**Reservation Fishing**

17 Reserved fishing rights include a tribe’s authority to regulate its members’  
 18 off-reservation fishing and to enforce those regulations with criminal penalties. *See*  
 19 *Settler v. Lameer*, 507 F.2d 231, 236 (9th Cir. 1974) (“It would be unreasonable to  
 20 conclude that in reserving these vital rights, the Indians intended to divest  
 21 themselves of all control over the exercise of those rights.”); *Passenger Fishing*  
 22 *Vessel*, 443 U.S. 658, 662 n. 2 (including 1855 treaty with Yakamas in its  
 23 interpretation of reserved fishing rights).  
 24

25 In *Settler*, the Ninth Circuit held that the Yakama Nation’s reserved fishing  
 26 rights include the authority to regulate its members’ off-reservation tribal fishing.

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1 507 F.2d at 237. Fishing rights are communal rights of the Tribe, even though  
2 individual members benefit from them. *Id.* The determination of when and how they  
3 may be exercised remains an internal affair of the Tribe. *Id.* *Settler* recognized that  
4 this regulatory authority includes but is not limited to determining the use of fishing  
5 places, the type of gear, the time of taking fish, and the quantity and nature of the  
6 catch. *Id.* at 237, 239. Furthermore, the court held that the Tribe could enforce  
7 regulations off the reservation, including by arresting and seizing the offending  
8 member off reservation. *Id.* at 238 (“The power to regulate is only meaningful when  
9 combined with the power to enforce.”).

11 Teck’s argument that CCT lacks regulatory authority in the North Half of the  
12 Columbia River and in the Reservation Zone of Lake Roosevelt fails under *Settler*.  
13 Teck relies on *Cassidy* for the proposition that CCT lacks regulatory authority in the  
14 Reservation Zone. Although *Cassidy* concluded that “paramount use”—as opposed  
15 to exclusive use—did not entitle the Spokane Tribe—and by implication CCT—to  
16 regulate fishing activities of non-Indians within the Reservation Zone of Lake  
17 Roosevelt, it says nothing about CCT’s ability to regulate its own tribal members’  
18 use of natural resources. CCT not only possesses this regulatory authority but also  
19 exercises it. See Desautel Dec. at ¶¶13; 16. Furthermore, CCT has a duty to regulate  
20 its members’ use of reserved rights in the North Half to prevent destruction of natural  
21 resource. See *United States v. Washington*, 520 F.2d 676, 686 (9th Cir.1975)  
22 (“[N]either the treaty Indians nor the state on behalf of its citizens may permit the  
23 subject matter of these treaties to be destroyed.”).

25 Notably, while CCT may freely regulate its members’ fishing in the North  
26 Half under *Settler*, the state has very limited authority to regulate CCT’s members.

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1 *See Antoine*, 433 U.S. at 682–84 (indicating state may not regulate CCT’s fishing in  
 2 the North Half except when reasonable and necessary for conservation). Similarly,  
 3 CCT’s fishing in the Reservation Zone of Lake Roosevelt may not be limited except  
 4 when necessary for conservation. *See* 16 U.S.C. § 835d.

5 **d. Resources Subject to CCT Management.**

6 The Tribes also asserts trusteeship based on management of natural  
 7 resources. *See* 42 U.S.C. § 9607(f). In 1990, the LRMA created a Reservation  
 8 Zone (comprised of the area of Lake Roosevelt overlying the Reservation) within  
 9 which CCT “shall manage, plan, and regulate all activities, development, and uses  
 10 that take place within that portion of the Reservation Zone within the Colville  
 11 Reservation in accordance with applicable provisions of federal and tribal law....”  
 12 Exh. A, Desautel Dec. at §IV.D.3.a.; Desautel Dec. at ¶4.

14 As fully discussed in the “History of the Colvilles’ Relation to the Land and  
 15 Waters of the UCR” above, CCT has been heavily involved in developing and  
 16 managing resident fisheries in Lake Roosevelt. Desautel Dec. at ¶4. These  
 17 restoration efforts include, but are not limited to the following:

- 18 • The Lake Roosevelt Fishery, where CCT completes angler creel surveys,  
 19 traps and collects returning adult kokanee and assists with Fall Walleye  
 20 Index Netting.
- 21 • The Upper Columbia White Sturgeon Recovery Plan, where CCT is co-  
 22 manager and CCT’s biologists have been instrumental in sturgeon  
 23 management.
- 24 • The White Sturgeon Enhancement project, which is solely managed by  
 25 CCT.  
 26

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- 1 • The Northern Pike Suppression and Monitoring Project.
- 2 • The Chief Joseph Kokanee Enhancement Project.
- 3 • Phase III of the Lake Roosevelt Rainbow Trout: Habitat/Passage
- 4 Improvement Project. *Id.* at ¶¶8–11.

5 These acts of management provide CCT a basis for trusteeship over the nature  
6 resources it manages. 42 U.S.C. § 9607(f).

7

8 **2. CCT’s Reserved Fishing Rights Establish That A**  
9 **Portion Of The Fish In The UCR Site Belong To CCT**

10 CCT’s reserved fishing rights in the North Half and paramount use of Lake  
11 Roosevelt give CCT the right to a harvestable portion of fish. See Article 6 of the  
12 1891 Agreement. In other words, a portion of the fish in the Columbia River—and  
13 in Lake Roosevelt—“belong” to the tribe.

14 As we have seen, CCT has the right to a portion of the harvestable fish in the  
15 North Half, which encompasses the Columbia River. The United States Supreme  
16 Court interpreted treaty language with Washington Indian tribes that stated they had  
17 the “right of taking fish, at all usual and accustomed grounds and stations . . . in  
18 common with all citizens of the Territory.” *Washington v. Washington State*  
19 *Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 661–62, *modified sub*  
20 *nom. Washington v. United States*, 444 U.S. 816 (1979). The Court had to determine  
21 if this language secured to the Indian tribes the mere opportunity to fish or secured  
22 a harvestable portion of fish. *See id.* at 669–71.

23 The Court reasoned that nobody at the time the treaties were executed would  
24 have had any doubt that the Indians could take as many fish as they might need, and  
25 thus, it may have been thought that merely guaranteeing them access to “usual and  
26

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1 accustomed fishing sites” would adequately protect their right to take fish. *Id.* at 675.  
2 Although the state argued that this inexorably leads to the conclusion that the treaty  
3 granted only the right of access, the Court rejected this argument. It reasoned that it  
4 was equally plausible to conclude that the provision for access was intended to  
5 secure a greater right—a right to harvest a share of the fish runs. *Id.* Indeed, the Court  
6 held that its prior cases construing Indian treaties mandated this conclusion. *Id.* at  
7 675, 689 (“[T]he purpose and the language of the treaties are unambiguous; they  
8 secure the Indians’ right to take a share of each run of fish that passes through tribal  
9 fishing areas.”).

10  
11 The Court cited *Antoine* as a “like interpretation.” *Id.* at 684. In *Passenger*  
12 *Fishing Vessel*, the Court cited to the series of *Puyallup* cases, including *Puyallup I*,  
13 as mandating its holding that the reserved fishing right secures a tribal portion of  
14 harvestable fish. 433 U.S. at 682–84, 682 n. 25 (quoting same language from  
15 *Puyallup I* as quoted in *Antoine*).

16 Thus, CCT’s reserved fishing right in the 1891 Agreement secures a right to  
17 a harvestable portion of fish in the North Half, which includes the Columbia River.  
18 Similarly, CCT’s paramount use in Lake Roosevelt leads to the same conclusion as  
19 CCT’s reserved rights in the North Half—the fish in the Reservation Zone “belong”  
20 to CCT and “appertain to” CCT. Indeed, paramount fishing access would be  
21 worthless without harvestable fish and healthy benthos providing for their habitat.  
22 *See United States v. Washington*, 853 at 965. Accordingly, a portion of fish in the  
23 North Half and Lake Roosevelt “belong” to CCT as it has a right to a harvestable  
24 portion of such fish. *See* 42 U.S.C. § 9607(f).  
25  
26

1 Notably, courts have held that neither the state nor the federal government  
 2 “owns” the fish within its waters. *United States v. State of Wash.*, 759 F.2d 1353,  
 3 1359 (9th Cir. 1985) (holding hatchery-raised fish released into public waters are  
 4 included in the harvestable portion of fish to which Indian tribes are entitled under  
 5 reserved fishing rights as recognized in *Passenger Fishing Vessel*); *Douglas v.*  
 6 *Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977) (holding federal government  
 7 also does not own the fish). In other words, of the three possible CERCLA trustees  
 8 over the fish in the Columbia River and Lake Roosevelt, it can really only be said  
 9 that they “belong” to CCT. *See* 42 U.S.C. § 9607(f).  
 10

### 11 3. CCT’s Reserved Fishing Rights Establish Trusteeship 12 Over Aquatic Resources In The UCR Site

13 Benthos appertain to CCT’s fishing rights as a “rightful part or attribute” of  
 14 CCT’s fishing rights. As discussed above, *United States v. Washington* found that  
 15 “the Tribes’ right of access to their usual and accustomed fishing places would be  
 16 worthless without harvestable fish”, just as the land would have been worthless  
 17 without water to irrigate the arid land, and just as the right to hunt and fish would be  
 18 worthless without water to provide habitat for game and fish in previous cases. *See*  
 19 *United States v. Washington*, 853 F.3d at 965 (9th Cir. 2017).  
 20

21 Here, benthos support the Columbia River and Lake Roosevelt ecosystem,  
 22 and in turn, this supports the fish population. Appendix H, UAO at p. 3, ¶ 7. The  
 23 fish population supports the game population. Without a healthy benthos population,  
 24 the fish and the supporting ecosystem in the North Half and Lake Roosevelt have  
 25 been injured and will remain so without remedial action. Thus, Benthos appertain to  
 26 and implicate CCT’s reserved fishing rights and right of paramount use. CCT’s

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1 reserved rights entitle it to protection of the fish's ecosystem from environmental  
2 degradation, which is exactly what CCT seeks to achieve through its CERCLA  
3 trusteeship.

4 **IV. CONCLUSION**

5 CCT respectfully requests this Court deny Teck's Motion for Partial Summary  
6 Judgment in full for the foregoing reasons.

1 DATED this 21<sup>st</sup> day of June, 2022.

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

3  
4 By: s/ Paul J. Dayton

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RESPONSE TO DEFENDANT'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT-  
30

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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.

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RESPONSE TO DEFENDANT'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT-  
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