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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs,

and

STATE OF WASHINGTON,

Plaintiff/Intervenor,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant.

NO. 2:04-cv-00256-SAB

REPLY IN SUPPORT OF TECK'S MOTION FOR SUMMARY JUDGMENT ON CCT'S TIME-BARRED CLAIMS

DATE: August 11, 2022 at 2:30 pm

With Oral Argument

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I. INTRODUCTION

The CCT cannot square the timing of its filing its NRD claims in 2005 with its 1999 Petition to EPA (ECF No. 2507-14) to investigate the contamination of the UCR – under any limitations period. That Petition is perhaps the best example of documented notice of a claim as one could have. And the CCT does not reference in its Opposition anything it learned between 1999 and 2005 that it actually put in its 2005 NRD claim once it filed. That claim, as originally framed in 2005, was exceedingly broad – no doubt by design – and does not include any reference to any nuance that the CCT now argues it needed to investigate before filing. Indeed, the language is notably parallel to the language used in the Petition.

The CCT admits that even as of 2003, EPA's investigation report stated that its process "did not include extensive or complete site characterization, contaminant fate determination or quantitative risk assessment." ECF No. 2533 at 9. It references nothing that gave the CCT the requisite information to allow it to file in 2005 that was somehow missing in 1999. Then, like the State, CCT inconsistently argues on the one hand that its claim had not accrued such that it would have had to file prior to 2005, and on the other hand, that it intentionally held off from filing on the assumption that the UCR was going to be listed on the national priorities list (NPL) (which would unequivocally make the "special" limitations period in Section 9613(g)(1) applicable). It is hard to square intentionally holding off from filing a claim based on assumptions about a limitations period, with the concept of not knowing enough to know you have a claim to file.

The CCT also argues that a different statute of limitations applies, though it does not address the fact that—even if it did apply—that statute would not save the CCT's claims based on the documented knowledge it had in 1999. At best, Section 9626(d)

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would give the CCT two more years; but it filed its claim more than five years after submitting the 1999 Petition. Moreover, the statute on its face only addresses situations where a tribe has an understanding that the federal government intends to assert the claim on behalf of the tribe. That is not the case here, and the CCT has not suggested it is.

Finally, like the State (and incorporating the State's arguments), the CCT argues for application of the limitations provisions in Section 9613(g)(1), which would be applicable to any NPL site, and also to an action where "remedial action is otherwise scheduled." Under that statute, the cause of action would accrue upon completion of "remedial action." But, also like the State, the CCT does not address the fact that, if Section 9613(g)(1) were applicable, the NRD claims would not be ripe. In fact, Section 9613(g)(1) provides that for *any* NRD claim under the chapter, with no exception for Indian tribes, no claim can be brought as to covered facilities until the RI/FS is completed, nor before 60 days from a notice being provided to Teck (which was never provided) and EPA. In short, even if the State and CCT are correct about the applicability of that "special" limitations statute, their claims are not yet ripe.

II. ARGUMENT

A. The extended statute of limitations for tribes under CERCLA Section 9626(d) does not apply, and in any event would still result in time-barred claims.

Under limited circumstances, CERCLA Section 9626(d) gives Indian tribes two more years beyond CERCLA Section 9613(g)(1)'s NRD limitations period, but only if "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. § 9626(d). This is a statutory tolling

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of the limitations period—essentially an equitable tolling—where a tribe may have reasonably believed that the United States was going to pursue its claim. That is not the case here, and never was.

The CCT argues it had two additional years to file suit under this provision in every circumstance. Although there are no reported cases interpreting Section 9626(d), the most reasonable reading is that the two additional years is only available where the U.S. is acting as a trustee for the tribe. This reading is consistent with the National Contingency Plan's (NCP) regulations, which provide that the U.S. Department of Interior "shall also be trustee for those natural resources for which an Indian tribe would otherwise act as trustee in those cases where the United States *acts on behalf of* the Indian tribe." 40 C.F.R. § 300.600(b)(2) (emphasis added). This may also be why the cases involving tribes that do discuss limitations periods discuss CERCLA's other limitations provision, and not this one.[1]

Here, the U.S. is not acting on behalf of the CCT, which has always acted for itself, including in this lawsuit (to which the U.S. is not even a party). Further, there are two parts to the extended statute of limitations: (1) where the U.S. *declines* to present a claim, or (2) when the U.S. *fails* to present a timely claim. 42 U.S.C. §

[1] *E.g., United States v. Asarco*, 28 F.Supp.2d 1170, 1178 (D. Idaho 1998), *vacated on other grounds*, 214 F.3d 1104 (9th Cir. 2000) (discussing the application of Section 9613(g)(1)); *Confederated Tribes & Bands of the Yakama Nation v. Airgas USA, LLC*, 435 F.Supp.3d 1103 (D. Or. January 22, 2019) (addressing the special statute of limitations for fluid NPL site boundaries); *The Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 2008 WL 2704482 (N.D. Okla. July 7, 2008) (dispute over ripeness of NRD and addressing the NRD statute of limitations).

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9626(d) (emphasis added). CCT has presented no evidence that it asked the U.S. to present a claim on its behalf, or otherwise expected it to, and none that the U.S. then either declined or failed to timely pursue such claim. Absent evidence of such declination or failure, the clock cannot be extended.

B. CCT in any event discovered the loss it alleges in this suit at least six years prior to filing its NRD claim.

An additional two years would not salvage CCT's time-barred claim in any case. The limitations period on CCT's claim began to run, at the latest, by the time it petitioned EPA in 1999, but it did not file its NRD claim until *six* years later.

1. CCT is charged with the facts it could have obtained through a reasonable inquiry, including state and federal studies reflecting the alleged loss and its connection to the releases in question.

"Discovery" for purposes of CERCLA Section 9613(g)(1) is a "knew or should have known" standard. *Mathes v. Century Alumina Co., LLC*¸ 2010 WL 2772695, at *6 (D.V.I. July 13, 2010), opinion amended on other grounds on reconsideration sub nom. *Mathes v. Century Alumina Co.*, No. 05-0062, 2010 WL 3310726 (D.V.I. Aug. 20, 2010) (citing *Merck*, 559 U.S. 633, 645-46, 130 S. Ct. 1784, 1794-95 (2010)). The Ninth Circuit has explained that a plaintiff is on notice of a claim under CERCLA when a "reasonable person in Plaintiffs' situation would have been expected to inquire about the cause of his or her injury," and if an inquiry "would have disclosed the nature and cause of plaintiffs' injury so as to put him on notice of his claim." *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002). Thus, a plaintiff is "charged with knowledge of facts that [it] would have discovered through inquiry." *Id.*

2. CCT admits that it (and the State) was on inquiry notice and was, in fact, inquiring as to the alleged loss and its connection to the release in question.

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Throughout the 1990s, the CCT was on inquiry notice, and, *as it admits in its response, was, in fact, making inquiries*: "What the 1999 letter shows is that CCT was making reasonable efforts to inquire about its potential claim," (ECF No. 2533 at 22) and "The 1999 letter and 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" (ECF No. 2533 at 23). These admissions alone would be sufficient to trigger the running of the limitations period. The fact that it remains in dispute the extent to which, if at all, slag actually caused harm, is irrelevant to the running of the limitations period. But on its face, the 1999 Petition contains much more than the CCT now acknowledges.

3. CCT's sophistication and resources arguments are inapposite

Citing *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139 (9th Cir. 2002), in which individual plaintiffs struggled to connect cancer and other latent disease to hazardous substances from a neighboring Rocketdyne facility, the CCT suggests that its inquiry was impeded because it lacks the "resources" to answer "complex" and "costly" causation issues and needed to "depend on the government's resources" to do so. ECF No. 2533 at 21-22. *O'Connor* is inapposite; this is a case by a sovereign asserting itself as a natural resource trustee as to allegedly injured natural resources over which it asserts trusteeship. *O'Connor*, 311 F.3d at 1151. The CCT is "a sovereign entity whose government is recognized by the United States", with its own Office of Environmental Trust, which is "recognized . . . [by] EPA." ECF No. 2507-14 at 1, 4. CCT is not an unsophisticated individual pursuing a personal injury claim, as reflected in its 1999 Petition to the EPA, and CCT was actively seeking and obtaining other governmental entities' cooperation. ECF No. 2507-14 at 9 ¶¶ 4.3, 5.1-5.2 (referencing the CCT's study on the impacts of mercury to fish and citing extensive outreach to and responses

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from government officials about the releases). Moreover, the CCT directly cited studies from the U.S. Fish & Wildlife Service from the 1980s, reporting elevated concentrations of metals in fish and identifying the Trail smelter as a "primary source" of such metals, a 1992 USGS sediment quality study (available at ECF No. 2607-10) tying elevated metals concentrations to "altered benthic invertebrate communities", and a 1994 USGS study determining that mercury in sportfish was at a high enough level to trigger fish consumption advisories (FCAs) (available at ECF No. 2507-13). ECF No. 2507-14 at 9.

This collectively demonstrates that the CCT was not burdened by a lack of resources or the need to seek information from outside parties and "had the means to test" its potential causes of action. And again, the CCT admitted that both it and the State were making inquiries throughout the 1990s, which it agrees are reflected in the 1999 Petition. ECF No. 2533 at 22-23.

4. The statute of limitations began to run when the CCT discovered its loss and its connection to the release in question, not when its legal theories are later fully developed.

In attempting to refute what the CCT would have discovered through a reasonable inquiry, the CCT also asserts that the limitations period could not begin to run until it was determined there had been a "re-release" in the UCR from the Trail smelter releases. This argument is unavailing: CCT is conflating the standard for what triggers the statute of limitations with the standard for Teck's legal liability, which are not one and the same. As explained in detail in reply to the State's Response (ECF No. 2529), "injury" for purposes of triggering SOL is not a legal injury (i.e., a "legal wrong"). *See, e.g.*, *Lukovsky v. City & Cty. of San Francisco*, 535 F.3d 1044, 1049 (9th Cir. 2008). In fact, a case cited by the CCT also makes this clear: "The discovery rule does not require knowledge of the existence of a legal cause of action itself, but

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merely knowledge of the facts necessary to establish elements of the claim." *Anderson v. Teck Metals, Ltd.*, No. CV-13-420-LRS, 2015 WL 59100, at *2 (citing *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wash. 2d 805, 814, 818 P.2d 1362 (1991)).

It was enough that the CCT knew slag had been discharged from the Trail smelter, that slag made its way to the UCR in the U.S., and that slag was associated with elevated metals concentrations there that constitute the facts sufficient to put CCT on notice. Contrary to the CCT's assertions, nothing in the Motion exhibits suggests that the CCT (or the State for that matter) thought that slag was inert and therefore not the cause of increased concentrations of metals in the UCR. *See* ECF No. 2507-1 to -18. Whether those facts were due to the presence of the slag itself or leaching therefrom was irrelevant. The connection between the slag from Trail and the loss in the UCR in the form of elevated metals concentrations had been made for decades before the Ninth Circuit adopted a *legal* theory that justified Teck's liability for response costs under CERCLA notwithstanding the origin of such releases being lawful operations across the U.S.-Canada border. *Pakootas v. Teck Cominco Metals Ltd*. 452 F.3d 1066, 1075 (9th Cir. 2006) (holding that leaching of hazardous substances from slag once it had come to be present in the U.S. constituted a domestic "release" under CERCLA). The fact that the slag originated in Trail is obviously a necessary element of this claim, and was in fact what the claim alleged.

5. <u>"Connection" for purposes of Section 9613(g)(1) does not require that the causation element of an NRD claim be fully developed.</u>

The "connection" required to trigger the statute of limitations does not equate to the causation element of an NRD claim that Plaintiffs ultimately must prove. 42 U.S.C. § 9607(a)(4)(C) (a potentially responsible party (PRP) is liable for NRD for injury to natural resources "resulting from" the PRP's release); 42 U.S.C. § 9613(g)(1)

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(requiring a "connection" between the losses and the release, not a full demonstration of causation). CCT mistakenly asserts that the "highly technical and complex questions" and the "complex causation questions" presented in this case along with the fact that "establishing that causal connection was an expensive, time-consuming process" somehow entitle it to a less strict standard for discovery for purposes of statute of limitations. ECF No. 2533 at 16, 21. But the CCT conflates the knowledge sufficient to trigger the statute of limitations versus what will be required of it at trial.

CCT does not cite any authority about what degree of "connection" is required to satisfy CERCLA Section 9613(g)(1), just that it is a complex endeavor to prove causation, an element of an NRD claim. But, it is well-settled that the exact nature of the injury and all of its causes are not required for purposes of triggering the statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 391, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007) ("The cause of action accrues even though the full extent of the injury is not then known or predictable.") (internal quotation marks and citation omitted); *Kyko Global Inc. v. Bhongir*, No. 20-17526, 2021 WL 4958989, at *1 (9th Cir. Oct. 21, 2021) (aggrieved parties "generally need not know the exact manner in which their injuries were effected, nor the identities of all parties who may have played a role therein" to trigger the statute of limitations) (citations omitted).

CCT's allegations are much like the plaintiff in *Diamond X Ranch LLC v. Atl. Richfield Co.*, No. 3:13-cv-00570-MMD-WGC, 2017 U.S. Dist. LEXIS 160845, at *22 (D. Nev. Sept. 29, 2017), which was a lawsuit involving a CERCLA cleanup action of acid mine draining (AMD) from the Leviathan Mine. On the limitations issue, the plaintiffs, relying on *O'Connor* as does the CCT, argued that the limitations period started later because before 2012 "there was an insufficient basis . . . to determine the Mine caused elevated concentrations of arsenic on the River Ranch" and

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"it remained an open question prior to 2012, despite a multi-year investigation, whether River Ranch had suffered actual injury or damage . . ." *Id.* at *18, *21. The court disagreed, finding that the plaintiff was aware of the facts underlying its claim in 2007 based on a letter in which the plaintiff informed various entities that it would stop grazing cattle "based upon an assessment of the damages caused by the Leviathan Mine. . . These decisions have been made because of the damage caused by trespass by and the contamination from Leviathan Mine." *Id.* at *19. The court explained:

> The letter shows that Diamond X believed that the contamination from the Mine caused it damage such that it would cease irrigation and cattle grazing activities. At a minimum, based on the information in the letter, Diamond X [Plaintiff] was aware of its injury, would have been expected to inquire about the cause of its injury, and an inquiry would have disclosed the nature and cause of Diamond X's injury so as to put Diamond X on notice of its claim.

Id. at *19. The court discounted other evidence, such as an environmental site assessment that plaintiff had urged (as CCT does here) called its basis for notice of injury into question; the court reasoned, however, that although the report "ultimately found that 'very little is known about the impacts that this irrigation has had on the site soils' . . . the report repeatedly stated that Bryant Creek was contaminated, therefore putting Diamond X on notice, at a minimum, of its claim for wrongful appropriation of water rights." *Id.* at *20-*21. The court determined "[t]his further demonstrates that prior to October 2009 Diamond X was on notice of contamination of its Property and that the likely cause of that contamination and loss of use of water rights was AMD from the Mine." That the definitive conclusions about the nature, extent and the causes of the injury had not yet been determined did not preclude the running of the statute of limitations. *Id.* at *22-*23.

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In determining the limitations period, the court emphasized that "certainty of cause or of the extent of injury is not required to trigger the commencement date" for claims resulting from a release of contaminants. *Id.* Further, even if the plaintiff did not know it could not develop the property, the basis for one of its causes of action, "it was aware of some injury to its land and water rights caused by contamination from the Mine that affected some use of the Property, thereby triggering inquiry notice." *Id.* at *22.[2] Therefore, the degree of causation that CCT asserts is required to be known for purposes of the statute of limitations is mistaken.

As the 1999 Petition demonstrates (and as CCT admits), by that time, CCT was on notice of the slag from the Trail smelter and its likely connection to increased metals concentrations and the potential impacts to natural resources in the UCR, including potentially benthic invertebrates, recreational fishing, and fish, including sturgeon. It is irrelevant that the CCT had not by then (and still has not) proved that releases from the Trail smelter caused such injury. By 1999, the statute of limitations had started to run.[3]

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[2] The *Diamond X* court also distinguished the plaintiff therein with the plaintiffs in *O'Connor,* noting that, unlike the unsophisticated parties in *O'Connor*, "there is no dispute that Diamond X had the means to inquire into whether contamination affected the use of the Property and whether AMD from the Mine was the cause of the contamination because it actually did so, as evidenced in the 2005 and 2006 Robison reports and the 2007 letter from its attorney." *Diamond X*, No. 3:13-cv-00570-MMD-WGC, 2017 U.S. Dist. LEXIS 160845, at *24-25.

[3] To note, the CCT's lengthy discussions of the 2003 UAO and the following RI/FS are inapposite. ECF No. 2533 at 23-25. EPA's investigation, which is for purposes of

(continued…)

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6. The loss is the alleged injury to natural resources.

The "loss" that triggers the limitations period is the injury to natural resources at the UCR Site. CCT now alleges those injuries are reduced benthic habitat, reduced sturgeon yield, and elevated mercury in fish resulting in reduced fishing. It did not detail those losses in its original claim. While CERCLA does not define "loss" (*see* 42 U.S.C. § 9601), DOI's NRD assessment (NRDA) regulations do: both "injury" and "loss" are defined as a "measurable adverse change to the physical or chemical" characteristics of a natural resource. 43 C.F.R. §§ 11.14(v), (x). Thus, the CCT's limitations period began to run when it discovered an injury to natural resources.

As noted in Teck's Reply to the State, which is incorporated herein by reference, the regulations define with specificity what constitutes injury. 43 C.F.R. § 11.62. For biological resources, such as the benthos and fish, including sturgeon, the measurable adverse change can come in the form of changes to viability, such as "death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), or physical deformations." *Id.* § 11.62(f)(1)(i). At the time of the 1999 Petition, and as reflected therein, elevated metals concentrations found in sediments within the UCR Site had been associated with alterations in benthic communities, which reside in and near the sediment. ECF No. 2507-14 at 7.

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ecological and human health risk assessment, and potential remediation, is not an assessment of potential injuries to natural resources. Assessment of potential injuries to natural resources is the regulatory responsibility of the natural resource trustees. In any event, the CCT was already actively inquiring as to the losses by that point.

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Additionally, injury occurs when the hazardous substance concentrations "[e]xceed levels for which an appropriate State health agency has issued directives to limit or ban consumption of such organism." 43 C.F.R. § 11.62(f)(1)(iii). At the time of the 1999 Petition, and as reflected therein, the Washington Department of Health had issued mercury-based FCAs for the UCR for fish tissue mercury levels. Moreover, CCT was funding a study to determine mercury concentrations in walleye. ECF No. 2507-14 at 7. In short, at the time of the 1999 Petition, CCT was well aware of what it now alleges constitute its "loss".

7. CCT admits it knew of both its alleged loss and its connection to the release by 1999.

There are no factual disputes as to CCT's discovery of its alleged loss. While "[c]ourts routinely recognize the fact-intensive nature of the determination of when a plaintiff is on notice of a claim . . . [and c]ritical factual disputes that govern when Plaintiffs knew or should have known of their claims" may preclude summary judgment, (*O'Connor*, 311 F.3d at 1150 (citations omitted)), here, sufficient factual support of the CCT's discovery is neatly wrapped in the 1999 Petition package and confirmed by the CCT in its response. ECF Nos. 2533 at 22-23, 2507-14.

CCT had no choice but to concede that it and the State were on inquiry notice by 1999: its Petition effectively documents that inquiry, formally. In short, the CCT not only reasonably had enough knowledge that it *could* inquire about the nature and extent of alleged loss and its connection to the release at issue, but indisputably *did* inquire. Moreover, the CCT's statements in the Petition reflect that CCT had actual knowledge of both the alleged loss and its connection to the Trail smelter. Further, the CCT cites to numerous technical studies of which CCT was aware that had already been performed with findings that allegedly support its claim. According to *O'Connor*,

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the information therein is now imputed to CCT. *O'Connor*, 311 F.3d at 1150 ("The plaintiff will be charged with knowledge of facts that [it] would have discovered through inquiry.") (citations omitted). Thus, the "complex causation questions" were already being answered, and CCT knew that, which prompted its Petition. The 1999 Petition (ECF No. 2507-14) facially eliminates any doubt that CCT was on notice of its potential claim with more than a "mere suspicion" (ECF No. 2533 at 19), was actively inquiring about its potential claim, and recognized *both* the loss it now claims and the connection to the release with specificity:

- "Active Tribal environmental and fishery management programs, in coordination with other management entities on the system, struggle to maintain a viable, healthy ecosystem given the past environmental damages and current management constraints." ECF No. 2507-14 at 6.
- "Based upon information and belief, Petitioner asserts that the following hazardous substances have impacted the study area and should be included in the Assessment process:
    - 3.1 metals (arsenic, cadmium, copper, lead, mercury, and zinc); primary source of the contamination appears to be a lead-zinc smelter on the Columbia River in British Columbia but may also come from the Spokane-River.
    - 3.2 blast furnace slag from Canadian smelters as well as from the LeRoi (Northport) Smelter site in Northport, Washington . . .
    - 3.5 contaminants released into the Upper Columbia from historic and ongoing mining operations in the region" *Id.* at 6-7.
- "4.1 In the early 1980s, concerns about water quality in Lake Roosevelt and the upper Columbia River were first reported in a U.S. Fish and Wildlife study that reported ***elevated concentrations of arsenic, cadmium, lead, and zinc in fish.*** Follow up studies identified the ***primary source of the contamination to be a lead-zinc smelter on the Columbia River in British Columbia***, 16 km upstream from the international boundary. Since the 1950s, the subject smelter had

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discharged several hundred tons of blast furnace slag and effluent per day into the Columbia River." *Id.* at 7 (emphasis added).

- "4.2 At the request of the U.S. Environmental Protection Agency (EPA) and Lake Roosevelt Water Quality Council (LRWQC), the U.S. Geological Survey (USGS) ***initiated a large-scale sediment quality study in 1992. The USGS reported that bed sediments were contaminated, as indicated by elevated concentrations of metals (arsenic, cadmium, copper, lead, mercury, and zinc), laboratory toxicity, and altered benthic invertebrate communities***. In addition, a ***1994 USGS study determined that mercury in sportfish was elevated to levels high enough to trigger a Washington Department of Health consumption advisory***." *Id*. (emphasis added).

- "4.3 Due in part to the studies in Canada and Washington state, the subject lead/zinc smelter in Canada has apparently stopped discharging slag and has reduced its effluent discharge. While this is a significant improvement in the loadings of metals to the system, ***large quantities of contaminated sediments remain in Lake Roosevelt***, and therefore studies are still in progress. ***For example, Petitioner is currently funding a USGS study to determine if the level of mercury found in the tissue of Walleye Pike has decreased since the 1994 study***." *Id.* (emphasis in original).

Given these findings, there can be no dispute that the CCT discovered the loss and its connection to the releases in question to a sufficient degree by 1999, at the very latest.

C. The special statute of limitations for a "site at which a remedial action . . . is otherwise scheduled" does not apply.

1. The UCR Site is not a site at which a "remedial action . . . is otherwise scheduled."

The UCR Site is not a site at which a "remedial action . . . is otherwise scheduled", triggering the special statute of limitations. 42 U.S.C. § 9613(g)(1). As explained in detail in Teck's Reply to the State's Response, which is incorporated by reference, the UCR RI/FS is ongoing, the culmination of which will result in a Record of Decision (ROD) and *may* result in EPA's selection of a remedial action.

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2. CCT misapplies the prior *Pakootas* ruling.

The CCT also misinterprets a prior *Pakootas* ruling as confirmation that a remedial action has been "otherwise scheduled" for the UCR Site, *Pakootas v. Teck Metals Ltd.*, 646 F.3d 1214 (9th Cir. 2011). ECF No. 2533 at 26-28. That decision arose in the context of a member of the CCT attempting (unsuccessfully) to obtain civil penalties from Teck for alleged non-compliance with EPA's UAO that were due, if there were due at all to anyone, to the U.S. government.[4] The issue therein was whether the individual plaintiffs' claims were precluded by 42 U.S.C. § 9613(h) and its bar to "challenges to removal or remedial action" at a site. Notably, the focus was on a 2006 settlement agreement between EPA and Teck for Teck satisfactorily performing an RI/FS in lieu of enforcing the 2003 UAO, "'conditioned upon the satisfactory performance" by Teck. *Pakootas*, 646 F.3d at 1221 (quoting the 2006 Settlement Agreement, available at ECF No. 2507-1). Importantly, the court quoted the operative settlement agreement provision, which plainly states Teck's obligations were to perform an RI/FS, not a "remedial action":

> [T]he United States covenants not to sue or to take administrative action against T[eck] C[ominco] and T[eck] C[ominco] A[merican] I[ncorporated] pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a) ... for (i) civil penalties or injunctive relief for non-compliance with the Unilateral Administrative Order issued by

[4] ECF No. 2507-1 at § XVI.55 (EPA covenanting not so sue for penalties or injunctive relief for noncompliance with the UAO, conditioned upon the satisfactory performance of the UAO); Defendant's Tr. Ex. 7268 at 1, ECF No. 2383 (parties' joint stipulation regarding admitted exhibits, admitting Defendant's Tr. Ex. 7268 as referenced in ECF No. 2381-1) (EPA's statement that Teck "raised good faith legal arguments and negotiated with the United States in good faith.").

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> EPA to T[eck] C[ominco] on December 11, 2003, or (ii) for performance of the R[emedial] I [nvestigation]/F[easibility] S[tudy] costs paid by T[eck] C[ominco] A [merican] I[ncorporated]. This covenant not to sue shall take effect upon the Effective Date of this Settlement Agreement, and is conditioned upon the satisfactory performance by T[eck] C[ominco] A[merican] I[ncorporated] and T[eck] C[ominco] of their obligations under this Agreement.

Id. at 1221, n.42. The court determined the plaintiffs were barred by § 9613(h) because the 2006 EPA-Teck UCR RI/FS Settlement Agreement was patterned to "accomplish the cleanup." *Id.* at 1221. But the CCT misconstrues what that means. The court did not determine that a "remedial action . . . was otherwise scheduled"; it merely points to a settlement provision requiring that Teck perform an RI/FS to determine whether and to what extent a remedial action is warranted.

D. The "continuing violation" doctrine does not apply.

The CCT and the State also argue that they are somehow saved by the "continuing release theory" even though acknowledging the only "releases" legally at issue are now the leaching of metals from slag, and that slag was last released by Teck (or more precisely, its predecessor in interest) in 1995. ECF Nos. 2529 at 22-25, and 2533 at 29-30. While leaching may continue, the actual discharge of slag stopped nearly 30 years ago so there is no continuing action taken by Teck. As such, the doctrine is inapplicable to the UCR Site and does not serve to toll the statute of limitations. The continuing violations doctrine has never been applied to toll a CERCLA claim, much less one for natural resource damages, and neither the CCT nor the State cite anything suggesting otherwise.

In the hostile work environment cases Plaintiffs describe as "analogous", it is the continued discriminatory acts that create a hostile work environment, ongoing, repeated misdeeds, and ongoing injuries, which underlie the doctrine. *See Nat. R.R.*

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Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) ("The 'unlawful employment practice' … occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.").

Here, unlike in Title VII hostile work environment case, the Ninth Circuit has limited recovery under CERCLA to releases from the leaching from the slag in the riverbed sediments. *Pakootas v. Teck Cominco Metals Ltd.*, 452 F.3d 1066, 1075 (9th Cir. 2006) ("We hold that the leaching of hazardous substances from the slag at the Site is a CERCLA release."). Under CERCLA, a single operable "release" becomes actionable and capable of causing significant harm. That is the very definition of a "discrete act" under *Morgan*. Moreover, as the Ninth Circuit has recently noted, after *Morgan*, "little remains of the continuing violations doctrine"; "Except for the limited exception for hostile work environment claims," the serial acts branch of the doctrine—the same branch relied upon by the CCT and the State—"is virtually nonexistent." *Bird v. Dep't of Human Servs.*, 935 F.3d 738, 747-48 (9th Cir. 2019).

Even in the case cited, applying the continuing tort doctrine in state law property torts, the court acknowledges that the claim accrues once a plaintiff becomes aware of damages and causation. *City of Spokane v. Monsanto Co.*, No. 2:15-CV-00201-SMJ, 2016 WL 6275164, at *3 (E.D. Wash. Oct. 26, 2016). At that point, the continuing tort doctrine would no longer apply to toll the claim. *Id.*; *see also Pacific Sound Res.*, 130 Wash. App. at 942 ("Here, even if the conditions are reasonably abatable, there were known actual and substantial damages well over three years before PSR and the Port filed the lawsuit.").

In sum, the "continuing violation" doctrine, to the extent it even survives in this circuit, does not apply here, and would do nothing to extend the limitations period.

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E. Equitable tolling is not justified.

Although equitable tolling is theoretically available in CERCLA cases, A*tlantic Richfield Co. v. United States*, 181 F.Supp.3d 898, 922-23 (D.N.M. 2016), the doctrine is an "extraordinary measure," which, even if available, is only sparingly applied. *Irwin v. Dep't of Vet. Affairs*, 498 U.S. 89, 96 (1990). To seek relief under the equitable tolling doctrine, the plaintiff must show (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) (internal quotation marks omitted); *Fue v. Biter*, 842 F.3d 650, 654 (9th Cir. 2016) (citations omitted). CCT (and the State) argues that Teck's actions opposing the application of U.S. law and listing the site on the NPL were "extraordinary conduct" on Teck's part. CCT notes, as the State did, that, "[h]ad the UCR been listed on the NPL, consistent with the UAO, there would be no question that this action is timely." ECF No. 2533 at 31. Notably absent from the discussion is mention of Teck having funded the entire investigation, including the ongoing RI/FS and Plaintiffs' (and others') participation in that process. There is no precedent for applying equitable tolling under circumstances remotely like these. Indeed, that relief has been denied under much more compelling circumstances.

In *United States v. Capital Tax Corporation*, the EPA filed a CERCLA contribution action against a PRP after the three-year limitations period set out in CERCLA § 9613(g)(2) had run. No. 04 C 4138, 2012 WL 1339449, at *3 (N.D. Ill. Apr. 16, 2012). The PRP moved for summary judgment on the statute of limitations issue, which EPA countered by asserting that the statute of limitations should be equitably tolled because of the PRP's "flip-flopping testimony" that he never entered into an agreement to buy the contaminated property. *Id.* at *2-3. The district court in

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the Northern District of Illinois granted summary judgment in favor of the PRP. In so doing, the court agreed that EPA "had all of the information it needed to file suit earlier" against the PRP even though EPA chose not to file the claim at that time in reliance on the PRP's prior denials that he never agreed to buy the property. *Id.* at *4. As the court emphasized: "The government's problem is not that it could not have found the relevant evidence earlier with reasonable diligence. Its problem is that it chose to believe Dukatt instead of Capital Tax about the existence of the agreement." *Id.* Although the court noted that such a choice was "reasonable," "it was a choice nonetheless" that rendered equitable tolling inappropriate. *Id.*

In this instance, neither the CCT nor the State was diligent in pursuing its NRD claims. The CCT prepared and submitted to EPA a Petition in 1999, described above, which is as comprehensive a documentation of "notice" of a claim as one could have. The State had knowledge of its alleged NRD claim in 1989, if not 1986, well over ten years before it ever filed its claim and more than twenty years before conducting a natural resource damage assessment.[5] And EPA's decision not to list the UCR Site on the NPL does not save either Plaintiff – if anything, both Plaintiffs' arguments for equitable tolling due to "reasonable" failure to file on an expectation that the Site would be listed on the NPL demonstrate conclusively that each was on notice of the claim, thought about whether it had to file, and decided to gamble on the applicability of the "special" statute that would indisputably apply if the Site were listed on the

[5] On August 12, 2012, the UCR Site Natural Resource Trustee Council (of which the State is a member) opened public comment on the draft assessment plan for the UCR Site. 77 Fed. Reg. 46,770 (Aug. 6, 2012). Yet, the Trustee Council never responded to the public comments nor finalized the injury assessment plan.

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NPL. As in *Capital Tax*, the Plaintiffs had the relevant information necessary to bring the NRD action much earlier, yet made the conscious decision not to do so, based on the (ultimately mistaken) belief that EPA would "include the Site on the NPL or address the Site as a Superfund alternative site." *See* ECF Nos. 2529 at 26, 2533 at 30. Even if that decision had been "reasonable" under the circumstances, it shows Plaintiffs "failed to exercise due diligence in preserving [their] legal rights," *see Irwin*, 498 U.S. at 96, despite having had the ability to bring the NRD action "within a reasonable time after [it] ha[d] obtained … the necessary information." *See Capital Tax Corp.*, 2012 WL 1339449, at *4. Accordingly, equitable tolling will not apply to forgive the ultimately erroneous (even if reasonable) belief and toll the limitations period for NRD claims.

III. CONCLUSION

For the foregoing reasons, Teck respectfully requests that the Court grant this motion for a summary judgment on Plaintiff Confederated Tribes of the Colville Reservation's time-barred claims.

DATED this 12th day of July, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system.

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