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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

and

STATE OF WASHINGTON,

Plaintiff/Intervenor,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant.

NO. 2:04-cv-00256-SAB

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

August 11, 2022 at 2:30 pm
With Oral Argument

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes and Codes

Rules and Regulations

Other Authorities

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I. INTRODUCTION

Much of CCT's Opposition is comprised of pages and pages attempting to establish facts that Teck does not dispute, but which are not relevant to the question of whether CCT can establish standing. Teck does not dispute that CCT has sovereign authority and control over the resources on its own tribal lands – but no such resources are at issue here. Nor does Teck dispute the CCT's historic and cultural connection to the UCR generally. Teck does not dispute that CCT has certain federally protected usufructuary rights in the North Half and the Lake Roosevelt Reservation Zone, or that CCT has the authority to regulate its own members' exercise of those rights – but CCT has no authority or control over the resources themselves, which is the statutory requirement for standing to make a claim for natural resource damages.

Similarly, Teck does not dispute that CCT exercises certain management duties outside of its reservation pursuant to cooperative agreements with the state and federal governments. But CCT's emphasis on such agreements misses the relevant issue for trusteeship: neither the state nor federal government has delegated or relinquished its sovereign authority over the resources to CCT under those agreements, which are also terminable at any time in those governments' sole discretion.

As to the questions that *are* relevant to this motion, CCT does not rebut – because it cannot – that its authority to control is limited to its own present lands, and its own members, under well-established law. Although CCT urges that the statute does not require actual legal authority to control a resource for trusteeship and standing to claim damages, that proposition and its underlying overbroad interpretation of "appertaining to" is inconsistent with the text and purpose of CERCLA's NRD provisions, under which control over the resource is the key

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attribute defining trusteeship/standing, and Ninth Circuit precedent on statutory construction.

II. ARGUMENT

A. The Sovereign's Control Is the Defining Characteristic of "Natural Resources" and Identifies the Relevant Public

Courts have long observed that CERCLA is not a model of clarity. *See, e.g., Artesian Water Co. v. New Castle Cnty.*, 851 F.2d 643, 648 (3d Cir. 1988) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."); *Pakootas v. Teck Cominco Metals Ltd.*, 830 F.3d 975, 985 (9th Cir. 2016) ("*Pakootas III*") ("the language of CERCLA is not a model of precise crafting"). And there is even less case law on NRD claims than on the other aspects of CERCLA.

To assert claims as an NRD trustee, CERCLA requires that a sovereign must have the authority to exercise control over, and the obligation to serve the public's interest in the restoration of, the specific natural resources for which NRD are claimed. CCT's suggestion, predicated on myopic focus on the term "appertaining to" as used in the NRD provisions, that CERCLA permits standing to assert NRD claims based on something less than a sovereign's actual authority to assert control over the resource at issue is refuted by the structure and language of the statute in at least two ways: (1) the statute establishes as a threshold matter that "control" over the resource is the defining attribute of a "natural resource," which is the basis for trusteeship; and (2) any NRD recovery can only be used for restoration purposes.

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1. The Sovereign's Control Is the Defining Characteristic of "Natural Resources"

The sovereign's authority to control the resource for which NRD are claimed is pivotal to standing under CERCLA's NRD framework. "Control" is called out as the common characteristic that underlies the statutory definition of the "natural resources" on which an NRD claim can be based. As a foundational matter, CERCLA defines "natural resources" for which NRD may be sought as those "belonging to, managed by, held in trust by, appertaining to, *or otherwise controlled by*" the sovereign. 42 U.S.C. § 9601(16) (emphasis added); *see also Ohio v. DOI*, 880 F.2d 432, 461 (D.C. Cir. 1989) (noting DOI statement that "a substantial degree of government regulation, management or other form of control over the property would be sufficient to make the CERCLA natural resource damage provisions applicable."). Because a sovereign's control over the resource is the defining characteristic of "natural resource," that same control is necessary to establish standing to assert NRD.

CCT argues that Teck's interpretation of the CERCLA trusteeship and standing requirements is too narrow because it applies the statutory definition of "natural resources" as those within a sovereign's authority to control, and that instead "the four trusteeship criteria" in the statute's liability provision should be understood as "alternatives so one is enough and necessarily multiple parties may satisfy the standard." *See* CCT Br. at 6, 16-19 (citing (§ 9607(f)(1)). In particular, CCT urges that the terms "appertaining to" and "management" as used in the statute's liability provision (§ 9607(f)(1)), should be interpreted to mean that a sovereign can exercise trusteeship based on something less than any actual authority to control the resource (i.e., rights to use or access a resource, or

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management of certain resources by agreement with the sovereign that has control over them).

But, while CCT argues that § 9607(f)(1) alone is determinative of the scope of trusteeship and standing, that term must be interpreted in the context of the statutory scheme, under which the sovereign's *control* is what defines a "natural resource" for which damages can be recovered, and for which a sovereign can act as trustee, in the first place. The statute's definition dictates that allegedly injured resource must be one "belonging to, managed by, held in trust by, appertaining to, *or otherwise controlled by*" a sovereign. § 9601(16). CCT does not address that clear indication of Congress's intent that *control* is the common factor underlying "belonging to, managed by, held in trust by, or appertaining to." *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs*., 484 U.S. 365, 371 (1988) ("[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme, because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law") (internal citations omitted); *see also Friends of Animals v. U.S. Fish & Wildlife Serv.*, 879 F.3d 1000, 1006-1007 (9th Cir. 2018).

The phrase "or otherwise controlled by" reflects Congressional intent that *control* is the common (and limiting) feature of the various examples listed, including "appertaining to," under Ninth Circuit precedent on directly analogous language. In *U.S. v. Delgado*, 4 F.3d 780, 785-86 (9th Cir. 1993), the court considered language in 21 U.S.C. § 828(c)(2)(A) that required a defendant "occup[y] a position of organizer, a supervisory position, or any other position of management....". Citing *U.S. v. Jerome*, 942 F.2d 1328, 1331 (9th Cir. 1991), the Ninth Circuit reasoned that "we must require that the organizer 'exercise

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some sort of managerial responsibility,' because of the statutory phrase, 'or any other position of management' modifying the word 'organizer.'" The court went on to explain, with an example quite on point for this case:

> Although the issue in *Jerome* was whether the retailer organized his suppliers, the ratio decidendi was broader than that. The syntax of the statute, "A, B, or any other C," implies that A must fall within the class C; that is, organizers are counted only if they exercise some sort of managerial responsibility. By analogy, a statute regulating fishing may state that licensed individuals may catch up to some specified limit of "bass, trout, or any other fresh water fish." The limits would apply to fresh water bass, such as black bass, but not to sea bass, because the clause "or any other fresh water fish" limits "bass" and "trout" to those in fresh water. Likewise, under the continuing criminal enterprise statute, it is not enough to be just a non-managerial organizer, as *Jerome* was.

Delgado, 4 F.3d 780, 785-86.

CCT would have this court adopt a broad interpretation of any resource "appertaining to" a tribe, that would go so far as to include any legal ability to *access* the resource, no matter how far beyond the tribe's reservation. *See*, e.g., CCT Br. at 16-18, 21-23. That standard would not only be unworkable, but also ignores that the statute defines "natural resources" for which NRDs may be claimed so as to make clear that "appertaining to" in this context was intended to reflect one way a sovereign may have "control." By requiring a potential claimant have the authority to control in some fashion the resource for which damages are claimed, the statute ensures that its purpose to "preserve the public trust in the Nation's natural resources," S. Rep. No. 96-848, 96th Cong., 2d Sess. at 84 (1980) (attached hereto), is fulfilled. Sovereign control over the resource ensures that NRDs can only be sought for *public* resources, that the sovereign bringing the claim has the practical authority to restore the resource as contemplated by the statute, and that potential claimants have an independent duty to serve the

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relevant public interest for that resource. All of these elements are essential to the statutory scheme – and to "preserving the public trust" in natural resources.

While CCT points to dicta in *Coeur d'Alene I* that "trusteeship is not an all or nothing concept," CCT Br. at 6 (quoting *Coeur d'Alene Tribe v. Asarco*, 280 F. Supp. 2d 1094, 1115 (D. Idaho 2003) ("*Coeur d'Alene I*")), that does not mean that statutory trusteeship and standing can be decoupled from actual control over the resource. Rather, it merely recognizes that more than one sovereign may have authority to control a resource, and that sovereigns may control certain aspects of an otherwise privately-owned resource on behalf of the public.

To be clear, Teck does not argue, as CCT suggests (CCT Br. at 20), that co-trusteeship is impermissible, and in fact Teck specifically recognized that the United States is likely the primary trustee for the resources at issue here, alongside the State. *See* ECF No. 2504 at fn. 2. Where multiple sovereigns each have authority to control different aspects of the same resource, each may be able to establish trusteeship, and in such cases it is appropriate for co-trustees to work in conjunction as natural resource trustees to balance the interests of their respective publics. But that is not the case with respect to the CCT and the natural resources at issue here. And because the restoration and/or replacement of an injured natural resource by a trustee as contemplated by the statute is a significant exercise of authority and discretion, CCT's exercise of co-trusteeship authority over resources *not* otherwise within its sovereign control necessarily diminishes the legitimate authority of the State (and/or the federal government) over the resource and prevents the relevant public's interests from being served.

CCT's description of some of the damages it seeks provides a good example of why the award of damages to the CCT in this instance would run

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contrary to the purposes behind CERCLA's NRD provisions. Among the damages CCT discloses in its initial calculations are many millions of dollars to allow the CCT to acquire land along the Upper Reaches, expressly for the purpose of providing tribal members with access to the river where they currently have none. *See* ECF No. 2505-4 (CCT Rule 26(a)(1) disclosures) at 30-31. Examination of the logical underpinnings for that proposal exposes its flaw: the CCT claim that what are inarguably public resources, available to the general public, have been injured, and as "restoration" of those resources, CCT proposes the acquisition of land solely for CCT. (This example, of course, also exposes the fundamental irony in seeking access to a portion of the river to which they have no current access, as restoration for claimed "injuries" to resources in that part of the river, due to its contamination.).

2. **The Decision in *Yakama Nation v. Airgas USA* Is Inapposite**

CCT makes much of the ruling in *Confederated Tribes & Bands of Yakama Nation v. Airgas USA*, 435 F. Supp. 3d 1103, 1124 (D. Or. 2019) ("*Yakama*"), claiming it stands for the proposition that fishing rights outside a reservation are sufficient to confer trusteeship at least over the fish. That decision does not support CCT's position, and indeed, is not instructive here at all, for several reasons. First, because the *Yakama* court ruled on tribal standing in the context of a Rule 12(b)(6) motion to dismiss, the factual allegations of the plaintiff (Yakama Nation) were taken as true. *See id.* at 1110, 1123. The court therefore did not examine the plaintiff's assertion that its off-reservation fishing rights gave it "some management or control over natural resources in the geographic area at issue, or that those resources appertain to it," but rather took the allegation at face value and presumed that they did. *Id.* at 1124. Second, because the Yakama

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Nation had not asserted an NRD claim,[1] the court considered the tribe's potential standing in the abstract, and not as to specific resources or claims. *Id.* at 1120, 1123. Should the litigation proceed and an NRD claim be asserted, the tribe would still have to demonstrate that specific resources within the scope of its trusteeship have been injured by the release of a hazardous substance. *See Pakootas III*, 830 F.3d at 981 n.4 (9th Cir. 2016) (quoting *Coeur d'Alene I*, 280 F. Supp. 2d at 1102 (citing § 9607(a)(4)(C)) (emphasis added)).

Third, perhaps because there was no NRD claim and/or due to the early stage of the case, the court did not examine CERCLA's language or statutory framework to determine whether the tribe could assert standing for any resource outside of its reservation based solely on its reserved fishing rights – or on any other basis. Instead, noting the lack of case law on point, the magistrate judge accepted the conjecture of a law review article that "an argument can be made that a tribe that holds protected treaty-reserved rights ... on off-reservation ceded lands would have authority ... to assert trusteeship over such off-reservation lands to assess and recover NRDs under CERCLA or OPA, because the resources continues [sic] to be one 'belonging to, managed by, controlled by, or [at least] appertaining to such tribe.'" *Id*. at 1124 (citing Adam S. Cohen, Mave A. Gasaway, *The Role of Indian Tribes in Recovering Natural Resource Damages under CERCLA and the Oil Pollution Act* (2017) (quoting 42 U.S.C. § 9607(f)(1)) (alterations in text)). The district court adopted that conclusion, but in doing so noted the lack of controlling authority and early stage of the case: "Judge Papak found that Plaintiff's off-reservation fishing rights qualify under

[1] The *Yakama* court dismissed the Yakama Nation's claim for NRDA costs without prejudice, having held that such claims cannot be adjudicated independently of an NRD claim, which the tribe had not asserted. *Id.* at 1119.

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CERCLA's definition of natural resources because at the motion to dismiss stage he takes Plaintiff's allegations as true." *Id.* at 1110.

B. CCT's Exercise of Trusteeship Would Confer Decision-Making Authority It Does Not Otherwise Have Over the Resources

CCT predicates its case for trusteeship on a number of factors, including its historical ties to the UCR, the communal right of the tribe to hunt and fish on its former reservation lands, its alleged "ownership" right in fish swimming in the UCR, the present CCT Reservation's proximity to the UCR Site, CCT's activities on State and/or federal lands pursuant to cooperative agreements including participation and management of certain conservation efforts, its participation in an agreement with other neighboring tribes, its participation in the prior phases of these proceedings, and the "intangible consequences of contamination of the Colville's Homeland." While all of these may be central to "the sovereign experience of the Tribes" and suggestive of CCT's deep connection with the region, CERCLA trusteeship and standing are not based on historic connection to the land and its resources (which Teck does not contest here), but on the authority to control the resource on behalf of the public.

Both the State and federal government each have authority to assert some level of control over each of the resources at issue and thus clear statutory authority to act as trustees and assert claims for NRDs. Unlike either, CCT does not have any legal authority to control these resources in any respect. The question is whether the statute permits CCT to exercise authority over public resources belonging to other sovereigns – effectively to *borrow* the authority it lacks from its co-trustees. Because trusteeship is limited to sovereign entities, the question must be considered in light of considerable authority addressing the

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scope of tribal sovereign authority relative to states and the federal government.

CCT argues that cases addressing the lack of tribal sovereign authority to regulate natural resources on lands that have been reclaimed by Congress are irrelevant to the question of its trusteeship (*see* CCT Br. at 19); but these cases put CCT's arguments for trusteeship over resources under state and federal control into perspective. Tribal sovereignty is limited in nature and fundamentally linked to the lands under the tribe's control. CCT has no authority to exercise control over public resources outside of its own tribal lands in any other context, and there is no reason to interpret CERCLA's statutory scheme as requiring another result in the case of the natural resources at issue here.

1. CCT's Agreements with Other Sovereigns Do Not Confer Any Authority to Control the Resources at Issue

CCT also argues that certain cooperative agreements with the State and the federal government are sufficient to establish trusteeship over the natural resources at issue. But while some of these agreements provide limited contractual rights to CCT to perform some management functions, none alters the scope of CCT's authority as a sovereign. Instead, they are contractual agreements to work cooperatively with CCT in support of the shared goals of their respective publics, that do not alter the relative sovereign authority of the contracting parties. The State has not forfeited any right or duty to control these resources on behalf of the State's citizens by entering into such agreements, because it retains discretion to terminate them should they no longer serve the interest of its citizens. *See U.S. v. Winstar Corp*., 518 U.S. 839, 877 (1996) ("[A]bsent an unmistakable provision to the contrary, contractual arrangements, including those to which a sovereign itself is a party, remain subject to

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subsequent legislation by the sovereign.") (citations and internal quotation marks omitted). By the same measure, CCT does not forfeit its sovereign authority over its tribal lands merely by entering into contracts with the State wherein the State exercises certain authority within the tribal territory.

Despite CCT's reliance on these agreements as a basis for standing, none confers on CCT independent authority to assert control over the resources, but only to act with the permission and under the ultimate authority of the State or federal government for actions taken on State or federal land. None of the examples CCT has presented suggests that some greater authority was expressly conferred on the tribe. For example, although CCT claims to have management authority over Reservation Zone lands at Lake Roosevelt pursuant to the 1990 Cooperative Agreement between CCT and the Spokane Tribe and the three DOI agencies exercising some control over the Lake Roosevelt National Recreation Area, that agreement expressly states that it does not alter the scope of DOI's statutory authority to control the Lake Roosevelt site. *See* Decl. Cody Desautel (ECF No. 2540), Ex. A (1990 Cooperative Agreement) § II.1 ("This Agreement is entered into by the Department of the Interior pursuant to the authority of the Act of August 30, 1935, 49 Stat. 1028, 1039, the Act of March 10, 1943, 57 Stat. 14, 43 U.S.C. §§ 373, 485i (1982). Nothing in this Agreement shall be construed to modify or annul the Secretary's authority under these Acts."). The parties further agreed "that the management and regulation of the LRMA set out below are not intended to nor shall they interfere with or be inconsistent with the purposes for which the Columbia Basin Project was established, is operated and maintained ... nor is it intended to modify or alter any obligations or authority of the parties."). *Id.* § IV.D. Moreover, DOI retains exclusive and unfettered

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authority to terminate the agreement. *Id*. § V.C ("This Agreement shall remain in effect until terminated by the Secretary of the Interior.").

In any event, *Cassidy v. U.S.*, 875 F. Supp. 1438 (E.D. Wash. 1994), specifically rejected any notion that the terms of the 1990 Cooperative Agreement can be construed as a cession or delegation of authority by DOI to the tribes in the Reservation Zone. *See id.* at 1455. *Cassidy* did so having first determined that, because Congress reclaimed "all right, title, and interest" in the tribal lands reclaimed for purposes of the Grand Coulee Dam Project, *see* 54 Stat. 703 (June 29, 1940) (ECF No. 2505-2, Tab B-03) ("1940 Act"), codified at 16 U.S.C. § 835d, CCT had lost all rights to regulate or control those lands. *See id.* at 1452-1455. *Cassidy* applied the Supreme Court's decision in *S. Dakota. v. Bourland*, 508 U.S. 679 (1993), which explained that when Congress reclaims all rights in tribal lands, as it did here, the tribe loses any authority to regulate or control those lands, *even those within its reservation border*. *See id.* at 1452 (while tribes had "arguably" once had regulatory control over" the Reservation Zone lands, they "lost this control when Congress acquired the lands underlying Lake Roosevelt.") (citing *Bourland*, 508 U.S. at 689).[2] While CCT argues that *Cassidy* and *Bourland* are limited to their facts (i.e., the tribes' lack of authority to regulate non-tribe members on reclaimed lands), both held that due to Congress's reclamation the tribes had lost *all* right to regulate the land and its resources in any way. *See Bourland*, 508 U.S. at 692 ("[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights

[2] *Cassidy* also considered the terms of 1974 DOI Solicitor Opinion referenced by CCT (*see* CCT Br. pp. 8-9). *See* 875 F. Supp. at 1441.

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to regulatory control.").

The court then considered whether DOI had restored some of that authority to the tribes by contractual delegation—and concluded that it had not. *See* 875 F. Supp. at 1455 (noting that the government could not prove, based on the 1990 Cooperative Agreement or otherwise, a valid delegation of authority to the tribes). Despite the subsequent efforts of both tribes to urge DOI and/or Congress to make a valid delegation of authority to the tribes in the Reservation Zone, since the 1994 ruling in *Cassidy*, DOI has not since agreed to delegate its authority. *See* Desautel Decl. (ECF No. 2540), Ex. B (Jan. 19, 2017 DOI letter to CCT et al.) (stating DOI has "considered several options" to "achieve a permanent resolution for management of the fisheries at Lake Roosevelt that is consistent with the paramount use requirement of the 1940 Act" "while addressing concerns raised by *Cassidy* and accounting for other public concerns," and expressing "a strong hope that the next administration will work closely with Tribal and State stakeholders to achieve permanent resolution"); *see also* SUMF ¶¶ 39-43.

Similarly, CCT's cooperative agreements with the State related to the North Half do not confer or cede State authority to CCT, but are mutual agreements by two sovereigns with divergent authorities and interests to accomplish common goals. Sovereign authority and control over natural resources off-reservation remains with the State, which must continue to ensure that its duties toward its public (including tribal members), are executed, and the State's agreements with CCT preserve that authority. *See, e.g.*, CCT Ex. D (1998 Cooperative Agreement at ¶ 2 ("This agreement doe[s] not purport to declare legal rights or authorities and has "no effect on jurisdiction or authority").

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2. CCT Does Not Have Any Measure of Control Over Resources on Former Tribal Lands Based on Hunting and Fishing Rights

CCT's primary argument is that the tribe's communal usufructuary rights, *i.e.*, "the right to make a modest living by hunting and gathering off the land," *Confed. Tribes of Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187, 1194 n.13 (E.D. Wash. 2011), give CCT basis for trusteeship over off-reservation fish. CCT contends that "the fish in the UCR 'appertain' to the Tribes' reserved hunting and fishing rights in the North Half, the use of its reservation lands, and its 'paramount rights' to use one-quarter of Lake Roosevelt." CCT Br. at 21. None of these rights, however, confers any authority or control over the resources themselves, which remain under federal and/or State control. CCT members may be a part of the general public on whose behalf resources are held in trust by the State, but CCT is not entitled to exercise decision-making authority over those resources and therefore are not authorized to do so as an NRD trustee.

While "the Supreme Court and the Ninth Circuit have, on multiple occasions, elucidated the principles guiding analysis of sovereignty issues relating to treaty-reserved usufructuary rights 'in common with the citizens of the state' in Washington," *Anderson*, 903 F. Supp. 2d at 1196, including those specific to CCT, no court has ever held that treaty-based usufructuary rights confer on the tribes any regulatory or co-management duty in the resource itself. They have in fact ruled to the contrary. Regarding CCT's hunting and fishing rights in the North Half, in *Antoine v. Washington*, 420 U.S. 194, 205 (1975), the Court held that Congress ratified CCT's "right to hunt and fish in common with all other persons" on the lands of its former North Half, and that this federally-conferred right *partially* preempts the State's authority to regulate tribe

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members' exercise of those rights. But *Antoine* did not state or imply that CCT had any regulatory authority over the resources themselves, which remained with the State. Nor would that proposition square with Congress's "clear and express" termination of all of CCT's former rights in the North Half, and restoration of those lands to the public domain. *See* Act of July 1, 1892, 27 Stat. 62, § 1 (July 1, 1892) ("1892 Act"); *Hagen v. Utah*, 510 U.S. 399, 414 (1994) (characterizing 1892 Act by which Congress "vacated and restored to the public domain" the North Half lands as an example of "clear and express language of termination") (citations omitted).

CCT's argument that it exercises regulatory authority in its former territories because it can regulate its members' exercise of federally-conferred hunting and fishing rights, CCT Br. at 23-24 (citing *Settler v. Lameer*, 507 F.2d 231, 236 (9th Cir. 1974)), also ignores that the tribe has no authority over the resources themselves, or even exclusive authority to regulate its members' use of resources on State land, as CCT obliquely acknowledges, CCT Br. at 24-25. The State continues to have "sovereignty over [its] natural resources," and it is well established that the State can curtail the exercise of federally-conferred hunting and fishing rights when necessary for the conservation of the State's natural resources. *See, e.g., Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (citing, *inter alia*, *Antoine*, 420 U.S. at 207); *see also U.S. v. Wash.*, 520 F.2d 676, 685 (9th Cir. 1975) (recognizing State's authority to "interfere with the Indians' right to fish when necessary" for conservation of State resources). While CCT can seek injunctions to challenge particular instances of the State's exercise of its authority over its natural resources (as it has done in *Antoine, Anderson*, and other cases), CCT has never been deemed to

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be a co-regulator with State (or federal) authorities over any of the natural resources at issue in this case. The statute should not be interpreted to permit CCT to take on the essential authority of a co-regulator by asserting trusteeship over those resources.

With regard to CCT's "paramount" hunting, fishing, and boating rights within the "Reservation Zone" of Lake Roosevelt, these rights were all that were conferred on the CCT after Congress reclaimed "all right, title, and interest" in the tribal lands reclaimed for purposes of the Grand Coulee Dam Project in the 1940 Act. 16 U.S.C. § 835d. By that action, CCT lost all rights to regulate or control those lands or others' use of them. *See Cassidy*, 875 F. Supp. at 1452-1455 (citing, *inter alia*, *Bourland*, 508 U.S. at 692).

3. CCT Cannot Claim "Ownership" of Fish Based on Its Fishing Rights in the North Half and Lake Roosevelt

CCT also claims trusteeship on the basis that its "reserved fishing rights" give CCT "the right to a harvestable portion of fish," and that therefore "a portion of the fish in the Columbia River—and in Lake Roosevelt—"belong" to the tribe. CCT Br. at 10, 26. CCT cites *U.S. v. Washington*, 853 F.3d at 965 (9th Cir. 2017) and its predecessor, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-62 (1979), which held that the "Stevens Treaty" tribes had (based on their treaty language) not merely a right to "take fish" but to "take a share of each run of fish that passes through tribal fishing areas." *Id.* at 689. But even if these cases were presumed applicable to the interpretation of the CCT's protected hunting and fishing rights, they do not hold that any tribe has a definite property right to fish still swimming in the wild – much less those found outside tribal waters. Rather, they stand for the proposition

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that where a tribe has federally-protected rights to use resources, neither the state nor the tribe may exercise its authority to destroy the rights of the other's citizens. *See, e.g., Passenger Fishing Vessel Ass'n*, 443 U.S. at 684-85.

CCT argues that it is the only potential trustee to which the fish truly "belong," CCT Br. p. 28. CCT does not own the fish. First, it is the law of the case that the fish and wildlife within the State's borders are the property of the State, held in trust for the general public. *See* ECF No. 2492 at 12; *see also* Wash. Rev. Code § 77.04.012; *Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wash.App. 566, 569 (2004). For its proposition that "neither the state nor the federal government 'owns' the fish within its waters," CCT Br. at 28, CCT cites *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977), which explains that while 19th Century cases referred to a state's "ownership" of its resources, this conveyed "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource," rather than an actual property right, and "[u]nder modern analysis," the issue is construed as one of state police power. 431 U.S. at 284, and *U.S. v. Washington,* 759 F.2d 1353, 1359 (9th Cir. 1985), which cites *Douglas*. Neither case suggests that the State does not have regulatory authority, effectively "ownership" over the fish, under its police powers. Indeed, the state even has an interest coextensive with the tribes for fish and game within an Indian reservation. *See White Mountain Apache Tribe v. Ariz. Dep't of Game & Fish*, 649 F.2d 1274, 1283 (9th Cir. 1981) ("The fact that fish and game are presently upon an Indian reservation does not negate the state interest in conserving them, along with all other fish and game within the boundaries of the state. A tribe cannot claim to 'own' the fish and game on the reservation so as to deprive the state of any interest in them.") (citing *Douglas*,

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431 U.S. at 284); *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988) (Indian tribe's right to use an area for religious and cultural purposes does not create a *de facto* beneficial ownership of public lands).

4. CCT Cannot Claim Trusteeship Over All "Aquatic Resources" in the UCR Site

Finally, CCT argues that it can even assert trusteeship for sediments and benthic macroinvertebrates located in the Upper Reaches, the lower end of which is approximately 10 miles north of the CCT Reservation border – and for that matter all "aquatic resources in the UCR Site" – extrapolated from its fishing and hunting rights in Lake Roosevelt and the North Half. CCT's theory is that the benthic macroinvertebrates and sediments support the population of fish and wildlife that the tribe can fish and hunt. CCT Br. at 28-29. This attenuated chain of interests – none of which includes the actual right to control the resource – cannot fulfill the statutory requirement that standing to assert NRDs derives from sovereign authority to control the specific resource.

C. CCT Cannot Assert Trusteeship for "Tribal Service Losses" Not Based on a Natural Resource Under Its Control

CCT argues that its own alleged "tribal service losses" provide an independent basis for CCT's trusteeship. But these alleged losses are not the result of an injury to a specific natural resource, and thus, they are not recoverable as NRD under the statute, by any claimant. CCT notes that NRD are not limited solely to "use" losses, *see Ohio*, 880 F.2d at 464, and may include "non-use value" of "cultural, religious and ceremonial losses that rise from the destruction or injury to natural resources." Natural Resource Damages for Hazardous Substances, 73 Fed. Reg. 57259-01 (Oct. 2, 2008). *See* CCT Br. at 20. Notably DOI guidance on cultural losses is not incorporated into the regulations

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themselves, only referenced in the preamble and other commentary. *See La. Env't Action v. EPA*, 382 F.3d 575 (2004) (the preamble provides the legal and factual basis for the rule and guidance in the interpretation of the agency's rules, but it is not itself an enforceable rule entitled to agency deference). While DOI's interpretation of "natural resources" as potentially inclusive of cultural resources appears to be inconsistent with the statute (particularly since other similar statutes, e.g., OPA, expressly provide for cultural resource damages, while CERCLA does not),[3] the court need not address that question to resolve this dispute. DOI's guidance does not suggest that "cultural losses" are a separate category of NRD, or a separate ground for claiming trusteeship over resources not under the sovereign's control, because the statute requires that all losses, including cultural losses, must result from damage to a specific natural resource within the trusteeship of a sovereign in order to be recoverable. As DOI has explained, because "cultural" resources "are not 'land, fish, wildlife, biota, air, water, ground water, drinking water supplies, (or) other such resources," they "do not constitute 'natural' resources under CERCLA." Natural Resource Damage Assessments, 59 Fed. Reg. 14,262-01, 14,269 (Mar. 25, 1994) (ECF No. 2511-2 at Tab B-07) (quoting § 9607(a)(4)(C) (defining NRD) In other words, the fact that "cultural losses" may or may not be available under the statute does not mean that CCT can claim them here.

[3] When this same question was raised in a lawsuit regarding the 1994 DOI NRDA rulemaking, the D.C. Circuit determined it was unripe for decision, but found that DOI's commentary "does not represent an interpretation of an identified statutory provision, nor a clarification of an otherwise binding regulation." *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191, 1222-23 (D.C. Cir. 1996). No court has since addressed the question.

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CCT states that tribal service losses are to "compensate for injury specific to the Tribes and may be used as the Tribes determines for the benefit of its members," CCT Br. at 19 n.2. But CCT does not identify any specific natural resource that is within its authority or control as the basis for such claims, or any reason why, if the CCT's alleged losses are the result of damage to a resource under the authority of the State and/or federal trustees, that those trustees could not include those claims. *Cf.*, *In re Exxon Valdez*, 104 F.3d 1196, 1198 (9th Cir. 1997) (the right to enjoy uncontaminated nature is shared by all members of the public and is not a special injury held by Native Alaskans). Instead, CCT argues that it should be permitted to proceed as a trustee because it has alleged certain losses that it says are unique to the tribe. But such claims, untethered from sovereign authority over a specific resource, are not cognizable NRD claims, or a basis for asserting trusteeship under the statute – and CCT has pointed to no case ever where a court has awarded such damages to a tribe under even remotely analogous circumstances.

III. CONCLUSION AND REQUEST FOR RELIEF

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

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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