No. 24-5565

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Plaintiff-Appellant

and

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation.
Plaintiffs

STATE OF WASHINGTON,
Intervenor-Plaintiff

v.

TECK COMINCO METALS LTD., a Canadian corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Washington
No. 2:04-CV-0256-SAB, Chief Judge Stanley A. Bastian

ANSWERING BRIEF OF DEFENDANT-APPELLEE TECK METALS LTD.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee Teck Metals Ltd., formerly known as Teck Cominco Metals Ltd., states that it is a Canadian corporation, and the parent corporation of Teck Metals Ltd., Teck Resources Limited, is also a Canadian corporation.

DATED: January 21, 2025. */s/ Anne M. Voigts*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes and Codes

Rules and Regulations

Other Authorities

INTRODUCTION

Plaintiff-Appellant the Confederated Tribes of the Colville Reservation (CCT) asks this Court to do what no other court has done: create a cause of action for cultural damages under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq*. CCT and Washington State jointly seek $350 million for "damages for injury to, destruction of, or loss of *natural* resources" that they claim are the result of actual contamination. That claim is not the subject of this appeal. Before the district court, however, CCT argued it was also entitled to claim more than $500 million in damages for cultural injuries or "tribal service losses" based on some members' perceptions of contamination outside the Reservation. As the district court correctly concluded, it is not.

Before this Court, CCT disavows that position, renames its claim, and asserts that it is only seeking "interim lost use damages." Despite CCT's rebranding efforts, that claim still fails because Congress did not create it, and CCT did not previously assert it. As this Court has recognized, "[a]lthough CERCLA should be liberally construed to effectuate the purpose of the statute, it may not be extended so far as to fashion a new right under CERCLA that Congress did not intend ...." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 975 (9th Cir. 2013). "If Congress wishes to change CERCLA's statutory scheme, it

may certainly do so. But it is not the province of the courts to rewrite the statute." *Id.* That, however, is exactly what CCT and its amici ask this Court to do.

That request comes well past the eleventh hour. In all its briefing on the issue in the district court, prior to seeking review in this court, CCT never described its claim as for "interim lost use," nor did its experts. CCT professes its adoption of that terminology in this Court is "[t]o avoid confusion." AOB at 7 n.2. And it defends its prior terminology, arguing that "[m]erely labeling a lost use 'cultural' does not take it outside the scope of recoverable damages, however." AOB at 28. In truth, merely labeling a loss 'interim' (especially when it is not) does not bring it within the scope of recoverable damages under CERCLA. CERCLA allows trustees to recover natural resource damages based on actual contamination, and defines natural resources to mean "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources." 42 U.S.C. § 9607(f); 43 C.F.R. § 11.14(z). It makes no mention of cultural damages, it conditions liability on actual injury, and it provides that such damages may *only* be used to restore, replace, or acquire the equivalent of the injured natural resources. 42 U.S.C. § 9607(f).

This Court should affirm the district court's decision. A contrary result would conflict with CERCLA's plain language, reach beyond even the relevant regulations, overturn settled expectations, and have sweeping consequences for

natural resource damages assessments, negotiations, and litigation. In so doing, it would open Pandora's box, spawning a series of questions with no proper statutory answers because the statute does not encompass such a claim in the first place. This Court should not do what Congress has not.

A closer examination of the components of CCT's claim underscores why. The damages CCT seeks have little or nothing to do with injury to natural resources or restoring those resources. They don't even bear any apparent causal connection to the *use* of those resources. Indeed, CCT's own witness acknowledges that the river is safe for recreational and cultural activities.

Nevertheless, CCT sought three types of cultural damages. Although CERCLA requires that damages be used to restore or replace the injured *natural* resources or acquire the equivalent *natural* resources, notwithstanding CCT's *post hoc* reframing, all three types of cultural damages that CCT sought were expressly intended to address *cultural* injuries. First, CCT proposed a $114.6 million "Cultural Restoration Plan" to re-establish a "cultural connection" to the river. That Plan would fund new cultural and language facilities and programs and reacquire land adjacent to the Columbia River taken by the federal government in 1892. Second, in the alternative, CCT used a survey to develop a purported estimate of the value some CCT members place on "an uncontaminated river" to demand up to $525 million in damages for cultural injuries. That, of course, is on

top of the comprehensive remedial investigation and feasibility study EPA is overseeing, EPA's ultimate remedy selection following the study, *and* the natural resource damages the State and CCT jointly seek. Third, CCT argued it was entitled to the alleged value of lost trips (mostly fishing) to the UCR. That is the *only* component of the CCT's tribal service loss claim that bears any relation to the relief CERCLA actually provides. At $9 million to $13.6 million, it is a small fraction of the tribal service loss damages CCT seeks. But it duplicates damages that CCT is already seeking jointly with the State of Washington, and CERCLA expressly prohibits double recovery. This Court should affirm.

ISSUES PRESENTED

1. Whether the district court correctly granted partial summary judgment dismissing CCT's tribal service loss claim.

    a. Whether CERCLA's language authorizing damages for natural resource injuries based on actual contamination extends to cultural injuries based on perceptions of contamination.

    b. Whether, even if CERCLA could be expanded to create such claims, CCT's claim fails.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

STATEMENT OF CASE

I. Legal Background

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA; Pub. L. No. 96-510, 94 Stat. 852 (1980)) "in response to a growing desire for the federal government to ensure the cleanup of the nation's most contaminated sites to protect the public from potential harm." Congressional Research Services, *CERCLA: A Summary of Superfund Cleanup Authorities and Related Provisions*, R4103 (2012), https://crsreports.congress.gov/product/pdf/R/R41039. The statute is intended to be remedial. Accordingly, it makes past and current owners and operators of facilities from which a release occurs financially responsible for response costs (*i.e.*, environmental investigation and cleanup costs), and EPA responsible for supervising that cleanup. It also authorizes natural resource trustees, who can be federal, state, or tribal authorities,[1] to recover damages where natural resources have been injured and the cleanup will not address those injuries. Congress

[1] As CCT's amicus noted, Indian tribes are "on an equal footing with federal and state trustees for the purpose of assessing and bringing claims for natural resource damages." Spokane Tribe of Indians Amicus Br. at 12-13; *see* 42 U.S.C. § 9607(f). But tribes are not entitled to *better* or "unique" footing, and they were not given the right to pursue damages "above and beyond" that recoverable by a state or federal trustee. *See* AOB at 7.

required that trustees use those natural resource damages to "restore, replace, or acquire the equivalent of such [injured] natural resources." 42 U.S.C. § 9607(f)(1).

42 U.S.C.A. § 9607 sets forth the elements of such a claim. It provides that in "the case of an injury to, destruction of, or loss of natural resources ... liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation."[2] *Id*.

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[2] The United States asserts that "[t]he Colvilles' trusteeship in this case is not questioned," noting what they call the Tribes' "treaty fishing rights" in the River. (U.S. Amicus Br. at 23.) They are not "treaty rights"; there is no treaty, just a cooperative agreement terminable at any time by the federal government. 7-SER-1706-08. It is also untrue that the "Colville Reservation extends to the midpoint of the Columbia River." U.S. Amicus Br. at 23. Congress reclaimed "all right, title, and interest" in the portion of the River previously within the Reservation when it took all the land under the River and some adjacent to it to construct the Grand Coulee Dam; that portion of the River is referred to as the "Reservation Zone" under the cooperative agreement, as distinct from its actual sovereign Reservation, and it is no longer subject to CCT's control. *See* 54 Stat. 703 (June 29, 1940); 7-SER-747-48; *see also* 7-SER-1707-08. More fundamentally, to say that the "trusteeship in this case" was not questioned is simply false. Teck moved for summary judgment on the CCT's claims for lack of standing (7-SER-1691-1717), because even those fishing rights gave the CCT no ownership, management or control whatsoever—hence no trusteeship—over the sediments in the Upper Reaches of the River or the benthic macroinvertebrates ("BMI") in those sediments. As discussed below, those do not abut the Reservation. CCT's

A trustee seeking natural resource damages bears the burden of proving that the responsible party's release of hazardous substances caused the natural resource injuries for which they seek damages. *Id*. § 9607(a)(4)(C) ("damages for injury to, destruction of, or loss of natural resources ... *resulting from* such a release") (emphasis added); *see also Pakootas v. Teck Cominco Metals Ltd.*, No. CV-04-256-LRS, 2011 WL 13112570, *2 (E.D. Wash. Feb. 14, 2011) ("*Pakootas I*"). Under that framework, a trustee must show that (a) a "responsible party" is liable for damages for (b) the injury, destruction, or loss; (c) to or of natural resources; (d) resulting from a release of a hazardous substance. 42 U.S.C. § 9607(a)(4)(C).

Courts (and the parties to litigation) do not have to guess at the meaning of those terms. Section 9601 defines natural resource damages,[3] and those statutory definitions do not include cultural damages. Specifically, it provides that: "the term 'damages' means damages for injury or loss of *natural resources* as set forth in section 9607(a) or 9611(b) of this title." 42 U.S.C.A. § 9601(6). In turn, "[t]he term 'natural resources' means *land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources* belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States …, any

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trusteeship over those natural resources, and therefore its trusteeship relative to the claims in this case, is very much at issue, even if not the subject of this interlocutory appeal.

[3] Notably, the United States does not discuss the language of that statutory provision in its amicus brief.

State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe." *Id.* § 9601(16) (emphasis added) (emphasis added).

The relevant regulations apply the same definition and note that "[t]hese natural resources have been categorized into the following five groups: Surface water resources, ground water resources, air resources, geologic resources, and biological resources." 43 C.F.R. § 11.14(z). Those regulations also define "injury" as "a measurable adverse change, either long- or short-term, *in the chemical or physical quality or the viability of a natural resource* resulting either directly or indirectly from exposure[.]" *Id.* § 11.14(v).

The statute itself also expressly limits how natural resource damages may be used. Any sums recovered shall be available "for use *only* to restore, replace, or acquire the equivalent of such natural resources[.]" 42 U.S.C.A. § 9607(f)(1) (emphasis added). Accordingly, those damages are measured by—and limited to—the costs of restoration, replacement, or acquisition of equivalent resources. *Id.*; *United States v. Asarco Inc.*, 471 F. Supp. 2d 1063, 1068 (D. Idaho 2003) ("Under CERCLA the 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" of restoration); *New Mexico v. G.E. Co.*, 467 F.3d 1223, 1248 (10th Cir. 2006) ("Clearly, permitting the State to use an NRD recovery, which it would hold in trust, for some

purpose other than to 'restore, replace, or acquire the equivalent of' the injured groundwater would undercut Congress's policy objectives in enacting 42 U.S.C. § 9607(f)(1)."); *In re Gold King Mine Release in San Juan Cnty., Colorado, on Aug. 5, 2015*, 669 F. Supp. 3d 1146, 1156 (D.N.M. 2023) (limitation on use of natural resource damages applies to tribal trustees).

In at least one instance, however, the Department of the Interior's regulations depart from the statutory focus on natural resource damages and restoration of those resources.[4] Specifically, the preamble to an amendment to DOI's Natural Resources Damages Assessment ("NRDA") regulations, *Natural Resource Damages for Hazardous Substances*, 73 Fed. Reg. 57,259, 57,264 (Oct. 2, 2008), asserted that such damages may also include compensation for lost services *pending restoration of the resources*. The preamble also claims that damages can be recovered for "[c]ultural, religious, and ceremonial losses that [a]rise from the destruction of or injury to natural resources…." *Id.* It does not explain how tribal or cultural service losses should be assessed, though, nor did it

[4] 42 U.S.C. 9651(c)(2) authorizes rulemaking and provides that "[s]uch regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover." That, however, does not create claims—those are established under the separate statutory provisions establishing liability and defining natural resource damages.

(or could it) create a freestanding basis for recovery—certainly not absent a causal nexus.

II. Factual Background

A. The Cultural Harms CCT Alleges Were Not Caused By Teck

CCT, like many other tribes, has suffered grave cultural injuries for centuries, many due to government actions. 2-ER-190-97 (citing 3-SER-694; 3-SER-650; 4-SER-896; 3-SER-630; 3-SER-634-35; 4-SER-636; 4-SER-638; 3-SER-647; 3-SER-648; 3-SER-653; 4-SER-888). Those actions, which have nothing to do with Teck, include the construction of the Grand Coulee Dam (which destroyed the iconic salmon runs, the "keystone" species of what used to be known as the "Salmon People"), the taking of the "North Half" and forced relocation of the Reservation, and government policies aimed at eradicating tribal culture and language, like mandatory boarding schools for tribal children. *Id*.

CCT has publicly and unequivocally identified the dams as the "primary reason" for its cultural losses: "In essence the dams themselves are a polluting element and will remain so as long as they stand .... This impact, this pollution, is the primary reason for the loss of Native American culture above Grand Coulee Dam and to a lesser degree above Chief Joseph Dam." 3-SER-621. At a 1994 Congressional hearing to approve a settlement of CCT's lawsuit against the U.S.

government for harm caused by the Grand Coulee Dam's construction, Eddie Palmanteer, Jr., then-chairman of the CCT, testified:

> …Grand Coulee Dam changed forever the livelihood and lives of our people and the very nature of the Colville Reservation.
>
> …
>
> How much is reasonable compensation for the loss of our fishery, our way of life, our towns where our elders lived? How much must be paid for the destruction of our mother's and father's graves? For some of our members no amount of money can fairly compensate the Tribes for this loss ....

2-SER-261; 2-SER-269. In a more recent video, CCT members emphasized the dam's ongoing impacts:

> Salmon is our blood; ... it's a way of life.... [S]almon fishing is our culture.... [T]he traditional way of life began to end as the treaties with the US were signed, pushing people off their historic lands onto reservations.... The [construction of the Grand Coulee Dam in 1939] had a devastating effect on tribal members.... [It] just wiped out a big fishery on the Columbia River ... [I]t changed a whole way of life for people.

2-ER-189-90 (quoting CCT Fish & Wildlife, *Salmon and Our People: The Chief Joseph Dam Fishery Story*, https://www.cct-fnw.com/video (last visited Oct. 9, 2023)).[5]

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[5] One of the (many) divides between the experts on the plaintiffs' joint (non-tribal) natural resource damages claims, ironic in light of this background, is that the natural resource Plaintiffs allege the Trail smelter's discharges have injured are benthic macroinvertebrates, particularly metals-sensitive fly larvae, and Teck's expert opines that a much more cost-effective and logical way to replace the ecological function of them (which function as nutrients in the ecosystem) would

As CCT has also publicly acknowledged, other significant historical contributors to its cultural losses include colonization, forced assimilation through boarding schools, and land dispossession, as well as environmental challenges such as climate change, other sources of pollution, and additional fish consumption advisories. *See* 2-ER-192-97 (citing 3-SER-630-33; 3-SER-36; 3-SER-694; 3-SER-647-50; 3-ER-531 at 77:14-78:13).

B. The Upper Columbia River, the creation of Lake Roosevelt, and CCT Reservation

The UCR watershed is a naturally metals-rich region. 7-SER-1637-38. The river's ecosystem has been significantly altered by human actions, most prominently the construction of the Grand Coulee Dam and ongoing water management efforts. 3-SER-621. The CCT Reservation, established in 1872, is located approximately 35 miles south of the U.S.-Canada border. *See* 7-SER-1725-26 (citing EPA, *Draft Upper Columbia River Site, Remedial Investigation/*

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be funding fish stocking programs. 5-SER-981-83; 5-SER-1090-92; 5-SER-1096; 5-SER-1232; 3-SER-570. Such programs would also put nutrients into the system, and would cost a tiny fraction of what Plaintiffs propose. 5-SER-981-82; 5-SER-1090-95; 5-SER-1096; *see also* 43 C.F.R. § 11.82 (trustees shall develop restoration alternatives, including natural recovery, and select based on factors including cost-effectiveness). Plaintiffs' restoration expert did not even consider fish stocking, as he was instructed only to price wetlands construction to produce and replace the actual allegedly lost benthic macroinvertebrates; CCT proposes doing that by constructing vast new wetlands in tributaries and side channels of the UCR. 5-SER-1220-23; 5-SER-1221-23; *see also* 6-SER-1280-81; 6-SER-1249-50; 3-SER-602-04; 3-SER-582-89.

Feasibility Study Scoping Plan (August 11, 2004), https://semspub.epa.gov/work/10/1224734.pdf). While historically, the Reservation encompassed an additional 1.5 million acres, known as the "North Half," which did border the Upper Reaches of the UCR, *Antoine v. Washington*, 420 U.S. 194, 196, n.3 (1975); *Confederated Tribes of Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187, 1189 (E.D. Wash. 2011), the United States reclaimed those lands in 1892. Act of July 1, 1892, 27 Stat. 62, § 1 (July 1, 1892); *Antoine*, 420 U.S. at 197-98, 205.

In 1940, the United States took both the river and abutting lands to build the Grand Coulee Dam, submerging lands and creating Lake Roosevelt. *See* 7-SER-1737-38 (citing 16 U.S.C. § 835d-h). The riverbed belongs to the State. Wash. Const. art. XVII, § 1. The "Upper Reaches" of the UCR where slag metals allegedly injured benthic macroinvertebrates do not abut the CCT Reservation. 7-ER-1732 (citing 2-SER-474-89; 2-SER-443-44); 7-SER-1735-36 (citing *Antoine*, 420 U.S. at 196 n.3; *Anderson*, 903 F. Supp. 2d at 1189).

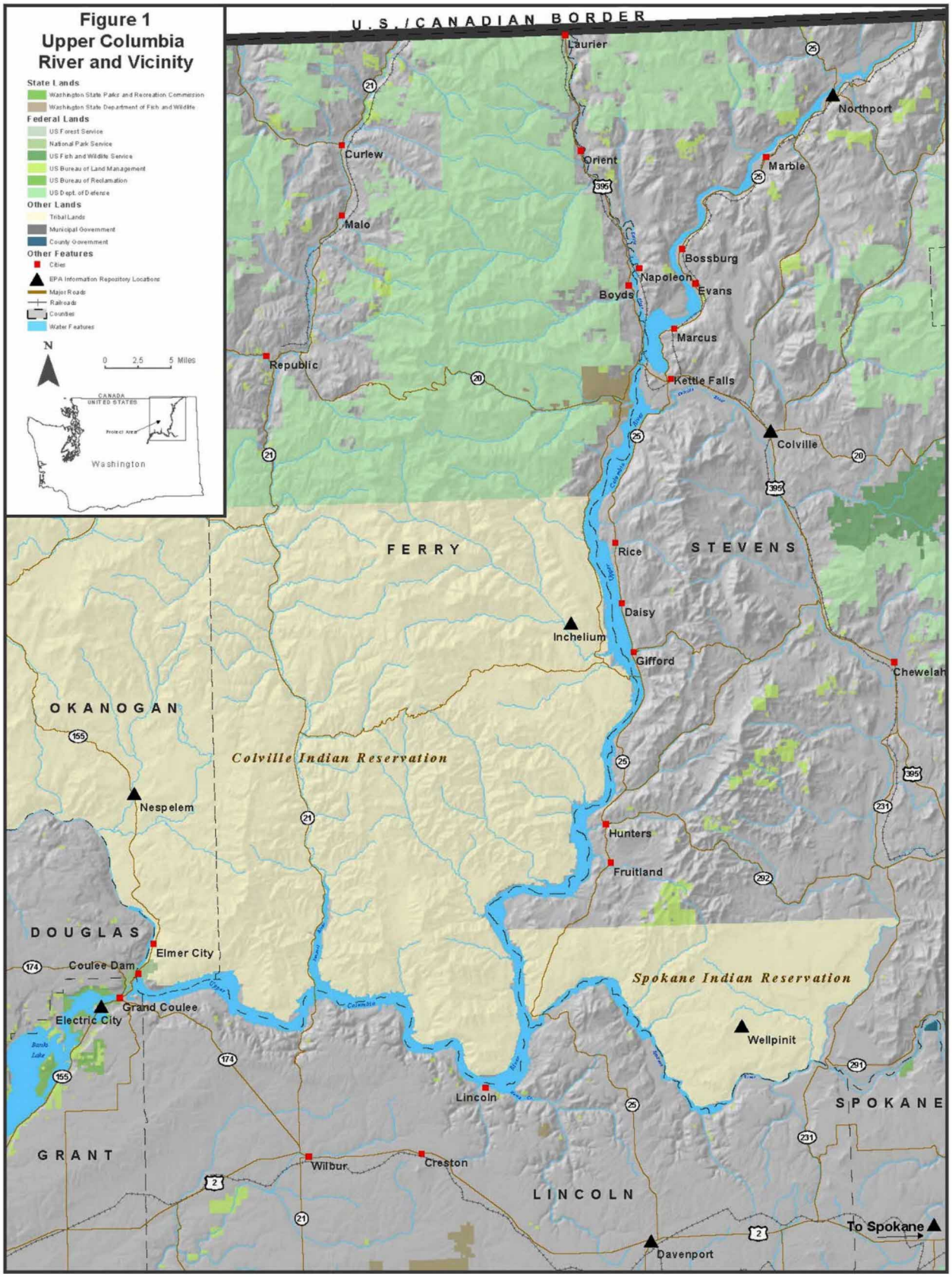
Figure 1
Upper Columbia
River and Vicinity
State Lands
Washington State Parks and Recreation Commission
Washington State Department of Fish and Wildlife
Federal Lands
US Forest Service
National Park Service
US Fish and Wildlife Service
US Bureau of Land Management
US Bureau of Reclamation
US Dept. of Defense
Other Lands
Tribal Lands
Municipal Government
County Government
Other Features
Cities
EPA Information Repository Locations
Major Roads
Railroads
Counties
Water Features
N
0 2.5 5 Miles
CANADA
UNITED STATES
Project Area
Washington
U.S./CANADIAN BORDER
Laurier
Curlew
Malo
Orient
Northport
Marble
Bossburg
Napoleon
Boyds
Evans
Marcus
Republic
Kettle Falls
Colville
FERRY
STEVENS
Rice
Daisy
Inchelium
Gifford
Chewelah
OKANOGAN
Colville Indian Reservation
Nespelem
Hunters
Fruitland
DOUGLAS
Elmer City
Coulee Dam
Grand Coulee
Electric City
Spokane Indian Reservation
Wellpinit
Lincoln
SPOKANE
GRANT
Wilbur
Creston
LINCOLN
To Spokane
Davenport

7-SER-1725 (citing *Draft Upper Columbia River Site, Remedial Investigation/ Feasibility Study Scoping Plan*).

C. The Trail Smelter and Its Discharges

For decades, Teck has owned and operated a lead and zinc smelter approximately 10 miles north of the Canada-U.S. border in Trail, British Columbia, Canada. 4-ER-693. That smelter has been and is essential to the North American critical minerals supply chain. Derrick Penner, *Why Teck's Trail Smelter May Hold Leverage Against Donald Trump's Tariff Threat*, Vancouver Sun (Jan. 13, 2025, 12:09 am), https://www.timescolonist.com/business/why-tecks-trail-smelter-may-hold-leverage-against-donald-trumps-tariff-threat-10066576. The Trail Facility produced lead, zinc, and copper, vital materials for the Allied war effort during World Wars I and II. Trail & District Chamber of Commerce, *A History of Discovery*, https://www.trailchamber.bc.ca/area-info/a-history-of-discovery/. During World War II, the Facility supported the U.S. government's Manhattan Project's heavy water production program and began producing fertilizer, another vital material needed by the Allies. Ron Verzuh, *Canada's A-Bomb Secret*, Canada's History (July 14, 2015), https://www.canadashistory.ca/explore/science-technology/canada-s-a-bomb-secret. Now, it is critical to other defense and high-tech applications, particularly in light of Chinese prohibitions on exports of certain critical minerals to the United

States. Penner, *Why Teck's Trail Smelter May Hold Leverage Against Donald Trump's Tariff Threat*.

From 1930 to 1995, the smelter discharged granulated slag into the Columbia River. 4-ER-694. Since 1978, when Canadian environmental regulations were first enacted, it did so pursuant to properly issued permits. *See* 4-ER-708; 4-ER-711; 4-ER-720-21. By 1995, discharges of slag ceased, coincident with major technological upgrades that also dramatically reduced metals in effluents. *Id.*; 4-ER-662-63; 4-ER-711. Slag, a byproduct of the smelting process, is a vitreous, sand-like material now repurposed for concrete production. 8-SER-1832. It is not a hazardous substance under CERCLA, although metals bound within its crystalline matrix are. 40 C.F.R. § 302.4.

As relevant here, Plaintiffs allege that slag discharged from the smelter during the 1900s came to rest in the sediments in parts of the UCR's "Upper Reaches" (River Miles 700-745), and then leached metals, primarily copper, into sediment porewater (*i.e.*, water within sediment), allegedly resulting in fewer metals-sensitive benthic macroinvertebrates, particularly fly larvae, in those sediments. 2-SER-474-89. Plaintiffs' claims are predicated on laboratory studies of a certain especially metals-sensitive species of amphipod. 2-ER-262. Plaintiffs also allege that mercury in liquid effluents discharged from the smelter is a contributing cause of State-issued mild fish consumption advisories ("FCAs") in

the area. 2-SER-474-89. Those FCAs, most of which are also predicated on unrelated PCB contamination, are similar to FCAs throughout the State and Pacific Northwest[6], and mercury concentrations in UCR fish tissue are below those typically found in canned grocery story tuna. 7-SER-1628; E3-SER-610-13; *see* Washington State Dept. of Health, *Fish Consumption Advisories*, https://doh.wa.gov/community-and-environment/food/fish/advisories (last visited Jan. 20, 2025).[7]

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[6] As explained in EPA's 2021 UCR Human Health Risk Assessment, those concerns are nationwide. *Final Site-Wide Human Health Risk Assessment for the UCR* (Feb. 10, 2021), at 157, https://www.ucr-rifs.com/assets/Docs/Risk_Assessments/HHRA/02-11-21-EPA-Final-UCR-Sitewide-HHRA-Report-v2.pdf; *Upper Columbia River Human Health Risk Assessment Presentation (June 10, 2020)*, YouTube, at 51:59, https://www.youtube.com/watch?v=VDH9P3n5kEo ("The other fish consumption risks are really varied with species, but they're no different than risks throughout eastern Washington or western Idaho or really throughout the whole Pacific Northwest region. And that's because the mercury is really in global circulation. Mercury is a volatile bio cumulative compound, so we just see it everywhere. So I don't mean to dismiss those risks, but my point is they are largely unavoidable. You can moderate them by choosing fish that don't eat other fish.").

[7] *See also* 1-SER-181; U.S. Food & Drug Admin., *Guidance for Industry: Action Levels for Poisonous or Deleterious Substances in Human Food and Animal Feed*, available at https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-action-levels-poisonous-or-deleterious-substances-human-food-and-animal-feed (last modified Aug. 2000); David C. Depew, *et al.*, *An Overview of Mercury Concentrations in Freshwater Fish Species: A National Fish Mercury Dataset for Canada*, 70 Can. J. Fish. & Aquat. Sci. 436 (2013), https://cdnsciencepub.com/doi/10.1139/cjfas-2012-0338; Collin A. Eagles-Smith, *et al.*, *Spatial and Temporal Patterns of Mercury Concentrations in Freshwater Fish Across the Western United States and Canada*, 568 Sci. Total Env't 1171, 1171–84 (2016), https://doi.org/10.1016/j.scitotenv.2016.03.229.

While the parties dispute the magnitude and significance of Plaintiffs' primary claimed natural resource injury—namely, alleged injury to benthic macroinvertebrates in parts of the Upper Reaches of the UCR sediments—the river and the water are safe for human recreational and cultural activities. *Final Site-Wide Human Health Risk Assessment for the UCR*, at 124-26, 172-73; *Upper Columbia River Human Health Risk Assessment Presentation*, YouTube (June 10, 2020), at 35:50, https://www.youtube.com/watch?v=VDH9P3n5kEo ("[T]here's no health benefit from ingesting sediment or river water, at the same time, there's really no risk from ingesting river water. The river water is extremely clean. The beaches for recreation are also safe with the exception of Bossburg Flat, which has been closed since we've been aware of that [separate] contamination."). Indeed, CCT's own witness agreed. 4-SER-874-77.

D. EPA's Remedial Investigation & Feasibility Study and Safety of the UCR

Since 2006, Teck has funded a Remedial Investigation and Feasibility Study (RI/FS) under EPA's oversight and National Contingency Plan regulations, pursuant to a settlement agreement with the agency. 7-SER-1688. In 2021, EPA completed the Human Health Risk Assessment, which confirmed that water in the UCR is safe for recreation, public beaches are safe for recreation with one exception not relevant here, and the fish are as safe or safer than other fish in the region. *Final Site-Wide Human Health Risk Assessment for the UCR*, at 124-30,

136-37, 157; *Upper Columbia River Site RI/FS Draft Human Health Risk Assessment*, Public Webinars: June 10, 2020 & July 15, 2020, at 18-20, https://www.ucr-rifs.com/assets/Docs/Risk_Assessments/HHRA/2020_EPA_Presentation_for_UCR_Draft_HHRA_Public_Webinars.pdf ("Public Beaches and the river are safe for recreation," "Human Health Risks from river water and sediment are low"); *Upper Columbia River Human Health Risk Assessment Presentation*, at 34:40, 36:07, 53:19. Indeed, the surface water of the UCR meets drinking water standards for metals. 2-SER-366-74.

III. Procedural Background

CCT and co-Plaintiff State of Washington (State) jointly seek approximately $350 million in natural resource damages under CERCLA, 42 U.S.C. § 9601, *et seq*. 2-SER-503-06; 2-ER-146-47. Notably, although the United States is a co-trustee, it did not join this litigation (nor did it weigh in on this issue before the district court). Plaintiffs allege injury to benthic macroinvertebrates, particularly fly larvae, in some areas of the Upper Reaches of the Upper Columbia River (miles above the Colville Reservation) due to metals in the sediments. 2-SER-474-89; 7-SER-1545-46. In particular, as relevant to CCT's cultural losses claim, Plaintiffs also jointly seek $17.9 million in recreational damages for allegedly lost river trips (primarily fishing) by all Washington citizens—including CCT members—due to

the mild fish consumption advisories. 2-SER-502-32; 2-ER-146-47; 2-ER-169 (citing 2-SER-375).

A. CCT's Claim for Cultural or Tribal Services Losses

In addition to its joint claims with the State, CCT separately seeks up to $538.6 million for alleged "cultural" or "tribal service" losses. 2-ER-174 (citing 3-ER-331-38; 4-SER-870; 4-ER-598; 3-ER-553-54; 2-SER-360). Specifically, CCT asserts that Teck's "contamination" of the UCR has disrupted its "traditional and cultural connections" to the river, resulting in an altered "relationship between the Colville Tribes community and natural resources in the [UCR] environment." 2-ER-170 (quoting 2-SER-451-52). According to CCT, this injury has manifested in, *inter alia*, declines in native language proficiency and in the number of members engaging in cultural and spiritual practices. 2-ER-182 (citing 3-ER-387; 4-SER-901); 2-ER-196 (citing 3-SER-647; 3-SER-653-54); 3-ER-371-72; 3-SER-759; 3-SER-778; 3-SER-719-26.

Unlike its joint claims for ecological damages based on alleged BMI injury, and alleged recreational damages based on the FCAs, CCT's tribal service loss claim does not even purport to stem from a specific injury to a natural resource. Instead, it invokes generalized notions of "contamination of the river," and relies not on *actual* contamination, but on members' "*perceptions* of contamination." 2-ER-171-73 (citing 4-SER-895; 3-ER-369; 3-ER-371-78; 3-SER-725-26; 3-SER-

735-37; 3-SER-648-55; 3-SER-634-41; 3-SER-768; 3-SER-783; 4-SER-883-85; 4-SER-889); 2-ER-99; 2-ER-117; *see also* 2-ER-171-72; 2-ER-184.[8]

In the trial court, CCT repeatedly described its claim as one for "cultural losses." It submitted multiple expert reports opining that "the presence of smelter wastes in the Columbia River has caused *significant cultural loss* among the Colville Tribes," 3-SER-783 (emphasis added); "smelter wastes have caused *cultural loss* due to widespread apprehension about the safety and health of the river and beaches," 3-ER-349; and "*[c]ultural harm and loss* occurred among the CCT community because hazardous substances released into the environment by Teck…." 3-SER-736 (emphasis added). And when CCT's damages expert attempted to describe what specific "natural resource" was actually injured, he testified that "the cultural resource that is injured is persons' connection with the river and series of cultural services that it provides." 4-SER-883.

CCT claims up to $538,600,000 to compensate for those cultural losses. That claim has three parts:

1. $9 to $13.6 million for alleged "tribal loss of use damages," *plus*
2. *Either* $114.6 million for a suite of "cultural restoration" projects, *or*
3. Between $165 and $525 million as the value of "future lost services of the River."

[8] To the extent CCT pointed to anything more specific than "perceived contamination," it focused on the fact of the slag discharge, not metals contamination. 2-ER-96-97 (citing 4-ER-693).

2-ER-174 (citing 3-ER-331-38; 4-SER-870; 4-ER-598; 3-ER-553-54; 2-SER-360).

1. Cultural Restoration Plan

CCT's "Cultural Restoration Plan," the first of its two alternatives, seeks $114.6 million for a suite of programs to "redress the cultural losses." 2-ER-102. As CCT's experts have framed it, the plan is intended to broadly restore CCT's connection to the river and its language and cultural practices. As CCT's damages expert testified, the Plan was "designed ... to increase confidence or at least reduce that stigma resulting from the river." 4-SER-890. As another CCT expert described it, the plan is "compensation that will restore that vital cultural and language river connection." 3-ER-352.

The plan consists of four main components: (1) cultural and language programs and facilities construction; (2) land acquisition; (3) slag removal; and (4) monitoring.

a. Cultural and Language Programs and Facilities Construction

$81.1 million of the plan's cost is designated for implementing cultural programs to revitalize CCT's native language and traditional practices. 3-ER-332-38; 4-SER-870. These include language immersion schools, cultural mentorship programs, and community education activities. 2-ER-175 (citing 3-ER-331-38; 3-ER-332-33). To facilitate these programs and provide spaces for traditional and

ceremonial practices, the plan also includes the construction of a longhouse, greenhouse, retreat, pit house, and cultural center. 3-ER-331-38; 3-SER-740-43; 3-ER-362-64.

b. Land Acquisition

CCT also seeks $6.4 million to reacquire land in the North Half, the area taken by the U.S. government in 1892, to enable tribal access to culturally significant areas and facilitate engagement in traditional practices. 2-ER-175 (citing 3-ER-333; 3-ER-332); 4-SER-870; 3-SER-739-40; 3-ER-354-55. Ironically, this land abuts the Upper Reaches, the area closest to the alleged source of contamination and the BMI allegedly injured by that contamination. 3-SER-653-54.

c. Slag Removal

In addition, although natural resource damages are never intended to remediate contamination (which is EPA's purview), the plan nonetheless includes an $18.7 million budget for slag removal on a subset of beaches to be selected from any EPA does not identify for remediation. 2-ER-175 (citing 3-ER-332; 4-SER-870). This measure is intended to address "aesthetic" concerns and reduce some members' apprehension about the river's safety. 1-SER-121 (quoting 3-SER-696); 2-ER-172 (citing 3-SER-692-96; 3-ER-352); 3-ER-338.

d. Monitoring

Finally, the plan proposes a 100-year "monitoring" program, costing over $500,000 annually, to measure metals levels in fish, water, and sediment. 2-ER-175 (citing 3-ER-331-32); 4-SER-870. This, too, is not natural resource restoration, and duplicates EPA's efforts, as well as existing State and tribal environmental monitoring programs. 2-ER-197-98; *see also Wash. Dept. of Ecology, River & stream water quality monitoring*, https://ecology.wa.gov/Research-Data/Monitoring-assessment/River-stream-monitoring/Water-quality-monitoring (last visited Jan. 21, 2025).

The "Cultural Restoration Plan" is modeled after a similar plan developed by a CCT expert for his own tribe, as part of a cooperative NRD assessment, ultimately funded with an $8.4 million settlement. 2-ER-177-78 (citing 3-ER-367; 4-SER-899; 4-SER-348-50). As CCT's expert Dr. Alfred readily admitted, he adopted "a novel kind of approach in terms of focusing on restoring the connection and the use and the reintegration of the land and the people, as opposed to looking at it as a contaminated site and looking for replacements or compensation for that." 2-ER-178-79 (citing 4-SER-900; 2-SER-353).

Dr. Alfred developed this "novel" approach to "find[] a way forward on a path that *differed* from the one laid out by the NRDA process":

> Prior to the work we did, NRDA settlements focused on remediating harms to the natural environment and compensating people for the

> calculated value of their lost use of natural resources. What we did in Akwesasne was new; rather than seek compensation for damages, per se, we sought to envision a way for General Motors and ALCOA to provide financial support for programs that would restore the relationships that are crucial to the expression of Mohawk identity.

2-ER-178 (citing 2-SER-353) (emphasis added).

In developing an analogous Plan for the CCT, he relied on qualitative information gathered through a Tribal Service Loss Study (TSL Study), conducted from 2013-2017, and which consisted of targeted interviews of 43 of approximately 9,400 CCT members. 4-SER-812; 2-ER-170; 2-ER-175-76 (citing 4-SER-909-10); 4-SER-931. From the get-go, the study was intended to support funding for a cultural restoration plan. 4-SER-914; 4-SER-911. Participants in the study were "not intended to be representative of the entire tribe," but "were targeted because of their unique level of family knowledge about or personal involvement with natural resources from the UCR area, and the importance of those resources to CCT traditional activities." 2-ER-181 (citing 4-SER-907-08; 4-SER-911; 3-ER-396; 3-ER-532 at 78:14-79:24; 4-SER-896). Moreover, any responses attributing cultural or language loss to other factors, such as the construction of the Grand Coulee Dam or systemic cultural suppression through federal policies, were excluded from the excerpts used in the study and given to

CCT's experts.[9] 2-ER-183-84 (citing 4-SER-813; 4-SER-911; 4-SER-897; 4-SER-902). CCT acknowledged its claim was based on "perceived" and not actual contamination. 4-SER-895; 4-SER-898; 3-SER-725-26; 3-SER-736-38; E3-SER-648-49; 3-SER-652; 3-SER-655; 3-SER-634-42; 4-SER-883; 4-SER-889; 2-ER-053.

Ultimately, the plan was not even limited to cultural injuries allegedly resulting from the perceived contamination, its $114.6 million price tag was not scaled to the level of "contamination" or even perceived contamination, and CCT's experts readily admitted that the plan would be beneficial regardless of any contamination of the UCR. 2-ER-184-85 (citing 4-SER-912; 4-SER-883; 4-SER-889; 3-SER-653-54; 3-SER-639-40; 3-SER-695).

2. Future Lost Use of the River

As an alternative to the Cultural Restoration Plan, CCT claims it is entitled to damages between $165 million and $525 million based on the "future service losses." 4-ER-598. This claim, like the Restoration Plan, hinges on "diminished traditional and cultural connections" to the river. *See* 4-ER-600. Rather than address "interim lost use" for the period between a release and restoration (as CCT

[9] CCT's experts relied on those excerpts selected by a CCT consultant, rather than reviewing the underlying interviews. 2-ER-181 (citing 4-SER-897); 3-ER-368-74; 3-ER-376-78; 3-SER-773-77; 3-SER-780-81; 3-SER-721; 3-SER-725; 3-SER-737-38; 3-SER-741.

and the United States now characterize CCT's claim in this court), this model explicitly purports to "valu[e] reductions in *future* service losses only" and projects these damages indefinitely. 4-ER 601 (emphasis added); 2-ER-175 (citing 4-ER-601, 611); *see also* 1-SER-110-12. Although natural resource damages can only be used to restore, replace, or acquire the equivalent of those natural resources, CCT has not explained how it would use any damages recovered under this framework. In fact, the model assumes both no remediation (EPA's decision) and no restoration by the natural resource trustees. *See* 4-ER-610-11; 2-ER-146-47; 2-ER-155.

3. Lost River Use

Third, CCT claims damages for "lost river use," estimated at $9 million to $13.6 million, for allegedly lost and diminished fishing and other trips to the UCR by tribal members. AOB at 14; 3-ER-554; 2-SER-360. This claim is based on the same FCAs as its joint claim for recreational losses. 2-SER-489; 2-SER-445; 3-ER-577-82.[10] CCT assumed lost trips through 2030 if CCT's "Cultural Restoration Plan" is implemented and 2100 if not. 3-ER-554. CCT (and its expert) repeatedly acknowledged that this claim mirrors the broader joint claim for recreational fishing losses on behalf of all residents of Washington State, AOB at 2-3; 2-ER-14;

[10] CCT's expert found losses. Teck's expert did not. Teck's found *no* reluctance by tribal members in using the UCR's water resources. 6-SER-1375.

2-ER-45; 2-ER-59; 1-SER-35, but its expert did not quantify that overlap or subtract duplicate trips. 3-ER-564-66; 2-SER-360.

B. Teck's Motion for Summary Judgment on Tribal Services Claim

1. The Parties' Arguments

Teck moved for partial summary judgment on CCT's tribal services losses claim because it was inconsistent with CERCLA as a matter of law. 2-ER-208.[11] As Teck explained, (1) CERCLA does not authorize recovery for cultural or tribal service losses, and the only courts to address such claims have uniformly declined to recognize them; (2) CCT's claim was not tied to any specific natural resource injury, as required for a natural resource damages claim, but instead focused on cultural injuries and members' "perceptions" of contamination; (3) the damages CCT sought were not aimed at restoring, replacing, or acquiring the equivalent of any injured natural resource and were not proportionally scaled to any such injury; and (4) CCT could not establish causation under undisputed admissions and facts, given the acknowledged historical injustices, colonization, and construction of the

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[11] As noted above, Teck also moved for summary judgment earlier because CCT lacked standing, 7-SER-1691-1717, and because the claims were untimely under CERCLA given that the RI/FS was still pending, and because any natural resource damages claim was statutorily barred until the RI/FS was complete to the point of a decision by EPA as to any remediation needed. 7-SER-1661-84; *see* 42 U.S.C. § 9613(g)(1). The district court denied those motions. 7-SER-1640-46. Although those questions are not among the issues on which interlocutory appeal was granted, Teck does not waive them and intends to raise them, if necessary, at the appropriate juncture.

Grand Coulee Dam that contributed to CCT's cultural losses but could not be attributed to Teck. 2-ER-213-42.

In response, CCT relied on (1) DOI's natural resource damages assessment regulations—even though CCT did not follow them[12]— to argue that CERCLA recognizes tribal service losses as claims for losses of "use and nonuse values"; and (2) natural resource damages settlements that included "[d]amages to the cultural practices of Native American tribes as a result of the injured resources." 2-ER-107-09. CCT asserted that its claim was "based on the actionable presence of Teck's contaminants in the river," but never explained how its alleged cultural losses were tied to any specific natural resource injury. 2-ER-117. Instead, it claimed that Teck's lack of contradictory expert testimony created disputed issues of fact and argued that "[p]roof of damage must flow from the wrongful act, but it need not specifically tie to the actionable injury." 2-ER-117-18. Fatally, CCT conceded that its "members' avoidance of the river is based on Teck's

[12] Plaintiffs did not adhere to DOI's natural resource damages assessment regulations in formulating their joint ecological and human use recreational claims either. Teck moved for summary judgment based on Plaintiffs' failure to complete a proper assessment. 3-SER-539. CCT inaccurately states that Teck did not move for summary judgment on Plaintiffs' human use claim, AOB at 13, only the ecological claim, but this is false. 3-SER-539. While the district court denied Teck's motion on the primary rationale that DOI's assessment regulations are optional, the issue remains preserved for appeal following final judgment.

contamination of the river and not specifically the injury its contamination caused to benthos in the sediment." 2-ER-118.

CCT defended its argument that it was entitled to recover based on "perceptions" of contamination by arguing that "all human actions are based on our perceptions." 2-ER-118. CCT acknowledged that its expert "did not investigate the impact of the Grand Coulee Dam." 2-ER-125.

2. The Trial Court Grants Teck's Motion

After a hearing, the court granted Teck's motion, holding that "cultural resource damages are not recoverable [under CERCLA] as a matter of law." 1-ER-03. The court observed that the "only courts to speak directly to the recovery of cultural resource damages, rejected the concept." 1-ER-05 (citing *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1107 (D. Idaho 2003) ("cultural uses of water and soil by the tribe are not recoverable as natural resource damages"); and *Gold King Mine*, 669 F. Supp. 3d at 1156-57 (cultural resource damage claims, such as the lost confidence in a river, are not natural resource damages and therefore not recoverable by CERCLA). That rule, the district court concluded, is consistent with the statutory language, relevant regulations, and case law, none of which refers to "cultural" or "tribal service" damages: "Neither the statute nor the regulations reference a cultural or tribal 'connection' or 'relationship' with a

particular resource, let alone possible recovery from loss or damage to that connection or relationship." 1-ER-06.

3. CCT Moves for Reconsideration

CCT moved for reconsideration, arguing that its claim had been misconstrued as a "cultural resource damages" claim, 2-ER-10, and alleging that it had not asserted any claims for 'cultural resource damages.'" 2-ER-13. It blamed this supposed error on Teck, arguing that "Teck's motion encouraged this error by conflating resource injury and resulting service loss and labelling them both 'cultural.'" 2-ER-13. Instead, CCT argued, its claims should be viewed as "tribal service loss claims." 2-ER-16. It did not describe them as "interim lost use" claims, however, no doubt because on their face they were not.

The court denied reconsideration, reiterating that "[w]hether termed cultural resource damages or lost services, this is not the type of loss contemplated by Congress when passing and amending CERCLA." 2-ER-11. The court, however, certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). *Id*. This Court denied CCT's first petition for review because the trial court had not made written findings regarding the § 1292(b) requirements. Ninth Cir. Case No. 24-2554, Dkt. 7.1. On July 9, 2024, the trial court made those findings, 1-SER-02, and this appeal followed.

SUMMARY OF ARGUMENT

On appeal, CCT argues that this Court should do what no other court has done and recognize its cultural losses claim. In so doing, it renames that claim, recharacterizing it as "damages for interim lost use of injured natural resources." AOB 19. But having made its bed through its litigation choices, CCT must now lie in it. Even adopting its new taxonomy, the substance of the claim—and the evidence CCT advances in support of it on summary judgment—remain the same, and thus subject to the same fundamental (fatal) flaws. Nonetheless, CCT contends that its claim satisfies CERCLA and that disputed issues of fact precluded summary judgment. AOB 25. In fact, it (and they) do not. Finally, CCT argues that: (1) the portion of its claim predicated on alleged lost fishing trips is a permissible interim lost use claim; (2) its claim based on its contingent valuation study is a claim for nonuse existence value; and (3) its Cultural Restoration Plan is a permissible alternate measure of damages. AOB 26-29. Each of those arguments also fails.

Simply put, each component of CCT's independent cultural or tribal service loss claim fails as a matter of law. All three purport to quantify claims for "cultural losses" and are not recoverable under CERCLA. But the Court need not decide whether such a claim could exist, because in this case, each category of CCT's damages also fails as a matter of law based on the nature of the damages sought

and their basic acknowledged premise: (1) the "Cultural Restoration Plan" claim is intended to restore CCT's diminished culture and language proficiency and rebuild its members' confidence, trust, and connection to the river, rather than restore a specific natural resource; (2) the "value of the uncontaminated River" claim (among other reasons) does not even purport to measure, be caused by, or restore any specific injured resource, let alone account for Plaintiffs' joint claim for natural resource damages; and (3) the "lost use" damages are redundant of CCT's and the State's joint "lost use" damages asserted on behalf of the entire public based on the same mild advisories. Last but not least, CCT has not and cannot commit to using any recovery for restoration, even though that is the only purpose for which it can be used.

This Court should affirm the district court's decision. Any other result would be inconsistent with CERCLA's plain language, congressional intent, the implementing regulations, and existing case law. Writing such a claim into the statute falls to Congress, not the courts, and Congress had good reasons not to do so, despite revisiting and revising CERCLA repeatedly over the years. Adding such a claim would also spawn a whole series of questions to which the statute offers no answer about what qualifies as a recoverable loss, how established a culture or practice needs to be, how to assess causation, and how to quantify damages, among others. Finally, even if this Court believed that such a claim

might be viable in some circumstances, based on the undisputed facts, it is not here.[13] This Court should affirm.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant or deny summary judgment or summary adjudication de novo. *See, e.g., Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir.) (grant), *cert. denied*, 142 S. Ct. 343 (2021); *2-Bar Ranch Ltd. P'ship v. United States Forest Serv.*, 996 F.3d 984, 990 (9th Cir. 2021) (partial summary judgment). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). Thus, on review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021). Summary judgment may be affirmed on any ground supported by the record. *Cruz v. Nat'l Steel & Shipbuilding Co.*, 910 F.3d 1263, 1270 (9th Cir. 2018).

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[13] Accordingly, this Court can also affirm on the narrower basis that CCT's claim cannot survive summary judgment as pled and proved here.

ARGUMENT

A. Cultural or "Tribal Service Losses" Are Not Recoverable Under CERCLA.

CERCLA does not authorize damages for cultural or tribal service losses. To the contrary, the only damages CERCLA authorizes are "*damages for injury to, destruction of, or loss of natural resources*, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(4)(C) (emphasis added). Accordingly, natural resource damages are *only* available to address injury to "natural resources." *Id.*

More specifically, as relevant here, "[t]he term 'natural resources' means *land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources* ...." 42 U.S.C.A. § 9601(16) (emphasis added).[14] That statutory definition (and the liability provision) turns on actual harm to natural resources. It does not address, let alone include perceptions of harm or cultural damages. Indeed, neither the statute nor the regulations contains any mention of "cultural" or "tribal service" losses or any reference to compensation for a "connection" or "relationship" with a natural resource. The government argues in its amicus brief that this reads the statute too narrowly. U.S. Amicus Br. at 20-21.

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[14] In turn, the relevant regulations define injury as "a measurable adverse change, either long- or short-term, *in the chemical or physical quality or the viability of a natural resource* resulting either directly or indirectly from exposure." 42 C.F.R. § 11.14(v) (emphasis added).

In truth, the government reads the statute far too broadly, by overlooking the statutory limits on liability. *See supra.*

As this Court previously recognized, "[a]lthough CERCLA should be liberally construed to effectuate the purpose of the statute, it may not be extended so far as to fashion a new right under CERCLA that Congress did not intend.... If Congress wishes to change CERCLA's statutory scheme, it may certainly do so. But it is not the province of the courts to rewrite the statute." *Chubb Custom Ins. Co.,* 710 F.3d at 975. "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 683 (2020); *see also King v. Burwell*, 576 U.S. 473, 497-98 (2015) ("In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—'to say what the law is.'" (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)); *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939) (cautioning against situations where "attempted interpretation of legislation becomes legislation itself").

B. Every Court To Consider Such A Claim Has Rejected It.

Consistent with these principles, the only other courts to reach this issue have uniformly held that cultural and tribal service losses fall outside the purview

of CERCLA's compensatory framework.[15] Expanding that framework to include such claims would improperly second-guess Congress's choices. Accordingly, and unsurprisingly, no court has ever awarded such damages, and the only two to address such claims have rejected them.[16]

In *Coeur D'Alene*, for example, the court held that "[c]ultural uses of water and soil by Tribe are *not* recoverable as natural resource damages." 280 F. Supp. 2d at 1107 (emphasis added). The "cultural uses" the tribe alleged were damaged—consumption of fish, tribal sweats, and swimming—are virtually the same as the lost-use portion of the CCT's tribal service loss claim. *See id.*; *see also Coeur d'Alene Tribe v. Asarco, Inc.*, No. 96-cv-00122, ECF 1233 (Asarco's Post Trial Brief) at 54. The court specifically held as a matter of law that cultural uses are not compensable. 280 F. Supp. 2d at 1107.

CCT tries to limit this to a ruling on the sufficiency of the evidence,[17] but the opinion never analyzes or even mentions that. If the court had wanted to say

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[15] Likewise, no such losses have been awarded as damages in cases under other environmental statutes providing for natural resource damages.

[16] Whether or not a settlement may have included similar components is irrelevant. Settlement agreements typically are not even an admission of liability as between the settling parties, let alone a persuasive statement of the law as to non-parties.

[17] Before issuing its opinion, the *Coeur D'Alene* court requested briefing on "legal issues," including, "[i]s the Tribe's alleged loss of use and enjoyment of natural resources recoverable under CERCLA?" Asarco's Post Trial Brief (ECF 1233) at 54.

that the Tribe had not proven the damages, it could have said that they were "not proven" instead of "not recoverable." Indeed, in the very same list of conclusions, when the court rejected (or accepted) claims based on failure (or acceptance) of proof of a factual nature, it said so explicitly. *See, e.g., id*. at 1107, Finding No. 11 ("There was no evidence supporting injury to any other species of wildlife."), No. 14 ("There was no credible evidence shown to establish any injury to people ... resulting from the consumption of fish....").

By contrast, *Coeur d'Alene*'s holding that "[c]ultural uses of water and soil by Tribe are not recoverable as natural resource damages," *id*., in no way suggests the court was making a limited finding of fact, as opposed to a conclusion of law that such a claim is "not recoverable."

Similarly, in *In re Gold King Mine,* the court held that the Navajo Nation's claims for cultural losses, including for "loss of confidence" in a river, were not claims for natural resource damages that could be recovered under CERCLA. From this, it concluded that the claim, which had been brought under state law, was not preempted by CERCLA. In *Gold King Mine*, much like here, the Navajo Nation sought funding for a "long-term monitoring plan" for the river; a "Cultural Preservation Program"; and "community involvement and education" programs, among others. 669 F. Supp. 3d at 1156-57. Based on the form and purpose of that relief, which was nearly identical to CCT's Cultural Restoration Plan claim, the

court concluded that those claims were inconsistent with, and not recoverable under, CERCLA: "[T]he restorative programs *seek to restore confidence in the resource* and ... the Navajo Nation *does not seek to restore*, replace or acquire the equivalent of *the damaged resource*." *Id*. at 1159 (emphasis added). So too here. CCT's tribal service loss claim does not seek damages to restore the natural resource (e.g., benthic macroinvertebrates), instead it seeks to restore its members' "confidence in" and "cultural connection to" the river.

Gold King Mine correctly concluded that although the Navajo Nation's restorative damages claims "[arose] from the contamination from the Spill," they did not qualify as natural resource damages claims because (as here) they "seek to remedy injuries that are distinct from the injury to the River," not the injured natural resource itself. *Id.* at 1158-60 (citing *New Mexico*, 467 F.3d at 1246, 1247-48). But, as the court correctly recognized, "CERCLA's comprehensive NRD scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource." *New Mexico*, 467 F.3d at 1247.

CCT responds to those cases by relying on the regulations and its relabeling of its claim as "interim." AOB at 23. But the regulations cannot be the source of CCT's claim. *See supra.* And while CCT has renamed its claim as interim losses,

its claim is not and has never even purported to be limited to any interim period between a release and restoration. *See infra.*

Nor do the cases on which CCT and the government do rely help them. *Ohio* did not address tribal service losses, or even any release or natural resource damages more generally. It addressed challenges to the first iteration of DOI's NRDA regulations, which emphasized using market value to assess lost use. *State of Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 438 (D.C. Cir. 1989). As relevant here, in invalidating those regulations, the court recognized that some natural resources, such as the bald eagle, have intrinsic value, even if they lack market value. *Id*. at 462-63. The court directed DOI to account for "non-consumptive values" in the regulations, which it surmised could include "option" and "existence" values, that is, the amounts an individual is willing to pay to preserve *the injured resource*. *Id*. at 462-63, 476 n.72 & 73.

What CCT seeks here is fundamentally different from the non-consumptive values the *Ohio* court identified. *Id*. at 462-63 ("From the bald eagle to the blue whale and snail darter, natural resources have values that are not fully captured by the market system."). CCT is not seeking the non-consumptive value of benthic macroinvertebrates or any other natural resource. Instead, CCT seeks either the

value of or the cost to restore "diminished traditional and cultural connections" to those resources. 4-ER-600; *see also* 3-ER-325-31.[18]

Alaska Sport Fishing does not help CCT either. It addressed *who* may recover natural resource damages, not *what* is recoverable as natural resource damages (and it had nothing to do with cultural or tribal losses). *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 772-73 (9th Cir. 1994). Specifically, this Court held that private parties, such as sport fishers, lack legally cognizable natural resource damages claims for the loss of use and enjoyment of injured natural resources because those claims are reserved for federal, state, and tribal trustees. *Id*. Moreover, the court emphasized that natural resource damages may only be used to restore, replace, or acquire the equivalent of injured natural resources, *id*.—another failing of CCT's claim, as discussed below.

Notably, on appeal, neither CCT nor the United States as amicus go so far as to argue that cultural losses are available as natural resources damages under the statute. Instead, they argue more narrowly that CERCLA allows for recovery of

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[18] Nor may CCT try to tie its claim to the slag admittedly present beneath the sediments in the riverbed. This court has already strictly limited any natural resource damages Plaintiffs may recover in this case to those that can be directly tied to the leaching (or "re-release") of metals into the water in a way that injures a natural resource; the existence of slag in or around the river itself is not actionable insofar as it is the result of an *extraterritorial release*. *Pakootas v. Tec. Cominco Metals, Ltd.*, 452 F.3d 1066, 1075 (9th Cir. 2006) ("*Pakootas II*").

damages for interim lost use of a natural resource if that use has a "cultural dimension" under the statute's implementing regulations. That is wrong, too.

C. Renaming CCT's Claim as "Interim Lost Use Damages" Does Not Save It.

On appeal, CCT tries to sidestep the statutory analysis and the cases uniformly rejecting its theory by reframing its claim as one for "interim" "lost use" damages. AOB at 7 n.2. Accordingly, it argues that: (a) CERCLA authorizes tribes to seek recovery of damages for injury to natural resources; (b) under the regulations, those damages expressly include the value of services provided by the resource lost to the public between the time of the release and restoration; and (c) that value should also include *nonuse* value, that is, the economic value that the public derives from natural resources independent of any direct use of the services provided. AOB at 19-22 (citing 43 C.F.R. § 11.83(c)(1)(ii)). In so doing, CCT tries to thread an extraordinarily narrow needle by contending that its claims "necessarily implicate 'cultural' perspectives to the extent such perspectives inform the value of the interim lost use of the tribes …," but that "that is not the same as asserting a claim for injury to 'cultural resources.'" AOB at 25.

That argument suffers from four fundamental problems.

First, it mischaracterizes CCT's own claim. This is about an injury to cultural, not natural resources. This Court need not take Teck's word on this, it can (and should) take CCT's words before the district court at face value. As

CCT's cultural damages expert testified, when asked what specific "*natural resource*" was injured: "*the cultural resource that is injured is persons' connection with the river.*" 1-SER-132 (citing 4-SER-883).

This claim was never about restoring natural resources or even actual contamination. That is the stated purpose of CCT's joint claims, and CCT's own witness repeatedly admitted that the UCR is safe for the purposes for which its members wish to use it. 2-ER-170 (citing 4-SER-874-76; 4-SER-877-78). Instead, this was and is expressly about restoring confidence, trust, and cultural connections (*not* a natural resource) allegedly damaged by perceptions of contamination.

Thus, for example, CCT's expert described CCT's "Cultural Restoration Plan" as "compensation that will restore that vital cultural and language river connection." 3-ER-352 ("A basis of trust in the River as a safe place needs to be re-established[.]"); *see also* 1-SER-122 (The Plan "can better inform and ease those fears or lack of trust in those river sites through that monitoring and through the aesthetic nature of making people feel more comfortable going to the river.") (quoting 3-SER-696). Other CCT experts agreed, opining that the Plan would "restore confidence in the environment," "increase confidence in the ability to safely swim and conduct sweatlodge ceremonies," "reduce apprehension about River use," "repair the trust," "restore the ability of the people to understand, describe and appreciate the natural environment," and "restore and revitalize

traditional cultural practices associated with the River." 3-SER-738-40; *see also* 3-SER-651 (Dr. Hoover: "look[ed] at programs that are designed to help people preserve and revitalize that language and culture"); 3-SER-779-80 (Dr. Whelshula: Plan a means "to restore river culture and lifeways for the Tribal community" and "to fully restore the cultural knowledge and language lost."); 4-SER-890 (Dr. Domanski: Plan was "designed ... to increase confidence or at least reduce that stigma resulting from the river."); *see also* 3-SER-660 (Dr. Domanski: Monitoring "would be designed to increase confidence"). That is also true of the other components of CCT's claim. CCT's alternative measure of damages for "future service losses" is also based on the alleged value of its "diminished traditional and cultural connections to those [natural] resources." 4-ER-600-01. And CCT's fishing loss portion of its claim, premised on some members' alleged avoidance of the river, is tied in duration to whether "actions demanded by the Tribes to restore confidence in the resource and related cultural connections will be undertaken." 3-ER-554.

Second, CCT's and amici's argument that these cultural damages are recoverable under CERCLA turn not on the statute's language, but optional assessment regulations (which, ironically, CCT declined to follow). As a threshold matter, "[l]anguage in a regulation may *invoke* a private right of action that Congress through statutory text created, but it may not *create* a right that Congress

has not." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (emphasis added) ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself."). And, under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), those regulations are entitled to no deference.[19]

Third, even if regulations *could* expand on a statute (they cannot), the regulations and the cases on which CCT and the government rely do not mention "cultural" or "tribal service" losses or compensation for or restoration of "trust," "confidence," "connection," or "relationship" in or with a resource.[20] Instead, CCT and the government rely on the regulations for the proposition that natural resource damages under CERCLA can include the value of the interim lost uses or services provided by the injured natural resource (and from this, that lost-use value can include a compensable "cultural dimension"). But that ignores the critical role of causation. As *Ohio* noted (and DOI conceded there), "attaching liability to injuries that bear only a speculative causal relationship to a particular substance

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[19] Even if *Chevron* deference still existed, the government is asking the court to rely on the fact that 42 U.S.C.§ 9651(c) authorizes rulemaking, and to expand on those regulations to create a claim here. That is overreach piled on overreach.

[20] DOI is required to "review[] and revise[]" the NRDA regulations every two years, 42 U.S.C. § 9651(c)(3), but has never revised them to include such language since their initial implementation decades ago.

release would run counter to Congress' desire for a 'fair' damage assessment mechanism." 880 F.2d at 472-73.

Fourth, CCT's claim is not a claim for interim losses. DOI's regulations provide guidance and methodologies for assessing interim natural resource damages, by quantifying "the loss in services provided by the injured resources *between the time of the discharge or release and the time the resources are fully returned to their baseline conditions*, or until the resources are replaced and/or equivalent natural resources are acquired." 43 C.F.R. § 11.83(a)(1), (c)(1).

Here, however, CCT's claim is not limited to interim lost use. Although CCT has termed its tribal service losses "interim lost uses" on appeal, all three of CCT's damages models extend well into the future—through at least 2100; its largest such claim is expressly "only future" in nature and has no end date. 3-ER-554; 4-ER-601; 4-SER-868; 3-SER-780-81.

D. CCT Has Not Shown That Its Claimed Service Loss Damages Satisfy CERCLA's Other Requirements That They "Result From" An Actionable "Release," Involve A Resulting "Natural Resource Injury," Or Will Be Used To Restore Those Natural Resources As CERCLA Requires.

CCT's hyperfocus on whether cognizable losses can have a cultural component overlooks other essential elements of a CERCLA claim—elements that CCT also fails to satisfy. Even if CERCLA *did* provide a remedy for "cultural losses" or CCT *had* stated a cognizable claim for lost interim use, those losses

would still have to be tied to an actionable release that injured a natural resource, the damages would be limited to interim uses, and they would have to be used to restore those natural resources. CCT's claim satisfies none of these requirements.

First, totally apart from the viability of *any* claim for "cultural" losses, CCT's claims do not even purport to arise out of (a) an actionable release, or (b) an injury to a specific natural resource. As noted above, CERCLA permits "damages for injury to, destruction of, or loss of natural resources ... resulting from [a release of a hazardous substance]." 42 U.S.C. § 9607(a)(4)(C). There is no *stand-alone* natural resource damages claim for service losses. *See* 5 Environmental Law Practice Guide § 32B.05 (2023) (Michael B. Gerrard ed., Matthew Bender) ("The first question in any NRD matter is whether, and to what extent, any resources have been injured or destroyed. If there is no injury, there is no claim."). Accordingly, CCT's claim also fails because it is disconnected from a specific, identified natural resource injury and any actionable release.

As this Court has already held, the actionable "release" in this case is "the leaching of hazardous substances from the slag at the [UCR] Site." *Pakootas II*, 452 F.3d at 1075. To recover natural resource damages, then, CCT must prove that the *leaching* injured a "natural resource," and that *that injury* resulted in the damages CCT seeks. *See Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975, n.4 (9th Cir. 2016) ("To win natural resource damages, a plaintiff ... must show

that 'natural resources within the [plaintiff's] trusteeship ... have been injured' and 'that the injury to natural resources 'resulted from' a release of a hazardous substance.'") (quoting *Coeur D'Alene*, 280 F. Supp. 2d at 1102). It has not.

CCT's claim is also not based on an alleged injury to a specific natural resource (*i.e.,* the benthic macroinvertebrates injury alleged by the joint claim)—as it *must be* to support a claim for natural resources damages. 42 U.S.C. § 9607(a)(4)(C); *Pakootas I*, 2011 WL 13112570 at *2. Instead, CCT alleges that releases from the Trail smelter have damaged "the relationship between the Colville Tribes community and natural resources in the [UCR] environment," 2-ER-155, and that damaged *"relationship"* with "the river" is the injury. 1-SER-132 ("[T]he cultural resource that is injured is persons' connection with the river.").

And, as CCT concedes, that injury stems from some members' "perception of contamination," not actual contamination (*i.e.*, an actual injury to a natural resource). 2-ER-170-73 (citing 4-SER-895; 4-SER-898; 3-SER-635-42); *see also* 2-ER-184 (citing 4-SER-912). Specifically, CCT's claim turns on some members' alleged "perception" that UCR beaches and water are "contaminated" and unsafe and their "choice" to avoid the UCR. 2-ER-170-73 (citing 4-SER-895; 4-SER-898; 3-SER-725-26; 3-SER-736-38; 3-SER-648-55; 3-SER-634-42; 4-SER-883-85; 4-SER-889; 4-SER-874-76; 4-SER-877-78; 3-SER-763; 3-SER-768; 3-SER-783). But this is—as CCT and its experts admit—a *cultural* injury, not an actual injury to

a specific natural resource; as they frame it, the perception itself *is* the harm. *See* 3-SER-642 (Dr. Whelshula: Agreeing "it's the perception that drives injury."); 4-SER-889 (Dr. Domanski: "It's the perceptions about the contamination that creates a large range of cultural losses.").

Simply put, perceived contamination does not prove a natural resource injury. *See* 42 C.F.R. § 11.14 (*"Injury* means a measurable adverse change…in the chemical or physical quality…of a natural resource[.]"). Even if perceptions were relevant, they would have to be held *at least* to a standard of objective reasonableness or plausibility similar to that required of plaintiffs seeking CERCLA response costs arising from environmental threats. *Cf. Ca. Dep't of Toxic Substances Control v. NL Indus., Inc.*, 636 F. Supp. 3d 1092, 1103, 1112 (C.D. Cal. 2022) ("Plaintiffs must establish a 'plausible,' … 'objectively reasonable,' … or 'justified,' … theory of contamination to satisfy CERCLA's causation requirement" and show that the release caused them to incur response costs) (citations omitted); *Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 458 n.2 (1st Cir. 1992) ("A plaintiff would first have to prove that it possessed a good-faith belief that some action was desirable in order to address a particular environmental threat. The plaintiff would then have to demonstrate that its response to the perceived threat was objectively reasonable.").

CCT's claimed "perceptions of contamination" and some members' alleged resulting avoidance are not tied to actual contamination given their own admissions and the ample evidence that the UCR is safe for human use. Indeed, CCT does not contend that swimming in the UCR or use of water from the UCR for sweats, etc., is prohibited. They are not. And, as noted above, CCT Business officials understand and have told tribal members that the UCR beaches and water are safe for fishing and other tribal uses. 4-SER-874-76; 4-SER-877-78.

Second, CCT's own admissions preclude any possible reach for the necessary causal link. All CCT's experts acknowledged that many factors—most significantly, the government's land takings and forced relocation of the tribe, dam construction, flooding of culturally significant sites, destruction of the salmon runs, and efforts to eradicate tribal cultural and language through forced boarding school attendance—have contributed to CCT's cultural losses, declines in language proficiency, and even disconnection from the river. Despite this, CCT made no effort whatsoever to determine which losses (if any) *Teck* actually caused. 2-ER-125; 2-ER-191 (citing 3-SER-630-33; 4-SER-896); 2-ER-195-96 (citing 3-SER-634-36; 4-SER-896). But as *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1224 (D.C. Cir. 1996), on which CCT and the government rely, explicitly recognizes, "the statutory language requires some causal connection between the element of damages and the injury—the damages must be 'for' an

injury 'resulting from a release of oil or a hazardous substance[.]'" CCT has presented no evidence of that.

Third, any recovery for natural resources damages *must* be used to "restore, replace, or acquire of the equivalent of [the injured] natural resources. 42 U.S.C. § 9607(f)(1). But CCT seeks $114.6 million in damages for "cultural restoration" and/or *up to $538.6 million* for other, *unspecified* purposes. Permitting CCT to use any recovery, as it proposes to do here, "for some purpose other than to 'restore, replace, or acquire the equivalent of' the injured [resource] would undercut Congress's policy objectives in enacting 42 U.S.C. § 9607(f)(1)." *New Mexico*, 467 F.3d at 1248.

Natural resource damages are not tort damages. *Id.* at 1247. "Sound public policy, as reflected in CERCLA ... demands that environmental protection and preservation be the primary, if not the sole, objective of natural resource damage valuation." *Id*. Indeed, CERCLA's restriction on trustees' use of NRD funds "underscore[s] ... [Congress's] paramount restorative purpose for imposing damages at all." *Ohio*, 880 F.2d at 444-45. Natural resource damages are intended to restore or replace the injured natural resource, "*not to provide a windfall to the public treasury*[.]" *New Mexico*, 467 F.3d at 1247 (internal citation omitted; emphasis in original).

Consistent with that "paramount restorative purpose," CERCLA restricts the use of *all* funds recovered as natural resource damages. *Ohio*, 880 F.2d at 445 (CERCLA "mandates the expenditures of all damages on restoration"); *Alaska Sport Fishing*, 34 F.3d at 772 ("Unlike trustees, private parties are not bound to use recovered sums for the restoration of natural resources, or the acquisition of equivalent resources"); *New Mexico,* 467 F.3d at 1244-45, 1250 ("*All sums recovered* for injury to the public's natural resources *must* be devoted to restoration of damaged resources or acquisition of equivalents.") (cleaned up; emphasis original). The restriction applies equally to tribal trustees. *Gold King Mine*, 669 F. Supp. 3d at 1156-57.

Because damages *must* be spent to restore, replace, or acquire the equivalent of the injured natural resources at issue, the regulations recognize that "quantification [of lost use] will be done only for resources for which [natural resource] damages will be sought." 43 C.F.R. § 11.71(a)(3).

Even setting aside the fact that CCT's "Cultural Restoration Program" is expressly intended to restore culture and confidence, not natural resources, *Gold King Mine*, 669 F. Supp. 3d at 1159-60—CCT cannot "acquir[e] the equivalent of" an injured natural resource when it has not sought damages arising from *an injured resource* in the first place, and its experts admit that CCT's claim does not depend on any natural resource injury, *see, e.g.*, 1-SER-132 (citing 4-SER-874-76; 4-SER-

877-78), and that CCT would want the Plan even if the alleged "contamination" had never occurred, 2-ER-185 (citing 3-SER-653-54; 3-SER-639-40;3-SER-695), or, if it had, regardless of the extent or degree of such "contamination," 2-ER-184 (citing 4-SER-912; 4-SER-887).

Indeed, this is *exactly* how CERCLA's restriction on the use of natural resource damages supposed to operate—by precluding claims inconsistent with its "paramount restorative purpose."[21] *Ohio*, 880 F.2d at 444-45.

Fourth, recognizing CCT's claim would undermine CERCLA's focus on environmental remediation and restoration by diverting resources from recovery efforts. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (CERCLA "was designed to promote the timely cleanup of hazardous waste sites"); *Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214 (9th Cir. 2011) (excessive penalties can hinder cleanup efforts); *Alaska Sport Fishing*, 34 F.3d at 772-73 (allowing private parties to recover lost-use NRD would limit trustees' ability to conduct restoration). And it risks privileging notions of perceived harms over actual measurable harms.

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[21] CCT contends that the limitation on how natural resource damages may be recovered and used "is not an element of an NRD claim." AOB at 22 n.6. Regardless, it is a clear congressional directive. Without such a limit, a responsible party would have no recourse against a trustee who misuses recovered funds in violation of this statutory mandate.

E. CCT's Damages Models Illustrate Why This Court Should Decline to Craft a Novel Theory of Recovery.

CCT's damages models underscore the problems with attempting to assess intrinsically subjective and speculative damages for cultural or tribal losses. Unlike CERCLA's established framework for quantifying damages tied to tangible natural resource injuries, CCT's methodologies are unreliable, unworkable, and inconsistent with CERCLA's purpose. CCT's damages claims by their terms range from $128.2 million to $538.6 million—a staggering spread of over $410 million. This wide variance in CCT's own valuations highlights the inherent difficulty in quantifying alleged cultural losses.

1. CCT's Damages Model Based on Future Service Losses Does Not Compensate for any Recoverable Harm.

As an alternative to CCT's Cultural Restoration Plan, CCT seeks damages for "future service losses" for "[d]iscouraged use of natural resources, as well as diminished traditional and cultural connections to those resources." 4-ER-600-01. To measure these alleged future losses, CCT's experts conducted a "contingent valuation" (CV) or "stated preference" (SP) survey.[22] That survey asked tribal members to choose between two, hypothetical non-monetary options: a specified

[22] Contingent valuation is a survey-based economic technique used to assign a monetary value to non-market resources like environmental benefits or public goods. A contingent value survey typically asks people their willingness to pay for hypothetical specific changes.

amount of sediment removal on the one hand and the purchase of a specified amount of forestland on the other. 4-ER-598. Based on the survey results, CCT's experts opined that "future service losses" damages fell somewhere between $165 million and $525 million. 4-ER-598.

As with CCT's other damage measures, this claim fails on several grounds. First, CCT has not proposed any use for those damages, let alone one intended to restore a natural resource. Second, the damages are not tied to specific natural resource injuries. Third, these alleged losses are the opposite of interim: CCT's experts are clear they "focused on valuing reductions in future service losses only." 4-ER-601. Fourth, CCT's valuation methodology falls outside both CERCLA and the regulations. While on appeal CCT calls this "lost passive use or existence value of an uncontaminated UCR" in an attempt to fit the claim within *Ohio*'s dicta, CCT's experts don't. AOB at 27; *see* 4-ER-596-612. The SP study does not purport to value any injury to any natural resource. *At best*, it attempts to value sediment removal in the UCR. *See* 4-ER-598-99; 2-ER-601; 6-SER-1529-31. But that cannot be a basis for damages because EPA will determine whether sediment should be removed at the conclusion of the RI/FS; and this Court has already held that the presence of slag is not a basis for liability in this case. *Pakootas II*, 452 F.3d at 1075.

This claim relies on an unquantified theory of "cultural service losses" tied to an alleged and entirely undefined injury "to the River." There is no precedent for a claim for natural resource damages for lost services that does not measure either a specific natural resource injury or the lost services allegedly caused by that injury.

2. CCT's Restoration Plan Is Not A Permissible Alternate Measure Of Damages For Use And Nonuse Service Losses.

CCT's $114.6 million Cultural Restoration Plan is also fundamentally inconsistent with and insufficient as a matter of law in light of the methods that the DOI regulations on which CCT relies identify for valuing "the cost of a project that restores, replaces, or acquires services equivalent of natural resource services" pending return to the baseline condition. 43 C.F.R. § 11.83(c)(3). Indeed, as described above, the Plan was expressly intended to be, and is, a "novel" *alternative* to the statutory framework for natural resource restoration, replacement, or equivalent acquisition. 2-ER-178-79 (quoting 4-SER-900) ("[T]his was a novel kind of approach in terms of focusing on restoring the connection and the use and the reintegration of the land and the people, as opposed to looking at it as a contaminated site and looking for replacements or compensation for that."). He explicitly noted that this approach *"differed* from the one laid out by the NRDA process." 2-SER-353 (emphasis added). It is also akin to the damages theory rejected in *Gold King Mine*, 669 F. Supp. 3d at 1156-57.

Just like those "restorative damages," CCT's Cultural Restoration Plan seeks to remedy alleged cultural injuries *distinct from any injury to a UCR natural resource* through a set of cultural revitalization measures aimed "restor[ing] the tribal members['] trust in the River and the connection they have with it." 3-ER-362; *see also* 3-SER-737-39 (Plan is "to repair the relationship between the CCT and the River[.]"); 3-ER-351-53 (Plan "will restore that vital cultural and language river connection."). Like the Navajo Nation, CCT seeks over $80 million to implement cultural and language programs and to construct a cultural center and other spaces to engage in traditional and ceremonial practices. 2-ER-175 (citing 3-ER-332-38; 4-SER-870). It also includes $500,000 per year for environmental monitoring, allegedly necessary to restore confidence and trust in the river on top of ongoing State and federal monitoring because of tribal distrust of government sources. 2-ER-173 (citing 3-SER-674); 2-ER-175 (citing 3-ER-331-32; 3-SER-674-80); 2-ER-197-98 (quoting 3-ER-355) (citing https://ecology.wa.gov/Research-Data/Monitoring-assessment/River-stream-monitoring/Water-quality-monitoring); 3-ER-331-32; 3-ER-337; 3-SER-737-38; 3-ER-375-76; 3-SER-780-81; 3-SER-780-81.

Even CCT's $18.7 million slag removal proposal addresses "aesthetic" concerns and some members' alleged apprehension about using the river due to the "visible" presence of slag. 2-ER-175 (citing 4-SER-870); 2-ER-172-73 (citing 3-

SER-696; 3-ER-332; 3-ER-337; 3-ER-351-52; 3-SER-693; 3-SER-696). Again, none of this does anything to restore any natural resources; its purpose is purportedly to repair CCT's "confidence" and "trust" in the river. 3-ER-352; 3-SER-737; 3-SER-782. Finally, CCT contends that it should be awarded $6.5 million to reacquire CCT land in the North Half the federal government took from them in 1892 to facilitate access to and engagement with the river and assist in the preservation and revival of culture. 3-SER-739-40; 3-ER-332. Ironically, this land is located *closer* to the "contaminated" Upper Reaches of the river than the CCT Reservation.

Moreover, as with CCT's other damage measures, the Cultural Restoration Plan is not limited to interim losses, but instead seeks to fund (additional) environmental monitoring for 100 years and cultural and language programs for at least 75 years. 3-ER-331-32; 3-SER-780-81; 3-SER-743.

3. CCT's Claim for Lost River Use Damages is Redundant of its Joint Lost-Use Claim.

CERCLA prohibits double recovery. 42 U.S.C. § 9607(f)(1). Nevertheless, CCT's individual claim for "lost River use damages" duplicates Plaintiffs' joint lost-used claim for fishing damages. CCT seeks $9 million to $13.6 million in damages for its members' trips to the UCR for fishing and other recreational trips based on mild FCAs. AOB at 14; 3 ER 553-56. CCT claims that its members either didn't go at all, or didn't go as often. *Id.* At the same time, CCT and the State of

Washington jointly seek $17.9 million for allegedly lost fishing trips by *all* Washington residents, including CCT members, based on the very same FCAs. Despite that overlap, CCT's damages calculation includes recreational fishing trips and its expert made no effort to separate these from trips included in Plaintiffs' joint fishing damages claim. 3-ER-554; 3-ER-565-66.

Nor is CCT's claim limited to subsistence and ceremonial fishing uses. CCT has never described this claim as subsistence-based, and its expert did not distinguish trips for recreation from those for subsistence or cultural purposes. Instead, his estimate includes all trips, regardless of purpose. AOB at 14, 22-23; 3-ER-551-93.

Both CCT's and Plaintiffs' analogous claims are premised on mild FCAs. The only difference is that CCT's damages estimates use survey responses from people living on the CCT Reservation, while the joint claim uses data for the general public (which includes CCT). 3-ER-554; 2-SER-379. That does not make CCT's claim "unique," let alone allow for double recovery, even if such a claim were cognizable in the first instance.

CONCLUSION

This Court should not create a new basis for CERCLA recovery that Congress has not. Other courts have uniformly and correctly rejected similar attempts, and this Court should do the same. Anything else would create

problems, not solve them. For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that the foregoing brief is in 14-point, proportionally spaced Times New Roman type and contains 13,465 words (13,332 words of text and 133 words in the included map) excluding the items exempted by Fed. R. App. P. 32(f).

By: /s/ *Anne M. Voigts*
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