No. 24-5565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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, and the STATE OF WASHINGTON,

Plaintiff-Appellant,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant-Appellee,

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:04-cv-00256-SAB
Hon. Stanley Bastian

APPELLANT'S REPLY BRIEF

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INTRODUCTION

From start to finish, the Answering Brief of Teck Metals, Ltd., (Teck) is a continuation of Teck's longstanding refusal to face up to the consequences of decades of dumping its smelter wastes in the Columbia River. After Teck refused to accept responsibility under federal environmental law, this Court confirmed that Teck is, in fact, a responsible party under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et. seq. (CERCLA) who dumped some ten million tons of waste into the river that have now released hazardous wastes to the Upper Columbia River (UCR). *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 (9th Cir. 2006), *Pakootas v. Teck Cominco Metals, Ltd*., 905 F.3d 565, 572 (9th Cir. 2018).

Responding to natural resource damages claims by the Confederated Tribes of the Colville Reservation ("Colvilles" or "Tribes") Teck now seeks to avoid responsibility for the impact of that contamination on the Tribes' use of the natural resources in the river, belittling the Tribes' claims as arising merely out of "some members' perceptions of contamination." In so doing, Teck refuses to confront the Colvilles' proof that Teck's pervasive releases of metals have caused injury to benthic organisms living in the sediment, that its mercury has prompted fish advisories, and that these *natural resource injuries* are the basis for the Colvilles' separate claims for its unique lost uses of these natural resources.

In the district court, Teck consistently misrepresented the Colvilles' claims as targeting "cultural resources" rather than natural resources. *See* 2-ER-213; 2-ER-223–242. That erroneous characterization led to the district court's order. *See* 1-ER-2–6. Teck now continues the strategy in this Court, for even after the Colvilles and the United States explained that the claims allege injuries to natural resources and resulting lost uses of those resources by the Tribes, Teck persists in re-labeling the claims as seeking "cultural resource" damages. *See, e.g.* Answering Br. at 2. As the Colvilles already have explained, that is wrong: the Tribes seek damages for their lost uses of injured natural resources, not for injured cultural resources such as a temple or archeological relic damaged by pollution. *See* Opening Br. at 4. CERCLA and its implementing regulations, as well as applicable circuit case law, uniformly recognize the validity of such claims.

For this reason, Teck's contention, parroted by its amici, that the Colvilles seek to "fashion a new right" by "rebranding" their claims as interim lost use claims, Answering. Br. at 1, distorts both the law and the record below. The Colvilles' claims have *always* been based on interim lost use, and such claims have *always* been actionable under CERCLA. Quite to the contrary, it is Teck that continually seeks to "rebrand" the Colvilles' claims in order to argue for a statutory bar that simply does not exist. That effort fails as a matter of law, for as discussed below, Teck misapplies the relevant statutory provisions, cases, and regulations concerning recovery for the lost uses of natural resources.

Lacking legal support for its proposed bar on lost use damages with a "cultural" component, Teck resorts to arguing a series of alternate grounds for summary judgement not discussed in the district court's order from which this appeal is taken. Such claims are generally best remanded for initial consideration by the district court, and this Court should decline to consider them. Indeed, Teck's arguments are particularly poorly presented in this Court because they depend on thousands of pages of evidence not called to the attention of the district court and not considered by the district court as part of its decision; some were not even raised below at all, and Teck is precluded from arguing them here. Even if these "alternative" arguments had properly been raised, however, many of them have no grounding in CERCLA or simply fail on initial scrutiny, and all of them raise multiple issues of fact precluding summary judgment in any event.

REPLY TO TECK'S STATEMENT OF THE CASE

The Colvilles respond to Teck's erroneous representations of the record below.

Teck recounts various historical events that have caused injury to the Colvilles with the aim of showing that the damages at issue here were caused by parties or events other than Teck's extensive contamination of the UCR with hazardous wastes. Answering Br. at 10–12. Without belaboring the point, the Colvilles note that Teck's characterization of events consists entirely of disputed facts having no bearing on the issues before this Court. Moreover, each component

of the Colvilles' interim lost use claims is directly linked to natural resource injuries resulting from Teck's contamination of the UCR:

- The Colvilles' reduced river use is linked to mercury-based fish advisories due to Teck's contamination of the UCR. *See* 2-ER-64–65. These fish advisories are *per se* evidence of injury. 43 CFR §11.62 f(1)(iii).
- The Colvilles' claim of reduced total or "existence" of an uncontaminated river value is based on a stated preference (contingent valuation) study valuing the choice between a contaminated river resulting in injury to benthos in sediment—one of the natural resource injuries at issue herein—and an uncontaminated river. 4-ER-601–602.
- The Colvilles' restoration plan approach to damages is based on investigation of Tribal Members' reduced use of the UCR for social and cultural purposes due to Teck's contamination. 3-ER-368–377.

ARGUMENT AND AUTHORITY

A. Teck fails to dispute the governing law.

Just as it did in the district court, Teck persistently labels the Colvilles' claims as seeking damages for lost "cultural resources." But while Teck's actionable contamination of the UCR has indeed led to lost cultural uses of natural resources, Teck's position misstates, because the Colvilles' claims seek damages for the interim lost use of natural resources—and only *some* of those uses are in

some way "cultural." Teck acknowledges that the Colvilles seek recovery of lost river use due to mercury-based fish advisories. This is a typical form of natural resource damages and not directly cultural. 3-ER-565–566. Teck also acknowledges but mislabels the Colvilles' claim for the lost total or "existence" value of the river measured by a stated preference study valuing the choice between a contaminated river resulting in damage to benthos in sediment and an uncontaminated river. This is also a typical form of natural resource damages. 4-ER-600–602. It may be regarded as incorporating cultural values because such considerations are part of the calculus in determining the value of a resource, but no more so than damages for the Deep Water Horizon oil spill in the Gulf of Mexico or the Exxon Valdez in Alaska. In the most direct instance of cultural lost use, the Tribes investigated and identified lost cultural uses resulting from Teck's contamination. Teck ignores the investigation part of the claim in which the Colvilles identified specific lost cultural uses as well as the opinions of Dr. Taiaike Alfred describing the conclusions of the investigation, 3-ER-368–377, and targets the remedy—a restoration plan. Teck's semantic protestations do not change the substance of the Colvilles' claims, and Teck fails to meaningfully address the claims as described in the Tribes' Opening Brief.

Against this backdrop, Teck's accusation that the Tribes have "rebranded" their claims on appeal is little more than misdirection intended to avoid straightforward application of relevant standards. As the Colvilles explained in its

opening brief, CERCLA's implementing regulations and the governing case law have used a variety of terms to describe the same concept, including "lost use," "interim lost use," and/or "service loss." Opening Br. at 4 n.2; *see also, e.g., Kennecott Utah Copper Corp. v. U.S. Dept. of Int*., 88 F. 3d 1191,1220-1221(D.C. Cir. 1996) (CERCLA regulations permit recovery of damages for "human uses" of natural resources as lost "services" provided by the injured resource); 43 CFR §11.83(c)(1)(i) (defining "use value" as the economic value of the resources to the public attributable to the direct use of **the services provided by the natural resources**.") (emphasis added). Teck would have this Court believe that which of these terms a party chooses to describe the same claim is somehow dispositive of that claim. It is not. Whether described as "tribal service loss" or "interim lost use," the claims are the same: the Tribes lost the use of (or the "services provided by," if one prefers that phrasing) natural resources due to Teck's contamination, and seeks damages for that loss.

More to the point, such claims are plainly actionable under CERCLA, which expressly authorizes claims for the value of lost use of injured natural resources. *See* 42 U.S.C. §9607(a); 42 U.S.C. §9651(c)(2). Every court to consider the issue has agreed, including this Court. *Alaska Sport Fishing Ass'n v. Exxon Corp*., 34 F.3d 769, 772 (9th Cir. 1994) (natural resource trustees "are entitled to recover **for all lost-use damages on behalf of the public**, from the time of release until restoration.") (emphasis added); *see also Kennecott Utah Copper Corp*., 88 F.3d at

1220-21, *supra*; *State of Ohio v. U.S, Dept. of the Interior*, 880 F. 2d 432, 464 (D.C. Cir. 1989) ("use" under CERCLA is to be construed broadly to allow for recovery of damages for **all lost "utility derived by humans from a [natural] resource**.") (emphasis added). None of these cases carve out "cultural" uses of natural resources from "all lost-use damages" recoverable under CERCLA. Teck's insistence that the inarguably recoverable use, nonuse, or existence values under CERCLA should exclude "cultural" considerations finds no footing in the law.

Teck's attempts to distinguish the controlling circuit court authorities on their facts are unavailing and merely highlight distinctions without difference. Teck first argues that *State of Ohio* "did not address tribal service losses," but rather "addressed challenges to the first iteration of DOI's NRDA regulations." Answering Br. at 40. That is accurate, but irrelevant. *State of Ohio* rejected DOI's initial regulations precisely because those regulations viewed the loss recoverable under CERCLA far too narrowly, just as Teck does here. 880 F.2d at 463 ("Neither the statute nor its legislative history evinces any congressional intent to limit use values to market prices. On the contrary, **Congress intended the damage assessment regulations to capture fully all aspects of loss**.") (emphasis added). Such recoverable losses identified by *State of Ohio* included the "non-consumptive values" referenced by Teck, but were not limited to them; to the contrary, the court expressly noted that *any* "utility derived by humans from a resource … ought to be included in a damages assessment." *Id*. at 464.

Similarly, Teck's averment that *Alaska Sport Fishing* "had nothing to do with cultural or tribal losses," Answering Br. at 41, also misses the point. There, the appellants argued that their private claims for lost use of natural resources were not barred by *res judicata* based on a settlement between the State of Alaska and the United States as natural resource trustees and the polluter because CERCLA permits recovery "only for 'residual' resource injury, and [not] damages for public loss of use and enjoyment that occurs prior to 'recovery,' or cleanup." 34 F.3d at 772. This Court rejected appellants' argument because it "relie[d] on a strained and hypertechnical reading of the DOI regulations that is inconsistent with the statutes, the policy underlying them, their legislative history, and the relevant case law." *Id*. Rather, "trustees are entitled to recover for **all lost-use damages on behalf of the public**, from the time of any release until restoration." *Id*. (emphasis added).

B. Teck's Continued Reliance On Inapposite District Court Cases Is Unavailing.

Finding no support in the only circuit court opinions to rule on the scope of recoverable services or lost use under CERCLA, Teck again resorts to relying on two district court cases neither of which considered the issue. Teck now goes so far as to cite one the polluter defendant's *post-trial brief* in *Coeur d'Alene Tribe v. Asarco, Inc*., 280 F. Supp. 2d 1094 (D. Idaho 2003), Answering Br. at 37, as though a brief submitted by one of the parties in a district court case somehow constitutes

relevant legal authority that should persuade this Court. It does not.[1] Regardless of what any party may have argued at trial in that case, the fact remains that the sole mention of "cultural uses" anywhere in the opinion is a single-sentence finding of fact with no explanation or analysis. 280 F. Supp. 2d at 1107. We are left to speculate about the court's reasoning, the applicable law, and the facts of the case – that is why Teck here resorts to citing a party's brief, and it is why *Coeur d'Alene Tribe* is wholly unavailing as legal authority on the recoverability of lost use damages under CERCLA.

In re Gold King Mine Release in San Juan Cty., Colorado, on Aug. 4, 2015, 669 F. Supp. 3d 1146 (D.N.M. 2023) is no more helpful. There, the defendant polluter sought to preclude the plaintiff tribe from pursuing tort claims for various cultural losses by arguing that such claims were preempted by CERCLA. *Id.* at 1156. The court rejected the defendant's argument, noting that there were no allegations that the damages suffered by the plaintiff had anything to do with lost services from natural resources. *Id*. at 1159 ("[The defendant] has not shown that the restorative programs damages claims are natural resource damages claims the recovery of which would be subject to the restriction that they be used only to

[1] This Court's Local Rule of Appellate Procedure 28-1(b) provides that parties may not incorporate by reference briefs submitted to the district court "or refer this Court to such briefs for the arguments on the merits of the appeal." It is wholly unclear why Teck believes deviation from this rule is warranted in this case.

restore, replace or acquire the equivalent of the damaged resource.") (emphasis added). The district court thus had no reason to consider – and did not consider – CERCLA's regulations, *State of Ohio*, or *Alaska Sport Fishermen*. Teck's cherry-picked quotations about "cultural" loss notwithstanding, *In re Gold King Mine* simply has nothing to say about the issues on appeal here.

C. Congress Rejected The Very Bar On Recovery Of Damages With A "Cultural" Component Now Sought By Teck And Its Amici.

It is particularly ironic that Teck and its amici argue that the Colvilles seek to create a "new" or "novel" claim under CERCLA, when it is Teck who asks this Court to adopt a change in law that Congress declined to do. CERCLA's legislative history – quoted by Teck in its motion for summary judgment – makes clear that CERCLA always has contemplated damages to compensate for lost "cultural and religious values attached to natural resources that have been destroyed or damaged by toxic contaminants." *The Superfund Act, Hearings Before the Subcomm. On Finance and Hazardous Materials of the H. Commerce Comm*., 105th Cong. at 24 (1998); 2-ER-227[2]; *see also* 73 Fed. Reg. 57259, 57264 (noting that claims for "**cultural, religious, and ceremonial losses that rise from the destruction of or injury to natural resources continue to be cognizable**" under CERCLA)

[2] In addition to quoting and citing these publicly-available excerpts of the Congressional Record in its motion for summary judgment (as did the Colvilles in their opposition), Teck submitted full copies of the record to the district court attached to its motion. *See* 5-ER-988.

(emphasis added). Indeed, the same legislative history originally cited by Teck in its motion for summary judgment reveals that in the 1990s, several major polluters exhorted Congress to amend CERCLA in order to eliminate recovery by Tribes for damages for ceremonial or religious services provided by injured natural resources. *Superfund Reauthorization, Hearings of the Commerce, Trade and Hazardous Materials Subcomm. of the H Commerce Comm*., 104th Cong at 369–370 (1995) (testimony of Kevin L. McKnight on behalf of Alcoa alleging that "NRD program has become punitive, not restorative" and requesting that "lost-use and non-use damages, including contingent valuation methodology, be proscribed"); 2-ER-227. A bill, H.R. 3000, was introduced to do just that. *The Superfund Act, Hearings Before the Subcomm. On Finance and Hazardous Materials of the H. Commerce Comm*., 105th Cong. at 129–130 (testimony by Sandra M. Stash of ARCO that "[t]rustees are filing claims to collect so-called non-use values … [H.R. 3000] prohibits that practice."). Congress, however, rejected these attempts to eliminate recovery of such damages under CERCLA by declining to pass H.R. 3000. *Id.* at 23–24 (statement by Rep. Furse that "I completely oppose a **prohibition on compensation for nonuse values. These are the [aesthetic] cultural and religious values attached to natural resources that have been destroyed or damaged by toxic contaminants**." (emphasis added). Teck's position here would have this Court enact the very prohibition that Congress rejected.

For these reasons alone, this Court should reverse the district court's order.

D. This Court Should Decline To Consider Teck's Alternative Arguments Seeking Summary Judgment Of Dismissal.

Teck's Answering Brief raises several arguments not addressed by the district court in its orders. In the ordinary course, these claims should be reviewed in the first instance by the district court on remand. *Roth v. Foris Ventures LLC*, 86 F. 4th 832, 838 (9th Cir. 2023) (issue not addressed in district court remanded for decision in first instance); *see also Shirk v. United States ex rel. Dep't of Interior*, 773 F. 3d 999, 1007 (9th Cir. 2014) (standard practice is to remand to district court for decision in first instance); *Detrich v. Ryan*, 740 F.3d 1237 1248–49 (9th Cir 2013) (same.); Amicus Brief of United States at 26–27.

This is particularly the case here because Teck has submitted thousands of pages of material in the appellate record that were not called to the district court's attention, and none of its evidentiary claims were addressed below and therefore may not be considered in the first instance by this Court. "'[It is a] basic tenet of appellate jurisprudence ... that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below.'" *Lowry v. Barnhart,* 329 F.3d 1019, 1024-25 (9th Cir. 2003) (bracketed material in original).

The Court in *Harkins Amusement Enters., Inc. v. Gen. Cinema Corp*., 850 F. 2d 477, 482 (9th Cir. 1988) concluded that "only those items referred to in the parties' partial summary judgment memoranda below may be considered". The Court's reasoning applies here: "In a complex case such as this, the judge was not required to examine thousands of additional pages of record even if they were

presented to him. For this reason, our analysis is limited to the factual assertions raised in Harkins' district court papers, and the additional items cited in its appellate briefs have not been considered." *Id*.

Teck's materials not considered by the district court take two forms: (1) new evidentiary material never offered in the record below and (2) evidence in the record not before the district court in the motion for summary judgement. We list both categories of documents in Appendices A and B to this Reply. Such materials should be considered first by the district court before review by this Court.

In the event the Court nevertheless wishes to consider Teck's alternate grounds, each of them fail as a matter of law and raise disputed issues of fact precluding summary judgment as explained below.

1. <u>The Colvilles' interim lost use claims are based on actionable releases of metals in the UCR and resulting injury to natural resources.</u>

Teck's challenge to the relation of injury to damages begins with a misstatement of the causation standard for an NRD claim. In cases such as this in which wastes are commingled at a site, section 9607(a)(4)(C) requires proof that Teck's releases of metals contributed to natural resource injuries. *Coeur D'Alene Tribe*, 280 F. Supp. 2d at 1124 ("the causation standard is a contributing factor test"); *Boeing v. Cascade Corporation*, 207 F. 3d 1177, 1182–1186 (9th Cir. 2000) (applying causation standards in CERCLA response costs claim). Citing dicta from the district court's earlier decision in *Pakootas v. Teck Cominco Metals, Ltd*., 2011

WL 13112570 *2, Teck claims that the causation standard is "resulting" and presents its own articulation of the elements of a 9607(a)(4)(C) claim, with no mention of the analysis in *Coeur d'Alene*. *Coeur D'Alene* is persuasive on this point because it analyzed the causation standard in light of Ninth Circuit case law. It matters little here, though, because Teck has not controverted the Colvilles' proof that releases of metals from Teck's slag and mercury laden effluent caused the injury to benthos and the mercury-based fish advisories, which are the natural resource injuries in this case.

2. Teck's Challenge to the Linkage of Injury and Damages Does Not Engage Two of Three Service Loss Claims.

Teck targets the relation of the injuries that have been proved to damages claimed, suggesting that they are based in perceptions and are disconnected from natural resource injury. Teck's argument, both here and in the district court, focused on the Colvilles' lost cultural use investigation and proposed restoration plan and ignored two out of three of the Colvilles' approaches to damages: reduced river use; and (2) reduced total value or "existence" value of an uncontaminated river.

The Colvilles' claims for damages based reduced river use due to mercury-based fish advisories are by their terms based on releases of mercury in the UCR, not perceptions in any form. *See* Opening Br. at 10; 2-ER-64–66. Fish advisories are *per se* evidence of natural resource injury, so the linkage to injury cannot be questioned. 43 CFR §11.62f(1)(iii). In the district court, Teck ignored this

component of the Colvilles' damages claim and for that reason alone its challenge to the linkage of injury to damages must fail. In this Court, it argues that the Colvilles' lost river use claim is duplicative of or overlapped Plaintiffs' joint claim for recreational fishing lost uses. This does not persuade because the Colvilles' expert, Robert Unsworth, calculated enhanced value to Colville members, greater than those of the general public, employing well established NRD valuation methodologies. 1-ER-64–66; 3-ER-563. Mr. Unsworth also confirmed that any overlap was less than 5%. Thus, Teck's attacks on this proof of damage fail and summary judgment is foreclosed. 3-ER-565–566.

Teck's attack on perceptions and relation to injury do not engage the Colvilles' claims for total or existence value of an uncontaminated river. It did not address the sufficiency of this claim in the district court either and in this court it does not attempt to show that it is disconnected from natural resource injury. Such a claim would fail because the claim directly measures the exchange value of a river in which contaminants are toxic to benthos (one of the natural resource injuries proved in this case. *See* 1-SER-111 (toxicity to creatures in sediment for the basis for injury.) Thus, the claim is directly based on the natural resource injury at issue.

The Colvilles' expert economists, David Layton and Robert Paterson developed a study design with questions informing tribal members that the UCR had been contaminated with hazardous wastes causing injury to creatures in the sediment and offering a choice between cleanup of the river and varying amounts of

forest land. 4-ER-598. The members constantly preferred cleanup and rejected exchange and its economists calculated the resulting minimum lost total value as $165,000,000. 1-SER-111 (Decl. of Layton, ¶6, $165 million was a "conservative lower bound for the mean" formed "by imputing the smallest feasible land compensation that is consistent with each respondent's vote."); 4-ER-610–611; *see also* Opening Brief at p. 11. This opinion was bolstered by the Colvilles' 2006 rejection of $1 billion for rights to mine molybdenum on its reservation, 4-ER-611, confirming the high value the Colvilles' give to protection of the resources with which they live and on which they depend.

Despite the clear framing of this claim in the Paterson/Layton report, in this Court Teck insists that it hinges on "diminished traditional and cultural connections" to the river." Answering Br. at 26–27. This quotation is taken from the introduction to the Layton/Paterson report in which the authors note the Colvilles' expert Dr. Alfred's opinion that "[r]eleases of hazardous substances to the River have resulted in natural resource injuries and altered the relationship between the [Colvilles] and the River environment. 3-ER-369. Teck elsewhere ignores this linkage between natural resource injury and cultural lost use, but here it insists that it describes the work of Dr. Layton and Mr. Paterson. Teck's account is incomplete. Dr. Alfred's opinion is introduction to the work of Dr. Layton and Mr. Paterson in which they designed and implemented a study to estimate the approximate economic value of service losses due to contamination causing injury to creatures

living in the sediment. 4-ER-598. They used a stated preference study because such methods "create choice settings where individuals can reveal their value for natural resource services." Layton and Paterson explained that such a study is approved for use in natural resource damage assessment (43 CFR §11.83) and recognized in the U.S. EPA's Guidelines for Preparing Economic Analyses (2014) and the Office of Management and Budget's circular A-4 guidance on regulatory impact analysis (2003). Thus, this valuation may reflect "traditional and cultural connections" to the river, but it is not defined by them.

Teck argues that the stated preference study measures only the value of sediment removal. Answering Br. at 55. It reasons that the presence of slag, alone, is not a basis for liability so removing it, presumably, is not a CERCLA remedy. To state what should be obvious, releases from slag are actionable and have been proven in this case. Thus, removal of slag removes the sources of releases and forms the basis for the stated preference choice between remedying the contamination and valuable forest land. *See* 4-ER-601–602.

3. The Colvilles' proposed restoration plan addresses actionable lost use of natural resources for cultural purposes.

Teck's challenge to the linkage of injury to damages is restricted to the Colvilles' service loss investigation and proposed restoration plan. It cites *Kennecott Utah Copper Corp.. v. U.S. Dept. of Interior*, 88. F. 3d 1191, 1224 (D.C. Cir. 1996) for the relevant standard: "CERCLA authorizes the recovery of 'damages for injury to, destruction of, or loss of natural resources…resulting from"

a release, citing 42 U.S.C. §9607(a)(4)(C). Based on 42 U.S.C. §9651(c) and CERCLA's implementing regulations, these damages include lost uses of injured resources.

Teck attacks the Colvilles' claim for service losses with a cultural component arguing that it is based on contamination of the UCR and not specific knowledge of the natural resource injuries at issue. In making this claim, Teck ignored the opinion of the Colvilles' lead expert on lost cultural uses, Dr. Alfred, in which he described his conclusions regarding lost cultural uses based on the Colville Tribal Service Loss Investigation. He confirmed that based on the interviews conducted in the investigation, it was evident that Tribal members' cultural and spiritual connections to the UCR site have been damaged due to their awareness of the impacts of hazardous substances in the UCR." 3-ER-372. Based on the interviews, he concluded that "because of the injuries to natural resources caused by Teck's releases, Tribal members have chosen not to relate to the riverine environment and have discontinued cultural practices central to their ancestral way of being and identity of a nation." *Id*. He concluded that based on the interviews of Colville members, "their cultural and spiritual connections to the UCR site have been damaged due to their awareness of the impacts of hazardous substances in the UCR." *Id.* (Compare Layton/Paterson's account of Dr. Alfred's opinions at 4-ER-600, cited by Teck for other purposes.) At a minimum, this evidence presents material issues of fact foreclosing summary judgment.

Teck did not attempt to answer Dr. Alfred's opinions and insisted that the Colvilles' lost cultural uses are based on the perception of contamination, not the natural resource injuries that have been proved, citing the opinions of Dr. Domanski. Answering Br. at 21, citing 4-SER-883. Taken in context, Dr. Domanski explained that the "presence of contaminates in the river is the injury that leads to changes in behavior and losses in cultural services." 4-SER-883. Teck derives this claim as based on the "perception" of contamination. Teck's facile argument ignores the basic premises of economics: "Value, like beauty, is in the eye of the beholder. The economics discipline not only accepts this, but in fact valuation is based on it." 1-SER-111.

Let's be clear here. Teck's waste disposal practices have led to pervasive actual contamination of the UCR and there is no denying that. Teck's dumped 10 million tons of slag and 200 tons of mercury in the Columbia River and most of that has moved into the UCR. 4-ER-695–696.

Unfazed by this proof and the findings of the district court, Teck seems to use the term "perception" to minimize the impact of its contamination. As a matter of semantics, Teck is well off target because all human experience is based on "perceptions," so emphasizing that lost cultural use is due to "perception" of contamination is no different than saying it is due to "knowledge" of contamination. Merriam-Webster Dictionary ("awareness of the elements of environment through physical sensation.") As noted above, Dr. Layton has explained that in economics,

perceptions are the foundation for value. 1-SER-111. Teck has never suggested that the Colvilles' "perceptions" of the effects of contamination were incorrect, nor could it.

Teck's obsession with the concept of "perceptions" forgets that contamination is the process by which causes injury, so avoidance of cultural use based on contamination is a result of the wrongful act and recoverable as damages. This was Dr. Domanski's point when he explained that "[t]he documented loss in cultural use services that result from the UCR would not occur if the contamination in the UCR were not present." 2-ER-76. Thus, the lost cultural uses resulting from Teck's contamination and resulting injury to natural resources are recoverable.

This result is consistent with damages principles in torts and contracts. Proof of damage must flow from the wrongful act, but it need not specifically tie to the actionable injury. For example, a claim for fear of developing a latent disease is compensable if that fear is reasonably related to an exposure and accompanied by a physical injury (caused by the tortfeasor's breach of a duty). *See* 50 A.L.R.4th 13 (1986). Consistent with this, in *Norfolk & Western Railway Company v. Ayers*, 538 U.S. 135, 140 (2003) the United States Supreme Court held that former railroad employees, who had developed asbestosis from asbestos exposure while working for the defendant railroad, could recover for their fear of developing cancer even if they never had cancer. Liability was proved based on exposure to asbestos and resulting asbestosis. Damages were then available for losses due to the wrongful

act, not just the asbestosis. Prior Supreme Court cases analogize to the "zone of danger" test in which even a bystander may recover emotional distress from the consequences of observed negligent acts. *See, e.g. Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 429-430 (1997).

Applied here, Teck dumped its wastes in the UCR for decades, resulting in releases in the UCR and natural resource injuries. In its motion below, Teck did not contest the Colvilles' proof of cognizable injury, nor did it dispute that the Tribes' members avoid the river as a consequence. This alone proves lost use of injured natural resources, and Teck has no basis to refuse compensation for its acts. The Colvilles explained these principles and provided these authorities in their opposition to Teck's motion for summary judgment, but Teck had no response. 2-ER-118-119. It has no response on this appeal either.

Teck then proposes an objective reasonableness standard for perception-based claims, citing CERCLA response cost cases. *E.g.Ca. Dep't of Toxic Substances Control v. NL Indus. Inc*., 636 F. Supp. 3d 1092,1103,1112 (C.D. Cal. 2022) and *Dedham Water Co., Inc v. Cumberland Farms Dairy, Inc.*, 972 F. 2d 453, 458 n. 2 (1st Cir. 1992). This test applies to the determination of liability in the first instance and not the relation of proven injury to damages. Even if applied here, an objective reasonableness test raises questions of fact that cannot be resolved on summary judgment, at least not in favor of Teck. Where the objective reasonableness turns on disputed issues of material fact, it is "a question of fact best

resolved by a jury." *See Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir.2003) (Where objective reasonableness turns on disputed issues of material fact, it is "a question of fact best resolved by a jury"). An objective reasonableness test is easily met here where Teck has dumped 10 million tons of slag into the UCR as well as hundreds of pounds of mercury. As a result, Teck's slag lines the beaches and mercury-based fish advisories have issued. At minimum, the question of objective reasonableness raises issues of fact that foreclose summary judgment.

Teck insists that even though its slag lines the bottom of the river and its mercury will remain in the system for longer than 100 years, 2-ER-284, any avoidance is unreasonable because the water quality is acceptable. Aside from the obvious issues of fact, Teck fails to account for the larger picture. It dumped its wastes in the Columbia River for most of the last century without any disclosure or guidance to those downstream regarding resulting contamination. Investigation of site conditions only began in 2002 and is still ongoing and Teck has not commenced comprehensive remediation at the site. In these circumstances, the Colvilles may reasonably avoid cultural and physical use out of apprehension concerning the consequences of Teck's waste disposal practices.

4. Teck's alternate causation arguments are unavailing and raise disputed issues of fact.

Next Teck argues that because the Colvilles have suffered injuries from other influences such as the construction of the Grand Coulee Dam more than eighty years ago and the loss of the North Half more than one hundred years ago, it cannot

be injured by its disposal of its wastes which remain in the UCR. This has no force and at best can only raise issues of fact. The Colvilles' lost river use claim is expressly tied to current fish advisories and has no relation to the Grand Coulee Dam or the loss of the North Half or forced schooling or any of the other injuries the Tribes have suffered. The same is true of the Colvilles' claim for the lost total or "existence" value of the uncontaminated river because it is expressly based on injury to benthos in the UCR and has no connection to Teck's list of historical concerns. Even the third component of the Colvilles' damage claim, its investigation and proof of lost cultural use, targeted the impact of Teck's contamination and excluded consideration of the impact of other causes such as the Grand Coulee Dam and the resulting loss of the salmon fishery. The Colvilles' experts considered alternative causes, such as the Grand Coulee Dam and excluded their impacts from their analyses. *See* 3-ER-376–377; 3-ER-387–388; 3-ER-387–389; 3-ER-338–339; 4-SER-902.

5. Teck's arguments about the future use of the Colvilles' recovery lack merit.

Teck also argues that the Colvilles' interim service loss claim must be dismissed because it would not use the recovery to restore the lost resource. This fails for multiple reasons. First, future use of funds is not an element of a claim under section 9607 and Teck cites no authority supporting such an argument. Second, the Colvilles will be bound to use any recovery as required by law. 42 U.S.C. §9607(f)(1). Third, CERCLA expressly provides that recoveries are not

limited to the cost of restoration and may include the value of services lost to the public. 43 CFR §11.80(b), §11.83(a). Indeed, lost use damages may exceed such restoration costs. 43 CFR §11.83(c). Fourth, Teck seems to insist that natural resource damages may only be used to restore the resource, not the services lost due to the resource. This is contrary to the statute and common practice in NRD enforcement. 3-ER-328–329. Damages recoveries are often measured using equivalency analyses in which the value of the lost resource is calculated based on an equivalent healthy resource and recoveries are used to fund acquisition of substitutes, not restoration of the resource itself. *Id.* That is the case in Plaintiffs' joint claim for ecological injury. Experts used a form of habitat equivalency analysis to measure the acres of injured acres and then calculate the equivalent number of substitute acres and used the resulting value to project the cost of measures to improve the services provided by the UCR—not restore the injured benthos in the sediment or eliminate the mercury accumulated in fish.

Lost cultural services are no different. Dr. Domanski explained that "components of cultural services can be restored through a set of programs designed to replicate community, cultural, and spiritual linkages". 3-ER-328. Expressed in CERCLA terminology, "[c]ompensation through cultural restoration programming is a type of service-to-service scaling." This approach to compensating lost cultural services has been used to resolve other natural resource damage assessments. 3-ER-329.

Teck's argument that NRD recoveries cannot be used to restore cultural services reprises its argument that damages for cultural uses are not recoverable. It emphasizes that the Colvilles' restoration plan approach involves restoring cultural connection with the river lost due to its contamination. Teck maintains that NRD recoveries must only be used to restore resources but concedes, as it must, that they can be used to recover equivalents. Answering Br. at 52. That concession dooms its argument because the Colvilles' damages request seeks to restore the equivalent of the service provided by the uncontaminated resource.

6. Teck cannot avoid damages for interim lost use by relying on remediation and restoration efforts it has not even agreed to undertake.

Finally, Teck argues that requiring it to pay damages would undermine remediation and restoration. Teck has not agreed to any comprehensive remediation or restoration and the remedial investigation has been ongoing for almost twenty years with no end in sight, so there is no rational basis to believe remediation and restoration will be undermined. No case law supports Teck's claim that it can discount damages to fund remediation. It cites *Burlington* for the basic proposition that CERCLA is designed to promote timely cleanup of hazardous substances. This is certainly the case, if not Teck's practice here, but it offers no support for Teck's effort to discount its damages responsibility. The same is true of the *Pakootas* decision on recovery of penalties not damages, and which is only dicta and has no force applied here where Teck is a multi-billion-dollar company with ample

resources to respond in damages. *Alaska Sport Fishing* concerned private party enforcement is not applicable to this litigation by government entities.

CONCLUSION

The district court's order granting summary judgment on the Colvilles' separate claims for natural resource damages should be reversed and the case should be remanded for trial.

RESPECTFULLY SUBMITTED this 11th day of February, 2025.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-5565

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Signature */s/ Paul J. Dayton* **Date** 2/11/2025
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing System, which will send Notice of Electronic Filing to all counsel of record:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this 11th day of February 2025 at Seattle, Washington.

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No. 24-5565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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, and the STATE OF WASHINGTON,

Plaintiff-Appellant,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant-Appellee,

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:04-cv-00256-SAB
Hon. Stanley Bastian

APPENDIX A TO APPELLANT'S REPLY BRIEF

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NEW EVIDENTIARY MATERIAL DEFENDANT-APPELLEE RELIES UPON IN ITS ANSWERING BRIEF THAT WAS NOT OFFERED IN THE DISTRICT COURT

New "Evidence"	Answering Brief Page Number
Canada 's A-Bomb Secret, Canada's History (July 14, 2015), *available at* https://www.canadashistory.ca/explore/science-technology/canada-s-a-bomb-secret	15
Derrick Penner, *Why Teck's Trail Smelter May Hold Leverage Against Donald Trump's Tar Threat,* Vancouver Sun (Jan. 13, 2025, 12:09 am), https://www.timescolonist.com/business/why-tecks-trail-smelter-may ho1d-leverage-againsbdonald-trump s-tariff-threat- 10066576	15
Trail & District Chamber of Commerce, *A History of Discovery*, *available at* https://www.trailchamber.bc.ca/area-info/a-history-of-discovery/	15
Final Site- Wide Human Health Risk Assessment for the UCR (Feb. 10, 2021), *available at* https://www.ucr-rifs.com/assets/Docs/Risk_Assessments/HHRA/02-11-21 - EPA-Fina1- UCR-Sitewide-HHRA-Report-v2.pdf	17, 18, 19
Washington State Dept. of Health, *Fish Consumption Advisories*, *available at* https://doh.wa.gov/communityand-environment/food fish/advisories (last visited Jan. 20, 2025)	17
Upper Columbia River Site RI/FS Draft Human Health Risk Assessment, Public Webinars: June 10, 2020 & July 15, 2020, at 18-20, *available at* https://www.ucr-rifs.com/assets/Docs/Risk_Assessments/HHRA/2020_EPA_Presentation _for_UCR_Draft_HHRA_Pub1ic_Webinars.pdf	19

Upper Columbia River Human Health Risk Assessment Presentation, YouTube (June 10, 2020), at 35:50, *available at* https://www.youtube.com/watch'?v=VDH9P3n5kEo	17, 18, 19
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/regulatoryinformation/search-fda guidance-documents/guidance-industry-action-levels-poisonous-o deleterious-substances-human-food-and-animal-feed (last modified Aug. 2000)	17
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), *available at* https://cdnsciencepubcom doi/10. 1139/cjfas-2012-0338	17
Wash. Dept. of Ecology, River & stream water quality monitoring, https://ecology.wa.gov/Research-Data/Monitoring-assessment/River-stream-monitoring/Watebquality-monitoring (last visited Jan. 21, 2025)	24

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APPENDIX B TO APPELLANT'S REPLY BRIEF

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EVIDENCE IN THE RECORD BELOW, BUT NOT BEFORE THE DISTRICT COURT IN THE MOTION FOR SUMMARY JUDGEMENT

(1) 1-SER-181: Columbia River Basin: State of the River Report for Toxics January 2009

(2) 2-SER-498: Statement of Undisputed Material facts in support of Defendant's Motion for Partial Summary Judgment on Plaintiffs' Joint Natural Resource Damages Claims

(3) 3-SER-567: Supplement to the Expert Report of Dr. Ann M. Morrison; September 13, 2023

(4) 3-SER-578: Declaration of Adam Domanski in Response to Teck's Motion to Limit his Opinion on Ecological Damages

(5) 3-SER-594: Plaintiff's Joint Response to Teck's Motion to Exclude Opinion of Adam Domanski, on Ecological Damages

(6) 3-SER-607: Transcript of Deposition of David E. McBride; July 25, 2023

(7) 5-SER-957: Expert Report of Dr. Ann Michelle Morrison, Dec. 15, 2022

(8) 6-SER-1283: Transcript of Deposition of Robert E. Unsworth, June 5, 2023

(9) 6-SER-1305: Rebuttal Expert Report of Dr. Desvousges to Dr. Layton and Mr. Patterson, Dr. Domanski, and Mr. Unsworth

(10) 6-SER-1525: Transcript of Deposition of Robert Paterson

(11) 7-SER-1534: Expert Report of Jesse Sinclair and Dr. William Clements

(12) 7-SER-1627: UCR Fish Consumption Advisory

(13) 7-SER-1629: Expert Rebuttal Report of Karen J. Murray; December 15, 2022

(14) 7-SER-1640: Order Denying Defendant's Motion for Summary Judgment on Ripeness

(15) 7-SER-1647: Declaration of Kris McCaig in Support of Teck's Motion for Summary Judgment on Ripeness

(16) 7-SER-1661: Defendant's Motion for Summary Judgment on Ripeness

(17) 7-SER-1691: Defendant's Reply in Further Support if Defendant's Motion for Partial Summary Judgment on the Colville Tribes' NRD Claims for Lack of Standing

(18) 7-SER-1718: Plaintiff's Motion for Leave to File Excess Pages

(19) 7-SER-1721: State of Washington's Motion for Leave to File Excess Pages

(20) 7-SER-1729: Teck's Statement of Undisputed Material Facts in Support of Teck's Motion for Summary Judgment on Standing

(21) 7-SER-1745: Appendix B- Tab 3 on Teck's Statement of Undisputed Material Facts In Support of Teck's Motion for Partial Summary Judgment on the Colville Tribes' NRD Claims for Lack of Standing

(22) 7-SER-1749: Teck's Motion for Partial Summary Judgment on the Colville Tribes' NRD Claims for Lack of Standing