Appeal No. 24-5565

IN THE 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. CV-04-0256-SAG, CHIEF JUDGE STANLEY A. BASTIAN

BRIEF OF HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29

His Majesty the King in Right of the Province of British Columbia ("British Columbia") respectfully submits this brief as amicus curiae in response to the Confederated Tribes of the Colville Reservation's ("Tribes") appeal under 28 U.S.C. § 1292(b) from partial summary judgment granted in favor of Appellee Teck Cominco Metals, Ltd. ("Teck"). Fed. R. App. P. 29(a)(4). This brief is concurrently filed with a Motion for Leave to File Amicus Brief and is timely filed. Fed. R. App. P. 29(a)(2), (a)(6).[1]

Amicus provides the following statements of interest pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D):

British Columbia is one of ten Canadian provinces. It has a population of more than five million, the third largest in Canada. British Columbia shares a 1,347-mile border with the United States—561 miles adjacent to Washington, Idaho, and Montana, and 786 miles adjacent to Alaska. Every American state along the British Columbia-United States border lies within the Ninth Circuit, making British

[1] Amicus certifies that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the amici and their counsel—contributed money intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E).

Columbia more affected than any other Canadian province by this Court's decision.

British Columbia, like all Canadian provinces, has significant exclusive and shared governmental powers under the Canadian Constitution. Can. Const., art. VI, § 92 (Constitution Act, 1867) (granting certain exclusive powers to the provincial legislatures). In Canada, environmental regulation, including regulation of discharges into the environment and remedial regulation governing cleanup of polluted sites, is largely a provincial responsibility. *See, e.g.*, *Friends of the Oldman River Soc'y v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (Can.) (explaining the federal-provincial division of environmental regulatory authority under Sections 91 and 92 of the Constitution Act, 1867); *Canadian Nat'l Ry. Co. v. Ontario (Director Under the Envtl. Prot. Act)*, [1991] 3 O.R. (3d) 609, ¶ 43 (Ont. Div. Ct.) ("Pollution is not a single matter assigned by the Constitution exclusively to one level of government. It is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."). Accordingly, British Columbia has enacted a comprehensive environmental law, Part 4 of the British Columbia Environmental Management Act, S.B.C. 2003, Ch. 53 (Contaminated Site Remediation), which is comparable to

the American Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq.

In addition to having their own environmental laws, the United States and Canada have, over the years, created mechanisms for resolving trans-boundary environmental issues on a government-to-government basis, e.g., the Boundary Waters Treaty of 1909 and the International Joint Commission, or the NAFTA Commission on Environmental Cooperation. These mechanisms have been repeatedly used by the United States and Canadian governments to address trans-boundary environmental problems, rather than having them resolved by lawsuits by private litigants pursuing only their own private interests.

Under the Court's precedents in this case, Canadian businesses are vulnerable to suit by private litigants under CERCLA—*even if those Canadian businesses operate entirely in Canada and comply fully with Canadian environmental and regulatory requirements*.

Now this Court is being asked to impose a novel and unprecedented form of liability—damages for cultural injuries that appellants claim they suffered due to the alleged contamination. Such damages are not clearly authorized by CERCLA and, instead, turn on interpretations of the terms "natural resource damages" and "use value"

in CERCLA and definitions in regulations enacted in 1994. AOB 15-18, 22; Brief of Amicus Curiae United States of America 5. This adds even more uncertainty for British Columbia businesses that may face claims under unclear categories of damages not previously recognized at law for conduct that, as in Teck's case, largely predated CERCLA and the regulations.

British Columbia continues to be concerned about the Court's precedents in this case to the extent that they provide for and potentially encourage private litigation seeking the application of U.S. domestic law to parties residing and conducting operations in British Columbia. Still, British Columbia accords due deference to the Court's interpretation of U.S. laws and its own decisions, and acknowledges its finding that CERCLA does not have extraterritorial application to Teck as the location of the alleged damages is in the United States.

However, British Columbia has a strong interest in advocating for the determination of the present appeal in a way that accords with the interpretation of U.S. domestic law in accordance with international law and custom; does not undermine the long-standing tradition of Canada-U.S. and Province-State cooperation on environmental issues; and ensures that its citizens and businesses are not subjected to expanding and unpredictable claims arising from the United States,

which should instead be resolved through transnational negotiation and agreements.

British Columbia believes that its perspective on these matters will assist the Court in deciding the appeal in the most appropriate way. In advancing this brief, British Columbia does not maintain that the plaintiffs in this litigation or litigants in similar cases should be deprived of the opportunity to seek a remedy for environmental impacts. But neither should any remedy be unbounded or without regard for established principles of statutory interpretation or international law and custom.

INTRODUCTION

For more than a century, the United States and Canada have resolved trans-boundary environmental issues through international treaties and agreements. These agreements and dispute-resolution procedures are a recognized and successful means of addressing environmental concerns without undermining principles of international comity and sovereignty. In fact, proceedings under the International Joint Commission ("IJC") created by the U.S.-Canada Boundary Waters Treaty of 1909 have previously adjudicated disputes over the very smelter that is the subject of this action.

Now this Court is being asked to overlook international law and custom and to impose liability for a form of damages that is neither clearly set forth in the statute nor readily calculable. The Tribes ask this Court to award damages against a corporation located and operating in British Columbia under the laws of British Columbia and Canada for cultural injuries potentially in excess of $500 million. The ramifications of such a ruling would extend far beyond the litigants in this case.

These types of decisions should be made by the political branches of government through negotiated transnational agreements and treaties, not by the judicial officers of one country imposing their will on businesses operating in another country. Although this Court has

previously held that this case does not involve the extraterritorial application of CERCLA, its rulings will impact business operating near the United States border with Canada. Yet this Court has never considered the sovereign interests that Canada and British Columbia possess in overseeing industries within their borders. This Court should not interpret CERCLA to encompass the type of damages the Tribes request against a corporation located and operating outside of the United States, in British Columbia, which will interfere with British Columbia's regulatory scheme and invite foreign actions against American companies for environmental violations.

Accordingly, this Court should affirm the district court and hold that damages for cultural injuries are not available under CERCLA against a foreign defendant.

ARGUMENT

I. Courts Should Interpret U.S. Laws In a Manner That Complies with the United States' International Obligations and Respects the Sovereignty of Foreign Nations.

This Court has twice held that CERCLA extends to Teck in *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006) ("*Pakootas I*") and *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018) ("*Pakootas III*"). *Pakootas I* rejected Teck's argument

about the extraterritorial application of CERCLA, finding that, because CERCLA controls only the cleanup of hazardous waste and that cleanup would take place in the United States, this case involved only a domestic application of CERCLA. *Pakootas I*, 452 F.3d at 1075-79. *Pakootas III* held *Pakootas I* was law of the case. *Pakootas III*, 905 F.3d at 586 n.13. Neither case addressed the international implications of the decision, issues of comity, or the sovereign interests of Canada or British Columbia in its analysis.[2]

Looking at the issues not through an extraterritoriality lens but instead with an eye on international legal obligations and international relations, the present appeal provides opportunity for consideration of comity and the implications of allowing private litigation to govern trans-boundary environmental disputes in lieu of bilateral agreements and their mechanisms for resolving disputes. These include the troubling concept that U.S. environmental laws could be applied to Canadian businesses operating *solely and lawfully in Canada* or the concern that unlimited private litigation over trans-boundary

[2] In an intervening opinion, *Pakootas v. Teck Cominco Metals, Ltd.*, 830 F.3d 975 (9th Cir. 2016) ("*Pakootas II*"), this Court held that the Tribes could not bring CERCLA claims for emissions Teck released into the air. However, that decision turned on the meaning of the term "disposal" in the statute. *Id.* at 981-86. The Court once again did not address the implications of applying CERCLA to trans-boundary environmental disputes.

environmental disputes "pose[s] a threat of international discord," destabilizing the North American economy. Randall S. Abate, *Dawn of a New Era in Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on Continuum of Context*, 31 Colum. J. Envtl. L. 87, 133 (2006). There is also the risk that "the floodgates of litigation would be opened for similar suits hauling U.S. businesses into Canadian courts for the effects of polluting activities that originate in the United States but have effects in Canada." *Id.*

The United States Supreme Court has long recognized that courts should be hesitant in construing statutes "to violate the law of nations if any other possible construction remains[.]" *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("*Charming Betsy*") ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."); *accord McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (quoting *Charming Betsy*); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (same). This so-called *Charming Betsy* doctrine is " 'wholly independent' of the presumption against extraterritoriality." *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (quoting

EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 264 (1991) (Marshall, J., dissenting), *superseded by statute on other grounds as recognized by Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512-13 (2006)). "[E]ven where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.*; *see also F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 164 (2004) ("*Empagran*") ("this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. . . . '[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains' ") (quoting *Charming Betsy*, 6 U.S. (2 Cranch) at 118) (other internal citations omitted).[3] In applying this standard, courts "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Empagran*, 542 U.S. at 164.

[3] A similar presumption applies to interpretations of Canadian law. *R. v. Hape*, [2007] 2 S.C.R. 292 (Can.). Canadian courts presume the legislature acts "in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community [to] avoid a construction that would place Canada in breach of those obligations." *Id.* at 323, ¶ 53.

This standard derives from the principle of " 'prescriptive comity.' " *Hartford Fire Ins.*, 509 U.S. at 817 (Scalia. J., dissenting) (cited with approval in *Empagran*, 542 U.S. at 164). This principle—"the respect sovereign nations afford each other by limiting the reach of their laws" —must be considered when weighing the effect of a domestic statute. *Id.* at 817 (Scalia, J., dissenting); see also *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008) (applying doctrine to antitrust statute to avoid "the very sort of interference" with other countries' sovereignty "that we ordinarily seek to avoid"). Under this standard, courts must "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164.

Importantly, courts should consider comity even if the presumption against extraterritoriality does not prevent a statute from applying to foreign defendants. *See, e.g. Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108, 127-129 (2013) (Breyer, J., concurring) (though the presumption against extraterritoriality would not prevent the Alien Tort Statute, 28 U.S.C. § 1350, from applying to conduct by foreign defendants against victims in Nigeria, the foreign policy implications of the case required the statute to be interpreted "consistent with those notions of comity that lead each nation to respect

the sovereign rights of other nations by limiting the reach of its own laws and their enforcement"). As the Second Circuit has said, "international comity is a separate notion from the 'presumption against extraterritoriality[.]' " *In re Maxwell Commc'n Corp. plc by Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996).

Applying these principles, this Court should be mindful of the Supreme Court's admonition in *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957), that the judiciary is ill-suited to wade into international affairs where not clearly directed to do so. Declining to apply the Labor Management Relations Act to foreign seamen on a foreign ship while in an American port, the Supreme Court stated:

> For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

Id. at 147.

II. The United States and Canada Have International Legal Obligations Under International Treaties, Agreements, and Procedures to Resolve Trans-Boundary Environmental Disputes.

As one commentator has noted, "North America constitutes a vast and interconnected system—physically, ecologically, and economically."

Jameson Tweedie, *Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement*, 63 Wash. & Lee L. Rev. 849, 857 (2006).

Indeed, almost 90% of Canada's population lives within 100 miles of the U.S. border. Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. Rev. 363, 385 (2005). Most Canadian economic activity takes place within that 100-mile border region.

Because of this explosion in economic activity near the border, the United States and Canada "'have a lot of trans-boundary environmental problems.'" Tweedie, *supra*, at 857 (quoting John Knox, *Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution*, 27 Can.-U.S. L.J. 199, 199 (2001)). The United States and Canada "'share an extensive border that includes some 150 rivers and lakes—a situation that has "provided ample opportunity for the generation of international environmental disputes."'" Parrish, *supra*, at 383-84 (quoting Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiffs: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 Harv. Envtl. L. Rev. 85, 132-33 (1991)); *see also generally* Abate, *supra*, at 131-32

(discussing a variety of brewing trans-boundary environmental disputes).

Over the last hundred years or so, Canada and the United States have dealt comprehensively with these "trans-boundary environmental problems" *solely* through diplomatic and inter-governmental means. On issue after issue—from acid rain, to solid waste, to sewage dumping, to pollution emanating *from the very smelter at issue in this case* (the "Trail Smelter")—the governments of the United States and Canada have endeavored to solve problems collaboratively, in their common interest. These diplomatic efforts have included such mechanisms as the International Waterways Commission (established in 1905), the Boundary Waters Treaty of 1909 and its International Joint Commission, the Great Lakes Water Quality Agreement of 1978, and the NAFTA "Side Agreement" on Environmental Cooperation between the United States, Mexico, and Canada, which included creation of the NAFTA Commission on Environmental Cooperation. In short, the fact of intergovernmental cooperation on environmental issues is well established and effective.

Most recently, in March 2024, the Governments of Canada and the United States provided a reference to the International Joint Commission to assist in establishment of a collaborative governance

body involving both federal governments, British Columbia, indigenous nations and the states of Idaho and Montana to study and make recommendations regarding transboundary water pollution in the Elk-Kootenai/y watershed.

British Columbia also has a strong record of working with neighboring American states to address and resolve environmental issues. *See, e.g.*, Environmental Cooperation Agreement Between the Province of British Columbia and the State of Washington (May 7, 1992); Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Ministry of Environment, Land and Parks (April 12, 1996); Interagency Memorandum of Understanding Between the State of Washington, Department of Ecology and the Province of British Columbia, Ministry of Environment, Land and Parks (1995) (applying the 1992 Environmental Cooperation Agreement to the Columbia River); Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Environmental Assessment Office (June 20, 2001); Environmental Cooperation Arrangement Between the Province of British Columbia and the State of Idaho (September 14, 2003); Environmental Cooperation Arrangement Between the Province of British Columbia and the State

of Montana (September 14, 2003); Memorandum of Understanding Between the Idaho Department of Environmental Quality and the British Columbia Ministry of Water, Land and Air Protection.[4]

These diplomatic and inter-governmental mechanisms for solving trans-boundary environmental issues have served Canada and the United States well. Indeed, the IJC was instrumental in resolving one of the most contentious trans-boundary environmental disputes of the 20th Century—a dispute that arose from the *very same smelter at issue in this case*. The so-called "Trail Smelter" proceedings—a bi-national dispute adjudicated under the IJC—that resulted in the Canadian government agreeing to compensate U.S. farmers and others for damages caused by air pollution emanating from the Smelter, and imposing sulfur dioxide fume controls on the Trail Smelter. Parrish, *supra*, at 420-21 (discussing the Trail Smelter Arbitration (U.S.-Can.) 3 R.I.A.A. 1905 (1938) ("Trail Smelter I"), further proceedings 3 R.I.A.A. 1938 (1941) ("Trail Smelter II")).

[4] Since neither Canadian provinces nor American states have the power to enter into treaties, these types of state-provincial accords are limited to "agreements" and "memorandums of understanding" that do not have the full force of international treaties. But these state-provincial environmental agreements and memorandums reflect British Columbia's ability and desire to discuss and enter into agreements with its neighbors to address trans-boundary environmental issues.

The inter-governmental structure that resolved the Trail Smelter dispute still exists and is available to resolve trans-boundary environmental issues and related disputes between the United States and Canada, including this one. L.H. Legault, *The Roles of Law and Diplomacy in Dispute Resolution: The IJC as a Possible Model*, 26 Can.-U.S. L.J. 47, 50 (2000) (one of the IJC commissioners noting that "[t]he fundamental mandate of the Commission, as reflected in the preamble to the Boundary Waters Treaty, is to prevent and resolve disputes between Canada and the United States"); *see also id.* at 52-53 (noting the IJC "has developed a rich body of practice in addressing transboundary water and environmental issues assigned to it under the Boundary Waters Treaty, the Great Lakes Water Quality Agreement [of 1978], and other agreements"); Parrish, *supra*, at 419 ("Using the IJC as a method for dispute resolution has been successful.").

If the United States and Canada are unable to resolve the dispute through bilateral negotiation, either country may, under the treaty, refer "matters of difference . . . involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the [U.S.-Canada border] . . . to the International Joint Commission ["IJC"] for examination and report." Boundary Waters Treaty, art. IX. If the two countries are unable to reach an agreement

based on the IJC's Article IX report, the countries may agree to have the IJC issue a binding decision. *Id*. art. X. As such, this treaty "specifically provides a remedy for resolving these types of transboundary water pollution disagreements." Parrish, *supra*, at 414; *see also id*. at 415-20 (discussing the application of the Boundary Waters Treaty to trans-boundary pollution issues).[5] The Boundary Waters Treaty, like all treaties, is part of "the supreme law of the land" in the United States. U.S. Const., art. VI, cl. 2.

III. Expanding CERCLA Damages to Conduct That Occurred in British Columbia Interferes with British Columbia's Environmental Regulatory Scheme.

This Court's application of CERCLA to foreign companies operating solely and lawfully in British Columbia threatens to interfere with British Columbia's environmental regulatory scheme. The application of American law by U.S. courts to discharges from the Trail Smelter into the Columbia River is not limited to that specific facility

[5] Professor Parrish also notes that "Canada has long been concerned that Teck Cominco's Trail Smelter operations were violating Canada's obligations under the Boundary Waters Treaty." Parrish, *supra*, at 414 n.264. British Columbia does not seek to absolve Teck of all responsibility for pollution at the Columbia River site; rather, it seeks to ensure that, if Teck is to be assessed liability for cleanup costs, it be done by bilateral agreement or application of treaty law, not unilateral, cross-border application of American law by private litigants.

and that specific activity. Nothing in this Court's prior opinions would preclude the application of American law to thousands of other entities whose activities take place entirely within British Columbia and are subject to provincial regulation. Expanding damages in the manner the Tribes seek would incentivize even more claims seeking damages under newly devised and novel theories.

CERCLA, like many U.S. environmental statutes, contains a parallel enforcement mechanism whereby "private attorneys general" can file citizens suits such as the instant case so as to enforce regulations, permits, and orders. 42 U.S.C. § 9659(a). To incentivize such private enforcement, prevailing plaintiffs are entitled to an award of attorneys' fees and costs. *Id.* § 9659(f). At the same time, such private actions are somewhat constrained by the requirements that they must provide 60-day advance notice of the suit to the federal and affected state governments, *id.* § 9659(d)(1), no action may be commenced if the United States is already "diligently prosecuting" an enforcement action, *id.* § 9659(d)(2), and the United States and the affected state may intervene in any action as of right, *id.* § 9659(g).

Because neither British Columbia nor the federal government of Canada enjoy any of the notice, diligent prosecution, or intervention rights afforded their American regulatory counterparts under CERCLA,

trans-boundary application of CERCLA provides none of the mechanisms for protecting the government's interests in such litigation. A Canadian province that has consciously chosen to take a different regulatory path than the United States would be subject to a more extreme exposure to private oversight, with its attendant contentiousness and attorneys-fees disputes, than U.S. jurisdictions would be subject to. This undermines longstanding principles of international comity and bilateral resolution of trans-boundary issues.

As commentators have recognized, discussing *Pakootas I*, this Court's prior decisions "interfere[] in the operation of Canadian law and create[] uncertainty in its application to Canadian facilities." John C. Turchin & Risa Schwartz, *Beyond Trail Smelter: Assessing the Changes in International Environmental Law*, *in Environmental Law: The Year in Review 2006* 105, 106, 124 (Stanley D. Berger & Dianne Saxe eds., 2007); see also Parrish, *supra*, at 403 (the "use of the U.S. CERCLA laws to regulate extraterritorially the conduct of Canadian companies operating solely in Canada is an affront to Canadian sovereignty"). As another author put it: forcing Teck to defend itself against these claims "smacks of environmental imperialism because, if the . . . Tribes are successful, the capacity of British Columbia to set its own environmental priorities and policies will be limited sharply." *Parrish*,

supra, at 406. This Court's opinions have "set a precedent that Canadian companies, without Canadian consent, are required to follow U.S. environmental policy" or face significant liability. *Id.* "Canadian environmental policy—to the extent that it imposes a different standard or a different method of regulation—would be undermined as Canadian companies would feel compelled to follow U.S. laws." *Id.*

IV. Out of Respect for Comity and Fundamental Fairness, This Court Should Decline to Expand the Scope of Damages Under CERCLA Against Foreign Companies.

The concerns discussed above weigh strongly against the award of damages for cultural injuries in this case. The Tribes' arguments highlight precisely why CERCLA litigation is a particularly inappropriate method of resolving trans-boundary environmental disputes. They invite this Court to retroactively decide the meaning and scope of CERCLA, resulting in punishment to foreign parties that could not have anticipated facing such exposure when the alleged wrongdoing took place.

The Tribes concede that, though CERCLA authorizes damages for "use value," it does not define the term. AOB 3 & n.2. That is not new; this Court has long recognized that "the language of CERCLA is not a model of precise crafting[.]" *Pakootas II*, 830 F.3d at 985; *see also Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 883 (9th Cir.

2001) ("[N]either a logician nor a grammarian will find comfort in the world of CERCLA.") (en banc). Yet this Court is now being asked to adopt a novel and unprecedented interpretation of "use value" that could subject Teck to damages in excess of $500 million for injuries to the Tribes' culture.

This case presents a situation where a foreign defendant had no reason to believe it would be subject to CERCLA in the first place. And even after this Court issued its unprecedented rulings extending CERCLA to Teck, it now may be subject to entirely unforeseen and nearly incalculable categories of damages that depend entirely on judicial parsing of unclear language.

The ever-expanding scope of CERCLA that the Tribes urge shows why courts should not be resolving issues that threaten the sovereignty and environmental policies of other governments. If companies in British Columbia and other areas near the United States border have no way of knowing the scope of their potential liability for trans-boundary environmental impacts, they will be exposed to potential and uncertain liabilities if they do not defer to the United States' environmental policies, even if they differ from their home province or nation. Instead, these types of disputes should be resolved by diplomacy and the mechanisms already in place—the numerous treaties

between Canada and the United States and the agreements between British Columbia and its neighboring states.

In deference to comity and the concerns detailed above, this Court should reject the interpretation the Tribes urge. To the extent a foreign company operating entirely outside the United States is liable, its liability should be limited to harms that are clearly enumerated in CERCLA. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Imposing a novel form of damages on top of its already unprecedented ruling applying CERCLA to a foreign defendant operating entirely outside of the United States is a step too far.

V. Expanding CERCLA Liability Invites Foreign Nations to Subject American Companies to Reciprocal Actions.

This Court should also consider the risk to American businesses of being forced to litigate environmental claims in neighboring countries under the laws enacted by foreign governments. Canada, for instance, has suffered significant environmental damage from acid rain from the coal usage in the eastern United States. Under the Canada-U.S. Air

Quality Agreement (AQA) signed in 1991, both countries reduced their emissions of sulfur dioxide (SO2) and oxides of nitrogen (NOX). Environment and Climate Change Canada and United States Environmental Protection Agency, Review and Assessment of the Canada-U.S. Air Quality Agreement (AQA) (2023), https://www.epa.gov/system/files/documents/2024-03/review-and-assessment-of-the-canada-us-aqa-508-compliance.pdf. But the effects are still being felt in Canadian rivers and the Atlantic salmon population. Moira Donovan, *Nova Scotia's rivers still suffer from acid rain. Restoring them could also help the climate*, CBC News (Aug. 6, 2024), https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-s-rivers-still-suffer-from-acid-rain-restoring-them-could-also-help-the-climate-1.7239696. Should U.S. coal producers face suit for the environmental damage to the salmon fisheries?

British Columbia has experienced increasingly destructive wildfires driven by climate change. Laura Van Vliet, et al., *Developing user-informed fire weather projections for Canada*, Climate Services 35 (2024), https://www.sciencedirect.com/science/article/pii/S2405880724000608#f0020; Benjamin Shingler, *The true scale of Canada's quietly devastating wildfire season, in 4 charts*, CBC News (Oct. 4, 2024), https://www.cbc.ca/news/climate/wildfires-2024-charts-

1.7341341. These fires disproportionately affect First Nation reserves and communities. Van Vliet, *supra*, at 2. ("42% of wildfire evacuations affect First Nation reserves or communities with largely Indigenous populations, however, these communities make up only 5% of Canada's population").

Historically, propelled by the coal and automobile industry, the United States has been the greatest contributor to climate change. Nadja Popovich and Brad Plumer, *Who Has The Most Historical Responsibility for Climate Change?* New York Times (Nov. 12, 2021), https://www.nytimes.com/interactive/2021/11/12/climate/cop26-emissions-compensation.html; Council on Foreign Relations, *Who Releases the Most Greenhouse Gases?* (Oct. 10, 2024), https://education.cfr.org/learn/reading/who-releases-most-greenhouse-gases; see also Simon Evans, *Analysis: Which countries are historically responsible for climate change?* (Oct. 5, 2021) ("The US remains in first position for its cumulative CO2 emissions throughout the timeseries, as its development continued first with widespread use of coal, then with the advent of the motor car."), https://www.carbonbrief.org/analysis-which-countries-are-historically-responsible-for-climate-change/. If Canadian companies can be sued under CERCLA, there is no reason

that U.S. coal producers or auto manufacturers could not be sued in Canada for the environmental damage caused by their products.

As these examples illustrate, extending CERCLA to defendants operating entirely in a foreign country undermines the other nation's sovereignty and invites reciprocal litigation against American businesses.[6] It also creates potential and uncertain liabilities for American businesses, just as it does for Canadian businesses. Instead, trans-boundary environmental disputes should be resolved by the political branches through treaties and international cooperation.

CONCLUSION

Accordingly, this Court should affirm the district court and hold that damages for cultural injuries are not available under CERCLA against a foreign defendant.

[6] That this Court held CERCLA did not apply to air emissions flowing from Canada to the United States in *Pakootas II* does not mean the converse must be true when American air pollutants travel to neighboring countries. This Court's reasoning turned on CERCLA's language; nothing would prevent Canadian (or Mexican) lawmakers from enacting legislation that imposes liability for emissions from the United States.

Respectfully Submitted,

Date: January 28, 2025

By: s/ *Rex S. Heinke*
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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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Appeal No. 24-5565

IN THE 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. CV-04-0256-SAG, CHIEF JUDGE STANLEY A. BASTIAN

MOTION FOR LEAVE TO FILE BRIEF OF HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amicus Curiae His Majesty the King in Right of the Province of British Columbia ("British Columbia") requests leave of this Court to file the accompanying amicus curiae brief. Fed. R. App. P. 29(a)(3). British Columbia requested consent from all parties to submit their brief. 9th Cir. R. 29-3. Counsel for Appellee Teck Cominco Metals, Ltd. ("Teck") consented, but counsel for the Confederated Tribes of the Colville Reservation's ("Tribes") did not consent.

I. Interest of Amicus Curiae

British Columbia is one of ten Canadian provinces. It has a population of more than five million, the third largest in Canada. British Columbia shares a 1,347-mile border with the United States—561 miles adjacent to Washington, Idaho, and Montana, and 786 miles adjacent to Alaska. Every American state along the British Columbia-United States border lies within the Ninth Circuit, making British Columbia more affected than any other Canadian province by this Court's decision.

British Columbia, like all Canadian provinces, has significant exclusive and shared governmental powers under the Canadian Constitution. Can. Const., art. VI, § 92 (Constitution Act, 1867) (granting certain exclusive powers to the provincial legislatures). In

Canada, environmental regulation, including regulation of discharges into the environment and remedial regulation governing cleanup of polluted sites, is largely a provincial responsibility. *See, e.g.*, *Friends of the Oldman River Soc'y v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (Can.) (explaining the federal-provincial division of environmental regulatory authority under Sections 91 and 92 of the Constitution Act, 1867); *Canadian Nat'l Ry. Co. v. Ontario (Director Under the Envtl. Prot. Act)*, [1991] 3 O.R. (3d) 609, ¶ 43 (Ont. Div. Ct.) ("Pollution is not a single matter assigned by the Constitution exclusively to one level of government. It is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction."). Accordingly, British Columbia has enacted a comprehensive environmental law, Part 4 of the British Columbia Environmental Management Act, S.B.C. 2003, Ch. 53 (Contaminated Site Remediation), which is comparable to the American Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq.

In addition to having their own environmental laws, the United States and Canada have, over the years, created mechanisms for resolving trans-boundary environmental issues on a government-to-government basis, e.g., the Boundary Waters Treaty of 1909 and the

International Joint Commission, or the NAFTA Commission on Environmental Cooperation. These mechanisms have been repeatedly used by the United States and Canadian governments to address trans-boundary environmental problems, rather than having them resolved by lawsuits by private litigants pursuing only their own private interests.

Under the Court's precedents in this case, Canadian businesses are vulnerable to suit by private litigants under CERCLA—*even if those Canadian businesses operate entirely in Canada and comply fully with Canadian environmental and regulatory requirements*.

Now this Court is being asked to impose a novel and unprecedented form of liability—damages for cultural injuries that appellants claim they suffered due to the alleged contamination. Such damages are not clearly authorized by CERCLA and, instead, turn on interpretations of the terms "natural resource damages" and "use value" in CERCLA and definitions in regulations enacted in 1994. AOB 15-18, 22; Brief of Amicus Curiae United States of America 5. This adds even more uncertainty for British Columbia businesses that may face claims under unclear categories of damages not previously recognized at law for conduct that, as in Teck's case, largely predated CERCLA and the regulations.

British Columbia continues to be concerned about the Court's precedents in this case to the extent that they provide for and potentially encourage private litigation seeking the application of U.S. domestic law to parties residing and conducting operations in British Columbia. Still, British Columbia accords due deference to the Court's interpretation of U.S. laws and its own decisions, and acknowledges its finding that CERCLA does not have extraterritorial application to Teck as the location of the alleged damages is in the United States.

However, British Columbia has a strong interest in advocating for the determination of the present appeal in a way that accords with the interpretation of U.S. domestic law in accordance with international law and custom; does not undermine the long-standing tradition of Canada-U.S. and Province-State cooperation on environmental issues; and ensures that its citizens and businesses are not subjected to expanding and unpredictable claims arising from the United States, which should instead be resolved through transnational negotiation and agreements.

British Columbia believes that its perspective on these matters will assist the Court in deciding the appeal in the most appropriate way. In advancing this brief, British Columbia does not maintain that the plaintiffs in this litigation or litigants in similar cases should be

deprived of the opportunity to seek a remedy for environmental impacts. But neither should any remedy be unbounded or without regard for established principles of statutory interpretation or international law and custom.

II. Desirability and Relevancy of Amicus Curiae Brief

British Columbia's proposed amicus brief raises issues that are not addressed by the parties. Specifically, this Court has previously held that CERCLA applies to Teck, even though business operations at issue took place entirely within British Columbia. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1075-79 (9th Cir. 2006) and *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 586 n.13 (2018). Although this Court has resolved the question of extraterritoriality in those decisions, this appeal provides opportunity for it to consider independent precepts relevant to the scope of statutes on foreign defendants, including the *Schooner Betsy* doctrine and comity. These doctrines require the Court to consider the implications of allowing private litigation to govern trans-boundary environmental disputes in lieu of bilateral agreements and their mechanisms for resolving disputes.

In the current appeal, the Tribes seek to recover damages that are not recognized under Canadian or British Columbia law and turn on

judicial interpretation of unclear language in CERCLA. As the proposed amicus brief explains, this Court should decline to expand CERCLA liability even further than it already has out of respect for comity and fundamental fairness.

CONCLUSION

For the foregoing reasons, this Court should grant leave to file the proposed amicus brief.

Respectfully Submitted,

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