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,

Defendants - Appellees.

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

BRIEF OF *AMICI CURIAE* NEZ PERCE TRIBE, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, THE CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION OF OREGON, AND THE CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

TREATIES

STATUTES & LEGISLATIVE MATERIALS

REGULATIONS

RULES

OTHER MATERIALS CITED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), *Amici Curiae* Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation are federally recognized Indian Tribes, *Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 89 Fed. Reg. 944 (Jan. 8, 2024), and are not non-governmental corporations.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation ("CTUIR"), the Confederated Tribes of Warm Springs Reservation of Oregon ("Confederated Tribes of Warm Springs"), and the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), collectively referred to as the "Columbia River Treaty Tribes" or "*Amici* Tribes.[1]" All of the *Amici* Tribes are federally recognized, self-governing Indian Tribes, who are parties to, or legal successors-in-interest of, certain treaties with the United States. *See* Treaty of June 11, 1855 with the Nez Perces, 12 Stat. 957; Treaty of June 9, 1855, between the Cayuse, Umatilla, and Walla Walla Tribes and the United States, 12 Stat. 945; Treaty of June 25, 1855, with the Tribes of Middle Oregon, 12 Stat. 963; Treaty of June 9, 1855, with the Yakamas, 12 Stat. 951.

The *Amici* Tribes have occupied the Columbia Plateau in the Pacific Northwest from time immemorial and the combined area of their ceded lands covers 25% of the Columbia River Basin. As noted, in 1855, each of the Columbia River Treaty Tribes entered treaties with the United States, ceding millions of acres of land.

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[1] This brief is filed without leave of the Court because the parties have consented to its filing. Fed. R. App. P. 29(a)(2). *Amici* certify that none of the parties' counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief, and no person—other than *Amici*, their members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

See generally Charles Wilkinson, *Treaty Justice: The Northwest Tribes, the Boldt Decision, and the Recognition of Fishing Rights* 65-100 (2024). These treaties include terms that not only establish reservations, but reserve sovereign, pre-statehood usufructuary rights, including the Tribes' right to fish in all "usual and accustomed places," whether on or off their respective reservations. *See Sohappy v. Smith*, 302 F. Supp. 899, 911 (D. Or. 1969) ("*Belloni*") (ruling that the four Columbia River Treaty Tribes had an "absolute right" to a "fair share" of the fish runs destined to pass the Tribes' fisheries), *as amended by Sohappy v. Smith*, 529 F.2d 570 (9th Cir. 1976) (defining "fair share" as up to 50 percent of the spring harvest destined to reach the Tribes' usual and accustomed grounds and stations); *see also United States v. Winans*, 198 U.S. 371, 381 (1905); *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985).

The Nez Perce Tribe, CTUIR, and the Yakama Nation serve as co-trustees on the Hanford Natural Resource Trustee Council, which is conducting a Natural Resource Damage Assessment ("NDRA") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERLCA") for the Hanford Site, located near the city of Richland in southeast Washington state. Between 1944 and 1989, the United States produced plutonium at Hanford for use in atomic weapons.[2]

[2] *Understand the Past*, The Hanford Site, U.S. Department of Energy, https://www.hanford.gov/page.cfm/understandPAST (last visited Dec. 11, 2024).

This work created billions of gallons of liquid waste and millions of tons of solid waste at a place where the Nez Perce Tribe, CTUIR, and the Yakama Nation hold treaty-reserved rights.[3] The Hanford Site sits on the last free-flowing reach of the Columbia River, which provides unique habitat to a variety of terrestrial and aquatic species of significance to the Columbia River Treaty Tribes.

The Confederated Tribes of Warm Springs, CTUIR, and the Nez Perce Tribe serve as co-trustees on the Portland Harbor Natural Resource Trustee Council, which is conducting an NRDA under CERLCA. The Yakama Nation is also a trustee but does not serve on the Trustee Council. The Portland Harbor Site is located on the lower Willamette River where, for decades, industries released contaminants into the river and adjacent land. This stretch of the Willamette River provides important habitat to a variety of terrestrial and aquatic species of significance to the Columbia River Treaty Tribes. The Columbia River Treaty Tribes have substantial treaty-reserved fishing rights and other federally reserved rights within the Portland Harbor site.

[3] *Id*.

ARGUMENT

I. CERCLA'S STATUTORY LANGAUGE AND LEGISLATIVE HISTORY AUTHORIZE A TRIBAL TRUSTEE'S CLAIM FOR NATURAL RESOURCE DAMAGES BASED ON LOST USES AND RELATED SERVICES.

This appeal turns on a simple question: whether damages for the injured and lost service use of natural resources sought by a Tribal trustee are recoverable under CERLCA.[4] The district court held that these damages were not recoverable, relying primarily on district court holdings in *Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003) and *In re: Gold King Mine Release in San Juan Cty., Colorado, on Aug. 5, 2015*, 669 F. Supp. 3d 1146 (D.N.M. 2023), and a cursory analysis of CERCLA. *Pakootas v. Teck Cominco Metals, Ltd.*, No. 2:04-CV-00256-SAB, 2024 WL 457769, at *2 (E.D. Wash. Feb. 6, 2024), *reconsideration denied*, No. 2:04-CV-00256-SAB, 2024 WL 1559540 (E.D. Wash. Apr. 10, 2024), *motion to cert. appeal granted*, No. 2:04-CV-00256-SAB, 2024 WL 3354427 (E.D. Wash. July 9, 2024). The district court centered its decision by unilaterally, and without explanation, reframing the Tribal trustee's service loss damages as "cultural resource damages." *Pakootas*, 2024 WL 457769, at *1 n.1 ("The Court will refer to 'tribal service loss' as 'Cultural Resource Damages' throughout this Order.").

[4] The Tribal trustee is the Confederated Tribes of the Colville Reservation ("Colville Tribes").

However, the damages claimed by the Tribal trustee in this case clearly fall within the broad scope of CERCLA § 301(c)(2), 42 U.S.C. § 9651(c)(2), and are consistent with the types of natural resource damage claims anticipated when CERCLA was amended in 1986 to add Tribes as CERCLA trustees.

A. CERCLA's plain language creates broad categories of recovery, which include the lost use damages claimed by the Tribal trustees.

Under CERCLA's statutory language, the term "natural resources" expressly means all -

> land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

42 U.S.C. § 9601(16). Liability for injuries to such natural resources, like the Upper Columbia River at issue in this case, are plainly cognizable under CERCLA's statutory language. *See id.* §§ 9607(a), (f).

CERCLA provides a damage determination process which considers the value of lost use of natural resources. 42 U.S.C. § 9651(c)(2). CERCLA's implementing regulations define "use values," as "the economic value of the resources to the public attributable to the direct use of the services provided by the natural resources." 43 C.F.R. § 11.83(c)(1)(i). CERCLA regulations also recognize nonuse values derived by the public from natural resources as an independent damage. *Id.* § 11.83(c)(1).

As such, the clear language of CERCLA allows for broad recovery when contemplating the Tribal service loss damage claims of the Colville Tribes in the instant action.

1. Tribal trustees may evaluate use, non-consumptive use, and lost-service values as part of an NRDA, which may include cultural considerations.

This Court recognizes that a trustee may recover natural resource damages for the value of "*all* the lost uses" of the damaged resources from the time a hazardous substance is released to the time of restoration. *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 772 (9th Cir. 1994) (emphasis in original) (citing H.R. Rep. No. 253, 99th Cong., 1st Sess. pt. 4, at 50 (1985)). This Court also recognizes that the Department of Interior ("DOI") regulations "when read in their entirety, demonstrate that the government trustees are entitled to recover for all lost-use damages on behalf of the public, from the time of any release until restoration." *Id.* (citing 43 C.F.R. §§ 11.81(b), 11.14(gg), 11.51(a)(1)(ii)).

Section 301(c)(2) of CERCLA requires the DOI, when assessing natural resource damages, to "take into consideration factors including, *but not limited to* . . . use value." 42 U.S.C. § 9651(c)(2) (emphasis added). CERCLA's statutory language neither expressly limits recovery to use values, nor does it exclude other "non-consumptive use values," such as option and existence values, as a baseline. *Ohio v. United States Dep't of Interior*, 880 F.2d 432, 464 n.77 (D.C. Cir. 1989); *see,*

e.g., Utah v. Kennecott Corp., 801 F. Supp. 553 n.29 (D. Utah 1992) (holding that the "existence value [of an aquifer] should have been considered in the settlement given the fact that people who live in a desert most likely would assign substantial value in just knowing that an aquifer exists.").

CERCLA regulations expressly include non-consumptive uses as a compensable value. 43 C.F.R. § 11.83(c)(1) ("Compensable value is the amount of money required to compensate the public for the loss in services provided by the injured resources . . . [and] can include the economic value of lost services provided by the injured resources, including both public use and nonuse values such as existence and bequest values."); *see also id.* at (ii) ("Nonuse value is the economic value the public derives from natural resources that is independent of any direct use of the services provided."). CERCLA is clear: the use, non-consumptive use, and nonuse values of natural resources are determined in relation to the loss of services to humans derived from impacted natural resources. *See* 43 C.F.R. § 11.71(e).

Loss of services to humans from natural resources span both active and passive use categories and those services can, at least in part, be shaped by a cultural context, regardless of which "public" is being compensated for the service loss resulting from the release of a hazardous substance.[5]

[5] Natural resource "services" consist of "the physical and biological functions performed by the resource including the *human uses* of those functions. These services are the result of the physical, chemical, or biological quality of the

Use, nonuse, and non-consumptive use values all have the breadth to implicate cultural considerations without constituting "cultural resource" claims. In *Ohio*, the D.C. Circuit made this breadth clear when it identified that use values cannot be "fully captured by the market system." 880 F.2d at 462-64. In reviewing challenges to DOI's 1986 regulations on NRDAs under CERCLA, the D.C. Circuit Court of Appeals in *Ohio* held that prescribing a hierarchy of methodologies for measurement of lost use value of natural resources with an exclusive focus on market values when such values are available was not a reasonable interpretation of CERCLA. *Id.* at 438. In so holding, the *Ohio* court implicitly recognized that use value can be defined within a societal context.[6] *See id.* at 462-64.

As an example of non-consumptive use value, reflected in congressional legislation, the D.C. Circuit offered the valuation of national parks as "priceless national treasures." *Id.* at 463. Further, by recognizing the "priceless" value of

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resource." 43 C.F.R. § 11.14(nn) (1996) (emphasis added). One physical and biological function performed by a river may be providing habitat for salmon and other anadromous fish. Human use of that function, for example for subsistence or recreational fishing, and the associated historical cultural value of those types of fishing, warrant calculation within an NRDA. An accepted methodology for measuring the loss of fishing opportunities is to estimate the value of "fishing trips lost and diminished due to the fish consumption ban and advisory." *United States v. E.I. du Pont de Nemours & Co.*, No. 5:16-CV-00082, 2017 WL 3220449, at *4 (W.D. Va. July 28, 2017).

[6] Valuation of the loss of services based on cultural use of a natural resource remains constrained by the parameters of acceptable valuation methodologies as prescribed by 43 C.F.R. § 11.83 (outlining the damage determination phase).

national parks, it implied that the loss of a culturally-valued service that a natural resource provides to the public cannot be adequately measured by the market system alone, which is why "[o]ption and existence values . . . *prima facie*[] ought to be included in a damage assessment," and more broadly, market prices are "not acceptable as primary measures of the use values of natural resources." *Id.* at 463-64. Cultural considerations, therefore, do not *per se* render the non-consumptive value or value of a service lost from an injured natural resource unrecoverable.

2. To the extent ambiguity exists regarding the scope of a Tribal trustee's lost services provided by natural resources under CERCLA, the Indian canons of construction instruct resolution in favor of Tribal interests.

"The starting point for [the] interpretation of a statute is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006). CERCLA's statutory language plainly provides for the recovery of the public's lost uses of injured natural resources. *See* 42 U.S.C. § 9651(c). However, if there is any ambiguity in a statute pertaining to, or passed for the benefit of Tribes, then courts must consider the Indian canons of treaty and statutory construction. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

The first two principles of the Indian canons require statutes be liberally construed in favor of Tribes and ambiguities resolved in favor of Tribal interests. *Cohen's Handbook on Federal Indian Law* § 3.01 (Nell Jessup Newton ed., 2023)

[hereinafter, *Cohen's Handbook*]; *see Bryan*, 426 U.S. at 392 ("[W]e must be guided by that 'eminently sound and vital canon' . . . that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expression being resolved in favor of the Indians."); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). The Court should keep in mind that the Indian canons are "rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)).

Congress amended CERCLA in 1986 to include Tribes as trustees. Superfund Amendments and Reauthorization Act ("SARA") § 207(c), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (amending CERCLA § 107(f) to permit Tribes to recover natural resource damages). SARA expressly confronted the failure of the original CERCLA regulatory structure to adequately account for the unique nature of Tribal land. *See* Section I(B), *infra*. The SARA amendment incorporating Tribes as trustees specifically addressed application of CERCLA to Tribes and was passed for the

benefit of Tribes. Thus, the statutory schema for Tribal recovery of natural resource damages established under SARA warrants application of the Indian canons resolving ambiguity in favor of Tribal interests. Even if this Court determines that the SARA amendment was not passed for the benefit of Tribes, the Supreme Court has "long applied the Indian law canons to statutes of general applicability" where the statute concerns "the distinct rights of . . . [T]ribes." *Cohen's Handbook*, *supra*, § 2.03. Therefore, where there is any ambiguity regarding the breadth of the lost uses provision of CERCLA, such questions should be considered per the Indian canons and read to the benefit of Tribes, rather than employing an arbitrarily exclusive interpretation.

3. Tribal trustees have discretion to determine how to assess the value of lost services to, or non-consumptive use value for, their members.

Where a Tribe is appointed as a natural resource trustee under CERCLA, the trustee Tribe is fiduciary of its Tribal members and is focused on damage recovery for its members' "lost use," rather than the general public. *See Alaska Sport Fishing Ass'n*, 34 F.3d at 773 ("A state has a sovereign interest in natural resources within its boundaries. . . . [and u]nder the *parens patriae* doctrine, 'a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens.'") (internal citations omitted); *see also Quapaw Tribe of Oklahoma*

v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1181 (N.D. Okla. 2009) (finding *parens patriae* doctrine applies to Tribal trustees as sovereigns under CERCLA as well).

Natural resource trustees have discretion to determine whether, and with which methodologies, to assess damages to a natural resource and the services that resource provides to the public, leaving it in a Tribal trustee's hands to ascertain the value of the service damage for which it seeks recovery. *See* 43 C.F.R. § 11.80(b) ("Damages may also include, at the discretion of the authorized official, the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement, and/or acquisition of equivalent of baseline."); *see also* NRDA, 59 Fed. Reg. 14,262-01, 14,273 (March 25, 1994), 43 C.F.R. § 11 ("Preamble") ("[T]he rule gives trustee officials the discretion to decide . . . which services to consider when determining the necessary level of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.").

CERCLA regulations emphasize the trustee's discretion "to assess compensable value," which encompasses "all of the lost public economic values, including lost use values and lost nonuse values such as existence and bequest values." *Id*. A trustee's discretion in determining the type of lost service at issue is, therefore, a critical component of an NRDA. The Senate CERCLA report instructs that the assessment procedures "should provide trustees 'a choice of acceptable

damage assessment methodologies to be employed.'" *Ohio*, 880 F.2d at 463 (citing S. Rep. No. 848, 96th Cong., 2d Sess. 85-86 (1980)). Congress thus intended a variety of assessment methodologies that would allow trustees the discretion to determine how to fully capture all aspects of service loss. The inclusion of contingent valuation, which can assess "lost use values of injured natural resources," as one valuation methodology, is evidence that Tribal trustees have the discretion to assess the full extent of lost use values. 43 C.F.R. § 11.83(c)(2). Contingent valuation methods permit trustees to use all techniques that "set up hypothetical markets" to ascertain "an individual's economic valuation of a natural resource" and its associated services. *Id.* § 11.83(c)(2)(vii). Contingent valuation properly allows the value individual Tribal members place on a natural resource to inform an economic valuation that may account for cultural components of the associated lost services. *Id.*

4. A Tribal trustee's claim for lost services is a recoverable natural resource damage, even if the service holds cultural meaning.

The DOI discussed the reach of CERCLA's categories of recovery in the Preamble to its final regulations implementing CERCLA in 1994. The DOI explained that "although archaeological and cultural resources, as defined in other statutes, are not treated as 'natural' resources under CERCLA, the rule does allow trustee officials to include the loss of archaeological and other cultural *services* provided by a natural resource in a natural resource damage assessment." Preamble,

59 Fed. Reg. at 14,269 (emphasis added). Semantically, whether under the broad categories of recovery for non-consumptive use values and lost services or explicitly as part of the scope of loss of cultural services, recovery for damages to natural resource services, including cultural services, is perfectly legitimate. The numerous CERCLA settlement agreements that incorporate damages for loss of cultural uses of natural resources underscore this legitimacy. As trustees, Tribes have repeatedly recovered damages for injury to natural resource services, "ecological services," "human use losses," and "cultural resources" in CERCLA settlement agreements. *See, e.g.,* Consent Decree [Doc. 12] at 3-4, *United States v. Nippon Paper Industries USA Co. Ltd*., No. 21-CV-5204 (W.D. Wash. June 9, 2021) ("*Nippon*") (Lower Elwha Klallam Tribe, Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe); *see also* Section II(B), *infra*.

B. CERCLA's legislative history supports recovery of damages unique to Tribes.

Congress enacted CERCLA, as amended by SARA in 1986,[7] to address the widespread problem of hazardous substances contaminating the environment. A co-sponsor of the original amending bill in the Senate, Senator Robert Stafford, argued

[7] The 1986 amendment resulted from the integration of the provisions Superfund Improvement Act, S. 51, 99th Cong. (1985) with the eventually passed H.R. 2005, 99th Cong. (1986). Actions, H.R. 2005 - Superfund Amendments and Reauthorization Act of 1986, https://www.congress.gov/bill/99th-congress/house-bill/2005/all-actions (last visited Dec. 5, 2024).

that Congress crafted the statute's cleanup standards "to be applied so that human health and the environment is protected in every circumstance." 131 Cong. Rec. 23,942 (1985) (statement of Sen. Robert Stafford, cosponsor of Superfund Improvement Act of 1985, S. 51 (1985)). The definition of "natural resources" within the statute specifically "covers a very broad array of economic and esthetic values." 126 Cong. Rec. 30,986 (1980) (statement of Sen. Alan Simpson).

Congress identified basic principles to address environmental contamination and "make whole the natural resources that suffer injury from releases of hazardous substances." 132 Cong. Rec. 29,767 (1986) (statement of Rep. Walter Jones). First, CERCLA aims to make the victim and environment whole by providing sufficient compensation to the public for "economic, health, natural resource, or other damages." S. Rep. No. 98-631, at 3 (1984); 131 Cong. Rec. 23,943 (1985) (statement of Sen. Robert Stafford). Second, CERCLA operates through a "polluter pays" principle, where the polluter "should bear the cost of cleaning it up, including the cost of making its victims whole." S. Rep. No. 98-631, *supra*, at 3. Through these comprehensive remedies, the legislators intended to incentivize those "responsible for contaminating sites . . . to make maximum effort to clean up or to mitigate the effects of any such release." *Id.* CERCLA is meant to protect individuals and society at large and make them whole when protection fails. *Id.*

These overarching principles and objectives were subsequently applied to Tribes when SARA recognized Tribes as trustees. *See* Section I(A)(2), *infra*. Congress did not include Tribes when it enacted CERCLA in 1980, and the Environmental Protection Agency ("EPA") identified this problem, noting that CERCLA is "silent as to the treatment of Native Americans lands." *Superfund Oversight: Hearing Before the Comm. on Env't and Public Works, U.S. Senate*, 98th Cong. 376 (1983) (memorandum of William N. Hedeman, Director, Office of Emergency and Remedial Response, EPA). EPA noticed that "Congress failed to consider specifically the peculiarities of Native American lands when it passed CERCLA" after it identified three sites on its Interim Priorities List involving Tribes and Tribal lands. *Id.* at 375.

EPA recognized that CERCLA's then-existing (circa 1980) framework involved "three major actors"—the federal government, state governments, and private entities—and that "Native American tribes do not fit within any of these groups." *Id*. EPA identified Indian lands as "unique" and a "particular jurisdictional problem," also recognizing that other environmental statutes have "encounter[ed] problems fitting Native Americans into their regulatory framework." *Id*. Courts consider Tribes "sovereign dependent nations," whose status is based in part on a trust relationship with the federal government. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823); *Martin v. Waddell's Lessee*, 41 U.S. 367, 433 (1842); *United States v.*

Mitchell, 463 U.S. 206, 225 (1983). As such, EPA developed "a broad policy statement [for CERCLA] regarding the unique status of Native Americans." *Superfund Oversight: Hearing Before the Comm. on Env't and Public Works, U.S. Senate*, 98th Cong. 375 (1983). With SARA, the legislature sought to "eliminate the resulting uncertainty and ambiguity by specifying how the program operates within Indian lands." S. Rep. No. 99-11, at 4 (1985). The amendment provided that "Indian tribes may recover damages for injury to, destruction of, or loss of natural resources caused by the release of a hazardous substance." S. Rep. No. 99-11, at 5 (1985).

S. 51, the original amending bill in the Senate, was later integrated into H.R. 2005, 99th Cong. (1986). When S. 51 was introduced, the DOI proposed amending CERCLA to allow trustees "to select the lesser of (i) restoration or replacement costs or (ii) diminution of use values as the measure of damages." 132 Cong. Rec. 28,442 (1986) (statement of Sen. Max Baucus, cosponsor of S. 51 (1985)). Senator Baucus argued such a damages assessment was untenable, and proposed instead that, "The cost of restoration, replacement, or acquisition of equivalent resources - if restoration is impossible, plus any demonstrated additional lost use value, or other damage beyond such cost, is the correct measure of damages." *Id*. at 28,433. To be made whole as CERCLA intended, Senator Baucus argued trustees should be entitled to comprehensive compensation "if they can show that it is more likely than not that the injury has been caused by the discharge or release, even if Interior's general rules

do not recognize those injuries." *Id*. He further argued, any model developed to recognize and assess injuries "should be based upon restoration or replacement costs, plus any *lost use value* and other demonstrable damages." *Id*. (emphasis added).

CERCLA'S statutory language and legislative history plainly place Tribal trustees in an equal position to the United States and states to claim natural resource damages based on the value of lost services to the public, including culturally significant service losses. Further, the statute's language as amended by SARA creates broad categories of recovery which include the lost use damages at issue here. A trustee's claim for lost services is a recoverable natural resource damage when the service holds cultural meaning, be it from a Tribal or a national perspective. *See, e.g., Ohio* 880 F.2d at 462-64. A review of CERCLA's legislative history further supports a finding that recovery of damages unique to Tribes was part of the intent of the SARA amendments.

II. SERVICE LOSSES TO TRIBES IN CERCLA CASES ARE SUBSTANTIAL AND A HOLDING PRECLUDING RECOVERY OF DAMAGES FOR A TRIBE'S UNIQUE USE OF NATURAL RESOURCES WOULD HAVE A DETRIMENTAL IMPACT ON TRIBES.

The Columbia River Treaty Tribes have already suffered great losses to their treaty-reserved resources due to the United States' contamination of the Hanford Site and the Portland Harbor Site, among other sites where they have served as natural resource trustees. They will lose even more if this decision stands, because it will

limit their opportunity to be fully compensated under CERCLA for their substantial losses, which include injuries to treaty-protected resources.

A. Upholding the district court's decision will be detrimental to the Columbia River Treaty Tribes.

Affirming the district court will seriously impact the Columbia River Treaty Tribes in their CERCLA recovery efforts. The Hanford Site, for example, is located in southeast Washington State, on the Columbia River – the center of the ancestral homelands and use areas of the Yakama Nation, CTUIR, and the Nez Perce Tribe. Darby C. Stapp & Michael S. Burney, *Tribal Cultural Resource Management* 125 (2002). The Hanford Site occupies an important landscape and is home to natural and cultural resources central to, and reserved by the Yakama Nation, CTUIR, and the Nez Perce Tribe. *Id.* at 126.

After decades of federal government nuclear production, the Hanford Site became one of the largest Superfund cleanups in the country; so far, the cleanup has removed seventeen million tons of waste from the site and treated over twelve billion gallons of groundwater for contamination.[8] The Yakama Nation, CTUIR, and the Nez Perce Tribe have treaty-reserved interests in the natural resources and associated services tied to the land and water the Hanford Site occupies and has affected.

[8] *See Hanford (USDOE) Site*, EPA, https://www.epa.gov/superfund/superfund-success-stories-epa-region-10 (last updated Mar. 13, 2024).

CERCLA requires consideration of the effects of hazardous substance releases on the natural resources under the Tribes' CERCLA trusteeship, including those resources to which the Tribes hold treaty-reserved rights. The treaties signed by the four Columbia River Treaty Tribes each used a "substantially identical provision" to reserve the Tribes' "right of taking fish at all usual and accustomed places in common with citizens of the Territory." *Belloni,* 302 F. Supp. at 904. *Belloni* defined the Tribes' treaty fishing rights as "absolute" and "entitl[ing the Tribes] to a fair share of the fish produced by the Columbia River system." *Id.* at 911. *Belloni* was adopted and applied in *United States v. Washington*, which involved the treaty-reserved fishing rights of the Yakama Nation and many other Tribes in the Pacific Northwest. 384 F. Supp. 312, 345 (W.D. Wash. 1974) ("*Boldt*") (recognizing Stevens Treaty Tribes' on- and off-reservation treaty fishing rights to take up to 50% of the harvestable fish), *aff'd and remanded*, 520 F.2d 676 (9th Cir. 1975).

Belloni and *Boldt* stand for the principle that the Tribes' reserved fishing rights necessarily come with a right to the resource itself, a fair share of the fish, which was upheld by this Court. *Sohappy v. Smith*, 529 F.2d 570, 573 (9th Cir. 1976); *United States v. Washington,* 520 F.2d at 688. In *Belloni*, the court "recognized the importance of a broader view of the interests at stake." Monte Mills, *Beyond the Belloni Decision:* Sohappy v. Smith *and the Modern Era of Tribal Treaty Rights*, 50 Env't L. 387, 391 (2020). This Court must similarly take a broad view of the Tribes'

interests at stake to properly recognize there is a treaty and reserved right basis for the need to assess service losses under CERCLA associated with treaty protected natural resources.

B. Existing settlement agreements under CERCLA have permitted Tribes to recover for injuries to their cultural uses of natural resources.

Recognizing the absolute importance of Tribal treaty-reserved resources and all services to Tribes provided by those resources, there are many examples of CERCLA settlements where Tribes have recovered for injuries to their cultural uses of natural resources. Several Tribes have filed or joined complaints in federal courts, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, alleging "injury to, destruction of, and loss of natural resources . . . including . . . resources of cultural significance" and "loss of natural resource services (including ecological services as well as direct and passive human use losses)."[9] Most trustee Tribes involved in these

[9] *See* Consent Decree [Doc. 12] at 3-4, *Nippon*, No. 21-CV-5204 (Lower Elwha Klallam Tribe, Port Gamble S'Klallam Tribe and Jamestown S'Klallam Tribe); Consent Decree [Doc. 7] at 7, *United States v. Vigor Industrial LLC*, No. 2:21-CV-00044-RSM (W.D. Wash. May 26, 2021) (Muckleshoot Indian Tribe and Suquamish Tribe); Consent Decree [Doc. 2-1] at 3, *United States v. Earle M. Jorgensen Co.*, No. 2:19-CV-00907 (W.D. Wash. June 10, 2019) ("*Jorgensen*") (Suquamish Tribe and Muckleshoot Indian Tribe); Consent Decree [Doc. 6] at 4, *United States v. Jeld-Wen Inc.*, No. 2:18-CV-00113 (W.D. Wash. April 5, 2018) (Suquamish Tribe and Tulalip Tribes); Consent Decree [Doc. 14] at 8, *United States v. Advance Ross Sub Co.*, No. 15-5548RBL (W.D. Wash. Oct. 2, 2015) (Puyallup Tribe of Indians and Muckleshoot Indian Tribe); and Consent Decree [Doc. 8] at 5, *United States v. Foss Maritime Co.*, No. 3:11-CV-05263-BHS (W.D. Wash. May 23, 2011) (Puyallup Tribe of Indians and Muckleshoot Indian Tribe). Plaintiffs have also successfully alleged "injury to

natural resources damages settlement agreements recovered monetary damages from defendants after claiming damages to natural resources services, including cultural uses of natural resources and associated services. Recovery for the assessed natural resource damages has ranged from $1,300,000 to $8,500,000.[10]

For example, under a 2022 CERCLA consent decree, the federal and Tribal trustees to the Buffalo River recovered $4.25 million from the responsible parties. Consent Decree 8, *United States v. Honeywell Int'l Inc.,* No. 1:21-CV-01218-JLS (W.D.N.Y. Feb. 22, 2022). The Tribal trustee, the Tuscarora Nation, recovered $574,415 for Cultural Restoration Projects and Cultural Assessment Costs. *Id.* In another example, the federal and Tribal trustees to the National Zinc Corporation Site recovered $1,695,500 from the responsible parties for damages to the area. Consent Decree and Judgment for Natural Resource Damages 9, *United States v. Cyprus Amax Minerals Co.*, No. 4:19-CV-697-GKF-JFJ (N.D. Okla. Feb. 25, 2020). The Tribal trustees, the Cherokee Nation, the Delaware Tribe, and the Osage Nation, received a portion of these funds for a Bison Preserve Habitat Enhancement project,

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Natural Resources including . . . to the services provided to humans and to the environment by those resources," Consent Decree at 6-7, *United States v. Homestake Mining Co.*, Consol. No. 97-5100 (W.D.S.D. July 13, 1999) (Cheyenne River Sioux Tribe).

[10] *See* Consent Decree at 11, *Nippon*, No. 21-CV-5204 (defendants paid $8,500,000 for "Covered Natural Resource Damages"); Consent Decree at 10, *Jorgensen*, No. 2:19-CV-00907 (defendant paid $1,300,000 for "Covered Natural Resource Damages").

which would restore the habitat to a "precolonial state" and would involve "creating a comprehensive management plan that considers natural and Tribal cultural resources and associated services." National Zinc Trustee Council, *Draft Restoration Plan and Env't Assessment*, https://www.cerc.usgs.gov/orda_docs/DocHandler.ashx?task=get&ID=10657 (last visited Dec. 12, 2024).

Upholding the district court's decision would inappropriately narrow CERCLA's broad scope of recoverable damages for lost use and services and have a chilling effect on recognizing the legitimate natural resource damages, which in some cases include damages to treaty-reserved resources, in settlements with national implications. If left undisturbed, the district court decision would impact the work of Tribal trustees across the United States to hold polluters accountable and obtain compensation under CERCLA for natural resources service losses.

CONCLUSION

From the enactment of the SARA amendments in 1986, Tribes have diligently exercised their CERCLA trustee responsibilities by seeking to hold polluters accountable for damages from hazardous releases that result in natural resource service losses relevant to Tribal interests, including treaty-reserved resources. The intent and structure of CERCLA, as amended, is to allow Tribal trustees to recover from polluter impacts to natural resources, including the services provided by those natural resources – whether use-based or non-use in nature. While CERCLA's

mandates are broad and clear, any ambiguity whether compensable services or lost uses can include cultural components should be resolved in Tribes' favor per the Indian canons of construction. Recovery of the Tribal trustee's service loss in this case is permissible under CERCLA. Holding otherwise will prevent Tribal trustees from fully recovering damages for those natural resources over which they have jurisdiction—natural resources critically important to their culture, identity, and economies.

This Court should reverse the district court's Order Granting Defendant's Motion for Partial Summary Judgment and remand this matter to the district court for consideration of the Colville Tribes' Tribal service loss claims.

RESPECTFULLY SUBMITTED this 12th day of December, 2024.

s/ Thomas L. Murphy
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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 5,707 words, including words excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2) or Cir. R. 29-2(c)(3).

DATED this 12th day of December, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2024, I electronically filed the foregoing *Brief of* Amici Curiae *Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing System. All participants in the case are registered for electronic filing.

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