

IN THE
Supreme Court of the United States

TECK COMINCO METALS, LTD., a Canadian corporation,
Petitioner,

v.

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;
STATE OF WASHINGTON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**SUPPLEMENTAL BRIEF FOR RESPONDENTS
PAKOOTAS AND MICHEL**

RICHARD A. DU BEY
PAUL J. DAYTON*
LESLIE C. CLARK
MICHELLE U. ROSENTHAL
SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104
(206) 682-3333

*Counsel for Respondents
Pakootas and Michel*

* *Counsel of Record*



TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CITED AUTHORITIES	ii
SUPPLEMENTAL STATEMENT OF THE CASE ...	1
DISCUSSION	4
A. Post-Suit Withdrawal Of The UAO In A Non-CERCLA Agreement Does Not Automatically Moot Respondents' Citizen Suit, And Application Of This Court's Mootness Principles Requires Remand To The District Court For Factual Inquiry.	4
B. EPA's Agreement With TCM Does Not Raise A <i>Res Judicata</i> Bar To This Suit; Any Claim To The Contrary Must Be Evaluated By The District Court On Remand.	7
C. Even If This Court Deems Respondents' Claims Moot, It Should Not Vacate The Ninth Circuit Opinion.	8
CONCLUSION	10

TABLE OF CITED AUTHORITIES

Cases	<i>Page</i>
<i>Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn</i> , 139 F.3d 664 (9th Cir. 1997)	7
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997)	8
<i>Ass'n of Irrigated Residents v. Fred Shakel Dairy</i> , 460 F. Supp. 2d 1185 (E.D. Cal. 2006)	6
<i>City of Mesquite v. Aladdin's Castle, Inc.</i> , 455 U.S. 283 (1982)	5, 6
<i>Coral Constr. Co. v. King County</i> , 941 F.2d 910 (9th Cir. 1991)	5
<i>Crowell v. Mader</i> , 444 U.S. 505 (1980)	9
<i>Deakins v. Monaghan</i> , 484 U.S. 193 (1988)	9
<i>Ellis v. Gallatin Steel Co.</i> , 390 F.3d 461 (6th Cir. 2004)	6, 8
<i>EPA v. City of Green Forest</i> , 921 F.2d 1394 (8th Cir. 1990), <i>cert. denied</i> , 502 U.S. 956 (1991)	8
<i>Federated Dep't Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1981)	8

Cited Authorities

	<i>Page</i>
<i>Friends of the Earth, Inc. v. Laidlaw Env't'l Servs. (TOC), Inc., 528 U.S. 167 (2000)</i>	5, 6, 9
<i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987)</i>	5
<i>Natural Res. Council of Me. v. Int'l Paper Co., 424 F. Supp. 2d 235 (D. Me. 2006)</i>	6
<i>Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)</i>	5
<i>U.S. Bancorp Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994)</i>	8, 9, 10
<i>United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199 (1968)</i>	6
<i>United States v. Munsingwear, Inc., 340 U.S. 36 (1950)</i>	8, 9, 10
<i>Univ. of Texas v. Camenisch, 451 U.S. 390 (1981)</i>	9
<i>Walling v. James V. Reuter, Inc., 321 U.S. 671 (1944)</i>	8

Cited Authorities

Page

Statutes

42 U.S.C. § 9606(b)(1)	3
42 U.S.C. § 9622(d)(3)	3
42 U.S.C. § 9659	2
42 U.S.C. § 9659(a)(1)	4
42 U.S.C. § 9659(c)	1, 3
42 U.S.C. § 9659(f)	1, 3
42 U.S.C. § 9659(g)	2

Rules

40 CFR 19.4	3
Federal Rule of Civil Procedure 12(b)(1)	2
Federal Rule of Civil Procedure 12(b)(2)	2
Federal Rule of Civil Procedure 12(b)(6)	2
S.Ct. Rule 15.8	1

Respondents, Joseph Pakootas and D.R. Michel, concur with the view of the United States that the current posture of this case “counsels strongly against this Court’s review.” Brief for the United States as Amicus Curiae (“Brief of the United States”) at 6. Respondents submit this brief pursuant to S.Ct. Rule 15.8 for the sole purpose of commenting on the mootness and vacatur issues discussed in the Brief of the United States.

A suggestion of mootness at this stage is anomalous because petitioner, Teck Cominco Metals, Ltd. (“TCM”), has not claimed that its agreement with the Environmental Protection Agency (“EPA”) moots this appeal. Instead, TCM advised the court of appeals that “claims for civil penalties under CERCLA ‘for each day’ of violation of the Unilateral Administrative Order are not moot . . . [and] claims for attorneys’ fees in trying this lawsuit are not moot. . . .”¹ As no court has analyzed TCM’s agreement with EPA or considered its effect on this citizen suit, any mootness concerns should be considered by the district court after remand. The petition for Writ of Certiorari should be denied.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondents’ complaint sought declaratory and injunctive relief under CERCLA based on TCM’s failure to comply with the unilateral administrative order (“UAO”) issued by EPA on December 11, 2003. Pet. App. 6a, 105a-12a. Their complaint also sought an order requiring the payment of civil penalties to the maximum extent permitted by CERCLA “for each day during which the violation of the UAO continues,” pursuant to 42 U.S.C. § 9659(c) and recovery of attorneys’ fees pursuant to 42 U.S.C. § 9659(f). Pet. App. 111a.

¹ Petitioner’s Request for Judicial Notice, Ninth Circuit Court of Appeals (“Pet. C.A. Request for Judicial Notice”) <[http://www.law.washington.edu/Directory/docs/Robinson-Dorn/Trail Smelter](http://www.law.washington.edu/Directory/docs/Robinson-Dorn/TrailSmelter)> at 5.

