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On July 3, 2006, in a case of first impression, the U.S. Court of Appeals for the Ninth Circuit held that hazardous substances, from slag and heavy metals originally released into the Columbia River in Canada, triggered the application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Moreover, the court reasoned that this was in effect the application of domestic law to a domestic situation because the slag was not inert, but continued to release hazardous substances into Lake Roosevelt and the Upper Columbia River when it entered the United States. In sum, the three-judge panel held that:

[T]he leaching of hazardous substances from the slag at the site is a CERCLA release. That release—a release into the United States from a facility [the Upper Columbia River Site] in the United States—is entirely domestic.

Paskotas v. Teck Cominco Metals, Ltd., 9th Cir., No. 05-35153, slip op. at 15 (July 3, 2006).

This article addresses the facts underlying this case and the legal arguments presented by plaintiffs in the U.S. district court and before the Ninth Circuit.

Since time immemorial, the Upper Columbia River Basin has been home to the tribes that comprise the Confederated Tribes of the Colville Reservation (Tribe) and to the Spokane Tribe of Indians. Tribes and their members have always occupied and used the area from south of the confluence of the Columbia and Okanogan Rivers, north into what is now Canada. Tribal members possess expressly reserved hunting, fishing, and gathering rights and entitlements to use the Columbia River and Lake Roosevelt environment, which they continue to exercise as they fish, hunt, gather, and recreate in the area. Tribes are a people of the river, their ancestors are buried in and around the Columbia River Basin, and the fish, wildlife, plants, lands, and waters of the Upper Columbia River and Lake Roosevelt continue to be of central importance to their subsistence, culture, and spiritual well-being.

Against this backdrop of the Tribes and their lifestyle is the Trail Smelter, the world’s largest lead smelting facility, located on the banks of the Columbia River in Trail, British Columbia, just a few miles north of the Canadian border with Washington State. For at least one hundred years, through at least the mid-1990s, the Canadian Teck Cominco Metals, Ltd. (Cominco), the current owner and operator as well as the past owner and operator of the Trail Smelter, disposed of hundreds of thousands of tons of slag, a by-product of the smelting process, by dumping it directly into the Columbia River. Cominco’s slag includes many substances considered hazardous to human health and the environment, including arsenic, cadmium, copper, mercury, lead, and zinc.

Given its location ten river-miles north of the United States–Canada border, Cominco released these contaminants with full knowledge that the free-flowing Columbia River would transport the slag and effluent downstream, across the international border, and into the United States. Cominco’s releases of heavy metals and other toxic contaminants have since come to rest along the bed, banks, waters, and resources of the Upper Columbia River and Lake Roosevelt (river site) in eastern Washington. Once pristine, the Upper Columbia River Basin is now heavily contaminated.

In 1999, the Tribes petitioned the U.S. Environmental Protection Agency (EPA) to assess the threat of slag and other hazardous substances to human health and the environment at the river site. From October 1999 to March 2003, EPA performed various studies that concluded that the river site was significantly contaminated and showed with scientific certainty that Cominco is the predominant source of the hazardous substances released into the environment at the river site. Based on the data generated, the river site is eligible for placement on the National Priorities List (NPL) as one of the most contaminated areas in the United States.

EPA determined that Cominco was a potentially responsible party under CERCLA and, therefore, was responsible to pay for the costs of further investigation as well as potential remediation at the river site. In 2003, EPA and Cominco’s American subsidiary engaged in protracted discussions to secure Cominco’s cooperation in conducting the investigation and cleanup at the river site. After eleven months, however, EPA concluded that...

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Cominco would not commit to a satisfactory and verifiable investigation and remediation plan. In December 2003, EPA issued a Unilateral Administrative Order (UAO) under CERCLA § 106(a) that ordered Cominco to prepare a remedial investigation and feasibility study (RI/FS) for the river site consistent with CERCLA. The purpose of an RI/FS is two-fold: to determine the nature and extent of contamination and the threat to human health and the environment, and to evaluate alternatives for final cleanup actions in response to the contamination. Cominco, however, refused to comply, arguing that CERCLA, a U.S. domestic law, did not apply to the acts of a Canadian company operating in Canada even if the acts had a direct and substantial effect on the U.S. environment.

In July 2004, two members of the Tribes filed suit against Cominco in the U.S. District Court for the Eastern District of Washington under CERCLA’s “ citizen suit” provision. Shortly thereafter, the state of Washington joined the action as a plaintiff. Together, plaintiffs sought to enforce EPA’s UAO and compel Cominco to conduct the RI/FS at the river site. At the same time, the plaintiffs hoped to secure civil penalties from Cominco of up to $25,000 per day, payable to the United States Treasury. Cominco moved to dismiss the matter, claiming a lack of personal subject matter jurisdiction. Its subject matter jurisdiction argument was grounded in its claim that CERCLA did not apply to its Canadian operations.

On November 8, 2004, in a twenty-seven-page opinion, Senior Judge Alan A. McDonald denied Cominco’s motion to dismiss the lawsuit. Pakootas v. Teck Cominco Metals, Ltd., 2004 U.S. Dist. LEXIS 23041 (Nov. 8, 2004). The court rejected Cominco’s argument that CERCLA only applies to actions and operations that occur within the United States. While the court acknowledged that there is a presumption against the extraterritorial application of U.S. laws, Judge McDonald concluded that the presumption did not apply in this case, stating: “Because the fundamental purpose of CERCLA is to ensure the integrity of the domestic environment, we expect that Congress intended to proscribe conduct associated with the degradation of the environment, regardless of the location of the agents responsible for said conduct.” Because this was a case of first impression, Judge McDonald certified the case for interlocutory appeal.

In December 2004, Cominco appealed the lower court’s ruling to the Ninth Circuit Court of Appeals. The parties submitted briefs to the Ninth Circuit in summer 2005, as did several amicus parties on both sides. Oral arguments were presented on December 5, 2005, in Seattle. As noted above, the court issued its ruling just prior to publication of this article.

**Congress Intended CERCLA to Hold All Polluters Liable**

The focus of the court of appeals’ decision was whether CERCLA applies to Cominco for Cominco’s releases of hazardous substances at the river site. CERCLA is a comprehensive remedial statute. It gives the executive broad powers to ensure prompt and effective cleanup of domestic waste disposal sites and to assure that the parties responsible for creating wastes bear the cost of the cleanup. Under the terms of the statute, polluters who “release” hazardous substances into the environment are responsible for remediation of the site, or “facility,” where the substances have “come to be located.” As a result, CERCLA’s liability regime focuses on the “facility” or site at which hazardous wastes are located, and not the place where the wastes were originally produced.

For this reason, the Tribes and the state of Washington seek to hold the responsible parties accountable to clean up the site at issue, which is a domestic site located entirely within the United States. The fact that the responsible party happens to reside in Canada is purely incidental to the application of CERCLA. As the district court observed:

What plaintiffs seek to remedy by way of the UAO is not what is happening right now and what has happened in the past at defendant’s “facility” in Canada with regard to the disposal of hazardous substances into the Columbia River at that location. What plaintiffs seek to remedy is the result of that practice which has manifested itself at a “facility” within the territorial boundaries of the United States.

Certainly, it is true this remedy may have the incidental effect of altering defendant’s future disposal practices at its “facility” in Trail, B.C., but that does not change the essential fact that what plaintiffs are attempting to do is remedy an existing condition at a “facility” (the Upper Columbia River Site) wholly within the U.S. In other words, plaintiffs are not attempting to tell Canada how to regulate defendant’s disposal of hazardous substances into the Columbia River, simply that they expect defendant to assist in cleaning up a mess in the United States which allegedly has been caused by those substances. Plaintiffs’ use of CERCLA is not intended to supersede Canadian environmental regulation of the defendant. Canada’s environmental laws
are intended to protect Canadian territory, including the 10 miles from Trail, B.C. to the U.S. border. Those laws do nothing to remedy the damage that has already occurred in U.S. territory as a result of defendant's disposal of hazardous substances into the Columbia River.

_Pakootas v. Teck Cominco Metals, Ltd., 2004 U.S. Dist. LEXIS 23041, at *40 (emphasis added)._ 

Cominco asserts that it cannot be held liable for the hazardous substances that have "come to be located" in the United States because Congress did not intend for foreign polluters of U.S. territory to be held liable under CERCLA. The company argues that plaintiffs are attempting to regulate the conduct of a Canadian company in Canada that is subject only to Canadian environmental policies and standards. Cominco invokes the presumption against the extraterritorial application of U.S. law and contends that the application of CERCLA to its acts in Canada constitutes an unlawful extraterritorial application of a domestic statute to a foreign source in a sovereign nation.

Contrary to these arguments, this case involves a domestic application of CERCLA. Application of CERCLA here is intended solely to remedy domestic conditions resulting from Cominco's essentially domestic acts. The plaintiffs seek enforcement of an EPA UAO that Cominco undertake remedial activities in the United States, not in Canada, based on conditions that Cominco created in the United States. As a result, this case does not require the extraterritorial application of CERCLA.

Not only is the river site or "facility" entirely within the United States, but Cominco's "releases" occurred and continue to occur at the river site within the United States by virtue of the natural flow of the river, the periodic exposure of the sediments to the air, and the breakdown of slag into its constituent elements. The hazardous substances Cominco placed in the Columbia River continue to migrate downstream, break down, and leach heavy metals that "re-release" their constituent elements as they move through the sediment, water, and air during low- and high-water variations. EPA concluded that the presence of these hazardous substances at various locations within the river site and the continuing passive movement and migration of contaminants without any human action assisting in the movement, constitute a "release" for purposes of CERCLA in this case. These releases, and re-releases at the river site in the United States are not the original discharges in Canada, are the bases for EPA's UAO and Cominco's liability.

Regardless, the traditional presumption against extraterritoriality does not apply in this case. The presumption does not apply to a dispute involving domestic conditions, nor when the foreign conduct causes significant domestic effects or harm. _Restatement (Third) of Foreign Relations Law of the United States_ § 403, Com. (g) (1987); _Envl. Defense Fund v. Masey_, 986 F.2d 528, 530 (D.C. Cir. 1993).

It is a long-standing principle of U.S. law that legisla-

tion is presumed to apply only within the territorial juris-
diction of the United States unless Congress has expressed a clear intent for a particular law to apply beyond the nation's borders. Courts, therefore, must assume that Congress legislates with knowledge of the presumption that a statute is concerned primarily with domestic conditions. As discussed above, this case is concerned solely with "domestic conditions" (i.e., the hazardous substances Cominco released at the river site in the United States that threaten human health and the environment). The unilateral order does not attempt to regulate Cominco's operations at its Canadian smelter, but rather, it requires the investigation and identification of remediation alternatives at the river site, which is located entirely within the territory of the United States.

The United States clearly has sovereignty over the river site as well as a strong interest in protecting these lands and waters and ensuring that they are cleaned up. Indeed, the prerogative of the United States to do so is absolute. As discussed in more detail below, no other nation can effectively ensure that the river site is cleaned up. Because application of CERCLA to hold Cominco accountable for the cleanup of this legacy site is a domestic exercise of U.S. legislative authority, extraterritoriality concerns are not germane.

The presumption against the extraterritorial application of U.S. statutory law also does not apply when the conduct under scrutiny either has not occurred wholly outside the United States or when external acts cause substantial domestic harm. In these cases, courts have looked to the nature of the conduct or effects in the United States to determine whether extraterritorial application would be consistent with the purposes underlying the statute (known as the "effects test"). Several cases support the proposition that U.S. law applies when external conduct (e.g., dumping slag on the Canadian side of the border) caused foreseeable and substantial harm to interests in the United States (e.g., the deposition of that slag at a site in the United States). See, e.g., _Hartford Fire Ins. Co. v. California_, 509 U.S. 764, 796 (1993); _In re Simon_, 153 F.3d 991, 995 (9th Cir. 1998). Cominco's releases of millions of tons of hazardous substances at the river site was virtually certain to and did cause substantial effects within the territorial United States. As a result of these substantial domestic impacts, there is no presumption against this allegedly extraterritorial application of CERCLA.

There is no dispute that Congress has the authority to apply U.S. law to extraterritorial acts, so the question is simply whether it exercised that authority in a given case. Although the court begins by looking at a statute's language for indications of intent regarding extraterritorial application, intent may be ascertained from similarly phrased legislation, the overall statutory scheme, legislative history, and administrative interpretations. The overall purposes of CERCLA, the statutory text and structure, and the legislative history all indicate Congress intended to apply the statute to a case such as this one.
The primary goals of CERCLA are to ensure that domestic waste sites are quickly and effectively remediated and that those responsible for dumping waste illegally are held liable for paying the cleanup costs. CERCLA’s strict liability scheme places the burden of financing cleanup activities on the parties responsible for the contamination. The reason for this is simple: Parties that have profited or otherwise benefited from commercial activities involving hazardous substances should not be allowed to avoid responsibility for the harm they have caused by forcing society to shoulder the costs.

Failure to apply CERCLA here would create an inexplicable gap in CERCLA’s coverage that is both anomalous and unfair: waste sites created by domestic industries would be remediable through CERCLA’s scheme, while sites created by foreign industries located outside the United States that discharge into the United States would not. At sites involving potentially responsible parties that were both foreign and domestic, the domestic parties would have to bear the foreign polluter’s costs, and where the only polluter is a Canadian company located in Canada, the American public would bear the entire cost of remediation.

This result would create perverse incentives that are equally contrary to CERCLA’s goals. Industries on both sides of international borders would be able to externalize the costs of their pollution by locating near borders and using natural means such as waterways to direct their hazardous wastes over the borders into neighboring countries. Congress never intended to create such a result.

Thus, the statute’s overall purpose and scope clearly demonstrate that CERCLA was intended to hold all polluters—including foreign polluters like Cominco—liable for domestic waste sites under CERCLA.

Applying CERCLA to Cominco Is Consistent with International Law

Application of CERCLA to Cominco for its contamination of this site not only comports with U.S. law, but is consistent with Canadian law, international law, and the principle of international comity. Moreover, if CERCLA does not apply to Cominco’s disposal of hazardous contaminants at the river site within the United States, then no law applies because no Canadian law applies to a Canadian company that pollutes in a foreign country.

Cominco’s central argument is that CERCLA should not apply because it would violate Canadian sovereignty. EPA’s reliance on CERCLA here, however, is consistent with Canadian environmental law and policy, which is similarly based on the “polluter pays” principle. In fact, had Cominco’s hazardous substances come to be located in Canada rather than the United States, precisely the same liability would attach under Canadian law, which was patterned on CERCLA.

Nonetheless, the company relies on Subafilms Ltd. v. MGM-Pathé Commes. Co., 24 F.3d 1088 (9th Cir. 1994) (en banc), a case that held that U.S. copyright law did not apply to acts of infringement in foreign lands, due in part to a likely conflict between U.S. law and foreign law. There, the court reasoned that the presumption against extraterritoriality “is particularly appropriate when ‘it serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.’” Id. at 1096.

The requisite precursor to potential “international discord” is an actual “conflict.” No such conflict exists, however, between U.S. and Canadian law in this case. Cominco cannot cite even a single provision of Canadian law that clashes with CERCLA, is in any way compromised or displaced by EPA’s unilateral order, or is at all inconsistent with the obligations imposed on Cominco under Canadian law. To the contrary, Canadian obligations are materially identical to obligations that exist under CERCLA.

Because both U.S. and Canadian laws impose strict liability on polluters for remediation of hazardous substances that they release into the environment, application of CERCLA does not impose a “zero emissions” policy on Cominco as it has proposed nor constrains its disposal of slag in Canada to any greater degree than Canadian law does already. Thus, Cominco may continue to dispose of its slag in Canada, subject to Canadian regulatory laws, and for which it will be responsible in Canada for the cost of investigating and remediating hazardous waste sites it creates in Canada. It should not be able to escape equivalent responsibility under CERCLA for the cost of investigating and remediating hazardous waste sites it creates here.

Nor will compliance with the UAO require action in Canada that might interfere with Canadian sovereignty. If plaintiffs prevail, the district court’s order will concern cleanup of the river site in the United States and will not require any action within Canadian territory. As Cominco is located in Canada, enforcement of that order may eventually require action by a Canadian court, which in turn will decide whether the U.S. order should be enforced. The Canadian court then will have the opportunity to determine whether enforcement will interfere with Canadian sovereignty. See United States v. Ivey, 26 O.R. (3d) 533, 549 (1995), aff’d, 30 O.R. (3d) 370 (C.A. 1996) (finding “considerations of comity strongly favour enforcement” of an EPA remedial order against a Canadian).

There is no dispute that Congress has the authority to apply U.S. law to extraterritorial acts.
Even then, Canada does not enjoy absolute sovereignty; rather, its right to set policy is conditioned upon an obligation not to allow transboundary environmental harm. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 601, RN1 (1987); Boundary Waters Treaty, U.S.–Gr. Br., Jan. 11, 1909, art. IV, 36 Stat. 2448, 2450. Although nations have a sovereign right to exploit their natural resources, longstanding principles of international law prohibit Canada from using its territory in a manner that harms the United States. Id. When a nation’s natural resources are adversely affected by another nation, the first nation should be allowed to protect itself and preclude such adverse effects. Those same principles permit the United States to establish and enforce domestic laws, like CERCLA, to address transboundary pollution. As such, EPA can legally take action through its issuance of the UAO against Cominco in response to the company’s release of millions of tons of slag into the river site in the United States.

Application of CERCLA does not violate the principle of international comity. In general, comity is a courtesy that exists among nations involving mutual recognition of one another’s laws, and includes rules respecting noninterference with the domestic affairs of other sovereigns. The principle of international comity is not violated unless compliance with both nations’ laws is impossible. When analyzing issues of comity, the threshold question is whether a conflict actually exists between U.S. and foreign law. Here, there is no concern about the potential clash of domestic law with foreign laws because Canadian law does not conflict with the application of CERCLA, and, as noted above, no such claim has been made by Cominco. Moreover, there is no provision in Canadian law that would address the contamination at this U.S. site. Additionally, Cominco is fully capable of simultaneously complying with CERCLA and Canadian environmental laws. Because there are no conflicting demands between the two nations’ laws, compliance with the UAO will not violate comity.

Treaty Allows Private Litigation

Finally, the mere existence of bilateral agreements addressing transboundary pollution between the United States and Canada does not defeat CERCLA’s application. When international agreements contain provisions for engaging in optional procedures to resolve disputes involving foreign parties, they do not preclude private litigation under either U.S. or Canadian law. As discussed below, in the only treaty that even arguably applies to the dispute here, the Boundary Waters Treaty of 1909, the United States specifically rejected a proposal under which all transboundary water pollution disputes would have been resolved by international means.

In 1909, the United States and Canada enacted the Boundary Waters Treaty, which established the International Joint Commission (IJC), a bilateral dispute resolution organization that monitors cross-border water issues. Initially, Canada proposed vesting IJC with “such police powers” as might be necessary to enforce the treaty’s antipollution clause, but the United States refused. The enforcement clause was omitted in the final version of the treaty, rendering optional its dispute resolution process. The two nations’ agreement on this point is evident in Article IX, under which IJC has no jurisdiction until a matter is voluntarily referred by the United States or Canada (which neither has done in this case). Even if a referral is made, the IJC’s power is only to “report” and “recommend,” and its reports “shall not be regarded as [a] decision” and “shall in no way have the character of an arbitrable award.” The only way that the United States and Canada can be bound to IJC recommendations is if the two nations agree to binding arbitration under Article X. Even then, significant restrictions exist with regard to transboundary pollution issues. Perhaps this is why the two nations have never invoked the binding decision mechanism in its one hundred-year history.

If the two nations had intended for the treaty to preempt domestic laws and provide exclusive dispute resolution procedures, the treaty would state as such in clear terms. The treaty, however, clearly allows parties in either nation to pursue national judicial remedies for water pollution and does not preclude legal action under either nation’s environmental laws. At most, it provides an optional means for governments to resolve such disputes. The United States Supreme Court held as much in Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971), rev’d by implication on other grounds, see Int’l Paper Co. v. Ouellette, 479 U.S. 481, 488 n. 8 (1987). There, the state of Ohio sued a Canadian company under state common law for dumping mercury into streams that flowed across the border into Lake Erie. The Supreme Court declined to exercise federal jurisdiction, but allowed the claims to be brought and resolved in state court, despite the applicability of the treaty and the existence of a related proceeding before IJC. As Justice Douglas observed:

This suit is not precluded by the Boundary Waters Treaty of 1909. . . .

In other words, so far as pollution is concerned, the Treaty contains no provision for binding arbitration. Thus, it does not evince a purpose on the part of the national governments of the United States and Canada to exclude their States and Provinces from seeking other remedies for water pollution. Id. at 506–507 (1971) (Douglas, J., dissenting on other grounds) (emphasis added).

Thus, the treaty does not preempt the application of domestic law.

The IJC process is not an appropriate vehicle in this case. First, the treaty exists between and applies to the federal governments of the United States and Canada. By contrast, the dispute here exists among tribal members, the state of Washington, and a private Canadian company. Although the U.S. State Department and government of Canada briefly attempted to forge a diplomatic solution to this mat-
ter in late 2004 and early 2005, the negotiations ended without either a diplomatic resolution or a joint decision to refer this matter to IJC. Because only the two nations can invoke the IJC process in their capacity as sovereigns, the parties have no independent access to the treaty.

Second, the treaty is not designed to address matters in a timely and efficient manner. For example, in 1928 the United States and Canada jointly referred an air pollution dispute to IJC involving the very same Canadian facility (the famous Trail Smelter Arbitration). It was not until 1941, however, that IJC issued its final decision. For tribal members and the citizens of Washington State, thirteen years is simply too long to wait to address the contamination that Cominco illegally dumped at the river site in the United States. The IJC process is not equipped to respond rapidly to substantial and imminent threats to human health and the environment. The Tribe and the state need to ensure that scientific studies and investigations into the nature and extent of the contamination occur now—not a decade from now.

Third, the IJC process is not an effective vehicle for addressing Cominco’s legacy waste and the adverse impacts the company’s historic releases have had on the River site. By contrast, CERCLA provides an effective regulatory framework for monitoring, investigating, and remediating sites contaminated by hazardous releases, and provides the civil regulatory authority, tools, funding, and liability scheme necessary to ensure that the river site is cleaned up and protected. CERCLA is the appropriate means here for effectively remediating threats to public health and the environment caused by the deposition of hazardous substances as a result of Cominco’s century-long contamination of the river site.

This is not to say, however, that the treaty has no relevance to transboundary pollution problems, especially with regard to prospective acts. While CERCLA, as a remedial statute, does not address or regulate ongoing sources of contamination (future releases from which will continue to adversely impact human health and the environment), the treaty might be an ideal vehicle for dealing with such issues. Here, it will be necessary to control continuing discharges from Cominco to avoid recontamination of the Upper Columbia River Basin, Lake Roosevelt, and the broader ecological system. To accomplish this goal, the United States and Canada could work bilaterally through IJC to develop recommendations for ways to control ongoing source contamination from the Trail Smelter.

In the meantime, the United States and Canada have expressed concern about how best to address this transboundary environmental issue. Although the answer is unclear, what is certain is that the reciprocal blindness of governments to the harm being imposed on their own territories as well as those of their neighbors is bad public policy. At the same time, suggestions that the application of CERCLA to Cominco should be avoided because it will result in quid pro quo “retaliation” against U.S. companies is not a legitimate reason to avoid applying it here. This approach would be contrary to CERCLA’s goals and would contravene both Canadian law and principles of international law. Industries would be induced to externalize their pollution costs by locating near borders and using natural means such as waterways to direct their hazardous wastes over the borders into neighboring nations. This type of thinking is short-sighted, self-serving, and will result in greater threats to human health and the environment.

Meanwhile, on June 2, 2006, in advance of the Ninth Circuit ruling, EPA and Cominco entered into a non-CERCLA private settlement agreement under which, among other things, Cominco agreed to perform an RI/FS of the river site subject to EPA oversight in return for a mix of CERCLA and non-CERCLA benefits, including EPA’s agreement to withdraw the outstanding UAO. The agreement, to which neither the Tribe nor the state are parties, is a private contract between the U.S. government and Cominco, and is not issued under or governed by CERCLA enforcement principles. It has limited duration and scope, and does not require Cominco to conduct any cleanup activities at the close of the RI/FS process. Because this private settlement does not rely on an established regulatory process, it is not yet clear whether it will be consistent with the scope and purpose of the UAO. The contract provides Cominco with substantial flexibility, and necessarily increases uncertainty for Tribal and state regulatory agencies with regard to the outcome of the quasi-CERCLA RI/FS process.

On July 3, 2006, just four weeks after EPA and Cominco entered into their private agreement, the Ninth Circuit upheld the district court’s ruling in favor of the Tribes and the state holding that Cominco is liable under CERCLA.

We hold that applying CERCLA here to release of hazardous substances at the River site is a domestic, rather than an extraterritorial application of CERCLA, even though the original source of the hazardous substances is located in a foreign country.

Pakootas v. Teck Cominco Metals, Ltd., 9th Cir., No. 05-35153, slip op. at 20 (July 3, 2006).

The Ninth Circuit rejected Cominco’s argument that the case was based on the extraterritorial application of U.S. law and for the first time in the twenty-six years since CERCLA was enacted, addressed the question of whether a party responsible for the transboundary release of hazardous substances into the United States can be sued under CERCLA. The Ninth Circuit’s opinion will strongly impact the Tribe because it confirms that CERCLA is available to help protect public health, the quality of the environment, and the natural resources that are central to the culture and spiritual health of the Tribe and its members. The Tribe, the state, and the United States can take comfort from this bold ruling wherein the court has held that CERCLA reaches foreign polluters like Cominco and permits them to be held liable for their releases of hazardous substances into the United States, including those that threatened the ecological health of our precious Columbia River.