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# ENFORCEMENT OF U.S. ENVIRONMENTAL LAW IN CASES OF CROSS-BOUNDARY POLLUTION: A CASE STUDY

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# Case Study: the Upper Columbia River

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- Lake Roosevelt created by Grand Coulee Dam in 1942
- Colville Reservation west of Lake Roosevelt
- Spokane Reservation east of Lake Roosevelt
- From the Grand Coulee Dam to the U.S./Canada border is 150 miles
- The world's largest lead-zinc smelter 10 miles upstream from border

*Area of Concern*

**Cominco Smelter**



# Trail Smelter



# TCM's Hazardous Substance Disposal Practices

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- TCM arranged for the disposal of hazardous substances from the Trail Smelter by directly discharging hazardous substances into the Columbia River
- Based on TCM's historical records, it is estimated that from about 1930 to 1995 TCM disposed of
  - 13,000,000 tons of solid granulated slag; and
  - 308,396 tons of liquid metals
- Both slag and effluent were transported downstream and released into the United States

# Timeline

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- 1999 Tribe Petitioned U.S. Environmental Protection Agency (EPA) for PA
- September 2000 – EPA granted Tribe’s petition for Superfund Preliminary Assessment
- 2001 EPA conducting sampling/analysis sources of hazardous substances
- 2003 EPA issued a Unilateral Administrative Order (Order) to Teck Cominco Metals, Ltd. (TCM), a Canadian corporation

# TCM's Response to the EPA Order

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- TCM rejects the 2003 EPA Order and asserts that EPA does not have jurisdiction. EPA fails to enforce its Order
- In 2004 two members of the Confederated Tribes of the Colville Reservation filed a CERCLA citizen suit against TCM seeking to enforce the Order issued by EPA
- Before answering the complaint, TCM filed a motion to dismiss the case



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# Issue Presented

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- Whether U.S. environmental law (CERCLA) can be applied to a Canadian company, whose discharges into the Columbia River, flowed into the United States
- The case presented question of scope of CERCLA: did Congress intend CERCLA to reach discharges of hazardous substances originating across the U.S. border and now found in the U.S.?



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# Presumption Against Extraterritoriality

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It is a longstanding principle of American law “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” . . . It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.

*EEOC v. Arabian American Oil Company and Aramco Services Company*, 499 U.S. 244, 111 S. Ct. 1227



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# Exception: The Effects Doctrine

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“[T]he presumption [against extraterritoriality] is generally not applied where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.”

*Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993), citing Restatement (Second) of Foreign Relations Law, §§ 38, 17



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# District Court Decision

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- In November 2004 the District Court denied TCM's motion to dismiss finding that
  - Court has subject matter and personal jurisdiction, and
  - That the Complaint stated a cognizable claim for relief



# The District Court Found That CERCLA Applied Extraterritorially

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- CERCLA affirmatively expresses a clear intent by Congress to remedy 'domestic conditions'
- Failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States
- The court concludes that extraterritorial application of CERCLA is appropriate in this case

*2004 U.S. Dist. LEXIS 23401 (E.D. Wash., Nov 8, 2004)*



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# The Ninth Circuit Affirms

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- “We hold that because CERCLA liability is triggered by an actual threatened release of hazardous substances, and
  - because a release of hazardous substances took place within the United States
  - this suit involves a domestic application of CERCLA.” 452 F.3d 1066, 1068 (9th Cir. 2006)
- TCM then seeks *en banc* review by the 9th Circuit. Review is denied
- TCM next files a *writ of certiorari* to the U.S. Supreme Court. The Court requested a brief from the United States

# U. S. Opposes TCM's Petition for Writ of Certiorari

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- The U.S. brief stated that, “the case involved a direct and compelling United States’ interest.”
- And that an assertion of (U.S.) jurisdiction to prescribed law would be consistent with considerations of international comity.”  
Brief of the United States at 16
- The U.S. brief further stated that, “petitioner’s deliberate 90 year discharge of millions of tons of hazardous substances into a river just upstream from the United States directly and foreseeably caused harmful effects in the United States.”  
Brief of United States at 17



# Certiorari Denied – Case Goes Back to Trial Court

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- On January 7, 2008 the U.S. Supreme Court Denied TCM's Petition for *Writ of Certiorari*
- Case Returns to District Court for enforcement of the CERCLA Citizen Suit against TCM
- In March, 2008, Tribes and the State Amended Complaints to include CERCLA Response Costs and Natural Resource Damages (NRD)
- Parties bifurcate Case. Phase I liability and Phase II damages (Response Costs and NRD)

## The Supreme Court's revolving view on extraterritorial application in United States law – *Morrison v. National Australia Bank Ltd.*

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- The Supreme Court rejected extraterritorial application of § 10(b)
- Rejected line of cases from Second Circuit applying securities law extraterritorially even without “affirmative intention of the Congress clearly expressed”
- Justice Scalia criticized the Second Circuit’s willingness to discern Congress’ intent to apply § 10(b) based on domestic effects or domestic conduct
- Implications of the Supreme Court’s denial of Writ of Certiorari in *Pakootas*

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