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WATER: 9th Circuit allows suit against Canadian smelter to proceed

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The 9th U.S. Circuit Court of Appeals has ruled that a lawsuit against a Canadian smelter operator who dumped heavy metals into the Columbia River can proceed, rejecting the British Columbia-based company's arguments that it is not subject to U.S. environmental laws.

Two members of the Colville Confederated Tribes had filed the lawsuit against Teck Cominco Ltd., charging that the company's smelter in Trail, British Columbia, pollutes the Columbia River and Lake Roosevelt in Washington with heavy metal slag. The state of Washington later intervened in the lawsuit as a plaintiff.

Teck Cominco had sought to have the lawsuit dismissed on the grounds that the Superfund law does not apply to a Canadian facility operating in Canada.

But a three-judge panel of the 9th Circuit rejected that argument Monday, ruling that "the suit concerns actual or threatened releases of heavy metals and other hazardous substances into the Upper Columbia River Site within the United States."

The appeals court affirmed a November 2004 decision by Judge Alan McDonald of U.S. District Court for the Eastern District of Washington that found the Superfund law was intended to clean up pollution within the United States, regardless of where it came from ([Greenwire](#), Nov. 9, 2004).

State and tribal officials hailed the appeals court's decision.

"This decision is great news for all Washingtonians," said Gov. Christine Gregoire (D) in a statement. "The Columbia River is a lifeline of the Pacific Northwest and the taxpayers should not have to foot the clean-up bill for contamination by a private company."

"Teck Cominco and its predecessors used our state as a dumping ground for 90 years and they should pay for the cleanup," Gregoire said.

State officials said the decision has implications for any state that borders a foreign country. "It means that states on the borders that become contaminated from pollution flowing over a foreign border can rely on U.S. cleanup laws, like the Superfund law to take care of it for us," said

Washington Department of Ecology spokeswoman Jani Gilbert.

The lawsuit, filed in 2004, marked the first time residents of the United States used the Superfund law to sue a Canadian company. The tribes asked the court to enforce all fines and penalties U.S. EPA had ordered Teck Cominco to pay for pollution at its smelter, located 10 miles north of the border ([Greenwire](#), July 22, 2004).

David Godlewski, a spokesman for Teck Cominco, downplayed the significance of the decision, in light of a settlement EPA and Teck Cominco reached in early June that secured up to \$20 million for a study along 150 miles of the Upper Columbia River between the Canadian border and Grand Coulee Dam.

"Clearly, we're disappointed, but we do have an agreement with EPA and we will move forward with identifying the risks to the reservoir," Godlewski said, adding that the company is committed to addressing those risks if they prove to be a result of the company's actions.

The study, which will be conducted under EPA's direct oversight, is expected to provide information on the ecological and public health risks associated with pollution in the Columbia River Basin above Coulee Dam. While the study phase of the Columbia River cleanup will be paid for with industry dollars, EPA has not resolved who will pay for the removal of the pollution and restoration of the Upper Columbia, which could run into the hundreds of millions of dollars ([E&ENews PM](#), June 2).

State officials said the agreement left too many loopholes open and would not ensure that any cleanup would be performed to federal and state standards. Neither the state nor the Colville tribe are a party to the settlement.

Teck Cominco has until July 17 to file a request for the entire 9th U.S. Circuit Court of Appeals to hear the case or it may file an appeal with the U.S. Supreme Court by Oct. 2. If the company does not appeal the case further, it will head back to district court where the judge will decide on the merits of the lawsuit.