NO. 16-35742

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; DONALD R. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

No. 2:04-cv-00256-LRS
The Honorable Lonny R. Suko, United States District Court Judge

RESPONSE BRIEF OF APPELLEE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

ANDREW A. FITZ, WSBA No. 22169
Senior Counsel
KELLY T. WOOD, WSBA No. 40067
Assistant Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6770

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Statutes

Federal Rules

Federal Regulations

Other Authorities

I. INTRODUCTION

For the better part of twenty years, Appellant Teck Cominco Metals, Ltd. (Teck) has fought liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for a century's worth of industrial waste it discharged directly to the Columbia River from its smelter complex just north of the international border, in Canada. Teck's waste has polluted more than 100 miles of riverbed, beaches, and shoreline in the United States. *See* ER 23, 65, 85. The waste is a byproduct of Teck's Trail Smelter, one of the world's largest integrated lead-zinc smelting and refining complexes. Teck purposefully optimized processes at the Trail Smelter to better use the River as a cheap disposal pathway. This included purposefully granulating molten "slag" so that it could be carried downstream more effectively. SER 14-17. Teck's wastes are so prevalent in the Upper Columbia River region of northeast Washington that, for decades, locals have referred to a giant shoreline deposit of Teck slag as "Black Sand Beach."

The current appeal marks the second time this Court has been asked to review whether Teck can be liable for polluting the River. In 2003, the Environmental Protection Agency (EPA) ordered Teck to investigate contamination at the Upper Columbia River (UCR) Site in the United States.

Teck refused to recognize the application of United States law and refused to comply. The order went unenforced by the EPA and remained unenforced until this litigation. Individual members of the Confederated Tribes of the Colville Reservation (Tribes), together with the State of Washington and the Tribes intervening, began this lawsuit as a CERCLA citizens' suit to enforce the EPA's order. Teck's response was a motion to dismiss on the basis that the Plaintiffs' suit constituted an extraterritorial application of CERCLA. In *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1074 (9th Cir. 2006), *cert. denied*, 552 U.S. 1095 (2008) (*Pakootas I*), this Court rejected Teck's argument, holding that Teck could be liable under CERCLA for releases of contaminants that occurred within the United States, as well as holding that Teck could be an "arranger" under CERCLA without the assistance of a third party.

More than ten years later, the district court completed adjudication of two of the three claims made by Plaintiffs. In Phase I, the court held that Teck is liable under CERCLA as an "arranger" of hazardous substance disposal at the UCR Site. This holding was based on a mountain of evidence amassed by Plaintiffs during the litigation, as well as Teck's concessions on the eve of trial that, in fact, its contaminants have traveled to the UCR Site and have leached

(and continue to leach) hazardous substances into the waters and sediments of the UCR Site. The district court also held that Teck failed to meet its affirmative defense burden of showing that liability at the UCR Site is capable of apportionment.

Following trial on Phase II, the court ruled on the Tribes' claim to recover "response costs" incurred by the Tribes in evaluating and proving Teck's threshold CERCLA liability. The court entered a monetary judgment against Teck for more than $8 million in such costs.

Prior to adjudicating Phase III, which will concern the Tribes' and the State's claim to recover damages to natural resources at the UCR Site, the district court certified its Phase II judgment under Civil Rule 54(b) for appeal to this Court.

Teck still seeks to defeat CERCLA liability at the UCR Site. Despite overwhelming evidence that Teck knew it was disposing toxic metals to the UCR Site, and was intentional in that disposal, Teck challenges the district court's finding of personal jurisdiction. Teck also challenges the district court's dismissal of its apportionment defense, as well as its award to the Tribes of attorney's fees and consultant costs as "response costs." Finally, Teck asks this Court to reverse its own rulings in *Pakootas I* that Teck can be liable for

releases of contaminants that occur within the United States and that Teck can itself be an "arranger" under CERCLA.

Teck is wrong on every count. The State respectfully requests that this Court affirm the rulings below.

II. STATEMENT OF JURISDICTION

Appellee State agrees with the Appellant's statement of jurisdiction.

III. STATEMENT OF THE ISSUES

1. Whether the district court had authority to certify final judgment under Rule 54(b).

2. Whether the courts have personal jurisdiction over Teck based on Teck's intentional disposal of waste into the Columbia River just north of the international border and Teck's knowledge the waste would repose in Washington State.

3. Whether the district court erred in holding that the Tribes' litigation fees and costs are recoverable as "response costs" under CERCLA.

4. Whether the district court erred in dismissing Teck's "apportionment" defense when Teck failed to delineate the CERCLA harm to be apportioned and, even if it did, failed to establish that the UCR Site was capable of apportionment.

5. Whether under the law of the case doctrine, *Pakootas I* is binding on the issues of whether CERCLA is being applied extraterritorially in this case and whether Teck can be an "arranger" under CERCLA without the assistance of a third party.

IV. STATEMENT OF THE CASE

A. Teck's Waste Discharges

Since 1896, Teck and its predecessors have continuously operated the Trail Smelter, a metals smelting and fertilizer production facility on the shores of the Columbia River in Trail, British Columbia, Canada. ER 410. The Trail Smelter is approximately ten river miles upstream of the United States-Canada border. *Id*. As a byproduct of metals recovery, the Trail Smelter produced granulated "slag" consisting primarily of silica, but also containing metals including zinc, lead, copper, arsenic, cadmium, barium, antimony, cobalt, manganese, nickel, selenium, and titanium. *Id*. ¶ 13. Between 1930 and 1995, Teck intentionally discharged at least 9.97 million tons of slag directly into the Columbia River via outfalls at the Trail Smelter. *Id*. ¶ 14. Teck admits that the Columbia River transported the vast majority of this material downstream of the international border into Washington, and that slag came to be located at the UCR Site. ER 411.

Teck also generated and intentionally discharged large amounts of liquid wastes ("liquid effluent") into the Columbia River. ER 48. Teck's liquid effluent contained numerous metals and a variety of other chemical compounds in dissolved, colloidal, and particulate form. *Id*. Teck admitted that these

effluents contained over 130,000 tons of hazardous substances, including approximately 200 tons of elemental mercury. *Id*. As with Teck's slag, Teck admits that nearly all of its liquid effluent discharged from the Trail Smelter went down the Columbia River into Washington and that at least some portion thereof came to be located at the UCR Site. ER 411.

Teck's slag in the UCR Site has leached and continues to leach hazardous substances into the waters and sediments of the UCR Site, including but not limited to lead, zinc, arsenic, and cadmium. ER 65. Hazardous substances in Teck's liquid effluent likewise leach or release hazardous substances via adsorption and desorption or other geochemical and/or biogeochemical processes into and within the waters and sediments of the UCR Site. ER 66.

Teck's senior leadership knew for decades that these wastes flowed into Washington and became deposited in the UCR Site. ER 51. As early as the 1930s, Teck was aware that slag had been observed on the beaches of the Columbia River just downstream of the Canadian border. *Id*. In subsequent years, a Teck Environmental Control Manager recognized that Teck was "in effect dumping waste into another country – a waste that they classify as

hazardous material." ER 55. The manager also described Teck's disposal practices as utilizing a "free" "convenient disposal facility." *Id*.

Teck was also aware of the potential consequences. By at least the 1980s, Teck became aware that metals were leaching from Teck's slag and causing adverse impacts to the Columbia River. ER 52. Teck was also well aware of the resulting harm caused by its discharges. Indeed, by 1981, Teck's Environmental Control Manager observed that "[t]here is no question in my mind that this is the single most vulnerable area if Americans ever find the time and money to do exhaustive research on the lake sediments [at the UCR Site]." ER 53. Despite all this knowledge, Teck continued to discharge its wastes into the River. While earning $100 million in profits each year, the Trail Smelter discharged batch after batch of liquid effluent and 400 tons of slag every single day. ER 56.

B. Commencement of the Lawsuit and the *Pakootas I* Decision

In 1999, the Tribes petitioned the EPA to conduct an assessment of Upper Columbia River contamination and entered into a Memorandum of Understanding with EPA setting out the Tribes' roles and responsibilities with regard to the assessment. ER 11. In 2003, after that preliminary assessment made environmental agencies in the United States aware of the elevated

contaminant levels within the Upper Columbia River, the EPA issued Teck a Unilateral Administrative Order requiring Teck to investigate the UCR Site and produce a plan to identify ways to cleanup the contamination caused by the Trail Smelter. ER 11-12. In 2004, the original Plaintiffs in this suit, Joseph Pakootas and Donald R. Michel (collectively Pakootas), filed a complaint under CERCLA's citizens' suit provision in the United States District Court for the Eastern District of Washington. ER 265. The complaint asked the district court for declaratory and injunctive relief, including enforcement of the EPA issued Order against Teck. ER 1220-21. The State moved to intervene as of right pursuant to 42 U.S.C. § 9659(g) and filed a Complaint in Intervention, which was granted. ER 1195.

Teck immediately filed a Motion to Dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Teck argued that CERCLA could not apply because it discharged its wastes in Canada. Both the district court and this Court disagreed. This Court held that an actionable CERCLA release would occur in the United States, constituting a domestic application of CERCLA, if hazardous substances from Teck could be shown to have been released from a CERCLA "facility" within the United States (i.e., the UCR Site): an area where "hazardous substances [have] been deposited,

stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9)(B); *Pakootas I*, 452 F.3d at 1074. The Court stated: "In the case of an actual release, the plaintiff need only prove that the defendant's hazardous substances were deposited at the site, [and] there was a release at the site, and that the release caused it to incur response costs." *Pakootas I*, 452 F.3d at 1078 n.18. This Court also rejected Teck's argument that CERCLA "arranger" liability requires the act of a third party. *Id*. at 1080-81. The Supreme Court denied certiorari. *Pakootas*, 552 U.S. 1095.

C. District Court Phase I Proceedings—CERCLA Liability for Teck's Discharges into the Columbia River

Following *Pakootas I*, the district court bifurcated the causes of action into two phases. Plaintiffs moved forward on their "liability" claim, wherein Plaintiffs sought declaratory judgment that Teck was an "arranger" under CERCLA, 42 U.S.C. § 9607(a), while all remaining claims, including Plaintiffs' "damages" claims were stayed until a liability determination was made ("damages" claims focused on the amount of the State's and Tribes' response costs, as well as the presence and quantification of damages to natural resources ("NRD costs")). SER 134-37; ER 1098-1103. Teck raised numerous arguments in defense of Plaintiffs' liability claim, including lack of personal jurisdiction and an assertion that Teck could not be held joint and severally

liable under CERCLA because the harm at the UCR site was capable of apportionment (the "divisibility" defense). SER 113, 117.

1. Dismissal of Teck's divisibility defense

Teck prepared and submitted multiple expert reports in support of its divisibility defense. Teck hired a "divisibility" expert who opined that the harm at the UCR Site could be divided by calculating the mass of seven contaminants released from the Trail Smelter (arsenic, cadmium, copper, mercury, lead, and zinc, as well as antimony)—in slag only, ignoring the liquid effluent—compared against the contribution of those same seven metals from a selected portion of the historic mining and smelting operations that existed in and around the UCR Site. ER 778-80. Furthermore, this expert limited his analysis to presence of the seven metals only in the top five centimeters (less than two inches) of UCR Site sediments. ER 749. Then, to establish the mass of the seven metals that migrated from non-Teck upland mining sources into the UCR Site (the largest contributor to UCR Site contamination under Teck's divisibility theory), the expert relied exclusively on the expert work of Teck's mining "fate and transport" of materials expert, Mr. Adrian Brown. ER 786. But, aside from the seven metals listed above, Teck's experts made no attempt to quantify other contaminants known to be present at the UCR Site, including

those known to have been discharged from the Trail Smelter. *See* ER 783. Teck's divisibility expert concluded that Teck should receive a zero percent share or, at most, Teck was 0.05% liable for only zinc. ER 748-50.

On July 22, 2011, the State and the Tribes moved for partial summary judgment to dismiss Teck's divisibility defense. ER 982. Simultaneously, the State and Tribes also moved to exclude Mr. Brown's testimony regarding the amount of materials transported to the UCR Site from upland sources under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). SER 38-59. The district court granted the summary judgment motion. First, the district court outlined numerous ways in which Teck failed to identify the harm it was attempting to apportion. ER 95-102. The court held that Teck's defense failed by limiting its analysis to only those metals specifically enumerated in the Plaintiffs' complaints; in doing so, Teck failed to acknowledge the breadth of the harms alleged in the complaints. The court found it "apparent" that Plaintiffs' complaints sought recovery of response costs for all of the hazardous substances released at or from the Site "from whatever source." ER 102-03. The court also noted that the Plaintiffs' complaints clearly did not limit the basis of Teck's liability to only those metals Teck analyzed for divisibility purposes. ER 103.

Further, the court found that, even if Teck had properly limited its analysis to the enumerated metals, its evidence failed to account for those metals because it limited its analysis to only the top five centimeters of sediments at the bottom of the river in the UCR Site, despite the fact that Plaintiffs plead broader harms. ER 103-04. "Simply put, because [Teck] has failed to account for all of the harm at the UCR Site, it cannot prove that harm is divisible . . . ." ER 106.

Finally, the court found that even if Teck had fully accounted for the harm at the UCR Site, it still failed to present a reasonable, factual basis on which to apportion liability. ER 109.

With regard to the *Daubert* motion to exclude Mr. Brown, the district court initially determined that the motion was mooted by the court's dismissal of Teck's divisibility defense. ER 123-24. After Plaintiffs pointed out that Mr. Brown's analysis was also relevant to Teck's counterclaim against the State, the district court renewed its review of the motion and ultimately excluded Mr. Brown's opinions in their entirety. SER 30-37. The court determined that Brown's methodology was inapplicable to the context in which it was applied, had not been subjected to peer review, and was not generally accepted in the scientific community. SER 33. The court concluded that

Mr. Brown's conclusions were "arbitrary" and "not scientifically reliable" as they were "not grounded in any analytical or empirical methods" for determining the amount of materials transported to the UCR Site. SER 34. Teck has not challenged this ruling.

2. Determination of CERCLA liability

Following the dismissal of Teck's divisibility defense, the parties moved forward on Teck's CERCLA liability under the framework this Court set out in *Pakootas I* (i.e., that Teck could be held liable under CERCLA for releases of Teck contaminants at the UCR Site). On the eve of trial, Teck conceded in a stipulation that both its slag and liquid effluent crossed into the United States and had come to be located at the UCR Site. ER 410-12. Teck further conceded that those wastes had released, and continue to release, hazardous substances into the sediments and waters of the UCR Site. ER 411-12. The district court ultimately held that Teck was liable as a CERCLA "arranger" on December 14, 2012.

D. District Court Phase II Proceedings—Tribes' Response Costs

Following the Phase I ruling, the district court ordered an intermediary Phase II proceeding limited to the adjudication of the State's and Tribes'

claims for past response costs, with the claims for NRD costs separated into a new Phase III proceeding. ER 401-05. In doing so, the district court noted:

> Limiting Phase II to adjudication of Plaintiffs' recoverable past response costs guarantees this phase will be completed more rapidly than if claims for natural resource damage assessment costs are included. It appears that a determination of the amount of recoverable past response costs could properly be certified as a final judgment pursuant to Fed. R. Civ. P. 54(b), allowing for an immediate appeal of all matters adjudicated up to that point, including divisibility/apportionment and personal jurisdiction. *Clearly it would be more efficient to have an appellate resolution of these issues prior to expending resources on an adjudication of Defendant's liability for natural resource damages [Phase III]*.

ER 402 (emphasis added).

The State and Teck reached a settlement on the State's response costs. The Phase II proceedings on the Tribes' costs began at the end of 2012 and concluded in August 2016 when, following trial, the district court entered a monetary judgment against Teck on the Tribes' claim for the sum of $8,253,676.65. ER 6-12. In issuing its final judgment on Phase II, the court again noted that "[b]efore commencement of Phase III litigation, efficiency is best served by full appellate resolution of response cost liability and the amount of recoverable response costs." ER 6.

V. SUMMARY OF ARGUMENT

The district court properly certified this case for appeal under Federal Rule of Civil Procedure 54(b). Although the Plaintiffs' response cost and natural resource damages claims are rooted in a common base of CERCLA liability, they thereafter involve different legal rights, are factually distinct, and are completely independent of each other. Under this Court's precedent, they are properly considered as distinct "claims," because one set of facts gives rise to the claims that Teck owes Plaintiffs for costs already incurred in responding to a release of hazardous substances, while another set of facts gives rise to the claim that Teck owes Plaintiffs damages for injuries to natural resources. The district court exercised appropriate discretion in separating the case into three phases (Phase I base liability, Phase II response costs, Phase III natural resource damages), entering judgment on the response cost claim after adjudicating Phases I and II, and certifying the matter for appeal under Rule 54(b). If this Court affirms the district court, it will have no effect on the Phase III trial, as they involve functionally different claims. If it reverses the district court, it will eliminate the need for a lengthy and resource-intensive Phase III trial.

Under the plain terms of CERCLA, 42 U.S.C. § 9607(a)(4)(A), the Tribes are entitled to recover "enforcement" costs (including reasonable attorneys' fees) associated with establishing Teck's CERCLA liability for the UCR Site. Section 9607(a)(4)(A) expressly provides that persons liable under CERCLA are liable to each of three entities—the United States Government, *states*, and *tribes*—for *all costs* associated with activities that constitute "removal" and "remedial action." These activities include all related "enforcement activities," which this Court has held to include reasonable attorneys' fees.

Teck is wrong that a tribe (or state) may only recover enforcement costs when "delegated" enforcement authority by the EPA under a Section 9604 cooperative agreement, and in conjunction with enforcing an existing CERCLA obligation or order. Teck is fundamentally mistaken that a Section 9604 agreement "delegates" or conveys any federal law (CERCLA) authority to a state or tribe. And, under established precedent, there is no basis to restrict "enforcement activities" recoverable under Section 9607(a)(4)(A) to only those activities undertaken in conjunction with a Section 9604 agreement, or only those activities undertaken to compel compliance with an existing CERCLA obligation established by the United States.

Teck's argument that personal jurisdiction is lacking also fails. This Court has long held that the *Calder* "effects" test is the appropriate measure of establishing jurisdiction based on the intentional actions of a defendant. And, with regard to the application of *Calder*, the district court was correct: Teck's intentional dumping of millions of tons of waste into the Columbia River establishes personal jurisdiction. Teck knew precisely what it was doing when it built its facility to use the south-flowing Columbia River as its dumping ground. Teck knew the wastes were making their way into Washington and knew that harm would result. It cannot evade responsibility for that harm now.

As the district court properly determined, Teck's divisibility defense fails on two fronts.

Teck admits it did not attempt to apportion the full harm at the UCR Site. Instead, and despite its knowledge of a wide range of contaminants at the Site, Teck limited its divisibility case to only seven metals that Teck believes formed the basis of Plaintiffs' CERCLA liability case. Teck's novel divisibility approach finds no support in the case law and completely upends the liability scheme Congress adopted for CERCLA. Thus, Teck's limiting of the "harm" to Plaintiffs' minimal burden to establish Teck's liability—rather than the full joint and several scope of that liability—is fatal to Teck's defense.

Next, even if this Court accepts Teck's apportionment of only seven of the dozens of contaminants found at the UCR Site, Teck still fails to establish a basis to apportion. Contrary to Teck's assertions, river pollution by multiple sources and that combines to cause damage to natural resources is a paragon of *indivisible* harm. Teck's claim that it is only 0.05% liable for only one metal is not a rational basis to divide the UCR Site harm because the remedy is not proportionate to any particular pollutant or any particular polluter's volumetric share. Furthermore, the expert opinion Teck relied upon for the presence of metals from other mining operations was excluded on a *Daubert* motion. Because Teck failed to challenge that exclusion, Teck cannot establish any quantity of metals at the UCR Site from upland mines—by far the largest other source of metals alleged by Teck.

Teck's final two issues—arguing that this case represents an extraterritorial application of CERCLA and arguing it cannot be an "arranger" under CERCLA without the assistance of a third party—were already considered by this Court and decided against Teck in *Pakootas I*. Under the law of the case doctrine, *Pakootas I* is binding on the extraterritoriality and "arranger liability" issues.

VI. STANDARD OF REVIEW

The State agrees that the issues of law in this appeal are generally subject to a de novo standard of review. However, with regard to factual matters relevant to this Court's review of the law, the district court's factual findings "must be accepted as true unless clearly erroneous." *See, e.g.*, *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1475 (9th Cir. 1995).

VII. ARGUMENT

A. The District Court Properly Certified This Case for Appeal under Federal Rule of Civil Procedure 54(b)

Teck argues that this case involves a single "claim" making the district court's certification under Federal Rule of Civil Procedure 54(b) erroneous. *See* Teck Br. at 20-23, Dkt. 18-1. Teck wrongly characterizes CERCLA Section 9607(a), however, as providing only a "single claim for relief" with "multiple remedies." *See id*. at 21-22. Although the Plaintiffs' response cost and natural resource damages claims are both rooted in CERCLA liability, they involve different legal rights, are factually distinct, and are wholly independent. Under this Court's precedent, the district court properly certified its judgment for appeal under Rule 54(b) after the completion of Phases I and II (adjudicating base CERCLA liability and adjudicating to finality all elements

of the Tribes' response cost claim), and before the commencement of Phase III (adjudicating the natural resource damages claims).

1. This Court applies a pragmatic test for whether a certification under Rule 54(b) is proper

When an action presents "more than one claim for relief," Rule 54(b) allows a trial court to direct the entry of a final judgment on fewer than all the claims if the court determines there is no just reason for delay. Fed. R. Civ. P. 54(b).

For purposes of Rule 54(b), a "claim" is a "set of facts giving rise to legal rights in the claimant . . . ." *CMAX, Inc. v. Drewry Photocolor Corp.*, 295 F.2d 695, 697 (9th Cir. 1961) (*cited with approval in Ariz. State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991)). It is something "less than the central object of a lawsuit," but "more than merely one element of proof offered in support of a complaint seeking money damages." *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

Applying this test in practice is not always simple. However, rather than becoming mired in the "difficulty of deciding whether a pleading is a unitary claim or multiple claims," *Wood v. GCC Bend, LLC*, 422 F.3d 873, 880 (9th Cir. 2005), this Court has adopted a "pragmatic approach" to determining

whether a Rule 54(b) certification is proper. *Cont'l Airlines*, 819 F.2d at 1525. The focus is on "severability and efficient judicial administration," *id.*, with the Court asking questions such as whether the adjudicated "claims" are separate, distinct, and independent of any other claims; whether review of the certified claims would be mooted by any later developments in the case; and whether an appellate court would have to face the same issues on a later appeal. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980); *Wood*, 422 F.3d at 878 n.2; *see also U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013). Claims certified under Rule 54(b) do not have to be completely independent of the remaining claims in the case. *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 468 (9th Cir. 1987). Particularly when an important or controlling issue cuts across claims, resolving the issue on a Rule 54(b) appeal may save the need for further trial. *See Wood*, 422 F.3d at 881.

The Court reviews the district court's evaluation of the interrelationship of claims de novo. *Id.* at 879. Beyond this, determining whether there is "no just reason for delay" under Rule 54(b) is left to the sound judicial discretion of the district court, with reversal appropriate only if this Court can say the trial court's conclusion was "clearly unreasonable." *Stanley v. Cullen*, 633 F.3d

852, 864-65 (9th Cir. 2011). Here, the Plaintiffs' litigation presents severable claims for the purposes of Rule 54(b) certification.

2. The Plaintiffs' litigation involves distinct, independent claims

Judicial opinions routinely refer to CERCLA response costs and natural resource damages claims as separate "claims" or "causes of action." *See*, *e.g.*, *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 943–44 (9th Cir. 2002) ("CERCLA provides states, federal agencies, and Indian Tribes with a federal *cause of action to sue for damages to natural resources* that they hold in trust for the public") (emphasis added); *State of Cal. v. Montrose Chem. Corp. of Cal.*, 104 F.3d 1507, 1511 (9th Cir. 1997) (separately identifying the plaintiff's "claims" in the case for response costs and natural resource damages); *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1109 (D. Idaho 2003) (same); *State of Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 439 (D.C. Cir. 1989) ("The Act provides for the designation of federal and state 'trustees' who are authorized to assess natural resource damages and *press claims for the recovery of such damages* . . . .") (emphasis added).

While claims for recovery of response costs and natural resource damages both require establishing the same base liability under CERCLA

Section 9607(a),[1] the claims are thereafter completely independent of each other, being factually, legally, and temporally distinct.

Proving a claim for response cost recovery under 42 U.S.C. § 9607(a)(4)(A) requires showing that at least "some" costs related to removing or remedying a release of hazardous substances have been incurred. *See, e.g.*, *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1122. Once this showing is made, the burden shifts to the defendant to rebut a presumption that such costs are consistent with the "national contingency plan." *Fireman's Fund*, 302 F.3d at 949. Because claims for response costs are only for costs "incurred," they cannot recover prospective future costs. *See Stanton Rd. Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021 (9th Cir. 1993) (deciding issue in context of 42 U.S.C. § 9607(a)(4)(B)). CERCLA thus provides that once CERCLA base liability is proven, "the court shall enter a declaratory judgment on liability on response costs . . . that will be binding *on any subsequent action or actions to recover further response costs* . . . ." 42 U.S.C. § 9613(g)(2) (emphasis added).

[1] This involves proving that there has been a "release" of a "hazardous substance" from a "facility," with the defendant falling into one of CERCLA's four classes of "covered persons." *See* 42 U.S.C. § 9607(a); *see also Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 870-71 (9th Cir. 2001) (en banc).

Once decided, the issue of base liability under Section 107(a) will thus not be re-litigated in any future cost recovery claims.

A claim to recover natural resource damages focuses on an entirely different subject. Rather than recouping incurred costs, it seeks "compensation for [the] injury, destruction, or loss of natural resources" resulting from a release of hazardous substances. *See* 43 C.F.R. § 11.14(l); *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1114. The claim may only be asserted by statutorily-designated natural resource trustees, for resources within their trusteeship. 42 U.S.C. § 9607(f)(1), (2); *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1114–17. While the elements of CERCLA Section 107(a) liability must again be proven, *see Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1114, a trustee must additionally show: (1) that "injury" has occurred to natural resources within the plaintiff's trusteeship; (2) that the injury has been caused by ("resulting from") the release of hazardous substances at the facility; and (3) some quantification of damages. *See id*. at 1114–17, 1122–24.

This is a substantial undertaking that goes well beyond proving CERCLA liability. Demonstrating injury, establishing causation, and quantifying damages all require detailed scientific evidence, together with specialized and intensive expert analysis. *See Ohio*, 880 F.2d at 440; *see*

generally 43 C.F.R. pt. 11 (outlining damage assessment procedures that, if followed, provide a rebuttable presumption per 42 U.S.C. § 9607(f)(2)(C)). The undertaking is wholly independent of any claim for response costs. *See New York v. Gen. Elec. Co.*, 592 F. Supp. 291, 298 (N.D. N.Y. 1984) (holding that a state's "claim" for natural resource damages does not depend on the state having incurred any response costs).

There are additional differences between the two claims. Claims for natural resource damages are subject to different statutes of limitations and timing restrictions than response cost claims. *See* 42 U.S.C. § 9613(g)(1), (2); *Montrose Chem.*, 104 F.3d at 1512. And, unlike response cost claims, natural resource damages may be recovered for both past injury and prospective future injury. *See* 43 C.F.R. § 11.83(a)(1).

In short, there are two distinct claims in this case. One set of facts gives rise to the claims that Teck owes Plaintiffs for costs incurred in responding to a release of hazardous substances. The other set of facts gives rise to the Plaintiffs' claim that Teck owes them damages to compensate for injuries to natural resources. That the two claims both depend on CERCLA liability does not preclude certification of one of the claims under Rule 54(b), provided that "severability and efficient judicial administration" support the certification. *See*

Cont'l Airlines, 819 F.2d at 1525; *Wood*, 422 F.3d at 881; *Sheehan*, 812 F.2d at 468. That is the case here.

3. The district court properly certified this case for appeal under Rule 54(b)

The district court properly exercised its discretion in separating the case into three phases (Phase I base liability, Phase II response costs, Phase III natural resource damages), entering judgment on the response cost claim after adjudicating Phases I and II, and certifying the matter for appeal under Rule 54(b).

This is a practical division. With liability having already been determined in Phase I, the matter of Teck's liability will not be re-litigated in Phase III, or in any future action or actions for further response cost recovery. *See* 42 U.S.C. § 9613(g)(2) (specifying declaratory relief to streamline future response cost claims); *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000) ("Environmental litigation is tremendously complex, lengthy, and expensive. . . . Declaratory relief . . . is therefore consistent with the broader purposes of CERCLA."). If, however, this Court reverses and holds that Teck is *not* so liable, it will save the need for a lengthy and resource-intensive Phase III trial.

Further, the proof for the claims is independent. The facts and issues litigated in the Phase II response cost claim trial (e.g., costs incurred, and whether they are properly recoverable as response costs) will not be re-litigated, or even come into play, in Phase III. The corollary is also true: the facts and issues to be litigated in Phase III are wholly unique from Phase II, involving technical issues of natural resource injury (e.g., toxicity and effects), causation, and damages quantification.

This appeal is properly before the Court under Rule 54(b). *See Stanley*, 633 F.3d at 864–65; *Wood*, 422 F.3d at 881; *Cont'l Airlines*, 819 F.2d at 1525; *Sheehan*, 812 F.2d at 468.

B. The District Court Correctly Found That Plaintiffs Proved Personal Jurisdiction Under the *Calder* Effects Test

1. The district court did not err by applying *Calder* to evaluate intentional acts by Teck that warrant personal jurisdiction

Teck argues that the district court erred in applying the *Calder* test to find personal jurisdiction, claiming that *Calder* can only apply to intentional torts. Dkt. 18-1, at 25. This argument fails for multiple reasons.

First, Teck's argument ignores the fact that the district court *did* analyze Teck's actions as an intentional tort for purposes of personal jurisdiction. The district court expressly concluded that this is a case "sounding in tort." ER 69;

see also Pakootas I, 452 F.3d at 1076 (finding "specific personal jurisdiction over Teck here based on its allegedly *tortious* act aimed at the state of Washington") (emphasis added). And, the district court analyzed Teck's conduct as an "intentional act." ER 70-71.

Teck's attempt to draw a hard line between "intentional acts" sounding in tort and actual claims of intentional torts tries to draw a difference without distinction. This Court has already held that the term "'[i]ntentional act' has a specialized meaning in the context of the *Calder* effects test" and generally applies "to actions sounding in tort."[2] *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 806 (9th Cir. 2004); *see also Picot v. Weston*, 780 F.3d 1206, 1214 (9th Cir. 2015) ("[t]he meaning of the term 'intentional act' in our jurisdictional analysis is essentially the same as in the context of intentional torts"). That is precisely what the district court did here by using "intentional

[2] This concept is well established in the Ninth Circuit. *See, e.g.*, *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1399 (9th Cir. 1986) (applying "the foreign-act-with-forum effect standard" in an insurance context because the Ninth Circuit has consistently and "clearly held that '[a]n out-of-state act having an effect within the state may be sufficient to support jurisdiction' in a non-tort situation."); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998) (applying the *Calder* effects test because the defendant's purposeful conduct was such that "the present case is akin to a tort case").

acts" within this "specialized, limited meaning in the context of the *Calder* effects test." *See* ER 70.

In short, Teck's claim that *Calder* was misapplied reflects a misreading of the district court opinion and runs contrary to this Court's prior decisions using the *Calder* effects test in cases sounding in tort, such as Teck's intentional act of dumping waste into the River for transport into Washington State.

Next, the cases cited by Teck do not support its claim that the *Calder* effects test applies solely to actual intentional torts. *Walden v. Fiore*, 134 S. Ct. 1115 (2014), is inapposite because, as even Teck concedes, *Walden* "did not address whether *Calder* can apply in the absence of any intentional torts." Dkt. 18-1, at 25. The same is true of *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199 (9th Cir. 2006), which Teck admits applied *Calder* in a non-intentional tort context. Dkt. 18-1, at 25-26.

Teck's cite to *Holland America Line Inc. v. Warstila North America, Inc.*, 485 F.3d 450 (9th Cir. 2007), is out of context and does not support overruling prior decisions applying *Calder* in contexts, like CERCLA, analogous to intentional torts. While the *Holland* court "decline[d] to apply *Calder* because it is well established that the *Calder* test applies only to

intentional torts," it made that statement in the context of declining to apply *Calder* for claims of "breach of contract and negligence." *Holland*, 485 F.3d at 460. Indeed, the Court approved the *Calder* distinction between an "intentional *action* and 'mere untargeted negligence'" *Id.* at 460 (emphasis added) (citing *Calder v. Jones*, 465 U.S. 783, 789 (1984)). Thus, *Holland* shows that *Calder* applies to "intentional actions" as opposed to actions sounding in contracts or mere untargeted negligence—neither of which describe the Plaintiffs' claim in this case. *Holland*, 485 F.3d at 460; *Picot*, 780 F.3d at 1214.

In short, Teck's claim that the *Calder* effects test applies only to intentional torts is contrary to case law and provides no reason to hold that the claims here do not sound in tort for purposes of personal jurisdictional limits. The district court did not err in applying the *Calder* effects test to find that Teck's relevant "actions create personal jurisdiction" because the Plaintiffs' claims involve an "intentional act" and the case is "sounding in tort." ER 69-71.

2. The district court correctly found the "express aiming" element of the *Calder* test satisfied here

Teck also argues that discharging enormous quantities of waste while "knowing that waste would 'repose' in the State of Washington is not the same as targeting or 'expressly aiming' at the State of Washington." Dkt. 18-1, at 27.

Thus, Teck claims that the district court conclusion that "'Teck's intentional actions were specifically targeted at Washington State,' ER 71, is a leap of logic unsupported by the evidence." *Id.* Teck's approach to the "express aiming" element of the *Calder* test is nonsensical, unworkable, and unsupported by case law.

Case law from district courts within this circuit shows that the district court's analysis is consistent with the "express aiming" element of *Calder*. "Express aiming" is satisfied whenever an intentional act is known to result in harm in a specific forum-state, that act is intentionally performed with that knowledge, and the specific harm actually results in that forum-state. This analysis comports with other decisions throughout the Circuit. *See, e.g.*, *Senne v. Kansas City Royals Baseball Corp.*, 105 F. Supp. 3d 981, 1029 (N.D. Cal. 2015) (finding the "express aiming" requirement satisfied even where defendant did not "expressly require employees to perform the work in California" but defendant's own intentional conduct applied the challenged labor policy to individuals hired to work at businesses in the forum state); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1090 (C.D. Cal. 2003) (finding purposeful availment where website operator intentionally and materially contributed to the infringement with full

knowledge that much of the harm from this infringement would be suffered in the forum).[3]

Moreover, the district court's approach to "express aiming" follows from *Calder*. There, the Court found that "[w]here defendants engaged in intentional misconduct in Florida knowing that this would cause serious harm in California, jurisdiction in California was proper 'based on the "effects" of [petitioners'] Florida conduct in California.'" *See Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95, 128 (E.D.N.Y. 2000) (citing *Calder*, 465 U.S. at 789).

Teck does not challenge and cannot dispute that it knew its actions would result in waste reposing in the state of Washington. Teck dumped *millions* of *tons* of slag and liquid effluent directly into the powerful, swift-moving Columbia just ten river miles north of the international border. ER 410. In doing so, Teck intended to "take advantage of the natural transport

[3] *See also Pinckard v. Laughland-Pinckard*, No. 1:12-CV-00848-CL, 2012 WL 5198168, at *4 (D. Or. Aug. 2, 2012) (finding "express aiming" where "an intentional action calculated to cause harm in a distant forum" is committed and "harm occurs there"); *Holliday v. Lifestyle Lift, Inc.*, No. C09-4995RS, 2010 WL 3910143, *4 (N.D. Cal. Oct. 5, 2010) (finding the "express aiming" requirement and that defendants targeted California where their actions "could reasonably have suspected that California employees would be harmed by such conduct"); *T-Mobile USA, Inc. v. Walts*, No. C06-0187L, 2006 WL 1842980, at *3 (W.D. Wash. July 3, 2006) (holding that the second element of the test "requires that the plaintiff's claim arise out of or result from the defendant's forum-related activities. . . . This element is evaluated in terms of 'but for' causation.").

mechanism the river offered . . . ." ER 70. Teck leadership had direct knowledge that these wastes flowed into Washington as early as the 1930s. ER 51. Teck also knew that its wastes caused harm. Teck knew that metals were leaching from its slag. ER 52. And, it was aware of the potential liability. ER 53. With this knowledge, Teck management admitted that it used Lake Roosevelt and the UCR Site as a "free" "convenient disposal facility" for its wastes. ER 55.

The undisputed facts satisfy the "express aiming" element of the *Calder* effects test; there is no "leap of logic" as Teck asserts. Dkt. 18-1, at 27. Teck's argument, in contrast, is unsubstantiated in case law, and unpersuasive in consideration of how other district courts have analyzed the "express aiming" element of the *Calder* effects test. Thus, the Plaintiffs proved the elements of personal jurisdiction over Teck with regard to claims arising out of its intentional actions of discharging enormous quantities of waste into the Columbia River a few miles from the Washington State border, with the knowledge that the waste would be carried downstream to repose in Washington.

C. The Tribes' Expenses Related to Establishing Teck's Liability Are Recoverable as Enforcement-Related "Response Costs" Under Section 9607(a)(4)(A) of CERCLA

1. Tribes and states can recover enforcement costs under Section 9607(a)(4)(A) without exercising federal law (CERCLA) authority

Under the plain terms of CERCLA Section 9607(a)(4)(A), the Tribes are entitled to recover "enforcement" costs (including reasonable attorneys' fees) associated with establishing Teck's CERCLA liability for the UCR Site.[4] Each of the four classes of persons liable under CERCLA are liable for, among other things:

> *[A]ll costs* of removal or remedial action *incurred by* the United States Government *or a State or an Indian Tribe* not inconsistent with the national contingency plan;

42 U.S.C. § 9607(a)(4)(A) (emphasis added).

CERCLA defines "removal" and "remedial action" (collectively "response" actions) by the nature of the activities, without respect to the specific legal authority, if any, under which the actions are taken or compelled. *See* 42 U.S.C. § 9601(23), (24), (25). CERCLA also expressly defines "response" actions to "*include enforcement activities related thereto*."

[4] While the State settled its response costs claim with Teck, Teck's challenge to the Tribes' award of enforcement-related response costs could, if accepted, impair the State's ability to recover such costs in the future in this and other cases. The State thus has an interest in the issue.

42 U.S.C. § 9601(25) (emphasis added); *see also Key Tronic Corp. v. United States*, 511 U.S. 809, 813 (1994). In plain terms, then, Section 9607(a)(4)(A) provides that persons liable under CERCLA are liable to each of three entities—the United States Government, States, and Indian Tribes—for *all costs* associated with activities that constitute "removal" and "remedial action." 42 U.S.C. § 9607(a)(4)(A). These activities are expressly defined to include all related "enforcement activities," 42 U.S.C. § 9601(25), which this Court has held to include reasonable attorneys' fees. *United States v. Chapman*, 146 F.3d 1166 (9th Cir. 1998).

Teck, however, argues that unless a tribe (or state) has entered into a cooperative agreement with the EPA by which it is "delegated" enforcement authority under CERCLA Section 9604, the tribe (or state) cannot, under Section 9607(a)(4)(A), recover response costs associated with "enforcement activities." *See* Dkt. 18-1, at 32-34. Teck also asserts that to be a recoverable "enforcement activity," a lawsuit must seek to compel compliance with a CERCLA cleanup obligation or order. *Id*. at 37.

Teck is wrong on both counts. First, Teck is mistaken that a Section 9604 agreement "delegates" or conveys any federal law (CERCLA) authority to a state or tribe. Second, under established precedent, there is no basis to

restrict "enforcement activities" to only those activities undertaken in conjunction with a Section 9604 agreement, or only those activities undertaken to compel compliance with an existing CERCLA obligation established by the United States.

a. Section 9604(d) agreements do not convey CERCLA authority to states or tribes

At the threshold, Teck misapprehends the operation of cooperative agreements under Section 9604. Section 9604 authorizes the President to undertake removal and remedial actions using "Superfund" dollars. *See* 42 U.S.C. § 9604(a)(1). It also authorizes the President to enter into contracts or cooperative agreements authorizing states or tribes to use Superfund dollars to undertake such actions. *See* 42 U.S.C. § 9604(d)(1)(A); 40 C.F.R. § 300.515(a)(1). Contrary to Teck's understanding, however, these agreements do not delegate CERCLA enforcement authority, or any other authority, from the federal government to a state or a tribe. Instead, states and tribes enter into—and carry out—such agreements based on their own organic authority.

Nothing in the language of Section 9604(d)(1) purports to grant federal authority to states or tribes, or "deputize" states or tribes as federal agents upon entering into a cooperative agreement. *See* 42 U.S.C. § 9604(d)(1)(A). Instead, the plain language of Section 9604(d)(1) dictates simply that the President

must determine that a state or tribe itself "*has the capability* to carry out any or all such [response] actions . . . *and to carry out related enforcement actions* . . . ." *Id*. (emphasis added). This is confirmed by the federal regulations that define the eligibility criteria for such agreements:

> To be eligible for an enforcement Cooperative Agreement, the State, political subdivision or Indian Tribe must demonstrate that *it has the authority*, jurisdiction, and the necessary administrative capabilities *to take an enforcement action(s)* to compel PRP cleanup of the site, or recovery of the cleanup costs.

40 C.F.R. § 35.6145 (emphasis added).

In the case of the State, this authority is derived from, among other sources, Wash. Rev. Code § 43.21A.440 (authorizing the Washington Department of Ecology to "participate fully in . . . and administer all programs of [CERCLA] . . . contemplated for state participation and administration under that act"), as well as the State's sovereign authority to bring lawsuits to vindicate its interests, such as through an action to recover response costs under Section 9607(a)(4)(A).[5] The State can also independently compel response activities through its state-law analog to CERCLA, the Model Toxics Control Act. *See* Wash. Rev. Code § 70.105D.

[5] This is the "inherent enforcement authority" the district court referenced in its Order on Reconsideration. *See* ER 175.

b. "Enforcement activities" are not limited to activities undertaken in conjunction with a Section 9604 agreement

More broadly, there is no basis to restrict the "enforcement activities" recoverable under Section 9607(a)(4)(A) to only those activities undertaken in conjunction with a Section 9604 agreement. Nothing prevents a state or a tribe from spending their own dollars on a cleanup effort instead of drawing from the Superfund, and then under Section 9607(a)(4)(A) seeking to recoup those dollars from liable persons. For instance, a state or tribe may compel a liable person to clean up a site under the force of state or tribal law (e.g., Washington's Model Toxics Control Act), but seek the recoupment of response costs associated with compelling the action under 42 U.S.C. § 9607(a)(4)(A). *See, e.g.*, *Fireman's Fund*, 302 F.3d at 935, 953. Or, a state or tribe may wholly perform all cleanup tasks itself in its capacity as a sovereign, and then seek the recoupment of response costs. *See, e.g., Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir 1988).

Speaking to this point, this Court has already held that response cost recovery under Section 9607(a)(4)(A) is *not* dependent on whether a state or tribe has entered into a Section 9604 agreement. In *Washington State Department of Transportation v. Washington Natural Gas*, 59 F.3d 793 (9th

Cir. 1995) (*WSDOT*), this Court rejected as "unfounded" the argument that a state must be acting under a Section 9604 agreement in order to recover response costs under Section 9607(a)(4)(A). *WSDOT*, 59 F.3d at 801. The Court noted that Section 9607(a)(4)(A) allows for the recovery of response costs "'notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b).'" *Id.* (quoting 42 U.S.C. § 9607(a)(4)(A)). Adopting the position that a Section 9604 agreement—or any other advance "authorization" from the federal government—is a prerequisite for state or tribal response action and cost recovery would require reading the "notwithstanding" clause out of the statute, as well as "creating an authorization requirement where none presently exists." *Id.* "States need not obtain EPA authorization to cleanup hazardous waste sites and recover costs from potentially responsible parties." *WSDOT*, 59 F.3d at 801.

c. "Enforcement activities" are not limited to compelling compliance with an existing CERCLA obligation established by the United States

There is also no basis to restrict response action-related "enforcement activities" to only those activities aimed at compelling compliance with a cleanup obligation or order imposed pursuant to federal authority under CERCLA. Teck cites no authority for this proposition. *See* Dkt. 18-1, at 37. By

the statute's plain language, "enforcement activities" must be "related" to "removal" or "remedial action." 42 U.S.C. § 9601(25). Once again, neither "removal" nor "remedial action" are defined in relation to the specific legal authority, *if any*, under which they are taken or compelled. *See* 42 U.S.C. § 9601(23), (24), (25).

Given this, it is not surprising that the Supreme Court has never construed "enforcement activities" as narrowly as Teck. In *Key Tronic*, the Court addressed whether, under a different CERCLA response cost recovery subsection, private parties are entitled to attorneys' fees as "enforcement costs." *Key Tronic*, 511 U.S. at 815-16. The Court held that private parties are not so entitled. *Id*. at 819. Significantly, however, the Court did not reach its result based on restricting "enforcement activities" to only those taken in enforcing an EPA-issued order, or those taken in conjunction with a Section 9604 agreement. The Court instead simply held that the phrase "enforcement activity" is "not sufficiently explicit to embody a private action under § 107 to recover cleanup costs," while offering "no comment" on "the extent to which that phrase forms the basis" for the recovery of attorneys' fees under Section 9607(a)(4)(A). *Id*. at 819. In dissent, Justice Scalia notably argued that the phrase "enforcement activities" is broad enough to include the assertion of a

valid private claim against another private litigant. *Id*. at 824 (Scalia, J., dissenting).

Four years after *Key Tronic*, this Court distinguished between private response cost recovery and recovery under Section 9607(a)(4)(A) in holding that the federal government is entitled to attorneys' fees under Section 9607(a)(4)(A). *Chapman*, 146 F.3d at 1175. The Court declared: "Section 107(a)(4)(A) evinces an intent to provide for attorney fees because it allows the government to recover '*all costs* of removal or remedial action' *including 'enforcement activities.'*" *Id*. (emphasis added).

There is no basis for a different result in this case. Congress bundled states, tribes, and the federal government together without distinction in Section 9607(a)(4)(A). *See* 42 U.S.C. § 9607(a)(4)(A). To quote *Chapman*, liable persons are responsible to all three entities for "'*all costs* of removal or remedial action' including 'enforcement activities.'" *Chapman*, 146 F.3d at 1175; *see also Fireman's Fund*, 302 F.3d at 953 ("Attorney's fees recoverable by states are included in the definition of 'all costs.'"). As established below, the Tribes' actions in this case constitute "enforcement activities" related to "removal or remedial action."

2. The Tribes' investigative and litigation activities are "enforcement activities" related to "removal or remedial action"

The findings and conclusions of the district court outline in detail the nature and effect of the Tribes' investigative and litigation activities. *See* ER 11-22 (Findings 5-9, 14-34); ER 28-29 (Conclusions 8-13); ER 31 (Conclusion 17); ER 33-34 (Conclusions 20-24); ER 37 (Conclusion 32). In simple terms, Teck has steadfastly fought CERCLA liability at the UCR Site for nearly twenty years. Its "settlement agreement" with the EPA is notably *not* a CERCLA legal instrument. ER 13 (Finding 10 n.1); ER 14 (Finding 13); ER 22 (Finding 34). It does not establish, or even assert, CERCLA liability, nor does it not commit Teck to take any further response actions beyond its strict terms. ER 13 (Finding 10 n.1); ER 14 (Finding 13); ER 22 (Finding 34). Significantly, in findings and conclusions Teck does not directly challenge, *see* Dkt. 18-1, at 35-40, the district court determined that the Tribes' (and State's) actions have materially advanced the status of cleanup at the UCR Site by establishing Teck's liability under CERCLA and supplementing "to achieve greater results" the state of knowledge concerning the nature and extent of contamination at the UCR Site. *See* ER 15 (Finding 15); ER 18-20 (Findings

22-27, 29); ER 21 (Findings 32-34); ER 33-34 (Conclusions 20-24); ER 40 (Conclusion 37).

Action by the federal government, a state, or a tribe to evaluate and establish an entity's liability under CERCLA is the axiom of "enforcement activity" related to "removal or remedial action." *See* 42 U.S.C. § 9601(25); 42 U.S.C. § 9607(a)(4)(A). The district court did not err in awarding the Tribes its enforcement costs (including reasonable attorneys' fees) associated with establishing Teck's liability under CERCLA for the UCR Site.

D. The District Court Properly Dismissed Teck's Divisibility Defense Because Teck Failed to Properly Define the Harm and Cannot Establish That the Site Is Theoretically Capable of Apportionment

A defendant found liable in a government cost recovery suit is jointly and severally liable for all costs unless the defendant establishes that there is a reasonable and rational basis to divide the harm at the site. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (*BNSF*). The "harm" to be divided is the overall presence of hazardous substances—from whatever source—and the response costs incurred to address the resulting contamination. *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993), *overruled on other grounds by United States v. E.I. Dupont De Nemours & Co. Inc.*, 432 F.3d 161 (3d Cir. 2005); *see also* 42 U.S.C. § 9607(a)(4)(A)

(CERCLA liable parties responsible for "*all* costs" of remediation) (emphasis added). In response to the State's and Tribes' motions for summary judgment on this defense, Teck failed to meet this burden. The district court thus appropriately dismissed the defense.

Teck admits it did not attempt to apportion the full harm at the UCR Site. Dkt. 18-1, at 55. Instead, despite its knowledge of a wide range of contaminants at the Site, Teck limited its divisibility case to the "harm" from seven metals that formed the core of Plaintiffs' CERCLA liability case. In doing so, Teck conflated its burden in showing divisibility with the minimal burden the Plaintiffs' must show to establish Teck's liability—a fatal defect.

But even if this Court accepted Teck's attempt to apportion only seven of the dozens of contaminants at the UCR Site, Teck's defense still fails. Teck failed to show that the harm it did analyze is capable of apportionment. This is consistent with the case law finding that harms of the type presented by commingled river contamination are typically indivisible. Furthermore, the expert opinion Teck relied upon to claim it had evidence of metals delivered from other mining operations was excluded on a *Daubert* motion. Because Teck failed to challenge that exclusion, the record before this Court shows that Teck cannot establish any quantity of metals at the UCR Site from upland

mines—which was supposed to be the largest other source of metals alleged by Teck in its divisibility defense.

In short, Teck's approach to divisibility upends the liability scheme Congress adopted for CERCLA by effectively shifting the divisibility burden to the plaintiffs. This Court should reject Teck's strained analysis of its divisibility defense and affirm the district court dismissal.

1. Liability under CERCLA is strict, joint and several, unless a clear basis for dividing harm is shown

Courts have repeatedly construed CERCLA broadly to accomplish its remedial goals. *See, e.g.*, *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1343 (9th Cir. 1992). The foremost of these goals is to provide "effective responses to health and environmental threats posted by hazardous waste sites." *Team Enters., LLC v. W. Inv. Real Estate Trust*, 721 F. Supp. 2d 898, 903 (E.D. Cal. 2010) (citing *United States v. Burlington N. & Santa Fe Ry. Co.*, 502 F.3d 781, 792 (9th Cir. 2007), *rev'd on other grounds*, 556 U.S. 599 (2009)). And, CERCLA's primary tool for effectuating this goal is to encourage early settlement and expeditious cleanups by imposing strict, joint and several liability for cleanup costs from liable parties. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc).

To establish liability, government plaintiffs need only show that there has been a *single* release of a *single* contaminant at a site (or even just the threat of a release) and that the plaintiff has incurred some response costs.[6] *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2d Cir. 1993). There is no causation aspect to this burden, and government plaintiffs need not show that the defendant's release specifically gave rise to the response costs.[7] *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 264 (3d Cir. 1992).

While this liability scheme may produce harsh results, it furthers a clear policy of placing the cost of cleaning up environmental harm on "the parties who benefited from the disposal of the wastes that caused the harm" rather than the taxpayers. *EPA v. Sequa Corp. (In re Bell Petroleum Servs., Inc.)*, 3 F.3d

[6] Plaintiffs need not show that the release of a hazardous substance be of any threshold magnitude. Judge Kozinski of this Court famously quipped: "Drop an old nickel that actually contains nickel? A CERCLA violation. Throw out an old lemon? It's full of citric acid, another hazardous substance . . . CERCLA leaves us little choice but to agree." *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998).

[7] This Court has yet to clarify whether a government plaintiff must establish that a defendant's releases of hazardous substances gave rise to response costs. In the context of CERCLA actions by private parties, courts in the Ninth Circuit have generally found that this Court's prior rulings establish that CERCLA plaintiffs need only show a "loose nexus" between the defendant's release and response costs. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 287 F. Supp. 2d 1118, 1185-86 (E.D. Cal. 2003). In any event, Teck concedes that its releases have caused Plaintiffs to incur response costs. ER 412.

889, 897 (5th Cir. 1993) (*Bell Petroleum*). Thus, CERCLA's low bar for liability, along with its strict liability scheme, allows governments to perform remedial actions up front and then recover cleanup costs from *any* liable party. *See, e.g.*, *Alcan*, 990 F.2d at 723 (recognizing that Congress intended CERCLA liability to be determined "immediately for enforcement purposes" with contribution actions among the PLPs occurring afterwards).

2. Teck's divisibility burden is a heavy one that, even post-*BNSF*, remains the exception rather than the rule

While joint and several liability is CERCLA's default, courts have recognized that, under certain circumstances, a CERCLA defendant may show that its cleanup liability can be apportioned and thus limited (known alternatively as "apportionment" or "divisibility"). *BNSF*, 556 U.S. at 613-14. In contrast to the low bar for establishing liability, however, the bar for establishing that liability is divisible is quite high. Using Section 433A of the Restatement (Second) of Torts as a guide (the "Restatement"), apportionment is proper only when the defendant carries its burden to demonstrate there are distinct harms or that there is "a reasonable basis for determining the contribution of [multiple parties] to a single harm." *Id*.

While often termed a "defense" by courts, divisibility is only a defense to the joint and several nature of CERCLA liability; it is not a defense to

liability itself and, as such, does not impact a CERCLA plaintiff's burden. *See BNSF*, 556 U.S. at 613-14 (describing the genesis of divisibility); *see also United States v. Monsanto Co.*, 858 F.2d 160, 170 (4th Cir. 1988) (noting that the divisibility burden falls solely on "the defendant who profited from the generation and inexpensive disposal of hazardous waste"). Furthermore, equity to the defendant does not play a part in the divisibility analysis; assuring fairness among multiple liable parties is instead "the proper subject of the contribution stage, not of apportionment at the liability stage." *Burlington N.*, 502 F.3d at 940-41.

As the Supreme Court has affirmed, "[n]ot all harms are capable of apportionment." *BNSF*, 556 U.S. at 614. Divisibility must be proven by "concrete and specific" evidence. *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8th Cir. 2011). Following *BNSF*, courts have repeatedly held that, where a defendant's proof on causation is unclear or where there are doubts about the reasonableness of apportioning liability, courts should avoid apportionment altogether by imposing joint and several liability. *See, e.g.*, *BNSF*, 556 U.S. at 614-15; *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 482 (D. S.C. 2011).

The divisibility burden is thus high and divisibility is the exception, not the rule. *See id.* This has proven particularly true at complex sites with lengthy histories of contamination and extensive commingling of contaminants. *See, e.g.*, *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989) (courts generally find it "simply is impossible to determine the amount of environmental harm caused by each party" when contamination has commingled). The district court properly held that Teck failed to meet this high burden.

3. Teck's purposeful failure to offer evidence that analyzes the full scope of harmful contaminants at the UCR Site is fatal to its divisibility case

For Teck to mount a successful divisibility case, it was required to: (1) show that the harm at the UCR Site is theoretically capable of apportionment; and (2) provide a reasonable and rational basis to apportion that harm.

Teck failed in this task. Rather than address what was actually in the UCR Site, Teck expressly limited its divisibility analysis to seven metals it alleged formed the Plaintiffs' case for Teck's liability: the six metals Plaintiffs expressly listed in their complaints, plus antimony. *See* ER 768. Teck then further limited its analysis to the top five centimeters of UCR Site sediments. ER 749. As set out below, Teck's arguments as to why this limiting was

reasonable or comports with CERCLA are unconvincing. Instead, and as the district court found, Teck does not satisfy the threshold requirement of showing the harm is capable of apportionment because it failed to account for all of the harm.

a. Teck's explanations for limiting its defense fails because Teck had full knowledge that the "harm" at the UCR Site was much broader than its divisibility analysis

Teck's primary argument for limiting its divisibility defense to the Plaintiffs' liability burden is that it did not have "fair notice" of Plaintiffs' claims under the Civil Rules such that it could anticipate the scope of its divisibility defense. Dkt. 18-1, at 58-59. Teck fails to show how notice was inadequate.

As the district court found, and as noted above, Plaintiffs' complaints established that the Plaintiffs sought to recover response costs for cleaning up "the entire UCR Site" including "all of the hazardous substances released from the Site, from whatever source." ER 103; *see also* ER 1179, ¶ 1.2; ER 1195, ¶ 1.3. It is also "apparent" from the four corners of the complaints that Plaintiffs did not limit the allegations of harm to "only six metals . . . from Teck's slag and/or liquid effluent" or that the harm was "limited to the first five centimeters of the sediment" at the UCR Site. ER 103.

As a result, while Plaintiffs must plead and prove each element of a claim, Teck cites to no evidence that there was a failure to do so here. Plaintiffs asserted that the UCR Site was contaminated with hazardous substances, including but not limited to those discharged by Teck. ER 1181-83, 1201. Plaintiffs asserted that Teck's discharges, including but not limited to the listed metals, caused releases of hazardous substances at the UCR Site. ER 1182, 1189. And, Plaintiffs asserted an intent to hold Teck liable to cleanup the entire Site. ER 1179, 1195. Indeed, aside from expressly reminding Teck in the complaints that a divisibility defense (if it chose to bring one) would need to account for all the harm at the Site, it is unclear what exactly more Teck would need in terms of "fair notice" to establish its defense. Much like plaintiffs are the masters of their claims, defendants are the masters of their defenses. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995). Teck's willful decision to frame its defense on a novel reading of CERCLA case law cannot be placed on Plaintiffs' shoulders.

Teck next complains that, because Plaintiffs' expert reports focused on Teck's contributions to metals at the Site, Teck did not know Plaintiffs were "concerned" with other contaminants at the UCR Site. Dkt. 18-1, at 63. But, evidence of contamination from other sources is irrelevant to Plaintiffs' case

against Teck because non-Teck contamination cannot be used to establish Teck's liability. Indeed, had Plaintiffs produced expert opinions on non-Teck sources of contamination, those opinions would have been unlikely to withstand exclusion based on Evidence Rule 401 grounds. The burden to establish divisibility and present evidence of other sources of harm remained with Teck, not Plaintiffs. *See BNSF*, 556 U.S. at 614.

Teck's claimed ignorance of concerns over other contaminants is further belied by the fact that, as Teck was formulating its defense, it was working with EPA on an investigation of the UCR Site, with the mandated involvement of both the State and the Tribes. SER 62. As the record shows, the plan for that investigation identified approximately 199 contaminants of concern, including non-metal organics such as PAHs (polycyclic aromatic hydrocarbons) and PCBs (polychlorinated biphenyls), dioxins and furans, and a number of pesticides. SER 63. At that time, sampling results already indicated that contaminants at the UCR Site were consistently commingled in surface water, sediments, and porewater throughout the Site. *Id*.

As a result, Teck's argument that it did not understand the full scope of harm at the UCR Site Plaintiffs sought to remediate is not credible and was

properly rejected as a basis for lowering what it needed to prove to demonstrate divisibility.

b. Teck's arguments constitute a radical departure from CERCLA liability that finds no support in CERCLA case law

Teck's attempt to lower its divisibility burden also contravenes the CERCLA liability burden established by Congress and supported by decades of case law.

To establish a defendant's joint and several liability at a site, plaintiffs need only prove there was a release or a threatened release of *any* hazardous substance from the defendant, regardless of contributions of other substances by that defendant or third parties not named in the lawsuit. *Alcan*, 990 F.2d at 723. As noted, Plaintiffs have no burden to prove causation and no burden with regard to divisibility. *BNSF*, 556 U.S. at 614 (at all times, the burden remains on the party seeking apportionment to "prove[] that a reasonable basis for apportionment exists").

Teck's position flips this burden on its head in a way that would constitute a massive expansion of CERCLA divisibility and evisceration of the original liability scheme, defeating the long-recognized Congressional intent. If the "harm" to be apportioned is artificially limited to what plaintiffs presented

to establish liability, CERCLA plaintiffs would be forced to plead and prove the presence of *all* contamination from *all* sources in order to avoid up-front "pre-apportionment" of the harm. This is not what Congress envisioned when it allowed government plaintiffs to obtain an early liability determination—applicable to just one responsible party at a site—to effectuate cleanup quickly and with allocation of costs among liable parties occurring later via contribution actions. *See, e.g.*, *Alcan*, 990 F.2d at 723.

The cases cited by Teck do not support its argument that divisibility is limited by a plaintiff's liability case. Far from stating that divisibility is tied to the type of contamination traceable to the defendant, *Bell Petroleum* merely sets out the undisputed standard for establishing divisibility. *See Bell Petroleum*, 3 F.3d at 896. In doing so, *Bell* actually cuts against Teck's argument by expressly acknowledging that the normal burdens of proof tying plaintiffs' claims and defendants' defenses together "does not apply in CERCLA cases" because CERCLA liability does not require causation. *Id.* at 896. Similarly, the *Alcan* case merely sets out the proposition that defendants can escape liability altogether (obviating the need for divisibility) if the plaintiff fails to show that the substances used to establish liability do not contribute to the harm. *Alcan*, 990 F.2d at 722. *Alcan* then expressly reiterates

that a plaintiff's burden on liability is wholly independent of the defendant's divisibility burden. *Id*. And, *Coeur d'Alene Tribe* only considered harm from defendants' tailings because mine tailings were the *only* contaminants at the lake requiring remediation, and the tailings all contained the same metals in the same amounts. *Coeur d'Alene Tribe*, 280 F. Supp. 2d at 1120 (recognizing that the cause of the harm alleged was from "the dumping of the tailings into the waterways" by the defendants and that defendants' tailings were all substantially similar in composition).

Teck's citation to *BNSF* as constituting some sort of sea change in divisibility is also misplaced. While the Supreme Court's *BNSF* decision indicated that divisibility need not be exact, *BNSF* did not substantively change CERCLA defendants' divisibility burdens. *See BNSF*, 556 U.S. at 613-14 (reiterating the established divisibility framework); *see also Ashley II*, 791 F. Supp. 2d at 483 (*BNSF* did not change the law or mandate apportionment, but was "simply a reiteration of established law applied to the specific facts of the case"). And, in any event, *BNSF* did not address the question now before this Court, i.e., whether Teck can limit its divisibility defense to only the contaminants used to establish its liability. In short, Teck's radical departure

from CERCLA's liability and divisibility burdens finds no support in the case law.

c. Teck chose to litigate divisibility during the liability phase and must now live with that decision

Teck's complaint that it was forced to develop its divisibility defense before the UCR Site had been fully investigated also fails. As noted, divisibility is not a defense to liability itself—it is a limit on joint and several liability. While divisibility is often tried at the same time as liability, courts have recognized that this approach does not always make sense. *See, e.g.*, *Alcan*, 990 F.2d at 723. In this case, while Teck was denied a stay of Plaintiffs' liability case pending further UCR Site investigation(s), Teck made no attempt to postpone its divisibility defense and chose to litigate divisibility in Phase I.[8] ER 119. Teck's request to be relieved of the consequences of that choice should be rejected.

Furthermore, Teck's complaint about the unavailability of UCR Site data during Phase I rings hollow. Teck itself was conducting the remedial investigation and was in substantial control of the speed at which that investigation occurred. In fact, EPA ultimately took control of the remedial

[8] Teck does not appeal the district court's denial of its motion to delay the liability phase.

investigation from Teck because of Teck's lack of progress and its inappropriate focus on other sources. SER 93-101. If Teck's litigation of divisibility in phase I was premature, it was a mistake wholly of Teck's making and one that Teck must now live with.

4. Even if Teck could claim divisibility based solely on contaminants used to establish its liability, which is not the law, Teck still fails to establish that the Site is capable of apportionment

Even if this Court agrees that a CERCLA defendant's divisibility burden is coextensive with plaintiff's liability case, the district court should be affirmed because Teck fails to show that the Site is capable of apportionment.

Contrary to Teck's brief, river pollution does not "exemplify" divisible harm. While Comment *d.* of Restatement (Second) of Torts § 433A uses river discharges as an example of dividing responsibility for lost use (i.e., private nuisance), Teck fails to disclose that other Restatement comments—far more analogous to the CERCLA claim in this case—illustrate that river pollution by multiple parties causing harm to natural resources exemplify *indivisible* harm.

Specifically, Comment *i.* cautions that, unlike private nuisance, harms to tangible property and/or natural resources are "normally singular and indivisible." Restatement cmt. *i.* The Restatement then provides an illustration: Where two parties pollute a stream and cause harm to animals that use the

stream, liability for that harm is joint and several. *See* Restatement § 433A cmt. *i.*, illus. 14-15 ("A Company and B Company each negligently discharge oil into a stream. . . . C's cattle drink the water of the stream, are poisoned by the oil and die." In that case, "C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them."). The harm to the cattle illustrated in Comment *i.* is much more apt an analogy than Comment *d.* Plaintiffs' claims in this case are not based on a private loss of enjoyment. Plaintiffs' CERCLA claims are based on remedying harms to tangible property, including harm to State-owned wildlife.

Furthermore, remedying UCR Site harm is wholly independent of which party contributed what amount because the contamination at the Site is commingled. Teck argues for a contaminant-by-contaminant apportionment (and claims it is only 0.05% liable for only zinc). But, just as it is impossible to determine what amount of oil from what source contributed to the death of the cattle in the Restatement's illustration, there is no way to determine what metal is responsible for what amount of the harm. This is because each metal will independently drive the need for the cleanup, and the remedy for all will be the same (dredging, capping, removals, etc.).

Indeed, the Seventh Circuit recently examined a situation similar to the present case and concluded that commingled contamination of a river from multiple sources was not divisible. *United States v. NCR Corp.*, 688 F.3d 833, 839 (7th Cir. 2012). In doing so, the Court recognized that the cost of remediating the sediments (i.e., the "harm") was the same regardless of whether the need for remediation was caused wholly by the defendant's contributions or those of other parties. *Id*. As the Court explained, "the need for cleanup triggered by the presence of [contaminants] in the River is not linearly correlated to the amount of PCBs that each paper mill discharged . . . once the [contaminants] rise above a threshold level, their presence is harmful and the River must be cleaned." Thus, "the underlying harm caused—the creation of a hazardous, polluted condition—[is not divisible]."[9] *Id*. at 840. Teck's volumetric and contaminant-specific approach to divisibility fails here for the same reason. Regardless of whether Teck is only responsible for the zinc in

[9] In a later proceeding, the defendant in *NCR* showed that remediation costs and the relevant amount of contaminants were in fact correlated, and—on that basis—the Court agreed the harm was theoretically capable of apportionment. *See United States v. P.H. Gladfelter Co.*, 768 F.3d 662, 678 (7th Cir. 2014); *but see United States v. NCR Corp.*, No. 10-C-910, 2015 WL 6142993, at *1 (E.D. Wis. Oct. 19, 2015) (finding on remand that NCR failed to establish a theoretical basis to apportion because it failed to analyze its full contributions to the site). Unlike *Gladfelter*, however, in this case there is no evidence in the record to establish that the volume of zinc at the UCR Site and remediation costs are correlated.

UCR sediments, Teck failed to make any showing that the volume of contaminants correlates to the cost of remediation.

Teck's failure to analyze potential synergistic effects of commingled contamination also renders its apportionment approach unworkable. Courts have long recognized that, at sites where commingled contamination may produce conditions more harmful than the presence of any one contaminant alone, looking solely at the amount of contamination present "will not suffice . . . to estimate the harm." *Id*. at 841 (citing *Monsanto Co.*, 858 F.2d at 173 n.27); *see also United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 811 (D.C. Ohio). Teck's assertion that its experts did analyze the possibility of synergistic effects is misleading. *See* Dkt. 18-1, at 66. While Teck's experts did opine that there was no increased harm from the commingling of Teck's contaminants with other contaminants at the Site, that conclusion was based entirely on Teck's assertion that such impacts were impossible because Teck's slag did not leach. ER 875 ("Dr. Johns considered that Teck's slag was [merely] co-located [rather than commingled] because it is not leaching, Dr. Johns undertook *no further analysis*" (emphasis added)). Teck has since *admitted* that its slag leaches metals at the Site. Its failure to examine the

commingled nature of UCR Site is another flaw justifying dismissal of Teck's divisibility defense. *See, e.g.*, *NCR*, 688 F.3d at 841.

Finally, Teck faces insurmountable difficulties in establishing any reasonable basis to apportion liability if divisibility is remanded. As noted, the vast majority of allegedly non-Teck metals that Teck pointed to were purportedly from tailings from upland mining sites. ER 786-87. Teck's theory was that either rainfall eroded tailings piles or tailings were discharged to tributaries, carrying the tailings to the Columbia River and ultimately to the UCR Site. ER 786. To calculate the volume of tailings eroded to the River for its divisibility analysis, Teck's divisibility expert relied solely on the work of Mr. Adrian Brown, who was purportedly an expert in the fate and transport of mine tailings in the environment. ER 786-87. However, the district court excluded Mr. Brown's opinions as "arbitrary" and "not scientifically reliable" because they were "not grounded in any analytical or empirical methods" for determining the amount of materials transported to the UCR Site. SER 34. Teck does not appeal that exclusion and, thus, the record is devoid of any evidence to avoid summary judgment dismissal of its attempt to apportion its liability from those alleged other sources.

It is appropriate for this Court to rely on this absence of any admissible fate and transport evidence, because after *Daubert*, it is "implausible" to suggest that parties will "initially present less than their best expert evidence in the expectation of a second chance . . . ." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). Thus, "[i]n the normal course of events, district courts are well within permissible discretion to deny the opportunity to name a new expert after discovery has closed and a party receives an unfavorable *Daubert* ruling." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1256 (10th Cir. 2011). Here, Teck had years to develop its divisibility case and put its best foot forward. The parties spent considerable resources in discovery, expert witnesses, depositions, and motions practice based on that case. The prejudice to the Plaintiffs to re-do that work—years after the discovery cutoff—would be extreme. Teck is now stuck with the divisibility case it brought. Because it has no basis to apportion liability to the most significant of other sources it alleged contributed metals to the UCR Site, even on remand Teck cannot present a reasonable basis to apportion as a factual matter.

E. Under the Law of The Case Doctrine, Teck Cannot Relitigate the Extraterritoriality and "Arranger Liability" Issues Decided in *Pakootas I*

Finally, Teck re-raises two arguments already rejected by this Court in *Pakootas I*: (1) that this case presents an extra-territorial application of CERCLA; and (2) that Teck cannot be liable as an "arranger" of the disposal of hazardous substances under CERCLA Section 9607(a)(3) without another person or entity involved. Dkt. 18-1, at 68-71. Teck acknowledges that the Court has already decided these issues, but raises them again to "preserve" the issues for potential future review. *Id*. at 68.

Under the law of the case doctrine, a court will ordinarily not reexamine an issue previously decided by the same or a higher court in the same case. *United States v. Jingles*, 702 F.3d 494, 499-500 (9th Cir. 2012). The issue in question must have been decided explicitly or by necessary implication in the previous disposition. *Id.* at 499. If this is the case, the previous decision "must be followed in all subsequent proceedings in the same case . . . , unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1096–97 (9th Cir.

1994) (citing *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833-34 (9th Cir. 1982)).

The two issues Teck re-raises were decided explicitly in *Pakootas I*. *Pakootas I*, 452 F.3d at 1073-79 (extraterritoriality issue), 1079-82 (arranger liability issue). Teck identifies no change in controlling authority related to the issues. *See* Dkt. 18-1, at 68-71. Nor does Teck present any argument that *Pakootas I* is clearly erroneous and presents a manifest injustice. *Id*. It simply disagrees with the previous outcomes. Under the law of the case doctrine, *Pakootas I* is binding on the extraterritoriality and "arranger liability" issues. *Jingles*, 702 F.3d at 499.

VIII. CONCLUSION

For the foregoing reasons and the reasons stated in the Tribes' response brief, the decision of the district court should be upheld.

RESPECTFULLY SUBMITTED this 30th day of June 2017.

ROBERT W. FERGUSON
Attorney General

s/ Andrew A. Fitz
ANDREW A. FITZ, WSBA No. 22169
Senior Counsel
KELLY T. WOOD, WSBA No. 40067
Assistant Attorney General
Attorneys for Intervenor-Plaintiff-Appellee
State of Washington
(360) 586-6770

STATEMENT OF RELATED CASES

Plaintiff/Intervenor–Appellee is not aware of any case that may be deemed related to this case pursuant to Ninth Circuit Local Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,896 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

DATED this 30th day of June 2017.

s/ Andrew A. Fitz
ANDREW A. FITZ
Senior Counsel
(360) 586-6770

PROOF OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 30, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 30th day of June 2017.

s/ Andrew A. Fitz
ANDREW A. FITZ, WSBA No. 22169
Senior Counsel
(360) 586-6770

ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the addendum to Appellant Teck Metal's Opening Brief.

TABLE OF CONTENTS

Federal Statutes

State Statutes

Federal Regulations

Rules

Other

42 U.S.C. § 9601
(CERCLA § 101)

§ 9601. Definitions

For purpose of this subchapter—

*****

(9) The term "facility" means . . . (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

*****

(23) *See* Teck Addendum at 1.

(24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and

offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) *See* Teck Addendum at 1.

42 U.S.C. § 9607
(CERCLA § 107)

§ 9607. Liability

(a) *See* Teck Addendum at 9.

*****

(a)(4)(A), (B) *See* Teck Addendum at 9.

*****

(f) Natural resources liability; designation of public trustees of natural resources

(1) Natural resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government

as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) Designation of Federal and State officials

(A) Federal

The President shall designate in the National Contingency Plan published under section 9605 of this title the Federal officials who shall act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this chapter and such section 1321 of Title 33 for those resources under their trusteeship and may, upon request of and reimbursement from a State and at the Federal officials' discretion, assess damages for those natural resources under the State's trusteeship.

42 U.S.C. § 9613
(CERCLA § 113)

§ 9613. Civil proceedings

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

42 U.S.C. § 9659
(CERCLA § 310)

§ 9659. Citizens suits

(g) Intervention

In any action under this section, the United States or the State, or both, if not a party may intervene as a matter of right. For other provisions regarding intervention, see section 9613 of this title.

Wash. Rev. Code § 43.21A.440

Department authorized to participate in and administer federal Comprehensive Environmental Response, Compensation and Liability Act.

The department of ecology is authorized to participate fully in and is empowered to administer all programs of the federal Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 et seq.), as it exists on July 24, 1983, contemplated for state participation and administration under that act.

Wash. Rev. Code § 70.105D.030

Department's powers and duties.

(1) The department may exercise the following powers in addition to any other powers granted by law:

(a) Investigate, provide for investigating, or require potentially liable persons to investigate any releases or threatened releases of hazardous substances, including but not limited to inspecting, sampling, or testing to determine the nature or extent of any release or threatened release. If there is a reasonable basis to believe that a release or threatened release of a hazardous substance may exist, the department's authorized employees, agents, or contractors may enter upon any property and conduct investigations. The department shall give reasonable notice before entering property unless an emergency prevents such notice. The department may by subpoena require the attendance or testimony of witnesses and the production of documents or other information that the department deems necessary;

(b) Conduct, provide for conducting, or require potentially liable persons to conduct remedial actions (including investigations under (a) of this subsection) to remedy releases or threatened releases of hazardous substances. In carrying out such powers, the department's authorized employees, agents, or contractors may enter upon property. The department shall give reasonable notice before entering property unless an emergency prevents such notice. In conducting, providing for, or requiring remedial action, the department shall give preference to permanent solutions to the maximum extent practicable and shall provide for or require adequate monitoring to ensure the effectiveness of the remedial action;

(c) Indemnify contractors retained by the department for carrying out investigations and remedial actions, but not for any contractor's reckless or willful misconduct;

(d) Carry out all state programs authorized under the federal cleanup law and the federal resource, conservation, and recovery act, 42 U.S.C. Sec. 6901 et seq., as amended;

(e) Classify substances as hazardous substances for purposes of RCW 70.105D.020 and classify substances and products as hazardous substances for purposes of RCW 82.21.020(1);

(f) Issue orders or enter into consent decrees or agreed orders that include, or issue written opinions under (i) of this subsection that may be conditioned upon, environmental covenants where necessary to protect human health and the environment from a release or threatened release of a hazardous substance from a facility. Prior to establishing an environmental covenant under this subsection, the department shall consult with and seek comment from a city or county department with land use planning authority for real property subject to the environmental covenant;

(g) Enforce the application of permanent and effective institutional controls that are necessary for a remedial action to be protective of human health and the environment and the notification requirements established in RCW 70.105D.110, and impose penalties for violations of that section consistent with RCW 70.105D.050;

(h) Require holders to conduct remedial actions necessary to abate an imminent or substantial endangerment pursuant to RCW 70.105D.020(22)(b)(ii)(C);

(i) Provide informal advice and assistance to persons regarding the administrative and technical requirements of this chapter. This may include site-specific advice to persons who are conducting or otherwise interested in independent remedial actions. Any such advice or assistance shall be advisory only, and shall not be binding on the department. As a part of providing this advice and assistance for independent remedial actions, the department may prepare written opinions regarding whether the independent remedial actions or proposals for those actions meet the substantive requirements of this chapter or whether the department believes further remedial action is necessary at the facility. Nothing in this chapter may be construed to preclude the department from issuing a written opinion on whether further remedial action is necessary at any portion of the real property located within a facility, even if further remedial action is still necessary elsewhere at the same facility. Such a written opinion on a portion of a facility must also provide an opinion on the status of the facility as a whole. The department may collect, from persons requesting advice and assistance, the costs incurred by the department in providing such advice and assistance; however, the department shall, where appropriate, waive

collection of costs in order to provide an appropriate level of technical assistance in support of public participation. The state, the department, and officers and employees of the state are immune from all liability, and no cause of action of any nature may arise from any act or omission in providing, or failing to provide, informal advice and assistance. The department must track the number of requests for reviews of planned or completed independent remedial actions and establish performance measures to track how quickly the department is able to respond to those requests. By November 1, 2015, the department must submit to the governor and the appropriate legislative fiscal and policy committees a report on achieving the performance measures and provide recommendations for improving performance, including staffing needs;

(j) In fulfilling the objectives of this chapter, the department shall allocate staffing and financial assistance in a manner that considers both the reduction of human and environmental risks and the land reuse potential and planning for the facilities to be cleaned up. This does not preclude the department from allocating resources to a facility based solely on human or environmental risks;

(k) Establish model remedies for common categories of facilities, types of hazardous substances, types of media, or geographic areas to streamline and accelerate the selection of remedies for routine types of cleanups at facilities;

(i) When establishing a model remedy, the department shall:

(A) Identify the requirements for characterizing a facility to select a model remedy, the applicability of the model remedy for use at a facility, and monitoring requirements;

(B) Describe how the model remedy meets clean-up standards and the requirements for selecting a remedy established by the department under this chapter; and

(C) Provide public notice and an opportunity to comment on the proposed model remedy and the conditions under which it may be used at a facility;

(ii) When developing model remedies, the department shall solicit and consider proposals from qualified persons. The proposals must, in addition to describing the model remedy, provide the information required under (k)(i)(A) and (B) of this subsection;

(iii) If a facility meets the requirements for use of a model remedy, an analysis of the feasibility of alternative remedies is not required under this chapter. For department-conducted and department-supervised remedial actions, the department must provide public notice and consider public comments on the proposed use of a model remedy at a facility. The department may waive collection of its costs for providing a written opinion under (i) of this subsection on a cleanup that qualifies for and appropriately uses a model remedy; and

(l) Take any other actions necessary to carry out the provisions of this chapter, including the power to adopt rules under chapter 34.05 RCW.

(2) The department shall immediately implement all provisions of this chapter to the maximum extent practicable, including investigative and remedial actions where appropriate. The department shall adopt, and thereafter enforce, rules under chapter 34.05 RCW to:

(a) Provide for public participation, including at least (i) public notice of the development of investigative plans or remedial plans for releases or threatened releases and (ii) concurrent public notice of all compliance orders, agreed orders, enforcement orders, or notices of violation;

(b) Establish a hazard ranking system for hazardous waste sites;

(c) Provide for requiring the reporting by an owner or operator of releases of hazardous substances to the environment that may be a threat to human health or the environment within ninety days of discovery, including such exemptions from reporting as the department deems appropriate, however this requirement shall not modify any existing requirements provided for under other laws;

(d) Establish reasonable deadlines not to exceed ninety days for initiating an investigation of a hazardous waste site after the department receives notice or otherwise receives information that the site may pose a threat to

human health or the environment and other reasonable deadlines for remedying releases or threatened releases at the site;

(e) Publish and periodically update minimum clean-up standards for remedial actions at least as stringent as the clean-up standards under section 121 of the federal cleanup law, 42 U.S.C. Sec. 9621, and at least as stringent as all applicable state and federal laws, including health-based standards under state and federal law; and

(f) Apply industrial clean-up standards at industrial properties. Rules adopted under this subsection shall ensure that industrial properties cleaned up to industrial standards cannot be converted to nonindustrial uses without approval from the department. The department may require that a property cleaned up to industrial standards is cleaned up to a more stringent applicable standard as a condition of conversion to a nonindustrial use. Industrial clean-up standards may not be applied to industrial properties where hazardous substances remaining at the property after remedial action pose a threat to human health or the environment in adjacent nonindustrial areas.

(3) To achieve and protect the state's long-term ecological health, the department shall plan to clean up hazardous waste sites and prevent the creation of future hazards due to improper disposal of toxic wastes at a pace that matches the estimated cash resources in the state and local toxics control accounts and the environmental legacy stewardship account created in RCW 70.105D.170. Estimated cash resources must consider the annual cash flow requirements of major projects that receive appropriations expected to cross multiple biennia. To effectively monitor toxic accounts expenditures, the department shall develop a comprehensive ten-year financing report that identifies long-term remedial action project costs, tracks expenses, and projects future needs.

(4) By November 1, 2016, the department must submit to the governor and the appropriate legislative committees a report on the status of developing model remedies and their use under this chapter. The report must include: The number and types of model remedies identified by the department under subsection (1)(k) of this section; the number and types of model remedy proposals prepared by qualified private sector engineers, consultants, or contractors that were accepted or rejected under subsection (1)(k) of this section and the reasons for rejection; and the success of model

remedies in accelerating the cleanup as measured by the number of jobs created by the cleanup, where this information is available to the department, acres of land restored, and the number and types of hazardous waste sites successfully remediated using model remedies.

(5) Before September 20th of each even-numbered year, the department shall:

(a) Develop a comprehensive ten-year financing report in coordination with all local governments with clean-up responsibilities that identifies the projected biennial hazardous waste site remedial action needs that are eligible for funding from the state and local toxics control account and the environmental legacy stewardship account;

(b) Work with local governments to develop working capital reserves to be incorporated in the ten-year financing report;

(c) Identify the projected remedial action needs for orphaned, abandoned, and other clean-up sites that are eligible for funding from the state toxics control account;

(d) Project the remedial action need, cost, revenue, and any recommended working capital reserve estimate to the next biennium's long-term remedial action needs from both the local and state toxics control account and the environmental legacy stewardship account, and submit this information to the appropriate standing fiscal and environmental committees of the senate and house of representatives. This submittal must also include a ranked list of such remedial action projects for both accounts. The submittal must also identify separate budget estimates for large, multibiennia clean-up projects that exceed ten million dollars. The department shall prepare its ten-year capital budget plan that is submitted to the office of financial management to reflect the separate budget estimates for these large clean-up projects and include information on the anticipated private and public funding obligations for completion of the relevant projects.

(6) By December 1st of each odd-numbered year, the department must provide the legislature and the public a report of the department's activities supported by appropriations from the state and local toxics control accounts and the environmental legacy stewardship account. The report must be prepared and displayed in a manner that allows the legislature and the public

to easily determine the statewide and local progress made in cleaning up hazardous waste sites under this chapter. The report must include, at a minimum:

(a) The name, location, hazardous waste ranking, and a short description of each site on the hazardous sites list, and the date the site was placed on the hazardous waste sites list; and

(b) For sites where there are state contracts, grants, loans, or direct investments by the state:

(i) The amount of money from the state and local toxics control accounts and the environmental legacy stewardship account used to conduct remedial actions at the site and the amount of that money recovered from potentially liable persons;

(ii) The actual or estimated start and end dates and the actual or estimated expenditures of funds authorized under this chapter for the following project phases:

(A) Emergency or interim actions, if needed;

(B) Remedial investigation;

(C) Feasibility study and selection of a remedy;

(D) Engineering design and construction of the selected remedy;

(E) Operation and maintenance or monitoring of the constructed remedy; and

(F) The final completion date.

(7) The department shall establish a program to identify potential hazardous waste sites and to encourage persons to provide information about hazardous waste sites.

(8) For all facilities where an environmental covenant has been required under subsection (1)(f) of this section, including all facilities where the department has required an environmental covenant under an order, agreed

order, or consent decree, or as a condition of a written opinion issued under the authority of subsection (1)(i) of this section, the department shall periodically review the environmental covenant for effectiveness. Except as otherwise provided in (c) of this subsection, the department shall conduct a review at least once every five years after an environmental covenant is recorded.

(a) The review shall consist of, at a minimum:

(i) A review of the title of the real property subject to the environmental covenant to determine whether the environmental covenant was properly recorded and, if applicable, amended or terminated;

(ii) A physical inspection of the real property subject to the environmental covenant to determine compliance with the environmental covenant, including whether any development or redevelopment of the real property has violated the terms of the environmental covenant; and

(iii) A review of the effectiveness of the environmental covenant in limiting or prohibiting activities that may interfere with the integrity of the remedial action or that may result in exposure to or migration of hazardous substances. This shall include a review of available monitoring data.

(b) If an environmental covenant has been amended or terminated without proper authority, or if the terms of an environmental covenant have been violated, or if the environmental covenant is no longer effective in limiting or prohibiting activities that may interfere with the integrity of the remedial action or that may result in exposure to or migration of hazardous substances, then the department shall take any and all appropriate actions necessary to ensure compliance with the environmental covenant and the policies and requirements of this chapter.

(c) For facilities where an environmental covenant required by the department under subsection (1)(f) of this section was required before July 1, 2007, the department shall:

(i) Enter all required information about the environmental covenant into the registry established under RCW 64.70.120 by June 30, 2008;

(ii) For those facilities where more than five years has elapsed since the environmental covenant was required and the department has yet to conduct a review, conduct an initial review according to the following schedule:

(A) By December 30, 2008, fifty facilities;

(B) By June 30, 2009, fifty additional facilities; and

(C) By June 30, 2010, the remainder of the facilities;

(iii) Once this initial review has been completed, conduct subsequent reviews at least once every five years.

40 C.F.R. § 35.6145

§ 35.6145 Eligibility for enforcement Cooperative Agreements.

Pursuant to CERCLA section 104(d), States, political subdivisions thereof, and Indian Tribes may apply for enforcement Cooperative Agreements. To be eligible for an enforcement Cooperative Agreement, the State, political subdivision or Indian Tribe must demonstrate that it has the authority, jurisdiction, and the necessary administrative capabilities to take an enforcement action(s) to compel PRP cleanup of the site, or recovery of the cleanup costs. To accomplish this, the State, political subdivision or Indian Tribe, respectively, must submit the following for EPA approval:

(a) A letter from the State Attorney General, or comparable local official (of a political subdivision) or comparable Indian Tribal official, certifying that it has the authority, jurisdiction, and administrative capabilities that provide a basis for pursuing enforcement actions against a PRP to secure the necessary response;

(b) A copy of the applicable State, local (political subdivision) or Indian Tribal statute(s) and a description of how it is implemented;

(c) Any other documentation required by EPA to demonstrate that the State, local (political subdivision) or Indian Tribal government has the statutory authority, jurisdiction, and administrative capabilities to perform the enforcement activity(ies) to be funded under the Cooperative Agreement.

40 C.F.R. § 300.515

§ 300.515 Requirements for state involvement in remedial and enforcement response.

(a) ***General.***
(1) States are encouraged to undertake actions authorized under subpart E. Section 104(d)(1) of CERCLA authorizes EPA to enter into cooperative agreements or contracts with a state, political subdivision, or a federally recognized Indian tribe to carry out Fund-financed response actions authorized under CERCLA, when EPA determines that the state, the political subdivision, or federally recognized Indian tribe has the capability to undertake such actions. EPA will use a cooperative agreement to transfer funds to those entities to undertake Fund-financed response activities. The requirements for states, political subdivisions, or Indian tribes to receive funds as a lead or support agency for response are addressed at 40 CFR part 35, subpart O.

43 C.F.R. § 11.14

§ 11.14 Definitions.

Terms not defined in this section have the meaning given by CERCLA or the CWA. As used in this part, the phrase:

(l) "Damages" means the amount of money sought by the natural resource trustee as compensation for injury, destruction, or loss of natural resources as set forth in section 107(a) or 111(b) of CERCLA.

43 C.F.R. § 11.83

§ 11.83 Damage Determination phase—cost estimating and valuation methodologies.

(a) General.

(1) This section contains guidance and methodologies for determining: The costs of the selected alternative for (i) the restoration or rehabilitation of the injured natural resources to a condition where they can provide the level of services available at baseline, or (ii) the replacement and/or acquisition of equivalent natural resources capable of providing such services; and the compensable value of the services lost to the public through the completion of the baseline restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

Fed. R. Civ. P. 12

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

*****

(6) failure to state a claim upon which relief can be granted;

Fed. R. Civ. P. 54

Rule 54. Judgment; Costs

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Restatement (Second) of Torts § 433A

Restatement (Second) of Torts § 433A (1965)
Restatement of the Law - Torts

June 2017 Update
Restatement (Second) of Torts
Division Two. Negligence
Chapter 16. The Causal Relation Necessary to Responsibility for Negligence
Topic 1. Causal Relation Necessary to the Existence of Liability for Another's Harm
Title A. General Principles
§ 433A Apportionment of Harm to Causes

- **(1) Damages for harm are to be apportioned among two or more causes where**
  - **(a) there are distinct harms, or**
  - **(b) there is a reasonable basis for determining the contribution of each cause to a single harm.**
- **(2) Damages for any other harm cannot be apportioned among two or more causes.**

See Reporter's Notes.
Comment:

*****

d. *Divisible harm.* There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.
Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream, or flooding, or smoke or dust or noise, from

different sources, has interfered with the plaintiff's use or enjoyment of his land. Thus where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream.

- **Illustrations:**
  - 3. Five dogs owned by A and B enter C's farm and kill ten of C's sheep. There is evidence that three of the dogs are owned by A and two by B, and that all of the dogs are of the same general size and ferocity. On the basis of this evidence, A may be held liable for the death of six of the sheep, and B liable for the death of four.
  - 4. Through the negligence of A, B, and C, water escapes from irrigation ditches on their land, and floods a part of D's farm. There is evidence that 50 per cent of the water came from A's ditch, 30 per cent from B's and 20 per cent from C's. On the basis of this evidence, A may be held liable for 50 per cent of the damages to C's farm, B liable for 30 per cent, and C liable for 20 per cent.
  - 5. Oil is negligently discharged from two factories, owned by A and B, onto the surface of a stream. As a result C, a lower riparian owner, is deprived of the use of the water for his own industrial purposes. There is evidence that 70 per cent of the oil has come from A's factory, and 30 per cent from B's. On the basis of this evidence, A may be held liable for 70 per cent of C's damages, and B liable for 30 per cent. Contrast Illustrations 14 and 15.

Comment on Subsection (2):

i. Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. Death is that kind of harm, since it is impossible, except upon a purely arbitrary basis for the purpose of accomplishing the result, to say that one man has caused half of it and another the rest. The same is true of a broken leg, or any single wound, or the destruction of a house by fire, or the sinking of a barge. Such harms can be apportioned, if it all, only upon the basis of a prior reduction in value of what has been destroyed. By far the greater number of personal injuries, and

of harms to tangible property, are thus normally single and indivisible. Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm. The typical case is that of two negligently driven vehicles which collide and kill a bystander. The two drivers have not acted in concert, and the duties which they owe are separate and distinct, and may not be identical in character or scope; but the entire liability of each rests upon the obvious fact that each has caused the single result, and that no rational basis for division can be found.

Such entire liability is imposed where some of the causes are innocent, as where a fire set by the defendant is carried by a wind to burn the plaintiff's house; and it is imposed equally where two or more of the causes are culpable. It is imposed where either cause would have been sufficient in itself to bring about the result, as in the case of merging fires which burn a building. (See § 432 (2).) It is imposed also where both are essential to the harm, as in the case of the vehicle collision suggested above.

It is not necessary that the misconduct of two or more tortfeasors be simultaneous. One defendant may create a situation upon which the other may act later to cause the harm. One may leave combustible material, and the other set it afire; one may leave a hole in the street, and the other drive into it. Whether there is liability in such a case may depend upon the effect of the intervening agency as a superseding cause (see Title C of this Chapter); but if the defendant is liable at all, he is liable for the entire indivisible harm which he has caused.

- **Illustrations:**
    - 12. Two automobiles, driven independently and negligently by A and B, collide. A's automobile is thrown against C, a bystander, breaking C's leg. C may recover a judgment for the full amount of his damages against A or B, or both of them.
    - 13. The motorman of the A Company's street car negligently drives it onto the tracks of the B Railroad in the path of an approaching train. B Company's crossing guard negligently lowers the crossing gates, shutting in the street car. C, a passenger, becomes frightened, and in seeking to escape

negligently knocks down D, another passenger, breaking D's arm. D may recover a judgment for the full amount of his damages against A Company, or B Company, or C, or any two of them, or all of them.

- 14. A Company and B Company each negligently discharge oil into a stream. The oil floats on the surface and is ignited by a spark from an unknown source. The fire spreads to C's barn, and burns it down. C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them.
- 15. The same facts as in Illustration 14, except that C's cattle drink the water of the stream, are poisoned by the oil and die. The same result.

*****