No. 16-35742

In The United States Court Of Appeals
For The Ninth Circuit
ON APPEAL FROM THE EASTERN DISTRICT OF WASHINGTON (NO. CV-0256-LRS)

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and 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,

and

THE STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

v.

TECK COMINCO METALS LTD., a Canadian corporation,

Defendant-Appellant.

ANSWERING BRIEF OF APPELLEES CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

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STATEMENT OF JURISDICTION

Appellee Confederated Tribes of the Colville Reservation (Tribes) agrees with Appellant's statement of jurisdiction, except its final sentence: This Court has jurisdiction under 28 U.S.C. § 1291, not § 1292(b), as stated by Appellant.

STATEMENT OF THE ISSUES

1. Whether the district court properly entered final judgment after trials to verdict deciding and awarding relief on the Tribes' causes of action regarding response costs.

2. Whether the district court correctly determined that it had personal jurisdiction over Teck Metals, Ltd. (Teck).

3. Whether the district court correctly awarded the Tribes its response costs as authorized by 42 U.S.C. § 9607(a)(4)(A).

4. Whether the district court correctly granted summary judgment dismissing Teck's apportionment defense based on its failure to demonstrate that the harm at the site is theoretically capable of apportionment.

5. Whether the Court should reconsider Teck's extraterritoriality and arranger arguments rejected in this court's opinion *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006), *cert. denied,* 552 U.S. 1095 (2008) (*Pakootas I*).

STATEMENT OF THE CASE

A. Tribes Petitions EPA to Investigate UCR Site and EPA Issues Unilateral Administrative Order Requiring Teck to Participate in Remedial Investigation and Feasibility Study; Teck Denies Liability Under CERCLA for its Deposits of Wastes at the UCR Site.

For much of the 20th century Teck dumped wastes from its Trail, B.C. smelter into the Columbia River. More than 8 million tons of those wastes moved

into the Upper Columbia River and Lake Roosevelt. ER 47. In 1999, the Tribes petitioned the United States Environmental Protection Agency (EPA) pursuant to Section 9605 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et. seq.,* (CERCLA) to assess hazardous substance contamination in the Columbia River extending 150 river miles south from the United States-Canadian border ("Upper Columbia River Site" or "UCR Site"). ER 11. EPA completed preliminary assessments in 2001.

In 2001, the Tribes agreed with EPA to government-to-government coordination of the Site investigation. ER 11. Pursuant to this agreement, as amended, EPA recognized the Tribes as the decision maker regarding program responsibilities affecting the Tribes, and it allocated the Tribes an "important role in conducting site investigations under CERCLA, including *inter alia*, work on 'reconnaissance and sampling visits,' scoping and sampling strategy development, reviewing and commenting on draft sampling and quality assurance plans, and reviewing and commenting on draft Site Investigation reports." ER 11 (¶ 6).

With this assistance from the Tribes, and based on its preliminary assessment, EPA determined that further action was warranted and, in 2003, it issued a Unilateral Administrative Order (UAO) "directing Teck to perform a Remedial Investigation and Feasibility Study (RI/FS) for the UCR site." ER 11-12. Teck refused to comply with the UAO, arguing it was not subject to United States

environmental law. Teck's opposition to application of U.S. law continues to the present. ER 12.

In July, 2004, after EPA did not enforce the UAO, the Tribes funded a citizen suit by its Chairman, Joseph Pakootas, and the Chair of its Natural Resources Committee, D. R. Michel, to enforce the UAO and recover attorneys' fees and penalties for non-compliance. The State of Washington intervened as a plaintiff in that suit. ER 1242-50. Teck then moved to dismiss that action, claiming extraterritorial application of United States law because its Trail Smelter—the alleged source of hazardous substances in the UCR—was located in Canada. Its motion was denied and Teck appealed. ER 126-52.

While appeal was pending, Teck's American subsidiary, TCAI, entered into the RI/FS Agreement, a non-CERCLA agreement to conduct a RI/FS patterned after CERCLA. The agreement contains no commitment regarding cleanup of the Site. ER 3; *see generally* 1361-1440. EPA withdrew its UAO after the RI/FS Agreement was executed, but Teck continued with its appeal of the district court's order denying its motion to dismiss and specifically told the Ninth Circuit that the appeal was not moot, evidently hoping to succeed in defeating application of U.S. environmental law. *Pakootas I,* 452 F.3d at 1071 n.10. During the appeal, the Tribes joined the suit alleging claims for declaratory relief, cost recovery, and natural resource damages. ER 1213-27.

B. Ninth Circuit Rules That Teck's Waste Discharges in Canada Resulting in Deposit and Release in the Upper Columbia River in the United States Were Actionable Under CERCLA and Confirms Personal Jurisdiction.

On appeal, the court was satisfied that application of CERCLA to releases of hazardous substances at the UCR Site was "a domestic, rather than an extra-territorial application of CERCLA, even though the original source of the hazardous substances is located in a foreign country." *Pakootas I,* 452 F.3d at 1079. As part of its analysis, the Court determined that the district court had personal jurisdiction over Teck based on *Calder v. Jones,* 465 U.S. 783 (1984). *Pakootas I,* 452 F.3d at 1076 n.16. Teck requested *en banc* rehearing and a *writ of certiorari,* and both were denied. ER 12-13.

C. Tribes and State Prove Teck's CERCLA Liability.

In 2008, after return of the mandate, the Tribes and State filed Second Amended Complaints (SACs) clarifying their allegations and withdrawing the citizen suit claims seeking enforcement of the now-withdrawn UAO. ER 1178-93, 1194-1210. The SACs alleged six causes of action, all arising under CERCLA. They may be placed in two groups: (1) Declaratory Relief Regarding Response Cost Liability and Recovery of Response Costs; and (2) Declaratory Relief Regarding Natural Resource Damages Assessment Costs and Natural Resource Damages. Teck answered, but did not admit that its hazardous wastes had been

deposited in the UCR or that its deposits led to releases to the environment, and denied liability under CERCLA. ER 1038-39 (¶¶ 15-20), 1043 (¶¶ 48-50). And, it alleged 19 affirmative defenses including apportionment.

D. Case Proceeds on Declaratory Relief Claim and Teck Litigates Liability Without Seeking Bifurcation of Apportionment Affirmative Defense.

At the outset, the parties agreed to stay litigation of all claims except Declaratory Relief Regarding Response Costs. Teck moved for stay of this cause of action as well, arguing that it should be litigated after completion of the pending RI/FS. ER 1104-28. EPA disagreed and advised that cleanup at the Site would benefit from prompt adjudication of Teck's liability. SER 207. The district court cited EPA's position and denied Teck's motion. ER 1100. Going forward, Teck did not request bifurcated litigation of components of the Response Costs Declaratory Relief Cause of Action, such as its apportionment defense.

Teck developed and presented an expert case supporting its apportionment defense. It included five experts, and it analyzed inputs from the Columbia River from many mines, mills smelters as well as other sources,[1] but limited its focus to a small subset of metals at the UCR Site and did not consider resulting commingling and synergistic effects. Plaintiffs moved for summary judgment dismissing Teck's

[1] Testimony from Teck's expert purporting to quantify these inputs was ultimately excluded on Plaintiffs' motion as insufficient under F.R.E. 702. SER 30-37.

affirmative defense because it failed to address all of the harm at the UCR Site and it did not demonstrate that the harm was theoretically capable of apportionment. The district court granted the motion. ER 88-125.

E. Court Adjudicates Declaratory Relief Claim and Enters Phase I Findings of Fact Determining Teck's CERCLA Liability.

After extensive litigation, and one month before trial, Teck stipulated to the elements of arranger liability—that it discharged over 9.97 million tons of slag and liquid effluent, more than 8 million tons of which had moved to the UCR, a portion of which remains at the Site, and that those wastes had released hazardous substances to the environment. ER 47 (¶ A.6), 65 (¶ C.1) (citing ECF 1928, Order on Parties' Stipulations). Based on that stipulation and a trial limited to Teck's personal jurisdiction defense, on December 14, 2012, the district court entered Phase I Findings of Fact and Conclusions of Law establishing Teck's liability under CERCLA. ER 43-87.

F. Parties Litigate Phase II Determining Causes of Action for Recovery of Response Costs.

Following entry of the Phase I judgment granting declaratory relief, the parties proceeded with Phase II adjudicating Plaintiffs' causes of action for recovery of response costs. The State's claim settled, but the Tribes' cause of action proceeded to trial. The Tribes presented evidence of response actions beginning with its petition to EPA in 1999 and joinder in EPA's site investigation. A

substantial portion of the costs requested were incurred investigating and assessing the presence and source of hazardous substances in the UCR Site in connection with proof of Teck's liability under CERCLA. As Teck never conceded its liability under CERCLA, substantial amounts were sought for legal fees proving Teck's liability for response costs and (consequently) ultimate cleanup at the site.

Teck sought to avoid responsibility for fees and costs incurred proving its liability and moved for summary judgment arguing that the Tribes lacked requisite "enforcement authority" and § 9607(a)(4)(A) did not authorize the Tribes' recovery of enforcement costs related to removal actions. The district court had extensive briefing on this question and, after reconsidering a ruling favoring Teck, ultimately ruled that the Tribes was entitled to recover enforcement costs including litigation expenses.[2] Trial was held and the Court entered Phase II Findings of Fact and Conclusions of Law awarding the Tribes $8,253,676.65 in response costs. An Amended Judgment was entered on August 29, 2016, adding $344,300.00 for prejudgment interest. ER 1.

[2] The district court's order on reconsideration issued subsequent to the Phase II trial, so the parties tried the case assuming the analysis of § 9607(a)(4)(B) in *Key Tronic Corp. v. United States,* 511 U.S. 809 (1994), governed recovery of the Tribes' response costs. After the district court issued its reconsideration order, the parties submitted new briefs and proposed findings of fact and conclusions of law, and the court, applying § 9607(a)(4)(A), subsequently entered judgment in favor of the Tribes.

STATEMENT OF FACTS

A. Teck Disposed of Hazardous Substances in the UCR Site.

Teck and its predecessors have operated metal and/or fertilizer production facilities at Trail since 1896. ER 46. Between 1930 and 1995, Teck discharged at least 9.97 million tons of slag directly into the Columbia river via outfalls at its Trail smelter. ER 47. This discharge was intentional. *Id.*

Teck concedes the 9.97 million tons of slag it discarded into the river contained 7,300 tons of lead and 255,000 tons of zinc. ER 47. At least 8.7 million of the at least 9.97 million tons of slag discharged from the Trail Smelter has been transported by the Columbia River downstream into Washington, and some portion of that slag has come to be located at the UCR Site. *Id*. Teck also discharged effluent via outfalls at the Trail Smelter directly into the Columbia River. ER 48. The discharged effluent contained lead, zinc, cadmium, arsenic, copper, mercury, thallium, and other metals, as well as a variety of other chemical compounds. *Id*. This discharge was intentional. *Id.*

Teck's Trail leadership assumed that both slag and effluent went downstream, across the border and into Lake Roosevelt. ER 51-52 (¶¶ 14-17). Teck knew what would be found in the sediments of Lake Roosevelt. Graham Kenyon, Teck's Environmental Control Manager, authored notes in 1990 acknowledging that "[h]istorical discharges have presumably accumulated in Lake

Roosevelt sediments." ER 55 (¶ 22). By 1991, Kenyon recognized substantial community concern regarding "the effects of accumulated slag in Lake Roosevelt" and, in particular, the international dimension resulting from the fact that "we are in effect dumping waste into another country – a waste that they classify as hazardous material." *Id.* Indeed, Kenyon later recognized that Teck had, essentially, been using Lake Roosevelt as a "free" "convenient disposal facility" for its wastes. *Id.*

B. The State and The Tribes File Suit Seeking Declaratory Relief Regarding Response Costs.

After successfully petitioning EPA to conduct a site assessment and working with EPA on the site investigation, in 2008, the Tribes (and the State) filed the SACs against Teck alleging causes of action arising under CERCLA including recovery of their response costs. In answer, Teck denied liability under CERCLA as it does today. ER 12, 14; SER 210. It also unsuccessfully sought a stay of litigation proving its liability. ER 1098-1103.

1. Plaintiffs Spend Millions of Dollars on Scientific Work Assessing the Presence of Hazardous Substances in the UCR Site.

In aid of proving Teck's responsibility for hazardous substances in the UCR Site, the Tribes and State engaged in extensive scientific work assessing and identifying hazardous substances at the site. Plaintiffs funded expert analysis of the quantities and characteristics of the slag and effluent discharged from Teck's Trail

Smelter. ER 16-17. The Tribes also retained experts who determined the movement of Teck's slag and effluent within the Columbia River in Canada and into the UCR Site.

The Tribes' field investigations and laboratory analyses, taken together with expert scientific review of data derived from those analyses, demonstrated Teck's slag and effluent had moved into the UCR Site and had released hazardous substances to the environment. ER 18. The costs of investigation and evaluation of Site conditions and rebuttal of Teck's divisibility affirmative defense totaled $3,483,635.90. ER 19. The Tribes' response costs also included legal fees incurred proving Teck's liability under CERCLA. ER 22. The Tribes incurred $8,253,676.65 in total past response costs through 2013. ER 23.

SUMMARY OF ARGUMENT

1. The district court had personal jurisdiction over Teck under the *Calder* test as explained in *Pakootas I,* 452 F.3d at 1066 n.16. The "express aiming" element of the test, which Teck challenges in this appeal, is demonstrated by findings of fact and conclusions of law determining that Teck knew the hazardous waste it deposited in the Columbia River adjacent to its Trail facility moves downstream and is released into the environment in the UCR Site. As

Teck's Environmental Manager put it, Teck used Lake Roosevelt[3] as a "free" "disposal facility." ER 55 (¶ 22).

2. Final Judgment is proper under Rule 54(b) because the Court bifurcated and has fully adjudicated two causes of action, including a money judgment, and these causes of action are separate from the remaining causes of action.

3. The Tribes was properly awarded response costs for its actions responding to contamination in the UCR Site and enforcement costs related thereto, as authorized by 42 U.S.C. § 9607(a)(4)(A). The requested costs, incurred in scientific investigation and assessment of Site conditions and legal action proving Teck's liability for response costs, were incurred as either "removal" action, as defined in § 9601(23), or were "enforcement activities related thereto," as specified in § 9601(25). Teck's attempt to avoid responsibility for these response costs by rewriting § 9607 to add the element of "enforcement authority" has no authority and has been rejected by this court. *Wash. State Dep't of Transp. v. Wash. Natural Gas Co.,* 59 F.3d 793, 799-800 (9th Cir. 1995) (*WSDOT*).

4. Teck's divisibility defense was properly dismissed on summary judgment because it failed to adequately identify the harm at the Site. Teck limited

[3] Lake Roosevelt was formed by construction of the Grand Coulee Dam spanning the Columbia River.

its proof of harm at the Site to a subset of six of the thirteen metals it deposited, made no attempt to identify or locate other metals and contaminants at the Site, and did not consider synergistic results from comingling of its wastes with other hazardous substances. Moreover, Teck limited its proof to the top five centimeters of sediment and did not consider porewater or biota. Having failed to identify all of the harm at the Site, it could not and did not demonstrate that the harm at the UCR Site was theoretically capable of apportionment.

5. Teck's attempt to reargue its extraterritoriality and arranger defenses, originally stated and decided in *Pakootas I,* must be rejected based on the law of the case doctrine.

STANDARD OF REVIEW

The district court's conclusions of law following a bench trial are reviewed de novo. *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 879 (9th Cir. 2005). Findings of fact, however, are reviewed for clear error. *Id*. Review under the clearly erroneous standard "is significantly deferential, requiring for reversal a definite and firm conviction that a mistake has been made." *United States v. Asagba*, 77 F.3d 324, 326 (9th Cir. 1996).

A district court's ruling on personal jurisdiction is reviewed de novo. *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010).

The interrelationship of claims for purposes of Fed. R. Civ. P. 54(b) certification is a mixed question of fact and law generally reviewed de novo; the district court's determination that there is no just cause for delay is reviewed for abuse of discretion. *Gregorian v. Izvestia*, 871 F.2d 1515, 1520 (9th Cir. 1989). The "present trend is toward greater deference to a district court's decision to certify under Rule 54(b)." *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 564 n.1 (9th Cir. 1994).

The district court's interpretation of CERCLA is a question of law, which is reviewed de novo. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870 (9th Cir. 2001). Statutory interpretation underlying a district court's attorneys' fees determination is reviewed de novo, but the award itself is reviewed for abuse of discretion. *Native Vill. of Quinhagak v. United States*, 307 F.3d 1075, 1079 (9th Cir. 2002).

The grant of summary judgment is reviewed de novo. *Carson Harbor*, 270 F.3d at 870.

ARGUMENT

I. Rule 54(b) Authorizes Final Judgment on the Phase I and II Adjudications

A. The District Court Resolved an Entire Claim After Full Trial.

The district court conducted two trials on the Tribes' response costs claims and entered final judgment deciding liability and awarding both forms of requested relief—declaratory judgment and over $8 million in monetary damages. The court found "no just reason for delay in entering final judgment," determined that "[c]ost recovery litigation is completed in this court," and concluded that "[b]efore commencement of Phase III litigation [on natural resource damages claims] efficiency is best served by full appellate resolution of response cost liability and the amount of recoverable response costs." ER 6.

Teck does not challenge these discretionary findings. Instead, Teck urges that "this court must first determine whether the district court's judgment disposes of 'an individual claim entered in the course of a multiple claims action.'" Appellant's Brief ("App. Br.") at 20 (quoting *Wood v. GCC Bend, LLC*, 422 F.3d 873, 878 (9th Cir. 2005)). The district court's judgments did exactly that—adjudicating *two* discrete causes of action and awarding declaratory relief and money damages. Without citing any cases in which entire claims were tried to judgment, Teck invokes cases in which parts of individual claims, such as liability

or damages—but not both—are determined to urge that Rule 54(b) certification was not proper.

Teck's focus is misplaced because both causes at issue here have been litigated to judgment. The Supreme Court has explained that Rule 54(b) is concerned with whether one or more claims have been finally decided. In *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427 (1956) the Court explained that Rule 54(b)

> is limited expressly to multiple claims actions in which "one or more, but less than all" of the multiple claims have been finally decided and are found otherwise to be ready for appeal.

Id. at 435. Applied here, this is a simple analysis. Plaintiffs' claims for declaratory relief and recovery of response costs have been tried to judgment—finally decided. Thus, the only question before the court is "the appropriate time when each 'final decision' upon 'one or more, but less than all' of the claims…is ready for appeal." *Id.* (emphasis omitted). This assessment is left to the district court as "dispatcher" and is only reviewed for abuse of discretion. *Id*.

Teck's cases involve partial adjudications, not final resolutions, and are thus unsuitable for Rule 54(b) certification. In *Arizona State Carpenters Trust Fund v. Miller*, 938 F.2d 1038 (9th Cir. 1991), the district court dismissed punitive damages under the Employee Retirement Security Act of 1974 (ERISA), but did not resolve ERISA liability. The panel observed that the "count for punitive

damages…is based on a single set of facts giving rise to a legal right of recovery under several different remedies," where "the primary proof on the compensatory damage and punitive damage counts would be the same." *Id*. at 1040. Similarly, in *General Acquisition, Inc. v. GenCorp., Inc.*, 23 F.3d 1022, 1025 (6th Cir. 1994), the appealed ruling "on damages—with no ruling on liability—was obviously not a 'final' order." Finally, *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742 (1976) also addressed partial summary judgment, this time on liability: the certified decision "finally disposed of none of respondents' prayers for relief." The Supreme Court noted plaintiffs had "prayed for several different types of relief in the event that they sustained the allegations of their complaint,…but their complaint advanced a single legal theory which was applied to only one set of facts." *Id.* at 743 (internal citation omitted). Partial summary judgment on liability without adjudication of the remedy was not sufficient to justify Rule 54(b) certification.

Unlike the cases Teck cites, this case does not involve a summary judgment on a remedy or liability alone; it involves full trials on two causes of action that decided liability and awarded relief. Current litigation of these claims while deferring the remaining claims resulted from the district court's order bifurcating natural resource damages issues—assigned to Phase III— and denying Teck's

motion to stay the declaratory relief claim. SER 188-192; ER 1103;1212.[4] Teck does not appeal that order. Consequently, it accepted the outcome that the parties would first adjudicate declaratory relief, and ultimately money judgment for response costs, to a final decision years before the parties would address the natural resource damage claims. This is a common—perhaps prevailing—approach in CERCLA cases, where courts frequently "streamline[ ] the litigation" by separating issues for early decision. *E.g. Cadillac Fairview/California*, 41 F.3d at 564 n.1; *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000); *In re Bell Petroleum Servs., Inc.* 3 F.3d 889, 893 (5th Cir. 1993).[5]

B. Claims for Response Costs and Natural Resource Damages are Separate

This case presents six causes of action, seeking separate claims for relief under two different statutory provisions: for response costs under 42 U.S.C. § 9607(a)(4)(A) and for natural resource damages under 42 U.S.C. § 9607(a)(4)(C). While both share elements of base liability, courts have recognized that these are

[4] Teck subsequently agreed to current litigation of the amount of response costs. ER 402-03. Notably, it did not contend that response costs were inextricably linked with natural resource damages.

[5] Indeed, courts routinely decide and certify under Rule 54(b) CERCLA response cost claims for declaratory relief alone, even where (unlike here) determination of the amount due awaits a later phase. *Kalamazoo River Study Grp. v. Manasha Corp.*, 228 F.3d 648, 651-52 (6th Cir. 2000); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992). *See also United States v. Hardage*, 982 F.2d 1436, 1439 (10th Cir. 1992) (reviewing trial court judgment on remedy when liability remained for trial).

separate "claims" with different elements that require separate proof. *Coeur D'Alene Tribe v. Asarco Inc.,* 280 F. Supp. 2d 1094, 1102 (D. Idaho 2003). Recovery of a sovereign's response costs requires only proof that eligible costs have been incurred, subject to the affirmative defense of noncompliance with the National Contingency Plan ("NCP"). *United States v. Chapman,* 146 F.3d 1166, 1169 (9th Cir. 1998). A natural resource damages claim requires proof that natural resources within the "trusteeship" of a plaintiff have been "injured" and that the injury "resulted from" a release of hazardous substances. *Coeur D'Alene Tribe,* 280 F. Supp. 2d at 1102-03. No proof of a direct causal link is required for recovery of response costs, while a natural resource damages claim requires proof under a "contributing factor" test. *Id*. at 1124. This proof is often unavailable for years after response costs can be determined, because it depends upon the results of the ultimate cleanup. *Utah v. Kennecott Corp.* 801 F. Supp. 553, 568 (D. Utah 1992).

Teck's argument that these distinct claims with separate elements are merely two forms of relief for a single claim fails. In *Seatrain Shipbuilding v. Shell Oil Co.*, 444 U.S. 572, 583 (1980), the Court upheld certification of a decision granting only one of two requests for relief arising out of the same statute. The Court held that plaintiffs sought two separate, although "not unrelated," remedies: a general declaration that the Secretary of Commerce lacked authority to waive a statutory provision protecting plaintiffs from competition (which the district court denied),

and relief from the specific waiver due to abuse of discretion (which remained undecided). *Id.* at 580, 581 n.18. The Court determined Rule 54(b) certification was appropriate because—as here—"[t]here were, in short, two claims made and two quite different sorts of relief sought." *Id*. at 581.

Furthermore, Teck "cannot successfully attack the court's finding of multiple claims merely by showing that some facts are common to all of its 'theories of recovery.'" *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979). Where there is some, but not complete factual overlap between separate claims, consistent with the "function of the district court under the Rule…to act as a 'dispatcher,'" *Curtiss Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980), the matter should be left to the discretion of the district court. As this court has noted, "the solution for Rule 54(b) purposes lies in a more pragmatic approach focusing on severability and efficient judicial administration." *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

Continental Airlines approved the approach taken by the Seventh Circuit in *Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.,* 642 F.2d 1065, 1070 (7th Cir. 1981), which recognized that "'separate claims' for Rule 54(b) purposes can arise out of the same transaction and can overlap in important respects." *Id.* (citing *Sears,* 351 U.S. at 436). The court applied rules of

thumb to identify claims that clearly cannot be separate, with the rest left to the sound discretion of the district court. *Id.* Thus, certifiable claims must enable "separate recovery," cannot constitute "mere variations of legal theory," and must not be so "related that they would fall afoul of the rule against splitting claims if brought separately." *Id.* at 1070-71.

Similarly, the Sixth Circuit has utilized the touchstone of exclusivity: where claims are mutually exclusive, such that recovery on all of them would provide a "double or triple recovery," they cannot be separate. *General Acquisition,* 23 F.3d at 1029; *see also* 10 Wright, Miller Kane, *Federal Prac. & Proc.* § 2657, p.72 (4th ed. 2014). However, where a single statute or set of operative facts implicates multiple constitutional provisions, the claims are not exclusive and Rule 54(b) certification is appropriate. *See Planned Parenthood SW Ohio Region v. Dewine*, 696 F.3d 490, 501-02 (6th Cir. 2012) (single statute causing distinct injuries to distinct constitutional rights raises separate claims); *U.S. Citizens Ass'n. v. Sebelius*, 705 F.3d 588, 595-96 (6th Cir. 2013) (aggregate of operative facts giving rise to each constitutional right was sufficiently separate to confer jurisdiction despite some overlap).

The claims here pass these tests. Response costs and natural resource damages are not duplicative or exclusive; CERCLA expressly authorizes recovery of both. 42 U.S.C. § 9607(a)(4)(A), (C). They are severable from one another,

require proof of separate sets of facts, provide wholly separate categories of relief, and cannot be characterized as mere variations of one legal theory. Teck is swimming against the tide in arguing for narrow limits on Rule 54(b) certification. It has no answer for this court's guidance in *Wood* that "[b]oth the Supreme Court and our court have upheld certification on one or more claims despite the presence of facts that overlap remaining claims when…the case is complex and there is an important or controlling legal issue that cuts across (and cuts out or at least curtails) a number of claims." 422 F.3d at 881.

II. The Trial Court Correctly Found Personal Jurisdiction.

A. *Calder* Applies to Intentional Acts Directed at the Forum.

A non-resident defendant "must have 'certain minimum contacts…such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Walden v. Fiore*, __ U.S. __, 134 S. Ct. 1115, 1121 (2014) (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). This inquiry "'focuses on the relationship among the defendant, the forum, and the litigation.'" *Id.,* (quoting *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 775 (1984)).

Jurisdiction may not be based solely upon a defendant's "'random, fortuitous, or attenuated' contacts." 134 S. Ct. at 1123 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). Thus, "mere untargeted negligence" is

insufficient to establish jurisdiction over a non-resident defendant, but intentional action may be enough. *Calder,* 465 U.S. at 789.

This court's analysis of minimum contacts depends upon the claims alleged: "A purposeful availment analysis is most often used in suits sounding in contract," while a "purposeful direction analysis…is most often used in suits sounding in tort." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.2d 797, 802 (9th Cir. 2004). Purposeful direction is analyzed under the Supreme Court's "effects test" enunciated in *Calder*. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993). This court, in a prior appeal in this case, applied the *Calder/Core-Vent* test to conclude that personal jurisdiction exists. 452 F.3d at 1076 n.16.[6]

Teck now claims that the *Calder* effects test is limited to intentional torts, but no court has applied such a narrow restriction. *Calder* articulates the requirements for jurisdiction based on intentional conduct, but its analysis was not limited to intentional torts; the phrase "intentional tort" is not even used. Instead, the court employed the term "intentional" to differentiate the petitioner's conduct from "untargeted negligence." 465 U.S. at 789. In *Calder*, defendants wrote and

[6] Teck challenged personal jurisdiction at the pleading stage; the district court denied the motion and Teck did not appeal. ER 128-32. However, on Teck's appeal of the district court's ruling that CERCLA applies, this court *sua sponte* evaluated personal jurisdiction as part of its analysis. The panel "adopt[ed] the district court's conclusion," based upon application of the effects test. 452 F.3d at 1076 n.16.

edited an allegedly defamatory article in Florida, but their employer published it throughout the U.S., including California, where the plaintiff resided. Recognizing that California was the "focal point both of the story and of the harm suffered," the Court held that jurisdiction was proper based on "the 'effects' of" the Florida conduct in California. *Id.*

This court applies *Calder* to tort, and tort-like, cases without limitation to "intentional torts." Indeed, an en banc decision applied the test to conduct that was not even tortious—the lawful procurement of French court orders alleged to violate plaintiff's rights under the United States Constitution. *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc). The court refused to "read *Calder* necessarily to require in purposeful direction cases that all (or even any) jurisdictionally relevant effects have been caused by wrongful acts." *Id.* at 1208.

This court regularly applies *Calder* to cases that are "akin to torts," regardless of whether they assert claims traditionally considered "intentional torts." *See Ziegler v. Indian River Cnty.*, 64 F.3d 470, 474 (9th Cir. 1995) (*Calder* applied to Section 1983 claim, which is "more akin to a tort claim than a contract claim"); *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1399 (9th Cir. 1986) (applying effects test to insurance claim, rejecting argument it applied solely to tort cases); *Panavision Int'l. L.P. v. Toeppen,* 141 F.3d 1316, 1321 (9th

Cir. 1998) (trademark dilution "akin to a tort case"); *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010) (copyright). Like the foregoing cases, the intentional direction of hazardous waste into Washington State is "akin to a tort" (and certainly more like a tort than a contract), and *Calder* applies.

Teck asserts that *Holland America Line, Inc. v. Wartsila North America, Inc.*, 485 F.3d 450, 460 (9th Cir. 2007), a panel decision issued after *Yahoo!*, effectively overrules *Yahoo!*'s en banc holding that the *Calder* test is not limited to wrongful conduct (let alone to intentional torts). App. Br. at 26. This is a misapplication of *Holland America*, which referred to "intentional torts" to distinguish actions intentionally targeting a forum from "mere untargeted negligence" like the product liability claims before it. *Holland America*, 485 F.3d at 460. The statement simply emphasizes the central distinction set out in *Calder*—between an untargeted placement of a negligently manufactured product into a general stream of commerce, and "intentional…actions…expressly aimed" at the forum. *Calder*, 465 U.S. at 789.[7] Teck has cited no case in which a court has refused to apply the effects test to intentional acts targeting a forum state.

[7] Some cases, like *Walden,* use the phrase "intentional torts" simply because those are the claims before them; this does not impose limitations on *Calder's* application in other contexts. 134 S. Ct. at 1123.

B. Express Aiming is Proved.

Teck also argues its disposal of 10 million tons of waste into the upper Columbia River with knowledge that it would move with the current to Washington does not meet the "express aiming" requirement of the *Calder* test. *Calder* requires proof that defendant:

(1) committed an intentional act,

(2) expressly aimed at the foreign state,

(3) causing harm that the defendant knows is likely to be suffered in the forum state.

Yahoo!, 433 F.3d at 1206.[8] While *Calder* is often applied to defendants who have targeted a specific person, it also applies to acts "performed…for the very purpose of having their consequences felt in the forum state." *Lake v. Lake*, 817 F.2d 1416, 1422 (9th Cir. 1987). Teck's intentional acts are sufficient to support jurisdiction if Teck could "'reasonably anticipate being haled into court'" in Washington to answer for the contamination resulting from its discharges. *Calder,* 465 U.S. at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

[8] Teck's appeal challenges only the second element. It admits its conduct was intentional, ER 410 (¶ 14), and that it knew the waste would "repose in Washington State," App. Br. at 26-27.

By dumping more than 10 million tons of waste into the Columbia River (one of the largest rivers on the planet) just 10 miles from the Washington border, Teck undeniably intended that its wastes would be moved with the current downstream away from its plant, in effect treating downstream waters in Washington as its waste disposal facility. Teck does not challenge the district court's extensive factual findings supporting its conclusion that Teck expressly aimed its waste at Washington, s*ee* ER 47-64 (¶¶ 5-39), including the following:

- Teck intentionally discharged millions of tons of slag directly into the Columbia River and knew the waste contained metals. ER 47.
- Teck intentionally discharged liquid effluent containing multiple metals and a variety of other chemical compounds directly into the Columbia River. ER 48.
- Teck's Trail leadership assumed and knew that for decades, its waste flowed downstream and across the border into Lake Roosevelt, yet continued its discharges. Teck's documents confirm its management's knowledge that the waste reached the Upper Columbia River and the United States. ER 51.
- Teck understood that it faced potential liability based on its "discharge of pollutants." ER 53 (¶ 18).

- Teck knew and understood that it was "in effect dumping waste into another country—a waste that they classify as hazardous material." ER 55 (¶ 22).
- Teck's own scientific work confirmed its slag was not chemically stable and was being transported well into Roosevelt Lake. ER 62-63.
- Teck management recognized that it had been using Lake Roosevelt as a "free" "convenient disposal facility" for its wastes. ER 55 (¶ 22).

Notwithstanding these clear findings, Teck argues that it intended only to discharge its wastes into the river in Canada and did not intend their movement into Washington State. As Teck puts it, "knowing that waste would 'repose' in the State of Washington is not the same as targeting or 'expressly aiming' at the State of Washington." App. Br. at 27. Teck's argument is incorrect.

The writer and editor in *Calder* made a similar argument—that the National Enquirer, not they, distributed their allegedly libelous article in California. The Supreme Court had none of it:

> [Defendants] wrote and…edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its

largest circulation.

465 U.S. at 789-90; *accord*, *Walden*, 134 S. Ct. 1124, n.7. Similarly, Teck disposed of its waste for nearly 100 years knowing it would have a devastating impact on the Upper Columbia River in Washington.[9] Teck must "reasonably anticipate being haled into court" in Washington to answer for the contamination it caused. *Id.* at 790 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

III. The Trial Court Properly Awarded Response Costs To the Tribes, Including Its Attorneys' Fees

A. Introduction and Summary.

The district court correctly awarded the Tribes' response costs pursuant to 42 U.S.C. § 9607(a)(4)(A), either as "removal" costs under § 9601(23) or "enforcement activities related thereto" under § 9601(25). Teck ignores the text of these provisions, instead arguing (without citing any authority) that the Tribes' response costs are not recoverable without proof of "enforcement authority." Such attempts to rewrite CERCLA to add an enforcement authority element have been rejected by this court. *WSDOT,* 59 F.3d at 799-800. There is likewise no authority

[9] Teck's "out of sight, out of mind" argument is also contrary to tort jurisprudence. Restatement (Second) of Torts § 8A (1965) explains that intent exists where "the actor desires to cause consequences of his act, or…believes that the consequences are substantially certain to result from it." *See Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 950 (9th Cir. 2014) (Enjoined party subject to contempt for giving non-party the means to violate an injunction, even without affirmative desire to cause a violation, if party "knows it is highly likely" to be so used).

for Teck's argument that "enforcement costs" may only be recovered for enforcement of a cleanup order. App. Br. at 35. No case limits recovery of enforcement costs to "cleanup actions," and the "enforcement activities related thereto" language in § 9601(25) plainly grants much broader rights. Moreover, this court has upheld fee awards in government cost-recovery actions under § 9607. *United States v. Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998)

Teck further insists that its voluntary engagement in an investigation that is expressly *outside* of CERCLA's authority and does not provide for cleanup renders CERCLA enforcement unnecessary. Again, Teck imports an element not found in the statute. Unlike private cost recovery under § 9607(a)(4)(B), which is limited to "necessary costs of response," governments (such as the Tribes) may recover "all costs of removal or remedial action" under § 9607(a)(4)(A) (subject only to defenses not at issue here).

Finally, Teck argues that the Tribes' scientific investigation of site conditions is excluded from the definition of "removal" because the work was done in connection with litigation. The district court found (and Teck does not dispute) that the Tribes' scientific work assessed the presence of Teck's hazardous substances and releases of metals in the UCR Site, and was considered in EPA's investigation. ER 18 (¶ 23), 29-30 (¶ 13). Thus, this work fits easily in the

"removal" definition—"actions [that] assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C § 9601(23).

B. Overview of CERCLA.

In analyzing the defects in Teck's "enforcement authority" arguments, it is helpful to start with CERCLA's enforcement provisions.

1. Structure of CERCLA's enforcement provisions.

Congress enacted CERCLA in 1980 to provide a comprehensive response to releases of hazardous substances. *Wickland Oil Terminals v. Asarco, Inc.* 792 F.2d 887, 890 (9th Cir. 1986). To meet its goals, the statute establishes several methods of enforcement. First, the EPA (as the President's delegate) may initiate cleanups under § 9604, funded by the Hazardous Substance Response Trust Fund ("Superfund"); it may also enter into cooperative agreements with other sovereigns—states or tribes—to take such action. 42 U.S.C. § 9604. Second, EPA is empowered to seek judicial relief to abate actual or threatened releases of hazardous substances. *Id.*; 42 U.S.C. § 9606. Finally, § 9607, at issue here, authorizes civil actions by either governments (federal, state or tribal) or private parties to recover their costs of responding to releases of hazardous substances. 42 U.S.C. § 9607.

2. Liability for and definitions of removal and response costs.

Section 9607(a)(4) establishes liability for response costs—independent of any other CERCLA remedy—by four categories of responsible parties, with the

scope of the recovery depending upon whether the costs are sought by a governmental entity or by a private party:

> *Notwithstanding any other provision or rule of law*, and subject only to the defenses set forth in section (b) of this subsection,
> …
>
> [Four enumerated categories of responsible parties[10]] shall be liable for—
>
> (A) *all* 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; [and]
>
> (B) any other *necessary* costs of response incurred by *any other person* consistent with the national contingency plan….

42 U.S.C. § 9607(a) (emphasis added).

Thus, § 9607 distinguishes between sovereign entities, such as the Tribes, and private parties. Sovereigns are entitled to receive "all" costs, subject only to a defendant's burden of proving that they are "inconsistent with the [NCP]."[11] *United States v. Kramer,* 913 F. Supp. 848, 862-64 (D.N.J. 1995). Private parties, on the

[10] The district court previously determined, and this court affirmed, that Teck falls within one of these enumerated categories: it is liable under § 9607(a)(3) as a "person who…arranged for disposal or treatment…of hazardous substances." 452 F.3d at 1082.

[11] Teck's appeal does not challenge the district court's determination that it "failed to rebut the presumption of consistency." ER 40 (¶ 38). In addition, Teck has not raised any of the defenses to § 9607 liability set forth in § 9607(b).

other hand, may only be awarded "necessary" costs, and must prove consistency with the NCP. *WSDOT*, 59 F.3d at 799-800.

> Section 9601(23) defines "removal action" broadly as:
>
> [S]uch actions as may be necessary to monitor, assess, and evaluate the release or threatened release of hazardous substances…or the taking of such other actions as may prevent, minimize, or mitigate damage to the...environment…. The term includes, in addition, without being limited to,…action taken under section 9604(b) of this title….

42 U.S.C. § 9601(23). Section 9601(25) defines the term "response" to mean:

> remove, removal, remedy and remedial action; all such terms (including the terms "removal" and "remedial action") *include enforcement activities related thereto*.

42 U.S.C. § 9601(25) (emphasis added).

3. Government recovery of litigation costs.

The phrase "include enforcement activities related thereto" was added to Section 9601(25) in the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) ("SARA"). After the SARA amendments, the removal definition expressly includes costs of enforcement activities for all removal actions, and courts have awarded fees based upon the SARA "enforcement activities" language. *See*, *e.g. B.F. Goodrich v. Betkowski*, 99 F.3d 505, 527-28 (2d Cir. 1996).

This court has upheld fee awards in government cost-recovery actions under Section 9607. *United States v. Chapman*, 146 F.3d 1166, 1175 (9th Cir. 1998) ("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.'"). Such a conclusion is buttressed by "persuasive policy arguments," due to CERCLA's remedial purpose, which requires that it be construed liberally to carry out its purpose. *Id.* Other circuits have agreed, relying on the SARA amendment language without reference to § 9604. *Betkowski*, 99 F.3d at 527-28; *United States v. Dico, Inc.*, 266 F.3d 864, 878 (8th Cir. 2001) ("language of the statute" provides that government attorneys' fees are recoverable, based upon "enforcement activities" language in § 9601(25)). Consistent with the inclusion of three types of sovereign entities (Federal, State, and Indian tribes) in Section 9607(a)(4)(A)'s grant of recovery of "all costs," this court also recognized the right of a state to recover its attorneys' fees as response costs. *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 953 (9th Cir. 2003) ("CERCLA § 107(a)(4) permits the United States Government or a State or an Indian tribe to recover all 'reasonable attorney fees' 'attributable to the litigation as part of its response costs….'"). The *Fireman's Fund* court noted that the ability of these sovereigns to recover attorneys' fees "flows from language providing that responsible parties

shall be liable…for 'all costs of removal,'" and that a state's attorneys' fees are "included in the definition of 'all costs'" found in subsection (A). *Id*.

C. The Tribes is Entitled to Recover Enforcement and Removal Costs, Including its Attorneys' Fees.

1. Section 9607 creates an independent, stand-alone claim that enforces CERCLA.

Teck attempts to force an excessively narrow definition of "enforcement costs" that is not consistent with this court's case law or the statutory language, arguing that costs for enforcement may only be recovered in connection with a "cleanup" order by EPA under § 9606 or by EPA's delegate under § 9604. App. Br. at 30, 37. CERCLA is not so limited.

a. Teck's argument is inconsistent with Ninth Circuit case law.

This court has firmly rejected the argument urged by Teck. In *WSDOT*, defendants likewise claimed that § 9607 recovery of "all costs" by non-federal sovereigns could occur only if they had entered into cooperation agreements with the federal government under § 9604. The court deemed this position "*unfounded*", finding that it ignored the plain language of the statute, which "expressly imposes liability on listed parties *'notwithstanding* any other provision or rule of law….'" 59 F.3d at 801. (emphasis added). The court concluded that "'Section [9607(a)] was meant to stand by itself,'" and rejected the "strained" construction that would "creat[e] an authorization requirement where none presently exists." *Id*.

Even in the private party context, this court has repeatedly rejected any such requirement. In *Wickland*, the court reversed the district court's ruling that a private party's § 9607 claim could not be brought in the absence of "an authorized governmental cleanup program." *Wickland*, 792 F.2d at 892. Two years later, *Cadillac Fairview* emphasized that this court had already twice rejected the argument that § 9607 claims must be premised upon federal government or lead agency actions, and concluded that it "need not consider it further." *Cadillac Fairview v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988).

This court also rejected out of hand an argument, like that advanced by Teck, that only costs of "cleanup" may be recovered in a Section 9607 action. App. Br. at 35. The court in *Wickland* was clear: "the distinction that [plaintiff] attempts to manufacture between investigatory costs and on-site cleanup costs is immaterial under § 107(a)….We hold that the testing expenses alleged by [defendant] fall within [the] definition [of "removal" in § 9601(25)]." *Wickland* , 792 F.2d at 892.

b. Teck's argument conflicts with the plain language of Sections 9607 and 9601(25).

In addition to ignoring the prefatory language highlighted by the court in *WSDOT*, Teck's argument creates additional conflicts with the language of CERCLA. First, it ignores the two-part structure of Section 9607(a), with three

sovereigns on the one hand (the federal government, states and tribes) possessing broad recovery rights, and "other parties" (private parties and municipalities) on the other, with narrower rights. Teck's interpretation would pull apart subsection (A) to provide the sovereigns' right to recovery of "all costs" to only one of the three enumerated governments, confining the other two to the narrower rights granted "other parties" in subsection (B). This is contrary to the plain language of Section 9607. *See Alabama v. Ala. Wood Treating Corp.*, 2006 U.S. Dist. LEXIS 37372, *19 (S.D. Ala. 2006) (rejecting argument that federal plaintiffs bringing § 9607 claims should be treated differently than states: "the statute lists the United States Government, a State, and an Indian tribe together without distinction and the court is aware of no case law which has found such a distinction").

Second, Teck's interpretation of "enforcement costs" would render the SARA amendments to the definition of response costs in Section 9601(25) meaningless. According to Teck, the definition's phrase "enforcement activities related thereto" permits recovery of litigation costs *only* by EPA or its delegates under Section 9604(b). App. Br. at 30-32. But Section 9604(b)(1) *already* permitted recovery of these costs by the federal government and its delegates. 42 U.S.C. § 9604(b)(1); *United States v. Northeastern Pharm. & Chem. Co.,* 579 F. Supp. 823, 851 (W.D. Mo. 1984) (awarding Federal government attorneys' fees pursuant to § 9604(b), prior to 1986 SARA amendments). Teck's interpretation

would render the amendments superfluous and mere surplusage. *In re Oxborrow*, 913 F.2d 751, 754 (9th Cir. 1990) ("we must avoid statutory interpretation that renders any section superfluous and does not give effect to all of the words used by Congress").

2. The Tribes' litigation costs are "related" to removal action.

The district court reasoned that the Tribes could recover litigation costs because they were related to earlier removal action, ER 30-31 (¶ 15), some were incurred investigating site conditions, ER 31 (¶ 17), and because the Tribes' claim for declaratory relief enabled (was related to) recovery of future response costs. ER 33 (¶ 20). Teck ignores the first two grounds and gives some mention to the third ground, but its primary argument urges that "enforcement" generally was not necessary because it was engaged in a voluntary non-CERCLA RI/FS concerning river conditions. This concept of "necessary enforcement" has no anchor in Section 9607(a)(4)(A).

a. The non-CERCLA RI/FS does not preclude recovery of response costs.

Teck's argument that the Tribes' enforcement costs are not "related" to removal action is based upon a false premise—that its voluntary RI/FS constitutes "the actual [and only] response action for the UCR" and requires no further enforcement. App. Br. at 35. This is simply not true. The RI/FS is not a "response

action" under CERCLA; it is *expressly* being conducted *outside* of CERCLA's authority and disclaims any CERCLA liability. ER 13 (¶ 10 and n.1); ER 1361, 1385-86. Furthermore, the voluntary agreement governing the RI/FS does not provide for cleanup or any follow-up action; it ends when the RI/FS is complete. ER 3, 1361 (¶ 3), 1388 (¶ 84). EPA has acknowledged that the agreement does not resolve liability for cleanup and encouraged litigation of Teck's CERCLA liability. ER 15 (¶ 15) (quoting SER 207).

Nor does the existence of the voluntary, non-CERCLA RI/FS in any way preclude response action by the State or the Tribes. First, the RI/FS agreement expressly preserves "any claim…which an entity other than a Party [to the RI/FS Agreement] may have against [Teck] or the United States." ER 1386 (¶ 76). Second, Section 9607 authorizes recovery of "all" response costs subject only to proof of inconsistency with the NCP—which Teck failed to prove. ER 37. Third, nothing in CERCLA precludes a government's claim under Section 9607, even if (as is *not* the case here) there were an ongoing federal action under Sections 9604 or 9606; indeed the CERCLA provision that withdraws jurisdiction for "challenges" to ongoing EPA CERCLA proceedings contains an express exception for cost recovery actions under Section 9607. 42 U.S.C. § 9613(h)(1); *see N. Penn Water Auth. v. BAE Sys.*, 2005 U.S. Dist. LEXIS 14773 *10 (E.D. Pa. 2005) (declining to dismiss municipality's § 9607 claim because it "falls within the

exception provided in Section [9613(h)(1)] for actions under § 9607 to recover response costs"). Finally, EPA itself rejected Teck's position. ER 15 (quoting SER 207).

b. The Tribes took response action to which its enforcement activities relate.

The district court found that the Tribes' enforcement actions related to specific removal actions and Teck does not challenge these findings of fact. In 1999, the Tribes successfully petitioned EPA to conduct a preliminary assessment under Section 9605(d). 42 U.S.C. § 9605(d); ER 11. In prompting EPA to investigate the UCR Site in the first instance, the Tribes acted to "monitor, assess, and evaluate the release or threat of release of hazardous substances" and its actions therefore constitute "removal." 42 U.S.C. § 9601(23); ER 29-30.[12] In addition, the Tribes worked alongside EPA on the preliminary assessment, including influencing development of sampling and quality assurance plans, physically conducting Site sampling with EPA, and ultimately influencing the Site

[12] The Tribes entered the MOA to protect the health of all persons on the Reservation, the quality of Reservation lands, waters, and resources, and the quality of off-Reservation areas in which it has rights and entitlements. SER 201. By securing investigation (and eventual cleanup), the Tribes acted to "prevent, minimize, or mitigate damage to the public health or welfare or to the environment…." 42 U.S.C. § 9601(23) (removal definition).

Investigation report that concluded a problem existed and that further CERCLA action was warranted.[13] ER 11.

With this assistance from the Tribes, and based on its preliminary assessment, EPA determined that further action was warranted, and issued the UAO in 2003 ordering Teck to address contamination at the Site. ER 11-12. The UAO concluded that "The RI/FS required by this Order is necessary to abate an imminent and substantial endangerment because of an actual or threatened release of hazardous substances from the Site and protect the public health or welfare or the environment…and will expedite effective remedial action." ER 286 (¶ 7). Teck refused to comply with the UAO and study site contamination. ER 12. Thereafter, the Tribes funded a citizen suit seeking to enforce the UAO against a recalcitrant Teck.[14] ER 12. This led to Teck's settlement with EPA and execution of the non-

[13] The EPA and the Tribes entered into a Memorandum of Agreement (MOA) in 2000 related to the preliminary assessment work, and the Tribes played a significant role in that endeavor. ER 11; SER 193-205. All of this work pre-dated the Tribe's cost recovery action, filed in 2008. However, because it was reimbursed by federal grants, the Tribes excluded these costs from its claim to avoid double recovery. ER 33 (¶ 20 and n.11). The fact that these expenses are not technically recoverable, however, does not change their fundamental character as "removal" costs to which the "enforcement costs" relate, nor does it preclude the availability of declaratory relief. *Foster v. United States*, 922 F. Supp. 663, 664 (D.D.C. 1996) ("while a claim for recovery of past costs is logically antecedent to a claim for future costs, it is not a prerequisite.")

[14] The award of response costs to the Tribes does not include attorneys' fees for this action, which the district court had previously determined were not recoverable. ER 25, n.6.

CERCLA RI/FS Agreement, but not before the district court rejected Teck's challenge to application of U.S. environmental law (subsequently affirmed by this court, *Pakootas I,* 452 F.3d at 1082). This effort culminated in a finding of Teck's liability, thus "secur[ing] a right of recovery [to] future response costs." ER 33 (¶20).

The Tribes' attorneys' fees and costs "relate" to its response activities and are recoverable under Section 9607(a)(4)(A).

3. The Tribes' Expert Costs and Fees Qualify as "Removal" Actions.

Teck poses an artificial distinction in attempting to dismiss the Tribes' scientific and investigation costs as "litigation" related. App. Br. at 45. This is not a distinction that matters under CERCLA: instead, the inquiry is whether the costs were necessary to "monitor, assess, and evaluate the release" of hazardous substances, and to "prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." 42 U.SC. § 9601(23) ("removal" definition).

Teck appears to have derived its "litigation" distinction from a misreading of *Key Tronic,* 511 U.S. 809—although oddly it never cites that Supreme Court decision and instead relies only on two of its Third Circuit progeny.[15] Perhaps this

[15] Teck's reliance on those cases is misplaced. Both involve private plaintiffs limited to recovery of "necessary" costs, and ongoing statutorily-based cleanups.

is because *Key Tronic* is, by its own terms, limited to private party cases under Section 9607(a)(4)(B) and stated that its rule was not applicable to governments. *Key Tronic,* 511 U.S. at 819. But even under *Key Tronic*, there is no bright line that disallows costs that meet the definition of Section 9601(23) simply because they might also have advanced a litigation goal.

a. The Tribes' experts' expenses incurred for sampling and evaluating UCR Site conditions are recoverable as "removal" costs.

CERCLA Section 9607(a)(4)(A) holds responsible parties liable for "all costs of removal or remedial action" not inconsistent with the NCP. Section 9601(23) broadly defines "removal" to include "such actions as may be necessary to monitor, *assess, and evaluate the release* or threatened release of hazardous substances [or] *prevent, minimize, or mitigate damage to the…environment*." 42 U.S.C. § 9601(23) (emphasis added). CERCLA therefore provides for recovery of

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In *Black Horse Lane Assocs., LP v. Dow Chem. Co.,* 228 F.3d 275, 290-91 (3d Cir. 2000), plaintiff sought recovery of fees paid to its environmental consultant merely to review quarterly cleanup reports prepared by others; unlike the Tribe's experts, the plaintiff's consultants never visited the property, monitored the contamination, or gathered data. In *Redland Soccer Club v. Dep't of the Army*, 55 F.3d 827, 850 (3d Cir. 1995), plaintiffs sought recovery for personal health risk assessments, long after the site had been closed to the public for cleanup, which "ha[d] nothing to do with any remedial or response action" at the site and were not in any way "necessary" to the response. Both cases contrast with the extensive scientific work, testing and sampling conducted by the Tribe's experts, which were important to "monitor, assess, and evaluate the release…of hazardous substances." 42 U.S.C. § 9601(23).

the Tribes' costs incurred assessing and evaluating UCR Site conditions to determine whether hazardous substances are released from Teck's slag and effluent, as well as actions requiring Teck to participate in a CERCLA cleanup to minimize or to mitigate damage to the environment. The district court correctly determined that the Tribes' "investigative work identifying hazardous substances in the UCR Site, analyzing releases to the environment, and identifying the responsible party" meet CERCLA's requirements, because those actions "assessed and evaluated releases of hazardous substances, thereby proving Teck's liability." ER 29-30 (¶13). The court found that these costs totaled $3,483,635.90. ER 19 (¶28)

b. The Tribes' investigation of Site conditions advanced the cleanup.

This litigation was prompted by Teck's persistent refusal to admit liability under CERCLA, or that its wastes had released hazardous substances to the UCR environment.

In 2015, the Tribes' (and State's) success proving Teck's liability enabled EPA to negotiate a CERCLA-based cleanup order. ER 21-22 (¶¶ 33-34); SER 208-270. In contrast to Teck's previous refusal to enter into a CERCLA-based RI/FS agreement in 2006, EPA was able in 2015 to act pursuant to its CERCLA authority and entered an Administrative Order on Consent ("AOC") requiring Teck to

perform a time critical removal action to address lead and arsenic contamination on properties located within the UCR Site, including Tribal allotments. *Id*. EPA's issuance of the AOC demonstrates that Teck will be responsible for cleaning up the Site under CERCLA. The district court found ample evidence that Teck has vigorously resisted any finding of CERCLA liability. ER 12 (¶ 7), 14 (¶ 14), 20 (¶ 30), 35 (¶ 27). Teck's 2015 agreement to CERCLA-based action is compelling evidence that the Tribes' enforcement action overcame this resistance, and advanced cleanup at the UCR Site. ER 21-22; SER 208-270.

The Tribes' efforts also benefitted the entire cleanup by securing adequate financing. Teck's divisibility defense, arguing that it should be allocated 0.00% – 0.05% of liability for Site contamination, presaged its views on the scope of its duty to clean up the Site. ER 18-19 (¶¶ 23-24). The Tribes' refutation of this defense and ultimate success proving Teck's joint and several liability under CERCLA directly advanced the cleanup of the Site by holding liable a "responsible solvent polluter." *Key Tronic,* 511 U.S. at 820. Had the Tribes not disproven Teck's claim, Teck would have paid anywhere from zero to 0.05% of cleanup costs, ER 18-19, while the remaining 99.95% to 100% of costs would likely have gone unfunded as historical mining companies who contributed contamination are likely defunct a century after operations ceased. Thus, the Tribes' efforts benefited the

entire cleanup by ensuring it actually "get[s] paid for." *Key Tronic,* 511 U.S. at 820.

D. The District Court Correctly Exercised its Discretion in Determining that the Tribes' Attorneys' Fees Were Reasonable.

A district court "has discretion" in determining the amount of a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). In *Chapman*, this court adopted the principles in *Hensley* to determine the reasonableness of CERCLA fee awards, and the district court applied them here. *Chapman,* 146 F.3d at 1176. Teck makes no challenge to the district court's findings of *any* of the *Hensley* factors.

Under *Hensley*, "[t]he most useful starting point…is the number of hours reasonably expended…multiplied by a reasonable hourly rate." *Hensley,* 461 U.S. at 433. Teck does not challenge the district court's finding that the hours and rates expended were reasonable. ER 35. *Hensley* provides that the most "important factor" after calculating this lodestar is "the 'results obtained.'" 461 U.S. at 434. The district court found that the Tribes won the relief requested. ER 35 (¶ 27). "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," which "normally" will encompass the entire lodestar. 461 U.S. at 435.

Teck does not challenge the district court's rejection of its arguments below regarding allegedly unnecessary costs. ER 35-36 (¶¶ 28-29). Instead, it relies solely

on an alleged disproportionality between fees and response costs *if* the Tribes' expert costs do not so qualify. This speculative proposition is not a consideration under *Hensley*, and cannot meet Teck's burden of proving an abuse of discretion where the district court carefully and thoroughly applied the factors that are required by *Hensley*.

Whether viewed as "removal" costs or "enforcement" costs, CERCLA entitles the Tribes to recover both the costs of their experts' investigation, testing and analysis at the UCR, and its attorneys' fees in securing Teck's obligation to pay for the cleanup of the Site.

IV. The District Court Correctly Ruled That Teck Failed to Demonstrate That The Harm At Issue Is Theoretically Capable of Apportionment.

Plaintiffs' SACs alleged that Teck disposed of hazardous substances at the UCR Site (a "facility") resulting in CERCLA liability for response costs incurred at the facility. ER 1187-88 (¶¶ 6.1-6.3); 1203-04 (¶¶ 5.1-5.7). Answering the SACs, Teck interposed the affirmative defense of Liability Proportionate to Apportionment (Apportionment Defense) and attempted to show that it should only be responsible for a very small fractional share. ER 1051; 1082.[16]

[16] Teck's expert claimed that even though it dumped more than eight million tons of slag into the site, Teck's release of the suite of six metals represented less than 1% of the releases of metals deposited there. This apples to oranges comparison—releases to disposals—was only possible because Teck only counted its releases at the Site while it counted disposals from all other polluters.

In this attempt to avoid joint and several liability, Teck took on a difficult task. "Liability under CERCLA is generally joint and several unless the defendant meets its burden to prove the harm is divisible and capable of apportionment." ER 91. "CERCLA was designed to promote 'the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for contamination.'" ER 90-91 (quoting *Burlington Northern and Santa Fe Railway Company v. United States*, 556 U.S. 599, 602 (2009) (hereinafter *BNSF*). "Impos[ing] joint and several liability, when appropriate, serves that purpose, by making solvent liable parties, rather than the responding government, bear the risk that other liable parties are insolvent and therefore, places the financial burden of CERCLA cleanup on those responsible for the contamination." ER 91 (citing *United States v. Chem-Dyne Corp.,* 572 F. Supp. 802, 808 (S.D. Ohio 1983)).

In asserting the affirmative defense of apportionment/divisibility, Teck undertook the burden of proving two elements: (1) that the harm is theoretically capable of apportionment; and (2) establishing a reasonable basis for apportioning harm. *BNSF*, 556 U.S. at 614-15. "Evidence supporting divisibility must be concrete and specific." *United States v. Hercules, Inc.,* 247 F.3d 706, 718 (8th Cir. 2001). The first element is a question of law and the second is a question of fact. *Id*. The district court, in an extensive and carefully reasoned opinion, concluded

that Teck failed to prove the first element because it did not adequately identify the harm at the Site or show that it was susceptible to apportionment. Consequently, Teck's defense failed as a matter of law. ER 121.

The starting point for divisibility of harm analysis in CERCLA cases is Section 433A of the Restatement (Second) of Torts (1965) ("Restatement"). *BNSF,* 556 U.S. at 614. "Not all harms are capable of apportionment" and there is "such a thing as a 'single indivisible harm.'" ER 93 (citing *BNSF,* 556 U.S. at 614). Thus, "[w]hen two or more causes produce a single, indivisible harm, '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.'" *BNSF,* 556 U.S. at 614-15 (quoting Restatement § 433A, cmt. *i*).

Based on the allegations in Plaintiffs' pleadings, the district court recognized that the harm at issue is the "entirety of the contamination in the UCR Site." ER 104. Plaintiffs' SACs allege that "Teck Cominco's slag, liquid waste, and the hazardous substances contained therein have come to be located in, and cause continuing impacts to, the surface water and ground water, sediments, and biological resources which comprise the [UCR Site]." ER 1182 (¶ 4.2); 1198 (¶ 4.2). Because the Tribes and State sought recovery of response costs for investigating the entire UCR Site, "which includes all of the hazardous substances

released or threatened to be released from the Site, from whatever source," ER 103, any division of responsibility for harm must take up the entire site.[17]

Teck argues strenuously that the harm at the site must be limited to the six metals named in Plaintiffs' SACs and not the entirety of the harm at the Site, reasoning that it should not be responsible for the harm caused by others. In this, Teck has put the cart before the horse. In each of the cases it cites, *e.g., Bell,* 3 F.3d at 896, *Alcan,* 990 F.2d at 722, *O'Neil v. Picillo,* 883 F.2d 176 (1st Cir. 1989), the courts recognized that polluters may not be responsible for contamination traceable to others, but only after surveying the harm at the site and judging whether the elements for apportionment are met. In *Bell,* for example, the Court approved apportionment based on discharges of chromium to ground water by three successive operators of the same facility. It contrasted cases like this one—"hazardous waste sites at which numerous substances have been commingled"—in which joint and several liability is imposed. *Bell,* 3 F.3d at 895 n.7. "In such cases, determining the contribution of each cause to a single harm will often require a very complex assessment of the relative toxicity, migratory potential, and synergistic capacity of the hazardous wastes at issue." *Id.*

[17] *See* Plaintiffs' SACs. ER 1179 (¶ 1.2); ER 1195 (¶ 1.3).

Courts analyzing apportionment defenses require defendants to demonstrate the relationship between "waste volume, the release of hazardous substances, and the harm at the site." *United States v. Monsanto,* 858 F.2d 160, 172 (4th Cir. 1988). The harm caused by defendant(s), innocent causes, and even plaintiffs must be considered. *Bell,* 3 F.3d at 896. For a defendant alleging apportionment, such as Teck, that may lead to only fractional responsibility for harm at the Site, but only if the full harm at the Site is considered.[18]

Teck complains that it was hamstrung in this effort because the RI/FS it was engaged in with EPA was not complete. App. Br. at 57. There is no evidence that a complete RI/FS was necessary to identify the harm at the Site, but in any event Teck made the strategic judgment to proceed with its apportionment defense and cannot now complain about the outcome. In 2008—the outset of the liability and response costs case—Teck asked the district court to stay all proceedings pending completion of the RI/FS, which Teck projected to take three years, expressly raising concerns about proof of apportionment.[19] ER 1104-1153. Teck's motion demonstrated it understood the scope of its burden of proof in seeking to apportion

[18] Teck discussed at length the apportionment approved in *BNSF*, but neglected to note that the polluters presented evidence of total contamination and remediation costs necessary to support a volumetric approach. App. Br. at 48. *See BNSF*, 556 U.S. at 603-06, 616-18.

[19] Plaintiffs had agreed to defer five of the six causes of action, but refused to agree to defer trial of Declaratory Ruling Regarding Response Costs. SER 140-141.

harm at the Site—and contradicts its current claims. It acknowledged that EPA's investigation at the UCR Site was not limited to the six metals noted in Plaintiffs' complaint or even to those types of compounds. ER 1107-08. And, it explained that due to the "multiplicity of sources and contaminants," the RI/FS Scope of Work requires Teck to "identify the sources of contamination and define the nature, extent, and volume of the sources of contamination, including their physical and chemical constituents [and] their concentrations….[and] also investigate the extent of migration of this contamination…and any changes in its physical or chemical characteristics…." ER 1107-08, 1399. Teck told the court that this information was "necessary to inform the Court's decision on…divisibility and apportionment." SER 69; *see also* ER 1115. The district court denied that motion. Teck did not appeal this decision. ER 1098-1103.

At that point, Teck could have moved to bifurcate proceedings and litigate liability first, while deferring its affirmative defense of apportionment to subsequent proceedings, but elected instead to go forward to prove the defense. *See, e.g., Bell,* 3 F.3d at 893 (district court trifurcated case into liability, response cost recoverability, and divisibility phases). Indeed, the district court noted Teck's decision to go forward with its affirmative defense in its later ruling dismissing Teck's divisibility defense. ER 119.

Going forward to litigate apportionment, Teck marshalled substantial evidence. Teck undertook to identify inputs of contaminants throughout the 150-mile Site. It identified 487 mines, eight mills, a smelter and additional industrial operations that may have contributed various metals to the UCR Site. ER 855. And, there are multiple other sources of potential non-metallic hazardous substances. SER 63 (¶ 6). Inexplicably, Teck's expert testimony supporting this defense was limited to identification of only six of the at least thirteen metals it discharged—with no consideration of commingling with other hazardous substances present at the Site[20]—and their presence in the top five centimeters of the sediment, and it eschewed any analysis of synergistic effects between the six metals it addressed and other wastes it discharged or those discharged by other polluters. ER 864, 46 (¶ 4), 94-95, 115.

Teck sought to limit the harm in question to a subset of substances that were invoked to prove its liability.[21] This approach is nonsensical. To establish liability,

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[20] Teck's proof on apportionment posited that there were hundreds of other sources of contamination in the UCR Site but it did not address their commingled presence in the sediment and pore water, nor any synergistic result. Nor does Teck contest the district court's conclusion that it deposited more than six metals at the UCR Site. ER 46.

[21] Plaintiffs' SACs alleged that Teck contributed to contamination at the UCR Site by disposal of "certain hazardous substances…*including, but not limited to,* arsenic, cadmium, copper, mercury, lead, and zinc." *See* ER 1181 (¶ 4.1), 1185 (¶ 4.14); ER 1198 (¶ 4.1), 1201 (¶ 4.9) (emphasis added).

plaintiffs need only establish that a defendant is responsible for one release of one hazardous substance from one pathway. *A & W Smelter & Refiners, Inc. v. Clinton,* 146 F.3d 1107, 1110-11 (9th Cir. 1998). Proof of an apportionment affirmative defense, in contrast, requires evaluation of *all* of the wastes at the Site in order to determine whether the resultant harm is capable of apportionment among its causes. *United States v. R.W. Meyer, Inc.,* 889 F.2d 1497, 1507 (6th Cir. 1989); *Washington v. United States,* 922 F. Supp. 421, 424 (W.D. Wash. 1996) ("'Environmental harm' is defined by the Courts in divisibility analysis as 'the *hazardous substances present at the facility* and the response costs incurred in dealing with them.'") (emphasis added). As CERCLA is concerned with "averting future injury by remediating contamination," and "recovering the cost of eradicating contamination," all of the contamination subject to remediation must be considered as part of the harm. *United States v. Burlington Northern & Santa Fe Ry. Co.,* 520 F.3d 918, 938-939 (9th Cir. 2008), *rev'd on other grounds,* 556 U.S. 599 (2009); *see also Monsanto,* 858 F.2d at 172 (harm at the site was the "environmental harm"). This makes sense as the harm must be determined for purposes of divisibility of contribution of multiple polluters, each of whom may be found liable on different grounds or may never be brought to court. *Compare Bell,* 3 F.3d at 901-03 (Three parties operated same facility at mutually distinct times, all of which discharged the same one hazardous substance that had no synergistic

effects; court distinguished cases involving intermingled chemicals with possible synergistic effects). Teck seized on language from the Ninth Circuit's *BNSF* opinion to argue that the harm at the site is *only* the harm traceable to the defendant. ER 95-96; App. Br. at 59. In context, the court was explaining that since contamination was the harm at issue, divisibility arguments must consider "the contamination traceable to each defendant." 520 F.3d at 939. Read as Teck proposes, a polluter would have no responsibility for the results of commingling of its releases and resulting synergistic effects or disproportionately higher costs of remediation linked to its contamination. As we have seen, that is not the case.

Consistent with its effort to limit its apportionment burden, Teck restricted identification of harm at the site to the top five centimeters of the sediment, excluding porewater and biota, and it did not address synergistic effects either among the metals it released or interactions with other hazardous substances deposited into the river.[22] In this, Teck did not carry its burden of proof to address

[22] Teck was wrong in suggesting that the district court overlooked its expert's declaration that analysis of synergistic effects was unnecessary due to non-release from co-located contaminants. App. Br. at 66. The court expressly cited Dr. Johns' declaration on that issue, and explained that Teck's argument was inconsistent with liability because it posited no release to the environment. Apportionment assumes liability (which requires release of contaminants as an element) and addresses whether the harm is divisible. As explained, Teck itself later stipulated that its slag releases metals to the environment—pulling the rug out from its only point about synergy. ER 44, 115.

all the harm at the Site. *See Monsanto,* 858 F.2d at 172 (defendant bears burden of disproving commingling's impact on relative toxicity, migratory potential and synergistic capacity); *United States v. Alcan Aluminum Corp.,* 964 F.2d 252, 269 (3d Cir. 1992) ("[Defendant's] burden in attempting to prove the divisibility of harm…will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue"); *United States v. Vertac Chem., Corp.,* 364 F. Supp. 2d 941, 956 (E.D. Ark. 2005) ("Where…hazardous substances are commingled, a defendant cannot rely on merely volumetric evidence. Evidence must be produced disclosing the individual and interactive qualities of the substances deposited at the Site.") (internal quotations omitted); *United States v. Manzo,* 279 F. Supp. 2d 558, 572 (D.N.J. 2003) ("[Divisibility] is inappropriate where independent factors, such as relative toxicity, migratory potential, or synergistic capacities of hazardous substances, might have had a substantial effect on the harm to the environment"). This is so even though Teck engaged in an extensive investigation and proffered evidence regarding contributions of contaminants from hundreds of additional sources. The district court recognized that this deficiency in Teck's proof was sufficient to grant summary judgment against it. ER 105-06 ("Simply put, because [Teck] has failed to account for all of the harm at the UCR site, it cannot prove that harm is divisible ('theoretically capable of apportionment')."). Teck's Appellate Brief does not

attempt to answer the defects in its proof, and this is sufficient grounds for the Court to affirm the district court's decision.

Refusing to address all of the harm at the UCR Site and focusing only on a limited set of releases resulting from its disposal of hazardous substances, Teck urged volumetric apportionment based on inputs to the UCR Site. This is difficult in cases involving remediation of injury to land and water because the harm is not necessarily proportionate to the polluter's volumetric share. In cases such as this, various forms of hazardous wastes may cause different injuries and require different levels of remediation, and synergistic interactions between commingled wastes may cause additional injury like increased toxicity or contaminant migration. Consistent with this, Comment *i* to Section 433A of the Restatement explains that "[b]y far the greater number of personal injuries, and of harms to tangible property, are...normally single and indivisible."

Ignoring Comment *i*, Teck argues that Comment *d* to § 433A supports volumetric apportionment here. Comment *d* is off point because it describes instances in which pollution interferes with the "plaintiff's use or enjoyment of his land," as in a private nuisance. Restatement § 433A cmt. d. There, the harm may be apportioned on the basis of evidence of their respective quantities of the contaminant. Restatement illustrations fourteen and fifteen explain the difference. While discharge of contaminants causing loss of use alone may be divisible, when

the contaminants cause property damage, joint and several responsibility results. *See* Restatement § 433A cmt. *i,* illus. 14-15. As CERCLA cost-recovery claims concern investigation and remediation of contamination—not recovery for loss of use—they are comparable to claims for harm to tangible property and fit within Comment *i.*

Teck cites *Bell* as support for application of Comment *d* here, but as previously discussed, *Bell* involved a site in which a single chemical was present and it originated from three operators of a single source of pollution. With no commingling of hazardous substances and no conceivable synergistic effects, volumetric apportionment was feasible. The same was true in *Coeur d'Alene,* in which three polluters contributed the same metals to a single site. 280 F. Supp. 2d at 1020. Where, as here, the sediment is a chemical stew comprised of hazardous wastes from, by Teck's calculation, hundreds of sources, Comment d does not support apportionment.

In sum, Teck's apportionment defense was correctly dismissed because Teck failed to identify all of the harm at the Site, and it failed to address commingling and potential synergistic effects and necessary cleanup. In this, it failed to show how responsibility for cleanup of its hazardous wastes is susceptible to division so its affirmative defense fails as a matter of law.

V. The Law of the Case Doctrine Prevents Panel Reconsideration Of Issues Previously Adjudicated By This Court.

The law of the case doctrine prevents reconsideration of issues previously decided by this court in *Pakootas I,* 452 F.3d 1066. Under the law of the case doctrine, "one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case." *Leslie Salt Co. v. United States,* 55 F.3d 1388, 1392 (9th Cir. 1995). A prior decision should be followed unless "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997).

Reconsideration of *Pakootas I* by this panel is inappropriate. Teck cites no intervening change in controlling authority rendering reconsideration appropriate, nor does it offer substantially different evidence adduced in subsequent trials warranting reconsideration. Teck does not argue this court's prior decision was clearly erroneous and seek reversal by this panel. Teck seeks simply to "preserve[]" extraterritoriality and arranger liability issues for subsequent en banc or Supreme Court review. App. Br. at 68.

CONCLUSION

For the reasons stated above, and in the response brief of the State of Washington, the Tribes respectfully requests that this Court affirm the district court's judgment adjudicating Phase I and II of this case.

RESPECTFULLY SUBMITTED this 30th day of June, 2017.

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STATEMENT OF RELATED CASES

Appellee knows of no other related cases aside from those identified by Appellant.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points and contains 13,570 words, exclusive of the Table of Contents, Table of Authorities, and Certificates of Service and of Compliance.

Dated this 30th day of June, 2017.

s/Paul J. Dayton
Paul J. Dayton