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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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,

and

THE STATE OF WASHINGTON,

Plaintiff-Intervenor,

vs.

TECK COMINCO METALS, LTD., a Canadian corporation,

Defendant.

No. CV-04-256-LRS

ORDER GRANTING MOTIONS TO DISMISS SIXTEENTH AFFIRMATIVE DEFENSE (LIABILITY PROPORTIONATE TO APPORTIONMENT) AND MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT’S DIVISIBILITY DEFENSE, *INTER ALIA*

BEFORE THE COURT are the Motion To Dismiss Sixteenth Affirmative Defense (Liability Proportionate To Apportionment) (ECF No. 957) filed by The

ORDER GRANTING MOTIONS RE DIVISIBILITY AND APPORTIONMENT- 1

1 Confederated Tribes Of The Colville Reservation (Tribes), and the Motion For
2 Partial Summary Judgment On Defendant's Divisibility Defense (ECF No. 960)
3 filed by the State Of Washington (State).

4 These motions were heard with oral argument on January 23, 2012. Paul J.
5 Dayton, Esq., argued for the Tribes. Kelly T. Wood, Esq., argued for the State.,
6 Christopher J. McNevin, Esq., argued for the Defendant, Teck Cominco Metals,
7 Ltd. (Teck).

8 9 **I. BACKGROUND**

10 A bench trial is scheduled in September 2012 to determine if Defendant is
11 responsible for a “release” or “threatened release” of any “hazardous substance”
12 from the Upper Columbia River (UCR) Site which caused the Tribes and the State
13 to incur response costs that were “necessary” and “consistent with the national
14 contingency plan.”¹ Per the Ninth Circuit’s 2006 decision, *Pakootas v. Teck*

15
16 ¹ In order to establish liability for response costs under 42 U.S.C. Section
17 9607(a), Plaintiffs must establish: 1) the site on which the hazardous substances
18 are contained is a “facility” under CERCLA’s definition of that term, 42 U.S.C.
19 Section 9601(9); 2) a “release” or “threatened release” of any “hazardous
20 substance” from the facility has occurred, 42 U.S.C. Section 9607(a)(4); 3) such
21 “release” or “threatened release” has caused the plaintiff to incur response costs
22 that were “necessary” and “consistent with the national contingency plan,” 42
23 U.S.C. Section 9607(a)(4) and (a)(4)(B); and 4) the defendant is within one of four
24 classes of persons subject to the liability provisions of Section 9607(a). *Carson*
25 *Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 870-71 (9th Cir. 2001)(en
26 banc).

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 2**

1 *Cominco Metals, Ltd., (Pakootas I)*, 452 F.3d 1066 (9th Cir. 2006), it is already
2 established that the UCR is a “facility” under the Comprehensive Environmental
3 Response, Compensation, and Liability Act (CERCLA), and that Defendant can
4 potentially be held liable as an “arranger” for its disposal of slag and liquid
5 effluent into the Columbia River from its smelter in Trail, B.C., Canada, provided
6 there were releases or threatened releases of hazardous substances from that slag
7 and/or effluent after it was deposited in the UCR Site located wholly within the
8 United States. In sum, it will be determined if Defendant is liable for response
9 costs incurred by the Tribes and the State.

10 Defendant contests its liability and contends it cannot be held responsible
11 for any release or threatened release of hazardous substances from the UCR Site.
12 Consistent therewith, its expert, Mark W. Johns, Ph.D., opines there is no
13 detectable release of hazardous substances from Teck’s barren slag and there is no
14 evidence that dissolved metals from historical liquid effluent releases are located
15 in the UCR. (ECF No. 966-1 at p. 23). Moreover, even assuming it is liable,
16 Defendant asserts its liability should be several, not joint and several, because the
17 harm at issue is divisible.²

18 CERCLA was designed to promote the “timely cleanup of hazardous waste
19 sites and to ensure that the costs of such cleanup efforts were borne by those
20

21 ² Divisibility/apportionment is not a defense to liability itself. It is a
22 judicially created defense to joint and several liability. While it appears
23 “divisibility” and “apportionment” are terms used interchangeably, what is
24 potentially divisible is the harm, and if the harm is divisible, what is potentially
25 apportioned is liability, assuming there is a reasonable factual basis for
26 apportionment. *U.S. v. Monsanto Co.*, 858 F.2d 160, 172 (4th Cir. 1988).

1 responsible for the contamination.” *Burlington Northern and Santa Fe Railway*
2 *Company v. United States (BNSF)*, 556 U.S. 599, 129 S.Ct. 1870, 1874 (2009).
3 Imposition of joint and several liability, when appropriate, serves that purpose by
4 making solvent liable parties, rather than the responding government, bear the risk
5 that other liable parties are insolvent and therefore, places the financial burden of
6 CERCLA cleanup on those responsible for the contamination. *United States v.*
7 *Chem-Dyne Corp.*, 572 F.Supp. 802, 808 (S.D. Ohio 1983). In order to ameliorate
8 the harshness of joint and several liability, those who are found jointly and
9 severally liable may bring a contribution action against other liable parties. 42
10 U.S.C. §9613. “Equitable considerations play no role in the apportionment
11 analysis; rather, apportionment is proper only when the evidence supports the
12 divisibility of damages jointly caused by the PRPs [Potentially Responsible
13 Parties].” *BNSF*, 129 S.Ct. At 1182 n. 9 (emphasis added). Contribution actions
14 allow jointly and severally liable PRPs to recover from each other on the basis of
15 equitable considerations. *Id.*

16 Liability under CERCLA is generally joint and several unless the defendant
17 meets it burden to prove the harm is divisible and capable of apportionment.
18 *BNSF*, 129 S.Ct. at 1881. “The universal starting point for divisibility of harm
19 analyses in CERCLA cases is §433A of the Restatement (Second) of Torts.” *Id.*,
20 quoting *United States v. Hercules*, 247 F.3d 706, 717 (8th Cir. 2001). Under that
21 section of the Restatement, “when two or more persons acting independently
22 caus[e] a distinct or single harm for which there is a reasonable basis for division
23 according to the contribution of each, each is subject to liability only for the
24 portion of the total harm that he has himself caused.” *Id.* (quoting Restatement
25 (Second) of Torts, § 433A (1976)). “Evidence supporting divisibility must be
26 concrete and specific.” *Hercules*, 247 F.3d at 718.

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 4**

1 In a cost recovery action under 42 U.S.C. § 9607, CERCLA's strict liability
2 scheme precludes the need to prove causation in the traditional sense. The phrase
3 "causes the incurrence of response costs" does not require proof of causation as in
4 a traditional common law tort action, but requires only a nexus. *Carson Harbor*
5 *Village, Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1186 (C.D. Cal. 2003). The
6 nexus that must be shown is, however, "a loose one." *Id.* "In the case of an actual
7 release, the plaintiff need only prove that the defendant's hazardous materials were
8 deposited at the site³, that there was a release at the site, and that the release
9 caused it to incur response costs." *Id.* The plaintiff "need not show that
10 defendant's waste was the source of the release or that defendant's waste caused it
11 to incur response costs." *Id.*, citing numerous cases, including *United States v.*
12 *Alcan Aluminum Corp.*, 990 F.2d 711, 721 (2nd Cir. 1993). Although causation is
13 not required to show liability under CERCLA, the burden the defendant must meet
14 in order to reduce its liability under the doctrine of divisibility (apportionment) is
15 essentially a burden to prove that it caused only some part of the contamination
16 and how much. *Alcan*, 990 F.2d at 722 ("[C]ausation is brought back into the
17 case- through the backdoor, after being denied entry at the front door - at the
18 apportionment stage").

19 *BNSF* represents the Supreme Court's most recent foray into the availability
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23 ³ It is undisputed that Teck's slag has been deposited- is located- in the
24 UCR Site. This solid slag material is distinguished from the liquid effluent
25 discharged from Teck's Trail, B.C. Smelter into the Columbia River. The parties
26 dispute whether any of that effluent remains in the UCR Site.

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 5**

1 of apportionment under CERCLA.⁴ The apportionment inquiry is a two-step
 2 process. The first question is whether the harm is “theoretically capable of
 3 apportionment.” *BNSF*, 129 S.Ct. at 1881. This is a question of law. Before
 4 evidence can support a reasonable basis for apportioning the harm (which is the
 5 second, factual question), the harm must be “theoretically capable of
 6 apportionment.”⁵ In *BNSF*, the Supreme Court spent little time on this first step,
 7 merely observing that “both the District Court and Court of Appeals agreed that
 8 the harm created by the contamination of the Arvin site, although singular, was
 9 theoretically capable of apportionment.” *BNSF*, 129 S.Ct. at 1881. The Supreme
 10 Court acknowledged, however, that “[n]ot all harms are capable of
 11 apportionment.” *Id.* There is such a thing as a “single, indivisible harm.” *Id.* and
 12 see Restatement (Second) of Torts, §433A(2) (1966). “When two or more causes

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 14 ⁴ In *United States v. Iron Mountain Mines, Inc.*, 2010 WL 1854118 at *3
 15 (E.D. Cal. 2010), the district court denied a motion for reconsideration on the
 16 alleged basis that *BNSF* represented an intervening change in law:

17 Plaintiffs are correct that *Burlington Northern* does not
 18 constitute a change in law as required for reconsideration.
 19 *Burlington Northern* simply reiterated the law as established
 20 in 1983 in *Chem-Dyne*, and then examined the record to resolve
 a factual question of whether the record supported apportionment.
Burlington Northern did not add a new mandate that District
 Courts must apportion harm.

21 ⁵ “The preliminary issue of whether the harm to the environment is capable
 22 of apportionment among two or more causes is a question of law.” *Hercules*, 247
 23 F.3d at 718, citing *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 902 (5th Cir.
 24 1993). “Then, ‘[o]nce it has been determined that the harm is capable of being
 25 apportioned among the various causes of it, the actual apportionment of damages
 26 is a question of fact.’” *Id.*, quoting *Bell*, 3 F.3d at 896.

27 **ORDER GRANTING MOTIONS RE**
 28 **DIVISIBILITY AND APPORTIONMENT- 6**

1 produce a single, indivisible harm, ‘courts have refused to make an arbitrary
2 apportionment for its own sake, and each of the causes is charged with
3 responsibility for the entire harm.’ *Id.*, quoting Restatement (Second) of Torts
4 §433A, Comment *i*, p. 440 (1963-64).

5 Teck’s expert, Dr. Johns, uses three different methods to apportion Teck’s
6 liability for the harm to the UCR Site. At the outset, he apportions by “type” such
7 that he considers only seven metals that could be attributed to Teck’s slag, those
8 being the six specifically listed in Plaintiffs’ Second Amended Complaints
9 (“SACs”)- arsenic, cadmium, copper, mercury, lead, and zinc- and antimony as
10 opined by Plaintiffs’ expert, Dimitrios Vlassopoulos. After apportioning by
11 “type,” Dr. Johns proceeds to apportion by volume.

12 Dr. Johns’ first method, a “metals loading approach,” considers the amount
13 of metals released from Teck’s slag in the UCR Site. Dr. Johns assumes, per the
14 analysis of Teck’s expert, Jeffrey Bradley, that none of Teck’s liquid effluent
15 remains in the UCR Site. He also assumes, per the analysis of Teck’s expert,
16 Dr. Arthur C. Riese, that Teck’s slag in the UCR Site did not leach any of the SAC
17 metals or antimony. Dr. Johns’ conclusion based on this method is that Teck
18 should be apportioned 0% liability. In other words, the conclusion is that Teck is
19 not liable for any releases or threatened releases of hazardous substances from the
20 UCR Site. Apportionment is not an issue because there is no liability in the first
21 instance. Unless liability exists, there is nothing to apportion.

22 Dr. Johns’ second or alternative apportionment method is based on a
23 calculated flux of zinc from slag and sediment in the UCR Site. Dr. Johns opines
24 that Teck should be apportioned, at the most, a .05 percent share of liability for
25 releases or threatened releases of zinc because, according to Teck’s experts, zinc is
26 the only “SAC” (Second Amended Complaint) metal to even theoretically release

1 from slag. This percentage is derived by a volumetric analysis which includes: (1)
2 estimating the volume of Teck slag that might be present in the top five
3 centimeters of UCR Site sediments; (2) estimating the net rate of release of zinc
4 from this volume of Teck slag to surface water at the Site (using Dr. Riese's .03
5 percent calculated loss); and (3) comparing that estimate with an estimate for the
6 total rate of release of zinc allegedly from all sources to surface water at similarly
7 located areas of the Site.

8 Although not explicitly set forth as an "opinion" in his expert report, Dr.
9 Johns testified at his deposition to yet another apportionment method, that being a
10 "mass-based approach" in which he takes into account the six metals specifically
11 pled in Plaintiffs' Second Amended Complaints, plus antimony. Without regard to
12 whether there has been a release of those metals, he calculates the total amount of
13 those metals contained in Teck's slag which has been deposited in the UCR Site.
14 (See Dr. Johns' Expert Report, ECF No. 1137-1 at p. 85, and Table 11 at ECF No.
15 1138-1 at p. 113). This can then be compared to the total amount of those same
16 metals contained in waste originating from sources other than Teck which has
17 been deposited in the UCR Site. This too is a volumetric approach to
18 apportionment.

19 20 **II. DISCUSSION**

21 **A. What Is The Harm?**

22 Teck contends that "[t]aking together the definition of harm from *BNSF*,
23 Plaintiffs' expert evidence, and the *Pakootas* [*I*] holding, the type of harm which is
24 subject to apportionment in this case is the alleged contamination from the
25 leaching of SAC [Second Amended Complaint] metals allegedly traceable to
26 leaching from Teck slag and effluent."

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 8**

1 The definition of harm from *BNSF*, to which Teck refers, is contained in the
2 Ninth Circuit’s decision, 520 F.3d 918, 939 (9th Cir. 2008)⁶, which concluded “that
3 it is most useful for purposes of determining divisibility to view the ‘harm’ under
4 CERCLA as the contamination traceable to each defendant.” Teck asserts that
5 “[t]he harm of the type traceable to a defendant is subject to two limitations: (1) it
6 is limited by the plaintiff’s claim, and (2) in this case, it is further limited by the
7 type of release which is legally cognizable to trigger CERCLA liability against
8 Teck.” According to Teck, “[b]y limiting the relevant contamination to that which
9 is of a type ‘traceable to the defendant(s),’ the Ninth Circuit implicitly recognized
10 that the harm to be apportioned is necessarily limited to that pleaded and proved
11 by a plaintiff.”

12 The Ninth Circuit’s definition of harm was “**for the purposes of**
13 **determining divisibility**,” not liability in the first instance. (Emphasis added).
14 Divisibility/apportionment becomes an issue only after liability has been
15 determined. As noted, in a cost recovery action under Section 9607, CERCLA’s
16 strict liability scheme precludes the need for a plaintiff to prove causation in the
17 traditional sense. “In the case of an actual release, the plaintiff need only prove
18 that the defendant’s hazardous materials were deposited at the site, that there was a
19 release at the site, and that the release caused it to incur response costs.” *Carson*
20 *Harbor Village, Ltd.*, 287 F.Supp.2d at 1186. The plaintiff “need not show that
21 defendant’s waste was the source of the release or that defendant’s waste caused it
22 to incur response costs.” *Id.*

23 CERCLA imposes liability for the cleanup of sites where there is a release
24 or threatened release of hazardous substances into the environment. CERCLA

25
26 ⁶ This was the decision subsequently reversed by the Supreme Court.

1 liability attaches when three conditions are satisfied: (1) the site at which there is
2 an actual or threatened release of hazardous substances is a “facility” under 42
3 U.S.C. Section 9601(9); (2) a “release” or “threatened release” of a hazardous
4 substance from the facility has occurred, 42 U.S.C. Section 9607(a)(4); and (3) the
5 party is within one of the four classes of persons subject to liability under
6 §9607(a). *Pakootas I*, 452 F.3d at 1073-74.

7 Under 42 U.S.C. Section 9601(9), “facility” is defined as:

8 (A) any building, structure, installation, equipment, pipe
9 or pipeline . . . , well, pit, pond, lagoon, impoundment, ditch,
10 landfill, storage container, motor vehicle, rolling stock, or
11 aircraft, or (B) any site or area where a hazardous substance
has been deposited, stored, disposed of, or placed, or
otherwise come to be located

12 At the time the Ninth Circuit decided *Pakootas I*, the only claims before the court
13 where those of individual Plaintiffs Joseph A. Pakootas and Donald R. Michel,
14 and intervenor State of Washington, to enforce the Environmental Protection
15 Agency’s (EPA’s) Unilateral Administrative Order (UAO). The UAO defined
16 “facility” as the UCR Site, which was described as the “extent of contamination in
17 the United States associated with the Upper Columbia River.” Because Teck’s
18 slag had “come to be located” at the UCR Site, the UCR Site was a “facility” as
19 defined in Section 9601(9). 452 F.3d at 1074. According to the Ninth Circuit:

20 The [UAO] defines the facility as being entirely within the
21 United States, and Teck does not argue that the Site is not
22 a CERCLA facility. Because the CERCLA facility is within
23 the United States, this case does not involve an extraterritorial
24 application of CERCLA to a facility abroad. The theory of
Pakootas’s complaint seeking to enforce the terms of the Order
to a “facility” within the United States, does not invoke
extraterritorial application of United States law precisely
because this case involves a domestic facility.

25 *Id.* In a footnote, the circuit pointed out that:

26 Because the EPA and Pakootas in seeking enforcement of
the EPA’s [UAO] do not characterize either the Trail

1 Smelter or the Columbia River in Canada as a facility,
2 we need not and do not reach whether these sites are
3 facilities for purposes of CERCLA.

3 *Id.* at n. 4.

4 The circuit then went on to address the second element of liability which is
5 that there must be a “release” or “threatened release” of a hazardous substance into
6 the environment. 42 U.S.C. Section 9601(22), defines “release” as “any spilling,
7 leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping,
8 leaching, dumping, or disposing into the environment.” *Id.* at 1074-75.

9 According to the circuit:

10 Here, several events could potentially be characterized as
11 releases. First, there is the discharge of the waste from the
12 Trail Smelter into the Columbia River in Canada. Second,
13 there is the discharge or escape of the slag from Canada when
14 the Columbia River enters the United States. And third, there
15 is the leaching of heavy metals and other hazardous substances
16 from the slag into the environment at the [UCR] Site.
17 Although each of these events can be characterized as a
18 release, CERCLA liability does not attach unless the “release”
19 is from a CERCLA facility.

16 Here, as noted, the [UAO] describes the facility as the [UCR]
17 Site; not the Trail Smelter in Canada or the Columbia River
18 in Canada. Pakootas has alleged that the leaching of hazardous
19 substances from the slag that is in the Site is a CERCLA
20 release, and Teck has not argued that the slag’s interaction
21 with the water and sediment of the Upper Columbia River is
22 not a release within the intendment of CERCLA. Our
23 precedents establish that the passive migration of hazardous
24 substances into the environment from where hazardous
25 substances have come to be located is a release under CERCLA.
26 [Citations omitted]. We hold that the leaching of hazardous
27 substances from the slag at the Site is a CERCLA release.
28 That release- a release into the United States from a facility in
the United States- is entirely domestic.

23 *Id.* at 1075.

24 Pursuant to a settlement between Teck and EPA, EPA withdrew the UAO
25 and Pakootas and Michel no longer have any pending claims in this matter.
26 Enforcement of the UAO is no longer an issue. What is at issue now are the

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 11**

1 claims of the Tribes and the State for recovery of response costs and natural
2 resource damages. The Ninth Circuit did not decide the extraterritorial application
3 issue because it was not necessary for it do so. That continues to be the case
4 because in their currently operative Second Amended Complaints, the Tribes and
5 the State allege the relevant “facility” is the UCR Site- not the Trail Smelter or the
6 Columbia River in Canada- and that a “release” or “threatened release” has
7 occurred at the UCR Site. The Tribes and the State have not alleged that a
8 “release” or “threatened release” occurred when waste was discharged from the
9 Trail Smelter into the Columbia River in Canada or when there was a discharge or
10 escape of the slag from Canada when the Columbia River enters the United States.
11 The Tribes and the State intend to prove there has been an actual release or a
12 threatened release of hazardous substances from Teck’s slag and/or liquid effluent
13 at the UCR Site.⁷ That release or threatened release into the United States from a
14 facility in the United States is entirely domestic. Plaintiffs have to prove this in
15 order to establish the necessary nexus between Teck and the contamination in the
16 UCR Site. The slag and the effluent are not hazardous unless they have released
17 hazardous substances or threaten to do so. The nature of the slag and the liquid
18 effluent, and the fact the disposal occurred in Canada, make this case somewhat
19 unique. Although, as acknowledged by the Ninth Circuit, the discharge of the slag

21 ⁷Teck argues under the amici’s interpretation of *Pakootas I*, “every
22 discharge of a liquid, solid, or gas in Canada or Mexico that migrates to the United
23 States and does not instantly stop at the border would be deemed an actionable
24 release the moment it crossed the border.” At issue here are releases or threatened
25 releases from slag and/or liquid effluent that has already come to rest in the UCR
26 Site. It is actionable at that point and not “at the moment it crossed the border.”

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 12**

1 and the effluent from the Trail Smelter could potentially be characterized as a
2 “release” under CERCLA, in order for that “release” to create CERCLA liability,
3 it would be necessary to characterize the Trail Smelter as a “facility” and that
4 would clearly involve an extraterritorial application of CERCLA. Likewise,
5 although the discharge or escape of the slag from Canada when the Columbia
6 River enters the United States could potentially be characterized as a
7 “release” under CERCLA, that would require characterizing the Columbia River in
8 Canada as a “facility,” and that too would involve an extraterritorial application of
9 CERCLA.

10 The fact for liability purposes the Tribes and Plaintiffs need to, and intend
11 to, establish that Teck’s slag and/or liquid effluent released or threatens to release
12 hazardous substances (certain metals) from the UCR Site does not, however, limit
13 the scope of the releases or threatened releases from the Site for which Teck can
14 be held liable and, in turn, does not limit the scope of the relevant harm for
15 divisibility/apportionment purposes.⁸ The Ninth Circuit’s reference in *BNSF* to
16

17 ⁸ Plaintiffs have retained certain experts, Dimitrios Vlassopoulos and Victor
18 Bierman, to establish that Teck’s slag and/or liquid effluent released or threatens
19 to release hazardous substances (certain metals) from the UCR Site. Vlassopoulos
20 and Bierman have been retained specifically for the purpose of proving there has
21 been a “release” or “threatened release” of any “hazardous substance” from the
22 UCR Site (the “facility”). They have been retained to prove Teck’s slag and liquid
23 effluent- which undisputedly was carried across the International Border into the
24 UCR Site- was “hazardous” in that it was not benign or inert, but released
25 hazardous substances (certain metals), or threatens to release those hazardous
26 substances, after being deposited at the UCR Site. It appears that without this

1 “contamination traceable to the each defendant” as being the applicable harm in
2 the divisibility/apportionment inquiry (which is the secondary inquiry after the
3 initial liability inquiry), simply recognizes it is the defendant’s burden to prove it
4 “caused only some part of the contamination and how much.” It is not, as Teck
5 asserts, an implicit recognition by the Ninth Circuit “that the harm to be
6 apportioned is necessarily limited to that pleaded and proved by a plaintiff.”
7 Teck’s reading of the Ninth Circuit’s *BNSF* decision would effectively foist the
8 causation burden back onto the Plaintiffs in attempting to establish liability,
9 thereby eliminating the strict liability Congress intended.⁹

10 According to Teck, pursuant to “apportionment jurisprudence, . . . courts
11 implicitly have considered the harm subject to apportionment to be the
12 contamination of the type pleaded or proven to be traceable to defendant . . . by
13 **plaintiff.**” (Emphasis added). The Plaintiffs, however, have no burden with
14 regard to divisibility/apportionment. The burden belongs solely to Teck.
15 Plaintiffs’ experts did not evaluate divisibility/apportionment because that is not
16 Plaintiffs’ burden. Plaintiffs’ experts addressed Teck’s liability because that is the
17 threshold inquiry. As such, Plaintiffs’ experts concerned themselves only with

18
19 _____
20 proof, slag and liquid effluent are not “hazardous substances” as defined in 42
21 U.S.C. § 9601(14).

22 ⁹ Plaintiffs’ liability burden in Phase I does not require them to fingerprint
23 Teck’s slag and/or liquid effluent as the source of the contamination in the UCR
24 Site. It does not require them to prove that Teck’s slag and/or effluent was the
25 source of a particular release of hazardous substances (certain metals). Plaintiffs’
26 burden is to prove there was a release or threatened release of **any** hazardous
27 substance from the UCR Site which caused it to incur response costs.

28 **ORDER GRANTING MOTIONS RE
DIVISIBILITY AND APPORTIONMENT- 14**

1 actual and/or threatened releases of metals from Teck's slag and/or liquid effluent,
2 rather than all of the contamination in the UCR Site from whatever source.
3 Plaintiff's experts may have addressed only sediment contamination in the UCR
4 Site, but they need address no more than that to potentially establish liability for
5 response costs ("a release or threatened release of any hazardous substance").
6 They did not need to address contamination of surface water, groundwater, etc.,
7 although Plaintiffs certainly have alleged these other types of contamination in
8 their Second Amended Complaints. On the other hand, it is the Defendant's
9 burden to rule out other types of contamination so that the totality of the harm can
10 be considered in a divisibility/apportionment analysis.

11 Teck contends that in their Second Amended Complaints, the Plaintiffs have
12 alleged a single harm limited to six metals and, as a matter of law, this harm is
13 capable of being apportioned (it is divisible). What the Tribes and the State plead
14 in their Second Amended Complaints is as follows:

15 From approximately 1906 to mid-1995, Teck Cominco
16 generated and discharged into the Columbia River certain
17 hazardous substances in slag, as a solid form, and in liquid
18 waste, **including, but not limited to**, arsenic, cadmium,
19 copper, mercury, lead, and zinc.

20

21 The Tribes have incurred costs in response to releases of
22 hazardous substances into the environment at the Upper
23 Columbia River [UCR] Site. These costs **include** costs of
24 investigating the nature and extent of contamination
25 from the hazardous substances from the Cominco smelter,
26 **including** arsenic, cadmium, copper, mercury, lead, and
27 zinc), and costs of overseeing investigative activities performed
28 by others.

. . . .

The State has incurred costs in response to releases of
hazardous substances into the environment at the Upper
Columbia River [UCR] Site. These costs **include** costs of
investigating the nature and extent of contamination

1 from the hazardous substances from the Cominco smelter,
2 **(which include** arsenic, cadmium, copper, mercury, lead, and
3 zinc), and costs of overseeing investigative activities performed
4 by others.

5 (ECF No. 147 at Paragraphs 4.1 and 4.14; ECF No. 148 at Paragraphs 4.1 and 4.9).

6 It is apparent the Tribes and the State are seeking to recover response costs
7 from Teck for investigating and cleaning up the entire UCR Site which includes
8 all of the hazardous substances released or threatened to be released from the Site,
9 from whatever source.¹⁰ A component of this are the costs of investigating the
10 nature and extent of contamination “from the hazardous substances from the
11 Cominco smelter.” It is also apparent the Tribes and State are not limiting
12 themselves to alleging only six metals have leached or could leach from Teck’s
13 slag and/or liquid effluent deposited in the UCR Site. The Tribes and the State
14 have not pled a single divisible harm consisting of only six metals.

15 Furthermore, the environmental harm pled by the Tribes and the State is not
16 limited to the first five centimeters of the sediment located at the bottom of the

17 ¹⁰ See also Paragraph 1.3 of the State’s Second Amended Complaint which
18 indicates it seeks “to recover from Defendant Teck Cominco the costs of remedial
19 or removal actions . . . resulting from the release of hazardous substances into the
20 environment of the Upper Columbia River and Lake Roosevelt” This
21 paragraph contains no limitation that the State is seeking to recover only the costs
22 resulting from the release of hazardous substances attributable to Teck.

23 Paragraph 1.2 of the Tribes’ Second Amended Complaint is also not limited.
24 The Tribes seek to “recover from Teck Cominco the costs of remedial or removal
25 actions . . . that the Tribes have incurred and will continue to incur at the Upper
26 Columbia River and Lake Roosevelt where hazardous substances have come to be
27 located”

28 **ORDER GRANTING MOTIONS RE
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1 river in the UCR Site.¹¹ Paragraph 4.2 of the Tribes' and the State's Second
2 Amended Complaints allege "Teck Cominco's slag, liquid waste, and the
3 hazardous substances contained therein have come to be located in, and cause
4 continuing impacts to, **the surface water and ground water**, sediments, and
5 **biological resources** which comprise the Upper Columbia River and Lake
6 Roosevelt." (Emphasis added).

7 In this case, the harm is the entirety of the contamination in the UCR Site
8 and what the Plaintiffs seek are recovery of costs to investigate and clean up the
9 entirety of that contamination. The RI/FS (Remedial Investigation/Feasibility
10 Study), which is currently being conducted, is in response to the contamination of
11 the UCR Site as a whole. This contamination is not limited to metals which have
12 been released or which threaten to be released from Teck's slag and/or liquid
13 effluent deposited in the UCR Site.¹² None of Teck's apportionment theories
14

15 ¹¹ As noted, Dr. Johns so limits his flux apportionment analysis.

16 ¹² See Declaration of John Roland (ECF No. 965), State Department of
17 Ecology Project Coordinator for the UCR Site, who says there are approximately
18 199 contaminants of concern currently being evaluated by the EPA for the
19 ongoing RI/FS sediment sampling and risk evaluation regarding the Site. The
20 contaminants of concern include non-metal organics such as PAHs (polycyclic
21 aromatic hydrocarbons) and PCBs (polychlorinated biphenyls). Roland indicates
22 that "zinc is found consistently commingled with other hazardous substance
23 metals in Site sediments, and also can be found commingled with other types of
24 hazardous substances." He adds that sampling to date shows the presence of
25 hazardous substances in surface water, sediment and porewater (interstitial water
26 within sediment).

1 address the entirety of the contamination. Instead, they begin with the assumption
2 that the only harm at issue is whatever metals were released from Teck's slag
3 and/or liquid effluent and the same metals which were released from non-Teck
4 sources.¹³ This is a fatal flaw. Because Teck has not addressed the relevant harm
5 in the first instance, it has failed to establish as a matter of law that the relevant

7 ¹³ In Phase I, Plaintiffs are not pursuing emissions of airborne particles from
8 Teck's Trail, B.C. Smelter as a basis for **liability** for response costs. Whether they
9 will be allowed in Phase II to pursue liability for natural resource damages based
10 on such emissions remains to be determined. (See ECF No. 716). The fact,
11 however, these emissions are irrelevant to the liability determination, does not
12 render them irrelevant to the divisibility/apportionment inquiry. With regard to
13 divisibility/apportionment, the question is the nature of liability already
14 established or assumed to exist (joint and several, or merely several). Answering
15 that question depends on the nature of the harm and whether it is single and
16 divisible or single and indivisible. Teck bears the burden on
17 divisibility/apportionment and it is obligated to account for the full extent of the
18 harm in the UCR Site, including whatever harm was contributed by its own
19 airborne emissions which may contain some or all of the same metals released or
20 threatened to be release from Teck's slag and/or liquid effluent in the river.
21 Teck's volumetric analyses have not taken such a contribution into account and,
22 more importantly, have not ruled out the possibility there was such a contribution.
23 Even if only the river component of the UCR Site is considered, Teck's experts
24 did not take into account atmospheric deposition of hazardous substance particles
25 into the river. (See Paragraph 39 of Johns Declaration at ECF No. 1140-1).

1 harm is a single harm divisible in terms of degree. Simply put, because it has
2 failed to account for all of the harm at the UCR Site, it cannot prove that harm is
3 divisible (“theoretically capable of apportionment”).

4 This is evidenced by a comparison of this case with other CERCLA cases,
5 including *BNSF*, in which all of the harm at the particular facilities was accounted
6 for in determining divisibility was possible. In *In re Bell Petroleum Services, Inc.*,
7 3 F.3d 889, 901-902 (5th Cir. 1993), the contamination to which the government
8 responded involved a single hazardous substance (chromium) that originated from
9 industrial operations at a single plant, although it had spread from that plant in
10 groundwater. The plant had been operated, in succession, by three manufacturers.
11 All of them conducted essentially the same operations that resulted in chromium
12 reaching the aquifer. The Fifth Circuit held as a matter of law that the harm was at
13 least theoretically capable of apportionment and that as a factual matter, the
14 defendants had presented sufficient evidence from which the trier of fact could
15 have determined the relative contribution of each defendant to the harm. *Id.* at
16 902-04. The Fifth Circuit distinguished cases involving chemical soups
17 presenting possible synergistic effects. *Id.* at 903.

18 In *Coeur d’Alene Tribe v. Asarco Incorporated*, 280 F.Supp. 1094 (D. Idaho
19 2003), at issue was the harm to the environment from tailings released as a result
20 of mining activity in the Coeur d’Alene Basin. The court found this single harm to
21 be divisible. It reasoned as follows:

22 The Court finds the present case distinguishable from
23 *United States v. Monsanto Company*, 858 F.2d 160
24 (4th Cir. 1988). In *Monsanto*, there was no evidence
25 that each generator was contributing the same type and
26 quantity of hazardous substance. *Id.* at 172. In the case
at bar, sufficient evidence was presented by the Plaintiffs
that establishes each generator was contributing tailings and
all of the tailings released contained lead, cadmium and zinc.
Even though the exact percentages of lead, cadmium and zinc

1 in the tailings from each mill is unknown and differed slightly
2 based on the type of metal being extracted in the milling
3 process, the Court finds the milling methodologies used in the
Basin did not differ significantly from mill to mill to preclude
divisibility based on the volume of tailings generated.

4 Clearly, there is a reasonable relationship between the waste
5 volume, the release of hazardous substances and the harm
6 at the site. The Court makes this statement after acknowledging
7 that estimating releases is not an exact science. . . . Divisibility
8 of the common harm to the Basin based on causation using
9 volumetric calculations may not be the “perfect” method of
10 divisibility, but it certainly is reasonable based on the
11 historical facts available in this particular case.

12

13 The Court finds Defendants have presented concrete evidence
14 to support divisibility in this case. The cause or source of the
15 hazardous substances in the Basin was the dumping of tailings
16 into the waterways.¹⁴ The experts on both sides of this case
17 agree that a “reasonable basis” for apportioning is to consider
18 the amount of mining waste discharged into the waterways.
19 All of the tailings contained lead, cadmium and/or zinc and it
20 is the damages from these three primary metals [for] which
21 the Trustees seek relief. For these reasons, the Court finds
22 divisibility based upon tailings production is reasonable in
23 this particular case. Asarco is responsible for contributing
24 22% of the tailings and Hecla is responsible for contributing
25 31% of the tailings.

26 *Id.* at 1120-21.

27 ¹⁴ This was part of the court’s “Conclusions of Law.” The court did not
28 conclude as a matter of law that “forest fires, channelization, and urbanization”
were a source of hazardous substances in the Basin and it limited its divisibility
analysis to “tailings.” It is true that one of its “Findings of Fact”(No. 8), 280
F.Supp.2d at 1105, was that “[f]orest fires, channelization and urbanization has
impacted the waterways and the soil.” In its Finding of Fact No. 8, the court went
on to say that “the largest source of metal loading in the Basin is from mining
waste” and that “[s]eparating the damage to the environment from other causes
versus the mining waste will be determined in the second phase of trial.”

1 In *BNSF*, the Supreme Court found that a single harm was capable of
2 apportionment (divisible), but this was because of unique facts. The parties
3 involved were only of one type, that being owner-operators. Two relatively small
4 parcels of land were involved in *BNSF* (a 3.8 acre parcel and a .9 acre parcel). The
5 total number of PRPs was small (Brown & Bryant and the two railroads). There
6 were no past owners or past owner-operators. Only the railroads and Brown &
7 Bryant owned the properties since the contamination began. The properties were
8 contaminated by a limited number of discrete chemicals, three in total.

9 *Bell*, *BNSF* and *Coeur d'Alene* are similar in certain key respects and
10 therefore, arrived at the conclusion that the particular single harm involved was
11 divisible and response costs were capable of being apportioned. At the UCR Site,
12 the situation is not akin to that in *Bell* involving a single hazardous substance
13 originating from industrial operations at a single plant that had been operated, in
14 succession, by three manufacturers who conducted essentially the same operations.
15 The hazardous substances in the UCR Site, and specifically in the Columbia River
16 (Lake Roosevelt), are not limited to mining tailings as was the situation in the
17 Coeur d'Alene Basin- tailings containing three metals generated by similar milling
18 methodologies used by two generators.¹⁵ With regard to the UCR Site, there is not
19 evidence that the potentially multiple generators have contributed the same type
20 and quantity of hazardous substances. And certainly, unlike *Coeur d'Alene*, the
21

22 ¹⁵ This court did not find any discussion in *Coeur d'Alene* regarding the
23 presence of other hazardous substances such as PCBs and DDT. Nor did the court
24 find any discussion regarding synergy from commingling of hazardous substances,
25 presumably because that was not an issue. Nor did the court find any discussion
26 regarding airborne emissions, presumably because that also was not an issue.

1 court does not have the good fortune of having experts on both sides of the case
2 agreeing that a volumetric analysis alone is a “reasonable basis” for
3 apportionment. Finally, the UCR Site is nothing like the Arvin site in *BNSF*
4 which involved a limited number of current owner-operators, two small parcels of
5 property, a total of three chemicals and other unique factual circumstances which
6 made the single harm divisible and the apportionment of costs reasonable.

7 The UCR Site is a large, complex site involving potentially multiple
8 generators who have contributed a variety of hazardous substances to the
9 contamination existing at the Site. Although Teck takes issue with there still
10 being 199 contaminants of concern as indicated by Mr. Roland (See n. 11, *supra*),
11 it does not deny there are contaminants in the Site other than, and in addition to,
12 the metals to which it limited its apportionment analyses.

13 14 **B. Can The Harm Be Divided?**

15 Teck’s failure to account for the entire harm makes it unnecessary to go any
16 further. Even assuming, however, that Teck had accounted for the entire harm at
17 the UCR Site, it has not offered evidence allowing the court to conclude the harm-
18 a single harm- is divisible in terms of degree. In turn, this also means Teck has not
19 presented a reasonable factual basis to apportion liability.

20 A single harm is divisible and susceptible to apportionment in a situation
21 where the degree of harm shows true proportionality or dose-dependence. The
22 question is whether the volume of Teck’s contribution to the contamination at the
23 UCR Site is proportional to its contribution to the single harm at the UCR Site
24 such that the harm is susceptible to divisibility. In other words, is that single harm
25 divisible in terms of degree such that Teck’s relative contribution to the total
26 contamination can reasonably be established?

1 Teck contends the harm at issue here is a single, divisible harm.¹⁶ Citing the
2 Restatement §433 A, cmt. *d*, Teck asserts that “[p]ollution of a river by multiple
3 sources exemplifies a divisible harm” and therefore, “as a matter of law, the
4 contamination of a waterway such as the UCR is theoretically divisible based on
5 the respective quantities of pollution discharged in the river.” This portion of the
6 Restatement notes that:

7 [A]ppportionment is commonly made in cases of private
8 nuisance, where the pollution of a stream, or flooding,
9 or smoke or dust or noise, from different sources, has
10 interfered with the plaintiff’s use or enjoyment of his land.
11 Thus where two or more factories independently pollute
12 a stream, the interference with the plaintiff’s use of the
13 water may be treated as divisible in terms of degree, and
14 may be apportioned among the owners of the factories,
15 on the basis of evidence of the respective quantities of
16 pollution discharged into the stream.

17 The Restatement provides an example of this, Illustration 5, in which oil
18 negligently discharged from two factories onto the surface of a stream deprives a
19 downstream riparian owner of the use of the water for industrial purposes. “There
20 is evidence” that seventy percent of the oil came from one factory and thirty
21 percent from of the oil came from the other. On that basis, each factory owner is
22 liable for the corresponding proportion of the plaintiff’s damages.

23 Restatement §433A takes multiple views of pollution cases. While
24 Illustration 5 indicates the loss of a stream’s use for industrial purposes by the
25 combined effect of two oil discharges is divisible if the basis for apportionment is
26 proven, the Restatement says this should be contrasted with Illustrations 14 and 15
27 at cmt. *i*:

28 ¹⁶ An example of “distinct harms” would be where a site consists of non-
contiguous areas of soil contamination. *Coeur D’Alene Tribe v. Asarco
Incorporated*, 280 F.Supp.2d 1094, 1120 (D. Idaho 2003).

1 14. A Company and B Company negligently discharge oil into a stream.
2 The oil floats on the surface and is ignited by a spark from an unknown
3 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.

4 15. The same facts as Illustration 14, except that C's cattle drink the
5 water of the stream, are poisoned by the oil and die. The same result.

6 The distinction between Illustration 5 and Illustrations 14 and 15 has to do
7 with the nature of the harm. According to the Restatement, §433A cmt. *i*:

8 Certain kinds of harm, by their very nature, are normally
9 incapable of any logical, reasonable, or practical division.
10 Death is that kind of harm, since it is impossible, except
11 upon a purely arbitrary basis for the purpose of accomplishing
12 the result, to say that one man caused half of it and another
13 the rest. The same is true of a broken leg, or any single wound,
14 or the destruction of a house by fire, or the sinking of a barge.
15 By far the greater number of personal injuries, **and of harms
to tangible property**, are thus normally single and indivisible.
16 Where two or more causes combine to produce such a single
17 result, incapable of division on any logical or reasonable
18 basis, and each is a substantial factor in bringing about the
19 harm, the courts have refused to make an arbitrary
20 apportionment for its own sake, and each of the causes is
21 charged with responsibility for the entire harm.

22 (Emphasis added).

23 Those who contribute to the "indivisible" burning of a barn or fatal
24 poisoning of cows are liable, jointly and severally, for all of the damage to which
25 they contributed. On the other hand, the loss of use or enjoyment of land
26 apparently is inherently capable of logical, reasonable, or practical division.

27 The court is not bound by the "private nuisance" example in Illustration 5
28 upon which Teck relies ("use or enjoyment of the land"). Furthermore, it is
reasonable to argue that CERCLA liability is different from liability for a private
nuisance, the latter which came to be based on a separation between the individual
tortious acts of wrongdoers and the combined harmful consequences of those acts.

CERCLA liability . . . derives only from the status of the
responsible party in relation to the facility that released

1 hazardous substances. Arranger liability does not arise
2 when the hazardous substance leaves the arranger's
3 property The liability exists regardless of whether
4 the liable party's hazardous substances exceeded some
5 threshold quantity that would have occasioned the response
6 action. By tying the liability-creating conduct to the facility
at which the release and response occur, CERCLA unites
conceptually the liable parties' separate "torts" and unites
geographically the "tort" and the "consequence" in a way
that the private nuisance claims cited in the Restatement
do not.

7 Gold, *Dis-Jointed? Several Approaches To Divisibility After Burlington Northern*,
8 11 Vt. J. Env'tl. L. 307, 367 (2009).

9 As the Ninth Circuit made clear in *Pakootas I*, 452 F.3d at 1077-78, Teck's
10 potential liability as an arranger does not arise as a result of Teck's disposal of
11 slag from its Trail Smelter into the Columbia River. It arises as a result of actual
12 and/or threatened releases of hazardous substances from the slag and/or effluent
13 after it came to rest in the "facility," that being the UCR Site. Furthermore, if a
14 CERCLA claim is similar to a nuisance claim, it is more like a public nuisance
15 claim than a private nuisance claim. A CERCLA claim is not based on lost "use
16 and enjoyment" of the facility that is the subject of the cleanup, but on the need to
17 protect human health, welfare, and the environment. This is a governmental
18 function specifically authorized by CERCLA. CERCLA is concerned with
19 remedying a harm to "tangible property."

20 It is true that the fact hazardous substances are commingled or co-located in
21 the same site does not automatically preclude divisibility of the harm. This is
22 exhibited by the *BNSF* case. What allowed the divisibility of that single harm,
23 however, was sufficient evidence to reasonably establish each of the PRP's
24 proportionate contribution to, and share of, the single harm. In *BNSF*, the district
25 court employed three figures in apportioning the Railroads' liability as 9% of the
26 Government's total response costs: 1) the percentage of the total area of the

1 facility that was owned by the Railroads (19%), that being the .9 acre parcel leased
2 by the Railroads to Brown & Bryant; 2) the duration of Brown & Bryant's
3 business divided by the terms of the Railroads' lease (Railroads had leased their .9
4 acre parcel to Brown & Bryant for 13 years which was only 45% of the time
5 Brown & Bryant operated the Arvin facility (28 years)); and 3) the court's
6 determination that only two of three polluting chemicals spilled on the leased .9
7 acre parcel required remediation and those two chemicals were responsible for
8 roughly two-thirds of the overall site contamination requiring remediation. The
9 district court then multiplied .19 by .45 by .66 (two-thirds) and rounded up to
10 determine the Railroads were responsible for approximately 6% of the remediation
11 costs. 129 S.Ct. at 1882. Allowing for calculation errors up to 50%, the court
12 concluded the Railroads could be held responsible for 9% of the total CERCLA
13 response costs for the Arvin site.

14 Although the Ninth Circuit reversed the district court's apportionment
15 analysis, the Supreme Court upheld the analysis:

16 The District Court's detailed findings make it
17 abundantly clear that the primary pollution at the
18 Arvin facility was contained in an unlined sump
19 and an unlined pond in the southeastern portion of
20 the facility most distant from the Railroads' parcel
21 [.9 acre parcel] and that the spills of hazardous
22 chemicals that occurred on the Railroad parcel
23 contributed no more than 10% of the total site
24 contamination, some of which did not require
25 remediation. With those background facts in mind,
26 we are persuaded that it was reasonable for the court
27 to use the size of the leased parcel and the duration of
28 the lease as the starting point for its analysis.

....

Although the evidence adduced by the parties did not
allow the court to calculate precisely the amount of
hazardous chemicals contributed by the Railroad
parcel to the total site contamination or the exact
percentage of harm caused by each chemical, the
evidence did show that fewer spills occurred on the

1 Railroad parcel and that of those spills that occurred,
2 not all were carried across the Railroad parcel to the B & B
3 sump and pond from which most of the contamination
4 originated. The fact that no D-D spills on the Railroad
5 parcel required remediation lends strength to the District
6 Court's conclusion that the Railroad parcel contributed
7 only Nemagon and dinoseb in quantities requiring
8 remediation.

9 The District Court's conclusion that those two chemicals
10 accounted for only two-thirds of the contamination requiring
11 remediation finds less support in the record; however, any
12 miscalculation on that point is harmless in light of the
13 District Court's ultimate allocation of liability, which included
14 a 50% margin of error equal to the 3% reduction in liability
15 the District Court provided [reducing B & B's liability by 3%
16 and increasing the Railroads' liability by 3%] based on its
17 assessment of the Nemagon and dinoseb spills.

18 129 S.Ct. at 1883.

19 In *3000 E. Imperial, LLC v. Robertshaw Controls, Co.*, 2010 WL 5464296
20 at *10 (C.D. Cal. 2010), the district court concluded the facts and reasoning of
21 *BNSF* demonstrated the Supreme Court was concerned with finding evidence to
22 support a relationship between the figures employed in the particular
23 apportionment analysis and the amount of harm caused by the Railroads,
24 "although [the Court] did not seem to require the exact fit which some previous
25 cases had held was necessary." Therefore:

26 [A]ppportioning liability by the proportion of land owned
27 by the [Railroads] was reasonable in light of evidence that
28 only a few of the spills contributing to the contamination
occurred on the [Railroads'] lands as opposed to the
remainder of the facility. [Citation omitted]. As for the
number of years of operation on the [Railroads'] land, such
apportionment was logical since all contamination was
caused by spills of various chemicals which occurred
continually over the course of 28 years of operation.
[Citation omitted]. There was no indication that the
company's operations changed over the 28 years, and
thus the amount of contamination released would have
remained fairly constant each year.

Id. The district court in *3000 E. Imperial* found that unlike the situation in *BNSF*

1 where the evidence showed the Railroads' use of the land only contributed to a
2 small amount of the "total contamination," there was no evidence in its case
3 showing the defendants' relative contribution to the total contamination.

4 Here too, there is no evidence showing Teck's relative contribution to the
5 total contamination at the UCR Site. The volume of its slag deposited in the UCR
6 Site does not establish its relative contribution to the single harm at the Site.
7 There is no evidence this volume of slag is truly proportional to the harm
8 potentially caused by it, particularly so when Teck's experts failed to address
9 possible synergistic effects of commingled contaminants of various types (metals
10 and non-metals). Teck acknowledges its experts did not consider possible
11 synergistic effects, but contends this was appropriate because there was no risk of
12 the same. (See Paragraphs 36, 37 and 38 of Johns Declaration, ECF No. 1140-1).
13 According to Teck, while its slag was physically co-located in the sediment with
14 other slag and tailings in the UCR, it was not "commingled" in the sense of being
15 chemically mixed with other substances because its experts concluded the slag
16 does not have the propensity to leach under actual UCR conditions. (See
17 Paragraph 11 of Riese Declaration, ECF No. 1131-1). If Teck's slag does not have
18 the propensity to leach under actual UCR conditions, Teck may well not be liable
19 in the first instance (no actual or threatened release because the slag is
20 "environmentally benign"). When divisibility/apportionment is considered,
21 however, it is with the assumption that Teck is liable and the question is the nature
22 of the liability: joint and several, or merely several. Accordingly, if a nexus has
23 already been established between Teck's deposit of slag in the UCR Site and an
24 actual or threatened release of a hazardous substance from the Site, Teck cannot
25 ignore potential synergistic or disproportionate effects of actual and/or threatened
26 releases of hazardous substances from its slag.

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1 This court is unable to distinguish the circumstances existing in the UCR
2 Site from the circumstances which existed at the Bluff Road Site in
3 *U.S. v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988). In *Monsanto*, a number of
4 “generator defendants” had shipped chemical hazardous waste to the Bluff Road
5 site. Although the generator defendants conceded the environmental damage at
6 Bluff Road constituted a “single harm,” they contended there was a reasonable
7 basis for apportioning the harm, observing that each of the off-site generators sent
8 a potentially identifiable volume of waste to the Bluff Road site and, as such,
9 liability should have been apportioned according to the volume they deposited as
10 compared to the total volume disposed of there by all parties. The Fourth Circuit
11 disagreed:

12 The generator defendants bore the burden of establishing
13 a reasonable basis for apportioning liability among responsible
14 parties. *Chem-Dyne*, 572 F.Supp. at 810; Restatement (Second)
15 of Torts §433B (1965). To meet this burden, the generator
16 defendants had to establish that the environmental harm at Bluff
17 Road was divisible among responsible parties. They presented
18 no evidence, however, showing a relationship between waste
19 volume, the release of hazardous substances, and the harm at
20 the site. Further, in light of the commingling of hazardous
21 substances, the district court could not have reasonably
22 apportioned liability without some evidence disclosing the
23 individual and interactive qualities of the substances deposited
24 there. Common sense counsel that a million gallons of certain
25 substances could be mixed together without significant
26 consequences, whereas a few pints of others improperly mixed
27 could result in disastrous consequences. Under other
28 circumstances[,] proportionate volumes of hazardous substances
may well be probative of contributory harm. In this case,
however, volume could not establish the effective contribution
of each waste generator to the harm at the Bluff Road site.

Id. at 172-73.

23 The Fourth Circuit stated that at a minimum, evidence showing a
24 relationship between waste volume, the release of hazardous substances, and the
25 harm at the site was “crucial to demonstrate that a volumetric apportionment
26

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1 scheme was reasonable.” Because of the numerous hazardous substances found at
2 Bluff Road, “a volumetric apportionment based on the overall quantity of waste,
3 as opposed to the quantity and quality of hazardous substances contained in the
4 waste[,] would have made little sense.” *Id.* at 172 n. 25. It added that “volumetric
5 contributions provide a reasonable basis for apportioning liability only if it can be
6 reasonably assumed, or it has been demonstrated, that independent factors had no
7 substantial effect on the harm to the environment.” *Id.* at n. 27. Independent
8 factors relevant to establishing divisibility of harm include “relative toxicity,
9 migratory potential, and synergistic capacity of the hazardous substances at the
10 site.” *Id.* at n. 26. See also *Bell*, 3 F.3d at 901 (“even where commingled wastes
11 of unknown toxicity, migratory potential, and synergistic effect are present,
12 defendants are allowed an opportunity to attempt to prove that there is a
13 reasonable basis for apportionment . . . ; where such factors are not present,
14 volume may be a reasonable means of apportioning liability”).

15 In a recent case out of the Eastern District of Wisconsin, these independent
16 factors precluded divisibility of harm on the basis of volumetric contributions.
17 *United States v. NCR Corp.*, 2011 WL 2634262 (E.D. Wis. 2011), involved two
18 companies who, pursuant to a UAO issued by the EPA, were dredging and
19 disposing of PCB-contaminated sediment in the Fox River, and installing caps and
20 using sand to cover PCB-laden riverbed sediment in some areas. The district court
21 concluded “the extent and nature of the environmental harm in the River is not
22 easily correlated with volumes of PCBs discharged by the various parties”
23 because “numerous factors independent of the volume of pollution have affected
24 the Site.” *Id.* at *6. According to the court:

25 [I]t is undeniable that what’s left in the River bottom *now*
26 (the problem to be addressed by the cleanup) is not necessarily
representative of the pollution that was released into the River

1 decades ago during the period that carbonless copy paper
2 was produced. The harm, in other words, is not a stable,
3 stationary site but a dynamic one. The sediment that is
4 currently at the bottom of the River is in many ways just a
5 snapshot of the pollution that has persisted, often by the
6 mere happenstance of river depths, currents, etc. Moreover,
7 geography and the flow of the river over 50 years have
8 created a variety of different areas requiring remediation.
9 Some of these areas may be capped, while others must be
10 dredged. The depth of the sites and their location largely
11 control these decisions. These independent factors preclude
12 an apportionment analysis that is based primarily on the
13 volumes of the PCBs that the parties discharged.

14 *Id.* (emphasis in text).

15 In *NCR*, the district court also concluded that the cost of cleaning up the
16 river bore “little relation to the relative volume of PCBs released into the River”
17 and therefore, “apportioning liability based on volumes would not be advisable.”

18 *Id.* at *4. Its reasoning was:

19 [S]uppose that dredging one square foot of sediment from the
20 river bed costs one dollar. It will cost roughly that same dollar
21 whether the PCB levels are 20 parts per million or 200 parts per
22 million. The sediment has to be sucked off the river bottom by
23 a specially equipped barge and disposed of properly. Transportation
24 of the dredged material adds to the cost, and that cost is based on
25 distance and volume rather than PCB concentration. Although the
26 volumes of PCBs discharged obviously have some correlation with
27 the extent of the costs, the relationship between volume and cost is
28 a loose one.

.....

Implicit in [this] analysis . . . is that the “harm” at issue here is
the *cost* required to clean up the river. After all, this is not
a case about the environment or pollution in the abstract, but
about who should *pay* for cleaning up the Site. These cleanup
costs- not the pollution itself- are what is subject to
apportionment, and if these costs do not have a strong causal link
with pollution volume, then there would seem to be little reason to
apportion them on that basis. There is some precedent for this
approach. *See Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*,
746 F. Supp.2d 692, 738 (D.S.C. 2010)(“A method [of
apportionment] that does not take . . . the cost of the remediation into
account does not reasonably account for the harm at the Site”); *Chem-
Nuclear Systems, Inc. v. Bush*, 292 F.3d 254, 260 (D.C. Cir. 2002)
(finding that, to show divisibility, party must prove “the amount

1 of harm that it caused” was less than \$7,660,315 worth of
2 cleanup costs).

3 *Id.* at *5 (emphasis in text).

4 Teck contends the Tribes and the State have conflated the concepts of harm
5 and damages in arguing that apportionment is improper because the RI/FS has not
6 yet been completed, a remedy has not been selected, and the costs of cleanup
7 cannot reasonably be determined. Teck asserts “damages” and “harm” are distinct
8 and its liability for the environmental harm to the UCR Site, if any, can be
9 apportioned, even if the amount of Plaintiffs’ response costs remain uncertain.
10 According to Teck, “[i]f damages were the same as harm, the defendant would be
11 forced to anticipate and prove plaintiff’s damages at the liability phase of trial-
12 reversing both the burden of proof as well as the order of proof of that element- in
13 order to apportion harm.”

14 “[T]he choice as to when to address divisibility and apportionment are
15 questions best left to the sound discretion of the trial court in the handling of an
16 individual case.” *Alcan*, 990 F.2d at 723. In bifurcating this case, this court was
17 not asked to address, and did not address, when the issue of apportionment should
18 be raised. The Defendant has chosen to raise the issue in Phase I. Apportionment
19 can be determined at this liability stage (Phase I), but there is no question that the
20 consequences of any apportionment of liability relate ultimately to what a PRP
21 pays in response costs. Thus, in *BNSF*, the Railroads were apportioned “liability
22 as 9% of the Governments’ total response cost” for remediaton of the Arvin
23 site/facility. 129 S.Ct. at 1876. The Supreme Court characterized the divisibility
24 inquiry as “whether the Railroads were properly held jointly and severally liable
25 for the full cost of the Government’s response efforts.” 129 S.Ct. at 1880. And, as
26 noted, in a footnote in the majority opinion, the Supreme Court observed that

1 “apportionment is proper only when the evidence supports the divisibility of the
2 damages jointly caused by the PRPs.” 129 S.Ct. at 1882, n. 9 (emphasis added).¹⁷
3 *BNSF* recognized that what was ultimately being apportioned were response costs
4 and deemed the district court’s analysis a reasonable method for determining that
5 only certain costs were traceable to the Railroads (9%).

6 Teck does not bear the burden at the Phase I trial to anticipate and prove
7 Plaintiffs’ response costs, and indeed Plaintiffs do not have that burden either.
8 Phase I involves one claim by the Tribes and State and that is for a declaration that
9 Teck is liable to pay response costs. If the Tribes and State succeed in obtaining
10 that declaratory relief, thereafter they will not need to re-establish Teck’s liability
11 for a particular response cost as it is incurred. All they will need to establish is
12 that a particular cost was incurred in responding to the environmental harm and it
13 is not inconsistent with the national contingency plan (NCP). If Teck’s liability is
14 joint and several, it is responsible for 100% of that cost.

15 Teck treats the divisibility issue as a matter of whether the pollution, the
16 single harm, in the UCR Site can actually be divided, rather than whether the cost
17 of cleaning up the same is divisible based on volume. This court agrees with the
18 *NCR* court that the nature of cleanup costs are an important consideration in
19 determining whether a defendant can prove the harm is divisible and beyond that,
20

21 ¹⁷ Restatement of Torts Section 433A states that “[d]amages for harm are to
22 be apportioned among two or more causes where (a) there are distinct harms, or
23 (b) there is a reasonable basis for determining the contribution of each cause to a
24 single harm.” See also *O’Neil v. Picillo*, 883 F.2d 176, 180 (1st Cir.
25 1989)(recognizing “basic common law principle that defendants not be held
26 responsible for those costs traceable to others”).

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28 **DIVISIBILITY AND APPORTIONMENT- 33**

1 whether there is a reasonable factual basis for apportionment. The anticipated
2 cleanup of the UCR Site is all of the hazardous substances found therein, not just
3 the hazardous substances attributable to Teck's waste. Even if it could be
4 determined that Teck contributed only a certain percentage of the total volume of
5 hazardous substances in the UCR Site, there would not necessarily be a basis to
6 conclude it caused the same percentage of "harm" in the UCR Site, defined as the
7 cost of cleaning up the Site. See *NCR* at *7¹⁸. The harm is not the mere disposal
8 or release of hazardous substances, but the consequences thereof.

9 10 **III. CONCLUSION**

11 Teck has not presented the requisite evidence for the court to conclude, as a
12 matter of law, that the harm at the UCR Site is capable of being divided so as to
13 allow for apportionment of liability. Therefore, the court must conclude, as a
14 matter of law, that this harm is not capable of being divided. The harm is not
15 "theoretically capable of apportionment." *BNSF*, 129 S.Ct. at 1881. If Teck is
16 found liable following trial, it will be jointly and severally liable for response costs
17 incurred by the Tribes and State which are consistent with the national
18 contingency plan.

19 The Tribes' Motion To Dismiss Sixteenth Affirmative Defense (Liability
20

21 ¹⁸ See also *State of Washington v. United States*, 922 F.Supp.2d 421, 430
22 (W.D. Wash. 1996):

23 A better case might be made for division according to each
24 party's contribution of a particular contaminant akin [to] the
25 apportionment that occurred in *Hatco [v. W.R. Grace & Co.- Conn.]*,
26 836 F.Supp. 1049 (D. N.J. 1993)], but the parties would have
27 to make an evidentiary showing that their particular waste
28 necessitated a discrete clean-up effort apart from that required
for any other party's waste.

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1 Proportionate To Apportionment) (ECF No. 957), and the State's Motion For
2 Partial Summary Judgment On Defendant's Divisibility Defense (ECF No. 960),
3 are **GRANTED**. The defense is summarily adjudicated in favor of Plaintiffs and
4 is dismissed as a matter of law.

5 Fed. R. Civ. P. 56 allows a court to grant summary adjudication on a claim
6 or defense. The standard that applies to a motion for summary adjudication is the
7 same as that which applies to a motion for summary judgment. Fed. R. Civ. P.
8 56(a); *Mora v. ChemTronics*, 16 F.Supp.2d 1192, 1200 (S.D. Cal. 1998). The
9 purpose of summary judgment is to avoid unnecessary trials when there is no
10 dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th
11 Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R. Civ. P. 56,
12 a party is entitled to summary judgment where the documentary evidence
13 produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby,*
14 *Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v. Weidner*, 780 F.2d
15 727, 732 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine
16 dispute over a fact that might affect the outcome of the suit under the governing
17 law. *Anderson*, 477 U.S. at 248. The moving party has the initial burden to prove
18 that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v.*
19 *Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving
20 party has carried its burden under Rule 56, "its opponent must do more than
21 simply show that there is some metaphysical doubt as to the material facts." *Id.*
22 The party opposing summary judgment must go beyond the pleadings to designate
23 specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477
24 U.S. 317, 325, 106 S.Ct. 2548 (1986). In ruling on a motion for summary
25 judgment, all inferences drawn from the underlying facts must be viewed in the
26 light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Nonetheless,

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 35**

1 summary judgment is required against a party who fails to make a showing
2 sufficient to establish an essential element of a claim, even if there are genuine
3 factual disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322-
4 23.

5 Summary adjudication is appropriate here because of the evidence the
6 Defendant has failed to present concerning its divisibility/apportionment defense
7 (i.e., failure to account for the entirety of the harm at the UCR Site). While the
8 court has considered the evidence presented by the Defendant, it has not
9 “weighed” that evidence or made any determinations regarding the credibility of
10 Defendant’s experts. It is the failure to present certain evidence- the simple
11 absence of evidence- which warrants summary adjudication. There is no dispute
12 about what the Defendant has presented and what it has not presented.

13 Granting of the Plaintiffs’ motions regarding divisibility/apportionment
14 renders moot the Defendant’s motions challenging Plaintiffs’ expert testimony
15 intended to rebut Defendant’s divisibility/apportionment defense, as well as
16 related motions. This includes the following: 1) Defendant’s Motion To Strike
17 Expert Report And Testimony Of Jay L. Haney (ECF No. 900); 2) Defendant’s
18 Motion To Strike Expert Report And Testimony Of Ronald J. Kendall (ECF No.
19 904); and 3) Defendant’s Motion To Exclude Expert Report And Testimony Of
20 Remy J.C. Hennett (ECF No. 908).

21 All of these motions are **DISMISSED** as being moot with the understanding
22 it is no longer necessary for any of these Plaintiffs’ experts to testify regarding
23 divisibility/apportionment at the Phase I trial since Defendant will not be
24 presenting evidence at trial regarding the same.

25 ///

26
27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 36**

1 Defendant's Motion To Strike Certain Of Plaintiffs' Expert Opinions (ECF
2 No. 912) is **DISMISSED** as moot to the extent it seeks to strike the rebuttal
3 reports of Haney, Kendall, and Paul Queneau, all of which are intended to rebut
4 Teck's divisibility/apportionment defense.

5 Defendant's Motion To Exclude Expert Report And Certain Testimony Of
6 Plaintiffs' Expert David McLean (ECF No. 924) is **DISMISSED** as moot to the
7 extent it seeks to exclude those portions of McLean's May 2011 rebuttal expert
8 report and proposed testimony based thereon which are related to rebuttal of
9 Teck's divisibility/apportionment defense.

10 Granting the Plaintiffs' motions regarding divisibility/apportionment
11 renders moot the Plaintiffs' motions challenging Defendant's expert testimony
12 intended to support Defendant's divisibility/apportionment defense, as well as
13 related motions. This includes the following: 1) Plaintiffs' Motion To Exclude
14 As Inadmissible Jeffrey Bradley's Application Of A One-Dimensional Sediment
15 Transport Model To Quantify Sediment Deposition In The UCR Site Prior To
16 1942 (ECF No. 949); 2) Plaintiffs' Motion To Exclude Untimely Supplements
17 And Revisions To The January 2011 Report Of Jeffrey Bradley (ECF No. 942); 3)
18 Plaintiffs' Motion To Exclude The Expert Opinions Of Adrian Brown (ECF No.
19 982); 4) Plaintiffs' Motion To Strike Declarations Of Thomas Dunne And Adrian
20 Brown (ECF No. 1170); and 5) Plaintiffs' Motion To Exclude Testimony Relying
21 On Reports Issued By History Associates, Inc. (ECF No. 946).

22 All of these motions are **DISMISSED** as being moot with the understanding
23 these Defendant's experts will not testify at the Phase I trial regarding
24 divisibility/apportionment because that defense has been dismissed as a matter of
25 law.
26

27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 37**

1 The issue remaining for trial is Teck's liability and more specifically, the
2 issue of release or threatened release of hazardous substances from the UCR Site.
3 The opinions of Plaintiffs' experts, Dimitrios Vlassopolous and Victor Bierman,
4 are directed to that issue. Separate orders will address Defendant's Motion To
5 Strike Certain Testimony Of Plaintiffs' Experts Dimitrios Vlassopoulos and Victor
6 Bierman (ECF No. 915), Defendant's Motion To Strike Certain Of Plaintiffs'
7 Expert Opinions (ECF No. 912) to the extent it is directed at the rebuttal report of
8 Vlassopoulos, and Defendant's Motion To Exclude Expert Report And Certain
9 Testimony Of Plaintiffs' Expert David McLean (ECF No. 924) to the extent
10 McLean's May 2011 rebuttal expert report and proposed testimony based thereon
11 is related to the issue of Teck's liability.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter
13 this order and forward copies to counsel of record.

14 **DATED** this 4th day of April, 2012.

15
16 *s/Lonny R. Suko*

17
18 _____
19 LONNY R. SUKO
20 United States District Judge
21
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25
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27 **ORDER GRANTING MOTIONS RE**
28 **DIVISIBILITY AND APPORTIONMENT- 38**