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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 ORANGE COUNTY WATER DISTRICT,

4 Plaintiff,

5 v.

04 Cv. 4968 (SAS)

6 UNOCAL CORP., et al.,

7 Defendants.

8 -----x  
9 December 16, 2010  
2:35 p.m.

10 Before:

11 HON. SHIRA A. SCHEINDLIN

12 District Judge

13 APPEARANCES

14 MILLER AXLINE & SAWYER  
Attorneys for Plaintiff  
15 BY: MICHAEL AXLINE

16 KING & SPALDING LLP  
Attorneys for Defendant Chevron USA, Inc.  
17 BY: CHARLES CORRELL

18 ARNOLD & PORTER LLP  
Attorneys for Defendants BP and Atlantic Richfield  
19 BY: MATTHEW T. HEARTNEY

20 SHEPPARD MULLIN RICHTER & HAMPTON LLP  
Attorneys for Exxon Mobil Corporation  
21 BY: JEFFREY J. PARKER

22 BLANK ROME LLP  
Attorneys for Defendant Lyondell Chemical  
23 BY: JEFFREY MOLLER  
JOHN J. DiCHELLO, JR.

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1 (Case called)

2 THE COURT: Good afternoon, Mr. Axline.

3 MR. AXLINE: Good afternoon.

4 THE COURT: Good afternoon, Mr. Correll.

5 MR. CORRELL: Good afternoon.

6 THE COURT: Good afternoon, Mr. Heartney.

7 MR. HEARTNEY: Good afternoon.

8 THE COURT: Good afternoon, Mr. Parker.

9 MR. PARKER: Good afternoon.

10 THE COURT: I recognize you.

11 MR. MOLLER: Jeffrey Moller for Lyondell Chemical.

12 MR. DiCHELLO: John DiChello, also for Lyondell.

13 MR. CORRELL: Mr. Wallace may be joining us in person.

14 He was caught on the tarmac a couple of hours ago at National.

15 We checked our BlackBerries in downstairs, but he said he was

16 going to try and make it. He may come a few minutes later.

17 THE COURT: He is always welcome.

18 This is Judge Scheindlin. Who is on the phone?

19 MR. CONDRON: Peter Condron from Wallace King. I

20 believe you have about eight other parties on the phone as

21 well.

22 THE COURT: They are going to have to identify

23 themselves one by one, but I must say, Mr. Condron, I assume

24 you are just a live audience and don't intend to speak because

25 you're familiar with the difficulties of our phone system. I

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1 have to keep it on speaker so that the court reporter can take  
2 anything you do say, but the way the phone system works, and I  
3 have told you this before I think, if you're speaking there is  
4 absolutely no way for you to hear my voice. One voice cancels  
5 the other so I can't interrupt you. In real live court I give  
6 a stern look and say, all right, thank you, Mr. Heartney, sit  
7 down, and he will. But I can't say that to you because you are  
8 on the phone. So I really can't have eight lawyers on the  
9 phone being heard. You're welcome to listen in, and I don't  
10 think you're welcome to say anything.

11 That said, you can state your appearances.

12 So Mr. Condron has given his appearance.

13 MR. ANDERSON: Jon Anderson of Latham & Watkins for  
14 Conocophilips.

15 MR. WILFARB: David Wilfarb of Munger, Tolles & Olson  
16 on behalf of Shell defendants.

17 MS. DOYLE: Colleen Doyle on behalf of the Tesoro  
18 defendants.

19 MR. PEREZ: Ed Perez of Bracewell & Giuliani for the  
20 Valero defendants.

21 MR. PARDO: Jim Pardo on behalf of Exxon Mobil.

22 MS. VU: Monica Vu on behalf of G&M Oil.

23 THE COURT: Anybody else?

24 OK. We have got the eight appearances on the phone.  
25 For your own information, in the courtroom is Mr. Axline all

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1 alone for the plaintiffs, Mr. Correll for Chevron, Mr. Heartney  
2 for Arco and BP, Mr. Parker for Exxon Mobil, Mr. Moller and his  
3 colleague for Lyondell. That's who is in the courtroom.

4 We are waiting potentially -- we are not waiting. We  
5 are expecting, hopefully, maybe, Mr. Wallace depending on his  
6 flight from Washington which was delayed.

7 Having now managed to get through all the appearances,  
8 we turn to the issue of the premotion conference, which is that  
9 the plaintiff Orange County -- who joined the conference?

10 MR. TEMKO: Bill Temko on behalf the Shell defendants.  
11 I am sorry I am a minute late.

12 THE COURT: You didn't hear the speech, but basically  
13 you're a passive audience. I won't be able to hear the nine  
14 people or so who are on the phone contribute to the argument,  
15 but you are welcome to listen in.

16 I started to say the topic of the conference is the  
17 plaintiff's request to make a motion for summary judgment, or  
18 maybe it's partial summary judgment, and they wrote a letter  
19 dated December 8 explaining their views. Then a response came  
20 in on December 13 from Arco explaining the defense views, more  
21 particularly Arco's views, but I think the defense views.

22 The letters did raise some interesting and important  
23 issues. The two that I consider procedural up front are, one,  
24 the timing of the motion, and, two, who should decide the  
25 motion. The defense is arguing that the transferee court,

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1 that's me, should not decide the summary judgment, but that it  
2 should be sent back to the transferor court to decide.

3 There is also an issue of timing, in that I say in  
4 every case, even in this complex MDL but every other case too,  
5 you don't get multiple shots at summary judgment. If you think  
6 you're ready now, that's fine, but if you lose, you can't make  
7 it again on a better record.

8 So if the plaintiff is confident that now is the time,  
9 then now is the time. But plaintiff must realize that winning  
10 is one thing, but losing is another. You don't get a second  
11 shot. You know that, Mr. Axline, right?

12 MR. AXLINE: Yes, your Honor.

13 THE COURT: That's really, I would say, plaintiff's  
14 choice more than any ruling I would make. If the plaintiff  
15 feels this is a right time, an opportune time, and the record  
16 is developed enough to support the position, then I certainly  
17 would allow it at this time.

18 With respect to the second procedural issue, what  
19 court should decide it, I don't know that defendants' argument  
20 is that as a matter of law this court cannot do it. I think  
21 the argument is discretion.

22 Is that right, Mr. Correll?

23 MR. CORRELL: Yes, your Honor. It's your discretion.  
24 You have jurisdiction to do it. But as we set forth in the  
25 letter, what developing MDL case law says --

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1           THE COURT: You read my face. He read my face for the  
2 people on the phone. I gave him a funny little nod at the  
3 notion of developing case law. Basically, you cited two recent  
4 district court opinions that have to do with an employment  
5 case, where every plaintiff, it would have to be decided what  
6 job category that plaintiff falls in with UPS. I don't know  
7 that that's really a developing trend.

8           I did look into this issue a little bit in terms of  
9 actually the plain language of the MDL rules, the governing  
10 statute 28 U.S.C. 1407 and the rules developed since then, and  
11 whatever annotations I could find as to what existed up till  
12 now. And while I am happy to hear you, I have to say I don't  
13 think these two cases of the UPS show any developing trend at  
14 all. The point is there would be thousands of these little  
15 fact specific plaintiffs, what category are you in.

16           The rules assume that summary judgment will in fact be  
17 decided by the transferee court prior to remand, and whatever  
18 little case law there was that reached to the circuit courts  
19 also said, of course, the transferee court certainly has the  
20 power, which you're not arguing, certainly has the power to do  
21 it.

22           I also note that the court, at the defendants'  
23 request, did decide a summary judgment in the Orange County  
24 case. The defense made a summary judgment motion based on  
25 statute of limitations. It was a complicated motion. I think

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1 we had to brief it twice. It took a couple of years in the  
2 end, but it was made and decided, certainly without objection  
3 by the defendants since the defendants brought it in the  
4 transferee court. So in this particular case, I would find it  
5 troubling that it was OK for the defendants to bring their  
6 statute of limitations summary judgment, but somehow it isn't  
7 OK for the plaintiff to bring its motion for full or partial  
8 summary judgment. That would bother me in the same case to  
9 take an inconsistent view.

10 So I have to say, while I am happy to hear you, I am  
11 inclined to do it, and I think up till now I have done all the  
12 summary judgments, but go ahead.

13 MR. CORRELL: Two points. The reason I say developing  
14 case law, if you look at the Nuvaring Products Liability case,  
15 what the judge there says is, "Like other MDL judges before me,  
16 I find such case specific rulings are neither the purpose nor  
17 the forte of a court presiding over multidistrict litigation.  
18 An MDL seeks to promote judicial economy and litigation  
19 efficiency by allowing the transferee court to preside over  
20 matters common among cases. Given this function, the  
21 transferee court typically does not rule on cumbersome case  
22 specific legal issues."

23 And he cites a couple of cases. That's why I said  
24 developing law. He cites two or three. Then specifically to  
25 the In re Orthopedic Bone Screw Products case, in which there

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1 is a finding that adjudication of summary judgment motions  
2 pertaining to state law claims would slow down the MDL process,  
3 thereby deferring state law dispositive motions to the  
4 transferor courts. And I think the reason that they do it is  
5 because when this case gets back to California, the trial court  
6 is going to have to figure out how to try this case. He is  
7 going to have to come up with jury instructions, he is going to  
8 have to rule on evidentiary issues, and a lot of times these  
9 case specific summary judgment motions will aid in that  
10 process.

11 If we look at the motions that the plaintiffs are  
12 talking about, they don't go to all defendants, they don't go  
13 to all the sites, and they are not even complete summary  
14 judgments at those sites. So, therefore, at the end of the day  
15 when we go through this, you will have basically the case in  
16 the same posture going back whether or not you decide these  
17 motions, and they won't have docket-wide implications. The  
18 OCWD in all this briefing proclaims how different it is from  
19 the other California plaintiffs. The OCWD act is in no other  
20 motions and it doesn't provide water. It's in a unique  
21 position.

22 As far as the defendants' motion for summary judgment,  
23 if your Honor will recall, in the four focus cases it was  
24 ordered that certain motions be brought on a schedule, and the  
25 defendants complied with that order.



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1           THE COURT: But defendants didn't say, we are happy to  
2 bring the motion, but we don't think it belongs in the  
3 transferee court; we think we should make that motion in the  
4 transferor court and you should send it back for that purpose.  
5 It's true I issued a schedule, but you didn't raise this whole  
6 question.

7           Anyway, have you made enough of a record? I can't  
8 imagine in the exercise of discretion this could ever be a  
9 reversible problem, but I am not inclined to send it there. To  
10 me, pretrial proceedings means pretrial proceedings. I intend  
11 to complete the pretrial proceedings in this case. I have had  
12 long familiarity with this case. I have dealt with every issue  
13 in this case. Frankly, I think we will get it done faster than  
14 any district court in California, given the familiarity with  
15 the case, given the backlog and other people's dockets, given  
16 the known speed of this court in resolving motions.

17           I think given that, Mr. Axline, so far your flight  
18 wasn't worth it. You haven't gotten to say a word. Hopefully,  
19 that will change.

20           MR. AXLINE: So far it is worth it, your Honor.

21           THE COURT: You didn't get to argue anything. You  
22 just got to watch and smile from time to time.

23           Now, given the fact that I think I ought to do it,  
24 even though there are perfectly good arguments for not doing  
25 it, I do respect that, I think we ought to turn to the motion.

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1 First of all, it is partial summary judgment. Your  
2 adversary is right. Is that true?

3 MR. AXLINE: That is correct, your Honor.

4 THE COURT: I misspoke earlier on the record. It's  
5 clearly partial. And he says it's not even against all  
6 defendants and all sites, right?

7 MR. AXLINE: That is correct, your Honor.

8 THE COURT: Fair enough.

9 I understand there is an argument about the fact that  
10 it may involve 20 sites but in your premotion letter you only  
11 address one representative site, and the defense seemed  
12 troubled by that. Once again, I seem less troubled by that.  
13 It is a premotion conference. He would have had to write  
14 essentially 20 two-and-a-half-page letters to get fact specific  
15 on each. I think what he is saying is the Arco example is  
16 representative of the issues, and if he can, at least for the  
17 premotion purpose, deal with the generic issues in this  
18 discussion, those generic issues apply to the 20 sites.

19 Now, when the briefing actually comes, I don't know,  
20 Mr. Axline, if your intention was to only move with respect to  
21 Arco and then say, and you should apply this ruling to 19 other  
22 sites, or were you planning to try to do one omnibus motion  
23 that did address facts?

24 MR. AXLINE: The latter, your Honor. We think, as you  
25 can probably tell from the letter, that there are common types

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1 of evidence, a common pattern at all of these gas station  
2 sites, that will tee up the question of whether, given the  
3 property ownership, UST ownership, franchise control and  
4 control over the remedial process, and the uncontested fact of  
5 MTBE above the MCL at the site, is that adequate partial  
6 summary judgment with respect to nuisance, trespass and the  
7 Orange County Water District Act.

8 THE COURT: Right. But those are the facts in common.  
9 There are also facts that would diverge somewhat. So you would  
10 address each of the 20 sites in the motion.

11 MR. AXLINE: Correct.

12 THE COURT: Separately.

13 Does that meet your objection on that ground, Mr.  
14 Correll?

15 MR. CORRELL: It does not, your Honor. The reason is  
16 obviously Mr. Axline knows what sites he is talking about.

17 THE COURT: I didn't realize that. You don't know  
18 which the 20 sites are that he would intend to move on? I  
19 didn't appreciate that. I thought the defense knew.

20 MR. AXLINE: We haven't actually done the motion.

21 THE COURT: Of course not. But you must know the  
22 sites you intend to move on.

23 MR. AXLINE: There are a couple that we are still  
24 evaluating. We can tell the defendants now before we file the  
25 motion I suppose.

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1 THE COURT: Tell them right now.

2 MR. AXLINE: I don't know them off the top of my head.

3 THE COURT: You didn't bring any piece of paper with  
4 you that tells you that? I bet you did.

5 MR. AXLINE: I did not. However, I can do it  
6 tomorrow.

7 THE COURT: But not for today's discussion. All  
8 right. Sadly, send him the list, but I thought you actually  
9 did know and you know which defendants would be involved in the  
10 motion.

11 MR. AXLINE: I do, and I identified the defendants.

12 THE COURT: That we do know.

13 MR. AXLINE: That I did. Obviously, they can figure  
14 it out. They know which stations they own and franchise. But  
15 I will send them the list.

16 THE COURT: How many sites will it be?

17 MR. AXLINE: 19, possibly one or two more.

18 THE COURT: Between 19 and 21. He said he has told  
19 you which defendants will be involved in the motion, and he  
20 will identify the sites before actually making the motion. But  
21 in terms of the premotion conference construct, while I  
22 appreciate your objection, it doesn't pay to put this off  
23 longer to discuss the 19 or 21 sites individually. There  
24 certainly are some common facts, as he said, and he did list  
25 them out. They were, all the sites are owned or leased by one

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1 of the defendants, in each site the contamination has exceeded  
2 the MCL for a period of time, and in each case the defendant,  
3 who owns or leases, has engaged in apparently some amount of  
4 remediation. So those at least are common.

5 Now, Mr. Axline, you're not done. I think you have to  
6 answer some of the attacks, so to speak, that came in Arco's  
7 letter that weren't procedural. One is this notion of to  
8 establish a nuisance or a trespass as a continuing nuisance or  
9 trespass it must be, and this is a new English language word,  
10 it must be abatable. If it's not abatable, then it's, I guess,  
11 not continuing, it's permanent or done; it became permanent  
12 when it was not abatable.

13 So what do you have to say about this word abatable?

14 MR. AXLINE: Several things, your Honor.

15 One is that under the Orange County Water District  
16 Act, the act statutorily creates a presumption that the  
17 district's cost of investigation and remediation are reasonable  
18 and puts the burden on the defendants.

19 THE COURT: I think you're segueing to a slightly  
20 different topic. I didn't want to turn to the act, and I  
21 didn't want to turn to the shifting burdens. I wanted to  
22 really deal in a sense with the notion of continuing tort and  
23 time bar. So this concept of abatable is more in the common  
24 law claims of nuisance and trespass. I wasn't ready to move to  
25 the statutory claims and shifting burdens. Could we stay with

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1 my question?

2 MR. AXLINE: Certainly, your Honor. I do want to make  
3 the point, however, that the valuation of the abatement issue  
4 is colored by the nature of the district and its powers.

5 Now, the leading case, in our view, on the abatement  
6 issue is the Mangini case in the California Supreme Court, and  
7 there the court did say that, in responding to a statute of  
8 limitations claim, a plaintiff asserting nuisance and trespass  
9 has the burden of establishing that the nuisance and trespass  
10 are abatable at a reasonable cost.

11 THE COURT: That's right.

12 MR. AXLINE: So the district is going to have the  
13 burden, and I think the thing we would like to brief to you is,  
14 when did that burden arise? Because we believe that it's  
15 appropriate to make the nuisance and trespass determination,  
16 and then the defendants raise the statute of limitations issue,  
17 and then the response to the statute of limitations at that  
18 point is, well, it can be reasonably abated.

19 THE COURT: I don't have any problem with the notion  
20 that statute of limitations is always an affirmative defense.  
21 So I think you're probably right that defendants raise it.

22 That was not really my question. My question is, is  
23 this amenable to summary judgment? Because whenever you hear  
24 the word reasonableness, you immediately think a fact  
25 determination or a judgment call or a jury; somebody has to

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1 make a judgment call usually involving expert testimony and  
2 fact-finding. How am I going to do that on summary judgment  
3 and say as a matter of law something is reasonable? And even  
4 if I could do that, are we ready now without the expert  
5 testimony?

6 MR. AXLINE: Well, two responses. One is that we  
7 would like the opportunity to brief in a summary judgment  
8 motion to you why the district's abatement powers make that a  
9 question that is not a fact question in this case.

10 THE COURT: Can you develop that a little more for  
11 this record?

12 MR. AXLINE: Yes. Because the damage remedy that the  
13 district is seeking is abatement itself. So the damages that  
14 are ultimately going to be presented to the jury, as well as  
15 the question of whether the nuisance and trespass is  
16 continuing, will be presented to the jury at the time of trial.

17 THE COURT: So what am I deciding?

18 MR. AXLINE: The thing we want you to decide is that  
19 the evidence that we will present to you, the uncontested  
20 evidence that we will present to you on our motion shows that  
21 there is a nuisance, a trespass and a violation of the act at  
22 these stations.

23 THE COURT: But then I don't understand how you  
24 respond to the expected affirmative defense of statute of  
25 limitations without getting to this question of whether it is a

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1 continuing nuisance and therefore they are not time-barred.  
2 You're sort of saying that the abatability question is down the  
3 road for the jury; the reasonableness of the treatment is for  
4 the jury later. But otherwise how am I going to deal with  
5 their statute of limitations issue?

6 MR. AXLINE: You're not, your Honor. I don't think  
7 you need to. You have given guidance generally on the  
8 application of the statute of limitations to the common law  
9 products liabilities claim. But it's clear from the Mangini  
10 case, and, frankly, the cases that the defendants cite, that  
11 the process for determining nuisance, trespass and continuation  
12 is a linear process. You first determine whether there is a  
13 trespass or a nuisance, and then you determine whether the  
14 statute of limitations applies, and then you determine whether  
15 or not it's continuing based on evidence.

16 THE COURT: Somehow you must be missing the notion of  
17 the word judgment in summary judgment. What can I decide if I  
18 can't decide that there is a timely claim of nuisance because  
19 it's continuing? Judgment is in the word summary judgment.  
20 What judgment can I give you? I can't give you just an  
21 advisory opinion on an element of a claim. What is the  
22 judgment?

23 I am not saying that every summary judgment is  
24 judgment on every claim in every case, but even partial summary  
25 judgment to me usually means some claims or some parties.



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1 That's what makes it partial. It's not the whole case. But I  
2 have never heard of one element of one claim being amenable to  
3 a judgment.

4 MR. AXLINE: It is an interesting question. The  
5 amendments to rule 56 that just went into effect encourage the  
6 court, where it can, to identify discrete issues or claims,  
7 such as this, to treat them as on partial summary judgment  
8 grounds. In our view, and we will brief this to your Honor if  
9 you permit us to, the judgment will say that the district,  
10 assuming you agree with us, has proven its nuisance and  
11 trespass claims at these sites, but reserve for later the  
12 defendants' affirmative defense and the question of  
13 abatability. That's the way it would play out.

14 THE COURT: Let me interrupt you then.

15 What does the defense think of that?

16 Mr. Heartney.

17 MR. HEARTNEY: Your Honor, I think it simply misses  
18 the point, as your Honor was indicating, of the motion as it  
19 was described to us. What we had described to us was a partial  
20 summary judgment based on liability. We can't get to liability  
21 if an affirmative defense is out there and hasn't been  
22 adjudicated.

23 THE COURT: So you don't think he can sever out, so to  
24 speak, the affirmative defense and just say, if it turns out at  
25 the end of hearing the affirmative defense that it was timely

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1 and continuing because it was abatable, then the Court has  
2 already found that there was as a matter of law a trespass or a  
3 nuisance merely because the water was contaminated above the  
4 MCLs?

5 MR. HEARTNEY: I think what your Honor would be  
6 talking about then would not be a partial summary judgment of  
7 liability. What your Honor would then be talking about would  
8 be severing out a discrete element of a claim.

9 THE COURT: That's right.

10 MR. HEARTNEY: What I would urge then is this is a  
11 very different kind of procedure than the summary judgment  
12 motion that the defendants asserted, because the summary  
13 judgment motion of the defendants actually decided something  
14 that determined that a claim was good or was not good.

15 THE COURT: Right.

16 MR. HEARTNEY: Simply picking out a single element of  
17 a claim and saying this element is established does not advance  
18 the ball. There is a very large amount of work, both factual  
19 and legal, that undoubtedly would happen if we had to take 20  
20 stations and go through a briefing process. I think the  
21 pre-motion conference process that your Honor has put in place  
22 allows us to get to this and say, is this worth the candle, are  
23 we doing something that makes sense?

24 THE COURT: It might be too easy. It might be that  
25 you agree that, if it's timely, if it's abatable, which are the

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1 real issues to be tried, there is no question that  
2 contamination above the MCL would be a nuisance or a trespass,  
3 if it's abatable and therefore timely. Since that's what is  
4 left to be decided, nobody much cares to brief the other half  
5 of it. If the contamination is above the MCL and everything  
6 else were in place, it's a nuisance.

7 MR. HEARTNEY: I think even there we would say, if the  
8 nuisance is confined to the shallow groundwater right in the  
9 area underneath the station, it's not being used for drinking  
10 water, there is no beneficial use for that water where it is,  
11 and if that's all the contamination they are pointing to, there  
12 is authority under California law to say that's not a nuisance.

13 MR. AXLINE: I don't think there is any such  
14 authority, your Honor.

15 THE COURT: Maybe Mr. Heartney knows it. What  
16 authority do you think that is?

17 MR. HEARTNEY: I think it is cited in our papers.

18 THE COURT: Why don't you tell us what it is?

19 MR. HEARTNEY: It's the Beck Development case, 44  
20 Cal.App.4th (1996). I can describe the facts.

21 THE COURT: Take a minute. Mr. Axline heard the name  
22 of the case and maybe has it with him.

23 Do you have that one, Beck?

24 MR. AXLINE: I am familiar with that case.

25 THE COURT: Go ahead.

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1           MR. HEARTNEY: In that case, there was a property that  
2 had been used as a railroad, and the railroad had a big pit,  
3 and it had poured a lot of fuel oil onto this pit years ago,  
4 and the pit had then been covered over and it was being used  
5 for farming, and so for many years the fuel oil that had been  
6 poured into the pit that was in the ground had been there.  
7 Then down the road the property was sold. The new owner got  
8 this piece of property and it was told to develop it he was  
9 going to have to go in and remove all the fuel oil. And the  
10 new property owner sued the railroad saying this is a nuisance,  
11 and this is a continuing nuisance, the same kind of argument  
12 here. It was a long time ago, but there is not a statute of  
13 limitations, it's a continuing nuisance.

14           And the court looked at this and said, under  
15 California law, the mere presence of the contamination there is  
16 not a nuisance. It's going to be necessary for you to prove  
17 that it creates a harm of the kind that constitutes a nuisance.  
18 And you would have needed to show, because this was a case -- I  
19 may not be right on this procedural point, but I believe it was  
20 after a trial or at least after some kind of hearing where all  
21 these facts had come out. You would have had to have shown  
22 that that fuel oil that's down there is either going to  
23 contaminate a drinking water aquifer or cause harm to people on  
24 the surface because they might come into contact with it. It's  
25 very far down. It's five or six feet down. You haven't

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1 pointed to harm that's being caused by that, and because of  
2 that, you don't have a nuisance.

3 THE COURT: Mr. Axline said about two and a half  
4 minutes ago, I don't think there is any such authority, and I  
5 don't think Mr. Heartney can cite it. Well, he has, and how  
6 has he miscited it?

7 MR. AXLINE: In Beck there was failure of evidence.  
8 None of the agencies had -- in fact, all the agencies had  
9 declined to take any action with respect to the Beck property  
10 because they didn't think there was a contamination problem;  
11 they didn't think there was any harm at those sites. Here the  
12 defendants themselves affirmatively convinced you that there is  
13 harm at the sites that we want to seek summary judgment on. So  
14 Beck simply is distinguishable on its facts.

15 THE COURT: Because you're going to say the defendants  
16 have already conceded harm?

17 MR. AXLINE: Correct.

18 THE COURT: How did they concede harm, by saying so or  
19 by taking action to abate the harm?

20 MR. AXLINE: Both. And by asking you to find as a  
21 matter of law that there was harm for purposes of the statute  
22 of limitations. Now they want to do an about-face and say,  
23 well, there was really no harm for purposes of nuisance and  
24 trespass.

25 More importantly, there is a more recent case that we

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1 cited to you. It's a Ninth Circuit case applying California  
2 law, California v. Campbell, in which the court said, and I am  
3 quoting from it now, "To state a claim under California law,  
4 California need not prove that trichloroethylene migrated from  
5 the release property to other areas. It is enough that the  
6 water under the release property itself was contaminated."

7 THE COURT: Read that again.

8 MR. AXLINE: I will give you the pinpoint cite here.  
9 This is 138 F.3d 772, at 782.

10 "Thus, to state a claim under California law,  
11 California need not prove that trichloroethylene migrated from  
12 the 20th Street property to other areas. It is enough that the  
13 water under the 20th Street property itself was contaminated."

14 THE COURT: Does that decision talk about the word  
15 harm? I understand the water underneath the property was  
16 contaminated. Mr. Heartney already said in Beck it said, that  
17 may be, but unless it causes harm, just the mere fact that it's  
18 contaminated is not enough. That the water in Beck apparently  
19 wasn't going to be used for anything, wasn't going to affect  
20 drinking water, it was just sitting there contaminated, and the  
21 court said, so what, essentially. Does this case talk about  
22 what is the impact of the fact that the water underneath the  
23 site is contaminated?

24 MR. AXLINE: It does under California law. And it  
25 grants summary judgment to the plaintiff.

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1 THE COURT: Maybe it discussed harm.

2 MR. AXLINE: It didn't discuss harm in a lot of detail  
3 but --

4 THE COURT: If I did a word search, would I find the  
5 word harm?

6 MR. AXLINE: I suspect you would.

7 THE COURT: What does it say?

8 MR. AXLINE: There is another point I want to make  
9 here, which is that when the defendants moved for summary  
10 judgment, we argued to the court that the district is not  
11 harmed until the contamination moves off-site and threatens  
12 drinking water, and that's a fact dispute that we are entitled  
13 to put on evidence regarding. The Court rejected that argument  
14 at the defendants' insistence. Now Mr. Heartney is saying that  
15 there isn't harm. He is making the argument we were making in  
16 opposition of the motion on the statute of limitations in which  
17 he rejected.

18 THE COURT: And he then said that the harm was the  
19 mere contamination. The impact is there. There is  
20 contamination and that's harm. That's what he said then.

21 MR. AXLINE: Correct.

22 MR. HEARTNEY: To respond to that, your Honor, I guess  
23 what I would say is that our summary judgment motion was based  
24 on what the plaintiff's case was. And they took the position,  
25 the fundamental interest that they were talking about in the

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1 case was to say that we own all the groundwater, we have a  
2 property right to all the groundwater. We didn't agree that  
3 they have that, but that's what they said, and your Honor had  
4 assumed that that was true in dealing with the cognizable  
5 interest claims that we had. We said, if that's the  
6 fundamental interest that you have in the case, then having  
7 MTBE in your property would be a harm.

8 That I think is different from, is there a nuisance?  
9 I think those are distinct points. But whether they are or  
10 not, the defendants, of course, we were simply taking a  
11 position that flowed from what the plaintiffs had told us was  
12 the interest that they claimed that they were building their  
13 case around.

14 MR. AXLINE: Your Honor, may I?

15 We went through an elaborate exercise, again at the  
16 defendants' insistence, of amending our complaint to make it  
17 clear that what we were talking about in the complaint was  
18 drinking water. And the defendants still made their argument.  
19 We responded that the district wasn't harmed until it moved  
20 off-site and threatened drinking water, and again that was  
21 rejected.

22 THE COURT: All right. So where are we left? All I  
23 said was that the part that you're seeking summary judgment on  
24 then might be terribly simple and not worth the cost of making  
25 a motion because it gets you only so far. It gets you to the



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1 point, that if indeed there is contamination above the MCL at a  
2 certain site, if everything else falls into place, you have a  
3 nuisance or a trespass or both. But that's all it gets you.  
4 It doesn't get you judgment on that claim because there is an  
5 affirmative defense, and it will require possibly fact-finding  
6 or at least another determination after there is more evidence.  
7 So I don't know if the game is worth the candle because it gets  
8 you so little. It's almost as if, if you're right about this  
9 harm question now, you win, but you win the small point, so to  
10 speak.

11 MR. AXLINE: Your Honor, I think it significantly  
12 advances the ball if we get that determination. If the  
13 defendants are willing to stipulate, I suspect they won't, but  
14 if they were willing to stipulate, given these facts, there is  
15 a nuisance and a trespass at the site --

16 THE COURT: Assuming everything else falls into place.

17 MR. AXLINE: Assuming everything else falls into  
18 place. But given the fact that I started with, which is that  
19 the district is charged with abating these nuisances, and given  
20 the fact that you don't have to completely abate a nuisance in  
21 order to be entitled to recover for the damages of at least  
22 partially abating it -- under common law and under the statute  
23 by the way -- we think it's going to significantly advance the  
24 likelihood of settlement, one, and two, it's going to  
25 significantly narrow the issues to be tried to the issue of

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1 abatement only.

2 THE COURT: Which you admit has to be tried before  
3 there could be judgment on the trespass or nuisance claim?

4 MR. AXLINE: Well, your Honor, we would like the  
5 opportunity to present to you the argument that, given the  
6 district's powers and the relationship between the act and the  
7 nuisance and trespass claims, the statutory presumption, and  
8 what we know about the defendants' answers -- the answers that  
9 the defendants filed here said in almost every case this kind  
10 of contamination is remedial, that's what the defendants  
11 conceded in their answers.

12 Now, they were doing that in response to a fear of a  
13 market share claim, but that's a judicial admission. We would  
14 like the opportunity to make the pitch that, at least at some  
15 of these sites, it's appropriate to find as a matter of law  
16 that the costs of abatement are reasonable. If that gets  
17 rejected, we go to trial on it.

18 THE COURT: Do you agree that expert testimony would  
19 be quite pertinent to that determination of this abatability  
20 issue?

21 MR. AXLINE: I think if we do not prevail on our  
22 arguments that you can determine it as a matter of law, then,  
23 yes, I think there will ultimately be some expert testimony on  
24 that. Although, frankly, your Honor, it's not rocket science  
25 anymore as to how you go about remediating and what it's going

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1 to cost.

2 THE COURT: Mr. Heartney.

3 MR. HEARTNEY: I don't think that the type of evidence  
4 that Mr. Axline is talking about gets to what the abatability  
5 issue is really about.

6 We have two cases on that. The Beck case I think is  
7 the one that I would point to most prominently, because what it  
8 points to there was a situation in which a judgment based on  
9 continuing nuisance got reversed because the site had not been  
10 sufficiently characterized. There had not been enough expert  
11 and other scientific analysis of just what was the problem, how  
12 big is it, where is it going, what is going to happen to it,  
13 and there was not enough evidence of the methods and costs of  
14 what it would take to remediate it.

15 THE COURT: Was that a bifurcated judgment? You  
16 couldn't even have liability without getting to the details of  
17 the costs which is damages?

18 MR. HEARTNEY: This wasn't damages, your Honor,  
19 because this is an affirmative defense. You have got to  
20 remember here, if you don't have permanent nuisance, then you  
21 have to show that it's abatable. And the abatability analysis  
22 requires that you say, here is the problem, we have  
23 characterized it, we know what it is, this is what we say will  
24 remedy it, and here is our arguments as to why this is a  
25 reasonable means and a reasonable cost.

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1           So the reasonableness pieces come in, and they come in  
2 after the plaintiff has shown, as a matter of fact, here is the  
3 animal we are talking about. That's not going to be possible  
4 unless we do get into evidence that goes far beyond what Mr.  
5 Axline is suggesting here. And I don't think that the entirely  
6 separate statutory presumption that's limited only to the costs  
7 recovery statute that they have, I think we will have to deal  
8 with that presumption when we are dealing with the statutory  
9 cost recovery claim, but it has nothing to do with nuisance and  
10 trespass.

11           THE COURT: I don't know that you can say it has  
12 nothing to do with it because he is saying, as a matter of law,  
13 abatement has to happen, and, frankly, as a matter of law, the  
14 costs of doing so is reasonable because it has to be done under  
15 statute. That's the summary of the argument.

16           MR. AXLINE: And one other distinction I would make  
17 between the Beck case that Mr. Heartney relies on and our case  
18 is a distinction that was present in the California v. Campbell  
19 case that I quoted to you earlier. And that is, in the Beck  
20 case and the other cases that they rely on, you had private  
21 actors and they were seeking damages. Admittedly, some of them  
22 also sought injunctive relief ordering abatement, but the  
23 primary focus was on damages. What was the cost to you of the  
24 diminution of your property value? We don't have that here.  
25 The district's sole focus is, how do we get this problem

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1 cleaned up? And in the California v. Campbell case, the Ninth  
2 Circuit had no trouble saying, state, you have shown  
3 contamination of water beneath that site, you get partial  
4 summary judgment.

5 One other point that occurred to me --

6 THE COURT: When you say partial summary judgment, was  
7 that liability as opposed to damages? It didn't have this  
8 issue of nuisance or trespass and continuing versus permanent?

9 MR. AXLINE: No.

10 THE COURT: It was a statutory claim?

11 MR. AXLINE: Yes.

12 One other thing that occurred to me as Mr. Heartney  
13 was talking is that I think we have the presumption under the  
14 Orange County Water District Act that the costs are reasonable.  
15 I think that is particularly appropriate for a summary judgment  
16 motion here. The defendants are still going to want to try,  
17 perhaps, or maybe they will settle, but they are going to want  
18 to try whether the costs are reasonable. They are going to try  
19 to overcome --

20 THE COURT: They are going to try to?

21 MR. AXLINE: Overcome our presumption at trial.

22 THE COURT: It is a rebuttable presumption?

23 MR. AXLINE: It is rebuttable presumption, correct.

24 So that issue is going to be tried later anyway. The  
25 purpose of a partial summary judgment motion, as long as you're

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1 looking at claims and whether you can preclude an entire claim,  
2 and especially in an MDL setting, is to narrow the things --

3 THE COURT: You can't preclude the entire claim. You  
4 really mean an element of the claim at best. You can't end the  
5 debate over whether at the end of the day you're going to be  
6 successful on a trespass or nuisance claim because there still  
7 is the issue of abatability.

8 MR. AXLINE: Correct.

9 THE COURT: So at best you could foreclose the trial  
10 on an element of that claim.

11 MR. AXLINE: Yes. I would suggest that it's not an  
12 element of our claim; it's an element of a defense. That's why  
13 I keep referring to the Mangini case, because in the Mangini  
14 case, the California Supreme Court made a point at the  
15 beginning of the opinion, and I will give you the pinpoint cite  
16 to this as well. This is 12 Cal.4th 1087 and the jump cite is  
17 1097. The court went out of its way to say, at trial -- this  
18 came up after trial -- the question of whether any nuisance was  
19 a continuing nuisance was presented to the jury as an element  
20 of plaintiff's cause of action for a continuing nuisance. The  
21 question was not presented to the jury in the context of a  
22 defense or excuse by plaintiffs to avoid Aerojet's statute of  
23 limitations defense. The court then goes on to say, on appeal  
24 no party complains of the manner in which the matter was  
25 submitted to the jury, as an element of plaintiff's cause of

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1 action rather than as an exception to the statute of  
2 limitations defense, which we believe is the logical way it  
3 should be presented. Thus, we need not consider whether there  
4 were any technical defects in the manner of presentation.

5 To me, that signals that, had it been raised, it  
6 should have been treated as a response to an affirmative  
7 defense rather than an element.

8 THE COURT: All right. Is there more to say about the  
9 trespass and nuisance claims?

10 MR. HEARTNEY: No, your Honor. To us the key point is  
11 that it doesn't lead to partial summary judgment on liability.

12 THE COURT: It doesn't, and I need to research whether  
13 a court can do it on less than the claim. And then, assuming  
14 the court can, should the court? Does it make any sense?

15 Let's go on to the Water District Act question. There  
16 I thought the argument is that plaintiffs can only recover  
17 costs that they have already incurred for cleanup, containment  
18 or abatement.

19 Has the district already incurred costs for cleanup,  
20 containment or abatement at all these sites? Because there is  
21 no declaratory judgment language in the act. I know you  
22 analogize it to CERCLA, but, in fact, CERCLA mentions  
23 declaratory relief and the Orange County Water District Act  
24 does not. My first question is factual. Has the district  
25 already incurred costs?

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1 MR. AXLINE: Yes.

2 THE COURT: It has. At all of these sites?

3 MR. AXLINE: It has.

4 THE COURT: I thought the defendants thought  
5 otherwise.

6 Mr. Heartney, did you think otherwise?

7 MR. HEARTNEY: Your Honor, we believe that what the  
8 district has said are costs that it has incurred are simply  
9 litigation consultants that it has --

10 THE COURT: The shorter answer is?

11 MR. HEARTNEY: No.

12 THE COURT: You thought otherwise.

13 Go ahead, Mr. Axline. Tell me how you have incurred  
14 costs.

15 MR. AXLINE: We cited the Key Tronic case, which was  
16 admittedly a CERCLA case.

17 THE COURT: That's a good point. I told you already  
18 CERCLA has a declaratory judgment.

19 MR. AXLINE: I mean for purposes of costs.

20 THE COURT: But it's a different act.

21 MR. AXLINE: The act authorizes the district to  
22 recover incurred remedial costs.

23 THE COURT: Which act?

24 MR. AXLINE: The Orange County Water District Act.  
25 Not simply after cleanup is completed.



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1 THE COURT: But it says incurred.

2 MR. AXLINE: We have incurred nonlitigation  
3 investigation and characterization costs at each of these  
4 sites. The defendants say they think they are only litigation  
5 related, but they are not. They are costs that the district  
6 incurred in the normal course of attempting to figure out what  
7 needs to be done ultimately to clean up these sites.

8 THE COURT: Do you know about that, Mr. Heartney? He  
9 says in each case the district has spent money on investigation  
10 and characterization which are required, in essence, to get to  
11 the point of remediation. You can't get there until you take  
12 the first two steps.

13 MR. HEARTNEY: I guess what I am familiar with is the  
14 answers to our interrogatories. And the answers to our  
15 interrogatories, when we said what costs have you incurred at  
16 each one of these stations that you can contend are recoverable  
17 under the Orange County Water District Act, the only thing that  
18 was pointed to were reports that were done by the Comex  
19 consulting firm and the Hargis consulting firm, both of which,  
20 when we have tried to get discovery concerning them, we have  
21 been told that their work is work product, and there have been  
22 work product objections raised to that. We view this as, they  
23 were retained by the district's counsel, not by the district  
24 itself, in at least the case of the first of those, the Comex.

25

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1           THE COURT: Do you think you can get to the point of  
2 remediation, which I define as cleanup, containment or  
3 abatement, without doing an investigation and characterization?  
4 Can you skip over that and just hire somebody and say, come in  
5 and abate, I have no information for you, but please abate?  
6 Don't you need to do an investigation and a characterization  
7 first?

8           MR. HEARTNEY: I think what we would say is the  
9 question of whether these costs are potentially recoverable  
10 here will have to do with whether that's their purpose.

11           THE COURT: While they may be useful in litigation,  
12 the fact is can you get to cleanup, containment and abatement  
13 without having done an investigation and/or characterization?  
14 Because it seems to me that, while it's not uncommon that  
15 moneys spent for one purpose are also useful when you get  
16 around to litigation, but that doesn't mean it wasn't spent  
17 equally, so to speak, for another business purpose. Here the  
18 other business purpose is to set up the cleanup, containment  
19 and abatement, even though it's perfectly useful in a  
20 litigation.

21           I don't know that it loses its potential to help in  
22 setting up the cleanup, containment and abatement just because  
23 an attorney hired the consultant. Although I think your work  
24 product privilege point is interesting. I don't know how the  
25 plaintiff can protect it and then say, but this is our proof of

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1 the costs we have incurred. If it's proof of costs, you won't  
2 be able to protect it as work product.

3 MR. AXLINE: If I may, Special Master Warner has  
4 already addressed this issue.

5 THE COURT: How has he come out?

6 MR. AXLINE: He has come out by saying that a  
7 consultant such as Comex and Hargis can wear two hats. They  
8 can do work that the district is going to use to investigate  
9 and clean up, and they can also do litigation consultant work.

10 Here we have provided the Comex and the Hargis reports  
11 to the defendants because, at least for the investigation and  
12 characterization part of this, we are not claiming --

13 THE COURT: OK.

14 MR. HEARTNEY: I guess what I would say is the statute  
15 itself sets a standard that I think goes beyond just the  
16 sequencing fact question. I acknowledge, your Honor, that if  
17 what your goal is to do is to clean up, you're going to  
18 investigate first. I don't have any question about that. The  
19 act says that the costs that are going to be recovered have to  
20 be actually incurred, they have to be necessary and reasonable  
21 in amount, and they have to in fact have resulted in pollution  
22 or contamination being cleaned up or remediated.

23 THE COURT: So it's the third prong that you feel  
24 hasn't been reached.

25 MR. HEARTNEY: Here, your Honor, we have put testimony

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1 from the end of fact discovery, no more fact discovery, this  
2 was right at the end, in which we asked questions. We said,  
3 Are you planning to do any remediation? Can you tell us what  
4 you want to do based on this work that you have done and what  
5 is coming next, because we want to know that for our case.  
6 What they told us was, Well, based on the advice of our  
7 consultant, the Hargis consulting firm, we have identified  
8 stations at which we are going to go forward and do work to  
9 investigate and get to the point where we will know what we  
10 need to do, but this station isn't one of them. And that  
11 station was the one station that they provided information  
12 about in their papers, Arco 1887.

13 THE COURT: The premotion letters?

14 MR. HEARTNEY: Correct.

15 So I think our problem here is that they may have done  
16 these reports, and I think there is going to be a record in  
17 which we are going to say, no, these aren't remediation  
18 reports, this is in fact lawyer stuff, but the ultimate problem  
19 is, are these being used in a way that they would have to be  
20 used for them to be recoverable now?

21 It's one thing for the district to say, well, we need  
22 to have them before we can decide how we are going to  
23 remediate. We then asked them, what are you going to do and  
24 when are you going to do it? And the evidence is attached  
25 right to our letter. The answers we got at the end of fact

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1 discovery was we don't know what we are going to do.

2 THE COURT: Is that true for all these sites, Mr.  
3 Axline, that you don't know what you're going to do with the  
4 recommendation anyway? And if so, how do you meet that third  
5 prong in the statute?

6 MR. AXLINE: It's not a third prong in the statute.  
7 They are just wrong about that. I have got the statute right  
8 here, and I can read it to you. Obviously, this would be  
9 briefed, but the statute says, it's a run-on sentence --

10 THE COURT: Not unusual for legislators.

11 MR. AXLINE: It says, "The person causing or  
12 threatening to cause that contamination or pollution shall be  
13 liable to the district, to the extent of the reasonable costs  
14 actually incurred in cleaning up or containing the  
15 contamination or pollution, abating the effects of the  
16 contamination or pollution, or taking other remedial action."

17 THE COURT: And your view is the other remedial action  
18 is the investigation?

19 MR. AXLINE: Right. The defendants' reading of this  
20 would eliminate the last two circumstances. They would say  
21 only after you finish completely cleaning up.

22 THE COURT: No. They would say, so long as you spent  
23 money on cleaning up. We are not arguing it has to be done,  
24 but you have to have spent it to clean up, and you haven't yet  
25 spent a penny to clean up. What you have spent is money to

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1 prepare to clean up, at best, by investigating. And you're  
2 saying that falls in the third category of other remedial  
3 action.

4 MR. HEARTNEY: We say they haven't gotten to the point  
5 of remedial actions yet.

6 THE COURT: So this turns on the interpretation of the  
7 word remedial action. Is there legislative history what  
8 remedial action means? Is there case law?

9 MR. AXLINE: Not in the Orange County Water District  
10 Act, although we did provide the Court with one state court  
11 opinion in an Orange County Water District case that our firm  
12 handled, where the court found that the Orange County Water  
13 District Act was in pari materia with CERCLA and the HSAA.

14 THE COURT: In those acts the phrase remedial action  
15 has been defined?

16 MR. AXLINE: Similar phrases such as response costs.

17 THE COURT: The answer is no. The phrase remedial  
18 action hasn't been defined anywhere.

19 MR. AXLINE: Correct.

20 THE COURT: Yes.

21 MR. PARKER: If I could just add one point to what Mr.  
22 Heartney mentioned.

23 THE COURT: Just one second.

24 Mr. Parker.

25 MR. PARKER: In the depositions of the district's

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1 person most knowledgeable on the issues of this work they were  
2 performing, the investigative work, we all specifically asked,  
3 when you get these results back -- they hadn't even embarked on  
4 any work. The district's board had apparently authorized the  
5 contract but nothing had been done. And we asked them, What is  
6 the next step when you do these four different cone  
7 penetrometer borings?

8 THE COURT: Say it again, please.

9 MR. PARKER: It's shortened to CPT for cone  
10 penetrometer testing. It's a type of testing that's done. And  
11 the district's witness said, I don't know what we will do until  
12 we get those results. We may have to do more borings in  
13 different places. We may have to put in groundwater wells to  
14 see what is there. And we asked, Can you tell what remediation  
15 will have to be done? And the witness said, No, I can't tell  
16 you until we go through these steps.

17 So your Honor's point about those steps maybe being  
18 prefatory steps to remediation, the contrary is also true. If  
19 they determine that nothing needs to be done, or that a plume  
20 that they thought extended way off-site in fact doesn't, there  
21 may be ultimately no remediation done and that's our point.

22 THE COURT: What about that, Mr. Axline? If the  
23 investigation shows that there is no need for further action,  
24 has there still been remedial action?

25 MR. AXLINE: Yes, because remedial action includes the

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1 cost of investigation and characterization.

2 THE COURT: That finds no need for action. That's  
3 called remedial action?

4 MR. AXLINE: Yes.

5 THE COURT: What did it remediate?

6 MR. AXLINE: In the very narrowest sense, perhaps it  
7 confirms the remediation that has already occurred has taken  
8 care of the problem.

9 THE COURT: I thought there are many sites here where  
10 not a penny has been spent on remediation.

11 MR. AXLINE: No. I'm sorry?

12 THE COURT: We started this because the investigation  
13 or characterization, they are both used together, is the only  
14 money that has been spent. There hasn't been any money spent  
15 on cleanup or abatement. So you can't come up with the answer  
16 that what has been spent so far is enough, we don't need to do  
17 more. I thought some of these places haven't spent any money.

18 MR. AXLINE: Well, the defendants have been doing  
19 remediation on-site is what I was referring to.

20 THE COURT: So the report says, no need for anything  
21 further. We have investigated and we are satisfied that  
22 whatever the defendants have spent is enough. We don't have to  
23 spend anything.

24 MR. AXLINE: Under any other statute, CERCLA, the  
25 HSAA, that would be considered a response cost regardless, and



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1 you would be able to recover that.

2 THE COURT: Just to confirm that it's satisfactory  
3 now, it doesn't need more?

4 MR. AXLINE: Yes. There was contamination there. It  
5 came from the defendants. The district or any plaintiff I  
6 guess had to do some investigation and characterization. And  
7 the defendants should thank their stars if that shows that no  
8 further work is necessary. I don't think that's going to be  
9 likely in any of these cases, but regardless, that typically is  
10 a recoverable cost, and we think it is under the act as well as  
11 under CERCLA.

12 THE COURT: Although while admitting at the same time  
13 that it hasn't been construed yet specifically under the Orange  
14 County Water District Act, the term remedial action has not yet  
15 been construed.

16 MR. AXLINE: I would suggest that it has by Judge  
17 Colaw in the opinion that we attached. I don't remember if he  
18 parsed the phrase remedial action. That was all briefed to  
19 him, and he said in his opinion that we attached to our brief  
20 or letter --

21 THE COURT: Which was that?

22 MR. AXLINE: It's Exhibit 6, the last exhibit to our  
23 pre-motion letter.

24 THE COURT: OK. This was Orange County Water District  
25 v. Northrop Corporation.

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1           MR. AXLINE: Yes. There I will represent to the Court  
2 that the facts were as they are here. No actual sort of pipes  
3 and concrete remedial work had been done. There had only been  
4 investigation and characterization. And Judge Colaw found that  
5 both the Orange County Water District Act and the HSAA, and  
6 case law interpreting those acts, authorized the district to  
7 recover for incurred expenses of remediation and future costs.

8           THE COURT: Well, I don't see that in the one page  
9 decision.

10          MR. AXLINE: It's admittedly brief.

11          THE COURT: Where do you see it?

12          MR. AXLINE: There is a first page that is sort of  
13 notice.

14          THE COURT: I am in the decision, pages 1 and 2 of the  
15 decision.

16          MR. AXLINE: Paragraph numbered 1. I was reading the  
17 second sentence. Both the OCWDA and the HSAA and case law  
18 interpreting those acts authorized the district to recover for  
19 incurred expenses for remediation and future costs.

20          THE COURT: I can't tell from that small statement  
21 whether any moneys had been spent at the time the court wrote  
22 that. There may have been some money spent already.

23                 Now, true, the phrase "and future costs," well, they  
24 weren't spent yet. I assume this is a trial court. This is a  
25 lower court.

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1 MR. AXLINE: Yes, it was. But the state of play at  
2 the time of this decision was that the district, as here, had  
3 spent some initial money investigating and characterizing.

4 THE COURT: And that's all?

5 MR. AXLINE: Yes.

6 THE COURT: Do you know that case enough to know if  
7 you agree with it?

8 MR. PARKER: I do not. I represent a defendant in  
9 another case, the one that the defendants submitted the rulings  
10 saying there is no declaratory relief and there is no future  
11 costs recoverable under that.

12 THE COURT: Which exhibit is yours?

13 MR. PARKER: Exhibit C Mr. Heartney tells me. C and  
14 D.

15 THE COURT: One second.

16 So C is the Sabic case?

17 MR. PARKER: Yes.

18 THE COURT: Where is the operative language?

19 MR. PARKER: The operative language is --

20 THE COURT: These courts are a model of short decision  
21 writing. I have a lot to learn from these courts. One page.  
22 I have got to change my ways.

23 MR. PARKER: Exhibit C is the notice of ruling, and  
24 then Exhibit A to the notice of ruling. The top one, demur and  
25 motion to strike, demur to first cause of action. That is

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1 where the judge held that declaratory relief was not available.

2 THE COURT: That's obvious because it's not a statute.  
3 But go ahead.

4 MR. PARKER: It was raised --

5 THE COURT: I know. Plaintiffs can only recover costs  
6 that were already incurred for cleanup, containing or abating  
7 the contamination or other remedial acts. Not a surprise  
8 because that's a direct quote of the statutory language. That  
9 doesn't tell us how that court defines remedial acts that I  
10 know of.

11 MR. PARKER: Your Honor, what happened in between is  
12 the district, in response to the ruling, amended their  
13 complaint, and instead of seeking the recovery of future costs,  
14 instead sought declaratory relief. And that ruling by Judge  
15 Nancy Wieben Stock, at paragraph 3 in the substantive part,  
16 says, "Defendants' motion to strike OCWD's allegations  
17 concerning declaratory relief in the first cause of action is  
18 granted." And that first cause of action was the Orange County  
19 Water District Act claim.

20 So those two taken together support the point that the  
21 district, represented by Miller Axline, asserting these same  
22 claims under the act, the court found future costs are not  
23 recoverable and declaratory relief for liability for future  
24 costs is not recoverable.

25 THE COURT: Is that right, Mr. Axline?

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1 MR. AXLINE: Not exactly.

2 THE COURT: In what way was it not right?

3 MR. AXLINE: The district had a separate count for  
4 declaratory relief under California's Omnibus Declaratory  
5 Relief Act that's referred to in this language. On demurs and  
6 motions to strike in California the court is very particular  
7 about separating out causes of action, and what Judge Wieben  
8 Stock said here was, there is nothing in the act that provides  
9 for declaratory relief, and I am not going to let you include  
10 in this first cause of action a request for declaratory relief  
11 under the act. She did not address, although it has been  
12 discussed with her in subsequent conferences, the sixth cause  
13 of action, where we say we get declaratory relief under the  
14 Omnibus Declaratory Relief Act once we have shown that we have  
15 liability under the Orange County Water District Act. So this  
16 was merely a parsing of counts in the complaint.

17 MR. PARKER: That's not true. I agree that they pled  
18 a claim under the California declaratory relief statute that  
19 wasn't challenged on demur because it wasn't amenable to the  
20 challenge. But they sought specific relief under the Orange  
21 County Water District Act and the court held as a matter of law  
22 they were not entitled to that. That is a ruling interpreting  
23 this specific law here. Regardless of whether under some other  
24 claim they may have served they are entitled to declaratory  
25 relief, that's a separate issue, and that's what is addressed

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1 in the other cause of action. This is absolutely clear on the  
2 record that declaratory relief and future costs are not  
3 available under the act.

4 THE COURT: Well, all right. But that's only a part  
5 of plaintiff's argument anyway. Plaintiff argues that, I  
6 think, Mr. Axline, you have already expended moneys, and that  
7 comes to defining the term other remedial action. As far as  
8 you're concerned, the investigation and characterization costs  
9 are already spent.

10 MR. AXLINE: Yes.

11 MR. HEARTNEY: Let me go to one other point that we  
12 also raised. As to those costs, you asked a very good question  
13 and very important question when you said, all right, if all  
14 that you have is money that was spent to investigate and it  
15 hasn't led to any actual remediation, and it might end up  
16 leading just to a report that says, well, actually, nothing  
17 needs to be done, then, your Honor, I think that possibility  
18 leads us directly to the point that under the act no defendant  
19 may be required to pay money for a cost or expense until it has  
20 been able to submit evidence to rebut whether the work was  
21 necessary or the costs were reasonable.

22 I think it's important here that California has a  
23 comprehensive scheme to clean up pollution that covers the  
24 whole state. The Orange County Water District Act covers one  
25 county. California has a comprehensive scheme which puts

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1 responsibility for cleaning up in the Regional Water Quality  
2 Control Boards. They are already out there cleaning up. They  
3 are already out there requiring the defendants to clean up.  
4 And I cannot imagine it will not be a disputed fact if Mr.  
5 Axline was to come in and say, well, we decided that even  
6 though the Regional Water Quality Control Board, the statewide  
7 authority on this, was already cleaning up and already  
8 controlling things, we weren't sure that they were doing a good  
9 job so we wanted to do our own investigation. We did and it  
10 turned out we found out we didn't need to do anything, but we  
11 still are entitled to recover that money from the defendants as  
12 the necessary and reasonable costs. I think we can readily  
13 develop evidence, including expert evidence, that would say  
14 that money was wasted. There was no need for that money since  
15 we had an expert regulator already doing this. The expert  
16 regulator for the state of California is throughout the state  
17 doing this sort of thing.

18 So it's going to get to the same point. We are still  
19 going to be faced with an issue of whether, if they have not  
20 done work that has led to or reached a conclusion on some  
21 remedial work that actually needs to be done, whether they will  
22 be able to get a summary judgment that will establish any  
23 liability or move the ball forward in any sense.

24 THE COURT: Certainly both proposed prongs of the  
25 motion for partial summary judgment have pitfalls for

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1 plaintiff's side that may insnare them, but if they wish to  
2 try, the usual practice is to say yes, you can go ahead and  
3 make your motion, considering all that you have heard from the  
4 premotion conference, but you won't be able to do it again.  
5 Keep that in mind. If you think that after listening to the  
6 argument and the exchange of letters you have a reasonable  
7 chance of prevailing and wish to bring the motion, in the face  
8 of some of these difficulties, OK. We set the schedule and you  
9 go ahead. My practice is to use this as essentially the oral  
10 argument so everybody should congratulate themselves on being  
11 clear today on the arguments. Generally, then I take it on the  
12 papers.

13           Assuming you wish to proceed, Mr. Axline, on both  
14 prongs of this, I need a proposed schedule, and I want to talk  
15 about page limits, because we have covered this many times and  
16 everybody says their case is the big exception for page limits,  
17 I can't possibly do this in 25 pages. But I have to say, after  
18 hearing this argument, there are very discrete and legal  
19 issues, on both prongs. On the first prong, the nuisance and  
20 trespass, you basically say it's quite a simple motion, the  
21 presumption under the statute means that my expenses are  
22 reasonable and it is continuing and it's harm as a matter of  
23 law, and I cite a couple of cases, I win. On the second point,  
24 your argument is also fairly straightforward, at least until  
25 the rebuttal. And it says, the statutory language, other



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1 remedial action should be construed to include investigation  
2 and characterization, and I spent that money so I fall under  
3 the statute, and that's the ball game at this point, short of  
4 any actual damages. It's a fairly straightforward and moving  
5 brief. Then it gets complicated. Once the arguments are  
6 raised, you might have a need for more pages on the reply than  
7 usual, but I think the motion is fairly straightforward, and I  
8 am not inclined to grant what I know is the inevitable request  
9 for extra pages.

10           When can you make the motion, Mr. Axline? Assuming  
11 you decide to proceed, when do you want to do it?

12           MR. AXLINE: I think we can get it filed by the end of  
13 January, say February 1st and on.

14           THE COURT: So you need a lot of time. You want six  
15 weeks to file it.

16           MR. AXLINE: Yes. I say that not because there are  
17 going to be a lot of pages. I heard what you said about the  
18 page limits. But we do need to assemble just the excerpt pages  
19 for each one of these stations.

20           THE COURT: If it is limited to the mere fact of the  
21 contamination above the MCL, or the mere fact that there has  
22 been an investigation, that's not very many pages. But if  
23 that's what you say it takes, that will be Tuesday, February 1.

24           How long would the defense want to respond?

25           MR. HEARTNEY: Taking into account that we don't know

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1 what stations we are talking about --

2 THE COURT: You will know that tomorrow.

3 MR. HEARTNEY: There are 20 stations. There are  
4 multiple defendants. I know we are only going to get one  
5 brief, and I recognize that. But that makes it a little more  
6 difficult to make sure we can pull everybody's stuff together.  
7 I think we need at least 75 days, your Honor.

8 THE COURT: Two and a half months? I wouldn't even  
9 dream about two and a half months. I wasn't really dreaming  
10 about six weeks, but if you said, in fairness, you gave them  
11 six, how can you really give us less when we have to coordinate  
12 with bunches of co-defendants. The legal issues are uncommon  
13 and they are well delineated now on this record. I get the  
14 point. There are not a lot of cases to look at. Some issues  
15 of law go back 50 years and you end up looking at hundreds of  
16 pages and various circuits and getting yourself completely  
17 confused. This isn't like that. This is a California statute,  
18 California law, virtually no case law, for example, on the  
19 phrase other remedial action. It's really kind of a first  
20 impression. Yes, you might analogize it, you might not.  
21 That's for the court to decide. But I don't think it's all  
22 that complicated. Nor did I think the other part was all that  
23 complicated, because if you're right about needing to consider  
24 the statute of limitations issues now, it might be that it  
25 can't be disposed of on summary judgment and the short answer

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1 is denied.

2 I don't think it's all that complicated, and I think  
3 even six weeks is long and it's plenty. So March 15.

4 Mr. Axline, to reply? And any pages you don't use you  
5 can add to the reply. How long would you like?

6 MR. AXLINE: I will say three weeks.

7 THE COURT: That's a long schedule. That's April 5.  
8 That's so long that I would ask you please not to ask for  
9 extensions. I am not going to give them. But if you want to  
10 negotiate within those dates with each other, I am not going to  
11 know and I am not going to care, as long as it's fully  
12 submitted on April 5. So that is the schedule.

13 What about these page limits? I assume the defense is  
14 coordinating on the legal arguments, but may need a small  
15 number of extra pages per site to make the fact argument. He  
16 says hopefully three pages per cite. If you really have 20  
17 sites, you might need a 60 page appendix, separated out of the  
18 25 page brief, where you simply say, we have to show you enough  
19 facts per site for you to get our point. But the legal issue,  
20 there is no need to extend the pages at all. I get it from  
21 today. As I say, there's not a lot of case law, not a lot of  
22 years, not a lot of circuits. It's only going to be in the  
23 Ninth Circuit. It's only one state. So there can be a fact  
24 appendix, so to speak, but the legal brief is 25 pages. And  
25 one brief. Somebody will take the lead and everybody else will

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1 edit your work.

2 Anything else?

3 MR. AXLINE: There is one other thing. I just wanted  
4 to preview for the Court and for the defendants that we have  
5 reached a settlement in principle with a minor defendant in the  
6 Orange County Water District case. The papers are being drawn  
7 up.

8 THE COURT: Who might be this minor defendant?

9 MR. AXLINE: Actually, they asked it not be disclosed  
10 until the papers are filed. So I am not at liberty to say  
11 that. But what I did want to preview is that when we file the  
12 papers, both parties would like to get it done by the end of  
13 the year, we will ask the Court to instruct the defendants to  
14 indicate in a 10 or 12 day period whether they intend to object  
15 or not.

16 THE COURT: Do I have to do a good faith assessment?

17 MR. AXLINE: Yes. We would like you to direct the  
18 defendants to indicate whether they intend to object. If not,  
19 then we would like to try to get it done by the end of the  
20 year.

21 THE COURT: Defendants will have two weeks from the  
22 time they receive notice to decide whether to object or not.  
23 If they decide affirmatively, then they can have two further  
24 weeks to file any objections. So you have a total of 30 days  
25 to file, but two weeks to decide.

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1           MR. HEARTNEY:  If I could just ask for clarification,  
2 not to change those times, but when we get notice, that we get  
3 the necessary information, what the terms of the settlement  
4 are.

5           THE COURT:  How else can you decide whether to object?

6           MR. AXLINE:  That will all be in the papers.

7           THE COURT:  All right.  I think we are done.

8           Thank you all for coming in and thank the folks on the  
9 phone.  Obviously, the transcript must be ordered.  This is the  
10 argument and I do need this.

11           (Adjourned)

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