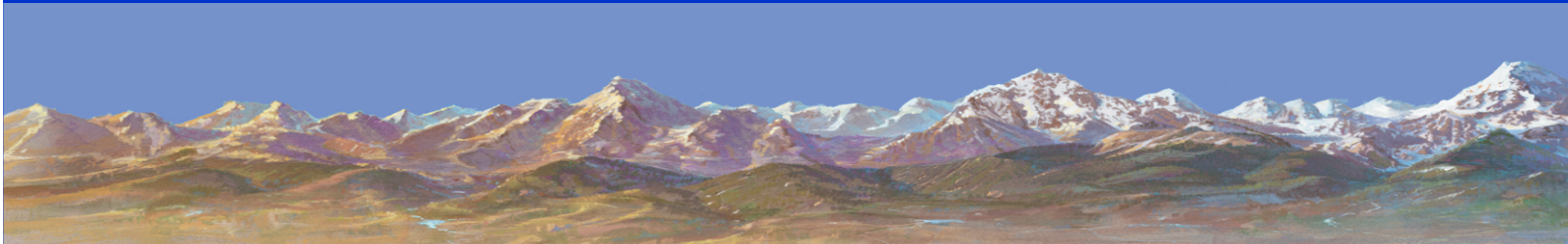


Supreme Court Resurrects Phoenix: CERCLA Section 107 Cost Recovery for PRPs is Alive (again) and Kicking

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Conference
Steamboat Springs, Colorado



Overview

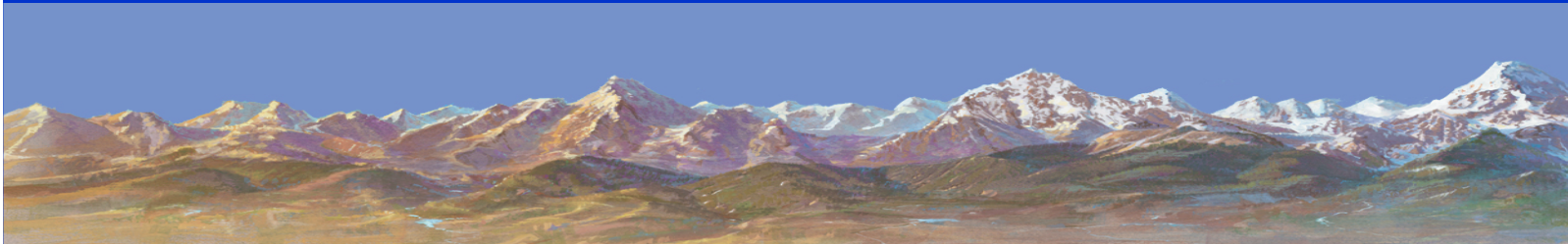
Intro

History of CERCLA 107 & 113 Lawsuits

Cooper Industries v. Aviall (2004)

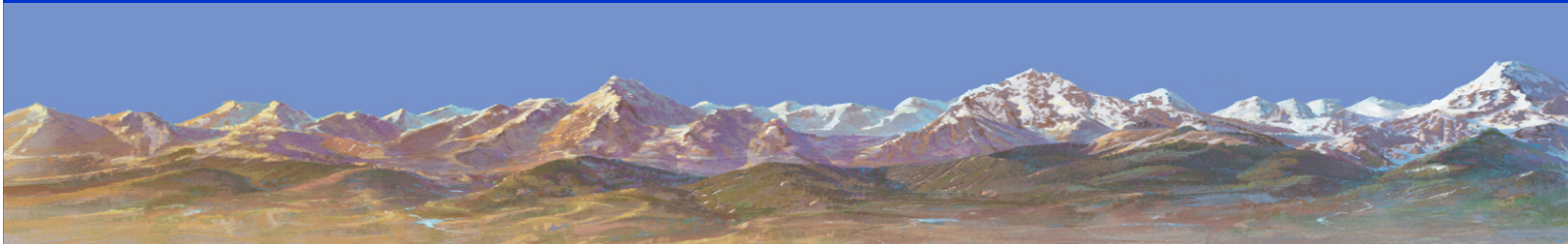
United States v. Atlantic Research Corp: A PRP may recover its voluntary cleanup costs from another PRP under CERCLA Section 107

Implications



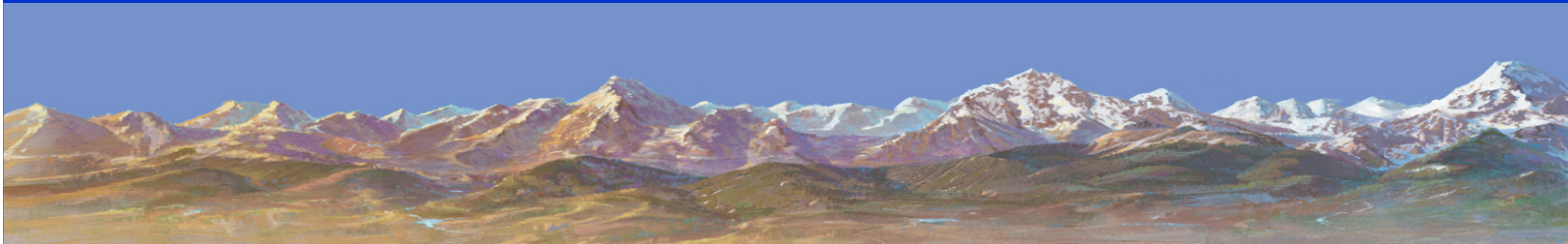
Introduction

- **Why is this case important?**
- **Impacts how one:**
 - **Investigates**
 - **Coordinates with EPA or CDPHE**
 - **Proceeds with lawsuits and when**
 - **Cleans up a site**
 - **Finances a cleanup**



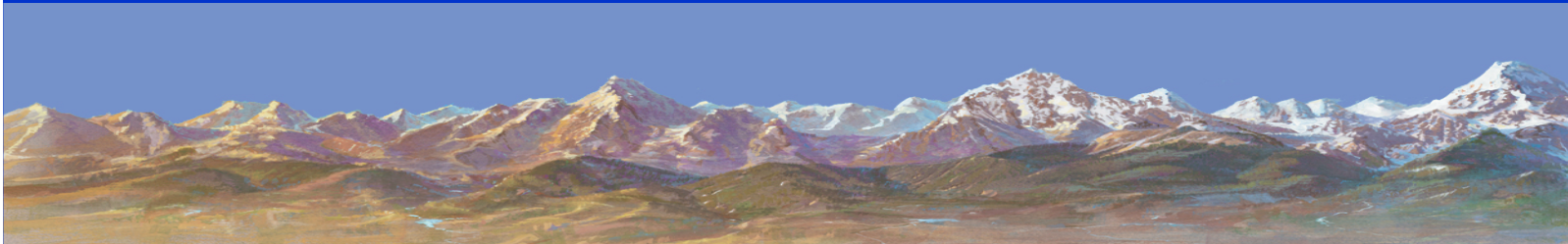
History

- In the beginning ... Congress said let there be CERCLA Section 107
- 1980
- No express right to contribution
- Handout



History

- **What happens if EPA enforces and you perform cleanup in excess of fair share, or you settle and pay more than your fair share?**
- **Courts created an implied right of contribution**



History

- **And Congress saw the cases, that they were good; and Congress divided contribution from cost recovery**
- **Section 113(f) – Contribution**
- **SARA 1986**



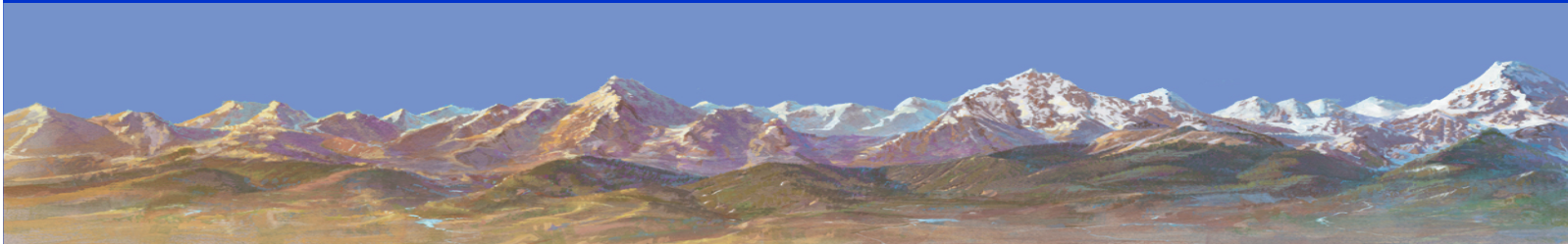
History

- **And the Circuits saw SARA, but did not see the light**
- **Circuits said that a PRP is limited to Section 113(f)(1) when suing another PRP**
- **No choice for PRPs**
- **Shrunk 107 but expanded 113**



History

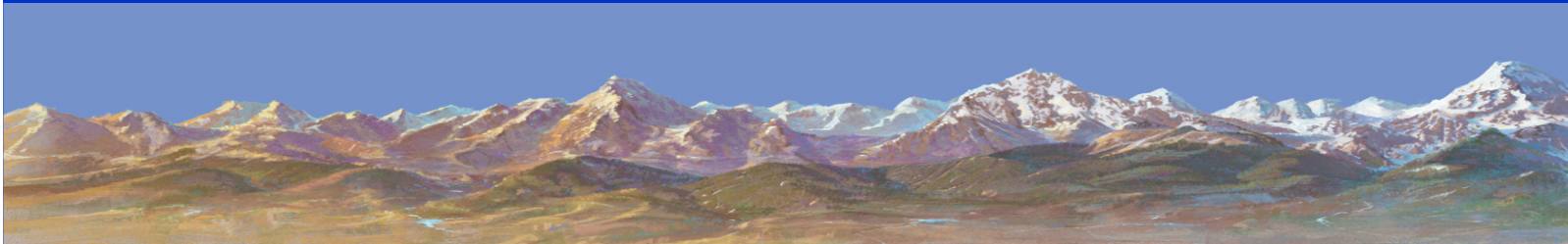
- **10th Circuit in CERC**
 - EPA 107 suit had been filed
 - PRPs should be limited to 113(f), else 113(f) “rendered meaningless”
 - One PRP suing another is a “quintessential claim for contribution”



History

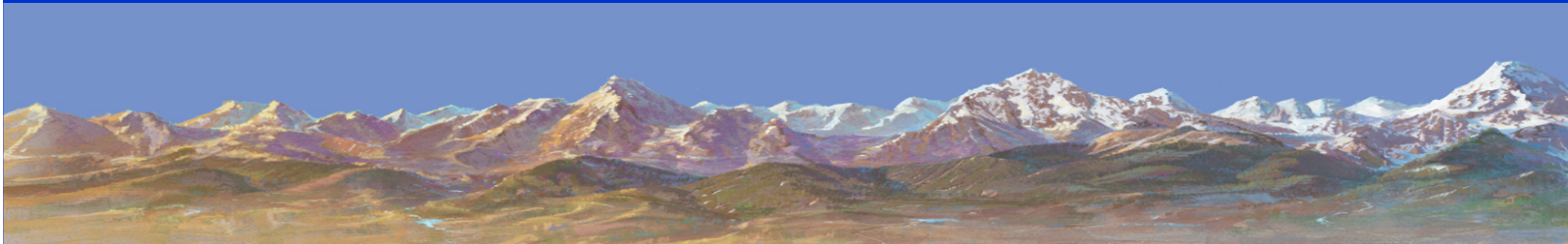
“Cost Recovery” = Section 107(a)

- Government**
- innocent private parties**
- Strict, & Joint and Several liability under 107**
- Longer Limitations period**



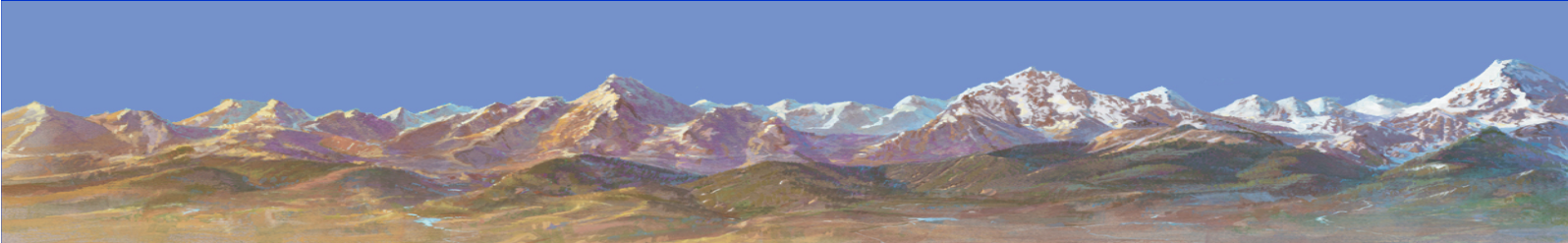
And the Spirit of the Supreme Court moved upon the face of CERCLA

- **Cooper Industries v. Aviall (2004)**
- **Cooper sold 4 engine maintenance sites to Aviall in 1981**
- **Aviall discovered that both Cooper and Aviall contaminated the sites**
- **Aviall reported to government**



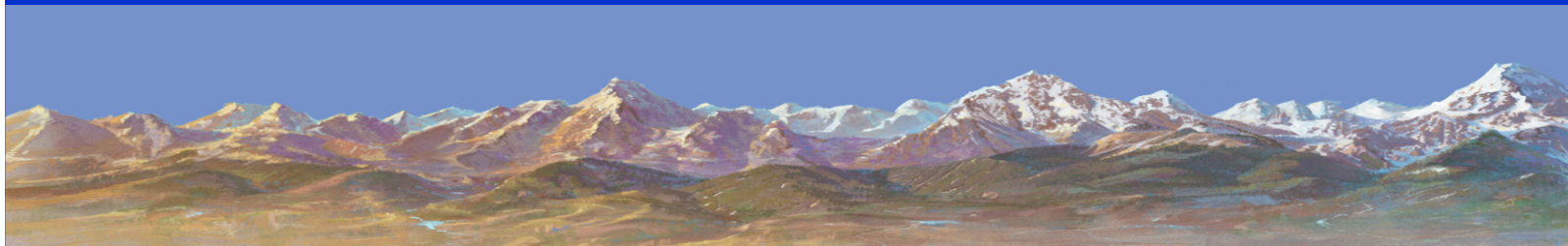
Facts of Cooper Industries

- **State Government “directed” Aviall to clean up (no EPA involvement)**
- **But no “judicial or administrative measures taken to compel cleanup”**
- **Only threats of enforcement**
- **Aviall performed cleanup for at least \$5 m.**
- **Aviall then sued Cooper**



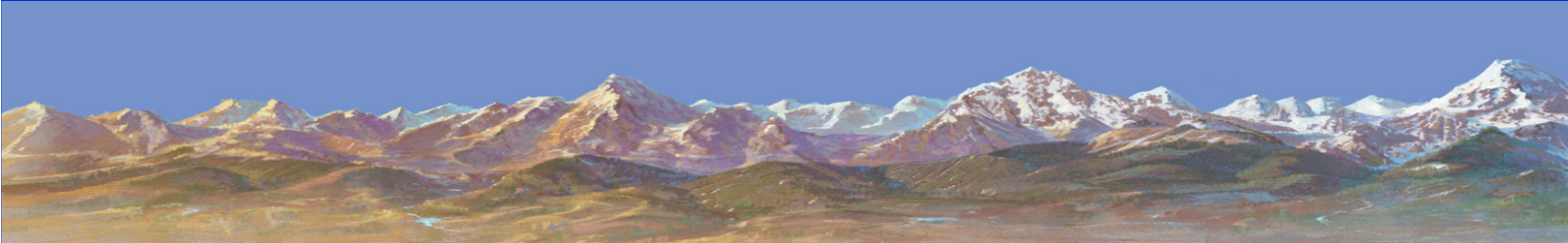
Facts of Cooper Industries

- Trial Court dismissed Aviall's CERCLA 113 claim because of voluntary cleanup and no 106 or 107 claim asserted against it



Section 113(f)(1)

- May seek contribution
- “during or following any civil action under”
- Section 106 or 107(a)
- Savings Clause: this does not “diminish the right” to sue for contribution in the absence of a 106 or 107 claim



Supreme Court Decision

- Agreed with trial court
- “during or after” language means what it says, even though a voluntary cleanup is good public policy
- Savings clause means claims independent of CERCLA 113(f)(1) (i.e. common law, state law claims, and perhaps other CERCLA claims?)



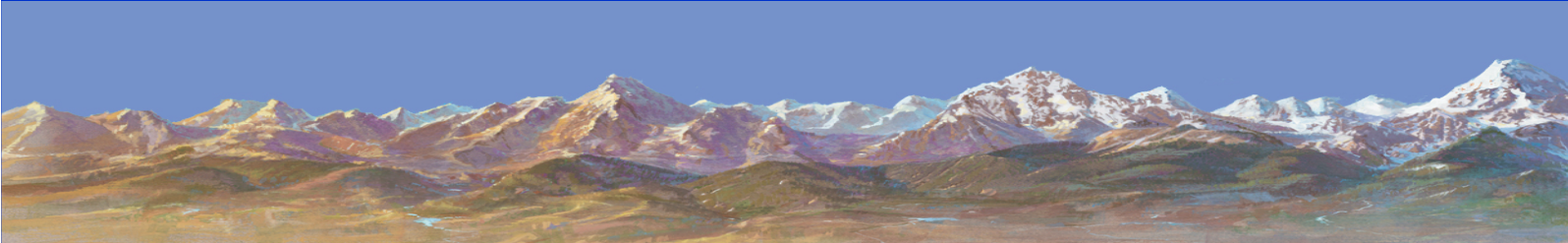
Section 113(f)(3)(B)

- **Alternative jurisdiction for a 113 claim**
- **Resolve liability to the USA or a State**
- **judicially approved or administrative settlement**
- **May seek contribution from a party who has not settled**
- **Don't need a 106 or 107 action**



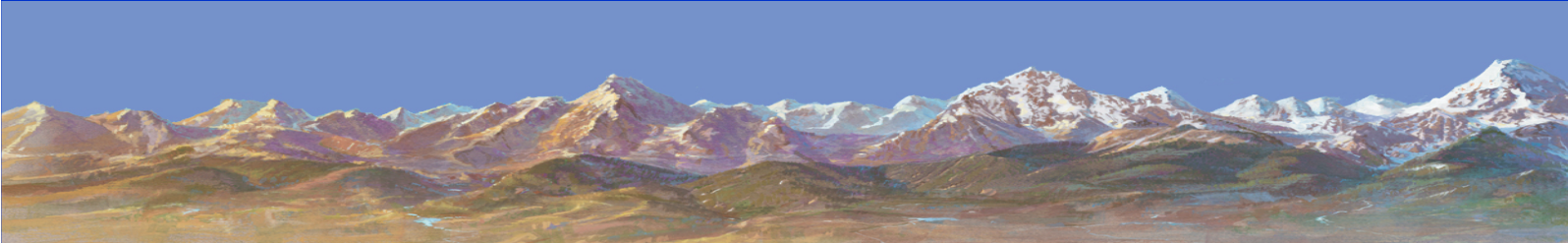
Aviall Implications

- **And CERCLA was without form, and void ...**
- **Chilled Voluntary Cleanups**
- **PRPs wanted settlements**
- **Relitigation of 107 Circuit Cases:**
 - **113 had shrunk, would 107 expand?**



CERCLA Section 107

- 8th, 7th and 2^d said PRPs may pursue 107 claims
- 3^d said no
- Supreme Court granted cert to 8th Cir.



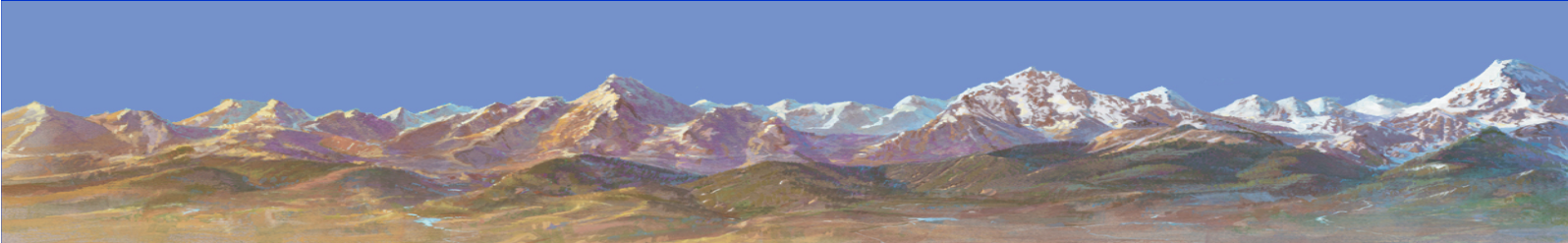
Atlantic Research

- **Atlantic Research leased federal property**
- **Cleaned up property under VCUP**
- **No prior lawsuit or settlement**
- **Sued USA for costs under 107 and 113**



Atlantic Research

- **USA argued: “any other person” in (B) means any other person who is not a PRP in (a)(1) – (4)**
- **AR argued: means any person other than those in (A)**



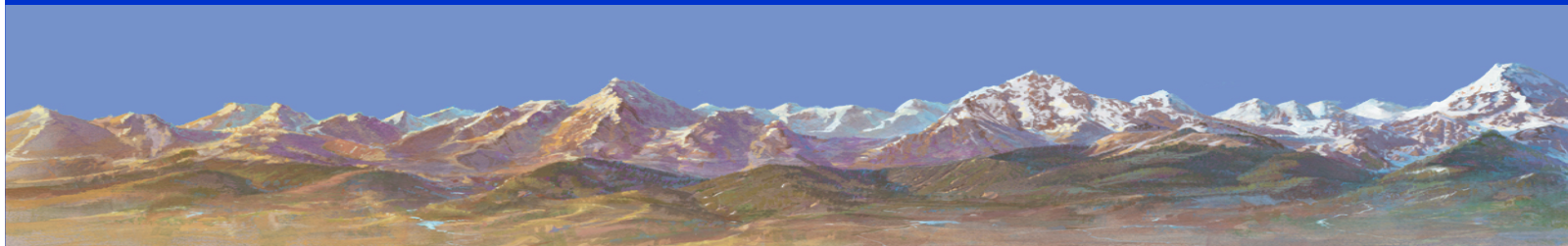
Atlantic Research

- **Court:**
 - (B) refers to (A) and statute must be read as a whole
 - Natural reading
 - “Plain language” authorizes cost recovery under 107 by private parties, including PRPs



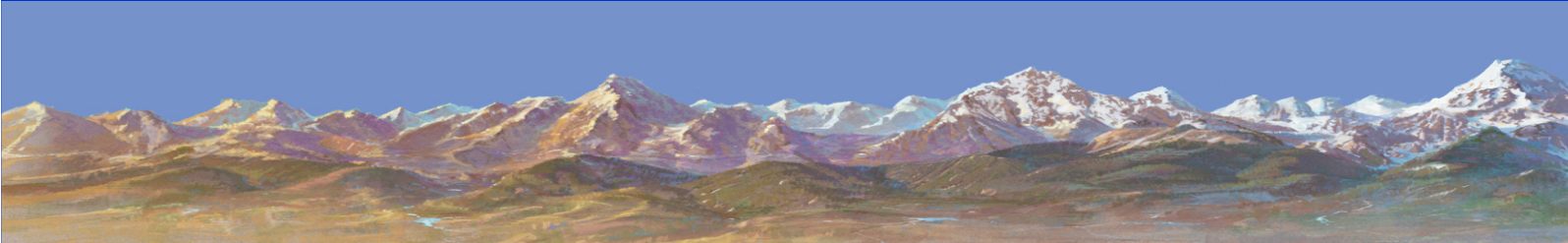
Atlantic Research

- Rejected “innocent PRP” interpretation
- “Even parties not responsible for contamination” may be a PRP
- Otherwise no plaintiffs under (B), making it a dead letter



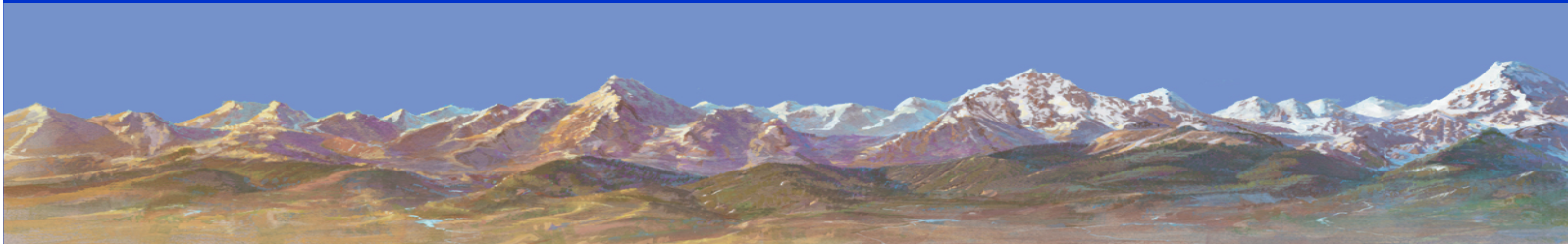
Atlantic Research

- **USA argued: PRPs should not choose between 107 and 113, per courts of appeals cases**
- **Court: Still no choice**



Atlantic Research

- **Cost Recovery**
 - Incur own cleanup costs
 - Without establishment of common liability



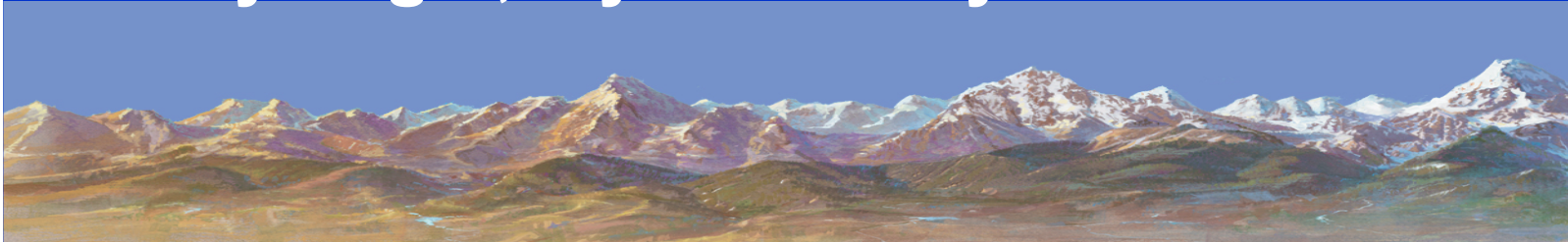
Atlantic Research

- **Contribution**
 - right to collect from others after overpayment of fair share
 - establishment of common liability
 - When party pays to satisfy a settlement agreement or a court judgment
 - It reimburses others for costs the others incurred



Atlantic Research

- **What if PRP performs cleanup under consent decree following a lawsuit?**
- **Did not incur costs voluntarily nor was there any reimbursement**
- **Court did not decide if this is a 107 or a 113 action**
- **Thus: not clear which limitations period you get, 6 years or 3 years?**



Atlantic Research

- Court did not decide if 107 provides for joint and several liability
- If J&S under 107, PRP Plaintiff is subject to a counterclaim under 113
- Plaintiff under 107 cannot avoid equitable distribution of reimbursement costs among PRPs



Atlantic Research

- **107 does not eviscerate contribution bar**
- **113(f)(2) – any person who resolves liability to USA or State shall not be liable for contribution**
- **Court: “The settlement bar does not by its terms protect against cost-recovery liability under 107(a)”**



Atlantic Research

- **What if 100 PRPs settle with EPA in de minimis settlement and 5 PRPs perform the cleanup?**
- **If voluntary cleanup, 107 claim against 100 settling PRPs**
- **If consent order cleanup, not clear if 113 or 107 action**



Atlantic Research

- If settling PRPs sued, 113 counterclaim would trigger an equitable apportionment
- “A district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus.”
- “Liability” or “Allocation”?
- Was there an underpayment?



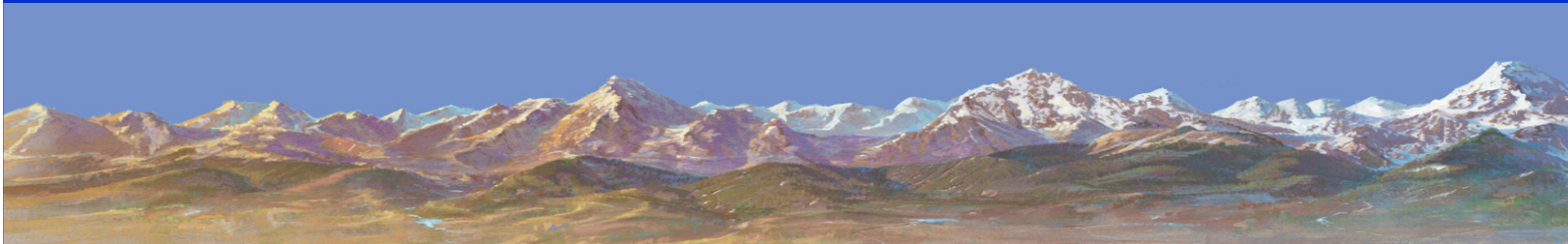
Atlantic Research

- **Do you have a trial with every settling PRPs' liability and share as evidence or just the dollars they paid?**
- **Are the settling PRPs non-parties or orphan shares now that there is no contribution bar?**



Implications

- **How do you settle with Government**
 - **If a de minimis PRP?**
 - **If a PRP performing cleanup?**
 - **What if you cleanup under a UAO?**
- **VCUP not dead, new and better life**
- **VCUP is not a settlement nor an order**



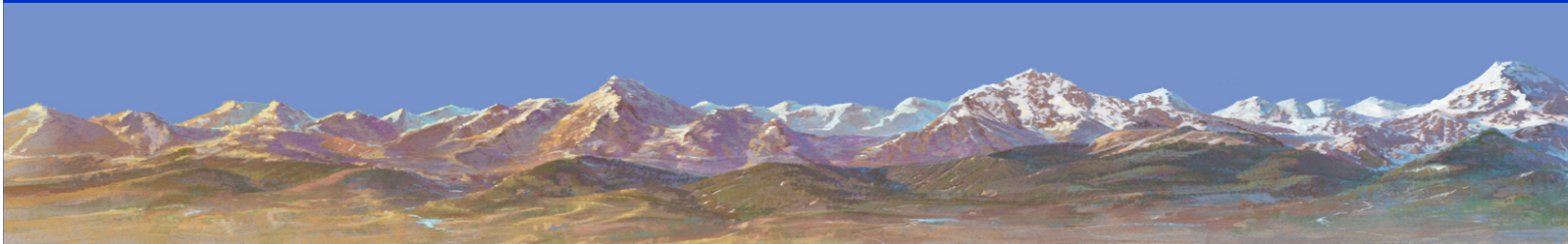
Implications

- **What if you settle with Colorado under a state law that does not address CERCLA?**
- **What if you enter into a RCRA CAP?**
 - **It is not voluntary**
 - **But it is not a CERCLA consent order**
 - **Does the “common liability” have to be a CERCLA liability, or any liability?**
 - **What if defendants not liable under RCRA but only plaintiff is liable?**



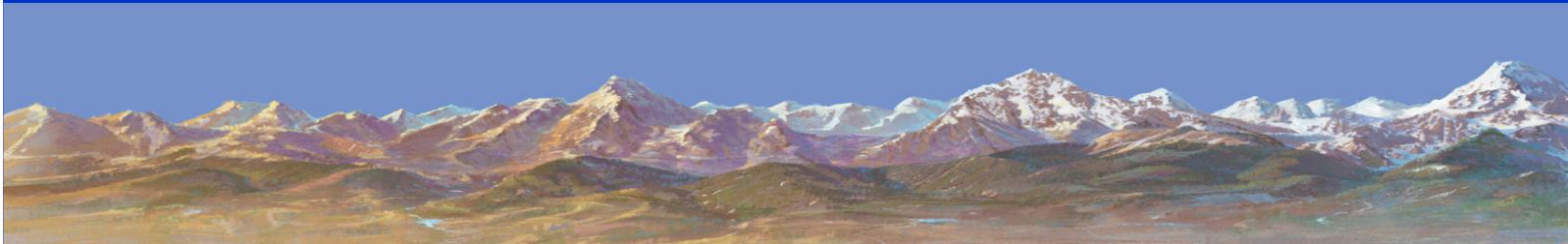
Implications

- **How does buyer or seller build VCUP or settlement into the deal?**
- **Some Buyers may want CDPHE VCUP or govt settlement as a condition precedent and some Sellers may not want government contacts prior to closing**



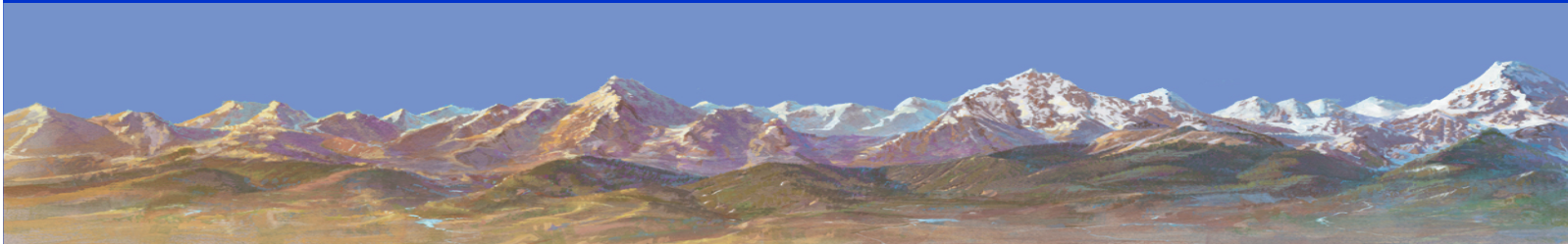
Implications

- **Drafting settlement/enforcement documents**
- **CERC – “matters addressed”**
- **Cooper Industries?**
 - **“settlement”**
 - **“response action”**
 - **“costs”**
 - **“resolved its liability” – NFA boilerplate**
 - **Cite to settlement pursuant to 113(f)(3)(B)**



Drafting

- **Atlantic Research?**
 - How to make “order” voluntary?
 - if you cleanup up, release?
 - **Common liability?**
 - What is an “establishment” of a liability?
 - Cf. Colorado contribution -



Conclusion

- **Good time to audit strategies in matters where CERCLA cost recovery/contribution is or may be an issue**
- **Settle with the Government?**
- **Ordered cleanups?**
- **More voluntary cleanups**
- **Let there be light**

