No.

IN THE
Supreme Court of the United States

MERILYN COOK, *et al.*,
Cross-Petitioners,

v.

THE DOW CHEMICAL COMPANY AND
ROCKWELL INTERNATIONAL CORPORATION,
Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), establishes a compensation regime for any "nuclear incident," a term that includes radioactive discharges causing "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property." 42 U.S.C. §2014(q). Congress provided that, in suits covered by the Act, "the substantive rules for decision * * * shall be derived from the law of the State in which the nuclear incident involved occurs," unless state law is inconsistent with certain provisions of the Act. *Id.* §2014(hh).

The questions presented are:

1. Whether state substantive law controls the standard of compensable harm in suits under the Price-Anderson Act, or whether the Act instead imposes a federal standard.

2. Whether, even assuming a federal standard applies, a property owner whose land has been contaminated by radioactive plutonium, resulting in a proven state-law nuisance and lost property value, must show some "physical injury" to the property beyond the contamination itself in order to recover for "damage to property."

PARTIES TO THE PROCEEDINGS BELOW

Cross-petitioners Merilyn Cook, Lorren and Gertrude Babb, Richard and Sally Bartlett, and William and Delores Schierkolk were plaintiffs in the district court and appellants in the court of appeals.

Cross-respondents The Dow Chemical Company and Rockwell International Corporation were defendants in the district court and appellees in the court of appeals.

Michael Dean Rice, Thomas and Rhonda Deimer, Stephen and Peggy Sandoval, and Bank Western were plaintiffs in the district court and are listed as parties in the caption in the court of appeals, but are not parties to the district court judgment under review.

The Boeing Company is identified in the district court judgment in *Cook I* as a party bound by the judgment, as successor-in-interest to Rockwell International Corporation.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Merilyn Cook, *et al.*, respectfully submit this conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The court of appeals' first opinion ("*Cook I*") is reported at 618 F.3d 1127 (Pet. App. 72a-119a[1]) and its second opinion ("*Cook II*") is reported at 790 F.3d 1088 (Pet. App. 1a-52a). The district court's relevant post-trial opin-

[1] "Pet. App. __" refers to the petition appendix in No. 15-791. "App., *infra*, __" refers to this conditional cross-petition's appendix.

ions are reported at 564 F. Supp. 2d 1189 (App., *infra*, 1a-69a) and 13 F. Supp. 3d 1153 (Pet. App. 55a-69a).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 23, 2015, Pet. App. 1a-52a, and denied rehearing on July 20, 2015, *id.* at 53a-54a. On September 28, 2015, Justice Sotomayor extended the time for Dow and Rockwell to file a petition for a writ of certiorari to December 17, 2015, No. 15A320, and the petition was docketed on that date, No. 15-791. This conditional cross-petition is timely under this Court's Rule 12.5. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919, as amended by the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended at 42 U.S.C. §§2011 *et seq.*), are reproduced at Pet. App. 294a-331a.

INTRODUCTION

Congress enacted the Price-Anderson Act in 1957 with the dual purpose of "protect[ing] the public and * * * encourag[ing] the development of the atomic energy industry." 42 U.S.C. §2012(i). Congress meant to minimize interference with state law and "assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). In 1988, Congress embedded that principle in the statutory text: "[T]he substantive rules for decision * * * shall be derived from the law of the State in which the nuclear incident involved occurs * * * ." 42 U.S.C. §2014(hh).

The petition in No. 15-791 rests on the premise that Price-Anderson preempts valid state-law claims that do

not meet a federal threshold of compensable harm. We will explain in due course why the court of appeals properly rejected that preemption argument in *Cook II*, and why that decision does not warrant this Court's review. If the Court grants review nonetheless, it should also consider the two necessary predicate questions, previously decided in *Cook I*, that are presented in this conditional cross-petition: whether there is a federal threshold of harm over and above what state law requires, and if so, what that threshold is.

Cook I held that Price-Anderson establishes a minimum threshold of harm for claims of "damage to property"—namely, a requirement that the radioactive contamination cause some "physical injury" to the property. If *Cook I* is correct, and if Dow and Rockwell's effort to overturn *Cook II* succeeds, those decisions would eliminate all remedies even for plaintiffs with proven state-law nuisance claims. That draconian result would not only contravene the basic purpose of the Act but could also render the statute unconstitutional. If *Cook I* is *incorrect*, however, the Court need not decide either the preemption or the constitutional question. The claim of preemption therefore cannot be severed from the predicate question whether federal law sets a minimum "physical injury" threshold in the first place.

If the preemption question in *Cook II* warrants review, *Cook I*'s decision on the threshold injury requirement certainly warrants review as well. It deepens a conflict between the Sixth and Ninth Circuits over whether state or federal law determines the standard of compensable harm under the Act. It conflicts with a Third Circuit decision holding that, even if a federal standard applies, no "physical harm" is required. Those issues are important: *Cook I* defies Congress's intent to preserve

state law. And it threatens to deny remedies for landowners who have suffered "damage to property" in any meaningful sense of the term—including the precise sense in which Congress and the Atomic Energy Commission used that phrase when Price-Anderson was enacted in 1957 and in which the Nuclear Regulatory Commission still uses that term today.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Price-Anderson Act

Price-Anderson establishes a compensation system for claims arising from any "nuclear incident," a term defined as "any occurrence * * * causing * * * bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of * * * special nuclear * * * material." 42 U.S.C. §2014(q). Plutonium—a radioactive carcinogen, Tr. 5747—is a "special nuclear material." 42 U.S.C. §2014(aa).[2]

To ensure compensation for those injured by nuclear incidents, the Act requires private nuclear facility operators to have specified amounts of insurance coverage. 42 U.S.C. §2210(a)-(b). It guarantees government indemnification up to other amounts. *Id.* §2210(c)-(d). But it limits a defendant's liability for nuclear incidents to the sum covered by insurance and indemnification. *Id.* §2210(e). Apart from that liability limit, Congress intended "no in-

[2] Citations to "Tr. __" are to the trial transcript, filed as volume 4 of the court of appeals appendix. Citations to "PX__" are to plaintiffs' trial exhibits, filed as volumes 5 and 6. Unless otherwise noted, citations to the court of appeals appendix and briefs are to the appendix and briefs in *Cook II* (No. 14-1112).

terference with * * * State law." S. Rep. No. 85-296, at 9 (1957).

B. The 1966 Amendments

When enacted, Price-Anderson contained no provision for federal-court jurisdiction. In 1966, however, Congress amended the Act to allow concurrent federal jurisdiction over "any public liability action arising out of or resulting from an extraordinary nuclear occurrence." Pub. L. No. 89-645, § 3, 80 Stat. 891, 892 (1966). The term "extraordinary nuclear occurrence" was limited to nuclear incidents the Atomic Energy Commission deemed to be "substantial" and to have caused or threatened "substantial damages to persons offsite or property offsite." *Id.* § 1(a)(2), 80 Stat. at 891.

The 1966 amendments again preserved state law's primary role. As in the original Act, "the claimant's right to recover * * * [wa]s left to the tort law of the various States." S. Rep. No. 89-1605, at 6 (1966). "[O]ne of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law." *Ibid.* Congress thus "assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

C. The 1988 Amendments

In 1988, Congress amended the Act again to facilitate consolidation in federal court. For more than 20 years, the responsible federal agency had never deemed any nuclear occurrence "extraordinary" so as to confer federal jurisdiction—not even the Three Mile Island partial core meltdown. See S. Rep. No. 100-218, at 13 (1987). Congress responded by eliminating the "extraordinary nuclear occurrence" limitation and expanding the Act's jurisdictional provision to cover "any public liability ac-

tion arising out of or resulting from a nuclear incident." 42 U.S.C. §2210(n)(2). Congress also clarified that, to assert an action in federal court, it was sufficient merely to *allege* a nuclear incident: It defined a "public liability action" as "any suit *asserting* public liability." *Id.* §2014(w), (hh) (emphasis added).

Congress again left state law to determine liability, embedding that principle in statutory text: "[T]he substantive rules for decision in [a public liability] action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [Section 2210]." 42 U.S.C. §2014(hh). The legislative history explains that, "[r]ather than designing a new body of substantive law," Congress left liability to be "determined under applicable state tort law." H.R. Rep. No. 100-104, at 5, 18 (1987); see also S. Rep. No. 100-218, at 13. The definition of "nuclear incident" did not change. 42 U.S.C. §2014(q).

II. PROCEEDINGS BELOW

A. Background

Located near Denver, Colorado, the Rocky Flats nuclear weapons plant was operated by Dow Chemical Company from 1952 to 1975 and Rockwell International Corporation from 1975 to 1989. Pet. App. 74a. Rocky Flats was riddled with safety failures. From 1966 to 1969, there were 31 reported plutonium fires. PX321 at 2. Thousands of barrels of plutonium-contaminated oil, many leaking, were left outside for almost a decade. PX64 at 74,879-80, 74,889, 74,928; PX223; Tr. 1530-1534. Over 2,600 pounds of weapons-grade plutonium went unaccounted for. PX1132 at 107-108; Tr. 5337.

In 1989, the FBI and EPA raided the Rocky Flats facility in "Operation Desert Glow." Pet. App. 3a, 74a; Bryan Abas, *Rocky Flats: A Big Mistake from Day One*,

Bull. Atomic Scientists, Dec. 1989, at 19. Rockwell was charged with, and pled guilty to, environmental crimes. Pet. App. 74a. Addressing conditions on the Rocky Flats facility became "one of the most significant and challenging environmental clean-ups to date." U.S. Dep't of Energy, *Rocky Flats, Colorado, Site: Fact Sheet* 2 (May 2015).

B. Proceedings in the District Court

1. In 1990, seven owners of property within the "plume" of plutonium released from Rocky Flats filed this class action against Dow and Rockwell. C.A. App. 194. They asserted federal jurisdiction under the Price-Anderson Act and 28 U.S.C. §§ 1331 and 1332. *Id.* at 195. The operative complaint alleged claims for nuisance and trespass "arising under the law of the State of Colorado," as well as public liability under the Price-Anderson Act, claiming damage to property caused by Dow and Rockwell's plutonium discharges. *Id.* at 266 ¶ 96; see also *id.* at 268-270 ¶¶ 111-121 (alleging nuisance and trespass claims "under Colorado law").

After nearly 16 years of hard-fought litigation, a four-month jury trial began in October 2005. Pet. App. 3a, 76a. All parties, including Dow and Rockwell, accepted that the property owners were asserting Price-Anderson claims based on Colorado law.[3]

The property owners presented substantial evidence of contamination, and Dow and Rockwell admitted that "plutonium from Rocky Flats is present in the Class

[3] See C.A. App. in No. 08-1224, at 498-499 ("None dispute this is a 'public liability action' arising under the Price-Anderson Act * * * . Defendants admit [§ 2014(hh)] permits Plaintiffs to assert claims based on Colorado tort law in this action * * * . "); Dist. Ct. Dkt. 1419 at 2 (Aug. 8, 2005) (reciting that claims "arise under the Price-Anderson Act" and "deriv[e] from Colorado law").

Area." C.A. App. 415. A government study found "[e]levated levels of plutonium both on and off site * * * , in some places, more than 50 times background levels." PX1620 at 23. Witnesses testified that contamination levels were even higher. Tr. 3108-3109 (offsite radiation levels up to "100 to 1,000 times what the normal background should be"). That contamination had serious health consequences: Evidence showed elevated rates of cancer near Rocky Flats—including a 29% increase in lung cancer among women. Tr. 4829, 4836. The district court rejected Dow and Rockwell's *Daubert* challenges to plaintiffs' scientific evidence, C.A. App. in No. 08-1224, at 1732-1871, and neither Dow nor Rockwell challenged that ruling or evidence on appeal.

The property owners also proved that the contamination diminished their property values. Tr. 2654-2732, 4209-4273, 6329-6351, 6399-6496, 6509-6635. Experts analyzed real-estate market research, reviewed analogous case studies, examined market sales data, and conducted regression analyses and public opinion surveys to measure the diminution in value. *Id.* at 2716-2718, 6406, 6416-6417.

2. The district court instructed the jury that, to recover for nuisance under Colorado law, the property owners had to prove Dow and Rockwell interfered with plaintiffs' "use and enjoyment of their properties" either by "causing [them] to be exposed to plutonium and placing them at some increased risk of health problems" or by "causing objective conditions that pose a demonstrable risk of future harm." App., *infra*, 88a. Consistent with Colorado law and the *Restatement*, the interference had to be "unreasonable" and "substantial." *Ibid.*; see Pet. App. 102a-103a. The jury had to decide whether the interference was substantial based only on "the magnitude

or level of interference that is common to the Class as a whole." App., *infra*, 93a. "Evidence that the value of Class members' properties has diminished," the instructions explained, "is evidence that the interference is substantial." *Ibid.* The district court also instructed the jury to calculate damages based on diminution in property value. *Id.* at 101a-103a.

At no time in the district court did Dow or Rockwell contend that Price-Anderson imposes a *federal* standard of compensable harm—either when arguing jury instructions, in post-trial motions, or during nearly 16 years of pretrial proceedings.

3. The jury found for plaintiffs on both their trespass and nuisance claims. App., *infra*, 1a. It found that Dow and Rockwell had caused "a reduction in the aggregate value of the Class Properties of $176,850,340"—around $12,000 per residential property. *Id.* at 6a; C.A. App. 398; Tr. 6422. The district court denied Dow and Rockwell's post-trial motions for judgment as a matter of law or a new trial. App., *infra*, 2a-38a. On June 2, 2008, the court entered a final judgment of about $726 million in compensatory damages. *Id.* at 70a-74a. Most of that amount consisted of *18 years'* worth of mandatory prejudgment interest under Colorado law, calculated at 8% compounded annually. *Id.* at 63a-64a.[4]

C. The First Appeal

1. On appeal, Dow and Rockwell claimed—for the first time—that Price-Anderson's definition of "nuclear incident" imposes a federal standard of compensable harm. Pet. App. 86a-100a. That definition's reference to

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[4] The jury also awarded $200.2 million in punitive damages, App., *infra*, 11a, which the property owners are no longer pursuing, C.A. Br. 7 n.15.

"damage to property," they contended, requires *physical* injury to property in addition to whatever state law requires. See *id.* at 86a-88a.

Although Dow and Rockwell faulted the district court for not instructing the jury on that newfound federal element, they had never requested such an instruction. The Tenth Circuit thus acknowledged that they may have "forfeited this argument." Pet. App. 87a. But the court held that the property owners had "forfeited any forfeiture argument"—even though they had accused Dow and Rockwell of making a "'novel Price-Anderson argument'" and of "fail[ing] to 'identify with clarity * * * the locations in the record where [their] points were raised.'" *Ibid.* (quoting C.A. Br. in No. 08-1224, at 29, 53); see also C.A. Supp. Br. in No. 08-1224, at 8 n.5 (reiterating waiver argument); C.A. Supp. Reply in No. 08-1224, at 7-8 (same).

On the merits, the Tenth Circuit held that federal law imposes a threshold standard of compensable harm. "[T]he occurrence of a nuclear incident, and thus a sufficient injury under §2014(q), constitutes a threshold element of any [Price-Anderson] claim." Pet. App. 89a. "In creating a federal cause of action under the [Act]," the court stated, "Congress made clear its intention to limit recovery to the discrete group of injuries enumerated in §2014(q)." *Id.* at 89a-90a.

The court rejected the property owners' argument that the cited provisions established only the pleading requirements for federal jurisdiction and did not alter state-law substantive requirements for recovery. See Pet. App. 89a. Those provisions define "public liability action" as "any suit *asserting*" liability from a nuclear incident, 42 U.S.C. §2014(hh) (emphasis added), and the court acknowledged that the complaint *asserted* such lia-

bility here, Pet. App. 75a. But the court did not believe Congress meant to "render the statute's nuclear incident requirement superfluous outside of the pleading stage." *Id.* at 90a. "Were a plaintiff only required to plead the presence of a nuclear incident, but never establish one," it opined, "a 'public liability action' would be completely indistinguishable from whichever state tort claim a particular [Price-Anderson] action incorporates." *Id.* at 89a.

The court tried to reconcile its holding with the Act's express provision that "the substantive rules for decision in [a public liability] action shall be derived from the law of the State in which the nuclear incident involved occurs." 42 U.S.C. §2014(hh). "Congress," the court acknowledged, "made clear its intention to * * * utiliz[e] state law to frame the 'substantive rules for decision.'" Pet. App. 90a. But the court held that Congress "simultaneously" sought "to limit recovery to the discrete group of injuries enumerated" in Section 2014(q)'s "nuclear incident" definition. *Ibid.* The provision preserving state law, the court stated, does not apply if state law is "inconsistent with the provisions of [Section 2210]." 42 U.S.C. §2014(hh). Permitting recovery for injuries that do not satisfy some federal threshold of harm, the court claimed, would be "inconsistent" with the "nuclear incident" definition (which is not in Section 2210). Pet. App. 90a n.10.

2. The Tenth Circuit next turned to whether the jury had been adequately instructed on that new, federally defined "damage to property" element. 42 U.S.C. §2014(q). The court did not dispute that Dow and Rockwell had contaminated plaintiffs' property with plutonium. Nor did it dispute that property values were lower as a result. Finally, the court agreed that "[t]he jury was properly instructed on the elements of a nuisance claim

as well as the definitions of 'substantial' and 'unreasonable'" interference under Colorado law. Pet. App. 102a.

But the court held that the jury had to find more. In *June* v. *Union Carbide Corp.*, 577 F.3d 1234 (10th Cir. 2009), the court observed, it had ruled that subcellular damage from radiation exposure, absent any medical symptoms, does not qualify as "bodily injury" (a term that also appears in the "nuclear incident" definition). Pet. App. 90a-91a. "Just as an existing physical injury to one's body is necessary to establish 'bodily injury,'" the court reasoned, "so too is an existing *physical injury* to property necessary to establish 'damage to property.'" *Id.* at 91a (emphasis added).

While the court did not elaborate on the "physical injury" required, it held that actual and objectively unreasonable plutonium contamination resulting in lost property value was not enough. "[D]iminution of value * * * cannot establish the fact of injury or damage." Pet. App. 92a n.12. "Otherwise," the court reasoned, "reduced value stemming from factors unrelated to any actual property injury, such as unfounded public fear regarding the effects of minor radiation exposure, could establish 'damage to property.'" *Ibid.* Price-Anderson, the court held, "requires a showing of actual physical injury to the properties themselves." *Id.* at 93a n.12. The court vacated the district court judgment and remanded. *Id.* at 95a, 119a.[5]

3. The Tenth Circuit denied rehearing *en banc*, with Judge Lucero dissenting. App., *infra*, 82a-86a. Judge

[5] Addressing an early pretrial ruling, the court of appeals also clarified that a scientifically unfounded risk could not rise to the level of an unreasonable and substantial interference. Pet. App. 101a-104a. But that pretrial ruling had been superseded by proper jury instructions, as the court of appeals later clarified. See *id.* at 24a-26a.

Lucero urged that the panel had erred by requiring property owners to "prove a 'nuclear incident' as an element of a [Price-Anderson] claim." *Id.* at 85a. The panel, he noted, "confuse[d] the [Act's] jurisdictional requirements with its substantive elements": While the Act "requires a showing of a 'nuclear incident' for jurisdictional purposes," "*state* law determines liability." *Id.* at 85a-86a (emphasis added). He urged the court to rehear the case "to undo the panel's damaging alchemy." *Id.* at 86a.

4. The property owners filed a petition for a writ of certiorari, raising two issues: (1) whether Price-Anderson imposes a federal standard of compensable harm, and (2) if so, whether plutonium contamination that constitutes a nuisance and diminishes property value qualifies as "damage to property." Pet. in No. 10-1377. This Court called for the views of the Solicitor General, 132 S. Ct. 82 (2011), who urged the Court to deny the petition, stating that the case might be resolved on other grounds, Pet. App. 270a-293a. This Court denied review. 133 S. Ct. 22 (2012).

D. Remand Proceedings

1. On remand, the property owners disclaimed any need to satisfy the Tenth Circuit's new threshold federal injury requirement. Instead, they sought entry of judgment on their Colorado nuisance verdict. Pet. App. 5a-6a. The property owners' complaint had sought relief under state and federal law, C.A. App. 266, 268-270; the jury had returned a nuisance verdict, Pet. App. 6a; C.A. App. 398; and *Cook I* had ruled that "[t]he jury was properly instructed on the elements of a nuisance claim," Pet. App. 102a. Neither Dow nor Rockwell, moreover, had challenged the sufficiency of the evidence supporting the nuisance verdict on appeal. Any instructional error identified in *Cook I* on what constitutes a "nuclear inci-

dent" under Price-Anderson could not alter the otherwise proper state-law nuisance verdict.

Dow and Rockwell did not assert that those arguments were waived. See C.A. App. 942-969. Instead, they urged that any Colorado state-law claim was preempted. Pet. App. 7a. Price-Anderson, they argued, was the exclusive remedy for damages arising out of alleged nuclear incidents: If plaintiffs did not satisfy the new federal nuclear-incident threshold announced in *Cook I*, Price-Anderson preempted any state-law claims. *Ibid.*

The property owners urged that that theory of preemption was forfeited. Pet. App. 60a; C.A. App. 707-709. Dow and Rockwell had previously disclaimed any field-preemption argument, as the Tenth Circuit recognized in *Cook I*. Pet. App. 97a n.16. The property owners also explained that preemption was contrary to the text of the statute and Congress's repeatedly stated objective of preserving state law. C.A. App. 707, 717. And they urged that the new preemption theory presented serious constitutional problems under the Due Process and Takings Clauses by effectively nullifying common-law and statutory nuisance claims in all 50 States with no substitute remedy. See *id.* at 718, 906-937 (50-state survey of nuisance law).

2. The district court held that Price-Anderson preempted the property owners' claims. Pet. App. 55a-69a. The court "remain[ed] convinced that the Colorado jurors in this case correctly found Plaintiffs to have suffered a nuisance under Colorado state law based on the nuclear contamination for which [Dow and Rockwell] are responsible." *Id.* at 55a-56a. But it nevertheless held that Price-Anderson "does not permit independent Colo-

rado state-law claims based on alleged radiation injury." *Id.* at 56a.[6]

E. The Second Appeal

The Tenth Circuit reversed. Pet. App. 1a-52a.

1. The court first held that Dow and Rockwell had forfeited their objection to entry of judgment on the state-law claim by not timely raising their preemption defense. Pet. App. 9a-10a. Dow and Rockwell, the court observed, were asserting field preemption—that Price-Anderson precluded relief for the entire field of actions that assert (but fail to prove) a nuclear incident. *Id.* at 9a. But they had failed to raise that argument in the first appeal. *Ibid.* Even though the verdict was based on both state and federal law, Dow and Rockwell had *never* argued that Price-Anderson preempted the state-law portion of the judgment. *Ibid.* Indeed, *Cook I* specifically observed that Dow and Rockwell "'never develop[ed]'" a field-preemption argument. *Ibid.* (quoting Pet. App. 97a n.16). Dow and Rockwell thus "had no business attempting a field preemption affirmative defense following the first appeal, and the district court had no business adopting it." *Id.* at 10a. That was especially true for "a new defense raised on remand some twenty-five years after the case began." *Ibid.*

2. Alternatively, the court of appeals held that there is "no field preemption in the Act." Pet. App. 11a. Price-Anderson, the court explained, provides a federal forum for cases where a nuclear incident is "'assert[ed]'"; limits liability if a nuclear incident is proven; and obligates the government to indemnify certain losses for nuclear incidents. *Id.* at 13a-14a (citing 42 U.S.C. §§2014(hh),

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[6] The district court also held that *Cook I*'s mandate barred relief. Pet. App. 64a.

2210(c)-(e)). But the statute expressly "stipulates that state law provides the 'substantive rules for decision' in the action except to the extent state law proves 'inconsistent' with the terms of §2210." *Id.* at 14a (quoting 42 U.S.C. §2014(hh)). Section 2210, in turn, merely "limit[s] the amount of liability certain defendants may face and it obligates the government to underwrite certain * * * losses." *Ibid.* (citing 42 U.S.C. §2210(c)-(e)). Far from preempting an entire field, the court ruled, the Act merely "provides a modest form of conflict preemption." *Id.* at 15a. The statute does not "speak[ ] to what happens" in a case like this, where "a nuclear incident is alleged but unproven." *Ibid.* Absent any hint of preemption in the statute, there could be no preemption of traditional state-law nuisance claims.[7]

Dow and Rockwell's request for rehearing *en banc* was denied. Pet. App. 53a-54a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In the course of two appeals, Dow and Rockwell have presented a two-step argument: First, they urged that Price-Anderson claims must meet a federal threshold for compensable harm—if "damage to property" is claimed, the property must suffer "physical injury" beyond radioactive contamination, even for a proven state-law nuisance claim (the argument accepted in *Cook I*). Second, they urged that Price-Anderson preempts state-law claims that do not meet that federal threshold (the argument rejected in *Cook II*). Dow and Rockwell's current

[7] Given its statutory holding, the court of appeals avoided resolving the property owners' due process arguments, which the court acknowledged were "no[t] trivial." Pet. App. 22a-23a n.3. The court also rejected the argument that *Cook I*'s mandate prohibited the entry of judgment on the nuisance claim. *Id.* at 23a-34a.

petition, however, seeks review of only the second step. If this Court grants the petition, it should also grant this conditional cross-petition to address both issues together. The Court should address the existence and scope of Price-Anderson's putative federal threshold for compensable harm (the issue in *Cook I*) before addressing whether the Act leaves a potentially unconstitutional liability gap by preempting traditional state-law torts—like nuisance—that do not meet that threshold (the issue in *Cook II*).

It makes little sense to consider the preemptive force of a purported federal requirement when there are substantial doubts over the scope of that requirement—and whether it exists at all. This Court's analysis of Congress's preemptive intent could well depend on *how much*, if anything, Congress allegedly preempted. Reviewing those intertwined issues together could also help avoid rendering the Act unconstitutional by eliminating longstanding common-law property torts without any adequate alternative.

If *Cook II* merits review, *Cook I* certainly does as well. *Cook I* interpreted Price-Anderson to impose a federal standard of compensable harm for Price-Anderson claims, and then construed that standard to require "physical injury" to property beyond significant radioactive contamination that constitutes a substantial and objectively unreasonable interference—a nuisance under state law. Those holdings conflict with decisions of other circuits. Like the court below, the Ninth Circuit has held that the Act's "nuclear incident" definition imposes a federal standard of harm. But the Sixth Circuit has adopted the opposite view, holding that the Act imposes only a state-law standard.

Cook I's holding that federal law imposes a "physical injury" requirement, moreover, conflicts with a Third Circuit decision holding that no such "physical harm" is required. It conflicts with half a century of administrative practice. And it conflicts with common sense: Any sensible definition of "damage to property" would include contaminating property with radioactive plutonium that interferes with use and enjoyment and impairs the property's value. The Act does not require physical deformation like a blast crater before a property owner can recover proven losses from a convicted environmental criminal. Accordingly, if the Court grants the petition, it should grant this conditional cross-petition as well.

I. IF THE COURT GRANTS REVIEW, IT SHOULD REVIEW *COOK I* AND *II* TOGETHER

Dow and Rockwell urge that Price-Anderson preempts all state-law claims that do not meet its posited federal threshold of compensable harm. Their petition, however, ignores necessary predicates: whether Price-Anderson creates a federal threshold in the first place, and if so, what that threshold entails. If the Court grants the petition in No. 15-791, it should also grant this conditional cross-petition to address those critical predicates. Indeed, the Court cannot meaningfully address whether Price-Anderson preempts state-law claims without deciding what claims can be asserted under that statute.

A. The Court Should Address Price-Anderson's Purported Injury Threshold Before Resolving the Preemption Issue

Dow and Rockwell's request for this Court's review evades a critical antecedent question. Despite Congress's repeated admonition that Price-Anderson preserves state-law liability rules, Dow and Rockwell assume that Price-Anderson's definition of "nuclear inci-

dent" establishes a *federal* threshold of harm. For claims of "damage to property," they insist, there must be some "physical injury." Radioactive contamination that devalues property is not enough—even if it constitutes a substantial and objectively unreasonable interference with the use and enjoyment of the property. Dow and Rockwell ask this Court to decide whether state-law claims falling below that threshold are preempted. But that question cannot be answered without resolving a prior question: whether Price-Anderson establishes a federal threshold of harm, and if so, what that threshold is.

Indeed, Dow and Rockwell's preemption argument arises *only* if Price-Anderson sets a minimum threshold of injury. Their theory is that, if injuries do not meet that threshold, there is no nuclear incident; absent a nuclear incident, there is no Price-Anderson claim; and absent a Price-Anderson claim, state law gives way. Pet. in No. 15-791, at 15-29. But if there is no minimum federal injury requirement—or if that requirement is satisfied by significant nuclear contamination that constitutes a nuisance under state law—valid state-law claims like these *do* rise to a "nuclear incident"; the claims are actionable under Price-Anderson; and the preemption issue never arises.

If this Court is to address the fate of state-law causes of action where Price-Anderson and state law diverge, it must first address *whether* they diverge. Whether these property owners can proceed under state law matters only if the "physical injury" requirement (first invented by Dow and Rockwell on appeal *18 years* into the litigation) precludes this suit under Price-Anderson. The Court cannot meaningfully address whether Price-Anderson preempts state-law claims below that putative

injury threshold without first addressing whether there is such a threshold—and if so, what it is.[8]

B. The Court Cannot Meaningfully Address *Cook II*'s Constitutional Implications Without Addressing *Cook I*

It is well-settled that "constitutionally doubtful constructions should be avoided where 'fairly possible.'" *Miller* v. *French*, 530 U.S. 327, 336 (2000). Preempting fundamental state property rights by denying property owners any recovery on otherwise valid state-law claims would raise serious concerns under the Due Process and Takings Clauses. See *Fein* v. *Permanente Med. Grp.*, 474 U.S. 892, 894-895 (1985) (White, J., dissenting from dismissal) (recognizing that "[w]hether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces" is an "important" issue not resolved by the Court); *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982) (holding that "claims for compensation are property interests that cannot be taken for public use without compensation"). In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), for example, this Court upheld the prior version of Price-Anderson against a due process challenge but expressly left open whether a "legislatively enacted compensation scheme" must "provide a reasonable substitute

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[8] Affirming on the alternative ground that the state-law claims here can be brought under Price-Anderson would not enlarge the judgment under review: The jury's Price-Anderson and Colorado nuisance verdicts were identical. See C.A. App. 398; *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529 (2013) (cross-petition only necessary if argument "would alter the Court of Appeals' judgment"). Nevertheless, because the judgments in *Cook I* and *II* were based on different claims, the property owners are filing this conditional cross-petition as a protective measure.

remedy * * * for the * * * state tort law remedies it replaces." *Id.* at 88.

The Tenth Circuit thus recognized that accepting Dow and Rockwell's argument—that Price-Anderson eliminates state nuisance law with no substitute remedy—raises significant constitutional questions. Pet. App. 22a-23a n.3 ("no trivial argument"). The more extensive the preemption, the more serious the constitutional problem. If *Cook I* remains the law, for example, Dow and Rockwell's position on preemption would threaten to eliminate nuisance law in all 50 States even for serious claims of radioactive contamination like those here. Unless the contamination is so extreme that it deforms the landscape (or satisfies one of the other categories of harm, for example by causing a loss of use such as a forced evacuation), property owners would be left without a remedy even for proven nuisance claims. There is no reason to believe Congress intended to cut that broad swath through state law.

This Court cannot properly evaluate those constitutional issues, and their implications for the constitutional avoidance canon, without determining what (if any) state-law claims Dow and Rockwell's view would leave unredressed. If the Court reviews *Cook II* to decide whether state-law claims excluded from Price-Anderson are preempted, it should also review *Cook I* to determine what (if anything) Price-Anderson excludes.

II. The Circuits Are Divided Over Whether Federal Law Imposes A Standard For Compensable Harm

The issues decided in *Cook I* are sufficiently important to warrant this Court's review. *Cook I* deepened a circuit conflict over whether Price-Anderson or state law governs any minimum standard for compensable harm.

When the property owners previously raised this issue in 2011, the Court sought the Solicitor General's views. The split is now well-settled and ripe for the Court's review.

A. The Courts Are Squarely Divided

1. In *Rainer* v. *Union Carbide Corp.*, 402 F.3d 608 (6th Cir. 2005), the Sixth Circuit held that state rather than federal law sets the standard for compensable harm under Price-Anderson's "nuclear incident" definition. There, workers exposed to plutonium claimed they had suffered compensable harm, although no symptoms had surfaced, because subcellular damage itself was a "bodily injury" under the Act. *Id.* at 618. Evaluating that claim, the Sixth Circuit observed that "[c]ourts are required to look to state law for the substantive rules to apply in deciding [Price-Anderson] claims." *Ibid.* Thus, the "key question" was "whether *Kentucky caselaw* equates 'subcellular damage' with 'bodily injury.'" *Ibid.* (emphasis added). Reviewing state precedents, the court held that Kentucky law did not. *Id.* at 618-622.

The Ninth Circuit rejected that approach in *Dumontier* v. *Schlumberger Technology Corp.*, 543 F.3d 567 (9th Cir. 2008). "Unlike the Sixth Circuit," it held, "we have never relied on state law to interpret bodily injury." *Id.* at 570. The court saw Section 2014(q)'s "nuclear incident" definition as imposing a separate *federal* threshold. *Ibid.* Section 2014(q), the court opined, is "a bar to claims that would otherwise be actionable under state law, *a bar imposed by federal law and therefore interpreted as a matter of federal law*." *Ibid.* (emphasis added).

2. *Cook I* widened that conflict. Like the Ninth Circuit, but in conflict with the Sixth, the Tenth Circuit construed Price-Anderson to impose a federal standard for compensable harm. It held that, as a matter of *federal* law, "a plaintiff must establish an injury sufficient to con-

stitute a nuclear incident as a threshold, substantive element." Pet. App. 90a. Like the Ninth Circuit, the court tried to reconcile that federal mandate with the Act's explicit preservation of state law. Although "Congress made clear its intention to * * * utiliz[e] state law to frame the 'substantive rules for decision,'" the court posited, Congress "simultaneously" sought "to limit recovery to the discrete group of injuries enumerated in § 2014(q)." *Ibid.*

3. Shortly after *Cook I*, the Fifth Circuit joined issue in a divided opinion. In *Cotroneo* v. *Shaw Environment & Infrastructure, Inc.*, 639 F.3d 186 (5th Cir. 2011), the Fifth Circuit held that workers exposed to radiation could not sue for battery, a tort that does not require "physical injury." *Id.* at 195. "[E]ven if [the claim] is actionable under state law," the majority concluded, the claim could not proceed "because it would allow plaintiffs to recover on their public liability action without establishing 'public liability'"—"an injury sufficient to make the occurrence a 'nuclear incident.'" *Id.* at 195, 199. The majority cited *Cook I* as support. *Id.* at 196-198.

Judge Dennis dissented. "Had Congress intended to limit recovery to these categories of personal injury claims" in the "nuclear incident" definition, he explained, "it easily could have * * * said so." 639 F.3d at 200 (Dennis, J., dissenting). "Instead, however, § 2014 of the [Act] clearly uses the bodily injury and property damage terms only for a specific federal *jurisdictional* purpose * * * ." *Ibid.* (emphasis added). Congress did not "intend[ ] for these jurisdictional terms to serve the additional purpose of limiting the types of claims that may be brought in a public liability action." *Ibid.*

Besides, Judge Dennis continued, "§ 2014(hh) provides that 'the substantive rules for decision' in a public liabil-

ity action 'shall be derived from the law of the State' in which a nuclear incident occurs." 639 F.3d at 201 (Dennis, J., dissenting). While the Act qualifies that rule with an exception for state laws "'inconsistent with the provisions of' 42 U.S.C. §2210," "[n]othing in §2210 expressly excludes, abrogates or modifies any particular kind of claim." *Ibid.* Instead, Section 2210 establishes liability limits. The battery claims thus should have been "adjudicated in accordance with the substantive rules for decision derived from state law." *Id.* at 205.

B. *Cook I* Erred in Holding That Price-Anderson Imposes a Federal Standard of Compensable Harm

The decision in *Cook I* does not merely exacerbate a circuit conflict. It also disregards Congress's plain intent.

1. The Act is clear: "[T]he substantive rules for decision in [a public liability] action *shall be derived from the law of the State* in which the nuclear incident involved occurs, unless such law is *inconsistent with the provisions of [Section 2210]*." 42 U.S.C. §2014(hh) (emphasis added). Nothing in Section 2210 establishes a minimum degree of property injury a plaintiff must sustain—much less a "physical injury" requirement. Section 2210 provides overall limits on liability, 42 U.S.C. §2210(e); imposes a (post-August 20, 1988) limitation on punitive damages, *id.* §2210(s); restricts recovery of evacuation costs, *id.* §2210(q); and limits liability for lessors, *id.* §2210(r). Had Congress wanted to establish a federal minimum threshold of property damage to override state-law requirements, it would have included that limit in Section 2210. It did not.

Where Congress intends to displace state law, it must make that intent clear. See *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2188 (2014). Here, Congress did the op-

posite, incorporating rather than supplanting state law. Having expressly stated that state law would supply the substantive rules of decision, Congress would not have covertly federalized the fundamental issue of the standard of compensable harm merely by listing "damage to property" among the types of injuries the Act addresses. The utter implausibility of that interpretation is clear from Dow and Rockwell's failure to conceive of it for the first two decades they litigated this case: They raised it for the first time on appeal—after 18 years of proceedings. Pet. App. 87a.

Cook I derived a contrary rule from the Act's definition of "nuclear incident." Pet. App. 88a-90a. But that definition does not even appear in Section 2210, the only provision that supersedes state law. The Act confers jurisdiction over "any public liability action arising out of or resulting from a nuclear incident," 42 U.S.C. §2210(n)(2), and it states that such actions arise under federal law, *id.* §2014(hh). A "public liability action" is "any suit *asserting* public liability"—that is, "legal liability arising out of or resulting from a nuclear incident," *id.* §2014(w), (hh) (emphasis added); and a "nuclear incident" includes, among other things, a radioactive discharge causing "damage to property," *id.* §2014(q). That the Act *lists* "damage to property" among the types of injuries to which the Act's jurisdictional grant applies does not mean Congress intended a newly minted federal standard to govern the *degree* of harm necessary to state a claim. To the contrary, that is precisely the sort of "substantive rule[ ] for decision" governed by "the law of the State in which the nuclear incident involved occurs." *Id.* §2014(hh).

Cook I posited that, when Congress provided federal courts with jurisdiction over claims asserting nuclear in-

cidents in 1988, Congress precluded liability under traditional state torts like nuisance unless some federal threshold of harm was met. But the theory that the 1988 amendments somehow covertly introduced such a limitation defies Price-Anderson's long history. When Congress enacted Price-Anderson in 1957, it emphasized that it intended "no interference with * * * State law." S. Rep. No. 85-296, at 9. When Congress amended the Act in 1966, it reiterated that "one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law" and confirmed its intent to "interfer[e] with State law to the minimum extent necessary." S. Rep. No. 89-1605, at 6, 9. This Court recognized in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), that a fundamental tenet of the Act was that state-law remedies still applied. *Id.* at 256. The 1988 amendments expanded permissive federal jurisdiction over public liability actions. But Congress did not diminish the primacy of state law. Congress intended state law to "determine[ ]" the substantive rules of liability, not to serve as a springboard for federal improvisation. H.R. Rep. No. 100-104, at 5.

2. The Tenth Circuit, moreover, ignored that no provision of the Act requires a plaintiff to *prove* a "nuclear incident" as a substantive element of its claim. Instead, the Act simply defines the "public liability action" that can be asserted in federal court as a "suit *asserting* public liability"—a suit asserting "legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. §§2014(w), (hh), 2210(n)(2) (emphasis added). The property owners' complaint undeniably "assert[ed]" public liability here. Pet. App. 75a.

Cook I effectively rewrote the statute because the court did not believe Congress intended to "render the

statute's nuclear incident requirement superfluous outside of the pleading stage." Pet. App. 90a. But it was hardly anomalous for Congress to define jurisdiction by what a complaint "assert[s]," even though doing so renders the condition superfluous outside of the pleading stage. See, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987) (plaintiffs need not "prove their allegations of ongoing noncompliance before jurisdiction attaches" where a statute requires only that "a defendant be '*alleged* to be in violation'"). Nor is it anomalous that a claim's substantive elements differ from its jurisdictional requirements: Price-Anderson's jurisdictional and substantive provisions have diverged throughout its history. See pp. 4-6, *supra*; *e.g.*, *Stibitz* v. *Gen. Pub. Utils. Corp.*, 746 F.2d 993, 995-996 (3d Cir. 1984). Congress did not "intend[] for these jurisdictional terms to serve the additional purpose of limiting the types of claims that may be brought in a public liability action." *Cotroneo*, 639 F.3d at 200 (Dennis, J., dissenting).

3. Finally, even if Section 2014(q)'s reference to "damage to property" could somehow be read as a substantive element rather than a category of claims that the Act's jurisdictional provision covers, that element should be interpreted—as the Sixth Circuit did in *Rainer*—by reference to applicable state law. See 402 F.3d at 618. "Congress sometimes intends that a statutory term be given content by the application of state law." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989). Courts look to state law when a statute's text, history, and purposes indicate Congress intended that result. See *id.* at 43-47.

That is the case here. Section 2014(hh) *expressly requires* courts to apply state-law substantive rules. 42

U.S.C. §2014(hh). Price-Anderson's history confirms Congress's intent. See p. 26, *supra*. And the standard of compensable harm in a tort suit is a matter at the core of traditional state authority—an area where Congress should be particularly loath to tread. Cf. *Reconstruction Fin. Corp.* v. *Beaver Cnty.*, 328 U.S. 204, 209-210 (1946) (defining "real property" in a federal statute to incorporate state law because the subject was "deeply rooted in state traditions, customs, habits, and laws").

III. The Circuits Are Divided Over Whether Radioactive Contamination That Results In A Proven Nuisance Constitutes "Damage To Property"

Even courts that look to federal law are divided over whether radioactive contamination that reduces property value can support a Price-Anderson claim. The Third Circuit correctly answered that question in the affirmative. The contrary ruling in *Cook I*—that "damage to property" requires some "physical" deformation like a blast crater—defies both decades of settled administrative practice and common sense.

A. The Courts Are Divided

In *Pennsylvania* v. *General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983), the Commonwealth of Pennsylvania and two townships sued the owners, operators, designers, and builders of the Three Mile Island nuclear plant. They sought damages for lost real estate taxes stemming from "'diminution of real estate values.'" *Id.* at 120-121. The Third Circuit allowed the suit to proceed even though "[t]he complaints d[id] *not* contain any claim of damages for direct *physical damage* to any of plaintiffs' property." *Id.* at 122 (emphasis added). The complaints satisfied the "statutory definition" of "nuclear incident," the court held, because they alleged "'damage to

property' as a result of the intrusion of radioactive materials upon plaintiffs' properties through the ambient air, *irrespective of any causally-related permanent physical harm to property*." *Id.* at 123 (emphasis added). Those allegations were sufficient to establish that "the events at Three Mile Island constituted a 'nuclear incident.'" *Ibid.*[9]

That holding cannot be reconciled with the "physical injury" requirement the Tenth Circuit imposed here. Pet. App. 90a-95a. *Cook I* was unprecedented: It was the first case to hold that widespread plutonium contamination that constitutes a nuisance under state law does not qualify as "damage to property" under Section 2014(q). It so held despite extensive evidence and jury instructions requiring that the lost value result from substantial and objectively unreasonable interference—*not* irrational fears. See *id.* at 25a-26a. Plaintiffs, the court held, must "present evidence of *actual physical damage*" beyond the contamination itself. *Id.* at 93a (emphasis added). A "substantial" and "unreasonable" interference with the use and enjoyment of the property that causes "diminution of value" is not enough. *Id.* at 92a n.12. The contrast between the Third and Tenth Circuits' rules—one holding contamination to be "damage to property" "irrespective of any causally-related permanent physical harm," 710 F.2d at 122-123, and the other "requir[ing] a showing of actual physical injury" beyond that contamination, Pet. App. 93a n.12—could not be more stark.

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[9] In *In re TMI Litigation*, 940 F.2d 832 (3d Cir. 1991), the Third Circuit held that other aspects of *Pennsylvania*'s reasoning did not survive the 1988 amendments. *Id.* at 857. But the court cast no doubt on the "nuclear incident" holding. The 1988 amendments did not redefine "damage to property" or change *what a "nuclear incident" is*.

B. The Tenth Circuit Erred in Requiring "Physical Injury" Beyond Substantial and Objectively Unreasonable Contamination

The Tenth Circuit's decision is also wrong. The Tenth Circuit construed the phrase "damage to property" to exclude radioactive contamination constituting a nuisance—no matter how much plutonium is dumped on owners' properties, no matter how grave the health risks, no matter how far property values fall—unless the landscape is physically deformed. That interpretation has no statutory basis and defies half a century of precedent and administrative construction.

1. Driving down property values by strewing radioactive plutonium across someone's land, substantially and unreasonably interfering with its use and enjoyment, constitutes "damage to property" within any commonsense meaning of the term. See, *e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 796 (3d Cir. 1994) (contamination constitutes "damage to property" that allows owners to "recover for the diminution of value of their land"). Indeed, "[d]epreciation in the value" of land is the classic measure of recovery in suits for property damage. See *Restatement (Second) of Torts* §930(3)(b) & cmt. d (1979).

The Tenth Circuit claimed that courts treat property value reduction *solely* "as a measurement of damages rather than proof of the fact of damage." Pet. App. 92a n.12. But the law of nuisance provides a remedy for substantial and objectively unreasonable interference with the use and enjoyment of property, and that is what the property owners proved here. *Id.* at 101a-102a. Numerous courts have held that lost property value is recoverable when caused by physical intrusion of dangerous particles onto another's land, whether or not the landscape

was physically deformed. See, *e.g.*, *Stevenson* v. *E.I. DuPont de Nemours & Co.*, 327 F.3d 400, 408-409 (5th Cir. 2003); *Scribner* v. *Summers*, 84 F.3d 554, 555-558 (2d Cir. 1996); *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1212-1213 (6th Cir. 1988); *Borland* v. *Sanders Lead Co.*, 369 So. 2d 523, 527-531 (Ala. 1979); *Sheppard Envelope Co.* v. *Arcade Malleable Iron Co.*, 138 N.E.2d 777, 779-782 (Mass. 1956); *Md. Heights Leasing, Inc.* v. *Mallinckrodt, Inc.*, 706 S.W.2d 218, 221-226 (Mo. App. 1985); see also *Aetna Cas. & Sur. Co.* v. *Commonwealth*, 179 S.W.3d 830, 838-839 (Ky. 2006) (radioactive contamination is "property damage" for insurance purposes); *Whittaker Corp.* v. *Am. Nuclear Insurers*, 671 F. Supp. 2d 242, 249 (D. Mass. 2009) (same); *Towns* v. *N. Sec. Ins. Co.*, 964 A.2d 1150, 1161 (Vt. 2008). That is the law in Colorado as well. Pet. App. 101a-102a, 107a.

There is no reason to interpret Price-Anderson differently. The vast majority of nuclear incidents—even serious ones like Three Mile Island, Fukushima, or Rocky Flats itself—do not result in blast craters. They result in *radioactive contamination*. The Tenth Circuit's interpretation would eliminate recovery based on damage to property for all nuclear occurrences short of a Hiroshima-type explosion. That cannot be what Congress intended.

2. Longstanding administrative practice erases any doubt. The "contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion" is entitled to "peculiar weight." *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933); see *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Shortly after Price-Anderson was enacted, the Atomic Energy Commission issued a form insurance policy, modeled on policies already used in the industry, that

was designed to satisfy the Act's insurance requirements. See *Financial Protection Requirements and Indemnity Agreements*, 25 Fed. Reg. 2948 (Apr. 7, 1960). That policy explicitly defined "property damage" to include "*physical injury* to *or* destruction *or radioactive contamination* of property." *Id.* at 2949 (emphasis added). That definition is still used today. See 10 C.F.R. § 140.91, app. A.

By defining "physical injury" and "radioactive contamination" as *alternative* types of "property damage," the agency made clear that contamination amounts to "damage to property" even absent any further "physical injury." 25 Fed. Reg. at 2949. The whole point of those form policies was to satisfy the Act's requirements by tracking the statutory definition. See 10 C.F.R. § 140.15(a). It would make no sense to define "property damage" one way in the statute but another way in the insurance contracts designed to comply with the statute. The form contracts, moreover, reflected existing understandings about the meaning of "damage to property" when Congress enacted Price-Anderson. And Congress has revisited the Act multiple times without altering that provision, acquiescing in the agency's longstanding construction. See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986).

Consistent with that contemporaneous construction, the Department of Energy admitted in this case that the radioactive contamination near Rocky Flats constituted a "nuclear incident." In a post-verdict letter, the Department advised Dow and Rockwell that, because the claims resulted from a "nuclear incident," they were "the proper subject of indemnification by the United States Government under the * * * Act." App., *infra*, 108a. Radioactive contamination cannot qualify as a "nuclear incident"

for Price-Anderson indemnification but not for Price-Anderson liability.

3. The Government previously attempted to dismiss the text of its model contracts as absurd because the Department of Energy would never indemnify for a single molecule of "harmless" contamination. U.S. Br. in No. 10-1377, at 17 (Pet. App. 288a). That argument reflected Dow and Rockwell's baseless attack—repeated here—that the property owners seek recovery for the intrusion of even a single plutonium atom. See Br. in Opp. in No. 10-1377, at 30; Pet. in No. 15-791, at 9. But *Cook II* rejected that single-molecule rhetoric, explaining that the jury instructions precluded liability based on any theory of irrational fear or anxiety. Pet. App. 25a-26a & n.4; see Pet. Reply in No. 10-1377, at 2. The nuisance instruction expressly required "unreasonable" and "substantial" interference from an "objective perspective," not irrational fear. Pet. App. 25a-26a.

The record utterly refutes any notion that this case involves only a single atom of contamination. Thousands of barrels of radioactive waste were left outside of the Rocky Flats plant, many of them corroded and leaking. See p. 6, *supra*. Dow knew that a serious off-site plutonium contamination problem would develop yet did nothing—for *years*. PX64 at 74,928; PX338 at US3086818. Plutonium released from the barrels contaminated the Class Area. See PX149A. Thousands of pounds of weapons-grade plutonium went unaccounted for. See p. 6, *supra*. High Colorado winds and animal activity resulted in offsite contamination both during and after Rocky Flats' 37 years of operation. See Tr. 3996-4001, 4013, 4067, 4121-4126. Studies confirmed—and Dow and Rockwell admitted—that Rocky Flats plutonium had been deposited throughout the Class Area over approximately 15,000

properties. See pp. 7-8, *supra*; App., *infra*, 32a. Studies that survived *Daubert* challenges showed elevated health risks. See p. 8, *supra*. This case does not remotely involve irrational fears about a single plutonium atom. See Pet. App. 25a-26a & n.4.

It cannot be that Price-Anderson affords relief for "damage to property" only for cataclysms that physically deform property. That extreme interpretation ignores that Congress sought to create a balanced compensation regime grounded in state law—not to grant immunity for anything short of atomic blasts that level the countryside. Congress enacted Price-Anderson, not just "to encourage the development of the atomic energy industry," but also "to protect the public." 42 U.S.C. § 2012(i).

CONCLUSION

If the Court grants the petition in No. 15-791, it should grant this conditional cross-petition as well.

Respectfully submitted.

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JANUARY 2016

APPENDIX A
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-CV-00181-JLK

MERILYN COOK, *ET AL.*,
Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION
AND THE DOW CHEMICAL COMPANY,
Defendants.

MEMORANDUM OPINION AND ORDER ON PENDING MOTIONS

MAY 20, 2008

Judge John L. Kane.

On February 14, 2006, the jury returned a verdict in the class trial on Plaintiffs' trespass and property claims finding for Plaintiffs and against Defendants on both claims and awarding Plaintiffs compensatory and exemplary damages. This matter is now before me on Defendants' renewed motion for judgment as a matter of a law pursuant to Rule 50(b) and their motion for new trial or, in the alternative, for remittitur of damages pursuant to Rule 59. For the reasons stated below, I deny both motions.

Both parties have also submitted motions directed at putting the claims and issues decided in the course of the

class trial in a posture for immediate appeal. Upon consideration of their competing proposals, I have determined that final judgment on the claims decided in the class trial shall be entered pursuant to Federal Rule of Civil Procedure 54(b). The substance of the final judgment and related plan of allocation to be entered is set out in Section III below.

Discussion

I. Defendants' Renewed Motion for Judgment as a Matter of Law

Defendants moved for judgment as a matter of law under Rule 50(a) at the close of Plaintiffs' case and again at the close of evidence. I review Defendants' latest Rule 50 motion under the same standard as their previous motions.

Under Rule 50, judgment as a matter of law in favor of Defendants is warranted "only if the evidence points but one way and is susceptible to no reasonable inferences supporting [Plaintiffs]." *Snyder* v. *City of Moab*, 354 F.3d 1179, 1184 (10th Cir. 2003); see Fed. R. Civ. P. 50(a). In making this determination, I must view the evidence and any inferences to be drawn from it most favorably to the Plaintiffs, as the non-moving party. *Baty* v. *Willamette Indus., Inc.*, 172 F.3d 1232, 1241 (10th Cir. 1999), *overruled on other grounds*, *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101 (2002). I also must "refrain from weighing the evidence, passing on the credibility of witnesses or substituting [my] judgment for that of the jury." *Brown* v. *Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1563 (10th Cir. 1993); see *Baty*, 172 F.3d at 1241.

I denied Defendants' first and second Rule 50 motions based on my determination that, viewing the evidence and all reasonable inferences therefrom in the light most favorable to Plaintiffs, there was a sufficient basis for a

reasonable jury to find for Plaintiffs on each of the issues identified by Defendants in their motions. In their most recent Rule 50 motion, Defendants seek judgment on the same issues as in their previous motions relying on much the same arguments as before. Having carefully considered these renewed arguments and Plaintiffs' response under the standard for decision stated above, I again find that there was a legally sufficient evidentiary basis for a reasonable jury to find for Plaintiffs on each of the issues challenged by Defendants. Accordingly, I deny Defendants' Renewed Motion for Judgment as a Matter of Law.

II. Defendants' Motion for New Trial and Alternative Motion for Remittitur of Damages

Defendants have also moved pursuant to Rule 59(a) for the jury's verdicts to be set aside and a new trial ordered based on alleged inconsistencies and excesses in the jury's verdicts and other alleged errors committed before, during and after trial. In the alternative, Defendants seek remititur of the jury's compensatory and exemplary damages verdicts.

Rule 59 of the Federal Rules of Civil Procedure provides that a court may grant a new trial after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Granting a new trial is only appropriate, however, where the claimed error substantially and adversely affects the rights of a party. See *Sanjuan* v. *IBP, Inc.*, 160 F.3d 1291, 1297 (10th Cir. 1998); Fed. R. Civ. P. 61. The burden of showing an error having this prejudicial effect rests on the party seeking the new trial. See *Streber* v. *Hunter*, 221 F.3d 701, 736 (5th Cir. 2000); *Clarksville-Montgomery County Sch. Sys.* v. *U.S. Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991); see generally 11 Charles Alan Wright, Arthur R. Miller & Mary Kay

Kane, Federal Practice & Procedure Civil § 2803, at 47 (2d ed. 1995 & Supp. 2007) (collecting cases). The decision of whether to grant a new trial rests within the sound discretion of the district court. See *Shugart* v. *Cent. Rural Elec. Co-op.*, 110 F.3d 1501, 1506 (10th Cir. 1997); *York* v. *Am. Tel. & Tel. Co.*, 95 F.3d 948, 958 (10th Cir. 1996). While federal law governs the procedural aspects of a motion for new trial or remittitur, state law sets the substantive standards in this action, see 42 U.S.C. § 2014(hh); *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 426-39 (1996), except to the extent that a federal constitutional challenge is raised.

Defendants devote nearly three-fourths of their voluminous Rule 59 motion to rearguing my decisions to proceed with a class trial, to admit certain lay and expert evidence, to reject certain of Defendants' proposed jury instructions and overrule their objections to other instructions, and to deny Defendants' multiple motions for mistrial. Each of the challenged decisions was reached after reasoned consideration of extensive written and/or oral argument from both parties. After careful review of Defendants' most recent arguments regarding these matters, I find no basis for reconsidering these decisions. Accordingly, I deny Defendants' motion for new trial based on the claimed errors in my previous decisions.[1]

The remainder of Defendants' arguments for new trial are based on alleged inconsistencies or excesses in the jury's compensatory and exemplary damages verdicts. I

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[1] In so holding, I did not find it necessary to make findings on whether Defendants have waived any of the arguments now asserted by failing to raise them at the appropriate time before or during trial or on whether any of the errors claimed by Defendants substantially and adversely affected their rights as would be required for a new trial to be ordered.

examine each of these arguments in turn, as well as Defendants' alternative motion for remittitur of damages.

A. Request for New Trial Based on Alleged Inconsistencies in the Jury's Damages Verdicts

Defendants assert a new trial is required because the jury's answers to the damages interrogatories in the jury verdict form are inconsistent in various respects. In order for a new trial to be ordered on this basis, Defendants must "show that any verdict inconsistency demonstrates either confusion or abuse on the jury's part." *Domann* v. *Vigil*, 261 F.3d 980, 983 (10th Cir. 2001) (internal quotation omitted). Special interrogatory answers that are "irreconcilably inconsistent" because they are "logically incompatible" indicate such jury confusion or abuse of power. See *Loughridge* v. *Chiles Power Supply Co.*, 431 F.3d 1268, 1275 (10th Cir. 2005). In determining whether there is any inconsistency meeting this standard, I "must accept any reasonable view of the case that makes the jury's answers consistent," and consider the verdict in light of the instructions given to the jury, among other factors. *Id.* (internal quotations omitted).

The jury answers challenged by Defendants are not "logically incompatible" or even inconsistent. Far from indicating that the jury was confused or abused its power in determining damages, these answers indicate a diligent effort by the jury to follow the instructions they received regarding determination of damages. Defendants' complaints, as a result, are more properly directed to the jury instructions and verdict form than to any inconsistency in the jury's verdicts.[2]

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[2] As discussed below, in many instances Defendants failed to object to the jury instructions and portions of the jury verdict form that they now challenge.

There is no inconsistency, for example, in the jury's determination of identical compensatory damages for the trespass and nuisance claims. The jury was instructed to determine any compensatory damages resulting from a trespass or nuisance committed by the Defendants separately, and informed that the court would apply the rule prohibiting multiple recovery of the same damages when it issued judgment on the jury's verdict. Notice of Final Jury Instructions (Doc. 2121) [hereinafter "Final Jury Instructions"], No. 3.26 ("Multiple Recovery Prohibited").[3] Following this and other instructions and the corresponding interrogatories in the verdict form, the jury found both Defendants liable on both theories of liability and determined that the aggregate damages to the Class[4] on each claim were $176,850,340. Jury Verdict Form (Doc. 2117) at 15, 24. All concede, and I found following the jury's verdict, see 2/14/06 Tr. at 10800-01, that these responses reflect the jury's determination that Defendants' proven trespass and nuisance caused the same damages: a reduction in the aggregate value of the Class Properties of $176,850,340.[5]

The damages verdicts on each claim reflect the jury's determination that the Defendants' trespass and nuisance each bore the requisite causal relationship to the

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[3] Defendants proposed this instruction. See Defs.' Submission of Phase III Jury Instructions and Jury Verdict Forms (Doc. 1271) at 64-65 (Defs.' Proposed Damages Instruction No. 3.14—Multiple Recovery Prohibited).

[4] The jury instructions defined the "Class" as "persons who owned property in a specific, defined area, known as the 'Class Area,' near the Rocky Flats Nuclear Weapons Plant on June 7, 1989." Final Jury Instructions, No. 1.1.

[5] The jury instructions defined "Class Properties" as properties owned by Class members as of June 7, 1989 that are located in the Class Area. Final Jury Instructions, No. 3.2.

entire diminution in value suffered by the Class Properties. This determination is consistent with the evidence presented indicating that some conduct by each Defendant contributed to both the continuing trespass and nuisance, and with authority recognizing that the same conduct can contribute to liability under both theories. *See, e.g.*, *Borland* v. *Sanders Lead Co.*, 369 So. 2d 523, 527 (Ala. 1979) ("trespass and nuisance are separate torts for the protection of different interest invaded," but "the same conduct on the part of a defendant may, and often does, result in actionable invasion of both interests."). It is also consistent with the evidence presented on damages and with the jury instructions and legal rule setting the same measure of damages for both types of tortious invasions. See Final Jury Instructions, No. 3.22; Restatement (Second) of Torts § 930(3)(b) (1979) (measure of damages for continuing tortious invasions of land is the decrease in the value of land caused by the prospect of invasion continuing).[6] There is, therefore, no inconsistency in the jury's answers concerning the aggregate damages to the Class caused by the Defendants' continuing trespass and nuisance. Defendants' concern about multiple recovery of the same damages will, as I stated in the relevant jury instruction and when the jury's verdict was announced, be addressed in the final judgment on the jury's verdict.

Nor is there any inconsistency in the jury's allocation of fault in the verdict form between Dow and Rockwell for their trespass and nuisance. Under the evidence presented, the jury could reasonably apportion fault differently between the Defendants for the trespass through

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[6] Unless otherwise noted, all references to the Restatement in this memorandum opinion and order are to the Restatement (Second) of Torts (1979).

contamination of the Class Properties and for the Defendants' unreasonable and substantial interference in the use and enjoyment of these Properties as found in the nuisance claim. In particular, the jury's apportionment to Dow of 90% fault for the trespass and 30% for the nuisance and to Rockwell of 10% fault for the trespass and 70% fault for the nuisance is reasonable and consistent under the evidence presented.

Defendants' attempt to create an inconsistency in the verdict by characterizing the jury's apportionment of fault as an allocation of loss causation or damages is unavailing. Colorado's pro rata liability statute required that the jury separately determine the total damages sustained by Plaintiffs and the percentage "fault" attributable to each Defendant. Colo. Rev. Stat. § 13-21-111.5(2). The jury instruction for the latter determination is titled "Apportioning Fault Between the Defendants." Final Jury Instructions, No. 3.19A. This instruction and the corresponding interrogatories in the verdict form are modeled on language approved by the Colorado Supreme Court for this jury determination. See Colo. Jury Instructions (Fourth) Civ. §§ 9:29-9:29B. The jury followed these instructions and apportioned fault for the trespass and for the nuisance between the Defendants. It is the duty of the Court, not the jury, to prorate each Defendant's liability based on the jury's allocation of fault between them. See *Lira* v. *Davis*, 832 P.2d 240, 242 (Colo. 1992) (after jury determines total compensatory damages, court applies pro rata liability statute and enters judgment against each defendant for compensatory damages "apportioned in accordance with the percentage of fault attributable to that defendant" found by the jury). The jury was not charged with determining loss allocation and did not do so.

It appears Defendants' true complaint here is not that the jury's apportionment of fault on the two claims is irreconcilably inconsistent but rather that the jury's answers in the verdict form did not sufficiently fix the compensatory damages to be awarded against each Defendant. In fact, the jury made the factual findings on compensatory damages that were required of it, leaving to the Court the task of applying the rule against multiple recovery and the pro rata liability statute. As described in Section III, this task is readily accomplished without disregarding any of the jury's factual findings or engaging in speculation regarding what the jury actually determined. As a result, there is no cause for a new trial on the ground that the jury did not make sufficient findings for judgment on compensatory damages to be entered against each Defendant.

I also note that Defendants' complaints about what they perceive as the jury's uncertain allocation of compensatory damages between them is of little practical significance if, as Defendants have maintained throughout this action, they are both fully indemnified here by the U.S. Department of Energy (DOE) pursuant to their contracts to operate Rocky Flats Nuclear Weapons Plant for the federal government. That the DOE has controlled the joint defense of its indemnitees[7] may also explain Defendants' failure throughout the long history of this action to raise the comparative fault of the other as a defense or to take other action to protect their interests

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[7] In their memorandum opposing Defendants' Rule 59 motion, Plaintiffs cite statements to this effect by Rockwell in a Form 10-Q filing with the United States Securities and Exchange Commission. See Pls.' Mem. of Law in Opp'n to Defs.' Mot. for New Trial or Remittitur (Doc. 2239) at 6-7 & n.4. Defendants do not dispute these statements in their reply brief.

as against the other, even when invited to do so by this Court. Thus, while I find no inconsistency in the jury's allocation of fault between the Defendants as required by the jury instructions and Colorado law, I also am dubious that any error on this point would substantially and adversely affect either Defendant's rights as a result of their joint indemnification by the DOE and their or the DOE's apparent decision not to protect the interests of each Defendant against the other in this action.

Defendants also claim that inconsistencies in the jury's determination of exemplary damages require a new trial. Specifically, they contend the jury's award of these damages is irreconcilably inconsistent with its determination of compensatory damages, because the total amount of exemplary damages awarded exceeds the amount of compensatory damages found by the jury. This result is internally inconsistent, Defendants argue, because it violates the jury instructions and Colorado's statutory cap on exemplary damages awards.

Defendants' complaint does not state an inconsistency in the jury's verdicts, but rather a claimed "violation" in the jury's determination of exemplary damages. Even if Defendants were correct that the jury "violated" the jury instructions or the statutory cap on exemplary damages as claimed, this would not be cause for a new trial. Resolution of this issue would require no more than a judicial adjustment of the exemplary damages award in entering judgment in accordance with Colorado law. See *Lira*, 832 P.2d at 246 (applying Colorado exemplary damages statute to limit amount of jury's exemplary damage award to amount of compensatory damages due after pro rata apportionment); see also *id.* (remanding for entry of judgment consistent with opinion, rather than for new

trial, after determining that jury's award of exemplary damages exceeded statutorily permitted amount).

In fact, Defendants are incorrect that the jury's exemplary damages award violated Instruction No. 3.27, and its direction that any exemplary damages "you award may not be more than the amount you awarded as actual damages against the Defendant or Defendants." From the jury's perspective, its verdict assessed compensatory damages of $353.7 million, the sum of the $176.8 million in actual damages it found on the trespass claim and on the nuisance claim, with the result that the sum of exemplary damages awarded against Dow and Rockwell, $200.2 million, did not exceed the amount of compensatory damages stated in the verdict. It is only upon application of the prohibition on multiple recovery to the jury's compensatory damages determinations, a task reserved for the court under Instruction No. 3.26, that the total amount of compensatory damages due from Defendants, $176.8 million, becomes less than the aggregate exemplary damages determined by the jury.

Further, for the reasons stated in Section III below, I find the jury's exemplary damages awards against each Defendant do not exceed Colorado's statutory cap on exemplary damages. See *infra* Section III.B.1.

B. Request for New Trial or Remittitur Based on Excessive Compensatory and Exemplary Damages

Defendants assert a new trial or remittitur is also required because the jury's compensatory and exemplary damages determinations are excessive on one or more grounds. I review each of Defendants' contentions in turn.

1. Compensatory damages award

I begin with Defendants' contention that the jury's compensatory damages determinations must be set aside because they are clearly unsupported by the evidence. As support for this contention, Defendants incorporate the legal and evidentiary arguments asserted in support of their Renewed Motion for Judgment as a Matter of Law (Doc. 2220).

Under both Colorado and federal law, a jury's determination of damages is inviolate unless the damages award is so excessive or inadequate "as to shock the judicial conscience." *Higgs* v. *Dist. Court*, 713 P.2d 840, 860-61 (Colo. 1985) *Dodoo* v. *Seagate Tech., Inc.*, 235 F.3d 522, 531 (10th Cir. 2000); *Palmer* v. *City of Monticello*, 31 F.3d 1499, 1508 (10th Cir. 1994). If the trial court determines the damages award is excessive under this test, then it may reduce or remit the jury's damages verdict by the amount of the damages found to be excessive, or, alternatively, set aside the verdict and order a new trial on damages alone if the plaintiff refuses to accept the remittitur. *Higgs*, 713 P.2d at 861; *Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981); see *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1560 (10th Cir. 1991). If, however, the court finds further that the damages awarded are so excessive as to raise "an irresistible inference" that "passion, prejudice, corruption or other improper cause invaded the trial," then the court must order a new trial on all issues because it is impossible to determine the degree to which these factors affected the jury generally and therefore influenced the determination of liability. *Higgs*, 713 P.2d at 861; *Malandris*, 703 F.2d at 1168; see *Mason*, 948 F.2d at 1560.

I find the jury's compensatory damages verdicts are not excessive. The question of what damages, if any, were caused by Defendants' wrongful conduct was vigorously litigated at trial. Plaintiffs presented ample evidence, including both expert and lay witness testimony, that, if credited, established the fact and amount of compensatory damages caused by this conduct. Defendants countered with their own array of expert and lay witness testimony that, if credited by the jury, would have caused it to find that no actual damages had resulted from any trespass or nuisance committed by Defendants. The jury's compensatory damages determination, therefore, turned on its assessment of conflicting evidence and the credibility of the parties' numerous experts and other witnesses. After several weeks of deliberations, the jury returned a verdict assessing $176.8 million in compensatory damages on each claim, some $70 million less than the $248 million in compensatory damages Plaintiffs had requested the jury find on each claim based on the evidence before it. See 1/18/06 Tr. at 10,350 (trespass), 10,352 (nuisance). Having considered the evidence presented and the jury's verdicts, I find the jury's determination of compensatory damages is neither against the weight of the evidence nor otherwise a shock to this judicial conscience. As a result, I find neither a new trial nor remittitur is warranted on the ground the compensatory damages verdicts are excessive under the evidence presented.

Defendants next contend the jury's determinations of compensatory damages must be set aside and a new trial ordered because these determinations improperly include damages to properties that were not owned by Class members on January 30, 1990, the date this action was filed. This contention invokes my Order of May 17,

2005 (Doc. 1338) [hereinafter "May 2005 Order"], which was one of a series of pretrial orders delineating the issues to be tried and decided in the class trial.

In the May 2005 Order, I addressed a number of issues, including whether and how compensatory damages would be addressed in the class trial. See May 2005 Order at 14-20. Based on the parties' extensive submissions on the subject, I ruled that while liability for the entire Class would be determined in the class trial, the only compensatory damages to be tried would be damages caused by the prospect of any proven trespass or nuisance continuing indefinitely, as set forth in Restatement § 930(3)(b).[8] *Id.* at 15. As relevant here, this Restatement section provides that the measure of damages for such "future" or "prospective invasions" is "the decrease in the value of the land caused by the prospect of the continuance of the invasion measured at the time when the injurious situation became complete and comparatively enduring." *Id.*

Restatement § 930 further provides that a property owner injured by a continuing tortious invasion, such as the trespass and nuisance found here by the jury, may elect to recover this type of damage for continuing tortious invasions if "it appears that the invasions will continue indefinitely." Restatement § 930(1) (cited in May 2005 Order at 15). In this case, Plaintiffs elected to seek damages for the decrease in property values caused by Defendants' continuing tortious invasions on January 30, 1990, when they filed suit seeking to recover these damages on behalf of a Class defined as persons owning

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[8] Consideration of whether and how Class members might seek to recover damages for past or present invasions pursuant to Restatement §§ 930(3)(a) and/or 929 was deferred until sometime after the class trial. May 2005 Order at 15.

property in the Class Area as of June 7, 1989. See May 2005 Order at 15-16; Order re: Instruction No. 3.28 (Doc. 2064) at 1-8 (regarding application of Restatement § 30(1) and § 930(3)(b) to this action). Whether this election is valid depends (in part) on Plaintiffs' subsequent demonstration of if and when it appeared that Defendants' wrongful invasions "will continue indefinitely." See Restatement § 930(1).

An additional consideration here is that some number of Class members, reportedly representing approximately 10% of the Class Properties, sold the property they owned in the Class Area between the June 7, 1989 date used to define the Class and January 30, 1990, when Plaintiffs filed this suit and elected to recover prospective damages on the Class's behalf. As a result, these Class members could not participate in the election to recover prospective damages that occurred upon the filing of this action.

Based on this consideration and others stated in the May 2005 Order, I declared in that Order that the Class would be divided into two subclasses for purposes of determining the "prospective damages" that could be recovered for any continuing trespass or nuisance found by the jury at the class trial. The first subclass, which I will refer to as the "Prospective Damages Subclass" or just the "Damages Subclass," consists of all Class members who owned property in the Class Area on January 30, 1990 or the date on which the jury, pursuant to Restatement § 30(1), found that Defendants' continuing tortious invasions would continue indefinitely, whichever was later. May 2005 Order at 15. This subclass, I found, was authorized to recover damages for these prospective or future tortious invasions, that is, the decrease in the value of their Class Properties, as provided in Restatement

§ 930(3)(b). *Id.* at 15-16. I further found that "[t]he compensatory damages, if any, to be awarded to this subclass, will be determined *based on the jury's findings* in the class trial."[9] *Id.* at 16 (emphasis added). I stated that the availability and means of determining any compensatory damages due to the second subclass, consisting of all other Class members, would be decided at some point after the class trial. *Id.*

Defendants now argue that the jury's assessment of compensatory damages at the class trial was improper and must be set aside because the jury was instructed to determine the decrease in value of the Class Properties as a whole, without distinguishing between properties corresponding to the two subclasses set out in the May 2005 Order.

I find no merit to Defendants' argument for two reasons. First, assuming that the jury should not have been instructed to determine the aggregate decrease in value for all Class Properties, Defendants failed to object to this instruction and, in fact, actively sought for the jury to be instructed in just this manner at the close of trial. The relevant background here is that after considering the parties' briefing and proposed instructions on the jury's determination of damages at the class trial, I prepared instructions directing the jury to determine the aggregate decrease in the value of properties within the Class Area and percentage decrease in property values, if any, caused by any continuing trespass and/or nuisance

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[9] In the May 2005 Order, I also set out the findings to be made by the jury, see *id.* at 16-17, but later determined that these findings were unnecessarily complicated and that the process and findings set out in Instruction No. 3.22 were sufficient and consistent with the May 2005 Order. See Mem. Op. re: Jury Instructions (Doc. 2205) at 61-62.

by one or both Defendants. See Final Jury Instructions, Nos. 3.20-3.23. As is my practice, I provided these and other substantive instructions to the parties and the jury before opening arguments began, with notice that the instructions would be revised if necessary as the trial progressed. See generally Mem. Op. re: Jury Instructions (Doc. 2205) at 3 & n.4 (describing jury instruction process). Neither party objected at this time to the instructions directing the jury to assess any decrease in property values for all properties in the Class Area.

Near the end of trial, I directed the parties to submit any proposed revisions to the jury instructions of record and a proposed jury verdict form. Defendants submitted extensive proposed revisions and objections to these instructions, including those regarding determination of compensatory damages. Defendants did not, however, object to the compensatory damages instructions on the ground that they improperly failed to limit the jury's damages determination to the decrease in value of Class Properties owned by members of the Damages Subclass. To the contrary, Defendants requested that the key damages instruction, No. 3.22 ("Measure of Actual Damages") be revised to emphasize and reemphasize that the jury was to decide any decrease in value for "all of" the properties in the Class Area. See Defs.' Proposed Changes to Prelim. Jury Instructions (Doc. 1958), Ex. A at 89-92 (requesting that "all" be inserted before every reference to properties in the Class Area).[10] Defendants also submitted proposed jury verdict forms that required the jury to determine compensatory damages for all Class Properties, using the same language as in their

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[10] I did not adopt these proposed revisions because the damages and other instructions already adequately communicated this concept. See Mem. Op. re: Jury Instructions at 75.

proposed revisions to Instruction No. 3.22. See Defs.' Proposed Jury Verdict Forms (Doc. 1963), Exs. A & B at 3-4, 5-6 (asking whether Plaintiffs proved Defendants' trespass or nuisance "caused the actual value of all of the Class Properties to be less than what the value of these properties would have been" but for the trespass or nuisance).[11] Nor did Defendants object to the final jury instructions and verdict form on the ground that they failed to limit the jury's compensatory damages determination to the Damages Subclass. In short, Defendants did nothing from the initial presentation of the jury instructions at the start of trial through the end of trial to call this alleged error to my attention, and, in fact, invited this approach by pressing for damages to be determined for "all of" the properties in the Class Area.[12]

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[11] Defendants argue they cannot be held accountable for the compensatory damages portion of this proposed Jury Verdict Form because I had directed the parties to prepare their proposed forms "consistent with the current jury instructions." See Order on Jury Instruction Submissions (Doc. 1929) at 2. Defendants are correct that the then current jury instructions directed the jury to determine the decrease in property values for the Class as a whole. Defendants' concurrence with this approach, however, is demonstrated by their separate proposed revisions to these instructions, which sought to emphasize this approach, not revise it. See Defs.' Proposed Changes to Prelim. Jury Instructions (Doc. 1958), Ex. A at 89-92. The order cited by Defendants also placed no restrictions on the parties' proposed revisions to the jury instructions, and Defendants in fact proposed any number of instruction revisions that were not consistent with the instructions then of record.

[12] Defendants cite their objection throughout the pretrial period to compensatory damages being determined on anything other than an individual basis as preserving their right to object to the jury's determination of damages for the Class as a whole as opposed to just the Damages Subclass. This general objection, however, is patently insufficient for this purpose. See *Bitler* v. *A.O. Smith Corp.*, 391 F.3d 1114, 1127-28 (10th Cir. 2004) (party must raise an objection

The second difficulty with Defendants' argument here is that the jury instructions, the verdict form and the jury's verdict on compensatory damages, are not, in fact, at odds with the plan for deciding compensatory damages set forth in the May 2005 Order. In this Order I held that: (1) damages for prospective invasions, *i.e.*, any decrease in property value caused by Defendants' continuing tortious invasions, would be decided at the class trial; (2) per Restatement § 930(1), only Class members who owned property within the Class Area on the later of January 30, 1990, when this action was filed, or the date on which the jury found it appeared the tortious invasions would continue indefinitely, were entitled to recover damages for prospective invasions; and (3) any damages for prospective invasions to be awarded to this subclass

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"distinctly" and "make abundantly clear the grounds and basis for its objection"); *Unit Drilling Co.* v. *Enron Oil & Gas Co.*, 108 F.3d 1186, 1190 (10th Cir. 1997) (party "waived its right to claim error in the instructions by failing to object specifically at trial to the defect in the jury instructions of which it now complains"); Fed. R. Civ. P. 51. For the same reasons, Defendants' criticism of Plaintiffs' proposed compensatory damages plan in July, 2004, on the ground that some portion of the Class would not be entitled to recover damages for prospective invasions under the plan, is also insufficient. This criticism was made in a lengthy memorandum filed more than a year before trial commenced, before any jury instructions on damages had even been proposed, and in the context of opposing any kind of class trial on compensatory damages. See Defs.' Resp. to Pls.' Proposed Plan for Determination of Compensatory Damages (Doc. 1247) at 11-14; see also *Abuan* v. *Level 3 Commc'ns, Inc.*, 353 F.3d 1158, 1172-73 (10th Cir. 2003) (arguments made in connection with summary judgment motion did not constitute specific objection to subsequent jury instructions). Even if this were not the case, Defendants' subsequent actions during the class trial seeking to have compensatory damages determined for "all of" the Class Properties waived the right to complain that the jury instructions were erroneous for doing so and that the verdict must be set aside as a result.

would "be determined based on the jury's findings in the class trial." May 2005 Order at 15-16. Pursuant to the jury instructions and verdict form, the jury at the class trial made all of the findings necessary to award damages to the Damages Subclass under this plan.

First, the jury was directed to decide whether it appeared on or before January 30, 1990, or on some other date, that the trespass or nuisance by Dow or Rockwell would continue indefinitely. See Final Jury Instructions, No. 3.28. The jury found that this condition existed on or before January 30, 1990. See Jury Verdict Form at 28-29. Pursuant to Restatement § 930(1) and the May 2005 Order, this determination establishes that the right to recover prospective damages existed on January 30, 1990, when the election to seek these damages was made by the filing of this action, and thereby defines the "Prospective Damages Subclass" entitled to recover these damages as the Class members who owned properties in the Class Area on this date. From this jury finding, identification of the members of this subclass and their corresponding properties within the Class Area is a ministerial task to be accomplished as part of the damages allocation plan based on county real estate records. See *infra* Section III.B.

Second, the jury was asked to and did determine any decrease in the value of all properties in the Class Area caused by any continuing trespass or nuisance by Defendants, and, as directed, expressed their findings by property category (residential properties, commercial properties and vacant land) and in the aggregate and by percentage. See Final Jury Instructions, No. 3.23; Jury Verdict Form at 15, 24. As described in Section III below, these factual findings are sufficient to allocate the aggregate damages found by the jury to individual Class

Properties based on county property records. This allocation can be applied to properties owned by members of the Prospective Damages Subclass as well as those owned by the second subclass. The compensatory damages to be awarded and distributed to the Prospective Damages Subclass, therefore, can be readily determined from the jury's verdict, just as contemplated by the May 2005 Order, and no additional factual findings by the jury are required.[13] As a result, even if Defendants had preserved a right to object to the jury's verdict because it determined prospective damages for all Class Properties, no grounds would exist for setting aside the jury's compensatory damages verdict and ordering a new trial on this basis.

Defendants next contend that a new trial is required because the jury was not instructed to determine the exact date on which the injurious situation caused by Defendants became complete and comparatively enduring or that it must limit its damages assessment to properties owned by Class members on this date. This contention suffers from a number of flaws, beginning with its misreading of the Restatement. Restatement § 930(3)(b) does not, as Defendants assert, require that damages for prospective invasions be "awarded" as of a specific date. See Defs.' Mem. in Supp. of Mot. for New Trial (Doc. 2225) at 20; Defs.' Reply in Supp. of Mot. for New Trial (Doc. 2249) at 5. Rather, it states clearly that when an injured party is empowered to and does elect to recover damages for continuation of an invasion into the future, such as occurred here, these damages are to be "meas-

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[13] The question of what disposition should be made of the damages caused by Defendants' continuing trespass and nuisance to properties in the Class Area that were owned by Class members not in the Damages Subclass is addressed in Section III below.

ured" at the "time" when the injurious situation became complete and comparatively enduring. Restatement § 930(3)(b). This is precisely what the jury was instructed to do, see Final Jury Instructions, No. 3.22, and what it did do, see Jury Verdict Form at 15, 24.

Nor can Defendants be heard to complain at this late date about this supposed error in the jury instructions and verdict form. Although the Defendants made many challenges to the instructions and verdict form presented to the jury, nowhere did they assert that the jury's deliberations and verdict on compensatory damages must be limited to Class members who owned their Class Property on a specific date the jury determined the injurious situation caused by Defendants became complete and comparatively enduring. To the contrary, as described earlier, Defendants affirmatively pressed near the close of trial for instructions directing the jury to determine compensatory damages for "all of the Class Properties" and to measure any "diminution in all Class property values" as of the time the injurious situation caused by Defendants became complete and comparatively enduring. See Defs.' Proposed Changes to Prelim. Jury Instructions (Doc. 1958), Ex. A at 89-92. In this same submission, they also did not request that the jury be directed to decide a specific date on which this condition came into existence, and made no argument that this finding was required for any reason. See *id.*, Ex. A at 91, 93 (requesting only that jury be instructed to determine whether injurious situation became complete and comparatively enduring at all, before being asked to decide whether it became so during the time period alleged by Plaintiffs).

Defendants did include a question on this point in their January 11, 2006 proposed jury verdict form, but they

offered no objection or rationale for requesting that the "CCE date" be specifically determined, and instead represented (consistent with my order) that their proposed verdict form was prepared in view of the current jury instructions. Defs.' Proposed Jury Verdict Forms (Doc. 1963) at 1 n.1. Those instructions (as well as Defendants' proposed revisions to them) did not require such a finding. Nor did Defendants assert in connection with this proposed interrogatory, or otherwise, that the jury was required to limit its damages assessment to Class members who owned Class Properties on this date. As a result, Defendants did not make the specific objection to the jury instructions and verdict form necessary to assert the error now claimed. See *Bitler*, 391 F.3d at 1127-28 (objecting party must make position "abundantly clear" and state grounds in terms that are "obvious, plain or unmistakable") (citations and internal quotations omitted).

I find no greater merit in Defendants' contention that the jury's verdict on compensatory damages must be set aside "to account for Class Members who decline to accept an easement on their properties." Defs.' Mem. in Supp. of Mot. for New Trial (Doc. 2225) at 22. This contention is raised for the first time in Defendants' post-trial motions and is thus subject to waiver for the same reasons stated above.

This untimely objection also elevates a comment to Restatement § 930(3)(b) and dicta in a prior decision in this case to a rule of law that, Defendants insist, requires that a formal easement be granted and recorded for each Class property that authorizes Defendants' continuing trespass and nuisance on it. Based on this premise, Defendants further assert the verdict must be set aside because some Class members may refuse to grant or accept the necessary easement. Defendants, who provide no

other authority for the alleged easement requirement, read too much into both of the cited statements.

The referenced Restatement comment discusses an injured party's right to elect to be compensated "once and for all" for an indefinitely continuing invasion. Restatement § 930 cmt. b. It concludes that "[t]he exercise of the power of election, followed by satisfaction of a judgment for damages for prospective invasions, confers an easement or privilege to continue the invasions thus paid for in advance." *Id.* In *Cook X*, I referred to this concept in even more summary fashion, noting that if the Class prevailed in its election to recover for prospective damages, satisfaction of its judgment would confer "an easement" for the tortious invasions to continue without payment of additional compensation. See *Cook* v. *Rockwell Int'l Corp. ("Cook X")*, 358 F. Supp. 2d 1003, 1013-14 (D. Colo. 2004). Other courts have used the terms "license," "grant," "consent" or waiver to refer to this concept. See *Severt* v. *Beckley Coals, Inc.*, 170 S.E.2d 577, 582-83 (W. Va. 1969) (license or grant); *Slater* v. *Shell Oil Co.*, 137 P.2d 713, 715-16 (Cal. Ct. App. 1943) (consent and waiver); *Strange* v. *Cleveland, C., C. & St. L. Ry. Co.*, 91 N.E. 1036, 1038 (Ill. 1910) (consent). No doubt other courts and commentators have described this concept in other terms and by reference to other legal theories as well.

No matter the term or language used, the common principle behind all of these expressions is that damages for continuation of a tortious invasion into the future can only be demanded and received once, and that satisfaction of a judgment for such damages precludes successors to the affected properties from recovering these same damages. Cf. *Severt*, 170 S.E.2d at 583 (once future damages are recovered "there can be no second recovery for [the nuisance's] continuance;" internal quotation

omitted). Thus, the governing rule here is the familiar doctrine of res judicata or claim preclusion. Application of that doctrine to the judgment in this action does not require or rely on some formal or theoretical process based on the grant or acceptance of an easement or like interest by members of the Class.

Defendants' concern that successive owners of the Class Properties, as nonparties to this action, will not be bound by this judgment is belied by the general rule that a successor to an interest in property that is the subject of a pending or completed action at the time of transfer is bound by the judgment to the same degree as the parties. See Restatement (Second) of Judgments §§ 43-44 (1982 & Supp. 2007). As a practical matter, I also think it is highly unlikely that any persons who have acquired or may acquire property in the Class Area since the commencement of this action will be inspired by the example of this long and hard-fought suit to bring their own claims for continuation of the invasion against Defendants. Were any to do so, Defendants are fully capable of defending their interests in such a suit by, among other things, asserting the satisfaction of judgment in this case as a defense. The conveyance of an easement is not required for this purpose, and none is required by the cited Restatement comment or any prior decision in this case.

Defendants also argue the jury's verdict on compensatory damages must be set aside because its determination of aggregate Class damages improperly includes Class members who suffered no damages or less than average damages. This is a reprise of arguments previously made by Defendants in support of their long-standing objections to a class trial of any kind on compensatory damages. I have considered and rejected these arguments on numerous occasions before, during and after

trial, *see, e.g.*, May 2005 Order at 19-20; Mem. Op. re: Jury Instructions (Doc. 2205) at 62-65, and Defendants provide no grounds for me to reconsider these decisions.

Finally, Defendants assert the jury's compensatory damages verdict must be set aside or reduced, because the jury improperly included damages incurred by Class members who previously released their claims against Defendants. The only Class members cited by Defendants in this regard are Charles and Perry McKay, who in the mid-1980's executed a release of certain claims against Defendants in settlement of *McKay* v. *United States* and related litigation, 540 F. Supp. 519 (D. Colo. 1982) (collectively "the *Church* litigation").

Although Defendants have been aware for many years that the McKays were members of the Class in this action, they do not point to any instance in the pretrial planning process or during trial in which they asserted a defense based on the release of claims by the McKays or any other Class member or otherwise raised the issue of such releases in connection with the damages sought by Plaintiffs. Nor do Defendants identify any instance in which they requested a jury instruction or verdict form question on this subject or objected to the Court's jury instructions or verdict form on this basis. In fact, this contention should have been raised before trial, *see, e.g.*, Mem. and Order of Feb. 12, 2001 (Doc. 1176) at 10 (requiring Defendants to state each defense to Plaintiffs' claims they intended to try); Order of Sept. 11, 2003 (Doc. 1212) at 2 (requiring parties to specify all claims and defenses to be tried); or (assuming the issue was preserved for trial) through the presentation of evidence regarding the McKays' release and property holdings in the Class Area and argument that compensatory damages should

be reduced as a result.[14] Defendants did none of these things and may not now assert that their failure to present this issue requires a new trial or a reduction in the jury's compensatory damages verdicts.

2. Exemplary damages awards

Defendants argue that the jury's determination of exemplary damages is excessive and must be set aside because it is not supported by the evidence, is unconstitutional, is not permitted by the Price-Anderson Act and/or is improper as a result of Defendants' alleged compliance with standards. If these arguments are not successful, Defendants request that I exercise my discretion under Colorado law to disallow or reduce the jury's exemplary damages verdict because the exemplary damages will not have a deterrent effect on Defendants or others. After careful consideration of these arguments, I find they present no basis for vacating or reducing the jury's verdict.

Sufficiency of the evidence

Defendants' challenge in this motion to the sufficiency of the evidence to support the jury's exemplary damages award constitutes another after-the-fact challenge to the court's instructions to the jury on this subject. In connection with Plaintiffs' claim for exemplary damages, I instructed the jury, as pertinent here, that it could only award exemplary damages against Dow or Rockwell if it found beyond a reasonable doubt that the company's conduct in committing the trespass and/or nuisance was "willful and wanton." Final Jury Instructions, No. 3.27; Jury Verdict Form at 26-27. "Willful and wanton" conduct was defined as "an act or omission purposefully com-

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[14] Defendants included Charles McKay in their witness lists during trial, but did not call him. Defendants do not deny that he was available, and within the range of a subpoena, to testify.

mitted by the Defendant in question, who must have realized that the conduct was dangerous, and which conduct was done heedlessly and recklessly, either without regard to the consequences, or without regard to the rights and safety of others, particularly the Plaintiff Class." This language is drawn almost verbatim from the standard Colorado Jury Instruction on this subject, see Colo. Jury Instructions (Fourth) Civ. § 9:30; see also *id.*, § 5:3, Notes on Use (directing that Instruction 9:30 be used to define "willful and wanton" in instruction on exemplary damages), which itself closely tracks the definition for this term provided in Colorado's exemplary damages statute. See Colo. Rev. Stat. § 13-21-102(1)(b) (defining "willful and wanton conduct"). There was ample evidence supporting the jury's award of exemplary damages against both Dow and Rockwell under this standard.

Defendants now contend, however, that Colorado law required Plaintiffs to prove something more before exemplary damages could be awarded against them: that each Defendant had an "evil intent" or "wrongful motive" or acted with the purpose of injuring the Plaintiffs. Because Plaintiffs failed to prove this element beyond a reasonable doubt, Defendants assert, the jury's award of exemplary damages is contrary to law and must be set aside.

Defendants cite to no instance in which they proposed that the jury be instructed that "evil intent," "wrongful motive" or their equivalent was part of Plaintiffs' burden of proof, or objected that the Court's instructions to the jury did not include this requirement. In fact, Defendants' own proposed instruction defining "willful and wanton conduct" is functionally the same as the instruction ultimately given. Compare Defs.' Submission of Phase III Jury Instructions (Doc. 1271) at 66 (Proposed Dam-

ages Instruction No. 3.15) with Final Jury Instructions, No. 3.27. Defendants' challenge to the instruction on Plaintiffs' burden of proof is, therefore, untimely at minimum. See Fed. R. Civ. P. 51(c), (d).

If Defendants had made a timely objection on this basis, it would have been overruled. In Colorado, exemplary damages are only available pursuant to Colo. Rev. Stat. § 13-21-102. See *Tri-Aspen Constr. Co.* v. *Johnson*, 714 P.2d 484, 485 (Colo. 1986). The primary authority Defendants cite in support of this statute requiring proof of "evil intent" or "wrongful motive," the just referenced *Tri-Aspen* decision, considered an earlier version of this statute, one that did not include the term "willful and wanton conduct" or the statutory definition of this term employed in the jury instructions in this case. Instead, Colorado's exemplary damages statute at the time of the *Tri-Aspen* decision authorized an award of exemplary damages when the injury complained of was attended by "circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings." See *id.* at 486 (quoting applicable statute). The Colorado Legislature amended Colo. Rev. Stat. § 13-21-102 shortly after this decision to delete "or insult, or a wanton and reckless disregard of the injured party's rights and feelings" from the statute and replace it with the current "or willful and wanton conduct." 1986 Colo. Sess. Laws 675 (H.B. 1197), § 1. It also added a new provision defining "willful and wanton conduct" at this time. *Id.* It is this statutory provision, and not the *Tri-Aspen* court's discussion of the prior statute and case law interpreting it, that governed the jury's determination of exemplary damages in this action.

Even if this were not the case, the *Tri-Aspen* decision still fails to support Defendants' argument. The Colora-

do Supreme Court declared in *Tri-Aspen* that an award of exemplary damages under the prior statute was justified if the plaintiff proved beyond a reasonable doubt that the defendant acted with evil intent and with the purpose of injuring the plaintiff *or* with a wanton and reckless disregard of the plaintiff's rights. See 714 P.2d at 486; see also *id.* at 488 (claim for exemplary damages requires proof that the defendant "acted with an evil intent or wrongful motive *or* created and then purposefully disregarded a substantial risk of harm") (emphasis added, internal citation omitted). The court also specifically disapproved language from a prior Colorado decision, relied upon by Defendants, that incorporated the concept of "wrongful motive" into the definition of "wanton and reckless disregard." *Id.* at 486 n.3 (rejecting this "more demanding requirement").[15] As a result, even if *Tri-Aspen* and related authority regarding the meaning of "wanton and reckless disregard" is relevant to the current Colorado exemplary damages statute and its definition of "willful and wanton conduct," it does not support Defendants' contention that "evil motive" or "wrongful purpose" must be proved to establish this conduct and to recover exemplary damages.

Constitutionality

Defendants' assertion that the jury's exemplary damages verdicts are unconstitutional fares no better. A punitive damages award is unconstitutional if it is "grossly

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[15] Instead, the Colorado court declared that the most accurate definition of "wanton and reckless disregard" for purposes of the exemplary damages statute then in effect was "conduct that creates a substantial risk of harm to another and is purposefully performed with an awareness of the risk in disregard of the consequences." *Id.* at 486 (quoting *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187, 215 (Colo. 1984)).

excessive" in relation to a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *BMW of N. Am.* v. *Gore*, 517 U.S. 559, 568 (1996). To determine whether this is the case, the court must determine if the defendant received "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574; *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232 (10th Cir. 2000). Three factors guide analysis of whether adequate notice was provided: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damages award to the actual or potential harm inflicted on the plaintiff; and (3) a comparison of the punitive damages award with the civil or criminal penalties that could be imposed for comparable misconduct. *Wharf*, 210 F.3d at 1232; see *BMW*, 517 U.S. at 574-75. The absence of one of these guideposts, however, is not determinative of whether the defendant received adequate notice of the magnitude of the punitive damages award that could be imposed for its misconduct. *Wharf*, 210 F.3d at 1233.

As to the first guidepost, the Supreme Court has noted a number of factors that bear on the reprehensibility of the defendant's conduct and whether the nature of that conduct provided the defendant with adequate notice of the punitive damages that could be awarded against it. These factors include: whether any physical harm resulted from the conduct, *BMW*, 517 U.S. at 576; if the harm was only economic, whether it was done intentionally through affirmative acts of misconduct or was suffered by a financially vulnerable target, *id.*; whether the defendant acted intentionally or with reckless disregard for the health and safety of others, *id*; whether the defendant's misconduct was repeated, *id.* at 577; whether the

harm suffered resulted from some form of malice, trickery or deceit as opposed to mere accident, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419 (2003); and whether the conduct risked harm to many as opposed to a few, *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007).

Viewed in the light most favorable to Plaintiffs and the jury's verdict, the evidence in this case shows the presence of a number of the factors the Supreme Court has identified as indicating reprehensible conduct that would provide a defendant with notice of the magnitude of punitive damages that could be awarded against it. The harm involved was not purely economic, but rather physical contamination of Class members' properties and substantial interference with Class members' right to use and enjoy their properties. There was ample evidence that the conduct by each Defendant that caused this harm was intentional and/or undertaken with conscious disregard of the Class members' health and safety. Defendants' misconduct affected approximately 15,000 individual properties and hence thousands of landowners, who suffered a decrease in the value of properties that oftentimes represented their single largest economic asset. Defendants' misconduct was not the result of a single incident, but rather a series of incidents and also routine practices over decades of operating Rocky Flats, some of which were attended by circumstances of dishonesty, subterfuge and deceit. All of these factors indicate Defendants' conduct was reprehensible to a degree that should have put Defendants on notice of the magnitude of punitive damages that could be awarded against them.

As for the ratio of punitive damages to the actual or potential harm, that ratio is capped by statute at one-to-one for each defendant, far below the ratios that have

raised constitutional concerns. *See, e.g.*, *BMW*, 517 U.S. at 582 (500 to 1 ratio); *State Farm*, 538 U.S. at 424-25 (finding 145 to 1 ratio of constitutional concern and stating "single-digit multipliers are more likely to comport with due process").

As for the final guidepost noted by the Supreme Court, it is difficult to predict what amount of civil and criminal penalties could be assessed against each Defendant for comparable misconduct. While the federal environmental laws can impose very substantial fines against corporations that knowingly or improperly release or dispose of hazardous substances, *see, e.g.*, 33 U.S.C. § 1319(c), (d) (authorizing criminal fines of up to $50,000/ day for knowing violations and civil penalties of up to $25,000/day for violations of the Clean Water Act); 42 U.S.C. § 6928(d), (g) (authorizing criminal penalties of up to $50,000/day for knowing violations and civil penalties of up to $25,000/day for violations of RCRA's hazardous waste management requirements), the many instances of misconduct considered by the jury cannot be easily compared to the various environmental statutes that might apply. The difficulty in making this comparison, however, or even the possible existence of a disparity between the potentially available fines and the amount of exemplary damages awarded here, does not compel the conclusion that the jury's exemplary damages awards are unconstitutional. As the Tenth Circuit has noted, the comparison between available civil and criminal penalties and an exemplary damages award "is only one of the indicators of whether a defendant is on notice of the magnitude of the award that may be imposed based on the defendant's misconduct." *Wharf*, 210 F.3d at 1233. The Colorado exemplary damages statute, Colo. Rev. Stat. § 13-21-102, puts a defendant on notice that exemplary

damages may be imposed in an amount up to the actual harm caused. *Wharf*, 210 F.3d at 1233 (discussing § 13-21-102(1)(a)). This notice, combined with the magnitude of actual harm caused by Defendants' misconduct and the reprehensible nature of that conduct, provided the Defendants with fair notice of the severity of the penalty that might be imposed. The jury's exemplary damages awards were not, therefore, unconstitutional under the standard enunciated in *BMW* and *Wharf*.

In their reply in support of their Rule 59 motion, Defendants raise an additional, entirely new challenge to the constitutionality of the exemplary damages award in this action: that Instruction No. 3.27 is unconstitutional under *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007) because it defines "willful and wanton conduct" in part as "conduct that was done heedlessly and recklessly, either without regard to the consequences, or without regard to the rights and safety of others, particularly the Plaintiff Class." The reference to "the rights and safety of others," Defendants argue, renders this instruction and the exemplary damages awards based on it unconstitutional because, under *Philip Morris*, a jury may not consider harm to others in deciding whether to impose punitive damages. Defs.' Reply (Doc. 2249) at 25-26.

The reference to "the rights and safety of others" in Instruction No. 3.27 is a quotation from the definition of "willful and wanton conduct" provided in Colorado's exemplary damages statute. Colo. Rev. Stat. § 13-21-102(1)(b) Defendants are thus inviting me to hold this statute unconstitutional, an invitation that I decline.[16] I

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[16] In addition, a party challenging the constitutionality of a state statute in an action to which the state is a nonparty must file written notice with the court identifying the challenged statute and describing the grounds on which unconstitutionality is asserted. D.C. Colo.

do not read *Philip Morris* as broadly as Defendants, and do not agree that either Instruction No. 3.27 or the evidence and argument at trial created a significant risk that the jury based its exemplary damages determination on a desire to punish Defendants for causing injury to anyone not before the court. Cf. *Philip Morris*, 127 S. Ct. at 1065 (when the evidence or argument presented raises a "significant" risk that the jury will seek to punish the defendant for causing harm to others, the court should, upon request, take action to protect against this risk). The jury's exemplary damages determination was not unconstitutional on this or any other basis.

Discretion to disallow or reduce exemplary damages awards

I also decline Defendants' invitation that I exercise my discretion under Colo. Rev. Stat. § 13-21-102(2) to disallow or reduce the jury's exemplary damages awards. This provision authorizes the court to reduce an exemplary damages award "to the extent that: (a) The deterrent effect of the damages has been accomplished; or (b) The conduct which resulted in the award has ceased; or (c) The purpose of such damages has otherwise been served." *Id.* While Defendants' operation of the Rocky Flats plant has obviously ceased, the effects of their conduct there, the continuing trespass and nuisance found by the jury, has not. I also cannot agree with Defendants that the deterrent effect of the damages has been accomplished or the purposes of the damages has been served. At minimum, the damages award will deter Defendants

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LCivR 24.1.B. It must also serve a copy of this notice on the state attorney general and file proof of this service. *Id.* The state is then provided an opportunity to intervene and to present evidence and argument regarding the constitutionality of the challenged statute. See 28 U.S.C. § 2403(b).

and other corporations that presently or may in the future operate hazardous manufacturing facilities from managing their facilities and the risks they pose in the manner that led to the trespass and nuisance the jury found was committed here.

Compliance with standards

Defendants also contend the jury's exemplary damages awards must be set aside as a result of their compliance with "applicable standards" during their operation of Rocky Flats. I disagree. The only legal authority Defendants cite in support of this contention, *Alley* v. *Gubser Development Co.*, 785 F.2d 849 (10th Cir. 1986), held only that a manufacturer's mere use of wood products containing formaldehyde, in a manner consistent with prevailing industry practice and without evidence that the manufacturer knew or should have known of the potential harm that could result, was not enough to sustain an exemplary damages award in an action arising from exposure to formaldehyde gas released from these products. *Id.* at 856. This holding does not establish a legal rule that exemplary damages are barred whenever a defendant shows it has complied with industry practice or "applicable standards."

In addition, even if such a rule existed, the jury heard extensive evidence from which it could have found Defendants' conduct violated any reasonable standard of industrial care. Further, Defendants do not specify the "standards" with which they allegedly complied, and the jury was not asked to and did not make any findings that the Defendants complied with standards. In fact, the jury heard evidence from which it could have concluded Defendants did not comply with some potentially applicable standards and/or that the environmental monitoring that Defendants conducted was not designed or im-

plemented in a manner that would allow Defendants' compliance with environmental standards to be determined. In short, there is no basis for setting aside the jury's exemplary damages awards on the basis of Defendants' alleged compliance with standards.

Price-Anderson Act

Defendants' final challenge to the exemplary damages awards, that they are barred by the 1988 Amendments to the Price-Anderson Act, has been considered and rejected on multiple occasions in this action and need not be addressed again. *See, e.g.*, *Cook* v. *Rockwell Int'l Corp. ("Cook IX")*, 273 F. Supp. 2d 1175, 1211-12 (D. Colo. 2003); *Cook* v. *Rockwell Int'l Corp. ("Cook I")*, 755 F. Supp. 1468, 1479-81 (D. Colo. 1991).

C. Remittitur of Damages

As an alternative to their motion for new trial, Defendants request remittitur of the jury's compensatory and exemplary damages awards. Remittitur is the process by which a court reduces or proposes to reduce the damages awarded in a jury verdict upon finding that the award is grossly and manifestly excessive or inadequate. See *Garhart ex rel. Tinsman* v. *Columbia/Healthone, L.L.C.*, 95 P.3d 571, 582 (Colo. 2004) (citing, among other sources, Black's Law Dictionary 1298 (7th ed. 1999)); *Foradori* v. *Harris*, 523 F.3d 477, 504 (5th Cir. 2008). It is an alternative to ordering a new trial on these grounds, and the successful claimant may decline the offer of remittitur and receive a new trial instead. *See, e.g.*, *Foradori*, at 504; *Lightfoot* v. *Union Carbide Corp.*, 110 F.3d 898, 914-915 (2d Cir. 1997); *O'Gilvie* v. *Int'l Playtex, Inc.*, 821 F.2d 1438, 1447-48 (10th Cir. 1987). Thus, a necessary prerequisite to remittitur is a finding that grounds exist to order a new trial if remittitur is not accepted. *Foradori*, at 504.

For the reasons described in the preceding section, I find no grounds that require the jury's damages awards to be set aside and either a new trial or remittitur in lieu of a new trial be ordered. Accordingly, I deny Defendants' alternative motion for remittitur of damages.

This does not mean, however, that the jury's verdict is not subject to judicial adjustment. As described earlier, three legal rules or statutes must be applied to the jury's verdict before judgment may be entered. They are the rule against multiple recovery, Colorado's pro rata liability statute and Colorado's statutory cap on the amount of exemplary damages. Judicial adjustment of the verdict through application of these rules is a matter of law determined by the court in the course of entering judgment. See *Lira*, 832 P.2d at 242 (court applies pro rata liability statute before entering judgment); *id.* at 244 n.4 (describing process as one of "judicial adjustment"). These potential adjustments are discussed in the following section.

III. Post-Trial Motions Regarding Posture for Appeal

The class trial and jury verdict at its close resolved many but not all of the issues presented by this action. For example, the medical monitoring claims of the individual Plaintiffs were bifurcated from the class trial and remain to be decided. See *Cook IX*, 273 F. Supp. 2d at 1179. The allocation and distribution of the jury's property damage verdicts to the Class as appropriate also must be accomplished. All parties agree, nonetheless, that the most efficient manner for this action to proceed, if possible, is to put the claims decided in the property class trial in a posture for appeal before the parties and the court invest additional time and resources in this action. Accordingly, following the close of trial, I invited the parties to state their views on the best method by

which to put the matters decided in the class trial in a posture for appeal.

Defendants responded by requesting that I certify four orders in this action for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Plaintiffs oppose this approach and propose instead that I direct entry of judgment on the property class claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Plaintiffs also proposed a form of judgment and plan of allocation in connection with their motion. For the reasons set forth below, I deny Defendants' motion for interlocutory appeal and grant in part and deny in part Plaintiffs' Rule 54(b) motion.

A. Defendants' Motion for Interlocutory Appeal

Defendants propose that this matter be presented to the Tenth Circuit through certification of four orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): (1) the Memorandum Opinion and Order of July 24, 2003 (Doc. 1210) (published as *Cook IX*); and (2) the Memorandum Opinion and Order of December 17, 2004 (Doc. 1312) (*Cook X*), both of which addressed various longstanding legal disputes between the parties in order to clarify the scope of trial on the property class claims; (3) the Order of May 17, 2005 on Scheduling and Jury Instruction Issues (Doc. 1338), which further addressed the scope of the upcoming property class trial; and (4) the Memorandum Opinion Regarding Jury Instructions of December 7, 2006 (Doc. 2205), which reported the basis of jury instruction decisions issued before, during and at the close of the property class trial.

Section 1292(b) provides that an order that is otherwise not appealable may be appealed if the district judge states in writing that: (1) the order "involves a controlling question of law as to which there is substantial ground

for difference of opinion" and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If such certification is made, the Tenth Circuit then has discretion to permit the appeal upon timely application by one of the parties. See *id.*

I find interlocutory appeal of the pretrial orders and decisions identified by Defendants meet neither of the statutory criteria. A number of the issues addressed in the orders and cited by Defendants are not, in my view, issues on which there is a substantial ground for a difference of opinion. More importantly, interlocutory appeal of any or all of these orders at this point in the action is highly unlikely to materially advance the ultimate termination of this litigation.[17] The class trial on Plaintiffs' property claims has already occurred. The four orders address some but by no means all of Defendants' many complaints about the court's legal, evidentiary and other rulings related to this trial, *see, e.g.*, Defs.' Renewed Mot. for J. as a Matter of Law (Doc. 2220); Mot. for New Trial or Remittitur (Doc. 2224), and so it is highly doubtful that affirmation of these orders would do anything more than set the stage for an additional round of appeals by Defendants. Nor is it at all clear that success by Defendants on appeal of these orders might materially advance the termination of this litigation because remand for a new trial, rather than dismissal of the property class claims, would be the likely result. In addition, if Defendants tru-

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[17] For the same reason, the orders do not involve "controlling questions of law," at this point in the litigation at least. See 16 Charles A. Wright et al., Federal Practice & Procedure: Jurisdiction § 3930, at 426 (2d ed. 1996) ("a question is controlling . . . if interlocutory reversal might save time for the district court, and time and expense for the litigants.").

ly believed that interlocutory appeal of these orders might materially advance the ultimate termination of this litigation, they should have sought interlocutory appeal when the decisions were issued, not years later, after trial defined in part by the principles set forth in these pretrial decisions has been concluded and a verdict entered against Defendants.

B. Plaintiffs' Motion for Entry of Judgment

Rule 54(b) permits me to direct entry of final judgment as to fewer than all claims or parties in an action upon an express determination that the judgment on these matters is final and that there is no just reason to delay entry of judgment. *Stockman's Water Co., LLC* v. *Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005); see Fed. R. Civ. P. 54(b). The purpose of this provision is to make an immediate appeal available when the rule's requirements are met. See *Okla. Tpk. Auth.* v. *Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001). In making the required determinations, I must weigh "Rule 54(b)'s policy of preventing piecemeal appeals against the inequities that could result from delaying an appeal." *Stockman's*, 425 F.3d at 1265. Factors to consider include "'whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [are] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.'" *Id.* (quoting *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)).

A decision is final and subject to appeal if it "'leaves nothing for the court to do but execute judgment.'" *Copeland* v. *Toyota Motor Sales U.S.A., Inc.*, 136 F.3d 1249, 1252 (10th Cir. 1998) (quoting *Catlin* v. *United States* 324 U.S. 229, 233 (1945)). In addition, a judgment

is final "even if it does not reduce the damages to a sum certain if [it] sufficiently disposes of the factual and legal issues and any unresolved issues are sufficiently ministerial that there would be no likelihood of further appeal." *Id.* at 1252 (internal quotations and citations omitted). In the class action context, a judgment that awards damages in favor of the plaintiff class is final when it "establishes both the formula that will determine the division of damages among class members and the principles that will guide the disposition of any unclaimed funds." *Strey* v. *Hunt Int'l Res. Corp.*, 696 F.2d 87, 88 (10th Cir. 1982).

1. Plaintiffs' proposed form of judgment

Plaintiffs contend a judgment meeting these finality requirements can be entered in this action and have proposed a form of judgment to this end. See [Pls.' Corrected Proposed] Final Judgment, Ex. A to Pls.' Statement re: Corrected Proposed Form of J. (Doc. 2243). Defendants oppose Plaintiffs' proposed form of judgment, and dispute that any judgment can be entered at this time because a "host of complicated issues" must be decided before judgment can be entered on the jury's verdict. These issues, however, relate to matters such as a plan for allocating the class damages award to class members, the disposition of unclaimed funds and the availability and amount of pre- and post-judgment interest, all of which have now been extensively argued by the parties in the context of this and the parties' other post-trial motions. Accordingly, these matters are now ripe for decision so that final judgment on the claims tried and decided at the property class trial can be entered. My decision on these matters and Defendants' other objections to Plaintiffs' proposed form of judgment is as follows:

Amount of damages awarded against each Defendant

As described earlier in this decision, the jury's compensatory and exemplary damages awards are subject to judicial adjustment before entry of judgment in accordance with the rule against multiple recovery, Colorado's pro rata liability statute and Colorado's statutory cap on the amount of exemplary damages. I have previously stated, and Plaintiffs do not dispute, that application of the rule against multiple recovery reduces the total compensatory damages owed by Dow and Rockwell to $176.8 million, the aggregate damages to the Class found by the jury on both the trespass and nuisance claims. Application of the two statutory limits on damages is disputed, however.

As required by Colorado's pro rata liability statute, the jury determined each Defendant's fault for the trespass and nuisance it found the Defendants had committed. The jury found Dow 90% at fault for the trespass on Class Properties and 30% at fault for the nuisance Defendants committed, and Rockwell 10% at fault for the trespass and 70% at fault for the nuisance.

Based on these findings, Plaintiffs propose that the judgment award compensatory damages of $176,850,340 plus prejudgment interest. The proposed judgment states that Dow is responsible for $159,165,306 (90% of the $176.8 million in trespass damages found by the jury) plus prejudgment interest, and Rockwell for $123,795,238 (70% of the $176.8 million in nuisance damages found by the jury) plus prejudgment interest, while also providing, as just stated, that the total amount recovered from the two Defendants is limited to the $176.8 million found by the jury, plus prejudgment interest. The exact amount of compensatory damages to be recovered from each Defendant within these parameters would not be set forth in

the judgment, allowing Plaintiffs to decide whether to collect the maximum amount due from one Defendant and the remainder of the $176.8 million total judgment (plus prejudgment interest) from the other, or to collect the total amount owed by Dow and Rockwell on some other basis consistent with the judgment's requirements.

Plaintiffs' proposal complies with the rule against multiple recovery and also Colorado's pro rata liability statute. Defendants dispute the latter conclusion, arguing that no judgment can be entered consistent with the statute because the jury assigned different percentages of fault to the Defendants on the trespass and nuisance claims. As discussed earlier in this opinion, however, the jury's allocation of fault on the two claims is not inconsistent and is supported by the evidence. In addition, Colorado's pro rata liability statute requires only that the jury return a special verdict "determining the percentage of . . . fault attributable to each of the parties . . . and the total amount of damages sustained by each claimant," and then directs the court to enter judgment "based on the jury's special findings." Colo. Rev. Stat. § 13-21-111.5(2). The statute further directs that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the . . . fault attributable to such defendant that produced the claimed . . . damage." *Id.* § 13-21-111.5(1). The judgment to be entered under Plaintiffs' proposal meets all of these requirements, as it is based on the jury's special findings allocating fault between Dow and Rockwell on each claim, and ensures that neither Defendant is liable for an amount greater than that represented by the degree of fault found by the jury on one of the two claims decided.

Defendants also protest that the proposed judgment fails to state with specificity a sum certain that each De-

fendant must pay, and that such specificity is required in order for final judgment to enter. The authority Defendants cite in support of this proposition, however, states only that a final judgment sets out a sum certain to be recovered by the prevailing party, see *Albright* v. *UNUM Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995), a condition that is met here by reference to the $176.8 million in actual damages found by the jury that is to be recovered by Plaintiffs. Judgments in cases involving joint and several liability similarly state the amount to be recovered by the plaintiff without specifying a sum certain to be paid by each liable party and yet are routinely entered and approved. I see no reason why the flexibility allowed in these forms of judgment is not also available here to enter final judgment based on the jury's special findings. In addition, Defendants' concern on this point appears more technical than real, given the practical consideration that DOE, as indemnitor for both Defendants, presumably will pay the entire $176.8 million in compensatory damages found by the jury regardless of how this amount is allocated between the Defendants. For all of these reasons, I will adopt Plaintiffs' proposed form of judgment as to compensatory damages.[18]

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[18] If it were necessary to declare in the judgment a sum certain owed by each Defendant, this sum could be calculated based on the jury's allocation of fault on both the trespass and nuisance claims and the determination that the trespass and nuisance caused $176.8 million in damages (after application of the rule against multiple recovery). Under this approach, the 90% fault the jury found for Dow's contribution to the trespass and the 30% fault the jury attributed to Dow for the nuisance would yield an overall fault allocation of 60% (90%+30% divided by 2) for the wrongdoing by Dow that caused the $176.8 million in total damages found by the jury. The same calculation yields an allocation of 40% (10% trespass fault+70% nuisance fault divided by 2) for Rockwell's wrongdoing. Under this approach,

As for exemplary damages, Colo. Rev. Stat. § 13-21-102, as interpreted by the Colorado Supreme Court in *Lira* v. *Davis*, 832 P.2d 240 (Colo. 1992), limits liability for exemplary damages to the amount of actual or compensatory damages owed by the defendant after application of the pro rata liability statute.[19] See *id.* at 245-46. Thus, where application of the pro rata liability statute results in a reduction of the compensatory damages owed by a defendant, it is this reduced compensatory amount that is considered in setting the limit on the exemplary damages that can be recovered from that defendant. *Id.* at 246.

Plaintiffs contend that, under this authority, the cap on exemplary damages recoverable from Dow is $159.1 million, representing Dow's 90% fault for the trespass, and $123.8 million for Rockwell, representing its 70% fault for the nuisance. If this position is correct, Plaintiffs are entitled to recover the full amount of exemplary damages assessed by the jury against each Defendant, $110.8 million against Dow and $89.4 million against Rockwell, because both amounts are less than the individual caps posited by Plaintiffs. Defendants object, arguing that this outcome would violate § 13-21-102 because the total amount of exemplary damages awarded under this approach ($110.8 million + $89.4 million =

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therefore, the sum certain owed by Dow for the harm the jury found it caused would be $106,110,204 (60% of the total compensatory damages of $176,850,340) and Rockwell's share would be $70,740,136 (40% of the total compensatory damages of $176,850,340). This approach takes full account of the jury's findings and requires no speculation as to them.

[19] The Colorado Supreme Court uses the terms "actual damages" and "compensatory damages" interchangeably in discussing the statutory cap on exemplary damages set by Colo. Rev. Stat. § 13-21-102. See *Lira*, 832 P.2d at 241 n.1.

$200.2 million) would exceed the $176.8 million in total compensatory damages to be recovered from Dow and Rockwell after application of the rule against multiple recovery.

As relevant here, § 13-21-102 provides:

> In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

Colo. Rev. Stat. § 13-21-102(1)(a).

On its face, the statute does not address the question presented, which is whether the amount of exemplary damages awarded against an individual defendant must be reduced on the ground that the total exemplary damages awarded against all defendants exceeds the total compensatory damages awarded against these defendants.

The Colorado Supreme Court's decision in *Lira* provides guidance on this issue. In *Lira*, the court considered whether exemplary damages awards are subject to reduction under Colorado's comparative negligence statute, Colo. Rev. Stat. § 13-21-111.5. The court first determined that exemplary damages are not subject to reduction by application of the comparative negligence statute. *Lira*, 832 P.2d at 243. Its rationale was that reducing an exemplary damages award by the plaintiff's percentage of comparative negligence would be inconsistent with the

focus of exemplary damages, which is the defendant's misconduct, and with the purpose of exemplary damages, which is to punish the defendant and deter the misconduct. *Id.* at 242-43. It also emphasized that the amount of an exemplary damages award "should be based on a consideration of the 'severity of the injury perpetrated on the injured party by the wrongdoer.'" *Id.* at 243 (quoting *Kirk* v. *Denver Pub. Co.*, 818 P.2d 262, 266 (Colo. 1991)).

The court continued its focus on the wrongdoer's conduct in determining that the pro rata liability statute limits exemplary damages to the compensatory damages awarded against an individual defendant after application of the jury's fault determinations for that defendant. The court concluded this result effectuated the legislature's intent to "effectively double[] the potential liability of a wrongdoing party." *Id.* at 245-46 (quoting remarks by Representative Grant, one of the bill's sponsors). It stated further that "[The legislation sponsor's] statements focused on the liability of the tortfeasor. Since under the comparative negligence and pro rata liability statutes, one of several negligent persons is only responsible for damages in accordance with his determined percentage of fault, that party's liability for punitive damages should be no greater than the amount of actual damages he owes." *Id.* at 246.

In this case, the jury found Dow 90% at fault for the trespass and Rockwell 70% at fault for the nuisance. As stated above, Colorado's pro rata liability statute limits actual damages owed by each of these defendant[s] to these percentages of the actual damages found by the jury. Setting the statutory cap established in § 13-21-102(1)(a) at the amounts calculated based on the jury's allocation of fault to each Defendant on each claim is consistent with *Lira*'s emphasis on the wrongdoing commit-

ted by the individual tortfeasor and its concern that the purpose of exemplary damages—to punish and deter a defendant's wrongdoing—be served.[20] Providing an individual defendant with some additional reduction in the exemplary damages awarded, as Defendants propose, based on the total compensatory damages awarded against all defendants, would shift the focus of the exemplary damages cap away from the individual defendant's wrongdoing and weaken the punitive and deterrent purposes of exemplary damages awards.

My conclusion that the jury's exemplary damages awards are within the statutory cap on exemplary damages is bolstered by considering another component of compensatory damages that is included in determining the amount of the cap: prejudgment interest.[21] Colorado courts have repeatedly held that prejudgment interest is an element of compensatory damages. *See, e.g.*, *Seaward Const. Co.* v. *Bradley*, 817 P.2d 971, 976 (Colo. 1991); *Allstate Ins. Co.* v. *Starke*, 797 P.2d 14, 19 (Colo. 1990); *Witt* v. *State Farm Mut. Auto. Ins. Co.*, 942 P.2d 1326, 1327 (Colo. Ct. App. 1997). The Tenth Circuit and other courts are in accord with this view. *Webco Indus., Inc.* v. *Thermatool Corp.*, 278 F.3d 1120, 1134 (10th Cir. 2002);

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[20] This result is also consistent with Colorado case law finding that the Colorado legislature's intent in § 13-21-102(1)(a) was "to limit the punitive damages awarded on a particular tort claim to the amount of actual damages awarded on that same claim." *Hensley* v. *Tri-QSI Denver Corp.*, 98 P.3d 965, 968 (Colo. Ct. App. 2004).

[21] Defendants cite Instruction No. 3.27 and statements regarding this instruction in the Memorandum Opinion Regarding Jury Instructions as amounting to a legal ruling that prejudgment interest cannot be considered in determining the statutory cap on exemplary damages. Not so. This issue was not raised in connection with Instruction No. 3.27 and hence is addressed here for the first time.

Johnson v. *Cont'l Airlines Corp.* 964 F.2d 1059, 1062 (10th Cir. 1992) (collecting cases).

In *James* v. *Coors Brewing Co.*, 73 F. Supp. 2d 1250 (D. Colo. 1999), Judge Babcock considered this case law and Colo. Rev. Stat. § 13-21-102 and concluded that prejudgment interest on damages is part of "actual damages" to be considered in determining the one-to-one actual damages to exemplary damages cap set by the Colorado statute. *Id.* at 1255. This analysis is sound and has been followed by this and other courts. *Mower* v. *Century I Chevrolet, Inc.*, No. 02-cv-01632-MSK-MEH, 2006 WL 2729265, *23 (D. Colo. June 16, 2006); see also *Tait* v. *Hartford Underwriters Ins. Co.*, 49 P.3d 337, 340 (Colo. Ct. App. 2001) (noting without comment that the district court calculated the statutory cap on exemplary damages as the amount of compensatory damages awarded plus prejudgment interest). Accordingly, I find that the statutory cap on each Defendant's liability for exemplary damages in this case includes the prejudgment interest each Defendant is required to pay on the compensatory damages recovered from it. Given the substantial prejudgment interest award to be included in the judgment, as discussed below, the sum of prejudgment interest and the amount due and ultimately recovered from each Defendant will exceed the amount of exemplary damages awarded by the jury against Dow and Rockwell under any reasonably conceivable scenario. Accordingly, no reduction of these damages awards is required, and judgment will be entered on the jury's exemplary damages verdicts.

Allocation of damages

Plaintiffs propose a Plan of Allocation that provides for the appointment of a Claims Administrator, defines the duties and authorities of the Claims Administrator

and sets forth the procedures and principles for determining the disposition of the compensatory and exemplary damages, attorney fees, expenses, costs and pre- and post-judgment interest awarded in the final judgment ("Judgment Fund"), including the substantive principles and procedures that will govern distribution of the "Net Class Award" (the Judgment Fund less certain fees, expenses, costs and awards).

In summary, Plaintiffs propose that the Claims Administrator begin the allocation process by consulting appropriate records and data from Jefferson County and other suitable and reliable sources to identify the properties and property owners satisfying the Class definition and to sort them into the three property categories set forth in the jury's verdict: commercial, residential and vacant.[22] Pls.' Reply in Supp. of Mot. for Entry of J. (Doc. 2240), Ex. B (Pls.' Rev. Proposed Plan of Allocation), ¶ 8. For each of these three property categories, the Claims Administrator would then compute the category's share of the Net Class Award, with the total sum allocable to each category bearing the same ratio to the Net Class Award as the jury's determination of compensatory damages for that category bears to the total of all compensatory damages found by the jury for the three combined categories. *Id.*, ¶ 9. Based on Jefferson County tax assessment records, the Claims Administrator would then determine, for each property in the Prospective Damages Subclass, the property's assessed value and from it calculate the fraction of this value relative to the total assessed value of all properties in the Damages Subclass within the same category (the property's "Fractional Allocable

[22] Both parties have relied on records such as these for this purpose in the course of this litigation.

Share"). *Id.*, ¶ 10. Subject to such equitable adjustments as the Claims Administrator might recommend and I might adopt, the Claims Administrator would then compute an award for each property in the Damages Subclass, based on the property's Fractional Allocable Share of the Net Class Award for the relevant property category. *Id.*, ¶ 11. The Proposed Allocation based on these principles and procedures would then be submitted to the Court for approval, along with a proposed process for notifying members of the Class of their awards (if any) under the Proposed Allocation, granting them an opportunity to seek adjustment of these awards, and making payment. *Id.*, ¶ 12. Plaintiffs' proposed Plan of Allocation further provides that any funds that remain unclaimed, after a due allowance period for late claims, would be distributed to members of the Damages Subclass on a pro rata basis to assist in making them whole notwithstanding payment of attorney fees, expenses and administrative costs from the Judgment Fund. *Id.*, ¶ 13. Plaintiffs do not expect the amount of these unclaimed funds to be substantial.[23] Plaintiffs submit the Declaration of Wayne L. Hunsperger, one of their real estate experts from the property class trial, to attest that this process is feasible and reasonable.

Having reviewed Plaintiffs' proposed plan and Defendants' objections to it, I adopt the plan with the following adjustment. As described earlier in this opinion, only Class members who owned property within the Class Area on January 30, 1990, when this action was filed and the date on which the jury found it appeared the tortious in-

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[23] Given the long and litigious history of this case, the charge against the Judgment Fund for attorney fees and expenses alone is likely to exceed the amount of unclaimed funds to be distributed to the Prospective Damages Subclass in this manner.

vasions would continue indefinitely, are entitled to recover damages for prospective invasions to Class Properties. See *supra* Section II.B.1. In identifying the members of the Class and their corresponding properties, as described above, the Claims Administrator shall identify and categorize members of this subclass, the "Prospective Damages Subclass," and the other subclass ("Non-Prospective Damages Subclass"), which consists of Class members who sold their Class Properties before January 30, 1990. This identification shall be based on Jefferson County records or other appropriate, reliable records that are used to identify the members of the Class as a whole. The distinction between these two subclasses and the prospective damages allocable to the Class Properties corresponding to members of each subclass shall be maintained throughout development of the allocation plan described above.

This process will result in some portion of the Net Class Award being allocated to properties once owned by members of the Non-Prospective Damages Subclass, who cannot claim these prospective damages under the Court's prior rulings. See *supra* Section II.B.1. Nonetheless, there is no question under the jury's verdicts that these damages exist and were caused by the Defendants' continuing trespass and nuisance.

Courts and commentators have recognized a variety of methods for disposing of unclaimed portions of class damage awards. See *Brewer* v. *S. Union Co.*, No. 83-F-1174, 1987 U.S. Dist. LEXIS 15940, *7-18 (D. Colo. Aug. 13, 1987); see generally 3 Alba Conte & Herbert B. Newberg, Newberg on Class Actions §§ 10:13-25 (4th ed. 2002). After considering these options, the substantive purposes of the claims of this action and the equities involved, I have determined that the portion of the Net

Class Award allocable to the Non-Prospective Damages Class will be distributed to the indirect benefit of the Class in accordance with *cy pres* principles. Although the Tenth Circuit has not spoken on *cy pres* distributions of class damages, there is precedent for this approach in this court. See *Brewer*, at *17-19. Once the amount of monies subject to this distribution has been determined under the approved allocation plan, I shall direct the Plaintiffs to identify options for the distribution of these monies in accordance with *cy pres* principles. These principles envision that the monies will be put to their "next best use" in keeping with the intent of the statutes and other law upon which the Plaintiffs' property class claims are based. See *id* at *13-16.

The Plan of Allocation described herein will be entered by separate order. Execution of this Plan, and of the judgment as a whole, will be stayed until such time as either Defendant files a timely notice of appeal from the judgment or the time allowed for filing any such appeal has expired.

Prejudgment interest

Plaintiffs request that the judgment on the jury's verdicts include prejudgment interest. Whether prejudgment interest may be recovered is a matter of Colorado law.[24] In Colorado, the right to prejudgment interest is governed by statute, and it must be awarded in cases to which the statute applies. See Colo. Rev. Stat. § 5-12-102(1) (covered parties "shall receive" prejudgment in-

[24] This is so because the trespass and nuisance claims decided by the jury were brought pursuant to the Price-Anderson Act ("Act"), which directs that state law provide the substantive rules of decision in the action. 42 U.S.C. § 2014(hh). The entitlement to prejudgment interest is a substantive matter, see *Webco Indus.*, 278 F.3d at 1134, and is therefore governed by Colorado law under the Act.

terest); *id.* § 13-21-101(1) ("it is the duty of the court" to award prejudgment interest in cases falling within the statute); see also *Todd* v. *Bear Valley Village Apts.*, 980 P.2d 973, 981 (Colo. 1999) (trial court's award of prejudgment interest under Colorado statute is "a ministerial act that is mandatory and does not require the exercise of judgment or discretion;" internal quotation omitted). The purpose of this mandatory award, under Colorado law, is to compensate the plaintiff for the loss of earnings on the actual damages due to their delayed payment and also to encourage the settlement of cases both before and after trial. See *Allstate Ins. Co.*, 797 P.2d at 19 ("prejudgment interest is an element of compensatory damages in actions for personal injuries, awarded to compensate the plaintiff for the time value of the award eventually obtained against the tortfeasor."); *Mesa Sand & Gravel Co.* v. *Landfill, Inc.*, 776 P.2d 362, 364 (Colo. 1989) (purpose of prejudgment interest "is to discourage a person responsible for payment of a claim to stall and delay payments until judgment or settlement"); *Stevens* v. *Humana of Delaware, Inc.*, 832 P.2d 1076, 1081 (Colo. Ct. App. 1992) ("prejudgment interest serves not only the purpose of compensating a party for the loss of use of money but is also used to encourage the settlement of cases both pre- and post-trial"); *Voight* v. *Colo. Mountain Club*, 819 P.2d 1088, 1092-93 (Colo. Ct. App. 1991) (same).

Defendants argue Plaintiffs are not entitled to recover prejudgment interest on the jury's verdict on three grounds. First, they contend that prejudgment interest is precluded because the jury, at Plaintiffs' request, awarded damages that included an inflation adjustment, based on the Consumer Price Index ("CPI"), through 2005. This inflation adjustment, Defendants contend, is

the equivalent of prejudgment interest prescribed by Colorado statute, with the result that an award of prejudgment interest would amount to a duplicate, and improper, payment to Plaintiffs.

Defendants cite no Colorado authority, or authority from other jurisdictions for that matter, holding that prejudgment interest is not available when the damages awarded by a jury include an adjustment for inflation.[25] The premise underlying Defendants' argument, that a CPI-adjustment is equivalent to the statutorily-directed award of prejudgment interest, is also incorrect. Colorado courts have repeatedly held that prejudgment interest is intended to compensate the plaintiff for the "loss of earnings," "loss of use," and "time value" of the money due from the defendant. *See, e.g.*, *Coale* v. *Dow Chem. Co.*, 701 P.2d 885, 890 (Colo. Ct. App. 1985); *Stevens*, 832 P.2d at 1081; *Allstate Ins. Co.*, 797 P.2d at 19. That this concept is more than mere inflation is obvious on its face, as has been recognized by other courts. See *United*

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[25] The case law Defendants cite for this proposition does not address this question and often is, at best, tangentially related to it. Defendants' attempt to portray the Tenth Circuit's decision in *Lowell Staats Mining Co.* v. *Pioneer Uravan, Inc.*, 878 F.2d 1259 (10th Cir. 1989), as supporting their position is particularly strained. In the passage relied upon by Defendants, the court merely held that the district court did not err in reserving the issue of interest computation to itself. *Id.* at 1268-69. Nor does the quotation from the 1925 Colorado Supreme Court case the Tenth Circuit cited in support of this holding establish or support the proposition that a plaintiff cannot recover prejudgment interest under Colorado law if the damages awarded include an inflation adjustment. See *id.* (quoting *Wood* v. *Hazelet*, 237 P. 151, 152 (Colo. 1925)). In fact, the *Lowell* decision, which reversed the district court's decision not to award prejudgment interest, actually supports the proposition that a district court must award prejudgment interest where required by Colorado statute. See *id.* at 1270.

States v. *City of Warren*, 138 F.3d 1083, 1096 (6th Cir. 1998) (district court abused its discretion in utilizing CPI to assess prejudgment interest because "merely adjusting the dollars the plaintiff would have earned to compensate for diminished purchasing power because of inflation does not compensate for the lost use of the money"); *Chandler* v. *Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir. 1994) (award of prejudgment interest for loss of use of inflation-adjusted damages did not constitute double recovery because the inflation adjustment did not compensate for the lost use of the money); *Clinchfield Coal Co.* v. *Fed. Mine Safey & Health Review Comm'n*, 895 F.2d 773, 780 (D.C. Cir. 1990) (rejecting award of prejudgment interest that provided "compensation for losses through inflation but none for the capacity of wealth to generate more wealth"); *Evans* v. *Connecticut*, 967 F. Supp. 673, 684 n.15 (D. Conn. 1997) (awarding prejudgment interest on damages award that had been adjusted to compensate for inflation because inflation adjustment did "not calculat[e] the value of the money as if it had been given to [plaintiff] for his use or for investment"), aff'd, 24 Fed. Appx. 35 (2d Cir. 2001).[26] It is also undisputed that the CPI inflation rate for the period in question was generally far below the 8% and 9% prejudgment interest rates set by statute, which further indicates the Colorado legislature did not intend for prejudgment interest to compensate only for inflation. Defendants' contention also gives no weight to the second

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[26] Defendants' attempt to discredit this authority based on the Supreme Court's earlier decision in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), is not persuasive. The Court in *Shaw* did not address the question presented here, and its statements regarding the bar sovereign immunity imposes on recovery of prejudgment interest on Title VII attorney fee awards against the federal government is not inconsistent with the authority cited above.

purpose served by an award of prejudgment interest, which is to encourage settlement. Finally, Defendants cite no case law indicating that I have authority under Colorado law *not* to award prejudgment interest if it is required by statute.

Defendants next contend that Plaintiffs are not entitled to recover prejudgment interest because neither of the Colorado statutes providing for an award of prejudgment interest applies here. While I agree that the Colorado statute governing prejudgment interest in personal injury actions does not apply,[27] I find the second potentially applicable statute, Colo. Rev. Stat. § 5-12-102, applies here and mandates that the judgment include prejudgment interest at the statutory rate of 8% per annum, compounded annually. See *id.* § 5-12-102(1)(b).

Section 5-12-102(1), titled "Statutory Interest," provides as relevant here:

> Except as provided in section 13-21-101, C.R.S., when there is no agreement as to the rate thereof, creditors shall receive interest as follows:

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[27] Plaintiffs argue this statute, Colo. Rev. Stat. § 13-21-101, and its provision for prejudgment interest at a rate of 9% per annum, applies here because the Colorado Court of Appeals has determined that nuisance awards affording compensation for annoyance and discomfort are governed by this statute. See *Miller* v. *Carnation Co.*, 564 P.2d 127, 132 (1977). The *Miller* case and other Colorado authority, however, also establish that a nuisance award for annoyance and discomfort is distinct from an award for diminution in a property's value as a result of the nuisance. See *id.* at 130; *Bd. of County Comm'rs* v. *Slovek*, 723 P.2d 1309, 1318 (Colo. 1986); *Webster* v. *Boone*, 992 P.2d 1183, 1185 (Colo. Ct. App. 1999); see also *Cook IX*, 273 F. Supp. 2d at 1206-07 & n.33 (recognizing distinction). In this case, the only nuisance damages sought by Plaintiffs, and awarded by the jury, were for the diminished value of the Class Properties caused by Defendants' nuisance.

> (a) When money or property has been wrongfully withheld, interest shall be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date judgment is entered, whichever first occurs; or, at the election of the claimant,
>
> (b) Interest shall be at the rate of eight percent per annum compounded annually for all moneys or the value of all property after they are wrongfully withheld or after they become due to the date of payment or to the date judgment is entered, whichever first occurs.

Defendants assert this statute applies only in actions arising from consumer credit transactions, basing this contention on their analysis of the statute and its legislative history and the erroneous contention that the statute is part of Colorado's Consumer Credit Code.[28] In so doing, Defendants dismiss the long line of Colorado Supreme Court and other cases that, contrary to Defendants' position, have construed § 5-12-102 liberally to apply to all types of cases not involving personal injuries.[29] For example, in *Mesa Sand & Gravel Co.* v. *Landfill, Inc.*, 776 P.2d 362 (Colo. 1989), the Colorado Supreme Court stated that "[i]n cases other than in 'actions

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[28] The Consumer Credit Code consists of Articles 1 through 9 of Title 5 of the Colorado Revised Statutes. Colo. Rev. Stat. § 5-1-101. The prejudgment interest statute is found in Article 12 of Title 5. See *id*. § 5-12-102.

[29] "The term 'creditors' used in the statute [Colo. Rev. Stat. § 5-12-102] has been construed broadly to include all claimants who have been damaged by the actions of another." *Stansbury* v. *Comm'r Internal Revenue Serv.*, 102 F.3d 1088, 1093 n.6 (10th Cir. 1996) (internal quotation omitted).

brought to recover damages for personal injuries sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership' under [Colo. Rev. Stat.] § 13-21-101, a prevailing party may recover prejudgment interest under section 5-12-102." *Id.* at 363. The court further declared § 5-12-102 "was not designed to distinguish between classes of prevailing parties in permitting recovery of prejudgment interest" and approved the statute's application to a breach of contract claim. *Id.* at 365. In subsequent decisions, the Colorado Supreme Court has affirmed this broad construction of the statute, including its application in property damage cases. See *Westfield Dev. Co.* v. *Rifle Inv. Assocs.*, 786 P.2d 1112, 1122 (Colo. 1990) (approving award of prejudgment interest under statute to pecuniary damages caused by intentional interference with contract because liberal construction of statute was necessary "to effectuate the legislative purpose of compensating parties for the loss of money or property to which they are entitled."); *Ballow* v. *PHICO Ins. Co.*, 878 P.2d 672, 683 (Colo. 1994) ("In cases other than 'actions brought to recover damages for personal injuries' under [Colo. Rev. Stat.] § 13-21-101, a prevailing party may recover prejudgment interest under section 5-12-102"); *Farmers Reservoir & Irrigation Co.* v. *Golden*, 113 P.3d 119, 133 (Colo. 2005) (holding § 5-12-102(1)-(3) codifies the doctrine of moratory interest in contract and property damage cases, so that "[t]he right to recover prejudgment interest for damages other than those resulting from personal injuries is a matter of law determined under section 5-12-102.").

The Tenth Circuit has also recognized that § 5-12-102 applies to claims for property damages and other actions not involving consumer credit transactions. *See, e.g.*,

Loughridge v. *Chiles Power Supply Co.*, 431 F.3d 1268, 1288-89 (10th Cir. 2005) (recognizing that "prejudgment interest in non-personal injury actions is available" under § 5-12-102(1) and applying statute to determine prejudgment interest to be awarded in property damage case); *Estate of Korf* v. *A.O. Smith Harvestore Prods., Inc.*, 917 F.2d 480, 486 (10th Cir. 1990) (applying § 5-12-102 to claim for property damages because, under the Colorado Supreme Court's decisions in *Mesa Sand* and *Westfield*, "victims of tortious conduct are clearly entitled to prejudgment interest under the statute."); *Lowell Staats Mining Co.* v. *Pioneer Uravan, Inc.*, 878 F.2d 1259, 1270 (10th Cir. 1989) (holding § 5-12-102 entitled plaintiff to prejudgment interest on breach of contract claim).

Defendants essentially argue that these cases were wrongly decided because they rely, directly or indirectly, on an alleged mistranscription of a statement by the sponsor of the legislation that became § 5-12-102. I disagree that Defendants' report of this sponsor statement, even if accurate, supports Defendants' narrow reading of the statute or casts doubt on the Colorado courts' construction of it.[30] Even if this were not the case, "it is the duty of the [federal court] to ascertain from all the available data what the state law is and apply it rather than to prescribe a different view, however superior it may appear." *Lowell*, 878 F.2d at 1269 (quoting *West* v. *Am. Tel.*

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[30] The chief difference between the transcription cited by the Colorado Supreme Court and that asserted by Defendants is that the Colorado Supreme Court reports the legislation's sponsor stated "*All* plaintiffs, or defendants who counterclaim, for that matter, are entitled to interest," *Mesa Sand*, 776 P.2d at 365 (emphasis added), while Defendants contend he actually stated "a plaintiff, or for that matter a defendant who counterclaims, is entitled to interest." Defs.' Resp. to Pls.' Mot. for Entry of J. (Doc. 2226) at 45 (emphasis added).

& Tel. Co., 311 U.S. 223, 237 (1940)). I am not at liberty, therefore, to depart from the Colorado Supreme Court's construction of § 5-12-102, even if I were inclined to do so.

Defendants conclude their challenge to the award of any prejudgment interest in this action by contending that the compensatory damages awarded by the jury were for "future losses," and as such have not been "withheld" as required for prejudgment interest to be awarded under § 5-12-102. Defendants' argument confuses the basis for liability in this action, that Defendants' tortious invasions will continue into the future, with the measure of damages for Defendants' ongoing invasions. Pursuant to Restatement § 930(3)(b), the jury determined damages for "the decrease in the value of the land caused by the prospect of the continuance of the invasion measured at the time when the injurious situation became complete and comparatively enduring." Restatement § 930(3)(b); see Jury Verdict Form at 14-15, 23-24. The jury's verdict, therefore, determined the damages caused by Defendants' continuing invasions that existed at the time the injurious situation became complete and comparatively enduring. In other words, the damages found by the jury were to remedy an existing wrong. As a result, Plaintiffs are entitled to an award of prejudgment interest under § 5-12-102. See *Loughridge*, 431 F.3d at 1290-91 (rejecting assertion that prejudgment interest was not available under Colorado law for award of future repair costs, finding these damages were "to remedy [plaintiffs'] past, not future injury" arising from defendant's wrong); see also *Wharf*, 210 F.3d at 1233-34 (rejecting argument that § 5-12-102 was inapplicable because contract damages characterized as "right to future income" could not be "wrongfully withheld" within meaning of statute).

Plaintiffs' entitlement to prejudgment interest under § 5-12-102 is also supported by Colorado authority holding that prejudgment interest "accrues in a property damage case from the time the cause of action accrued; in other words, from the date on which the injured party was wronged." *Fed. Ins. Co.* v. *Ferrellgas, Inc.*, 961 P.2d 511, 514 (Colo. Ct. App. 1997); see *Isbill Assocs., Inc.* v. *City & County of Denver*, 666 P.2d 1117, 1122 (Colo. Ct. App. 1983) (upholding prejudgment interest award from time property was damaged). By statute, prejudgment interest is awarded "from the date of wrongful withholding." Colo. Rev. Stat. § 5-12-102(1)(a). Thus, the Colorado courts deem damages to be "wrongfully withheld" as of the date on which the wrong occurred. See *Seaward*, 817 P.2d at 975 ("addition of prejudgment interest to a judgment for compensatory damages recognizes that the loss caused by the tortious conduct occurred at the time of the resulting injury but that the damages paid to compensate for that loss are not received by the injured party until later."). There is no question that the wrong here, Defendants' continuing tortious invasions, has occurred and that the damages attributable to this wrong have been wrongfully withheld since then.

The jury found that it appeared on or before January 30, 1990 that any trespass or nuisance by Rockwell and Dow would continue indefinitely. Jury Verdict Form at 28-29. This finding, coupled with the jury's determination that both Dow and Rockwell were liable for continuing trespass and nuisance, establishes that Plaintiffs' trespass and nuisance claims accrued, and the wrongs occurred, no later than January 30, 1990. Accordingly, pursuant to § 5-12-102(1), Plaintiffs are entitled to recover prejudgment interest on the compensatory damages awarded by the jury, at a rate of 8% per annum com-

pounded annually, from January 30, 1990 through the date of payment or the date judgment is entered, whichever occurs first. Colo. Rev. Stat. § 5-12-102(1)(b).

In their Motion for Entry of Judgment, Plaintiffs also requested an award of prejudgment interest on the jury's exemplary damages award, measured from the date of the jury's verdict awarding these damages. This start date was an attempt to accommodate Colorado case law declaring that prejudgment interest is not available on exemplary damages in part because these damages are not "wrongfully withheld" until they are awarded by a jury. See *Seaward*, 817 P.2d at 975-76; *Coale*, 701 P.2d at 890. Plaintiffs subsequently acknowledged that the Colorado Court of Appeals' decision in *Fail* v. *Community Hospital*, 946 P.2d 573 (Colo. Ct. App. 1997), which noted that a jury verdict is not conclusive until final judgment is entered on it, *id.* at 582, called this attempted accommodation into question. I agree and therefore deny Plaintiffs' request for an award of prejudgment interest on exemplary damages.

Postjudgment interest

There is no question that Plaintiffs are entitled to recover postjudgment interest, but the parties dispute whether the applicable rate is set by federal or Colorado law. In *Transpower Constructors* v. *Grand River Dam Authority*, 905 F.2d 1413 (10th Cir. 1990), the Tenth Circuit considered whether federal or state law governed the determination of postjudgment interest in a diversity action, in which the substantive rules of decision were drawn from state law. The Tenth Circuit determined that the federal statute, 28 U.S.C. § 1961, applied, because the imposition of postjudgment interest, while "rationally capable of classification as either" substantive or procedural, was most properly viewed as a procedural

rule. *Transpower*, 905 F.2d at 1424. Here, the Price-Anderson Act directs only that "the substantive rules for decision" shall be derived from state law. 42 U.S.C. § 2014(hh). As a procedural rule, therefore, postjudgment interest is not subject to this provision, with the result that the federal statute, 28 U.S.C. § 1961, governs the entitlement to, and rate of, postjudgment interest in this action.

Defendants' additional objections to Plaintiffs' proposed judgment

I have considered Defendants' additional objections to Plaintiffs' proposed judgment and find them to be without merit. In particular, I find the references to The Boeing Company in Paragraph 4 of Plaintiffs' Corrected Proposed Final Judgment (Doc. 2243-2) to be consistent with the representation made to this Court by Rockwell and The Boeing Company that The Boeing Company, as the successor-in-interest to Rockwell, is answerable for any judgment rendered against Rockwell in this suit. See Joint Submission re: Pls.' Mot. to Amend Caption or Compl. or to Substitute Rockwell's Successor Cos. as Parties in Interest (Doc. 2193); *id.*, Ex. A (Doc. 2193-2) (Statement/Description of Successor Interest by Rockwell and Boeing).

2. Entry of final judgment under Rule 54(b)

I further find that judgment, as described above, shall be entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

In so holding, I specifically find that the judgment to be entered is a final order under Rule 54(b). This is so because it is the ultimate disposition of Plaintiffs' claims to recover prospective damages for the continuing trespass and nuisance the jury found Dow and Rockwell had committed. See *Okla. Tpk.*, 259 F.3d at 1242 (stating

standard). These claims are distinct and separable from the remaining claims in this case. Defendants' liability and the total prospective damages owed on these claims has been decided on the merits, leaving only the amount due to each member of the Class entitled to recover these damages (the Prospective Damages Subclass as defined herein) to be determined.

As required to establish finality under *Strey* v. *Hunt International Resources Corp.*, 696 F.2d 87 (10th Cir. 1987), I have approved a Plan of Allocation that sets forth the procedures and formula for the division of damages among members of the Prospective Damages Subclass and the principles that will guide disposition of unclaimed funds. Even if issues and disputes arise in computing each member's damages entitlement under this Plan, these issues are not similar to, and in fact are separable from, the trespass, nuisance and prospective damages claims decided by the judgment to be entered. In addition, while it is very unlikely that the issues Defendants have indicated they will seek to appeal as a result of the judgment will be mooted or altered by the allocation and disbursement of these damages in accordance with the Plan of Allocation, the judgment also stays execution of the Plan until after any appeal of the judgment is decided. Accordingly, the judgment is final under Rule 54(b). See *Parks* v. *Pavkovic*, 753 F.2d 1397, 1401-02 (7th Cir. 1985) (Posner, J.) (describing circumstances in which finality is achieved when damages due to individual class members remain to be decided); see also *Strey*, 696 F.2d at 88 (order deciding liability and class damages not a final judgment until it also states formula for dividing damages among class members and principles guiding disposition of any unclaimed funds).

I have also determined, as required by Rule 54(b), that there is no just reason to delay entry of this final judgment. No one can seriously dispute that the class trial determined the central claims and issues in this action: each Defendants' liability for continuing trespass and nuisance and the decrease in the value of Class Properties caused by these continuing tortious invasions. The class trial was the product of an extraordinarily long and contentious pretrial process that consumed substantial private and judicial resources and required a number of hotly disputed legal, factual and evidentiary issues to be decided. Substantial additional time and resources will be required to execute the Plan of Allocation approved in this memorandum opinion and to resolve the remaining claims in this action. It would be inefficient and uneconomical for the parties and the court to proceed with this allocation and other claims before the parties have an opportunity to appeal the jury's verdicts on the claims decided in the class trial.

Immediate appeal of the final judgment also does not pose a risk of piecemeal appeals. Although Plaintiffs' medical monitoring claims, and perhaps claims for additional damages for the proven trespass and nuisance pursuant to Restatement § 929, in theory remain pending, these claims are distinct and separate from those decided in the final judgment to be entered on the jury's verdicts. In addition, even if there are subsequent appeals from adjudication of these claims or from the allocation of the damages awarded as a result of the class trial, it is highly unlikely they would present the same issues that the parties have indicated they may raise on appeal from the class trial. Nor can I conceive of a situation (other than settlement) in which appellate review of the issues raised

by the class trial would be mooted by any future developments in this case.

Finally, this action has been pending now for 18 years. The parties, and especially the members of the Plaintiff Class, deserve as speedy a resolution of this case as is possible under the Federal Rules. The opportunity for immediate appeal of the jury's verdicts under Rule 54(b), which would allow all of the parties' concerns regarding the class trial to be heard and decided once and for all, is by far the best means of achieving this end. There is simply no just reason to delay this action further by continuing proceedings in this court when appeal is virtually certain and may affect the nature of these additional proceedings.

Conclusion

For the reasons stated above:

1. Defendants' Renewed Motion for Judgment as a Matter of Law (Doc. 2220) is denied.
2. Defendants' Motion for a New Trial or, in the Alternative, for a Remittitur of Damages (Doc. 2224) is denied.
3. Defendants' Motion for Certification of Interlocutory Appeal (Doc. 2222) is denied.
4. Plaintiffs' Motion for Entry of Judgment (Doc. 2169) is granted in part and denied in part as follows:
   A. Final judgment on the jury's verdicts in the property class trial, in a form consistent with this Memorandum Opinion, shall be entered under Federal Rule of Civil Procedure 54(b);
   B. A Plan of Allocation, in a form consistent with this Memorandum Opinion, shall be entered for

the sum of all compensatory and exemplary damages awarded in this judgment, inclusive of such attorney fees, expenses, costs and pre- and post-judgment interest as have been or may be awarded to Plaintiffs and the Class;

C. Plaintiffs shall prepare and submit to the Court a revised proposed Final Judgment and Plan of Allocation that reflects the rulings set forth in this Memorandum Opinion;

D. Execution of the Final Judgment and Plan of Allocation entered by the Court, as well as proceedings to recover attorney fees, costs and expenses, is stayed until such time as a party files a timely notice of appeal of the Final Judgment or the time for doing so expires. An additional stay of execution may also be obtained upon proper application under Federal Rule of Civil Procedure 62(d).

IT IS SO ORDERED.

Dated this 20th day of May, 2008.

s/John L. Kane
John L. Kane, Senior District Judge
United States District Court

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-CV-00181-JLK

MERILYN COOK, LORREN AND GERTRUDE BABB, RICHARD AND SALLY BARTLETT, AND WILLIAM AND DELORES SCHIERKOLK,
Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION AND THE DOW CHEMICAL COMPANY,
Defendants.

FINAL JUDGMENT

JUNE 2, 2008

Judge John L. Kane.

A jury trial was held in this matter beginning October 6, 2005, and ending February 14, 2006, when the jury returned its verdict. Among the matters tried were claims by the Representative Plaintiffs (as defined below) and the Prospective Damages Subclass (as defined below) arising from prospective invasions of their interests in land, pursuant to the Price-Anderson Act, 42 U.S.C. § 2210, Colorado law, and *Restatement (Second) of Torts* § 930. The Representative Plaintiffs and the Prospective Damages Subclass have moved for entry of judgment on the verdict on those claims pursuant to 28 U.S.C. § 1291

and Fed. R. Civ. P. 54(b). As more fully explained in the Court's Memorandum Opinion and Order on Pending Motions dated May 20, 2008 (Doc. 2261), the Court has determined that the relevant claims for relief have been finally adjudicated and that there is no just reason for delay in entry of judgment on those claims. Accordingly, the Court hereby renders final judgment for the Representative Plaintiffs and the Prospective Damages Subclass, as more fully set forth below.

PARTIES

1. The Representative Plaintiffs are plaintiffs Merilyn Cook, Lorren and Gertrude Babb, Richard and Sally Bartlett, and William and Delores Schierkolk, suing on their own behalf and for a Property Class previously certified by this Court in *Cook* v. *Rockwell Int'l Corp.*, 151 F.R.D. 378 (D. Colo. 1993).

2. The Property Class includes all persons and entities not having opted out of the class who owned, as of June 7, 1989, an interest (other than mortgagee and other security interests) in real property situated within the Property Class Area, exclusive of governmental entities, defendants, and defendants' affiliates, parents, and subsidiaries. The Property Class Area is a geographic area near the former Rocky Flats Nuclear Weapons Plant in Colorado; its boundary is portrayed in the map attached to this Final Judgment as Appendix A. The Prospective Damages Subclass includes all members of the Property Class who still owned their properties as of January 30, 1990.

3. The term "Plaintiffs" is used in this Final Judgment to refer to the Representative Plaintiffs and the Prospective Damages Subclass, collectively.

4. The defendants are Dow Chemical Company ("Dow") and Rockwell International Corporation. The

Boeing Company, a Delaware corporation headquartered in Chicago, Illinois, is successor-in-interest to Rockwell International Corporation and has represented to the Court that it is answerable for any judgment rendered against Rockwell International Corporation in this matter. Accordingly, execution may proceed against The Boeing Company under this Final Judgment as though against Rockwell International Corporation and to the same extent. As used in this Final Judgment, the term "Rockwell" includes both Rockwell International Corporation and The Boeing Company, and the term "Defendants" includes both Dow and Rockwell.

CLAIMS

5. The claims for relief as to which final judgment is hereby entered include all claims by Plaintiffs in this action arising from prospective invasions of their interests in land pursuant to the Price-Anderson Act, 42 U.S.C. § 2210, Colorado law, and *Restatement (Second) of Torts* § 930 and only such claims.

AMOUNT OF JUDGMENT

Compensatory Damages

6. The Court orders that Plaintiffs recover compensatory damages from Dow in the amount of $653,313,678.05, inclusive of prejudgment interest.

7. The Court orders that Plaintiffs recover compensatory damages from Rockwell in the amount of $508,132,861.39, inclusive of prejudgment interest.

8. The total compensatory damages collected by Plaintiffs from all Defendants pursuant to this Final Judgment shall not exceed the sum of $725,904,087.00, inclusive of prejudgment interest.

Exemplary Damages

9. In addition to the sums recoverable by Plaintiffs under Paragraphs 6-8 of this Final Judgment, the Court orders that Plaintiffs recover exemplary damages from Dow in the amount of $110,800,000.00

10. In addition to the sums recoverable by Plaintiffs under Paragraphs 6-9 of this Final Judgment, the Court orders that Plaintiffs recover exemplary damages from Rockwell in the amount of $89,400,000.00

Costs, Fees, and Expenses

11. The Court orders that Plaintiffs recover their costs of suit herein. Further proceedings on costs, attorneys' fees, and related non-taxable expenses pursuant to Fed. R. Civ. P. 54(d)(2) shall be stayed until such time as the Court may later direct, except that plaintiffs may submit a bill of costs at any time after this Final Judgment is entered.

Post-Judgment Interest

12. Post-judgment interest is payable on all the above amounts at the rate prescribed in 28 U.S.C. § 1961, from the date this Final Judgment is entered until the date this Final Judgment is paid.

STAY OF EXECUTION

13. Execution on this Final Judgment against Dow is STAYED until: (a) such time as Dow files a timely notice of appeal, in which case Dow may secure an additional stay of execution pursuant to Fed. R. Civ. P. 62(d) and effective upon the Court's approval of Dow's supersedeas bond or such alternative security as the Court may approve; or (b) expiration of the time allowed for filing any appeal from this Final Judgment, if Dow files no timely notice of appeal.

14. Execution on this Final Judgment against Rockwell in STAYED until: (a) such time as Rockwell files a timely notice of appeal, in which case Rockwell may secure an additional stay of execution pursuant to Fed. R. Civ. P. 62(d) and effective upon the Court's approval of Rockwell's supersedeas bond or such alternative security as the Court may approve; or (b) expiration of the time allowed for filing any appeal from this Final Judgment, if Rockwell files no timely notice of appeal.

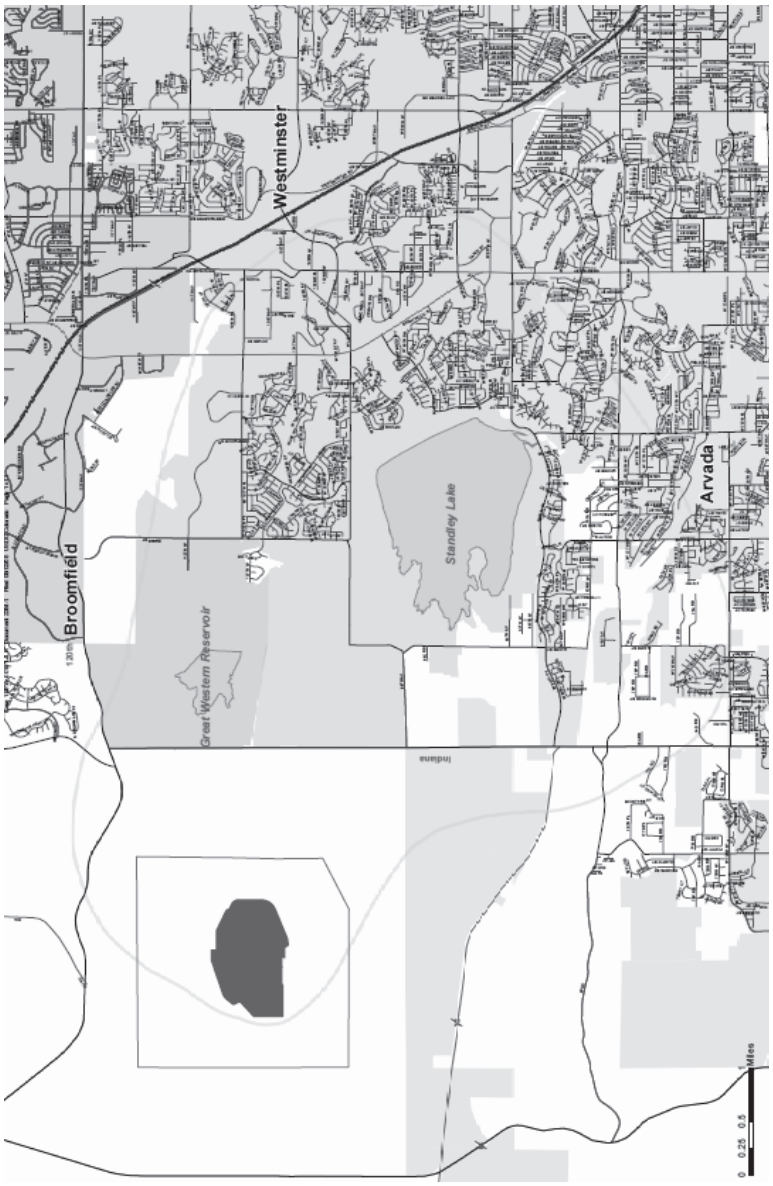
DEPOSIT OF FUNDS

15. Subject to further order of the Court, any funds recovered under this Final Judgment shall be deposited in United States government treasury bills or notes, and/or in such other investments as may be approved by the Court from time to time, pending implementation of the Plan of Allocation as approved by the Court and attached to this Final Judgment as Appendix B. Merrill G. Davidoff of Berger & Montague, P.C., is hereby appointed as escrow agent.

Dated this 2nd day of June, 2008.

s/John L. Kane
John L. Kane, Senior District Judge
United States District Court

FINAL JUDGMENT – APPENDIX A



FINAL JUDGMENT – APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-CV-00181-JLK

MERILYN COOK, LORREN AND GERTRUDE BABB, RICHARD AND SALLY BARTLETT, AND WILLIAM AND DELORES SCHIERKOLK,
Plaintiffs,
v.
ROCKWELL INTERNATIONAL CORPORATION AND THE DOW CHEMICAL COMPANY,
Defendants.

PLAN OF ALLOCATION

JUNE 2, 2008

Judge John L. Kane.

Before the Court is plaintiffs' proposed plan of allocation. The Court being fully advised in the premises, and for good cause shown, the Court hereby ORDERS as follows:

A. Definition of Terms

1. For purposes of this Order:

a. The term "Class" means the Property Class certified by the Court.

b. The term "Class Area" means the geographic area bounding the Property Class as certified by the Court.

c. The "Prospective Damages Subclass" includes all Class members who: (i) owned a property within the Class Area on June 7, 1989; and (ii) still owned the property as of January 30, 1990.

d. The "Non-Prospective Damages Subclass" includes all Class members who: (i) owned a property within the Class Area on June 7, 1989; but (ii) no longer owned the property as of January 30, 1990.

e. The term "Judgment Fund" means the sum of all compensatory and exemplary damages awarded in the trial of the Class claims in this matter and allowed after defendants' appeal (or after the expiration of time allowed for filing such appeal, if no appeal is filed within that time), inclusive of such attorneys' fees, expenses, costs, and pre- and post-judgment interest as have been or may be awarded to plaintiffs and the Prospective Damages Subclass, and inclusive of any interest earned through such investments as the Court may direct following defendants' payment of the judgment.

f. The term "Claims Administrator" means the officer appointed by the Court pursuant to this Order to recommend an allocation of damages and to perform such incidental and additional duties as are set forth in this Order or as the Court may subsequently direct.

g. The term "Net Class Award" means the Judgment Fund, less: (i) service awards to the representative plaintiffs; (ii) fees, expenses, and costs awarded from the Judgment Fund to counsel for plaintiffs and the Class; (iii) compensation and expenses paid or reimbursed to the Claims Administrator; and (iv) any additional admin-

istrative expenses that may be charged against the Judgment Fund at the Court's direction.

h. The term "Net Class Commercial Property Award" means the portion of the Net Class Award allocable to the commercial property category under the formula set forth in paragraph 9 of this Order.

i. The term "Net Class Residential Property Award" means the portion of the Net Class Award allocable to the residential property category under the formula set forth in paragraph 9 of this Order.

j. The term "Net Class Vacant Property Award" means the portion of the Net Class Award allocable to the vacant property category under the formula set forth in paragraph 9 of this Order.

B. Appointment of Claims Administrator

2. The Claims Administrator shall be appointed following remand from defendants' appeal, or upon expiration of defendants' time to file an appeal, whichever occurs first.

C. Duties of the Claims Administrator

3. The Claims Administrator shall be responsible for developing a recommended allocation ("Proposed Allocation") of the Net Class Award. The Proposed Allocation shall be developed under the guidelines set forth in this Order, under supervision from the Court, and subject to ultimate approval by the Court.

4. The Claims Administrator shall have such additional duties in connection with the allocation of damages and administration of claims as are set forth in this Order or in subsequent directives from this Court.

5. The Claims Administrator shall report to the Court from time to time to advise the Court of its progress in discharging its responsibilities under this Order, on such

occasions and at such intervals as the Claims Administrator may deem appropriate or as the Court may direct.

6. The Claims Administrator is authorized to make reasonable expenditures to secure the resources and assistance reasonably necessary to the performance of its duties. Such expenses, and the compensation of the Claims Administrator at its usual and customary hourly rates, will be paid and reimbursed from the Judgment Fund periodically, as incurred.

7. The Claims Administrator shall not commence the performance of its duties under this Order until such time as the case is remanded to this Court from defendants' appeal (or until after the expiration of the time allowed for filing such appeal, if no appeal is filed within that time).

D. Procedures and Principles for the Proposed Allocation

8. For each Class property, the Claims Administrator shall consult appropriate records and data, from Jefferson County, Colorado, and such other sources as the Claims Administrator may reasonably determine to be suitable and reliable, for the purposes of: (a) determining ownership of the property as of June 7, 1989, and January 30, 1990; (b) associating the property, and its owner(s) as of June 7, 1989, with the Prospective Damages Subclass or the Non-Prospective Damages Subclass; and (c) assigning the property to one of the three property categories from the jury's verdict form (i.e., commercial, residential, and vacant).

9. For each of the three property categories, the Claims Administrator shall compute the category's share of the Net Class Award. The total sum allocable to each category shall bear the same ratio to the Net Class

Award as the jury's award of compensatory damages for that category bears to the total of all compensatory damages awarded by the jury for all three categories combined. Thus the total sum allocable to commercial properties (the Net Class Commercial Property Award) will be 3.196% ($5,651,252 ÷ $176,850,340) of the Net Class Award; the total sum allocable to residential properties (the Net Class Residential Property Award) will be 81.537% ($144,199,088 ÷ $176,850,340) of the Net Class Award; and the total sum allocable to properties in the vacant land category (the Net Class Vacant Land Award) will be 15.267% ($27,000,000 ÷ $176,850,340) of the Net Class Award.

10. Based on Jefferson County tax assessment records and such other sources as the Claims Administrator may reasonably determine to be suitable and reliable, the Claims Administrator shall determine, for each Class property, the property's assessed value, expressed as a fraction of the total assessed value of all Class properties within the same category (the property's "Fractional Allocable Share").

11. Subject to such equitable adjustments as the Claims Administrator may recommend and the Court may adopt, the Proposed Allocation shall compute an award for each property in the Prospective Damages Subclass, based on the property's Fractional Allocable Share of the Net Class Award apportioned to that category. For example, for a residential property, the Proposed Allocation will present an award based on the property's Fractional Allocable Share multiplied by the Net Class Residential Property Award. The Claims Administrator shall memorialize a similar calculation for each property associated with the Non-Prospective Damages Subclass (see paragraph 14, *infra*).

E. Procedures for Payment of Claims

12. Prior to disbursement of any funds to members of the Prospective Damages Subclass, the Court will establish appropriate procedures for approval of the Proposed Allocation, for notifying Prospective Damages Subclass members of their awards under the Proposed Allocation, and for proceedings through which Prospective Damages Subclass members have an opportunity to seek adjustment of their awards under the Proposed Allocation.

F. Disposition of Unclaimed Funds

13. Subject to further order of the Court, any funds allocable to the Prospective Damages Subclass that remain unclaimed, after due allowance of a period for late claims, shall be distributed to members of the Prospective Damages Subclass on a pro rata basis.

G. *Cy Pres* Award

14. That portion of the Net Class Award allocable to properties in the Non-Prospective Damages Subclass, as computed pursuant to paragraph 11, *supra*, shall be assigned to a *cy pres* fund, for such subsequent distribution as the Court may later direct. In aid of such distribution, the Court will direct plaintiffs, at or near the time that approval is sought for the Proposed Allocation, to identify options and recommendations for disbursing the *cy pres* fund in a manner consistent with *cy pres* principles, as set forth at pages 55-57 of this Court's Memorandum Opinion and Order on Pending Motions dated May 20, 2008 (Doc. 2261).

Dated this 2nd day of June, 2008.

s/John L. Kane
John L. Kane, Senior District Judge
United States District Court

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOS. 08-1224, 08-1226, 08-1239

MERILYN COOK; WILLIAM SCHIERKOLK, JR.; DELORES SCHIERKOLK; RICHARD BARTLETT; LORREN BABB; GERTRUDE BABB; MICHAEL DEAN RICE; BANK WESTERN; THOMAS L. DEIMER; RHONDA J. DEIMER; STEPHEN SANDOVAL; PEGGY J. SANDOVAL; SALLY BARTLETT,
Plaintiffs-Appellees-Cross-Appellants,

v.

ROCKWELL INTERNATIONAL CORPORATION AND DOW CHEMICAL COMPANY,
Defendants-Appellants-Cross-Appellees.

AMERICAN NUCLEAR INSURERS; NUCLEAR ENERGY INSTITUTE, INC.,
Amici Curiae.

ORDER

DECEMBER 9, 2010

Before BRISCOE, Chief Judge, TACHA, KELLY, LUCERO, MURPHY, HARTZ, O'BRIEN, TYMKOVICH, GORSUCH, and HOLMES, Circuit Judges.

These matters are before the court on plaintiffs-appellees' *Petition For Rehearing En Banc*. We also have a response from the defendants-appellants.

The implicit request for panel rehearing contained in the en banc suggestion is denied by the panel that rendered the decision.

The request for rehearing en banc was also transmitted to all of the judges of the court who are in regular active service. A poll was requested and a majority of the active judges voted to deny rehearing en banc. Judge Lucero would grant the request for en banc rehearing. His dissent from the denial of rehearing is attached to this order.

Entered for the Court,

/s/

ELISABETH A. SHUMAKER
Clerk of Court

Cook v. *Rockwell International Corp.*,
08-1224, 08-1226 & 08-1239
LUCERO, J., Dissent to the Denial of En Banc Review

After eighteen years of litigation, a four-month trial, and three weeks of deliberation, a jury verdict favoring owners of approximately 15,000 Colorado properties has been set aside by the panel on the basis of three declarations of error. In my opinion each proposition is worthy of reconsideration. Particularly so because the panel's decision becomes the law of the case.

The three points of declared error are: (1) that the fear of cancer from a small but proven presence of plutonium on an owner's land is a "scientifically unfounded risk," is irrational, and inadequate as a matter of Colorado law for a nuisance claim, *Cook* v. *Rockwell Int'l Corp.*, 618 F.3d 1127, 1134, 1145 (10th Cir. 2010); (2) that plutonium cannot support tangible trespass under Colorado law because plutonium is "impalpable and imperceptible by the senses," *id.* at 1148; and (3) that plaintiffs must prove a "nuclear incident" as a threshold requirement to the initiation of any action, including one for plutonium contamination, under the Price-Anderson Act ("PAA"), *id.* at 1138, 1140.

Federal and Colorado law require neither the reversal of this jury verdict, nor the high barrier the panel has set for its mandated retrial. Under the present status of this case, fair retrial of the case becomes impossible. I respectfully dissent from the denial of en banc review.

First, Colorado law provides that nuisance is the substantial interference with use and enjoyment of a plaintiff's property, *Public Service Co. of Colorado* v. *Van Wyk*, 27 P.3d 377, 391 (Colo. 2001), and that interference is substantial if "it would have been offensive or caused inconvenience or annoyance to a reasonable person in the

community," *Saint John's Church in the Wilderness* v. *Scott*, 194 P.3d 475, 479 (Colo. App. 2008). Evidence was presented in the cases at bar of the presence of plutonium, including scientific testimony that "any plutonium exposure, no matter how small, increases the risk of cancer." *Cook*, 618 F.3d at 1134. Nevertheless, the panel opinion unilaterally voids the jury's acceptance of the evidence and declares as a matter of law that the evidence presents "a scientifically unfounded risk" upon which reasonable fear may be based. *Id.* at 1145.

Second, in *Van Wyk*, 27 P.3d 377, the Colorado Supreme Court ruled that "noise, . . . electromagnetic fields and radiation waves" coming from electrical lines constitute an intangible invasion of property. *Id.* at 387. Relying on *Van Wyk*, the panel opinion holds that plutonium cannot be the subject of a tangible trespass because it is "impalpable and imperceptible by the senses." *Cook*, 618 F.3d at 1148. This is scientifically unsupportable. Plutonium is an element with mass and dimensions. It is not an electromagnetic wave. Science will not come to the aid of such conclusions.

Third, the panel requires that plaintiffs prove a "nuclear incident" as an element of a PAA claim. The problem with this conclusion is twofold. A. The panel applies the incorrect standard of review. Because the defendants did not present an instruction or object to the lack of an instruction defining a "nuclear incident," the district court's failure to instruct should have been reviewed for plain error at best. See Fed. R. Civ. P. 51(d)(2). B. By any standard, there was no error. The panel confuses the PAA's jurisdictional requirements with its substantive

elements.[1] PAA requires a showing of a "nuclear incident" for jurisdictional purposes. See 42 U.S.C. § 2014(hh) (referring to the jurisdictional requirements of § 2210(n)); see also *June* v. *Union Carbide Corp.*, 577 F.3d 1234, 1248 (10th Cir. 2009) (affirming the dismissal of PAA claims which did not allege a "nuclear incident" for lack of jurisdiction); *Gilberg* v. *Stepan Co.*, 24 F. Supp. 2d 325, 340 (D.N.J. 1998) ("Without a nuclear incident, there is no claim for public liability, and without a claim for public liability, there is no federal jurisdiction under Price-Anderson."). However, state law determines liability for PAA claims. See 42 U.S.C. § 2014(hh). The panel does not decide the jurisdictional question; instead, it improperly applies a jurisdictional statute to impute an instructional error on the merits. A jurisdictional requirement cannot be changed into a substantive element of a PAA claim.

Because the en banc court ought to undo the panel's damaging alchemy, I respectfully **DISSENT**.

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[1] The panel has found jurisdiction properly exists under 28 U.S.C. § 1331. *Cook*, 618 F.3d at 1137. Even if the panel's analysis did apply to the jurisdictional question, because there was proven damage in the form of nuisance and trespass, there was also a "nuclear incident," making jurisdiction proper.

APPENDIX D
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-CV-00181-JLK

MERILYN COOK, *ET AL.*,
Plaintiffs,

v.

ROCKWELL INTERNATIONAL CORPORATION
AND THE DOW CHEMICAL COMPANY,
Defendants.

NOTICE OF FINAL JURY INSTRUCTIONS

FEBRUARY 16, 2006

Judge John L. Kane.

* * * * *

INSTRUCTION NO. 3.6

Nuisance Claim

Elements of the Nuisance Claim

Plaintiffs claim that Defendants, through their operation of the Rocky Flats plant, caused a nuisance. In order for the Plaintiff Class to recover from either Dow or Rockwell or both of them on their claim of nuisance, you must find Plaintiffs have proved each of the following elements by a preponderance of the evidence:

1. Dow or Rockwell or both of them interfered with Class members' use and enjoyment of their properties in the Class Area in one or both of these two ways:
   A. By causing Class members to be exposed to plutonium and placing them at some increased risk of health problems as a result of this exposure (see Instruction Nos. 3.7, 3.18); and/or
   B. By causing objective conditions that pose a demonstrable risk of future harm to the Class Area (see Instruction Nos. 3.7, 3.18);
2. This interference with Class members' use and enjoyment of their properties was both "unreasonable" and "substantial" (see Instruction Nos. 3.8 – 3.12);
3. The activity or activities causing the unreasonable and substantial interference were either "intentional" or "negligent" (see Instruction Nos. 3.13 – 3.16); and
4. It appears the unreasonable and substantial interference with the use and enjoyment of property caused by Dow and/or Rockwell's intentional or negligent conduct will continue indefinitely (see Instruction No. 3.17).

You must consider whether the Plaintiffs have proved these elements against each Defendant. If you find that any one of these elements has not been proved as to a particular Defendant, then your verdict on the nuisance claim must be for that Defendant. On the other hand, if you find Plaintiffs have proved each of these elements as to a particular Defendant, then your verdict on the

nuisance claim must be for Plaintiffs and against that Defendant.

INSTRUCTION NO. 3.7

Nuisance Claim

First Element: Interference with Use and Enjoyment of Property

The purpose of a nuisance claim is to protect a landowner's right to use and enjoy his property. Although there are countless ways that a person or company can interfere with this right, for purposes of deciding the first element of the Plaintiff Class' nuisance claim, you may only consider the two possible forms of interference with Class members' use and enjoyment of their property that I stated in Instruction No. 3.6 and will describe further here.

The first possible form of class-wide interference is whether one or both of Defendants' activities at Rocky Flats interfered with Class members' use and enjoyment of their properties by causing Class members to be exposed to plutonium and placing them at some increased risk of health problems as a result of this exposure. To find that Plaintiffs proved this form of interference, you do not need to find that all Class members were exposed to plutonium at the same time or by the same methods or to the same degree or that they all incurred the same level of health risk as a result of exposure to plutonium. It is enough to find for purposes of this form of interference with use and enjoyment of property that the Class members were exposed to plutonium in some way as a result of one or both Defendants' activities and incurred some increment of increased health risk as a result.

There may be some nonresident Class members—that is, Class members who owned property within the Class Area but without living there. If you find that occupancy of their properties would have resulted in exposure to plutonium in some way, causing some increment of increased health risk, as a result of one or both Defendants' activities, then you should find that the Class members too suffered an interference with the use and enjoyment of their properties.

The second possible form of interference you must consider in deciding this first element of the Plaintiff Class' nuisance claim is whether one or both of Defendants' activities at Rocky Flats interfered with Class members' use and enjoyment of their properties by creating objective conditions that pose a demonstrable risk of future harm to the Class Area. For example, if plutonium or other hazardous substances present on or in the vicinity of Rocky Flats is at risk of being released to the Class Area—through natural forces, cleanup activity, the conduct of others and/or accidents—and could cause harm to properties in the Class Area by increasing the health risk to residents or impairing the future use of their land in some way, then this would be an objective condition that poses a demonstrable risk of future harm to the Class Area.

In order for you to find interference based on the threat or risk of future harm, you also need not find that the future harm will occur and affect the whole of the Class Area. You need only find that conditions exist that present the *potential* for such class-wide harm to occur.

You need not find that all Class members were subject to the same form of interference with use and enjoyment of their properties. It is enough if you find the Class members were all subject to at least one form of inter-

ference described in this instruction, even if some Class members were subject only to the first form of interference, others only to the second, and still others to both.

In deciding whether either or both forms of possible class-wide interference exists, you should not consider whether individual Plaintiffs or Class members are or might be fearful, anxious or otherwise disturbed by any real or perceived risks relating to Rocky Flats and the Defendants' activities there or the conditions they left behind. Individual reactions to these matters are not relevant to the question of whether a class-wide interference exists.

You also should not consider in deciding this element of the nuisance claim whether Defendants' activities caused any decrease in the value of Class members' properties. The law does not consider a decrease in property value to be an interference with the use and enjoyment of property.

If you find that Plaintiffs have proved either Dow or Rockwell or both of them interfered with Class members' use and enjoyment of property in one or both of the ways I described in Instruction No. 3.6 and in this instruction, then you must find that Plaintiffs have proved the first element of their nuisance claim with respect to the Defendant or Defendants who caused or contributed to the proven interference. If, however, you find that neither Defendant interfered with Class members' use and enjoyment of property in at least one of these ways, then you must find Plaintiffs have not proved this element of their nuisance claim against either Defendant.

INSTRUCTION NO. 3.8

Nuisance Claim

Second Element: "Substantial" and "Unreasonable" Interference—Introduction

Practically all human activities interfere to some extent with other people or involve some risk of interference. One such possible interference is with another person's right to use and enjoy his property. The law of nuisance does not attempt to hold an actor liable for all interferences with this right, but rather only for those interferences that are both "substantial" and "unreasonable." That is why this is an element of Plaintiffs' nuisance claim. The definitions of these terms are set out in Instruction Nos. 3.9 and 3.10.

In deciding whether Plaintiffs have proven that the interference they claim is substantial and unreasonable, you may only consider any interference with Class members' use and enjoyment of property you find based on Instruction Nos. 3.6 and 3.7. Thus, if you find Plaintiffs proved that Dow and/or Rockwell interfered with Class members' use and enjoyment of property in only one of the ways stated in these instructions, you may only consider this proven form of interference in deciding whether Plaintiffs have proved a substantial and unreasonable interference. If, however, you find Plaintiffs proved that Dow and/or Rockwell interfered with Class members' use and enjoyment of property in both of the ways stated in these instructions, you should consider these two forms of interference together to decide whether the total interference caused by each Defendant was substantial and unreasonable.

INSTRUCTION NO. 3.9

Nuisance Claim

Second Element: "Substantial" Interference—Defined

An interference with a person's right to use and enjoy their land is "substantial" if the interference is significant enough that a normal person in the community would find it offensive, annoying or inconvenient. In this case, that means you must determine whether a reasonable landowner of normal sensibilities would find the proven interference caused by Dow or Rockwell to be offensive, annoying or inconvenient. "Normal sensibilities" for these purposes means a person who is neither unusually sensitive nor unusually insensitive to the interference you are considering.

In deciding whether any interference proven by Plaintiffs is substantial under this test, you must consider only the magnitude or level of interference that is common to the Class as a whole, and not any more severe level of interference that may have been suffered by some Class members but not by others.

Evidence that the value of Class members' properties has diminished because of any interference proven by Plaintiffs is evidence that the interference is substantial under the test stated in this instruction. This is so because normal members of the community are part of the market that determines the value of properties, and if they consider an interference with the use and enjoyment of these properties to be offensive, annoying or inconvenient, they may place a lower value on the property than they would if the interference did not exist. Evidence that Class Properties have a lower value because of any proven interference is not necessary, however, for you to

find that the interference is substantial under the test I just described to you.

INSTRUCTION NO. 3.10

Nuisance Claim

Second Element: "Substantial" Interference—
Balancing Test

In an action for damages, such as this case, an interference with a person's right to use and enjoy their land is "unreasonable" if the gravity of the harm outweighs the utility of the conduct that caused it. Accordingly, to determine whether a proven interference is unreasonable in this case, you must consider and balance the gravity of the harm to Class members against the utility of [ ] Dow and Rockwell's conduct at Rocky Flats and determine whether the gravity of this harm outweighs the utility of this conduct.

I will tell you more about this balancing test in my next instructions, but I want to caution you now that it does not mean that Dow and Rockwell can interfere with Class members' use and enjoyment of their properties as long as their activities at Rocky Flats served an important purpose or these activities are deemed more valuable or profitable than Class members' use of their land. Instead, you must consider a number of factors as part of the balancing test to decide whether any interference Defendants caused was unreasonable. I will describe those factors for you in a moment. (See Instruction Nos. 3.11 and 3.12.)

In considering these factors and deciding whether any interference by Dow or Rockwell was unreasonable, you must also use an objective perspective. In other words, the question is not how Plaintiffs, Class members or the

Defendants would consider the gravity of the harm or the utility of Defendants' conduct, or the judgment they would make about whether any proven interference is unreasonable. Instead, the question is whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider the interference to be unreasonable.

INSTRUCTION NO. 3.11

Nuisance Claim

Second Element: Unreasonable Interference: Factors Regarding Gravity of the Harm

The gravity of the harm refers to the gravity of the proven interference with Class members' use and enjoyment of their property. The factors you should consider in assessing the gravity of this harm are:

1. The extent of the harm involved.

   The extent of the harm depends on both the degree of the harm and its duration. You can consider both harm that has actually been incurred and the risk of future harm. In assessing the extent of the harm, you must also consider only harm that is common to the class as a whole, and not any more severe harm that may have been suffered by some Class members but not by others.

2. The character of the harm involved.

   This factor refers to the kind of harm suffered by the Class members.

3. The social value of the type of use or enjoyment of property that has been [ ] harmed.

   This factor considers the social value of the use to which the Class members' lands are being put.

The social value of a particular type of use depends on the extent to which the use or uses advances or protects the general public good.

4. The suitability of the particular use or enjoyment harmed to the character of the locality.

   This factor considers whether the particular use or enjoyment the Class members make of their land in the Class Area is suitable to this area.

5. The burden on the Class members of avoiding the harm.

   This factor is considered when it is possible for the landowner to take some action to avoid the harm.

INSTRUCTION NO. 3.12

Nuisance Claim

Second Element: Unreasonable Interference: Factors Regarding Utility of the Conduct

There are also certain factors you must consider in assessing the utility of the conduct that caused the harm, that is, any proven interference. Some of these factors focus directly on the conduct causing the harm, while other factors focus on any actions Dow or Rockwell have taken to avoid or compensate others for any interference they caused.

The factors focusing on the conduct causing the harm include:

1. The social value of the primary purpose of this conduct.

   It is undisputed that the primary purpose of the conduct that allegedly interfered with Class members' right to use and enjoy their properties was to

manufacture nuclear weapons components. The social value of this purpose depends on the extent to which it advanced or protected the general public good. The parties agree that the manufacture of nuclear weapons at Rocky Flats, as a general matter, advanced the public good by protecting national security.

2. The suitability of the conduct to the character of the locality.

   This factor considers whether the Defendants' conduct is suitable to the area in which it occurred.

In evaluating the utility of the conduct causing the harm, you must also consider whether and to what extent the actor causing the harm took steps to address the consequences of its conduct. Thus, you must consider the following factors focusing on any actions Dow or Rockwell have taken to avoid or compensate others for any interference they caused:

3. The impracticability of preventing or avoiding the interference.

   If it was practicable for Dow or Rockwell to avoid causing any interference with Class members' use and enjoyment of property, and they did not take the necessary measures to do so, then the law considers their conduct to have no utility, regardless of its social value. Any interference caused by Dow and/or Rockwell was practicably avoidable if by some means the company could have substantially reduced the harm without incurring prohibitive expense or hardship in its operation of Rocky Flats. If you find it was practicable for Dow or Rockwell to avoid any harm they caused under this test, then you must find the gravity of the harm

outweighed the utility of Dow or Rockwell's conduct, and that any interference proved by Plaintiffs was unreasonable.

4. The financial burden to compensate others for any interference caused by Dow and/or Rockwell's activities.

   A nuisance action for damages seeks to place the financial burden for any interference with the use and enjoyment of property on the actor that caused this harm. The financial burden of this cost is therefore a significant factor in determining whether the conduct of causing the harm without paying for it is unreasonable. You may find that Dow or Rockwell's conduct lacks sufficient utility to outweigh any interference it caused if you find it would be unreasonable for Class members to bear this cost without compensation.

INSTRUCTION NO. 3.13

Nuisance Claim

Third Element: "Intentional" or "Negligent" Conduct

As stated in Instruction No. 3.6, the third element Plaintiffs must prove to prevail on their nuisance claim is that the activity or activities causing the unreasonable and substantial interference were either "intentional" (see Instruction No. 3.14) or "negligent" (see Instruction No. 3.15). Thus, Plaintiff[s] must do more than show that the existence of Rocky Flats interfered with Class members' use and enjoyment of their properties. They must show that either Defendant or both of them engaged in intentional or negligent conduct at Rocky Flats that caused such an interference.

You do not need to find that all of the conduct that caused any substantial and unreasonable interference was intentional or that all of it was negligent in order to find that Plaintiffs proved this element of their nuisance claim. Proof that a substantial and unreasonable interference resulted from a combination of intentional conduct and negligent conduct is sufficient to prove this element.

INSTRUCTION NO. 3.14

Nuisance Claim

Third Element: Definition of "Intentional" Conduct

The conduct that results in an interference with another's use and enjoyment of property is considered "intentional" if it meets any of the following three tests:

(1) The defendant knew that its conduct would interfere with others' use and enjoyment of their property; or

(2) The defendant knew it was substantially certain that its conduct would interfere with others' use and enjoyment of their property; or

(3) The defendant learned that its conduct was interfering with or was substantially certain to interfere with others' use and enjoyment of their property and yet continued this conduct.

INSTRUCTION NO. 3.15

Nuisance Claim

Third Element: Definition of "Negligent" Conduct

The generation, use, storage and disposal of plutonium and other hazardous radioactive and non-radioactive substances as part of the operation of a nuclear weapons

plant are inherently dangerous activities. As a result, Dow and Rockwell were required to exercise the highest possible degree of skill, care, diligence, and foresight in conducting these activities, according to the best technical, mechanical and scientific knowledge and methods that were practical and available at the time. If either Dow or Rockwell or both of them did not fulfill this duty when they performed any activities that caused or contributed to a substantial and unreasonable interference (as defined in these instructions), then their conduct was negligent.

* * * * *

INSTRUCTION NO. 3.17

Nuisance Claim

Fourth Element: Continuing Nuisance

As stated in Instruction No. 3.6, the fourth element Plaintiffs must prove to prevail on their nuisance claim is that it appears that the unreasonable and substantial interference with the use and enjoyment of property caused by Dow and/or Rockwell's intentional or negligent conduct will continue indefinitely. In deciding this element, it is not necessary for you to find that the interference meeting these requirements will last forever. Instead, you should consider whether there is any reason to expect that this interference will end at any definite time in the future. If you find there is no reason to expect this interference to end by a definite time, then you must find it appears the interference will continue indefinitely.

INSTRUCTION NO. 3.18

Both Claims

Causation

The word "cause" as used in these instructions means an act or failure to act that in natural and probable sequence produced the claimed effect. It is a cause without which the claimed effect would not have happened.

* * * * *

INSTRUCTION NO. 3.22

Both Claims

Measure of Actual Damages

Plaintiffs seek an award of actual damages based on the decrease in the value of properties in the Class Area caused by the trespass and/or nuisance committed by Dow or Rockwell or both of them. This type of actual damages is sometimes called diminution in property value.

The diminution in property value that Plaintiffs may recover here is measured by the difference between the actual value of the Class Properties and the value these Properties would have had if Dow or Rockwell or both of them had not committed the trespass and/or nuisance proved by Plaintiffs. In other words, you must compare the actual value of the Class Properties to what their value would have been "but for" the trespass and/or nuisance, and the difference is the diminution in property value that Plaintiffs can recover as actual damages in this case.

In a case like this, the law requires that you measure the amount of any such diminution in Class property values at a particular point in time. That point is the time

or time period when the injurious situation became "complete" and "comparatively enduring." The injurious situation is "complete" when the effects of the trespass or nuisance are known to their full extent. It is "comparatively enduring" when there is no reason to expect that these effects will end at a definite time in the future. When the injurious situation became "complete" and "comparatively enduring" in this case is a question you will decide as I will describe in just a moment.

Plaintiffs contend that the diminution in the value of Class properties should be measured as of the period between June 6, 1989, when the FBI and U.S. Environmental Protection Agency searched Rocky Flats as part of their investigation into alleged wrongdoing by Rockwell, and March 26, 1992, when Rockwell pled guilty to certain environmental crimes at Rocky Flats. Plaintiffs allege this is the right time period to measure their actual damages because this is when the injurious effects of Defendants' alleged trespass and nuisance became "complete" and "comparatively enduring."

Plaintiffs have also presented evidence, however, of the injurious effects of the alleged trespass and nuisance in the larger period of 1988 through 1995. If you find these effects became "complete" and "comparatively enduring" at any time during this period, therefore, you may award actual damages to Plaintiffs measured as of the time you find the effects became "complete" and "comparatively enduring." If you do not find the injurious effects of the alleged trespass and/or nuisance became "complete" and "comparatively enduring" some time during the 1988-1995 period, then you should not award actual damages to Plaintiffs.

Accordingly, to decide whether Plaintiffs are entitled to the actual damages they seek in this case, you must

determine whether Plaintiffs have proved by a preponderance of the evidence that:

1. The injurious situation became "complete" and "comparatively enduring" (as defined in this instruction) sometime between January 1, 1988 and December 31, 1995; and
2. As of the time you find the injurious situation became "complete" and "comparatively enduring," the actual value of the Class Properties was less than the value these Properties would have had but for the trespass and/or nuisance committed by Dow or Rockwell or both of them; and
3. As of the time you find the injurious situation became "complete" and "comparatively enduring," the amount of the difference between the actual value of Class Properties and what their value would have been but for the trespass and/or nuisance (see Instruction No. 3.23).

INSTRUCTION NO. 3.23

Both Claims

Aggregate Damages and Percentage Diminution

If you find Plaintiffs have proved actual damages as described in instruction No. 3.22, you will be asked to report your findings regarding the amount of their actual damages in several ways. First, you will be asked to decide both the total amount of damages suffered by the entire Class as a whole (called "aggregate" Class damages), and the percentage diminution in property values in the Class Area as a whole.

Additionally, you will be asked to decide the amount of actual damages and percentage diminution in

Class property values for three different types of property in the Class: vacant land, commercial property and residential property.

You will not be asked to determine the amount of actual damages suffered by any individual Class member. Individual Class members' share of any damages you award will be determined in later proceedings. Therefore, you must only concern yourselves with the total, class-wide measures of actual damages I just described.

INSTRUCTION NO. 3.24

Both Claims

Matters Not Relevant to Determining Actual Damages

In determining any actual damages to be awarded in this case, you should not consider or award any diminution in value caused solely by the proximity of the Class Area to Rocky Flats. Instead, you must follow my directions in Instruction No. 3.22 to award damages for diminution in value you find was caused by any trespass or nuisance you find Dow or Rockwell or both of them committed.

In determining whether Plaintiffs have proved actual damages, you also should remember that Plaintiffs are not required to prove that any diminution in value caused by Dow or Rockwell's activities at Rocky Flats came into existence before or after the FBI raid or some other specific event. Instead, as stated in Instruction No. 3.22, the measure of damages to be proved by Plaintiffs is the value the Class Properties would have had "but for" any trespass or nuisance by Dow and/or Rockwell.

APPENDIX E

EMCBC-00589-08

CONTRACT NUMBERS AT-(29-1)-1106 (DOW) AND DE-AC04-76DPO3533 (ROCKWELL); *COOK, et. al.* v. *ROCKWELL INTERNATIONAL CORP. AND THE DOW CHEMICAL CO.*, No. 90-K-181 (DISTRICT OF COLORADO)

JUNE 5, 2008

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Environmental Management
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John R. Stocker, Esq.
Rockwell International Company
550 Hot Springs Road
Santa Barbara, CA 93108

Dear Ms. Looby and Mr. Stocker:

I am the Contracting Officer responsible for (i) the contract executed by and between the United States Atomic Energy Commission (the contract obligations of which were transferred to the United States Department of Energy ("DOE")) and The Dow Chemical Company dated January 18, 1951, identified as Contract No. AT-(29-1)-1106, including all modifications thereto, (ii) the contract executed by and between the United States Atomic Energy Commission (the contract obligations of which were transferred to the DOE) and Rockwell International Corporation effective June 30, 1975, identified as Contract No. DE-AC04-76DP03533, and (iii) the Rocky Flats Plant Three Party Transfer Agreement between DOE, Rockwell, and EG&G Rocky Flats, Inc. effective January 1, 1990, (collectively the "Contracts"). The term "Dow" as used herein shall mean The Dow Chemical Company and all of its successors in interest. The term "Rockwell" as used herein shall mean Rockwell International Corporation and all of its successors in interest, including The Boeing Company.

I am addressing this letter to the representatives of Dow and Rockwell concerning the entry of judgment and ultimate liability associated with the plaintiffs' claims in the litigation known as Cook, et al v. Rockwell International Corp. and The Dow Chemical Co., Case No. 90-K-181, which is currently pending in the U.S. District Court for the District of Colorado (the "Cook lawsuit"). I have authority to issue direction on behalf of the United States Government with respect to the Contracts, as well as, unlimited authority to bind the United States Government with respect to the Contracts, subject to the limitations contained in the Federal Acquisition Regulation and to the following (1) Department of Energy Acquisition Regulation; (2) EM Review and Approval Process; (3) Unlim-

ited for Procurement Contracts, including Interagency Agreements, Sales Contracts, and Financial Assistance Instruments.

Pursuant to the Contracts, DOE has directed Dow and Rockwell to proceed with the defense of the Cook lawsuit from the very outset of this case and at all points thereafter, including up to and through the trial in this case and through all post-trial motions. See, e.g., Dow Contract Modification 112, Article XIV and Rockwell Contract Modification 124, Clause 76. On August, 1, 1996, DOE refined its directions to Dow and Rockwell by determining and directing Dow and Rockwell with respect to "the Department's designation of Dow which, acting under the Department's oversight, shall be responsible for supervising the litigation and retaining counsel who will provide a common defense for all the contractor defendants effective August 1, 1996." This direction by the DOE has continued up through trial and to the present.

I and the DOE are aware that on February 14, 2006, the jury in the Cook lawsuit returned a verdict against defendants The Dow Chemical Company and Rockwell International Corporation in the amount of $176,850,340 for trespass and nuisance, as well as $110,800,000 in punitive damages against The Dow Chemical Company and $89,400,000 in punitive damages against Rockwell International Corporation. I and the DOE also are aware that on June 2, 2008, the court entered final judgment for certain plaintiffs. I have had an opportunity to review a copy of the court's June 2, 2008, final judgment. I and the DOE are aware that in its final judgment the court ordered that plaintiffs recover $725,904,087.00 in compensatory damages from Dow and Rockwell, inclusive of prejudgment interest, and $200,200,000.00 in exemplary damages against defendants, for a total of $926,104,087,

exclusive of the post-judgment interest. The court separately ordered that plaintiffs recover their costs of suit. The court stayed further proceedings on costs, attorneys' fees, and related expenses pursuant to Fed.R.Civ.P. 54(d)(2).

The Department of Energy has determined that the Cook lawsuit is a public liability action arising under the Price-Anderson Act because it is an action in which plaintiffs seek to impose liability arising out of or resulting from a "nuclear incident," as defined by the Price-Anderson Act. Therefore, plaintiffs' claims are the proper subject of indemnification by the United States Government under the Price-Anderson Act. The Department of Energy has further determined that the United States Government will, and is required by the Contracts and the Price-Anderson Act to, indemnify Dow and Rockwell for any judgment or settlement arising out of or in connection with the Cook lawsuit, together with any post-judgment interest, attorneys' fees, bond costs, and related costs and expenses that Dow and Rockwell are required to pay in order to defend the Cook lawsuit and/or satisfy any judgment or settlement. The Department of Energy has further determined that all elements of any judgment or settlement arising out of or in connection with the Cook lawsuit, together with any post-judgment interest, attorneys' fees, bond costs, and related costs and expenses that Dow and Rockwell are required to pay in order to satisfy any judgment or settlement are allowable costs for the Cook lawsuit, provided that they are reasonable, allocable, and subject to the limitations set forth in the Federal Acquisition Regulation and the terms of the Contracts.

DOE acknowledges that, pursuant to the Contracts and the Price-Anderson Act, the ultimate financial re-

sponsibility for all costs and any judgment or settlement in the Cook lawsuit lies with the United States Government. See enclosed memorandum opinion from the Department of Justice's Office of Legal Counsel regarding a similar Price-Anderson situation.

As the Contracting Officer for the Contracts and on behalf of the DOE, I hereby direct Dow and Rockwell to appeal to the U.S. Court of Appeals for the Tenth Circuit. See, e.g., Dow Contract Modification 112, Article XIV and Rockwell Contract Modification 124, Clause 76. In that same capacity, I hereby further direct Dow and Rockwell to file a motion pursuant to Federal Rule of Civil Procedure 62(e).

In my official capacity as a Contracting Officer, I am also providing this letter to counsel for Dow and Rockwell for inclusion in any pleading that may be filed on behalf of defendants The Dow Chemical Company and Rockwell International Corporation in order to confirm to the court that any appeal by Dow and Rockwell to the Court of Appeals of the Tenth Circuit is being "directed by a department of the Government of the United States." This letter is being provided to counsel with the understanding that it may be included in support of such the Rule 62(e) motion, and in connection with related proceedings.

The above-described determinations and directions to Dow and Rockwell have been approved by duly authorized officials of the United States Government, and I have all of the authority required by law to provide these binding directions to Dow and Rockwell under the Contracts on behalf of DOE. Dow and Rockwell may communicate all or any portion of this letter to third parties and to the public, as Dow and Rockwell deem appropriate.

Sincerely,

s/Derrick J. C. Franklin
Derrick J. C. Franklin
Contracting Officer
for Contract AT-(29-1)-1106 (Dow)
and Contract DE-AC04-76DPO3533
(Rockwell)

Enclosure: Opinion, 1989 OLC *Lexis* 114

Concurrence:
s/Eric J. Fygi
Eric J. Fygi
Deputy General Counsel

cc w/enclosure
Marc Johnston, GC-30, DOE-HQ
Barry Smith, EM-52, DOE-HQ
Jack Craig, EMCBC
Mell Roy, EMCBC
Ralph Holland, EMCBC