IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE QUAPAW TRIBE OF OKLAHOMA, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 03-CV-846-CVE-PJC**
BLUE TEE CORP., et al.,	)	
Defendants.	)	

MOTION OF CERTAIN DEFENDANTS TO DISMISS PLAINTIFF THE QUAPAW TRIBE'S CLAIMS FOR MEDICAL MONITORING AND BRIEF IN SUPPORT

Defendants Blue Tee Corp., Gold Fields Mining, LLC, NL Industries, Inc., and The Doe Run Resources Corporation ("Defendants"), by and through their counsel, hereby move this Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for an Order dismissing Plaintiff the Quapaw Tribe's ("the Tribe") claims for "medical monitoring" for failure to state a claim upon which relief may be granted.[1]

INTRODUCTION

In Plaintiffs' Third Amended Complaint, the Tribe asserts claims for medical monitoring on behalf of certain Tribe members under various theories of liability. Plaintiffs previously conceded that these medical monitoring claims were the private claims of "[a]ll members of the Quapaw Tribe who have been exposed to hazardous substances arising from the Tar Creek Site, and who seek medical monitoring to detect possible physical injuries from their exposure." (2d

[1] In this Motion, Defendants do not address or concede the availability of medical monitoring relief under Oklahoma law generally or the possible preemption of medical monitoring claims by Section 9604 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601, et seq. ("CERCLA"). In addition, other than arguing that the Tribe does not have parens patriae standing to pursue medical monitoring claims on behalf of its members, Defendants do not address or concede in this Motion whether the Tribe has parens patriae standing to pursue any claims or causes of action in this litigation.

Amd. Compl. ¶ 137(b).) Despite this concession, the Tribe now seeks to pursue the medical monitoring claims of individual Tribe members "in its capacity as the sovereign of all members of the Quapaw Tribe." (3d Amd. Compl. at 2.)

It is well established that a state or other sovereign does not have standing to pursue the private claims of its members. Although a sovereign and an individual person may have standing to participate in an action that addresses injuries to both public and private interests, neither a sovereign nor a private person may usurp the other's right to pursue their own particular claims. The rule of res judicata, and the prohibition on double recovery, mandate that the line between the claims of the sovereign (to recover on behalf of injuries to the public interest) and the claims of individuals (to recover for injuries to their own private interests) be strictly drawn. Otherwise, private individuals, on the one hand, or the collective citizenry, on the other, could be divested of their rights to seek recovery for their own injuries by the actions of those whose interests have not been injured.

A claim for medical monitoring relief is an assertion that a person's past exposure to hazardous substances entitles that person to receive compensation for his or her future medical expenses. Accordingly, a claim for medical monitoring logically belongs to the individual person who has been exposed to a hazardous substance, and not to any state or sovereign. The Tribe thus has no standing to pursue a medical monitoring claim on behalf of any injured Tribe member because that claim belongs only to the Tribe member who has been exposed to a hazardous substance. Accordingly, this Court should dismiss the Tribe's claims for medical monitoring because the Tribe does not have standing to bring those claims and thereby fails to state a claim upon which relief can be granted.

STATEMENT OF FACTS

On December 10, 2003, the Tribe and a putative class of "former and current possessors" of real property on the "Quapaw Reservation" filed a Complaint against the Defendants in the

Northern District of Oklahoma. [Dkt. #1.] That Complaint did not assert claims for medical monitoring. On May 5, 2004, Plaintiffs filed a First Amended Complaint that continued to assert those same class allegations but did not mention medical monitoring. [Dkt. #146.] On April 20, 2007, Plaintiffs filed a Second Amended Complaint, which, among other things, amended the class allegations to include a new putative sub-class of injured plaintiffs consisting of "[a]ll members of the Quapaw Tribe who have been exposed to hazardous substances arising from the Tar Creek Site, and who seek medical monitoring to detect possible physical injuries from their exposure." (2d Amd. Compl. [Dkt. # 330.] ¶ 137(b)). Additionally, in the Second Amended Complaint, Plaintiffs amended several "Claims for Relief" to include claims for medical monitoring.

On June 7, 2007, Plaintiffs filed a Third Amended Complaint, which contained no class allegations whatsoever. [Dkt. #367.] In that pleading, the Tribe, rather than individual members of the Tribe, asserted claims for medical monitoring on behalf of injured Tribe members under several theories of liability--including public and private nuisance (3d Amd. Compl. at 44, 47), strict liability (id. at 51), and negligence and gross negligence (id. at 53). The individual Tribe members allegedly in need of medical monitoring are not named parties in the litigation. As noted above, the Tribe purports to be pursuing these medical monitoring claims "in its capacity as the sovereign of all members of the Quapaw Tribe." (Id. at 2.)

ARGUMENT

A. An Indian Tribe Does Not Have Standing to Pursue Claims for Injuries to the Private Interests of Its Members.

It is well established that no state or other sovereign has standing to assert the rights or claims of private individuals. E.g., Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982) ("Snapp"); Pennsylvania v. New Jersey, 426 U.S. 660, 665 (1976); Louisiana v. Texas, 176 U.S. 1, 19 (1900). In Snapp, a case involving alleged violations of certain laws

protecting United States workers from foreign competition, the United States Supreme Court discussed the nature of a state or sovereign's parens patriae standing to bring an action to protect the health and well-being of its citizens. The Court in Snapp explained that a state or sovereign has standing to sue to protect three different types of interests. Snapp, 458 U.S. at 601. First, a state or sovereign, like any association or private entity, has standing to sue to protect its own interests in its property and in its business dealings. Id. at 601-02. Second, the Court noted that a state or sovereign has standing to sue to assert its true sovereign interests, such as its right to demand recognition from other states or its right to create a legal code. Id. at 601. Finally, the Court held that, in certain circumstances, a state or sovereign may have so-called "parens patriae standing" to sue to protect interests described as "quasi-sovereign interests." Id. at 607.

A state's "quasi-sovereign interests" have been defined broadly as the state's general interests in the "health and well-being--both physical and economic--of its residents in general." Id. Those quasi-sovereign interests and the concept of parens patriae standing, however, "do[] not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." Id. at 600. Instead, to successfully assert parens patriae standing to pursue an action, the state or sovereign must articulate its own separate "interest apart from the interests of particular private parties." Id. at 607; see Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1469 (10th Cir. 1993) ("Satsky") (citing 17 Charles A. Wright, et al., Federal Practice and Procedure: Jurisdiction 2d § 4047 at 223 (1988)).

Even when a state or sovereign has established its parens patriae standing to sue to protect its "quasi-sovereign interests," however, the state or sovereign is still limited to litigating claims for injuries to the public interest, and cannot assert claims belonging to private individuals. Neither Snapp nor other cases recognizing a state or sovereign's parens patriae standing have permitted that state or sovereign to assert the claims of private individuals in that action. In Snapp, for example, the Commonwealth of Puerto Rico invoked its parens patriae

standing only to pursue its own "quasi-sovereign interests" in protecting its citizens from discrimination and in ensuring the Commonwealth's full and equal participation in the federal labor scheme. Snapp, 458 U.S. at 609. The Commonwealth of Puerto Rico did not assert any claims in that action that were based on an injury suffered by a particular citizen. See id. at 592 (noting that the Commonwealth sought only declaratory and injunctive relief).

The Tenth Circuit Court of Appeals has underscored the importance of the rule barring a state or sovereign from asserting the private claims of its citizens in parens patriae actions. In Satsky, the Tenth Circuit Court of Appeals addressed the extent to which the State of Colorado had standing to pursue particular claims in an action alleging nuisance, strict liability, and negligence under the common law, and natural resource damages under CERCLA. 7 F.3d at 1466-67. After analyzing the nature of parens patriae standing, and the concomitant bar on a sovereign pursuing private claims, the court concluded that although the State had standing to pursue litigation, "the State could not have recovered under either CERCLA or the parens patriae doctrine for injuries to Plaintiffs' private interests." Satsky, 7 F.3d at 1470.

As such, Satsky held that no individual person's claims could be barred by a consent decree entered by the State as parens patriae, because the State never had the power to assert those private claims. Id. Conversely, in claims properly brought by the State as parens patriae, "the citizens of that state [we]re represented in such litigation by the state and are bound by the judgment." Id. (quoting Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979)). In other words, a state or sovereign's power to bring a particular claim is commensurate with its power to take that claim away from an injured person. Thus, in Satsky, the claims implicating injuries to public interests were limited to those "claims based on injuries to the natural resources held by the State . . . [or other] injuries to interests which all citizens hold in common…." Id. (emphasis added).

Although Plaintiffs now assert that the Tribe has parens patriae standing to litigate the claims of individual Tribe members exposed to hazardous substances, Plaintiffs previously recognized otherwise. In the context of their argument that their initial Complaint "ma[de] clear which Plaintiffs [we]re bringing which claims," Plaintiffs conceded that Satsky barred the Tribe from asserting the private claims of injured Tribe members:

> Under [Snapp and Satsky], a state may not assert the rights of private individuals, but at the same time a parens patriae action does not preclude the recovery by private individuals for claims arising out of the same facts and circumstances. The Satsky court, in fact, recognized that private landowner property damage claims were not barred by settlement of natural resources claims brought by the state of Colorado. Hence, individual members of the tribe can bring their claims, in the form of a class action, along with the distinct claims of the sovereign Quapaw Tribe for recovery of natural resource damages under the public trust doctrine and for damages arising in tort to the interests of all members of the tribe.

(Pl. Resp. to Mot. to Dis. [Dkt. #105] at 8 (emphasis added).)

Courts in other jurisdictions have agreed that an Indian tribe, like any other state or sovereign, does not have parens patriae standing to pursue claims for injuries to interests that are not shared by all of the tribe's members. See, e.g., Kickapoo Traditional Tribe of Texas v. Chacon, 46 F. Supp. 2d 644, 652 (W.D. Tex. 1999) (Indian tribe lacked parens patriae standing to prevent autopsy of deceased Tribe member); Navajo Nation v. Superior Court of Washington for Yakima County, 47 F. Supp. 2d 1233, 1240 (E.D. Wash. 1999) (Indian tribe lacked parens patriae standing to pursue adoption matter); Alabama and Coushatta Tribes of Texas v. Tr. Of the Big Sandy Ind. Sch. Dist., 817 F. Supp. 1319, 1323 (E.D. Tex. 1993) (Indian tribe lacked parens patriae standing to sue on behalf of group of student tribe members); Kickapoo Tribe of Oklahoma v. Lujan, 728 F. Supp. 791, 795 (D.D.C. 1990) (Indian tribe lacked parens patriae standing to litigate against federal recognition of breakaway group); Assinibone & Sioux Tribes v. Montana, 568 F. Supp. 269, 277 (D. Mont. 1983) (Indian tribe lacked parens patriae standing to sue on behalf of Tribe members forced to pay motor vehicle taxes). In other words, both the

federal courts and the Tribe itself have recognized that an Indian tribe, like any other sovereign, cannot assert the private, individual claims of its members.

B. A Claim for Medical Monitoring is a Claim Based on an Injury to a Private Interest.

Under Satsky, the sole question for determining whether the Tribe has parens patriae standing to pursue a specific claim is whether the alleged injury underlying that claim is an injury to a private interest or an injury to an interest held in common by all members of the Tribe. Satsky, 7 F.3d at 1470. In the Third Amended Complaint, the Tribe alleges that Defendants have exposed certain Tribe members to lead and other hazardous substances in excess of certain acceptable thresholds. (3d Amd. Compl. at ¶ 117-123.) The injury underlying that claim is the exposure of an individual Tribe member's body to a hazardous substance and medical monitoring is the relief sought to remedy that injury. A Tribe member clearly has a private interest in his or her own body and just as clearly would have standing to assert a claim to vindicate any injury to that body.

The Tribe has no more right to assert a claim based on the exposure of an individual Tribe member to a hazardous substance than the Tribe has a right to assert a claim based on a Tribe members' slip and fall in a parking lot or a claim based on injury to a Tribe member's private property. See Satsky, 7 F.3d at 1470. Accordingly, the exposure of a Tribe member's body to a hazardous substance implicates an injury to a private interest rather than an injury to an "interest[] which all citizens hold in common." Id.; see also Daigle v. Shell Oil Co., 972 F.2d 1527, 1535 (10th Cir. 1992) (noting that a medical monitoring claim is similar to "a cause of action for damages resulting from personal injury"). Therefore, because the injury underlying the medical monitoring claims is clearly an injury to an individual Tribe member's private interest, and those individual Tribe members are not parties to this action, this Court should dismiss the Tribe's claims for medical monitoring.

CONCLUSION

Because a medical monitoring claim seeks to remedy an injury to a purely private interest, and the Tribe may only bring claims based on an injury to an interest shared by all of its members, the Tribe lacks parens patriae standing to bring a medical monitoring claim. This Court should therefore dismiss Plaintiffs' claims for medical monitoring for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul Kingsolver, do hereby certify that on August 24, 2007, I electronically filed the foregoing with the Clerk of the Court using the ECF System for filing and a Notice of Electronic Filing was issued by the Court to the following ECF registrants:

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