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

THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH) by and through its Business Committee, and its Chairman JOHN L. BERREY et al.	)	Civil Action No. 03-CV-846-CVE-PJC
Plaintiffs,	)	
v.	)	
BLUE TEE CORP., et al.	)	
Defendants.	)	
BLUE TEE CORP., et al.	)	
Third-Party Plaintiffs,	)	
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Third-Party Defendants.	)	

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

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Plaintiff the Quapaw Tribe of Oklahoma (O-Gah-Pah) ("the Quapaw Tribe") files this Response to Motion of Certain Defendants to Dismiss Plaintiff the Quapaw Tribe's Claims for Medical Monitoring and Brief in Support.

SUMMARY OF ARGUMENT

The Quapaw Tribe has standing to pursue its medical monitoring claim because: (1) the Quapaw Tribe has a quasi-sovereign interest in the health of its tribal members; and (2) a sufficiently substantial segment of its population has been injured. In addition, individual tribal members would

likely not be able to obtain complete relief through a private suit. Accordingly, Defendants' Motion to Dismiss should be denied.

FACTUAL BACKGROUND

This civil action arises out of the widespread environmental devastation caused by the Defendants at the Tar Creek Superfund Site ("the Tar Creek Site" or "Site"), which is located almost entirely within the historic boundaries of the Quapaw Reservation. *See* Plaintiffs' Third Amended Complaint ("3d Amend. Comp.") at ¶ 1.

The Quapaw Reservation has been, and continues to be, severely contaminated as result of the release of hazardous substances from the Defendants' activities and operations. *See* 3d Amend. Comp. at ¶ 2. Lead, cadmium, zinc, sulfuric acid and other hazardous substances are uncontrolled and have escaped into the surrounding soils, water, sediments, wetlands and air. *Id.* The releases of these substances within the Tar Creek site by the Defendants have caused, and will continue to cause, severe adverse health effects and substantial endangerment to the members of the Quapaw Tribe. *Id.* at ¶ 7; 117-123.

The Quapaw Tribe has exercised sovereignty over its tribal members for centuries, and was recognized as a sovereign by the governments of Spain and France prior to the independence of the United States. S*ee* 3d Amend. Comp. at ¶ 9-30. The Quapaw Tribe's sovereignty was formally recognized by the United States in the Treaty of 1818 and subsequent treaties, and the Quapaw Tribe has been and remains a federally recognized Indian Tribe. *Id.*[1]

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[1] Federal recognition of an Indian tribe means the United States Secretary of the Interior acknowledges it to exist as an Indian tribe pursuant to Public Law No. 103-454, § 102, 108 Stat. 4791 (1994), which is codified at 25 U.S.C. § 479a. The Quapaw Tribe has ongoing formal recognition by the United States. *See* 72 Fed. Reg. 13,648, 13,650 (Mar. 22, 2007) (annual listing of recognized tribes); *see also* 25 U.S.C. § 479a-1 (requiring listing of recognized tribes).

The Quapaw Tribe, through its authority under the *parens patriae* and public trust doctrines, and in exercising the police power of the Quapaw Tribe, has, among other things, brought an action action for public nuisance, and "seeks medical monitoring on behalf of its members, and seeks the costs of all screenings, assessments, and monitoring of its members to detect possible injury to its members." 3d. Amend. Comp. at ¶ ¶ 149, 151.

ARGUMENT AND AUTHORITIES

A. General principles regarding the *parens patriae doctrine.*

As the Defendants recognize, the modern elements of the *parens patriae doctrine* were established by the United States Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 102 S.Ct. 3260 (1982). *Parens patriae* means literally "parent of the country", and derives from the common law concept of the "royal prerogative" to bring suit on behalf of those citizens legally unable to bring suit to take proper care of themselves or their property. *Snapp,* 458 U.S. at 600. In *Snapp,* the Court recognized that this common-law approach, however, has relatively little to do with the concept of *parens patriae* standing that has developed in American law. Rather, to have standing, the sovereign must assert an injury to what has been characterized as its "quasi-sovereign interests", which is a judicial construct that does not lend itself to a simple or exact definition. *Id.* at 601.

In *Snapp*, the Supreme Court concluded that the characteristics of quasi-sovereign interests fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being- both physical and economic- of its citizenry. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system. *Id.* at 607. The Court specifically did not attempt to draw any definitive limits on the proportion of the population

that must be adversely affected by the challenged behavior. Rather, the Court indicated that, although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered in determining whether the sovereign has alleged injury to a sufficiently substantial segment of its population. *Id.*

Thus, under *Snapp,* a sovereign must establish the following requirements for *parens patriae* standing: (1) the sovereign must express a quasi-sovereign interest, which is an interest apart from the interests of particular private parties; and (2) the sovereign must allege injury to a sufficiently substantial segment of its population. *Id.* at 607; *see also People of the State of New York v. Peter & John's Pump House, Inc.,* 914 F.Supp. 809, 811 (N.D. N.Y. 1996). In addition, the Second Circuit has interpreted *Snapp* to also require a finding that individuals could not obtain complete relief through a private suit. *People of the State of New York v. Peter & John's Pump House, Inc.,* 914 F.Supp. 809, 811 (N.D. N.Y. 1996) *citing People of the State of New York v. 11 Cornwell Co.,* 695 F.2d 34 (2d. Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d. Cir. 1983) (en banc). However, other Courts, including the Tenth Circuit, have not expressly included this latter requirement. *See e.g. Satsky v. Paramount Communications, Inc.,* 7 F.3d 1464, 1469 (10th Cir. 1993); *In Re John Edmond v. Consumer Protection Division, Office of the Attorney General of Maryland,* 934 F.2d 1304, 1310 (4th Cir. 1991); *State of Alaska v. Native Village of Curyung,* 151 P.3d 388, 399-402 (Alaska 2006); *see also Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.*, 16 F.Supp.2d 90 101-02 (D.Mass. 1998) (considering a "third" element subsumed within the first element of the *Snapp* test).

B. The Quapaw Tribe has a quasi-sovereign interest in the health and welfare of its tribal members.

It is indisputable that the Quapaw Tribe has a quasi-sovereign interest in the health and welfare of its tribal members. In *Snapp,* the Supreme Court noted the long line of cases in which states successfully represented their citizens in abating public nuisances that were harmful to the public's health and welfare. *Snapp,* 458 U.S. at 604-05. For instance, in one of the earliest cases, *Missouri v. Illinois,* Missouri sought to the enjoin the defendants from discharging sewage in such a way as to pollute the Mississippi River in Missouri. The Court relied upon an anology to independent countries in order to delineate those interests that a State could pursue in federal court as *parens patriae*:

> It is true that no question of boundary is involved, nor of direct property rights belong to the complainant State. *But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.* If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy . . . .

Missouri v. Illinois, 180 U.S. 208, 241, 21 S.Ct. 331, 343 (1901) (emphasis supplied), *quoted in, Snapp*, 458 U.S. at 603-04.

In *Georgia v. Tennessee Copper Co.,* a case involving air pollution in Georgia caused by the discharge of noxious gasses from the defendant's plant in Tennessee, Justice Holmes also drew on the analogy to an independent country:

> [T]he State has an interest independent of and behind the titles of its citizens, in all earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power . . . . When the States by their union made the

> forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever may be done. *They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests.*

Georgia v. Tennessee Copper, 206 U.S. 230, 237, 27 S.Ct. 618, 619 (1907) (emphasis supplied) *quoted in, Snapp*, 458 U.S. at 604.

As the *Snapp* Court recognized, both the Missouri and Georgia cases involved quasi-sovereign interests, because the State's interest in abatement of nuisances affecting public health caused by the harmful pollution was both graphic and direct. *Snapp*, 458 U.S. at 604; *accord North Dakota v. Minnesota*, 263 U.S. 365, 44 S.Ct. 138 (1923) (flooding); *New York v. New Jersey,* 256 U.S. 296, 41 S.Ct. 492 (1921); *Kansas v. Colorado*, 185 U.S. 125, 22 S.Ct. 552 (1902) (diversion of water). Post-*Snapp* courts have generally interpreted the health and well-being category of quasi-sovereign interests broadly. *See e.g. Commonwealth of Massachusetts v. Bull HN Information Systems, Inc.*, 16 F.Supp. 90, 97 (D. Mass. 1998) (finding state has quasi-sovereign interest in preventing age discrimination); *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D. N.Y. 1996) (racial discrimination); *Support Ministries for People with AIDS, Inc. v. Waterford,* 799 F. Supp. 272, 277 (N.D. N.Y. 1992) (finding state has a quasi-sovereign interest in challenging a town's altered zoning law denying permit for residence for homeless AIDS sufferers, because conduct threatened physical health and well-being of home's potential residents).

The Alaska Supreme Court recently applied this health and welfare aspect of the *parens patriae* doctrine directly to several Alaska Native Villages in *State of Alaska v. Native Village of Curyung,* 151 P.3d 388 (2006). In that case, the villages brought suit as *parens patriae* against the State of Alaska for violations of the Adoption Act, the Indian Child Welfare Act, and state law. *Id.*

at 392-93. The villages alleged a variety of harmful effects that the State's violations were having on the children of the villages. *Id.* The trial court reasoned that the villages' interest in their children, and in preserving their traditions through those children was "inherently linked to the health, safety and welfare of the village's members", and therefore qualified as a quasi-sovereign interest. *Id.* at 393. The Alaska Supreme Court agreed that the provisions the villages sought to enforce *affected the well being of the villages families and children,* and that the *well being of individual families and children is inextricably bound up with the villages' ability to maintain their integrity. Id.* at 402. Accordingly, the Court found this interest to be a quasi-sovereign interest under *Snapp* and its progeny. *Id.* at 399-402.

Likewise, in this case, the Quapaw Tribe's interest in the health and safety of its tribal members constitutes a quasi-sovereign interest. As set forth in Plaintiffs' Third Amended Complaint, members of the Quapaw Tribe continue to be exposed to hazardous substances which result in a severe risk of harm to their health. 3d Amend. Compl. at ¶ 1. This includes the poisoning of the Quapaw people with lead, a substance known to cause severe health problems, including brain damage in even small amounts. *Id.* at ¶ 117. Lead can also cause damage to the nervous system, kidneys and reproductive system. *Id.* at ¶ 123. The grim and enduring legacy of the Defendants' conduct is one of not only large-scale environmental devastation, and injury to adult members of the Tribe, but also grave and ongoing injury to the very future of the Quapaw Tribe-its children. *Id.* at ¶ 117.

The Quapaw Tribe has a unique sovereign relationship to its tribal members. Indian tribes are, in part, political and governmental entities, but they are much more than mere governments. Indian tribes such as the Quapaw Tribe are small nations whose "existence . . . turns on shared

language, rituals, narratives, kinship or clan ties, and a shared relationship to specific land." Cohen's Handbook of Federal Indian Law § 3.02[2], at 136 (2005 ed.) [hereinafter *Handbook of Federal Indian Law*].

In traditional American Indian societies, the tribe and the extended family provided social services, from caring for the sick and the elderly and educating the children. *See, e.g.*, Handbook of Federal Indian Law § 22.01[1], at 1. This system in part reflected the traditional

> religious values of responsibility and harmony. The community and an individual's responsibility to the community were more important than the individual and his or her rights within society. A person's rights and privileges never exceeded that person's duties and responsibilities. Power came from the community and flowed upward to the leaders. A large number of Indian societies were egalitarian and classless. A person's status and position were based on individual performance and ability.

Sharon O'Brien, *American Indian Tribal Governments* at 14-15 (Univ. Okla. 1989). To this day, it is difficult to distinguish between the *tribe* as a government and its members as the *tribe*. Tribal governments in tribes like the Quapaw Tribe sit not only as representative political bodies but as tribal leaders with unique responsibilities dictated by culture and tradition to care for the members of the tribe.

Federal law recognizes the unique nature of the relationship Indian people have to their tribal governments. In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act in order to return social services to tribal control. *See* 25 U.S.C. §§ 450 et seq. In passing this legislation, Congress acknowledged the value of the traditional Indian social fabric by finding that

> the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an

> effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities.

25 U.S.C. § 450(a)(1). Under the act and subsequent amendments, tribal governments such as the Quapaw Tribe that meet certain qualifications enter into self-determination contracts with the federal government to take control over governmental programs, including education and social services. *See Handbook of Federal Indian Law* § 22.02[1], at 1346.

Tribal obligations to provide care and social services to the members of the tribe thus arise not merely as political obligations, but as traditional and cultural responsibilities. Thus, the Quapaw Tribe has a quasi-sovereign interest in the health and well-being of the members of the Tribe, since, as in *Native Village of Curyung, the well being of individual Quapaw families and children is inextricably bound up with the Tribe's ability to maintain its integrity. Native Village of Curyung*, 151 P.3d at 402.

C. <u>The Tribe has a common interest in the future health of its members separate from any purely private interests of individual tribal members.</u>

The Defendants define medical monitoring as a claim only for *private* damages, namely that "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." The Defendants' narrow definition of the Quapaw Tribe's claim for medical monitoring unduly restricts the Quapaw Tribe's claim, and ignores well-established case law categorizing claims for medical monitoring. Moreover, by arguing against the Tribe's standing to pursue medical monitoring, the Defendants totally disregard the common interest of the Tribe in the future health of its members.

In order to maintain an action under the *parens patriae* doctrine, the sovereign must articulate an interest apart from the interest of particular parties, *i.e.* the State must be more than a nominal party. *Snapp*, 458 U.S. at 607. Courts typically find this requirement is satisfied when the relief sought by the state is broader than that which would be sought by private litigants. *Bull HN Information*, 16 F.Supp.2d at 101-02. For example, when a state seeks broad injunctive or declaratory relief, this requirement is satisfied even though some individuals could also conceivably obtain private relief. *Id.* Moreover, the mere fact that the sovereign seeks a monetary recovery for individual citizens does not preclude the sovereign from bringing suit, provided the sovereign institutes adequate claims provisions to process the individual claims. *In re John Edmond v. Consumer Protection Division*, 934 F.2d 1304, 1310-13 (4th Cir. 1991). However, if the claim involves injuries to "purely private interests," then the sovereign does not have standing to pursue the claim. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993).

Defendants rely upon the Tenth Circuit's opinions in *Daigle* and *Satsky*. However, neither of these cases bar the Tribe's claims. In *Daigle*, the Tenth Circuit simply held that a claim for medical monitoring could not be brought by a private person under CERCLA because medical monitoring is not a "cost of response" under Section 107(a). *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992). In reaching this conclusion, the Court construed the "monitoring" and "health and welfare" language in CERCLA to be directed at containing and cleaning up hazardous substances rather than at long term health monitoring of the sort requested by Plaintiffs. *Id.* at 1535. The Court also relied upon the legislative history of CERCLA, which suggested that Congress had considered, and then intentionally deleted, all personal rights to recovery of medical expenses. *Id.* at 1536. Although the Court did indicate that Plaintiffs' request for medical monitoring in that case

was similar to a cause of action for damages resulting from personal injury, the Court did not address the *parens patriae* doctrine nor did it address whether a medical monitoring claim could be brought by a sovereign under state law.

In *Satsky,* the Court held that Plaintiffs' private property damage claims against a mine operator were not barred by the doctrine of res judicata by a consent decree entered into by the State of Colorado and the mine operator in a prior action. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1466 (10th Cir. 1993). In the prior action, the state had initially sought damages under CERCLA and state law, but, for reasons that are not clear from the opinion, the state law claims were dismissed without prejudice by the trial court. Following the dismissal of the state law claims, and pursuant to the consent decree, the defendant was required to pay the State for CERCLA natural resource damages, response costs, and the costs of continuing oversight. *Id.* at 1467. The Defendant successfully argued to the trial court that the settlement of these claims by the state precluded the Plaintiffs in the second action from bringing their state law claims for property damages and economic losses. The Plaintiffs apparently were not seeking damages for medical monitoring, although they were seeking damages for "an increased risk of harm and an increased risk of contracting fatal or otherwise fatal diseases." *Id.* at 1470.

The Tenth Circuit, relying in part upon its decision in *Daigle*, held res judicata did not necessarily bar all of plaintiffs' claims because the State could not have recovered *damages* under either CERCLA or the *parens patriae* doctrine for injuries to Plaintiffs' purely private interests. *Satsky,* 7 F.3d at 1469-70. The Tenth Circuit remanded the case to the trial court for a determination of "whether some of the *damages* that the plaintiffs [were] attempting to recover were *damages* which the state was entitled to recover [in the prior action]". *Id.* at 1470. (emphasis

supplied)." If the Tribe in this case was *only seeking damages* for medical monitoring, then perhaps *Satsky* could be interpreted to bar its claim. However, this is not case.

Relief in the form of medical monitoring may be by a number of means. *Day v. NLO, Inc.*, 144 F.R.D. 330, 335-36 (S.D. Ohio 1992). As the Court in *Day* explained:

> First, a court may simply order a defendant to pay a plaintiff a certain sum of money. The plaintiff may or may not choose to use that money to have his medical condition monitored. Second, a court may order the defendants to pay the plaintiffs' medical expenses directly so that a plaintiff may be monitored by the physician of his choice. Neither of these forms of relief constitute injunctive relief ....
>
> However, a court may also establish an elaborate medical monitoring program of its own managed by court-appointed court-supervised trustees, pursuant to which a plaintiff is monitored by particular physicians and the medical data produced utilized for group studies. In this situation, a defendant, of course, would finance the program as well as being required by the court to address issues as they develop during program administration. Under these circumstances, the relief constitutes injunctive relief . . . .

Id.; see also Cook v. Rockwell International Corp., 778 F.Supp. 512, 515 (D. Colo. 1991).

In the First Claim for Relief (public nuisance) of Plaintiffs' Third Amended Complaint, the Quapaw Tribe "seeks medical monitoring on behalf of its members, *and* seeks the costs of all medical screenings, assessments, and monitoring of its members to detect possible injury to its members." 3d Amend. Comp. at ¶ 151. By these allegations, the Tribe seeks a court-supervised medical monitoring program with the Tribe as the trustee acting on behalf of its members. *Cf.* 3d Amend Comp. at ¶ 51 (alternatively seeking compensatory damages for medical monitoring under Fourth Claim for Relief (strict liability); *Id.* at 52-53 (alternatively seeking compensatory damages for medical monitoring under Fifth Claim for Relief (negligence and gross negligence); *see also Cook*, 778 F.Supp. at 515 (liberally construing Plaintiff's complaint to state an equitable claim for

medical monitoring relief); *see also Benefield v. McDowall*, 241 F.3d 1267, 1270 (10th Cir. 2001) ("A Complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").[2] Since the Tribe's claim for medical monitoring constitutes a request for injunctive relief, the Tribe's claim is not a claim *only for damages to a purely private interest.*

Moreover, the injunctive relief sought by the Quapaw Tribe is much broader than a claim for damages that could be brought by a single Quapaw acting alone. The Tribe anticipates that the medical monitoring program will not only include the medical testing of exposed Quapaws for early detection of disease, but will also include at a minimum a registry of exposed Quapaws, population-based health surveys, and the pooling of data derived from the medical tests of the exposed Quapaws in order to achieve earlier detection of latent diseases. *See Cook v. Rockwell International*, 778 F.Supp. 512, 515 (D. Colo. 1991) (agreeing that medical monitoring program could include pooling of data if reasonably necessary to detect onset of disease). This program for enhancing the early detection of disease, which will result in decreasing the morbidity and mortality of tribal members, is inextricably intertwined with the common interest that *all* Quapaws have in assuring the future health of *all* members of the Quapaw Tribe. *State of Alaska v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006) (concluding that well-being of individual families and children is inextricably bound up with the villages' ability to maintain their integrity); *see also Massachusetts v. Bull HN Information Systems, Inc.,* 16 F.Supp. 90, 97 (D. Mass. 1998) (state has quasi-sovereign interest in preventing any injury to the general health and well-being of its residents). Given its

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[2] Plaintiffs intend to file a motion for leave to file their Fourth Amended Complaint, which, among other things, will clarify that the Quapaw Tribe will only seek a court-administered medical monitoring program, and will no longer seek an unsupervised damage award.

political, cultural, and traditional obligations to provide care and social services to its members, the Quapaw Tribe is uniquely positioned to act as the trustee for this medical monitoring program.

The cases relied upon by the Defendants involving Indian Tribes do not bar the Quapaw Tribe's claims because in each of these cases the Tribes were unable to articulate a common interest apart from the interest of particular parties. *See Assiniboine & Sioux Tribes v. Montana*, 568 F. Supp. 269, 277 (D. Mont. 1983) (claim on behalf of limited number of tribal members seeking tax refunds); *Kickapoo Tribe of Oklahoma v. Lujan,* 728 F. Supp. 791, 795 (D.D.C. 1990) (claim on behalf of tribal members who were members of both Oklahoma Tribe and Texas Band); *Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*, 817 F. Supp. 1319, 1327 (E.D. Tex. 1993) (claim on behalf of members who were affected by school hair restriction policy); *Navajo Nation v. Superior Court of State of Washington for Yakima County,* 47 F.Supp. 2d 1233, 1240 (E.D. Wash. 1999) (claim brought in representative capacity on behalf of grandparents to challenge adoption under Indian Welfare Act and Washington state adoption laws); *Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F.Supp. 644, 652 (W.D. Tex. 1999) (claim brought on behalf of next of kin to enjoin state from exhuming body of recently deceased Indian).

The Defendants will no doubt claim that because an aspect of Plaintiff's medical monitoring program, i.e. medical testing of individual tribal members, could implicate private rights, that this should therefore preclude the tribe from pursuing its claim for medical monitoring. It is correct that a sovereign may not bring claims for damages on behalf of private individuals in a representative capacity. *See Assinboine & Sioux Tribes v. Montana*, 568 F.Supp. 269, 277 (D.C. Mont. 1983). However, the Tribe is not bringing damage claims on behalf of specific individuals. Rather, the Tribe is asserting a claim for injunctive relief on behalf of the Tribe as a whole in order to address

the common interest of the Tribe. As the Alaska Supreme Court recently recognized in applying the *parens patriae* doctrine to native villages: "the fact that individual parties could have brought suit to vindicate their rights does not deprive a state of *parens patriae* standing." *State of Alaska v. Native Village of Curyung*, 151 P.3d 388, 400 (Alaska 2006); *see also In re Taiibbi*, 213 B.R. 261, 271 (Bankr. E.D. N.Y. 1997) (recognizing that courts have granted standing to public agencies notwithstanding consumers' abilities to commence their own actions); *see also In re Edmond*, 934 F.3d 1304, 1313 (4th Cir. 1991) (holding that state did not need to bring class action to pursue quasi-sovereign interest). Any concerns regarding double recovery or res judicata related to the actual testing of individual tribal members can be addressed by requiring that a procedure be implemented to process individual claims. Such a procedure would ensure that any person who participated in the program could not also seek to receive money under a private cause of action. *See In re Edmond*, 934 F.3d at 1312. By so doing, the medical monitoring program, administered by the Tribe, and supervised by the Court, would directly address the common interest that the Tribe has in the future health of its members, while not unfairly divesting any person of his right to pursue a recovery on his own.

D. A sufficiently substantial segment of the Quapaw population has been injured by the Defendants' wrongful acts.

The Defendants claim that 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." Defendants' Motion at 7 (emphasis supplied). By so arguing, the Defendants attempt to blur the distinction between the quasi-sovereign *interest*, which must be an interest common to all members

of the Tribe, and the *injury* which impacts that interest. There is no requirement that all members of the Quapaw Tribe must be *directly* injured by the Defendants' wrongful acts in order for the Tribe to pursue its claim. In fact, there is no numerical talisman to establish *parens patriae* standing. *People of the State of New York v. Peter & John's Pump House, Inc.*, 914 F.Supp. 809, 812 (N.D. N.Y. 1996). As the Supreme Court indicated in *Snapp*:

> The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, *the indirect effects of this injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population.*

Id. (quoting *Snapp,* 458 U.S. at 607) (emphasis supplied). Thus, while the quasi-sovereign interest must be a common interest apart from the interests of private parties, the injury itself need only be to a "substantial segment" of the sovereign's population. *Bull HN Information Systems, Inc.*, 16 F.Supp. 2d. at 96 (noting two-part test that has emerged from *Snapp).*

Post-*Snapp* Courts have engaged in an expansive interpretation of the Supreme Court's instruction to consider the indirect effects of the injury in determining whether a "substantial segment" of the sovereign's population has been impacted by the Defendant's population. *Bull HN Information Systems, Inc.*, 16 F.Supp. 2d. at 96. It is simply not correct to suggest that the Court should not consider injuries suffered by particular citizens–indeed, it is these very injuries that establish whether a substantial segment of the population has been impacted. *See In re Hemingway*, 39 B.R. 619, 622 (N.D. N.Y. 1983) (finding that the state had *parens patriae* standing because, although only six consumers were named in the litigation, the lawsuit implicated a "much broader scheme of consumer protection").

The Second Circuit's decision in *11 Cornwell* illustrates this expansive interpretation of the "indirect effects" inquiry. *See People of the State of New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2nd Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2nd Cir. 1983) (*en banc*). In that case, the Court found that the defendant's actions in blocking a group home for eight to ten retarded adults affected a substantial portion of the state population. The Court described a variety of effects of the defendant's alleged conduct including the deprivation of "any number" of retarded persons of the opportunity to receive rehabilitation, the effect on "countless others" if this kind of discrimination were to be tolerated, and the effect on the state taxpayers who would be forced to bear the higher cost of traditional institutionalization. *Id.* at 38-40.

Absent medical monitoring, it is the Quapaw Tribe as a whole that will be forced to bear the higher cost of increased disease among its members. The Tar Creek site is located almost entirely within the historic boundaries of the Quapaw Reservation. 3d. Amend. Comp. at ¶ 2. The Quapaw Reservation has been, and continues to be, severely contaminated as a result of the release of hazardous substances from the Defendants' activities and operations. *Id.* The members of the Quapaw Tribe continue to be exposed to hazardous substances which results in a severe risk of harm to their health. *Id.* at ¶ 1. Notwithstanding the Defendants' failure to address the "substantial segment" test, these allegations, liberally construed, sufficiently allege an injury to a "substantial segment" of the Quapaw Tribe.

E. Individual Tribal Members may not obtain complete relief through a private suit.

The Second Circuit interpreted *Snapp* to hold that *parens patriae* is inappropriate if individuals could obtain complete relief through a private suit. *See 11 Cornwell*, 695 F.2d at 40. This "requirement" could also be considered another formulation of the general *parens patriae*

standing consideration that the state be more than a nominal party in a private dispute. *Bull HN Information Systems, Inc.*, 16 F.Supp. 2d. at 102. Regardless, courts typically find that this requirement is satisfied when the relief sought by the state is broader than that which would be sought by private litigants, which is the case here. *Id.*

Private litigants might not achieve the complete relief that a sovereign seeks because they may have a greater incentive to compromise requests for injunctive relief in exchange for increased money damages. *People of the State of New York v. Peter & John's Pump House, Inc.*, 914 F.Supp. 809, 813 (N.D. N.Y. 1996). This concern exists in a claim for medical monitoring. As Judge Seigel recognized, when a defendant pays an individual a certain sum of money, the plaintiff may or may not choose to use that money to have his condition monitored. *Day v. NLO, Inc.* 144 F.R.D. 330, 335 (S.D. Ohio 1992). By pursuing this case as *parens patriae*, the Tribe is best positioned to substantially reduce the risk that this will occur, since the Tribe is uniquely positioned to convince its members to support a comprehensive medical monitoring program that will benefit the Tribe as a whole.

CONCLUSION

As impliedly recognized by Justice Holmes over a century ago in *Georgia v. Tennessee Copper,* when the Quapaw Tribe entered into its last treaty with the United States in 1833 and agreed to the removal to the reservation in Oklahoma, the Quapaw Tribe "did not renounce the possibility of making reasonable demands on the ground of [its] still remaining quasi-sovereign interests." It is indisputable that the Quapaw Tribe has a quasi-sovereign interest in the health of its people, and it is indisputable that a substantial segment of the Quapaw Tribe has been injured by the wrongful acts of the Defendants. After causing such wide-spread environmental destruction on the Quapaws'

lands and poisoning the Quapaw people, it is surely a reasonable demand by the Quapaw Tribe that the Defendants should now be required to answer for their wrongful conduct, and to fund a medical monitoring program in order to achieve earlier detection of the very diseases that they have caused. Accordingly, this Court should find that the Quapaw Tribe has standing to pursue its medical monitoring claim, and should deny the Defendants' Motion to Dismiss.

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