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

QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH), *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 03-CV-0846-CVE-PJC**
BLUE TEE CORP., *et al.*,	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO THE FEDERAL DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

I. SUMMARY OF ARGUMENT.

The Federal Defendants contend that the Quapaw Tribe's Sixth Claim for Relief for natural resource damages ("NRD") and NRD assessment costs pursuant to CERCLA is barred by 42 U.S.C. §9613(g)(1) because, after twenty-six years of intermittent and ineffective efforts, the Environmental Protection Agency ("EPA") still has not selected the final remedy for the Tar Creek Superfund Site. However, as the Federal Defendants recognize, the Tribe's NRD claim is limited to the *interim* injury of the loss of the services of the natural resources. The Federal Defendants' argument fails on its erroneous characterization of this distinct "loss of services" injury as merely a "damages *theory*" for calculating the residual injury. *See* Fed. Def.'s Mem. [Doc. # 427] at p. 17.

In *New Mexico v. General Electric,* 467 F.3d 1223, 1244-45 (10th Cir. 2006), the Tenth Circuit recognized that NRD claims may be premised on two separate and distinct types of injuries: (a) the "residual" injury, *i.e*., the shortfall between the remediation selected by EPA and complete restoration or replacement of the damaged natural resources, and (b) the interim loss of services of the damaged natural resources from the time of the hazardous release up to the time of full restoration or replacement. In contrast to the "residual injury," the "loss of services" injury is unaffected by, and unrelated to, EPA's selection of the remedial action or its work on the remedial investigation and feasibility study ("RI/FS"). EPA does not investigate, attempt to quantify, nor select a remedy for the injury of interim loss of services. Instead, EPA's statutory mission is remediation of "present and future" conditions, with a primary focus on safeguarding human health.

The Federal Defendants urge this Court to apply a "common sense" reading of Section 9613(g)(1). The Tribe does not disagree. Common sense dictates that since there is no remedial action (or RI/FS) addressing the "loss of services" injury, it follows that there is no remedial action for which the Tribe must await EPA's selection before proceeding with a NRD claim limited to "loss of services" injuries. Accordingly, the Federal Defendant's motion to dismiss the Tribe's damages claim should be denied.

In the alternative, the Tribe requests leave to amend the Complaint to allege that Section 9613(g)(1) does not bar the Tribe's NRD claim because EPA's intermittent and piecemeal actions at Tar Creek fall far short of "diligently proceeding" with a remedial investigation. Indeed, a significant portion of the Tribe's "loss of services" injury – *twenty-six years* and counting – has occurred while EPA (and the defendants) have *not* been diligently proceeding with the investigation and selection of the remedial action. The Tribe has filed a concurrent motion seeking leave to amend the complaint to include the above-referenced allegations.

Finally, the Federal Defendants ignore that the Tribe's Sixth Claim for Relief seeks, in addition to damages, the costs of assessing the injury to the natural resources. The timing provision in Section 9613(g)(1) plainly applies only to claims for "damages." It does not apply to claims for assessment costs. Accordingly, at the very least, the Tribe can proceed with this action, as currently pled, on its claim for assessment costs. Pursuant to Section 9613(g)(2), any liability determination in the Tribe's action for costs will be binding in any future action brought by the Tribe against the Federal Defendants for additional assessment costs or natural resource damages.

II. FACTUAL BACKGROUND.

This action concerns the widespread environmental devastation caused by the Defendants at the Tar Creek Superfund Site ("Tar Creek"), which is located almost entirely within the historic boundaries of the Quapaw Reservation. Decades of mining have reduced much of the Quapaw Reservation to an amalgam of hundreds of mines, mine shafts, mill sites, mining waste piles, sink holes and other distinct sites. 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. In addition, throughout the Quapaw Reservation, there is widespread subsidence (collapse of the mine working areas) and the significant threat of further subsidence, which must be abated in order to protect the health, welfare and safety of the members of the Quapaw Tribe, and the public generally, and to enable to the Tribe and its members to fully use and enjoy the Quapaw Reservation. Moreover, the members of the Quapaw Tribe continue to be exposed to hazardous substances which results in a severe risk of harm to their health. *See* Plaintiffs' Third Amended Complaint ("Complaint") at ¶ 2 [Doc. # 427].

The Quapaw Tribe, acting in its capacity as the sovereign of all members of the Quapaw Tribe, has brought this suit against all Defendants[1] for damages to all natural resources within the Quapaw Reservation; against all Non-Federal Defendants for medical monitoring of its members and for punitive damages; and against the Mining Defendants for abatement of actual and threatened subsidence on all lands within the Quapaw Reservation. In addition, the Individual

[1]The term "Defendants" means all Defendants in this action. The non-Federal Defendants are referred to as the "Non-Federal Defendants." All Non-Federal Defendants other than Burlington Northern Sante Fe Railway Co. are referred to as the "Mining Defendants."

Plaintiffs bring suit against the Non-Federal Defendants for compensatory damages and for punitive damages. Complaint at ¶ 1.

The Quapaw Tribe seeks natural resources damages ("NRD") from the Non-Federal Defendants under common law theories (public nuisance, negligence, and strict liability) as well as under Section 107 of the CERCLA, 42 U.S.C. §9607. *See* Complaint (First, Fourth, Fifth and Sixth Claims for Relief). The Quapaw Tribe's NRD claim against the Federal Defendants is brought only pursuant to CERCLA. *See* Complaint (Sixth Claim for Relief). Under all legal theories and against all Defendants, the Tribe limited its NRD claims to "all past and interim loss-of-use natural resource damages . . . from the time of release of any hazardous substance until restoration and cost of assessing injury to the natural resources and resulting damage." *See* Complaint (First, Fourth, Fifth and Sixth Claims for Relief). The Tribe has preserved until after selection or completion of the CERCLA remedy its CERCLA and common law claims for abatement, restoration and/or replacement of natural resources that then remain contaminated with hazardous substances. *See id.*

III. ARGUMENT.

A. THIS COURT SHOULD NOT DISMISS THE TRIBE'S CLAIM FOR DAMAGES FOR LOSS OF SERVICES OF THE NATURAL RESOURCES.

1. Because the Tribe's NRD Claim is Premised Solely on Interim "Loss of Services" Injuries the Timing Provision in Section 9613(g)(1) Does Not Apply.

The Federal Defendants' motion is premised on 42 U.S. C. §9613(g)(1), which provides that "[i]n no event may an action for [natural resource] damages . . . be commenced . . . before selection of the remedial action if the President is diligently proceeding with a remedial

investigation and feasibility study." The Tribe agrees with the Federal Defendants that this section is intended to ensure that claims for natural resource damages are filed at the "appropriate time" and that construction of the statute should comport with "common sense." Fed. Def. Mem. at pp. 12-13, 14. The fundamental disagreement between the parties turns on the Tenth Circuit's analysis in *New Mexico* and concerns (a) whether the "loss of services" injury is "residual," and (b) whether the timing prohibition in Section 9613(g)(1) applies to damages claims for non-residual "loss of services" injuries that are unrelated to EPA's remedial mission and thus unaffected by any EPA-ordered remedial action or RI/FS. *See* Fed. Def. Mem. at p. 17.

The Federal Defendants argue that the loss of services of the damaged natural resources is not a separate injury, but "simply a damages theory" for determining the "residual" injury, *i.e.*, the difference between the natural resources in its pristine condition and the natural resources after completion of the EPA's selected remedy. Fed. Def. Mem. at pp. 14, 17. However, in *New Mexico* the Tenth Circuit stressed that the loss of services of the damaged natural resources is a separate injury from the residual injury, thus invoking separate timing considerations under a related statutory provision – 42 U.S.C. §9613(h).

New Mexico involved, in part, a common law nuisance claim by the State of New Mexico for natural resource damages to groundwater. The State sought damages for two distinct injuries: (1) the replacement of any contaminated groundwater not restored by the EPA's ongoing remedial action, and (2) the loss of use of the groundwater from the time of the hazardous release until replacement or complete restoration. *Id.* at 1248. The defendants contended that the State's NRD claims were time barred by 42 U.S.C. §9613(h), which provides that federal courts do not

have jurisdiction over state law claims that "challenge" a remedial action until after EPA completes the remedial action.

In analyzing whether it was the appropriate time to consider the common law NRD claims under Section 9613(h), the Court stressed that the two injuries were distinct. The claim for replacement was "residual of the outcome of the EPA-ordered remediation," (*id.* at 1253) in that the amount of replacement necessary was dependent on the ultimate success of the EPA-ordered remediation in achieving its stated goal of fully restoring the groundwater to its baseline or pre-contaminated state. Accordingly, since the premise of the State's " replacement" claim – that there would be some residual injury – was inconsistent with the stated goal of the EPA-ordered remediation – full restoration with no residual injury – the Court deemed the "replacement" claim as a "challenge" to the goals of EPA's remedial action and therefore premature under Section 9613(h). *Id.* at 1249.

In contrast, the Court stressed that the loss of services of the damaged natural resources from the time of release up to time of restoration was distinct from, and *in addition to*, the "residual" injury. *Id.* at 1244-45. Moreover, the "loss of services" injury was independent from the outcome of the EPA-ordered remediation. Even if the EPA-ordered remediation completely restored the groundwater, the interim loss of services would remain as a distinct, unaffected, and *independently quantifiable* injury:

> The State, in its capacity as trustee of the State's groundwaters, is entitled to recover for all interim loss-of-use damages on behalf of the public from the time of any hazardous waste release until restoration: "[L]ost use damages incurred by the public prior to cleanup are damages that, in a layman's terms, remain on the debit side of the ledger after cleanup, and are, in fact, unredressed

> damages for which the trustee may recover." *Alaska Sport Fishing Ass'n v. Exxon Corp.,* 34 F.3d 769, 772 (9th Cir. 1994).

Id. at 1250, n.39. Accordingly, the Tenth Circuit concluded that the claim for "loss of services" injury had no relation to the EPA-ordered remediation and was therefore ripe for consideration on the merits.[2]

The Tribe recognizes that *New Mexico* concerned the timing of review of *common law* NRD claims under Section 9613(h) rather than the timing of review of *CERCLA* NRD claims under Section 9613(g)(1), and that it is therefore not directly applicable to the case at hand.[3] However, the underlying reasoning applies. Under CERCLA, the terms "remedy or remedial action" mean "those actions consistent with the permanent remedy taken . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." 42 U.S.C. §9601(24). The extent of remediation provided by the remedy determines the extent to which there is a residual NRD injury for which a trustee can seek replacement or restoration damages.

However, the remedial action – with its expressed and inherent focus on "*present or future*" conditions – has no impact on, or relevance to, the "loss of services" injury. This disconnect means that, as the *New Mexico* court found, an NRD claim for "loss of services" cannot be deemed as a "challenge" to an unrelated remedy in the context of Section 9613(h). It

---

[2]The Court ultimately dismissed the "loss of services" claims on factual grounds specific to the case. *Id.* at 1251-52.

[3]The Tribe has found only a handful of cases interpreting the relevant language of Section 9613(g)(1) and no cases directly on point. The Tribe notes that although the Federal Defendants cite numerous cases in their memorandum, *none* of those cases involve construction of Section 9613(g)(1). This case raises an issue of first impression.

also means that, in the context of Section 9613(g)(1), there is no related "remedial action" for which to await selection.

In short, *New Mexico* demonstrates that, contrary to the Federal Defendants' characterization, the loss of the damaged resources is not "simply a damages theory," it is a uniquely defined and distinct injury independent of the "residual" injury. And given this distinct, non-residual character, to borrow a phrase from the Federal Defendants, "it *is* possible to make an informed decision of what those damages are" prior to EPA's selection of the remedial action. Fed. Def. Memo. at p. 17 (emphasis added).

The Tribe's current Complaint adheres to the distinction between "loss of services" injuries and "residual" injuries explained in *New Mexico*. For the common law claims, the Tribe expressly preserved its NRD claims for residual injuries until after completion of the still-to-be-determined EPA remedy, consistent with *New Mexico* and Section 9613(h). Similarly, in the CERCLA claim, the Tribe preserved its NRD claims for residual injuries until after selection or completion of the remedy, consistent with *New Mexico* and Section 9613(g). However, in light of EPA's twenty-six years of delay at the Tar Creek Site, the Tribe expressly preserved the right to pursue the residual claims at an earlier time because the EPA has not been "diligently proceeding" with the remedial investigation.

2. Alternatively, The Tribe Should be Granted Leave to Amend Their Complaint to Allege That EPA Has Not Diligently Proceeded With the Remedial Action.

The requirement that a damages action await EPA's selection of the final remedial action does not apply if the EPA is not "diligently proceeding with a remedial investigation and feasibility study under Section 9604(b)." 42 U.S.C. §9613(g)(1). Alternatively, the Tribe

requests leave to amend the Complaint to include detailed allegations that EPA's intermittent and piecemeal actions at Tar Creek fall far short of "diligently proceeding" with a remedial investigation. Indeed, a significant portion of the Tribe's "loss of services" injury – *twenty-six years* and counting – has occurred while EPA (and the defendants) have *not* been diligently proceeding with the investigation and selection of the remedial action.

The Tribe has filed a concurrent motion seeking leave to amend the complaint to include the above-referenced allegations as well as to clarify the medical monitoring relief sought. In the proposed amended complaint the Tribe's claims are still limited to "loss of services" injuries, and do not include the "residual" injuries. As explained in the concurrent motion, leave to amend should be freely granted, and the Tribe has ample factual allegations to demonstrate that the EPA's twenty-six years of delay does not constitute diligent effort towards remedial investigation.

B. THIS COURT SHOULD NOT DISMISS THE TRIBE'S CLAIM FOR THE COSTS OF ASSESSING THE DAMAGES TO THE NATURAL RESOURCES.

The Federal Defendants overlook that the Tribe's Sixth Claim for Relief seeks both (a) damages for the loss of services of the natural resources, and (b) the costs of assessing the damage to the natural resources. The timing provision relied upon by the Federal Defendants in Section 9613(g)(1) only applies to "action[s] for *damages*." As the court in *Confederated Tribes and Bands of the Yakama Nation v. United States*, 2007 U.S. Dist. LEXIS 65011 (E.D. Wa. Sept. 4, 2007) recently ruled, Section 9613(g)(1) does not apply to claims for recovery of NRD assessment "costs."

The *Confederated Tribes* court explained that there is a "common sense" distinction between "damages" and "costs:"

> Simply put, "costs" are intended to reimburse a party for certain expenses incurred by it, whereas "damages" are intended to compensate a party for an injury or a loss. In the context of §9607(a)(4)(C), this means that injury assessment costs reimburse a party for costs incurred in determining the extent of an injury (a damages assessment), whereas damages compensate for the injury (the loss) itself in order to make the party whole. This plain meaning is evident from the plain language of §9607(a)(4)(C), as well as the plain language of (a)(4)(A), (B), (C), and (D), all of which refer to categories of costs.

Id. at *9-10. The court also stressed that Section 9611(b)(2)(B) "makes clear the obvious distinction between "costs" and "damages" by defining "natural resource claim" as "any claim for injury to, or destruction of, or loss of, natural resources" and specifying that "[t]he term does not include any claim for the costs of natural resource damages assessment." 2007 U.S. Dist. LEXIS 65011 at *11. Based on its "common sense" reading of the plain language of the statute, the court correctly concluded that "an action for the recovery of injury assessment costs under §9607(a)(4)(C) is ripe when such costs are incurred." *Id.* at *15.

Finally, the court noted that if the plaintiff could prove that the defendants were liable for payment of the assessment costs already incurred, then the plaintiff would be entitled to declaratory relief under Section 9613(g)(2) and such liability finding would be binding on any subsequent action for assessment costs or natural resource damages. *Id.* at *17-18.

The same reasoning applies here. Section 9613(g)(1) does not apply to the Tribe's claim for assessment costs; therefore such claim is ripe for review. In addition, under Section

9613(g)(2), any liability determination in this action will be binding in any future action brought by the Tribe against the Federal Defendants for assessment costs or natural resource damages.

IV. CONCLUSION.

For the foregoing reasons, Plaintiffs respectfully request this Court to deny the Federal Defendants' motion. The Tribe's NRD claim should not be dismissed as unripe because it is limited to "loss of services" injuries. Alternatively, Plaintiffs should be granted leave to amend the Complaint to include allegations demonstrating that EPA is not, and has not been, diligently proceeding with the remedial investigation. The Tribe's claim for NRD assessment costs should not be dismissed because Section 9613(g)(1), on its face, does not apply to claims for cost recovery.

Respectfully submitted,

Bill Robins III
Heard, Robins, Cloud & Lubel, L.L.P.
300 Paseo de Peralta, Suite 200
Santa Fe, New Mexico 87501
(505) 986-0600 (Telephone)
(505) 986-0632 (Facsimile)

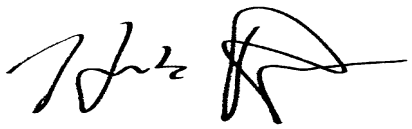
Michael A. Caddell
Cynthia B. Chapman
George Y. Nino
Caddell & Chapman
1331 Lamar, Suite 1070
Houston, Texas 77010
(713) 751-0400 (Telephone)
(713) 751-0906 (Facsimile)

Andrew Sher
The Sher Law Firm, PLLC
4151 S.W. Freeway, Suite 435
Houston, Texas 77027
(713) 626-2100 (Telephone)

(713) 626-2101 (Facsimile)

Stephen R. Ward, Okla. Bar No. 13610
Conner & Winters, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
(918) 586-8978 (Telephone)
(918) 586-8547 (Facsimile)

Hank Bates, AR Bar No. 98063
Cauley Bowman Carney & Williams
P. O. Box 25438
Little Rock, Arkansas 72221
(501) 312-8500 (Telephone)
(501) 312-8505 (Facsimile)



BY:_____
Hank Bates, ABN 98063

ATTORNEYS FOR THE PLAINTIFFS, QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH), JOHN L. BERREY, COLLEEN WILSON AUSTIN, EDWINA FAYE BUSBY, JEAN ANN LAMBERT, FLORENCE WHITECROW MATHEWS, and ARDINA REVARD MOORE

CERTIFICATE OF SERVICE

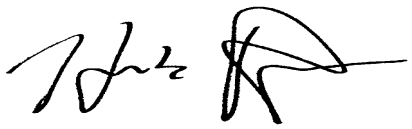
I hereby certify that on this the 28th day of September, 2007, a full, true, and correct copy of the above and foregoing was filed with the Clerk of Court through the ECF System, and copies were also deposited in the United States mail with proper first-class postage fullly prepaid thereon, to the following non-registrants of the ECF System:

Caroline M. Blanco
US Dept. of Justice (Envrmtl-Box 663)
Environment & Natural Resources Div
P O BOX 663
WASHINGTON, DC 20044-0663

JoAnn J. Bordeaux
US Dept. of Justice
(Envrmtl Torts-Box 340)
Civil Division Environmental Torts
P O BOX 340
WASHINGTON, DC 20044

John K Sherk, III
Shook Hardy & Bacon LLP
2555 GRAND BLVD
KANSAS CITY, MO 64108-2613

Judy Garner Vanderflute
1505 Skylaine Ct
Miami, OK 74354



HANK BATES, ABN 98063