IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE QUAPAW TRIBE OF OKLAHOMA, et al., Plaintiffs, v. BLUE TEE CORP., et al. Defendants.	No. 03-CV-846-CVE-SAJ Eagan, C. J.

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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Having obtained new counsel and completed amendments to their Complaint, Plaintiffs seek to advance a new natural resource damages ("NRD") claim against all parties pursuant to Comprehensive Response Compensation and Liability Act of 1980 ("CERCLA") § 107(f)(1), 42 U.S.C. § 9607(f)(1).[1/] The same statute that provides the Plaintiffs' claim, however, also expressly provides that "[i]n no event may an action for damages under this chapter . . . be commenced . . . before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study . . .." CERCLA § 113(g)(1), 42 U.S.C. § 9613(g)(1). Because the Environmental Protection Agency ("EPA") has not completed its decision-making for the Tar Creek Superfund Site ("Site"), the United States has moved for judgment on the pleadings, seeking dismissal without prejudice to re-institution following EPA's execution of a final Record of Decision ("ROD").[2/]

The Court should grant the motion; *first*, because Plaintiffs have chosen not to challenge the Environmental Protection Agency's ("EPA's") statutory diligence; *second*, because the phrase "selection of the remedial action" should be taken to refer to *final* ROD at large sites with multiple "operable units" ("OUs"); and *third*, because limiting the relief requested to interim damages does not preclude application of the statutory prohibition.

[1/] Third Amended Complaint ("Complaint") ¶¶ 60, 188-93, *see* Sixth Claim for Relief at 53 (titled as a "Claim for Damages Against All Defendants"). This is the only count pled against the United States and its Secretary of the Interior.

[2/] The President has delegated his authority under this portion of the CERCLA regulatory scheme to EPA pursuant to Executive Order 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987). Accordingly, any question regarding diligence would necessarily be directed to EPA activity.

STATEMENT OF THE CASE

Because the present motion relies primarily on the plain words of the applicable statute, an extensive statement is not required. Application of the law to the facts at hand, however, does require an understanding of EPA's approach to addressing complex environmental problems under CERCLA, and familiarity with the state of affairs at the Tar Creek site as the motion is made.

A. The CERCLA Process and the Tar Creek Site

The Tribe[3/] seeks to advance the NRD claim as part of an effort to address the admittedly substantial environmental legacy of lead and zinc mining in Northeastern Oklahoma. This once-lucrative industry peaked prior to WWII, and was in serious decline by the end of the Korean War.[4/] Early mining techniques are predictably associated with what today is considered serious contamination, and there is no dispute about the formidable nature of the environmental consequences that were left on the forty square mile Tar Creek Site.[5/] These include

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[3/] The Sixth Claim is also distinct because the individual Plaintiffs do not take part – CERCLA limits NRD plaintiffs to sovereign trustees: the United States, States, and Tribes. Complaint ¶ 189; *see* CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) ("liability shall be to . . . any Indian Tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe . . ."). Accordingly, the remaining references herein refer to the "Tribe" in this unique Plaintiff's role.

[4/] Keheley, Warner & Wood, Historical Survey of Indian-Owned Mill Tailing Piles in the Picher Mining Field, Ottawa County, Oklahoma at 12 (Final Report, March 2003) ("The 1920s were the golden years for the district with peak mine production being attained in 1925-26. The value of the concentrates produced for those two years alone were worth $74,009,883" (citation omitted)). *Id.* at 13 (Noting that most of the larger mining companies ceased operations during 1957).

[5/] Final Proposed Plan for Public Review Operable Unit 4 – Chat Piles, Other Mine and Mill Waste, and Smelter Waste, Tar Creek Superfund Site, Ottawa County, Oklahoma ("OU4 Proposal") 6 (published July 25, 2007) at http://www.epa.gov/Region6/6sf/pdffiles/tar_creek_

contaminated ground and surface waters, residential lead exposure associated with the surface storage of approximately thirty-one million cubic yards of mine tailings known locally as "chat," (OU4 Proposal at 6), a host of ecological problems, and at least some problems not being addressed directly by the CERCLA program (notably including a significant subsidence issue).

Following the listing of the site on the National Priorities List ("NPL") and some initial assessment work, EPA has set about conducting its work at the Site as it often does at such large, complex sites – by dividing the job into manageable tasks commonly known as "operable units."[6/] The Agency recently described the constellation of Tar Creek OUs in connection with its proposal to address the mine waste at the site:

> The following five operable units (OUs) have been defined at the site: OU1 - surface water/ground water; OU2 - residential areas; OU3 - Eagle-Picher Office complex (abandoned mining chemicals); OU4 - Mine and Mill Waste, and Smelter Waste, and OU5 - Sediments.

OU4 Proposal at 10-11. For present purposes, the important parts of the process the Agency has undertaken begin with the preparation of a remedial investigation and feasibility study ("RI/FS") in which the Agency seeks to acquire "data necessary to adequately characterize the site [or in

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ou4_proposed_plan_072407.pdf (Site size of approximately forty square miles).

[6/] CERCLA work is governed by an extensive set of regulations collectively known as the National Oil and Hazardous Substances Pollution Contingency Plan, commonly referred to as the "NCP." *See* 40 C.F.R. §§ 300.1-.920 (the NCP); CERCLA § 105, 42 U.S.C. § 9605 (statutory direction). The NCP defines an "operable unit," or "OU," as "a discrete action that comprises an incremental step toward comprehensively addressing site problems," and indicates that "[t]he cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site". 40 C.F.R. § 300.5; *see also* 40 C.F.R. § 300.430(a)(ii)(A) ("Sites should generally be remediated in operable units when early actions are necessary or appropriate to achieve significant risk reduction quickly, when phased analysis and response is necessary or appropriate given the size or complexity of the site, or to expedite the completion of total site cleanup").

this case the OU] for the purpose of developing and evaluating effective remedial alternatives," and to develop "appropriate remedial alternatives" reflecting "the scope and complexity of the remedial action under consideration and the site problems being addressed." 40 C.F.R. §§ 300.430 (d)-(e). Once the Agency has developed a suitable list of alternatives, it applies numerous criteria set forth in the NCP in an effort to systematically choose "best" solutions. 40 C.F.R §§ 300.430(e)(9)(iii), (f). As part of this process, the Agency issues a proposed plan for public comment prior to recording its remedial choice in a Record of Decision. 40 C.F.R. § 300.430(f)(2)-(3) (proposed plan and public comment); *Id*. § 300.430(f)(4)-(5) (final remedy selection and documentation in a ROD). Following remedy selection and recording of the decision, the Agency will produce a detailed design for the selected remedy and sets about actually conducting its remedial action – in the remedial design/remedial phase , or "RD/RA" . *See generally* 40 C.F.R. § 300.435.

To date, EPA has undertaken responses in connection with several of the OUs at Tar Creek, including an effort to prevent contaminant migration to the deep aquifer and to limit acid mine discharges to Tar Creek pursuant to at June, 1984 ROD,[7/] a program to remediate contaminated soils in residential areas following the execution of an August, 1997 ROD,[8/] and a

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[7/] Third Five-Year Review Report for the Tar Creek Superfund Site Ottawa County, Oklahoma at 14, 17, 20-21 (Sept. 2005) at http://www.epa.gov/Region6/6sf/pdffiles /tc_5yr_ 2005-09.pdf ("2005 Five Year Review") (Reporting on OU1, an effort to protect surface and deep (Roubidoux Aquifer) groundwater by limiting recharge of the shallow aquifer).

[8/] This OU2 work has addressed over two thousand individual properties. 2005 Five Year Review at 15-16, 23-24; *see Id.* at 24 (Testing confirmed "a decrease . . . in both the average blood lead levels and the percentage of elevated blood lead levels in children between the ages of 1 and 5"). The Agency for Toxic Substances and Disease Registry subsequently reported that blood lead levels in children living on-site were near the national average. *See* ATSDR Fact Sheet (Nov. 8, 2004) at http://www.atsdr.cdc.gov/sites/tarcreek/tarcreekfactsheet110804.html.

time critical removal action to dispose of mining chemicals still stored in containers at the Eagle-Picher Office Complex.[9] The Agency has recently proposed a remedial action for OU4, plainly the most ambitious undertaking at the Site to date. Following the study of sales of "pile-run" chat for use in roadbeds (testing encapsulation of the threat in asphalt), and the Agency's recent promulgation of a regulation governing the practice in Federally-funded transportation projects,[10] EPA now proposes to facilitate chat sales as a means to dispose of the bulk of the on-site source material. In addition to this basic design feature, OU4 includes plans to remediate chat bases (beneath chat piles), fine mining wastes, and other materials as required to either remove or control the source of any ongoing contamination (*e.g.*, to surface waters), and to deal with chat that cannot be sold. *See* OU4 Proposal at 2 (indicating that source material in named streams "will be addressed on a priority basis"; *id*. at 3 (discussing "[n]on-marketable chat piles," "fine tailings ponds," and other sources of contaminated material). OU5, addressed primarily to ecological concerns relating to stream-bed sedimentation, "is currently in the early site characterization phase." OU4 Proposal at 11.[11]

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[9] 2005 Five Year Review at 12. In contrast to the basic "remedial action" process described in the text, removal actions are often simpler – and sometimes temporary – responses. "Time critical" removals are generally reserved for exigent circumstances in which the threat requires that work be conducted on-site within a six-month time-frame. *See* 40 C.F.R. § 300.415(b)(2) (describing situations in which use of removal authority may be appropriate); *Id.* § 300.415(b)(4) (establishing the six month planning horizon that distinguishes between what are commonly referred to as "time critical" and "non-time critical" removal actions, and imposing additional planning requirements on the latter).

[10] Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as "Chat," 72 Fed. Reg. 39331-01 (July 18, 2007), *codified at* 40 C.F.R. Pt. 278.

[11] *See also* OU4 Proposal at 43 ("To address concerns of the State and the Tribes for the sediment and surface water downstream of the central mining area, OU5 will examine the nature and extent of contaminated sediment in Elm Creek and Tar Creek starting at the confluence of

B. Natural Resource Damages

CERCLA is "a broad and complex statute aimed at the dangers posed by hazardous waste sites," *United States v. CDMG Realty Co.*, 96 F.3d 706, 712 (3d Cir. 1996), "was designed to facilitate cleanup of environmental contamination caused by releases of hazardous substances," *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1488-89 (10th Cir. 1990), and is primarily intended to secure "the prompt cleanup of hazardous sites." *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985). It is by now well established that the statute provides no private right of action for injury to business or property.[12/] Nevertheless, in addition to extensive provision for addressing contamination directly, Congress did provide a novel cause of action for damages "[i]n the case of injury to, destruction of, or loss of natural resources . . .," CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1), available only to sovereign plaintiffs (the United States, States, and Indian Tribes) acting as statutory "trustees" of the resources in question.[13/]

Tar Creek and Lytle Creek to the Neosho River down to the point where it flows into Grand Lake").

[12/] *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1246 n.34 (10th Cir. 2006) ("*General Electric*") ("CERCLA as enacted provides no private right of action for personal or economic injury"); *see also Yellow Freight System, Inc. v. ACF Indus., Inc.*, 909 F. Supp. 1290, 1299 (E.D. Mo. 1995) ("CERCLA was not intended 'to make injured parties whole or to create a general vehicle for tort actions'"); *G.J. Leasing Co. v. Union Elec. Co.*, 854 F. Supp. 539, 561 (S.D. Ill. 1994), *aff'd* 54 F.3d 379 (7th Cir. 1995) (same -- citations omitted); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1250 (M.D. Pa. 1990); *Versatile Metals, Inc. v. The Union Corp.*, 693 F. Supp. 1563, 1582-83 (E.D. Pa. 1988); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1299-1300 (D. Del. 1987), *aff'd* 851 F.2d 643 (3d Cir. 1988).

[13/] *See also* CERCLA § 101(16), 42 U.S.C. § 9601(16) (defining natural resources and scope of trusteeship as "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources *belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by*" the United States, a State or an Indian Tribe. (emphasis supplied); *id.* § 107(f)(1), 42 U.S.C. § 9607(f)(1) (same). In the case of Tribes, trusteeship expressly includes resources "held in trust for the benefit of such tribe, or belonging to a member of such tribe if such

NRD trustees may recover only for natural resources over which they have (often overlapping) trusteeship, and Federal and State sovereigns are obliged to retain sums recovered "for use only to restore, replace, or acquire the equivalent of such natural resources . . .," although the measure of damages is not limited "by the sums which can be used to restore or replace such resources." CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).[14/] In addition to the basic cost associated with restoration or replacement, the measure of damages includes both the cost of assessing the injury to the natural resources and damages for lost use of the resource until baseline conditions can be restored.[15/] NRD's are compensatory, not punitive, *Ohio II*, 880 F.2d

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resources are subject to a trust restriction on alienation." CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

Novel, of course, does not mean entirely unprecedented. Congress appears to have been both responding to a trend in environmental legislation and consciously altering common law concepts. *Commonwealth of Puerto Rico v. SS Zoe Colocotroni*, 628 F.2d 652, 670-78 (1st Cir. 1980) (allowing a natural resource claim pursuant to a state statute, and surveying existing and proposed Federal remedies); *Ohio v. DOI*, 880 F.2d 432, 455 n.38, 470 (D.C. Cir. 1989) ("*Ohio II*") ("The legislative history illustrates, however, that a motivating force behind the CERCLA natural resource damage provisions was Congress' dissatisfaction with the common law").

[14/] *Coeur D'Alene Tribe v. ASARCO, Inc.*, 280 F. Supp. 2d 1094, 1115 (D. Idaho 2003) ("in many instances, co-trustees are the norm and not the exception"); *see id.* at 1117 (indicating that the Court would resolve the overlap by "allocat[ing] a stewardship percentage to each trustee in order to adequately compensate multiple trustees for damage to natural resources"); *Coeur D'Alene Tribe v. ASARCO, Inc.*, 471 F. Supp. 2d 1063, 1069 (D. Idaho 2005) (modifying the approach to allocating stewardship *sua sponte*: "Phase 2 of the trial will focus on the actual amount of damages that have occurred to the named natural resources and *not* on the percentage of management or control of the Plaintiffs as trustees" (emphasis original)).

[15/] CERCLA § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C) ("including the reasonable costs of assessing such injury"); *id.* § 301(c)(2), 42 U.S.C. § 9651(c)(2) (requiring the promulgation of regulations governing NRD assessment "including both direct and indirect injury, destruction, or loss" and taking into consideration "replacement value, use value, and ability of the ecosystem or resource to recover"); *General Electric*, 467 F.3d at 1245, *citing H.R. Rep. No.* 99-253(pt. 4) at 50 (1985) *reprinted in* 1986 U.S.C.C.A.N. 3068, 3080 (discussing "damages due to interim loss of use"); *cf. Ohio II*, 880 F.2d at 463 ("Congress intended the damage assessment regulations to

at 474, and such damages are – apart from work undertaken directly as part of EPA's basic response actions – the only means CERCLA provides for restoration of resources. Funding from the "Superfund" is not available.[16/]

Jurisdiction to try NRD claims rests exclusively with the Federal district courts, and the statute provides for the accrual of the cause of action and for a limitations period. Generally, a discovery rule applies to accrual (tolled to await the promulgation of damage assessment regulations), with a corresponding three year limitations period.[17/] This rule, however, does not apply in the case of ongoing remedial action at an NPL site like Tar Creek. In that instance (among several others), Congress has directed that the action not be brought "before selection of the remedial action" in the presence of diligent work on an RI/FS, and has enlarged the limitations period accordingly. *Id.* § 113(g), 42 U.S.C. § 9613(g) (requiring that suit be filed "within 3 years after completion of the remedial action (excluding operation and maintenance activities)").[18/] This is the provision that prevents the Tribe's proceeding with it's new NRD

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capture fully all aspects of loss").

[16/] CERCLA §§ 111(e)(2), 111(i), made some allowance for limited expenditures, but they are precluded after 1985 by the Superfund Amendments and Reauthorization Act. SARA § 517(a), 26 U.S.C. § 9507(c)(1).

[17/] CERCLA § 113(b), 42 U.S.C. § 9613(b) ("exclusive original jurisdiction over all controversies arising under this chapter . . ."); *id*. § 113(g)(1), 42 U.S.C. § 9613(g)(1) (accrual and limitations period).

[18/] The limitations period specified NPL sites at which EPA is conducting a response is a good bit more generous than the standard formulation. In the "ordinary" case, a trustee has three years from discovery of the injury in which to file a complaint. But at sites like Tar Creek, the statute does more than toll the three year limitations period until the remedy is *selected* – it allows for suits filed three years after the remedy is *complete*. Trustees are free to wait for the Agency to choose its remedy and to implement it before commencing an NRD suit.

claim at present, and is the reason the United States has advanced the attached motion.

STANDARD OF REVIEW

Because the United States has filed an answer, the present motion is necessarily for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The applicable standards for such a motion, however, are essentially identical to those applied to a motion to dismiss pursuant to Fed. R. Civ. P. 12(b). *Aspenwood Investment Co. v. Martinez*, 355 F.3d 1256, 1259 (10th Cir. 2004); *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401, 404 (10th Cir. 2004). Well pled allegations must be taken as true, and reasonable inferences allowed in Plaintiffs' favor. *Alvarado v. KOB TV, LLC*, No. 06-2001, 2007 WL 2019752, at *3 (10th Cir. July 13, 2007); *see Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002), *McDonald v Kinder-Morgan Inc.*, 287 F.3d 992, 997 (10th Cir 2002). "Conclusory allegations without supporting factual averments," however, are "insufficient," *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("*Hall*"), as are statements which "state legal conclusions rather that factual assertions" *Brooks v. Sauceda*, 85 F. Supp. 2d 1115, 1119 (D. Kan. 2000), *aff'd without opinion* 242 F.3d 387 (10th Cir. 2000).[19/]

The Court has two options with regard to the only facts that matter in connection with the present motion – publication of various documents depicting EPA's progress at the Tar Creek

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[19/] Although the Supreme Court has recently declined to follow the oft-quoted dictum that a Court ought grant a motion to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007) ("*Bell Atlantic*") *abrogating Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("after puzzling the profession for 50 years, this famous observation has earned its retirement"), the updated "plausibility" standard is hardly more stringent, and is not at issue on the present motion, which depends primarily on the legal sufficiency of the Tribe's Sixth Claim for Relief. *See generally TON Services, Inc. v. Qwest Corp.*, No. 06-4052, 2007 WL 2083744, at *7 (10th Cir. July 23, 2007) *quoting Bell Atlantic*, 127 S.Ct. at 194 ("enough facts to state a claim to relief that is plausible on its face").

site as CERCLA the response continues. It may take judicial notice of the limited facts required, as they are readily discernable from public documents,[20/] or it may if it prefers, consider these facts as "matters outside the pleadings," treating the motion "as one for summary judgment . . . disposed of as provided in Rule 56." Fed. R. Civ. P. 12(c). In that event, the Tribe may no longer rely on its allegations alone, but must instead provide evidentiary support for its positions regarding the material facts. *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). On summary judgment, Plaintiffs remain entitled to the benefit of the doubt if a material factual dispute remains, *Riggs v. Airtran Airways, Inc.*, No. 06-3250, 2007 WL 2258826, at *3 (10th Cir. Aug. 8, 2007) ("In making this determination, we view the evidence in the light most favorable to Ms. Riggs, the non-moving party, and draw all reasonable inferences in her favor"), but the dispute must be both genuine and material for the claim to survive. Fed. R. Civ. P. 56(c) ("the judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted"); *see Montes v. Vail Clinic, Inc.*, No. 05-1385, 2007 WL 2309766, at *1 (10th Cir. Aug. 14, 2007) ("Summary judgment follows when a moving party points to the absence of factual support on an element essential to the non-

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[20/] Fed. R. Evid. 201(b)(2) (matters "not subject to reasonable dispute . . . [and] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); 5B Wright, Miller and Kane, *Federal Practice and Procedure* § 1357 at 376 (3d ed.2004 and Supp. 2007) (court is not limited to the four corners of the complaint – "items subject to judicial notice, matters of public record, [and] orders . . . may be considered by the district judge without converting the motion into one for summary judgment").

movant's case, and on which the non-movant bears the burden of proof at trial").

ARGUMENT

Because the attached motion is based squarely an express statutory prohibition, it would certainly appear that the Tribe's claim must be dismissed. *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1990) ("we hold that the notice and 60-day delay requirements *are mandatory conditions precedent to commencing suit* under the RCRA citizen suit provision; a district court may not disregard these requirements at its discretion" (emphasis supplied)). As briefly discussed with the Court during the July 31, 2007 status conference, there are only three arguments that might offer Plaintiffs' hope of avoiding that result.

First, Plaintiffs might question EPA's statutory diligence in conducting the Tar Creek response – an argument the Tribe has chosen to withhold in this instance. Second, there are undoubtedly those who will argue that the complication introduced when EPA divides work into operable units at large sites produces an opportunity for suit each time EPA "selects a remedy" for any Operable Unit. Third, the Tribe apparently means to argue that while some NRD claims must await "selection of the remedial action," those pertaining to "past and interim loss-of-use natural resource damages" (Complaint at 54 – demand for Count VI) may be collected immediately, along with a declaratory judgment securing liability against various parties in connection with further claims to follow (*see* Complaint ¶ 190).

I. THE TRIBE DOES NOT CHALLENGE EPA's DILIGENCE

The most obvious way to support an attempt to bring an NRD claim earlier than would otherwise be permitted is to attempt a demonstration that EPA is not "diligently proceeding with a remedial investigation and feasibility study . . .." CERCLA § 113(g)(1), 42 U.S.C. §

9613(g)(1). For the moment, however, the Tribe represents that it will not make that argument – indicating an intention in the Complaint to "preserve their contention that EPA is not diligently proceeding with a remedial investigation and feasibility study . . ." without actually asserting the claim. Complaint at 55 n.6. To make this case, the Tribe would need to amend its complaint yet again, and to present an argument that EPA's extensive work at the site does not meet the statutory standard for diligence.

II. THE COURT SHOULD AGGREGATE OUs FOR PURPOSES OF SECTION 113(G)

The operative language set forth in section 113(g)(1) could hardly be more explicit:

> . . . *In no event may an action for damages* under this chapter with respect to such . . . facility *be commenced . . . (ii) before selection of the remedial action* if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) . . .

42 U.S.C. § 9613(d)(1) (emphasis supplied). The direction provided is clear and emphatic, and there is little room to interpret further the straightforward intention of the Legislature. Accordingly, in the commonplace situation involving a unitary remedy (in effect, a single OU), there can be no question: Absent a demonstration that EPA has not been diligent, suit may not be commenced until the Agency has "selected" the response action.

Any doubt that this is precisely what Congress had in mind when it added section 113(g) to CERCLA in 1986 is easily resolved by resort to the legislative history. The House Judiciary Committee, focusing on "those portions of the bill which fall within its jurisdiction," provided the following observations regarding amendments to what was then denominated section 113(h) of H.R. 2817:

> The Committee amendment to new section 113(h)(1) of CERCLA, as reported by the Energy and Commerce Committee, alters the statute of limitations for natural resource damages. *The amendment ensures that actions for natural resource*

> *damages are filed at the most appropriate time for the particular site involved.* Because a remedial action at the site may include the restoration, rehabilitation, or replacement of natural resources, *an action for natural resource damages for a site on the National Priorities List (NPL) should not take place before the remedy has been selected . . .*
>
> *. . . Actions filed subsequent to that time in cases where the remedy has not yet been selected should be dismissed without prejudice by the courts as unripe for review.*

H.R. Rep. No. 99-253(pt. 3) at 17, 20-21, *reprinted in* 1986 U.S.C.C.A.N. 3038, 3040, 3043-44 (1985) (emphasis supplied).

The timing specified is entirely consistent with both the remedial nature of CERCLA as a whole and, more specifically, with what Congress meant to be the subsidiary role of NRD claims. CERCLA is aimed first and foremost at securing "cleanup" of hazardous substances from the environment, together with payment or reimbursement by parties made liable by Section 107(a), 42 U.S.C. § 9607(a).[21/] As a result, NRD claims are often said to be *residual* – in the sense that the statute supplies them as a remedy for injuries that cannot be repaired by statutory response actions.[22/] These are the features that distinguish the CERCLA scheme from

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[21/] *General Electric*, 467 F.3d at 1244, *citing Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) ("CERCLA's principal aims are to effectuate the cleanup of hazardous waste sites and impose cleanup costs on responsible parties"); *J.V. Peters & Co. v. EPA*, 767 F.2d at 264 ("the Act's primary purpose is 'the prompt cleanup of hazardous waste sites . . .'" (citation omitted)).

[22/] *See, e.g.*, *Utah v. Kennecott Corp.*, 801 F. Supp. 553, 568 (D. Utah 1992) ("customarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment"); *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1035 (D. Mass. 1989) (same: "As a residue of the cleanup action, in effect, they are thus not generally settled prior to a cleanup settlement"); *cf. General Electric*, 467 F.3d at 1245 ("The *measure* and *use* of damages arising from the release of hazardous waste is restricted to accomplishing CERCLA's essential goals of restoration or replacement, while also allowing for damages due to interim loss of use" (emphasis original)).

traditional tort remedies – rather than provide primarily for compensatory damages (accompanied by a private mitigation requirement), with injunctive relief only in confined circumstances, CERCLA provides, in effect, for maximum mitigation of environmental harm at the outset – either by EPA or under regulatory supervision. It then awards damages only to selected sovereign entities, and only for specific kinds of injury.

Once that distinction is made, common sense dictates precisely the sort of timing for NRD claims Congress imposed in section 113(g)(1). Given this basic scheme, it would make no sense to allow claims prior to at least *selection* of a remedy. Without knowing EPA's response, for example, it is not possible to make a reasonable estimate of the residual harm expected to remain post-response (because the extent to which EPA's work can be expected to mitigate ecological harm is indeterminate) or ascertain the duration of any temporal injury due to loss of environmental "services" (because it would be impossible to know when remedial work would be complete and at least some of those "services" restored).

There remains only the question posed at the outset about how the Courts ought to handle complex sites with multiple operable units – an eventuality not explicitly provided for on the face of the section 113(g) timing provisions. However, once the reasons for the statutory scheme are understood, it is but a small step to the proposition that the statutory reference to "*the* remedial action" should be construed to encompass the sum of the planned operable units at complex sites. To rule otherwise would be to allow EPA's rules concerning the division of tasks at the largest, most difficult NPL sites to modify Congressional commands about the timing of NRD lawsuits in a manner that neither the Legislature nor the Agency could possibly have

intended.[23]

The case before the Court presents a fine illustration. As noted, EPA plans five separate operable units for the site. Several of these are highly likely to change conditions at and surrounding the site for NRD purposes – others may have more limited impact.[24] Therefore, until the Agency makes its selection on the final operable unit, it is impossible to evaluate the resource damages that will remain after the Agency implements the remedy. Because that is the case, the only reasonable construction of the timing provision would hold the Tribe's claim premature until EPA selects a remedy for OU5.[25]

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[23] The same construction also substantially furthers judicial economy, and prevents multifarious litigation. The Tribe has already alluded to what would be a second suit that will follow it's proposed NRD claim, one in which it will seek damages for "restoration or replacement." Complaint at 55 n.6.

[24] In somewhat simplified terms, OU1 (surface water/groundwater quality); OU4 (pertaining to over 30 million cubic yards of chat and related mine wastes, portions of which continues to add pollution to area streams at present); and OU5 (in which EPA is considering remedial work on metals and other contaminants in local stream sediments) are all likely to alter the local environment in a fashion that could be expected to materially impact an NRD claim. On the other hand, portions of OU2 pertaining to human exposure to metals in residential yards, and the drum removal undertaken as part of OU3, would tend to have only minor bearing on such a claim. OU4 Proposal at 10-11; *see Id*. at 14 (OU4: "the preferred remedy discussed in this Proposed Plan calls for the removal of source material located near streams and creek . . . [this] will prevent all discharge of lead-, cadmium-, and zinc-contaminated source materials to surface water and thereby remove the ingestion pathway of these chemicals to riparian biota").

[25] This construction is not strictly necessary to secure dismissal, because "a remedial investigation and feasibility study" is underway on OU4, as evidenced by the recent publication of the OU4 Proposal. *See* Note 5 *supra* at 2. But reliance on that immediate fact would imply a window for NRD suits that "opened" and "closed" with EPA's choice of a remedial action for *each* operable unit – a result that cannot be reconciled with the rationale for including the timing provision in the Statute. Similarly, a construction that construed the phrase "*the* remedial action" as "any remedial action" would here produce for the tribe a right to sue immediately following the OU1 ROD, notwithstanding the continuing presence tens of millions of tons of mine wastes that EPA intends to address. The NRD damage analysis is meant to be comprehensive, and the evaluation cannot be made if EPA is still considering work that my have

III. CLAIMS FOR TEMPORAL LOSSES ARE NOT YET AVAILABLE

The Tribe's Sixth Claim for Relief seeks "compensatory damages for all past and interim loss-of-use natural resource damages on behalf of the Quapaw Tribe from the time of release of any hazardous substance until restoration . . ." (Complaint at 54-55) and reserves claims for "restoration or replacement" in what Plaintiffs suggest is an effort to be "consistent with" sections 107 and 113(h) and the *General Electric* precedent. *Id.* at 55 n.6. Presumably, this is meant to suggest that the Tribe believes it has a right to immediately advance a claim for "use" or "environmental service" damages now, and that it will then rely on a section 113(g)(2) declaratory judgment in a subsequent action for "restoration or replacement" damages. 42 U.S.C. § 9613(g)(2); *see* Complaint ¶ 190.

There are several problems with that approach. First, the implicit suggestion that the Tenth Circuit's decision condones this sort of NRD claim misconstrues the holding in *General Electric*. The portion of the decision the Tribe cites involved an attempt to use common law tort remedies as a vehicle to make up for what was said to be an inadequate groundwater remedial action. 467 F.3d at 1249 ("Despite the States' contrary assertion, its expert-intense argument . . . is, in all respects, a challenge to an EPA-ordered remediation"); *compare* Complaint at 55 n. 6 (citing specifically to pages 1249-51).[26/] The Court responded to the State's proposal to

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significant impact on the terrestrial ecosystem.

[26/] Although the State had originally commenced a CERCLA-based NRD claim pursuant to section 107(f)(1), 42 U.S.C. § 9607(f)(1), it had voluntarily abandoned that claim, dismissing it with prejudice in an effort to keep the case in court. *General Electric*, 467 F.3d at 1235-36 (first of two suits based on section 107(f)(1)); *id*. at 1237 (indicating that the district court had granted the Attorney General's motion to dismiss all CERCLA claims with prejudice). The Court continued to refer to the AG's "NRD demand," apparently based on a state statutory claim, but the opinion makes clear that only state claims remained in the case. *Id.* at 1243 (indicating that,

substitute damages for a proper remedy by holding *first*, that any unlimited claims for money damages were pre-empted by CERCLA, and *second*, that CERCLA § 113(h) precluded challenges to the remedial work – including those masquerading as damage claims. 467 F.3d at 1247 (conflict preemption); *id*. at 1250 ("[w]e will not permit the State to achieve indirectly through the threat of monetary damages . . . what it cannot obtain directly . . . "). There is nothing in this discussion that speaks to the question now before the Court. There are no preemption arguments in play here, and section 113(h) is addressed to attacks on EPA's remedial work, not to the timing of NRD claims. Section 113(g)(1) is a completely distinct statutory requirement, and is aimed at a distinct problem – one which would arise even absent an attack on EPA's remedial work if Trustees were permitted to bring residual claims for NRDs before it is possible to make an informed determination of what those damages are.

Second, the Tribe appears to want to treat the demand for lost use damages as though they were a separate cause of action, something they plainly are not. Rather, the cause provided by section 107(f)(1) is a generic claim covering whatever natural resources subject to the Trustee's supervision have been injured. The claim is necessarily subject to all applicable statutory constraints – including the section 113(g)(1) prohibition on early commencement in the circumstances specified. The "loss of use" concept is simply a damage theory that may be advanced once suit is brought consistent with the statutory provisos.

Third, a claim for Declaratory Judgment will not save the claim in these circumstances. Declaratory judgment, authorized (but not compelled) at 28 U.S.C. § 2201, is also a remedy, one

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as the suit progressed the State "asserted an unrestricted right to pursue . . . any and all claims, remedies, and damage theories *available under state law*" (emphasis supplied)).

that has long been held to operate only as a procedural device. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). The statute "does not extend the jurisdiction of federal courts; it only 'enlarge[s] the range of remedies available.'" *Prier v. Steed*, 456 F.3d 1209, 1212 (10th Cir. 2006) *quoting Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671(1950). Because that is the case, the courts may not hear a case that is otherwise non-justiciable simply because a claim for declaratory relief is included. *See, e.g., Prier v. Steed*, 456 F.3d at 1213-14 (mootness compels dismissal); *Mylan Pharm. Inc. v. Thompson*, 268 F.3d 1323 (Fed. Cir. 2001) (impermissible private party action under Federal Food, Drug & Cosmetics Act not aided by inclusion of declaratory judgment claim).[27/] Accordingly, the presence of a claim for declaratory judgment does not bear on the issues required to resolve the motion, and the Court ought to dismiss the Tribe's claim until such time as EPA has completed its remedial decision-making.

[27/] Nothing in CERCLA amends this commonplace rule. Section 113(g)(2) does reference the availability of a declaratory judgment action in an action for response costs, understandably indicating that any such judgment "will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2). No doubt, such judgments will often be useful at sites where response cost claims are followed by NRD suits. But the provision is merely a recitation of ordinary legal principle in connection with a different CERCLA claim (response cost recovery), and there is no hint in section 113(g)(1) that Congress meant to alter the normal rules regarding declaratory judgments in connection with NRD claims.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss the Tribe's Sixth Claim for relief without prejudice to a subsequent suit once EPA has settled upon a complete set of remedial actions for the Tar Creek Site.

Respectfully submitted,

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