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IN THE UNITED STATES JUDICIAL DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION Plaintiff-Intervenor, v. QUESTAR GAS MANAGEMENT COMPANY, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION'S COMPLAINT** Case No. 2:08-CV-00167-DAK Judge: Dale A. Kimball Magistrate Judge: Samuel Alba

INTRODUCTION

The United States filed suit against Defendant Questar Gas Management Company ("QGM") on February 29, 2008, alleging that five of QGM's natural gas compression facilities are in violation of the Clean Air Act ("CAA"). (*See* United States' Complaint, Dkt. # 1.) QGM denies these allegations. (*See* Answer and First Amended Answer, Dkt. ## 19, 49.) The United States further alleges that the Environmental Protection Agency ("EPA") has exclusive CAA regulatory enforcement jurisdiction over QGM's facilities—and that the State of Utah has been stripped of any jurisdiction—because the facilities are located in "Indian Country." (Dkt. # 1.) QGM denies this allegation, too, and asserts several affirmative defenses to the United States' claims based upon the "Indian Country" issue, including that the portion of the Uintah and Ouray Reservation on which the facilities are located[1] was disestablished by acts of Congress more than one hundred years ago, and that, regardless, the Ute Indian Tribe of the Uintah and Ouray Reservation (the "Tribe") disclaimed its civil and regulatory authority over the lands upon which some of the facilities are located to the State of Utah more than ten years ago in settlement of previous jurisdictional litigation. (Dkt. ## 19, 49.)

The Tribe moved to intervene in this matter in October of 2009 (Dkt. # 88), 18 months after the United States' complaint was filed. This Court granted that motion, with express limitations. (Dkt. # 142.) The Tribe filed its Complaint in intervention on March 31, 2010. (Dkt # 167.) Pursuant to Federal Rule of Civil Procedure 12(b)(6), QGM moves to dismiss the

[1] The United States alleges that the facilities are located within the Uintah and Ouray Reservation, which is made up of the Uintah Valley Reservation (the northern half) and the Uncompahgre Reservation (the southern half). QGM's facilities are alleged to be located within the Uncompahgre portion of the Reservation.

Tribe's Complaint in intervention on the grounds that the Tribe has failed to state a claim upon which relief can be granted.

STATEMENT OF ISSUES AND FACTS

This Court's Order on the Tribe's Intervention

1. The Tribe initially sought intervention in this litigation on two general grounds. (Dkt. # 89.) One, the Tribe sought intervention with respect to jurisdictional issues raised by QGM's affirmative defenses, the resolution of which may affect the status of the Uncompahgre portion of the Uintah and Ouray Indian Reservation. (*Id.*) Two, the Tribe sought to bring its own CAA claims in intervention pursuant to the CAA citizen suit provisions. (Dkt. # 89-2.)

2. QGM did not oppose the Tribe's intervention on jurisdictional matters, but moved to strike the Tribe's CAA claims on the grounds that the Tribe does not qualify under CAA citizen suit provisions and the United States adequately represents whatever interest the Tribe does have in CAA enforcement. (Dkt. ## 94, 96.)

3. The Tribe replied with an amended complaint in which it brought a new claim of federal common law nuisance against QGM. (Dkt. #107-2.)

4. QGM opposed the Tribe's nuisance claim in intervention on the grounds that the claim was not timely made, and that the protracted discovery necessary to pursue and defend a nuisance claim would prejudice the current parties relative to the discovery schedule and trial date. (Dkt. # 125.)

5. In the Court's Order on Intervention (Dkt. # 142), this Court determined that:

(a) The Tribe did not qualify for intervention as of right because it did not qualify under the CAA citizen suit provisions and the United States adequately represents any interest the Tribe may have in CAA enforcement issues;

(b) The Tribe did qualify for intervention of right with respect to the jurisdictional issues raised by QGM's affirmative defenses; and

(c) The Tribe could permissively intervene on its claims of nuisance, limited, however, to "***only those matters that share common questions of law and fact with the existing CAA claims . . . . The court, however, will not allow the Tribe to pursue its nuisance claim to the extent that it covers matters unrelated to ongoing CAA enforcement action.***"

6. The Court also ordered the Tribe to "file an amended complaint in accordance with this ruling within ten days of this Order," which would have been January 23, 2010. (*Id.*)

7. Before filing its amended Complaint, the Tribe filed a motion to reconsider this Court's order on intervention. That motion was denied. (Dkt. # 172, Apr. 1, 2010.)

8. The Tribe filed its amended Complaint on March 31, 2010, more than two months after the filing deadline set forth in this Court's order on intervention. (Dkt. # 167.)

The Clean Air Act Regulatory Scheme

9. The Clean Air Act ("CAA") is the comprehensive federal law that regulates air emissions from stationary and mobile sources. *See* EPA website, Summary of the Clean Air Act, http://www.epa.gov/regulations/laws/caa.html. Many of the CAA's core programs regulate "major sources" and/or "major emitting facilities."

10. The CAA requires promulgation of National Ambient Air Quality Standards (NAAQS) for "criteria pollutants." *Id.*; CAA § 109; 40 C.F.R. pt. 50.

11. "Criteria pollutants" currently include lead, sulfur dioxide, nitrogen dioxide, carbon monoxide, particulate matter, and ozone (which is regulated by its precursors, nitrogen oxide and volatile organic compounds). 40 C.F.R. § 51.100.

12. The Tribe's complaint involves the CAA Prevention of Significant Deterioration ("PSD") program. (*See, e.g.,* Dkt. # 167 ¶ 11.) This program is designed to attain and protect air quality to satisfy all NAAQS requirements. *See* The Clean Air Act Handbook 131 (Robert J. Martineau, Jr. and David P. Novello eds., 2d ed., 2004). The PSD program is a complex, lengthy and elaborate permitting process known as "PSD review." *See* 40 C.F.R. §§ 52.21(j)-(r).

13. A source, to be potentially subject to PSD review, must initially qualify as a "major emitting facility." 42 U.S.C. § 7475. A "major emitting facility" is defined in the statute to include only those sources which "emit or have the potential to emit" certain pollutants in excess of either 100 tons per year, or 250 tons per year. *Id.* § 7479(1).

14. The Tribe's complaint also involves the CAA's National Emission Standards for Hazardous Air Pollutants (NESHAP). (*See, e.g.*, Dkt. # 167 ¶ 19.) NESHAP standards apply to certain sources that "emit or have the potential to emit" hazardous air pollutants (HAPs) in "major" amounts (i.e., greater than 10 tons per year for any individual HAP, or greater than 25 tons per year for all HAPs). *See* 42 U.S.C. § 7412. The United States alleges that two NESHAP standards apply to the compressor stations.[2]

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[2] The United States sued pursuant to the federal CAA because the United States alleges that the compressor stations are located in " Indian Country," where the United States claims to retain jurisdiction. This is a disputed issue of fact, as discussed below. In any event, Section 110 of the CAA authorizes States to develop, administer, and assume the primary responsibility to implement the CAA within their borders through State Implementation Plans, or "SIP's." 42 U.S.C. § 7410(a). With respect to PSD, NESHAP, and general CAA permitting rules, States can promulgate their own programs and seek approval from EPA to administer and enforce them as

15. The CAA does not bar a source from operating with emissions of "criteria pollutants" or "hazardous air pollutants." To the contrary, a source is expressly allowed to do so unless, as a threshold matter, the source exceeds certain thresholds in tons per year, in which case the source can still operate lawfully subject to various statutory and regulatory requirements. CAA § 169(1); 42 U.S.C. § 7479(1); 40 C.F.R. § 52.21(b)(1)(i)(b); CAA § 112; 42 U.S.C. § 7412(a)(1); 40 C.F.R. § 63.2.

The Tribe's Public Nuisance Claim As Alleged In The Complaint

16. The Tribe brings its complaint against QGM with respect to the same five facilities at issue in the United States' CAA enforcement action. (*See* Tribe's Complaint, Dkt. # 167 at ¶ 10.)[3]

17. The Tribe alleges that each of QGM's facilities "emit or has the potential to emit" 250 tons per year of "criteria pollutants" subject to regulation under the CAA, and that QGM releases potentially harmful amounts of HAPs. (*Id.* at ¶¶ 11, 19).

18. The Tribe makes several allegations about ozone—a "criteria pollutant"—alleging that ozone can be harmful to humans and to land (by way of harm to vegetation growth and crop yields) and that preliminary data suggests that current standards for ozone as set by the EPA have been exceeded in the Uinta Basin. (*Id.* at ¶¶ 12-18.)

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part of their SIPs. *See, e.g.*, 42 U.S.C. § 7410(a)(2)(C). Utah has received authority from EPA to implement the PSD and NESHAP programs through the Utah SIP.

[3] The Tribe's Complaint is attached as Exhibit "A."

Allegations of Uncontrolled Emissions

19. The Tribe alleges one specific instance of uncontrolled emissions, which allegedly occurred in late 2005 at QGM's Coyote Wash Facility. (*Id.* at ¶ 24.) (*See also* United States Complaint, Dkt. # 1 ¶ 9.)

20. The Tribe incorporates by reference Paragraphs 8-221 of the United States' complaint. (Dkt. # 167 ¶¶ 21, 29, 37, 45, 54.)

21. The Tribe does not allege which, if any, of the 214 paragraphs incorporated by reference support its nuisance claim.

The Tribe's Claim for Relief Under Federal Common Law Public Nuisance

22. Based upon the United States' allegations of fact and law, the Tribe concludes that each QGM facility has violated the CAA and its applicable regulations. (*Id.* at ¶¶ 21, 29, 37, 45, 54.)

23. The Tribe concludes that as a result of QGM's violation of the CAA, QGM is liable to the Tribe under federal common law public nuisance. (*Id.* at ¶¶ 66-76.)

ARGUMENT

Contrary to the Court's order, the Tribe's most recent complaint in intervention ("Complaint") includes allegations that do not share common questions of law and fact with the claims pursued by the United States. Further, the Tribe's Complaint fails to allege facts sufficient to survive challenge under the pleading standard set by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and made applicable to all federal actions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Even if the Tribe's Complaint did contain factual allegations sufficient to survive a *Twombly* challenge, however, much, if not all, of the Tribe's federal common law nuisance claim is preempted by federal law. *See United States v.*

Kin-Buc, Inc., 532 F. Supp. 699 (D. N.J. 1982). Additionally, the Tribe's nuisance claim is precluded by the applicable statute of limitations and barred under the doctrine of laches. Accordingly, the Tribe's Complaint should be dismissed in its entirety.

A. The Tribe's Complaint Ignores The Clear Direction Of This Court's January 13, 2010 Memorandum Decision And Order On Intervention.

With respect to the Tribe's nuisance claim, this Court expressly ordered that the Tribe could permissively intervene in only "those matters that share common questions of law and fact with the existing CAA claims . . . ." Further, this Court contemplated that the Tribe's pursuit of its nuisance claim as limited may have to continue outside the current litigation between the United States and Questar. "The court . . . will not allow the Tribe to pursue its nuisance claim to the extent it covers matters unrelated to ongoing CAA enforcement action. The Tribe should more properly assert such claims in a separate action against Questar." (Dkt. # 142 at 6.)

Contrary to this Court's clear direction, the Tribe's recently filed complaint in intervention includes allegations and requires proof not common to the claims pursued by the United States. The United States' claims against QGM are based on QGM's alleged failure to comply with various CAA regulatory programs. (*See* United States' Complaint, Dkt. # 1, ¶¶ 19-43.) The United States seeks penalties for non-compliance and a declaration that QGM come into compliance. (*See id.* at page 46). The Tribe's complaint, too, grounds its allegations of nuisance on QGM's alleged failure to comply with various CAA regulatory programs, apparently seeking to shoehorn its public nuisance claim into the United States' statutory claims and allegations. The Tribe's public nuisance claim as alleged, however, completely changes the nature of the United States' case. It morphs a regulatory enforcement action into a complex

toxic tort suit and raises numerous new medical, scientific and legal issues that are not contemplated by the current lawsuit.

- The Tribe claims QGM's activities have caused an unreasonable interference with the public "right to live in an environment that is *free from* harmful toxins and *pollutants*." ¶ 66 (emphasis added). Given that the CAA and its regulations expressly provide for emission thresholds of up to 250 *tons* of criteria pollutants and 10/25 *tons* of hazardous pollutants each year, the Tribe's claim raises new issues of both fact and law as to the precise amount of *actual* emissions (not *potential*, which underlies the majority of the United States' allegations), and whether or not the right to live in a "pollution"-free world exists, even assuming that there are any measurable or unregulated "pollutants" from the facilities.
- The Tribe alleges that QGM has caused or will cause an "unreasonable interference with . . . annoyance and/or injury to the Ute Tribe *and it members* . . . [and has endangered] public health and safety . . . ." ¶¶ 68-73. These new claims will require extensive factual development and discovery into the nature of the claimed medical/physical injuries to the Tribe and its individual members, as well as scientific and medical evidence of causation that are not at issue in the current lawsuit, *e.g.,* the environmental fate and transport of the contaminants of concern, modeling of the precise "dose" of pollutants to which human and ecological receptors may have been exposed, toxicological and medical evidence of illnesses allegedly caused by such alleged exposures, etc. These issues dramatically expand the nature and scope of this lawsuit beyond that which was contemplated by the Court's order, which sought to preserve the March, 2011 trial date with a modest change in the current discovery schedule.
- The Tribe claims that QGM has caused unreasonable and unnecessary danger to the public health and safety in the Reservation, including the lands, waters, and air therein. ¶ 70. By including allegations of harm to ***water and land***, the Tribe greatly expands the breadth of this Clean Air Act case, which only involves claims related to air emissions.
- The Tribe makes several allegations regarding ozone. ¶¶ 12-18. The United States has not alleged that any emissions from the facilities have created any exceedences of ozone standards.[4]

Accordingly, while the United States' CAA claims and the Tribe's nuisance claims may have some facts that overlap—such as the location of the facilities, the types of equipment utilized by the facilities, the types of emission controls used at facilities, the type of emissions

[4] The Tribe does not actually tie the factual allegations related to ozone to its vague nuisance claims, either.

from the facilities—the Tribe's nuisance claim goes far beyond the CAA claims and will require extensive additional proof and defense. To allow the Tribe to pursue and QGM to defend the nuisance claim without prejudice will likely require months if not years of extended discovery and protracted litigation, and likely require joinder of other operators of similar facilities with similar emissions in the Uinta Basin. QGM does not believe this is what this Court intended when it allowed the Tribe limited intervention on its nuisance claim. "The court . . . will not allow the Tribe to pursue its nuisance claim to the extent that it covers matters unrelated to ongoing CAA enforcement action. The Tribe should more properly assert such claims in a separate action against Questar." (Dkt. # 142.) Accordingly, QGM moves to dismiss the Tribe's complaint to the extent it exceeds this Court's order on intervention.

B. The Tribe's Federal Common Law Nuisance Claim is Preempted By Federal Law.

The Tribe's Complaint is based on the federal common law for public nuisance. (*See* Dkt. # 167, at 15 "Claim for Relief".) Though the Supreme Court held in *Erie Rail Co. v. Tompkins*, 304 U.S. 64 (1938), that "there is no federal general common law," a body of specialized federal common law has evolved. *See United States v. Kin-Buc, Inc.*, 532 F. Supp. 699, 700 (D. N.J. 1982). "Federal common law can be applied, if at all, however, only in the absence of an applicable Act of Congress." *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). Further, "'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of *federal law*." *Milwaukee v. Illinois*, 451 U.S. 304, 316-317 (U.S. 1981) (emphasis added). In *Milwaukee*, the United States Supreme Court held that the Federal Water Pollution Control Act ("FWPCA") pre-empts the federal common law of nuisance in the area of water pollution. *See id.* Under the reasoning of

Milwaukee, the CAA preempts (or displaces)[5] the Tribe's complaint of public nuisance in the area of air pollution. *Kin-Buc, Inc.*, 532 F. Supp. at 700 (holding that the CAA preempts federal common law nuisance claims when the comprehensive statute occupies the field).

The test for preemption from *Milwaukee* involves an assessment of the scope of the federal legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law. *Milwaukee*, 451 U.S. at 315, n.8. Further, even if application of federal common law does not directly conflict with the CAA, the federal courts are not free to "supplement" Congress' answer to the problem. *Id.* at 315 (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (wherein the Court refused to provide damages for "loss of society" under the general maritime statutes because Congress had not provided for such damages in the Death of the High Seas Act)). The *Milwaukee* analysis, therefore, involves a review of both the statute and the particular claims at issue. *See id.*

"[T]he CAA establishes a complete regulatory procedure whereby various pollutants are identified, air quality standards are set, and procedures for strict enforcement are created." *Kin-Buc, Inc.*, 532 F. Supp at 701; *see also Connecticut,* 582 F.3d at 375-76. Pursuant to the CAA, the EPA has promulgated NAAQS for "criteria pollutants" and developed programs to attain and achieve these standards. *See* CAA Handbook, *supra*, at 131 (describing, among other programs, the PSD program). (*See also* United States' Complaint, Dkt. # 1 at ¶¶ 37-43, describing PSD

[5] "The concept of 'displacement' refers to a situation in which 'federal statutory law governs a question previously the subject of federal common law.' . . . The term 'pre-emption,' in contrast, generally addresses a circumstance in which a federal statute supersedes state law, but courts have also frequently used the word 'pre-emption' when discussing whether a statute displaces federal common law." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 371 (2d Cir. 2009) (citing *Milwaukee*).

program.) Likewise, the CAA prescribes a comprehensive program to address HAPs. *See id.* at Ch. 8. (*See also* United States' Complaint, Dkt. # 1 at ¶¶ 20-36, describing CAA programs that address HAPs.) The CAA also includes a comprehensive enforcement program (civil and criminal) to ensure compliance. *Id.* at Ch. 17-18. (*See also* United States' Complaint, Dkt. # 1, at p. 46 seeking penalties, compliance, and injunction remedies as available under the CAA.)

The Tribe's complaint alleges facts with respect to QGM's emission of "criteria pollutants" or "hazardous air pollutants," as defined under the CAA. *See* Exhibit A at ¶¶ 11-12, 19. QGM's emission of these "criteria pollutants" and "hazardous air pollutants" and the regulatory programs that address them are the subject of the United States' enforcement action against QGM. (*See* United States' Complaint, Dkt. #1 ¶¶ 19-48.) The Tribe's allegations of public nuisance are wholly grounded in QGM's alleged CAA violations. *See* Exhibit A at ¶¶ 68-76. Accordingly there can be no clearer example of where "Congress occupies the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Kin-Buc, Inc.*, 532 F. Supp at 701.[6] The CAA addresses the emissions at issue, from the sources at issue, and the United States is currently pursuing enforcement under the same allegations of CAA violations alleged in the Tribe's complaint. Further, though the CAA may not provide the exact remedy the Tribe seeks in relief, the CAA does provide for penalties, injunctions, and even criminal liability in certain cases. Accordingly, Congress has spoken

[6] In contrast to *Kin-Buc*, *Inc.*, in *Connecticut*, the Second Circuit found that the CAA did not displace (or preempt) the plaintiffs' claims that defendants were contributing to global warming by way of excessive greenhouse gas emissions, because the EPA did not regulate greenhouse gas emissions from the sources at issue in the lawsuit. *See id.* at 380. Contrarily, the EPA *does regulate* the criteria pollutants *from the sources* at issue in this lawsuit (indeed, the United States' CAA enforcement claim is the basis for the Tribe's suit).

directly to the question of how to enforce the CAA and what remedies are available, and the federal courts may not supplement Congress' response. *See Milwaukee*, 451 U.S. at 313 ("We have always recognized that federal common law is "subject to the paramount authority of Congress.") Thus, there is no need for federal common law, and the Tribe's federal common law nuisance claim is preempted.

C. The Tribe's Complaint Does Not Provide Facts Sufficient To State A Claim To Relief.

Even if this Court were to allow the Tribe to pursue its nuisance claim as alleged, the Tribe's complaint in intervention fails to provide facts sufficient to state a claim to relief under the standard set by United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and made applicable to all federal actions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009). Under the federal rules, a pleading that states a claim for relief must contain, among other requirements, "a short and plain statement of the claim showing the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The United States Supreme Court held in *Twombly* that this level of pleading "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Further, to survive a motion to dismiss "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949. In *Iqbal*, the Court described two "working principles" that underlie the decision in *Twombly*.

> First, the tenet that a court must accept as true all allegations contained in a complaint is ***inapplicable to legal conclusions***. . . . Second, only a complaint that states a ***plausible claim for relief*** survives a motion to dismiss.

Iqbal, 129 S. Ct. at 1949-50 ("we are not bound to accept as true a legal conclusion couched as a factual allegation.") (emphasis added). Accordingly, *Iqbal* sets forth a process for analyzing

claims under a 12(b)(6) motion to dismiss: First, the court identifies all elements in a claim that must be proven. Second, the court identifies pleadings that are no more than legal conclusions and therefore not entitled to the assumption of truth. Third, the court examines the factual allegations to determine whether they plausibly give rise to entitlement to relief. *Id.*

1. Elements Of A Federal Common Law Nuisance Claim

There are two elements to a nuisance claim: (1) an unreasonable interference; (2) a right common to the general public. *Connecticut v. American Electric Power Co., Inc.*, 582 F.3d 309, 352 (2d Cir. 2009) (applying Restatement's definition of public nuisance in federal common law nuisance suit). The Restatement broadly defines a public right to include "the public health, the public safety, the public peace, the public comfort or the public convenience." *See Connecticut*, 582 F.3d at 352 (quoting Restatement).[7]

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

> (a) Whether the conduct involves a *significant interference* with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> (c) whether the conduct is of a *continuing nature* or has produced a *permanent or long-lasting* effect, and, as the actor knows or has reason to know, has a *significant effect* upon the public right.

[7] The Tribe alleges that Ute Tribe members share a common right to live "free from harmful toxins and pollutants." *See* Exhibit A at ¶ 66. Given that the CAA and its regulations expressly provide for emission thresholds of up 250 *tons* of criteria pollutants and 10/25 *tons* of hazardous pollutants each year (and indeed above those levels subject to compliance with relevant regulations), the Tribe's suggestion that the public has a right to live free from any of these pollutants and toxins is unsupportable, and the Tribe offers no allegations to suggest otherwise.

Rest. 2d Torts, § 821B(2)(a)-(c); *see also Connecticut*, 582 F.3d at 366. The Restatement further explains how conduct interferes with a public right so as to amount to a public nuisance:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.[8] There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.
>
> It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large. . . .

Connecticut, 582 F.3d at 369 (quoting the Restatement). Key to the Restatement's definition is that the defendant's *conduct must cause* a significant interference with a public right. Accordingly, the Tribe must allege facts sufficient to plausibly state a claim that QGM's conduct significantly interfered with the public health, the public safety, the public peace, the public comfort or the public convenience of the Tribe. The Tribe has failed to do so.

2. The Tribe's Legal Conclusions Are Not Entitled To The Assumption Of Truth.

Before this Court analyzes whether the Tribe has alleged facts sufficient to state a plausible claim that QGM's conduct has significantly interfered with a public right, it must first determine which of the Tribe's allegations are merely legal conclusions, and therefore not

[8] The Tribe makes several allegations of a significant interference with the Tribe's use and beneficial enjoyment of the land. *See* Exhibit A at ¶¶ 68, 69, 71. These conclusory allegations are not relevant to a *public* nuisance claim. *See* Rest. 2d (Torts) § 821D ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.").

entitled to the presumption of truth. *See Iqbal*, 129 S. Ct. 1937, 1949-50 ("although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation") (internal citations omitted). The third sentence in Paragraph 10 of the Tribe's Complaint, and Paragraphs 21, 29, 37, 45, 54, 66, and 68-76 of the Tribe's Complaint are legal conclusions not entitled to the presumption of truth. *See* Exhibit A. Since Paragraphs 66-76 of the Tribe's complaint form the basis of the Tribe's nuisance claim, and since these paragraphs are nothing but vague legal conclusions, the Tribe has failed to allege necessary *facts* to support its nuisance claim.

3. The Tribe's Factual Allegations Do Not Plausibly State A Claim For Relief Under Federal Common Law Nuisance.

The Tribe has not met its burden of alleging facts sufficient to state a plausible claim that QGM's conduct significantly interfered with a public right. Factual allegations relevant to the Tribe's nuisance claim are contained within Paragraphs 11-20, 22-28, 30-36, 38-44, 46-53, and 67. *See* Exhibit A. These factual allegations can generally be grouped into four categories: QGM's emission of criteria pollutants subject to regulation under the CAA; a discrete instance of uncontrolled emissions at the Coyote Wash facility in late 2005; potential harms from ozone, a criteria pollutant; and a possible exceedence of ozone standards in the Uinta Basin. Within these categories, the Tribe fails to allege facts sufficient to state a plausible claim for relief for public nuisance.[9]

[9] The Tribe incorporates by reference Paragraphs 8-221 of the United States' complaint, but fails to allege which, if any, of the United States' allegations are relevant to the Tribe's nuisance claim. For example, Paragraph 165(a) of the United States' complaint alleges that QGM failed to notify the EPA of the start-up date of a dehydrator within 15 days of start-up

For example, the Tribe alleges that each of QGM's five compressor stations "emit or has the potential to emit 250 tons per year of [CAA criteria pollutants]." *See* Exhibit A ¶ 11. Given the CAA's allowance of the emission of "criteria pollutants" and "hazardous air pollutants," however, even if these allegations are presumed true, the allegations provide no basis for an assertion that this conduct is or threatens a *significant interference* with the public health. Additionally, the Tribe alleges no facts to suggest what type of public health interferences have occurred as a result of QGM's facilities' emissions. Further, the only uncontrolled emission alleged by the Tribe involves a discrete instance of limited duration. *See* Exhibit A ¶ 24. The Tribe, however, alleges no facts to suggest that this uncontrolled emission significantly interfered with the public health (or how this uncontrolled emission could possibly threaten significant interference), or how this uncontrolled emission caused any permanent or long-lasting harm (or threat of such) to the public health.

With respect to ozone, the Tribe alleges that ozone *can be* harmful to humans, that ozone *can* affect vegetation growth and crop yields, and that *preliminary* data shows that the ozone standard is being exceeded. *See* Exhibit A ¶¶ 12-18. The Tribe offers no factual allegations, however, with respect to QGM's actual emissions and how QGM may have contributed to any exceedences of ozone standards. In fact, the Tribe never even alleges a connection between QGM's emissions and its "ozone allegations." Further, the Tribe offers no allegation that any members of the Tribe have actually suffered an injury from ozone. With no allegation of actual

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(along with other "failure to report" violations). Does the Tribe honestly believe that QGM's failure to comply with this CAA provision, even if true, constitutes a significant interference with public health? And if it does, how? Given the vagueness and conclusory presentation of the Tribe's nuisance claims as alleged, the Tribe simply cannot meet the *Twombly* standard with its blanket incorporation by reference.

emissions, no allegation of a connection between QGM's emissions and exceeded ozone levels, and no allegations of actual harm, the Tribe has not plausibly stated a claim that QGM significantly interfered with the public health. The Tribe also fails to allege any facts with respect to water pollution, harm to land (current or potential harm to vegetative growth or crop yields), or how QGM may have contributed to either. The Tribe fails to allege facts, therefore, which would plausibly state a claim that QGM has significantly interfered with either of these resources.

4. Judicial Experience And Common Sense

This Court is permitted to draw on its judicial experience and common sense to find that the Tribe is attempting to bootstrap its nuisance claims onto the United States' CAA claims, but that proof of one does not amount to proof of the other. *See Iqbal*, 129 S. Ct. at 1950 ("Determining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense."). Congress has never declared the violation of the CAA a public nuisance, thus, the Tribe cannot rely on the United States' allegations to support its nuisance claim. *See, e.g.*, *Lincoln Properties v. Higgins*, 1993 U.S. Dist. LEXIS 1251 (E.D. Cal. 1993) ("A legislatively declared public nuisance constitutes a nuisance per se"). Under *Twombly*, the Tribe bears the burden of alleging facts which link the alleged CAA violations to its nuisance claim, and it has failed to do so. Accordingly, the Tribe has failed to plausibly state a claim for relief, and its complaint should be dismissed in its entirety.

D. The Tribe's Nuisance Claims Are Barred By the Statute Of Limitations.

The federal courts do not appear to have expressly addressed the statute of limitations of a federal common law nuisance claim. Federal law prescribes a five year statute of limitations when not otherwise addressed by other authority. *See* 28 U.S.C.S. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ."). Where there is no federal statute of limitations, however, federal courts will normally "borrow" from the most closely analogous state statute. *See Del Costello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 159 (1983). The Tribe essentially seeks relief for alleged harm that QGM has caused to the lands, waters, and air within the Reservation. In Utah, claims for injuries to real property must be brought within three years. *See* Utah Code Ann. 78B-2-305(1). Accordingly, QGM believes that a three-year statute of limitations is applicable to the Tribe's nuisance claim.

The Tribe alleges that QGM failed to control emissions from four RICE units at the Coyote Wash facility from initial start-up (which was in October of 2005) for a period of up to several months. *See* Exhibit A ¶ 24. (*See also* United States' Complaint, Dkt. # 1 at ¶ 9) (stating initial start-up date.) This claim is not plead to have occurred within the applicable three-year statute of limitations, therefore a nuisance claim based upon it is barred by the statute. The Tribe has failed to allege any other instances of uncontrolled emissions or emissions above regulatory limits. To the extent any emission occurred more than three years before the Tribe filed its complaint, claims based on that emission are barred and should be dismissed.

E. The Tribe's Nuisance Claims Are Barred By Laches.

Regardless of the applicable statute of limitations, the Tribe's nuisance claim in intervention is barred by the doctrine of laches. Laches can act to bar a claim despite its being brought within the statute of limitations.

> [E]quity in the exercise of its inherent power to do justice between parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations. . . . . As observed in *Halstead v. Grinnan*, 152 U.S. 412, 416, "the length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."

Alsop v. Riker, 155 U.S. 448, 461 (U.S. 1894). Accordingly, unlike a statute of limitations defense, a defense based on the doctrine of laches requires no proof of an express limitation of time. *See Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466, 472 (10th Cir. 1979) ("The court in the proper case applies laches although the period of time may be much shorter than provided in a statute."); *see also Schnack v. Valley Bank of Nev.*, 291 Fed. Appx. 168, 173 (10th Cir. 2008) (unpublished) (affirming lower court's application of laches despite the claim being brought within the statute of limitations, stating "laches is an equitable defense 'primarily left to the discretion of the trial court.'").

A defense based on laches requires proof of (1) a lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello v. United States*, 365 U.S. 265, 282 (U.S. 1961). First, the Tribe has not diligently prosecuted its nuisance claim. The Tribe's current counsel admittedly knew of the Tribe's interest in this case for more than a year before the Tribe moved to intervene. Further, the Tribe itself has been

aware of this litigation since its inception, and both parties have informed and consulted with the Tribe about the claims and issues in this case. *See, e.g.*, EPA_00004528, 4530 (November 21, 2005 Letter from Jerry Ellington, counsel for United States, to Elaine Willie, Environmental Coordinator for Ute Indian Tribe, regarding pending litigation), attached as Exhibit "B." To have known about this litigation (the issues upon which the Tribe's nuisance claims are based) for almost four years before filing its nuisance claim (along with its continued failure to specifically allege facts in support of the nuisance claim) demonstrates the Tribe's lack of diligence in pursuing its claim. Second, bringing this nuisance claim in intervention as alleged without an expansive extension to the discovery and trial schedule will almost certainly prejudice QGM's ability to defend itself. Yet to extend the discovery and trial schedule sufficiently to accommodate the Tribe's nuisance claim will significantly hinder the United States' and QGM's ability to resolve the current claims in a timely manner. Accordingly, the Tribe's claims should be dismissed as barred under the doctrine of laches.

CONCLUSION

The Tribe has failed to state a claim upon which relief can be granted because (1) its complaint exceeds the explicit limitations of this Court's express order on intervention; (2) its claim for relief under the federal common law for public nuisance based on air pollution is preempted by the Clean Air Act; (3) it has failed to allege facts sufficient to state a plausible claim for relief; (4) it has failed to allege its claims within the applicable statute of limitations;

and (5) its claims are barred by the doctrine of laches. Accordingly, pursuant to Federal Rule of Civil Procedure 12(b)(6), the Tribe's complaint should be dismissed in its entirety.[10]

Pursuant to Rule 7-1(f) of the United States District Court Rules of Practice, QGM requests oral argument on this motion to dismiss**.**

RESPECTFULLY SUBMITTED this 12th day of April, 2010.

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[10] In the alternative, the Tribe should be required to amend its complaint—in line with this Court's order on intervention—to seek a declaratory judgment on the jurisdictional issues and injunctive relief on the nuisance claim to the extent it overlaps the CAA claims.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of April, 2010, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION'S COMPLAINT** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties of record as follows:

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