IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on January 11, 2013)

QUAPAW TRIBE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	No. 12-592L
	)	
v.	)	Hon. Susan G. Braden
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF [6] UNITED STATES' PARTIAL MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

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I. INTRODUCTION

Plaintiff effectively concedes in its opposition ("Opp'n," ECF No. 11) that the United States' motion should be granted in part. Plaintiff admits that its claims for damages stemming from the United States' alleged failure to maintain trust records or to provide the tribe with a "full and complete" historical accounting are outside this Court's subject-matter jurisdiction (Opp'n at 22 (tribe "is not entitled to relief under the Federal Records Act")) or have been previously settled and released (Opp'n at 7 (tribe waived "any rights to obtain from the United States an accounting of its trust assets or asset mismanagement history of its trust assets for all time periods up to and including the effective date of the Settlement Agreement")). Thus, those claims should be dismissed from plaintiff's First Cause of Action.

Plaintiff also admits that it cannot timely challenge the "transfer of the ["Catholic 40 land"] to the Catholic Church and acceptance of the land into trust." Opp'n at 26. Thus, plaintiff has to agree that any actions taken while that land was held in fee status—not trust status—are outside the scope of this Court's subject-matter jurisdiction. As plaintiff admits in its complaint ("Compl.," ECF No. 1), the Catholic 40 land was held in fee status through the 1980s. Compl., ¶ 20. Any leases entered into in 1977 would not be trust leases and would be outside the scope of this Court's subject-matter jurisdiction. Plaintiff's Catholic 40 land claims should be dismissed from its Second Cause of Action.

Plaintiff also does not deny that it has specific statutory remedies available to it for environmental harm under CERCLA.[1/] Opp'n at 26-30. Nor does plaintiff deny that it has, in fact, availed itself of those specific statutory remedies in the past. United States' Memorandum of Points and Authorities ("Br.," ECF No. 6-1) at 17-18. Thus, plaintiff has failed to show in its

[1/] The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, et seq.

opposition that it is entitled to relief under the Tucker Acts for CERCLA claims, and plaintiff's Third Cause of Action should be dismissed.

In any event, the United States' motion should be granted in its entirety because affirmative facts alleged in plaintiff's complaint establish that this Court lacks subject-matter jurisdiction over several of plaintiff's claims, and, as to the remaining claims challenged in the United States' motion, plaintiff's complaint is devoid of jurisdictional allegations that are based upon specific statutory or regulatory fiduciary obligations, money-mandating in breach, so as to have "nudged [its] claims across the line from conceivable to plausible." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). As to those latter claims, if the Court does not intend to dismiss, the Cort should order a more definite statement.

II. MATERIALS APPROPRIATELY CONSIDERED ON THIS MOTION TO DISMISS

A threshold issue in resolving the United States' motion is whether plaintiff has incorporated by reference the Quapaw Analysis into its complaint and whether the United States has to respond to the "171-page Quapaw Analysis" (Opp'n at 1) in its answer. The Quapaw Analysis is not properly incorporated into plaintiff's complaint, and the mere existence of the Quapaw Analysis does not relieve plaintiff of its obligations to plead facts in its complaint establishing subject-matter jurisdiction. Rules of the United States Court of Federal Claims ("RCFC") 8(a)(1); Renne v. Geary, 501 U.S. 312, 316 (1991); DaimlerChrysler Corp. v. United States, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)).

Even plaintiff doubts that it has incorporated the Quapaw Analysis into its complaint. Plaintiff equivocates in its opposition as to the interplay between its complaint and the Quapaw

Analysis, using phrases such as "as discussed in the complaint" (Opp'n at 1); "in effect incorporated by reference" (id. at 13); "described in much more detail in the Quapaw Analysis" (id. at 20); and "refers the Government to the Quapaw Analysis" (id. at 33). "Discussed," "described," and "refers" are different than explicitly and property adopting a statement in a pleading under Rule 10. RCFC 10(c), which is identical to Fed. R. Civ. P. 10(c), provides that

> [a] statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is part of the pleading for all purposes.

Nowhere in plaintiff's complaint does it adopt the entire Quapaw Analysis into its pleading. Nor does plaintiff attempt in its complaint to identify those specific statements in the Quapaw Analysis that are germane or relevant to plaintiff's claims. As acknowledged by plaintiff, much of the Quapaw Analysis addresses potential claims of individual Indians, and therefore has no relevance or application to tribal assets and potential tribal claims. Opp'n at 4; Cason Decl., ¶ 12. The Quapaw Analysis itself is a confidential document (see Motion for Leave to File Under Seal (ECF No. 12)) and was not attached as an exhibit to plaintiff's complaint. Thus, plaintiff did not and has not properly adopted the Quapaw Analysis into its complaint under Rule 10.

Furthermore, even if plaintiff were to attempt to incorporate the entire Quapaw Analysis into its complaint, such an endeavor would be improper. It is well settled, as a leading treatise notes, that incorporation by reference under Rule 10(c) "must be direct and explicit, in order to enable the responding party to ascertain the nature and extent of the incorporation." 5A CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1326 (3d ed. 2004) (citing Kolling v. Am. Power Conversion Corp., 347 F.3d 11, 17 (1st Cir. 2003)). This requirement of clarity ensures fairness to the responding party because without this requirement

incorporations "may prove confusing and inconvenient." 5A WRIGHT & MILLER § 1326. Rule 10(c) is not intended "to allow the use of a sweeping adoption clause which serves as nothing more than a boiler plate 'safety valve' . . . [because] [t]o sanction such an aberrant, error-prone pleading formulation . . . would unnecessarily increase the risks of practicing law." Wolfe v. Charter Forest Behavioral Health Sys., Inc., 185 F.R.D. 225, 230 (W.D. La. 1999). The Quapaw Analysis is not properly incorporated into plaintiff's complaint, and the United States should not be compelled to respond, sua sponte, to the myriad of allegations contained therein—many of which have no bearing on the tribe's claims—in its answer.

Instead, as required by Rule 8(a)(1) and case law, plaintiff, in its complaint, "must identify a substantive source of law that establishes specific fiduciary duties or other duties, and allege that the Government has failed to faithfully perform those duties." United States v. Navajo Nation, 537 U.S. 488, 506 (2003) ("Navajo I"); accord Opp'n at 8. This is not a "greater pleading burden than is required under RCFC 8" (Opp'n at 33); it is the pleading burden required by Rule 8. While a complaint does not have to contain detailed factual allegations, it must contain some facts that serve to raise a right of relief above the speculative level. Love Terminal Partners v. United States, 97 Fed. Cl. 355, 378 (2011); Edwards v. United States, 92 Fed. Cl. 277, 283 (2010); Pi Elec. Corp. v. United States, 55 Fed. Cl. 279, 284-85 (2003). The Court should look to the allegations in the complaint to assess its subject-matter jurisdiction, not to the Quapaw Analysis to infer whether plaintiff could potentially state a claim. Similarly, the United States is entitled to be placed on notice as to the specific claims advanced by plaintiff so that it can assess—and challenge, if appropriate—the merits and jurisdictional basis for those specific claims.

As for plaintiff's attachment of the Declaration of James E. Cason (ECF No. 11-1), the

2004 settlement agreement in Quapaw Tribe of Okla. v. U.S. Dept. of Interior, N.D. Okla. No. 02-cv-129 (ECF No. 11-2), and the contract between the Department of the Interior and Quapaw Information Systems (ECF No. 11-3), the United States presumes that plaintiff submits those materials only to provide general background facts for the Court's convenience. The prior litigation between the parties is not relevant to the jurisdictional issues raised in the United States' motion. For this motion, the Court should only consider facts extraneous to the complaint that are relevant to the jurisdictional question. Ferreiro v. United States, 350 F.3d 1318, 1324 (Fed. Cir. 2003) ("A trial court may weigh relevant evidence when it considers a motion to dismiss that challenges the truth of jurisdictional facts alleged in a complaint" (emphasis added)). Here, the jurisdictional facts at issue do not concern the prior litigation between the parties; rather they pertain to whether plaintiff has stated claims within the statute of limitations and based upon the United States' violations of a specific statutory or regulatory obligation of the United States, money-mandating in breach. Thus, plaintiff's submitted materials are irrelevant.

III. REQUIREMENTS TO STATE A CLAIM UNDER THE TUCKER ACTS

There can be no serious dispute as to the requirements for Indian tribes to state a claim against the United States for breach of trust under the Tucker Acts. As correctly noted by plaintiff, "[t]he claim must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" United States v. Mitchell, 463 U.S. 206, 216-17 (1983) ("Mitchell II") (quoting United States v. Testan, 424 U.S. 392, 400 (1976) (quoting Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1009 (Ct. Cl. 1967))); accord Navajo I, 537 U.S. at 503; accord Opp'n at 8-9.

After correctly summarizing the law (Opp'n at 8-9), plaintiff's opposition then diverges markedly from established Supreme Court precedent by arguing for a "fair inference" test to be applied to the first prong of the jurisdictional test (id. at 10-12): identification of "a substantive source of law that establishes specific fiduciary or other duties, and [allegation] that the Government has failed faithfully to perform those duties.'" Navajo I, 537 U.S. at 506. Plaintiff's digression is mistaken. Lest there be any dispute, the Supreme Court clarified this term that the "fair inference" test only comes into play after plaintiff identifies a specific statutory or regulatory trust obligation that the United States has allegedly breached.

> [The Federal Circuit] distorted our case law in applying to FCRA the immunity-waiver standard we expressed in [United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003)]: whether the statute "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" [] That is the test for determining whether a statute that imposes an obligation but does not provide the elements of a cause of action qualifies for suit under the Tucker Act—more specifically, whether the failure to perform an obligation undoubtedly imposed on the Federal Government creates a right to monetary relief.

United States v. Bormes, 568 U.S. ___, 133 S. Ct. 12, 20 (2012).

Contrary to plaintiff's assertion (Opp'n at 11, 13-15), the United States' trust obligations are limited and defined by statute and regulation. United States v. Jicarilla Apache Nation, 564 U.S. ___, 131 S. Ct. 2313, 2325 (2011) ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."). Far from "flatly reject[ing]" (Opp'n at 15) the United States' position, the Supreme Court has made clear that "neither the Government's 'control' . . . nor common-law trust principles matter" in the jurisdictional analysis unless the tribe can identify a "specific, applicable, trust-creating statute or regulation that the Government violated." United States v. Navajo Nation, 556 U.S. 287, 302 (2009) ("Navajo II"). Thus, plaintiff's complaint and plaintiff's opposition need to train on

specific statutory or regulatory obligations of the United States, money-mandating in breach, that the United States has allegedly violated, not the general trust relationship, the status of Indian tribes as "domestic dependent nations," the government's role as "guardian" to Indian tribe, or "moral obligations of the highest responsibility and trust." See Jicarilla, 131 S. Ct. at 2325 ("Congress has chosen to structure the Indian trust relationship in different ways" and "[t]hese concepts do not necessarily correspond to a common-law trust relationship."). If this Court determines that plaintiff has failed to root its claims in specific statutory or regulatory obligations of the United States, money-mandating in breach, that the United States has allegedly violated, this Court lacks subject-matter jurisdiction over plaintiff's claims, and the United States' motion should be granted.

IV. ARGUMENT

A. Plaintiff's First Cause of Action.

The United States does not deny that it owes certain fiduciary obligations to federally-recognized Indian tribes when it holds funds in trust for those tribes. C.f. Opp'n at 16. The United States' challenge to plaintiff's First Cause of Action addresses whether plaintiff has properly alleged a violation of any specific trust obligation, money-mandating in breach, in its First Cause of Action (Compl., ¶¶ 14-16). Br. at 8-12. Plaintiff admits that the arguments advanced by the United States in its motion are well taken. Opp'n at 22 (admitting it is "not entitled to relief under the Federal Records Act" and that "the Tribe seeks no relief" based on the Treaties of 1818 and 1824). After stripping plaintiff's First Cause of Action of its "record-keeping" allegations (see Compl., ¶ 15), there are scarcely any allegations remaining.

The trust fund mismanagement claims advanced in plaintiff's First Cause of Action are not based upon actual mismanagement of tribal funds by the United States. They are, instead, a

proxy for the United States' alleged failure to provide the tribe with an accounting of its funds. See Compl., ¶ 15; Opp'n at 19-20 (claiming $70,331 was not "officially posted;" not that the $70,331 was mismanaged or never credited to the tribe). The Quapaw Analysis, to the extent the Court intends to consider that document, does not mince words:

> The funds unaccounted for in items 5-6 above, along with accrued interest, are included in the losses the Quapaw Tribe is believed to have sustained in association with the management of the Tribal Trust Funds.

Quapaw Analysis at 36 (emphasis added). Plaintiff seeks damages for allegedly "unaccounted" funds, not for mismanagement of funds.

The United States does not deny that Congress imposed upon it certain reconciliation obligations in the American Indian Trust Reform Management Act of 1994, Pub L. No. 103-412, 108 Stat. 4239 ("1994 Act"). The United States does dispute, however, that the reconciliation provisions of the 1994 Act are money-mandating in breach. Br. at 10-11. Plaintiff does not meaningfully respond to the United States' legal argument in its opposition. Thus, any claims that plaintiff is entitled to money damages as a result of an alleged "failure to account" should be dismissed. In fact, plaintiff has previously waived and released any such claims:

> The Tribe agrees to waive any rights it has to obtain from the United States an accounting of any of its [tribal trust funds] and any of its other trust assets . . . . The Parties further agree that, as of the date the Tribe receives a copy of the Quapaw Analysis, the Tribe shall be deemed to have been "furnished with an accounting . . . ."

2004 Settlement Agreement, ¶ 4 (ECF No. 11-2).

The complaint and the Quapaw Analysis, fairly construed, aver that the United States has allegedly failed to comply with the reconciliation provisions of the 1994 Act and therefore the tribe is entitled to damages under trust fund management statutes such as 25 U.S.C. Sections 161, 161a, and 162a. This argument turns the Supreme Court's jurisdictional analysis on its

head. The money-mandating inquiry is the second half of the jurisdictional analysis, not a separate two-part analysis itself. The Supreme Court's focus on "specific rights-creating or duty imposing statutory or regulatory prescriptions" applies not to the money-mandating question, but to the first part of the Tucker Act inquiry: whether a plaintiff alleged that the government abridged a constitutional, statutory, or regulatory provision that establishes the specific right or duty that the government violated. Navajo II, 556 U.S. at 290; Testan, 424 U.S. at 400. Thus, it is inadequate for plaintiff to point to an alleged violation of the 1994 Act and then argue in essence that 25 U.S.C. Sections 161, 161a, and 162a are money-mandating in breach. Plaintiff has to identify a statute that is itself money-mandating in breach that the United States violated. Plaintiff's First Cause of Action fails to do so. Thus, it should be dismissed for lack of subject-matter jurisdiction, or plaintiff should be compelled to provide a more definite statement.

B. Plaintiff's Catholic 40 Land Claims Should Be Dismissed.

The United States moved to dismiss plaintiff's Catholic 40 land claims on two independent grounds: failure to identify a specific statutory or regulatory trust obligation, money-mandating in breach, as to those claims (Br. at 12-14); and because any Catholic 40 land claims are barred by the applicable statute of limitations (id. at 19-22). In its opposition, plaintiff effectively concedes that any claims based upon the transfer of the Catholic 40 land, in fee, to the Catholic Church and the restoration of that land to trust status are outside the scope of this Court's subject-matter jurisdiction. Opp'n at 26 ("the Government's arguments regarding transfer of the land to the Catholic Church and acceptance of the land into trust are irrelevant because the Tribe asserts no such claims"); contra Compl., ¶ 18 ("The Secretary's transfer of this trust land to the Catholic Church was a flagrant violation of Defendant's fiduciary duty and trust responsibility to the Tribe."). Plaintiff, instead, argues that its Catholic 40 land claims are

limited to a 1977 lease. Opp'n at 24. Even if plaintiff's Second Cause of Action were so limited, plaintiff's Catholic 40 land claims are still outside this Court's subject-matter jurisdiction.

The Catholic 40 land was held in fee status, not trust status, in 1977. Compl., ¶ 20 (Catholic 40 land returned to trust status "in the 1980s"). The United States' general trust responsibility to Indian tribes "do[es] not create property rights where none would otherwise exist but rather presuppose[s] that the United States has interfered with existing tribal property interests." United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987). Indeed, courts have repeatedly recognized that a tribe must demonstrate that it possesses trust property in order to pursue a claim for breach of fiduciary duties against the United States. Inter Tribal Council of Ariz., Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995) (finding that the Department of the Interior did not owe the tribe a fiduciary duty, because there was no trust property involved in the case); Wheeler v. U.S. Dept. of Interior, 811 F.2d 549, 553 (10th Cir. 1987) (finding that Mitchell II did not control the case because there was no trust property involved); Samish Indian Nation v. United States, 82 Fed. Cl. 54, 68 (2008) ("Because plaintiff has not shown the existence of trust property, there necessarily can be no trustee to manage the trust property or beneficiary for whom the trust property is managed.") aff'd in relevant part by Samish Indian Nation v. United States, 657 F.3d 1330 (Fed. Cir. 2012). "[O]nce tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." Plains Com. Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328 (2008). Even if the land at issue were within the reservation and previously owned by the tribe, those facts "do not change the status of the land at the time of the challenged" action. Id. at 338-39. Because plaintiff admits in its complaint that the Catholic 40 land was not trust property in 1977, it cannot advance breach of trust claims as to a lease of

the Catholic 40 land entered into in 1977.[2/]

Plaintiff argues that something (it is unclear what or who) is "trespassing" on the Catholic 40 land, presumably commencing in the 1980s, when the land was returned to trust status to the present. Opp'n at 24-25. Plaintiff's argument is puzzling, since trespass is mentioned nowhere in its complaint. See Compl., ¶¶ 18-21 (Catholic 40 land allegations). Contrary to plaintiff's assertion (Opp'n at 25), the United States Court of Appeals for the Federal Circuit has not acknowledged a "failure to eject trespassers" claim to be within Tucker Acts jurisdiction. In Shoshone Indian Tribe of the Wind River Reservation v. United States, 672 F.3d 1021 (Fed. Cir. 2012) ("Shoshone IV"), the Federal Circuit remanded the case to the Court of Federal Claims to determine, in the first instance, "whether the 1916 and 1938 Acts, or any other relevant statute or regulation" impose upon the United States "a duty to remove trespassers" from the land at issue in that case. 672 F.3d at 1041. Moreover, the Tucker Act explicitly divests this Court of subject-matter jurisdiction over claims "sounding in tort." 28 U.S.C. § 1491(a)(1); Brown v. United States, 105 F.3d 621, 623 (Fed. Cir. 1997). The Indian Tucker Act does not expand Tucker Act jurisdiction in Indian cases, and "[c]laims that would 'otherwise be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group' [under the Indian Tucker Act] include those founded upon the Tucker Act . . . which waives immunity for claims 'founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.'" Wolfchild v. United States, 96 Fed. Cl. 302, 324-25 (2010).

[2/] Plaintiff fails to explain how 25 C.F.R. Part 162, adopted in 2001 (Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 66 Fed. Reg. 7,068, 7,109 (Jan. 22, 2001)), applies to a fee lease executed in 1977. See Opp'n at 22-23. Plaintiff's Part 162 argument should be rejected.

"[T]respass is a tort." United States v. Atl. Richfield Co., 612 F.2d 1132, 1137 (9th Cir. 1980). Because "trespass is a tort . . . the court does not have jurisdiction over tort claims." Schrader v. United States, 103 Fed. Cl. 92, 98 n.6 (2012). Framing plaintiff's claims as "failure to eject trespassers," instead of as direct trespass claims against the United States, does not alter the analysis. The tort of trespass includes one who "causes a thing or third person" to trespass and one who "fails to remove from the land a thing which he is under a duty to remove." RESTATEMENT (SECOND) TORTS § 158 (1965).

At best, plaintiff argues in its opposition that the United States is under an obligation to abate a trespass that began when the Catholic 40 land was fee property. Plaintiff's argument should be rejected because plaintiff has not identified any statute or regulation, money mandating in breach, that obligates the United States to abate an alleged trespass of "mining waste, toxic dust, and air pollution" (Opp'n at 25) on fee land. Furthermore, trespass claims are tort claims outside this Court's subject-matter jurisdiction. Thus, plaintiff's strained "trespass" argument is not a basis for subject-matter jurisdiction over its Catholic 40 land claims.

Plaintiff admits that it cannot timely advance claims within this Court's subject-matter jurisdiction as to the transfers of the Catholic 40 land. Plaintiff's claims arising from a lease by the tribe with a third-party in 1977, when the Catholic 40 land was held in fee status, are outside this Court's subject-matter jurisdiction. Plaintiff's complaint is devoid of any allegations that the United States mismanaged the Catholic 40 land after it was restored to trust status in the 1980s. Thus, plaintiffs' Catholic 40 land claims should be dismissed for lack of subject-matter jurisdiction.

C. Plaintiff's Third Cause of Action Should Be Dismissed.

Plaintiff's two-paragraph Third Cause of Action (Compl., ¶¶ 26-27) does not concern any

specific leases of tribal land or the United States' alleged failure to enforce lease terms. Instead, plaintiff's Third Cause of Action claims "waste and contamination" resulting from an alleged failure to "prevent unnecessary and undue degredation of Tribal lands and resources." Id. Plaintiff argues that the United States should be liable in damages for the consequential harms of lead and zinc mining in and near the Quapaw Reservation because of a general trust obligation to appropriately manage Indian trust resources. As explained in the United States' opening brief (Br. at 15-17), such claims are not within this Court's subject-matter jurisdiction.

"Consequential damages" are defined as "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act." BLACK'S LAW DICTIONARY 445-46 (9th ed. 2009). As outlined by plaintiff (Opp'n at 27-28), 25 C.F.R. Part 215 regulates many aspects of lead and zinc mining leases for restricted land on the Quapaw Reservation. Nonetheless, Part 215 does not address or regulate "waste and contamination."[3/] In fact, what is now considered "waste and contamination" was, in times past, considered valuable and beneficial (e.g., ore tailings that could be reprocessed). See Gilmore v. Weatherford, 694 F.3d 1160, 1164 (10th Cir. 2012) (summarizing briefly lead, zinc, and chat development on the Quapaw Reservation); see also B.H. v. Gold Fields Mining Corp., 506 F. Supp. 2d 792, 794-96 (N.D. Okla. 2007) (describing mining activities within the Tar Creek Super Fund Site). The "waste and contamination" complained of in Plaintiff's Third Cause of Action is not the direct result of mining leases issued under Part 215, it is the indirect undesired consequence of lawful mining activities done pursuant to approved leases.

[3/] Part 215 was adopted in 1957, 25 years before Tar Creek was placed on the National Priorities List by the Environmental Protection Agency, and long before the environmental effects of mining were a primary concern for the Department of the Interior or other federal agencies. Part 215 specifically excludes from its purview post-mining activities such as site remediation. 25 C.F.R. § 215.0(g) (limiting regulations' application to "actual drilling, mining, or construction on the leased lands" (emphasis added)).

The Federal Circuit has made clear that consequential damages claims are not cognizable under the Tucker Acts in Indian breach of trust litigation. Mitchell v. United States, 664 F.2d 265, 273-74 (Fed. Cir. 1981) (en banc). Even in contract cases, "[r]emote or consequential damages are not recoverable." CCM Corp. v. United States, 15 Cl. Ct. 670, 671 (1988). Thus, plaintiff's claims for consequential damages to the environment as a result of lawful mining leases are not within this Court's subject-matter jurisdiction. Plaintiff fails to base its Third Cause of Action on statutes or regulations, money mandating in breach, and its claimed damages are nothing more than legally impermissible consequential damages. Thus, plaintiff's Third Cause of Action should be dismissed.

Plaintiff devotes well over a page of its opposition (Opp'n at 29-30) to addressing an argument not raised by the United States in its motion. The United States did not argue that CERCLA Section 113(h), 42 U.S.C. § 9613(h), bars plaintiff's Third Cause of Action. Instead, the United States argued that plaintiff cannot circumvent the self-executing remedial scheme available to the tribe for natural resources damages in CERLCA by resorting to the general remedies available under the Tucker Acts. Br. at 17-19. Plaintiff does not respond to this argument in its opposition. Plaintiff has effectively conceded the issue.

In any event, plaintiff has pursued its natural resources damages claims under CERCLA. Quapaw Tribe of Okla. v. Blue Tee Corp., 653 F. Supp. 2d 1166, 1193 (N.D. Okla. 2009) ("The Tribe may proceed with its claims for [natural resources damages] to the extent it is asserting a quasi-sovereign interest in recovering damages to natural resources within the Tribe's authority."). "The Tucker Act is displaced . . . when a law assertedly imposing monetary liability on the United States contains its own judicial remedies. In that event, the specific remedial scheme establishes the exclusive framework for the liability Congress created under the

statute." Bormes, 133 S. Ct. at 18. Here, the extensive and specific environmental damages remedies available to plaintiff under CERCLA displaces any "breach of trust" claim under the Tucker Acts plaintiff may have in this Court for the same damages. Under CERCLA, the district courts "have exclusive original jurisdiction over all controversies arising under this chapter." 42 U.S.C. § 9613(b). Thus, this Court lacks subject-matter jurisdiction over plaintiff's Third Cause of Action for "unnecessary and undue degradation of Tribal lands and resources." Compl., ¶ 27. Plaintiff's Third Cause of Action should be dismissed.

D. If the Court Declines to Dismiss the Challenged Claims, the Court Should Order a More Definite Statement.

Rule 8(a)(2) requires "a short and plain statement of the claim." This required statement includes both the legal basis for the claim and a brief summary of facts supporting the claim, such that the defendant is provided with "fair notice" of the plaintiff's claim in order to frame a response. Conley v. Gibson, 355 U.S. 41, 47 (1957). "Ordinary pleading rules are not meant to impose a great burden on a plaintiff, but it should not prove burdensome for a plaintiff suffering economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005). This Court has the power to direct a more definite statement of a claim, if the complaint is "so vague or ambiguous that the [United States] cannot reasonably prepare a response." RCFC 12(e). In light of the cursory allegations actually contained in plaintiff's complaint, because jurisdiction is a threshold issue, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998), and because jurisdictional defects to plaintiffs' claims may be revealed by a more definite statement, a more definite statement is appropriate here to "narrow the issues and disclose the boundaries of the claim and defense," Williams v. United Credit Plan of Chalamette, Inc., 526 F.2d 713, 714 (5th Cir. 1976).

As set forth in the United States' motion and herein, the allegations in plaintiff's complaint are so cursory that the United States cannot meaningfully form a response to plaintiff's charges. As set forth above (Section II, supra), the Quapaw Analysis is not properly incorporated into plaintiff's complaint, and even if it were it would be onerous and unfair to compel the United States to wade through its 171 pages to divine what claims the tribe intends to assert in this case. For example, plaintiff's opposition cites extensively to lead and zinc regulations associated with chat leases. Opp'n at 27-28. However, the "Tribe acknowledges that it owns in fee simple only one parcel of land actually used for mining activity." Quapaw, 653 F. Supp. 2d at 1172. Surely the tribe does not intend to advance chat claims in this case, but that fact is unclear from plaintiff's complaint and plaintiff's opposition. Also, the Quapaw Analysis discusses extensively chat leases on allotted land held in trust for individual Indians, but it is unknown if plaintiff intends or intended to incorporate those portions of the Quapaw Analysis in its claims here.

Under these circumstances, a more definite statement is appropriate. This Court has ordered such relief in Indian trust litigation. See, e.g., Order of June 6, 2005, (ECF No. 12) in Shoshone Indian Tribe of the Wind River Reservation v. United States, Fed. Cl. No. 79-4582 (ordering plaintiff to file a statement identifying "the types of damages claimed, the legal theories supporting recovery, and the time frames for which recovery is sought"); Order of July 23, 2004, (Docket No. 62) in Osage Tribe of Indians v. United States, Fed. Cl. No. 99-550. Thus, the United States' request for a more definite statement should be granted in this case.

V. CONCLUSION

Wherefore, the United States respectfully requests that its motion be granted in full.

Dated: January 11, 2013

Respectfully submitted,

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