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

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF (PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION OF THE COURT'S JULY 22, 2009 OPINION AND ORDER [DKT #2362]

Plaintiff, the State of Oklahoma ("the State"), hereby submits this reply memorandum in further support of its "Motion for Reconsideration of the Court's July 22, 2009 Opinion and Order [DKT #2362]" (Dkt. #2392).

I. Argument

A. Reconsideration and reversal of the Order dismissing Count 2 is warranted

Throughout their Response, in order to confuse the real issue, Defendants conflate issues of ownership, sovereignty, and jurisdiction with what is the actual cornerstone of standing under CERCLA: *trusteeship as defined by Congress in CERCLA*. For example, Defendants state: "[T]o the extent that the Cherokee Nation owns or holds in trust natural resources in the IRW, CERCLA does not grant the State jurisdiction over them." (Defendants' Joint Response (Dkt. #2448) ("Defs.' Brf.") at 11-12; *see also id.* at 7 ("CERCLA . . . provides those trustees with *jurisdiction* to investigate and remediate NRDs . . . . CERCLA . . . appoints each as the CERCLA 'trustee' over the natural resources already subject to its *jurisdiction*." (emphases added)).

Defendants' Response finds no grounding, however, in the language of CERCLA – specifically, 42 U.S.C. § 9607 – and is in large measure a recitation of unsupported assertions about CERCLA's provision of "jurisdiction." Section 9607 makes no mention of the *jurisdiction* of a public trustee; it speaks to liability for loss of resources and *trusteeship* for the limited purpose of recovering damages for loss of or injury to those resources. First and foremost, CERCLA provides for liability for loss of or injury to natural resources, and provides to whom responsible parties are liable:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section ***liability shall be*** to the United States Government and ***to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State*** and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation . . . .

42 U.S.C. § 9607(f)(1) (emphasis added). Congress provided for liability to the United States Government, to States, and to Indian tribes for injury to, destruction of, or loss of natural resources.

Congress provided for each sovereign to have a *trustee* to recover for the liability created in CERCLA. Specifically, with regard to state trustees, CERCLA provides as follows:

> The Governor of each State shall designate State officials who may act on behalf of the public as trustees for natural resources under this chapter and section 1321 of Title 33 and shall notify the President of such designations. ***Such State officials shall assess damages to natural resources*** for the purposes of this chapter and such section 1321 of Title 33 for those natural resources ***under their trusteeship***.

42 U.S.C. § 9607(f)(2)(B) (emphasis added). Notably, the only authority Defendants cite for their proposition that CERCLA designates trustees for the resources "within their jurisdiction" is – not a "treatise" as Defendants call it, but rather – a practice guide edited by an attorney at a

large defense firm. (Defs.' Brf. at 7 (quoting 2A-15A *Environmental Law Practice Guide* § 15A.05 (2009).)

In any event, Defendants focus narrowly on *ownership*, as though ownership were the only basis to support CERCLA *trusteeship*.[1] (Defs.' Brief *passim*.) It plainly is not. Again, Defendants fail to tie their exclusivity-of-ownership position to the language of CERCLA, which, of course, provides several bases on which liability to a State or Indian tribe, and hence their trusteeship, may rest. Once again, the plain language of § 107(f) of CERCLA provides in part:

> In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section ***liability shall be*** to the United States Government and ***to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State*** and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation . . . .

42 U.S.C. § 9607(f)(1) (emphasis added). Ownership of natural resources – i.e., natural resources "belonging to" a State – is but one basis to support a state trustee's CERCLA trusteeship. "Within the State," "management," and "control" are three other independent bases. Simply put, ownership of a natural resource is neither a prerequisite nor the sole basis for a state trustee's CERCLA trusteeship. Indeed, the leading treatise on federal Indian law states that "[a]lthough CERCLA otherwise bars recovery for resources held in 'purely private' ownership, it does not limit recovery to governmentally owned resources. Instead, recovery extends to resources in which the appropriate government has a sufficient interest." Cohen's Handbook of Federal Indian Law § 10.05[2], pp. 803-804 (2005 ed.); *see also id.*, p. 804 ("Because the OPA

[1] Although Oklahoma's Constitution Art. I § 3 disclaims "all right and title" to unappropriated public lands and to all lands "owned or held by any Indian, tribe, or nation," recovery under CERCLA for lost or injured natural resources in no way intrudes on the ownership or the "right and title" of such Indian lands.

contains the same 'managed by, controlled by, or appertaining to' language as CERCLA, recovery under the OPA should also extend to resources other than those owned by the trustee government.").

Here, the waters of the Oklahoma portion of the IRW and biota therein, at issue in Count 2, are "within the State," "managed by" the State, and "controlled by" the State. Defendants cannot, and indeed do not, dispute this. Any one of these factors expressly set forth in CERCLA, 42 U.S.C. § 9607(f)(1), supports the exercise in this case by the State of its CERCLA trusteeship over the waters of the IRW. Thus, the issue of whether the State "owns" the waters (and biota therein) within the IRW as a matter of law is neither the sole criterion under CERCLA nor an issue that needs to be resolved by this Court.

To deal with this reality, Defendants have come up with a new argument: While they now admit that a co-trusteeship between the U.S. government and an Indian tribe can exist over the same resource, Defendants claim that a co-trusteeship over the same resource cannot exist between a state and an Indian tribe.[2] (Defs.' Brf. at 10-11, 12 ("This is *not* a situation where two governments are co-trustees over the same natural resources." [emphasis in original]).) Such a position is without merit.

First, there is nothing in CERCLA that suggests a perfect division between the scope of a state trustee's NRD trusteeship on the one hand and a tribal trustee's NRD trusteeship on the

[2] Defendants conflate different uses of the term "trustee." The State understands that the federal government sometimes holds legal title to land in trust for the use and benefit of an Indian tribe or nation. This is an established relationship between the United States and the Indian tribe, *see* Defs.' Brf. at 10 n.8, into which the State of Oklahoma does not intrude. The State has no desire, intention, or ability to divest the United States of its trustee role in such situations. In exercising its authority under CERCLA to recover for loss of or injury to natural resources, the State CERCLA trustee in no way intrudes on this *other* kind of trust relationship between the United States and the Cherokee Nation, or challenges the title to any land.

other hand, as set forth in 42 U.S.C. § 9607. To insert such a prohibition is not supported by the language of CERCLA and would thwart CERCLA's remedial purpose.

Second, the fact that a co-trusteeship can exist over the same resource (or portion thereof) as between a state and an Indian tribe is a view maintained by the federal government. *See, e.g.*, EPA, *Natural Resource Damages: Frequently Asked Questions*, http://www.epa.gov/superfund/programs/nrd/faqs.htm (last visited August 11, 2009) ("Federal and State agencies and Indian Tribes may be co-Trustees for the same natural resource.").

Third, that states and Indian tribes can share a co-trusteeship interest in the same natural resource is not unusual. *See Coeur d'Alene Tribe v. Asarco, Inc.*, 280 F. Supp. 2d 1094, 1107 (D. Idaho 2003) ("*Coeur d'Alene I*") (describing co-trusteeship among federal government, state government, and Indian tribe); *State of Montana v. Atlantic Richfield Co.*, No. CV-83-317-H-PGH, Slip Op. (D. Mont. Jan. 21, 1997) (attached as Exhibit A); *see also* Portland Harbor Superfund Site, http://www.darrp.noaa.gov/northwest/portharbor/index.html (last visited Aug. 12, 2009) (co-trustees include various Tribes, Oregon Department of Fish and Wildlife, DOI, and NOAA); St. Lawrence River/Alcoa Site, http://www.darrp.noaa.gov/greatlakes/lawrence/index.html (last visited Aug. 12, 2009) (co-trustees include State of New York, St. Regis Mohawk Tribe, NOAA, and DOI to address injury to ecological, recreational fishing, and cultural services).

Defendants' novel attempt to distinguish *United States v. Asarco*, 471 F. Supp. 2d 1063 (D. Idaho 2005) ("*Coeur d'Alene II*") – on the ground that "the only issue before the court was whether *the federal government* and the Coeur d'Alene Indian Tribe could be co-trustees over the same natural resources" (Defs.' Brf. at 12) – is unavailing. The reason that the State of Idaho's co-trusteeship over the Coeur d'Alene Basin was not "at issue" in a technical sense was

because of Idaho's prior settlement with defendant Asarco. The court, in both *Coeur d'Alene I* and *Coeur d'Alene II* had clearly determined that the federal government, the State of Idaho, and the Tribe were co-trustees. *See, e.g.*, *Coeur d'Alene I*, 280 F. Supp. 2d at 1107 (describing co-trusteeship as follows: Idaho controlled and managed fish and birds; submerged lands at issue belonged to Idaho and Tribe; federal government owned very little of the land at issue; control and management of water quality performed by both federal government and Idaho). This is why the court concluded that any NRD recovery obtained by the United States for the natural resources at issue would be off-set by the amount of the earlier settlement with Idaho. *Coeur d'Alene II*, 471 F. Supp. 2d at 1069. Moreover, the fact that the United States and the Tribe could proceed without Idaho as a party only lends further support to the fact that the Cherokee Nation is not a necessary party here.

In sum, the State respectfully submits that the Court's conclusion that Count 2 could not proceed in the absence of the Cherokee Nation is based upon a misapprehension of the law and the facts. Such conclusion should be reversed on reconsideration.

B. Reconsideration and reversal of the Order dismissing Count 1 is warranted

On pages 15-19 of its Motion, the State argued that reversal of the Order dismissing the State's response costs claim in Count 1 is warranted. (Dkt. #2392.) The *only* statements Defendants make in direct opposition regarding the State's claim for CERCLA response costs in Count I are along the following lines:

> Because reversal of [this] ruling would undermine the Cherokee Nation's asserted interests in the IRW in the absence of the Cherokee, and would potentially expose Defendants to a risk of double recovery, Plaintiffs' Motion should be denied.

(Defs.' Brf. at 4.) Such statements lack any substance. Defendants do not – and cannot – explain how the State's recovery of response costs that it has expended could possibly "undermine the Cherokee Nation's asserted interests in the IRW." Similarly, Defendants do

not – and cannot – explain how the State's recovery of CERCLA response costs "would potentially expose [them] to a risk of double recovery." There is simply no risk of either.

Section 107(a)(4)(A) of CERCLA provides for the recovery from responsible parties of those costs that a government party incurs in responding to the release of hazardous substances. Such a claim is not dependent on an interest in a natural resource (even though the State maintains such an interest). It is simply dependent on the incurrence of response costs, which the State plainly satisfies here. The Cherokee Nation has no interest in the State's response costs, cannot prosecute a claim for their recovery, and has no impact as a matter of law whatsoever on the State's standing to bring such a claim.

II. Conclusion

WHEREFORE, the State's Motion for Reconsideration should be granted, and Counts 1 and 2 should be reinstated.

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