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IN THE SUPERIOR COURT OF GUAM
HAGÅTÑA, GUAM

THE GOVERNMENT OF GUAM, Plaintiff, vs. KEPCO MANGILAO SOLAR, LLC. and SAMSUNG E & C AMERICA, INC., Defendants.	**Civil Case No.** No. CV0597-21 **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

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The Government holds water and cultural resources in trust for the people of Guam. This duty is established by common law and has been incorporated into our statutes. The Government of Guam has filed this action as part of its responsibility to protect those resources and hold those who damage the resources accountable. Based on the common law and statutory authority to bring these claims, this court should grant the motion to amend or, alternatively, grant the Government leave to amend.

DISCUSSION

Government's request to file an amended complaint is not futile as its Second Amended Complaint as proposed effectively puts Defendants on notice. Guam's notice pleading standard is a minimal one, only requiring a short and plain statement. *See Lujan v. J.L.H. Tr.*, 2016 Guam 24 ¶ 14; *Ukau v. Wang,* 2016 Guam 26 ¶ 52. As a basic principle, "leave shall be freely given when justice so requires." Guam R. Civ. P. 15(a). The Second Amended Complaint seeks to include additional common law causes of action – cultural resource damage, negligence, and hindering public access – to the already existing common law actions of public nuisance and water resource damage. Public nuisance and water resource damage are not at issue for purposes of this motion to amend because they are part of the initial complaint.

Based on the preceding principles and all applicable standards for reviewing a motion to amend, the Second Amended Complaint exceeds Guam's liberal, notice pleading standard. Additionally, the more appropriate platform for the Court to address Defendants' dispositive arguments is in the already-filed motion for judgment on the pleadings, which allows for more extensive briefing. Instead, Defendants seek a legal finding in a motion to amend that denies the Attorney General the opportunity to fulfill his duty to protect Guam's natural and cultural resources by holding bad actors accountable.

I. Government's claims are grounded in both common law and statute and fall within the Superior Court's general jurisdiction

Defendant cites the doctrine of preemption and corresponding federal cases. All such citations are inapposite, as these cases hinge on the fact that federal courts are courts of limited jurisdiction, whereas the Superior Court is one of general jurisdiction. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312 (1981).

A. The Attorney General has standing to pursue common law actions under the *parens patriae* and public trust doctrines.

The Attorney General of Guam has standing as *parens patriae* to protect and seek compensation for injury to Guam's natural and cultural resources, held in trust for the citizens of Guam, by pursuing causes of action in statute or common law. *See* 5 GCA § 30103.

While the scope and application of both the *parens patriae* and the public trust doctrines present questions of first impression in Guam, in the context of natural and cultural resource damages these doctrines are otherwise well-established in common law and state jurisprudence. The public trust doctrine traces its origins to Roman law, which recognized community rights in the air, water, and natural world. *See* Lynda L. Butler, *The Commons Concept: A Historical Concept with Modern Relevance,* 23 Wm. & Mary L.Rev. 835, 846–67 (1982). Today, with our world dominated by human activity, the public trust doctrine serves as a reminder that human flourishing is contingent upon the health and condition of the natural world. Notably, the Attorney General of Guam has a duty and the authority to pursue causes of action against Defendants, and the like, to protect crucial resources and hold bad actors accountable.

1. *Parens Patriae*

The legislature entrusted the Attorney General to act as trustee, guardian, or representative of all citizens. *See* 5 GCA § 30103. The doctrine of *parens patriae* is a species of prudential standing. *See Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192 (D.C. Cir. 2002). The Territory has a

parens patriae interest in its air, land, and waters, and courts have accorded the right to seek monetary damages based upon that interest. *See Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 221 Cal. App. 3d 1601 (Ct. App. 1990). The Attorney General may act in a *parens patriae* capacity to protect "quasi-sovereign" interests, including its interest in the health and well-being of its residents and the integrity of its natural resources. When natural resources are held in trust, the *parens patriae* may bring common law actions for damage done to those resources. *See Maryland Department of Natural Resources v. Amerada Hess*, 350 F.Supp. 1060. 1067 (D.Md. 1972). The sovereign has "the obligation to bring suit not only to protect the *corpus* of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property." *Ohio v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974). In *Kansas v. Colorado*, 533 U.S. 1 (2001), the U.S. Supreme Court recognized that a state suing in a *parens patriae* capacity may recover all damages that result from the injury to the state's water supply, whether the damages were incurred by the state directly or by members of the public it represents.

2. Public Trust Doctrine

While *parens patriae* establishes standing, the public trust doctrine establishes a cause of action. *See State v. Exxon Mobil Corp.*, 126 A.3d 266 (N.H. 2015). The U.S. Supreme Court has long acknowledged a state's right to sue on behalf of its citizens to protect natural resources – especially water – held in public trust. *See Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 258 (1972). As the U.S. Supreme Court has pronounced, the scope and content of the public trust doctrine is primarily a matter of state law. *See, e.g., Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 285 (1997); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

The seminal public trust doctrine case is *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) where the U.S. Supreme Court held states hold their navigable waters and underlying

lands in trust for the public for purposes of navigation, commerce, and fisheries. "Thus, the public trust is ... an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Nat'l Audubon Soc'y v. Superior Ct.*, 33 Cal. 3d 419, 441(1983).

Guam's public trust doctrine is embedded in statute and rooted in common law. *See* 5 GCA § 30103; 12 GCA §§ 14501, 14505. The legislature also recognizes this doctrine by designating all surface and groundwater as property of the people and to be held in trust. *See* 12 GCA §§ 14501, 14505. Even in the absence of explicit recognition of the public trust doctrine in a state constitution, as in Guam's Organic Act, other states have recognized that this common law power exists independent of statutory provisions.

The public trust doctrine should be "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972). Historically, the public trust doctrine has been applied only to tidelands and navigable waters but has been judicially extended to cover other natural resources deemed worthy by courts of public ownership. *See, e.g., Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 595-96 (Cal. Ct. App. 2008) (public trust doctrine covers wildlife).

Furthermore, Defendants' interpretation of the public trust doctrine is outdated. The public trust doctrine expansively protects values that are recreational and ecological. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983); S*ee also R.W. Docks & Slips v. State of Wis.*, 2001 WI 73, ¶ 19 (2001); *Gillen v. City of Neenah*, 219 Wis. 2d 806 (1998); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082–83 (D.C. Cir. 1984); *Neptune City v. Avon–By–The–Sea,* 61 N.J. 296 (1972). Sasayan Cave is a public resource not just as a feeder for our drinking water but as a

recreation spot for locals and tourists because of its beauty (now tainted), its history, and the mood it imparts upon its visitors; it must be protected.

Government suggests that the dated notion of the public trust in the context of navigable and tidal waters does not offer a complete picture of the water resource trust of this Territory. In two instances, the legislature has recognized Government's common law duty under the doctrine, and established the doctrine's broad scope in the Territory. "All surface water and groundwater in Guam are declared to be a public asset and belong to all of the people of Guam held in trust by Government of Guam." 12 GCA § 14505; *See also* 12 GCA § 14501; 10 GCA §§ 46101, 47102.

The Legislature's transfer in part of enforcement authority to Guam Waterworks Authority ("GWA") demonstrates public trust rights originally resided with the sovereign. Furthermore, California law establishes that sovereign rights under the public trust doctrine are not fully alienable, and therefore, Government retains rights including the ability to sue under the public trust doctrine despite some rights being allocated to GWA or the land being held by private landowners. *See Nat'l Audubon Soc'y*, 33 Cal. 3d at 438 (1983) ("[G]rantees did not acquire absolute title; instead, the 'grantees own the soil, subject to the easement of the public...to enter upon and possess the same for the preservation and advancement of the public uses....'"). Thus, it is irrelevant whether or not the land within which Sasayan Cave sits is privately held. In line with its role as trustee for the Territory's natural resources, Government has a property interest in the waters of the cave and the aquifer which the cave feeds.

The property interests imparted by the public trust doctrine and *parens patriae* give Government standing to also pursue a negligence claim despite the lands involved being otherwise privately held. Contrary to Defendants' argument, the Attorney General – as trustee – may act as *parens patriae* by defending an articulable interest of Guam's citizens, such as by abating public

nuisances and conserving natural resources. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 602-604 (1982). To accomplish this, the Attorney General has the authority to pursue not only statutory but also common law claims. *See Maryland Department of Natural Resources v. Amerada Hess,* 350 F.Supp. 1060, 1067 (D.Md.1972); *See also Ohio v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) (A sovereign has "the obligation to bring suit not only to protect the *corpus* of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property."). Thus, negligence, which is both a statutory and common law action, is available to the Government.

B. The mere existence of related statutes does not create exclusive remedies prohibiting Government's common law claims.

As a basic principle, the enactment of a statute does not abrogate a preexisting common law claim unless the legislature so expressly states. *Accord Watson v. Brown*, 686 P.2d 12, 15 (Haw. 1984) ("A statutory remedy is, as a rule, merely cumulative and does not abolish an existing common law remedy unless so declared in express terms or by necessary implication."); *See also Abraham v. County of Hennepin*, 639 N.W.2d 342, 346-47 (Minn. 2002) ("[U]nless a statute provides that its remedy is exclusive, a party should not be prevented from bringing concurrent claims."); *Christensen v. Lundsten*, 863 N.Y.S.2d 886, 889 (N.Y. Dist. Ct. 2008) ("Statutes arising after the creation of the common law are held to abrogate it only to the extent of the 'clear import of the language used' and only to the extent the 'statute absolutely requires.'").

Defendants mistakenly assert that Government's claims should be dismissed because the mere existence of corresponding statutes implicitly precludes the availability of common law remedies for violations of those laws. This assertion skips the first step of the legal analysis of coexisting statutes, which is to determine if the legislature intended the scheme to be exclusive of common law. Statutory schemes can be both comprehensive and non-exclusive of common law. Defendants have not

demonstrated the Legislature's intent to establish exclusivity, and the initial presumption should be that the rights are cumulative. *Mahoney v. Crocker Nat. Bank*, 571 F. Supp. 287, 293 (N.D. Cal. 1983) ("Where a right is established at common law or by statute, before a new statutory remedy is created, the statutory remedy will generally be considered 'merely cumulative, and the older remedy may be pursued.'"). Government's right of recovery is not diminished by the coexistence of express statutory remedies where the legislation does not presume to preempt common law rights. *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 221 Cal. App. 3d 1601 (Ct. App. 1990), disapproved of on other grounds by *Johnson v. Am. Standard, Inc.*, 43 Cal. 4th 56 (2008). For example, 10 GCA § 4711(c)[1] demonstrates the non-exclusivity of the Water Pollution Control Act. *See* 10 GCA § 4711(c) ("Nothing in this Act shall be construed to abridge, limit, impair, create, enlarge or otherwise affect substantively or procedurally the right of any person to damages or other relief on account of injury to persons or property and to maintain any action or other appropriate proceeding therefor.").

Similarly, 21 GCA § 76101 demonstrates the non-exclusivity of the statutory scheme by stating the comprehensive program of historical preservation should be "undertaken at *all levels* of Government of this territory" which certainly includes the level of the Attorney General. 21 GCA § 76101 (emphasis added). As for the Defendants' references to the Contractors Licensing Board ("CLB"), the amended complaint does not implicate the CLB or its powers. Furthermore, Defendant Samsung resorts to cite to 29 GAR § 1446[2] and 29 GAR § 1402 because nothing written by the legislature supports their argument, leaving the presumption of coexistence standing. Finally, 21 GCA § 76113 clearly establishes the non-exclusivity of cultural resource remedies.

1. **Government's common law claims are within the jurisdiction of the Superior Court, not the various government agencies.**

[1] Defendant Samsung mistakenly collapsed the distinction between the Water Pollution Control Act, which is 10 GCA § 47101 et. seq., and 10 GCA § 45101 et. seq.. which is the Guam Environmental Protection Act.
[2] Authority inapplicable, as it involves license regulation, and the complaint does not seek licensing based relief.

Government's claims rest in common law and are autonomous from related-statutory agency review. No single or combination of agency involvement can address the totality of the issues. Once discovery is completed, Defendants will not be able to credibly claim that the agencies, even considered as a whole, have the authority or ability to remedy the extent of the damage caused by Defendants' willful and reckless actions.

The various agencies lack authority to respond to the magnitude or entirety of Defendants' actions, thus, agency involvement cannot be a prerequisite to instituting suit. *See Ghost Player, L.L.C. v. State*, 860 N.W.2d 323, 328-29 (Iowa 2015) (exhaustion only required when action or inaction is related to the authority of the agency); *Rowen v. LeMars Mutual Ins. Co. of Iowa*, 230 N.W.2d 905, 909 (Iowa 1975) (exhaustion only required when "the relief sought is within the jurisdiction of the [agency]"). Defendants' arguments reveal the limitations on available administrative remedies. If Defendant KEPCO's argument that Government can only seek declaratory relief for protection from *future* injury under 21 GCA § 76113 is correct, then clearly the statutory scheme is not comprehensive because Government would lack the ability to claim actual damages for past injuries. Moreover, *past* injury committed to Sasayan Cave's cultural resources is of such tremendous, even incalculable, value and deserves first-hand adjudication in the Superior Court rather than being fragmented at the administrative level. Agencies, while possessing specific expertise and authority, are not empowered to address the magnitude of harms in which the Attorney General has authority. Accordingly, Defendants' argument that they will suffer prejudice absent agency participation or exhaustion of administrative remedies should be taken with a grain of salt.

II. Government – in addition to its common law claims – has the benefit of related statutes.

Government's cultural resource damage claim is premised on 21 GCA § 76113, and Government finds itself confused by Defendants' misplaced interpretation of the statute. This is because Section 76113 so evidently contemplates that a cause of action is triggered by a violation,

not just the prospect of one. *See* 21 GCA § 76113. In the present action, Defendants' failure to implement led to the disruption and degradation of human remains and other deposits. There is evidence to prove that Defendants performed earthwork and that led to this destruction of cultural deposits and also failed to implement an environmental impact and monitoring plan.

Defendants also allege that Government's cause of action for *Hindering Public Access* is not rooted in Guam law. This cannot be more inaccurate. While Government references a single statute to support this theory of relief, there is an additional authority offering further support for Government's assertions.

The allegations, as evidenced by the proposed Second Amended Complaint, state that Defendants' reckless, willful, and knowing conduct resulted in large volumes of water, soil (sediment), debris, and trash being discharged onto adjoining properties, starting at Lot 5354-3A-4-2 and beyond, to include Sasayan Cave and the fifty (50) foot wide public access and utilities easement. The statutes supporting Government's third cause of action are found throughout Title 21 GCA, Chapters 62 and 65. More specifically, Section 65105 makes it "unlawful for the owner, lessee, or tenant of any lands adjacent to or abutting the ocean shore to block, impede, or interfere with the public use of any traditional right-of-way." Additionally, Section 62112 mandates that "the public shall have the right to pass unhindered over a Public Right of Way." Finally, Guam law defines a nuisance as including anything which "unlawfully obstructs . . . any public park, square, street, or highway[.]" 21 GCA § 10101.

III. References to specific statutes in the headers of each cause of action establish intentionality and are not essential to Government's common law claims.

Government's reference to specific statutes in section headings of its Second Amended Complaint as proposed, are not indicative of the position that those statutes are an exclusive remedy. Rather, Government pursues common law actions, for example, related to natural resource damage,

based on the Public Trust Doctrine. Specific statutory references merely impart and establish intentionality and malice on the part of Defendants; they are neither exclusive remedies nor essential to Government's various common law claims. The references also impart notice to Defendants of Government's arguments and were included for their benefit. Instead, Defendants have misinterpreted these references as the sole basis of the claims.

Guam law allows exemplary damages in actions not arising from contract where a defendant is guilty of malice. *See* 20 GCA § 2120. Malice is presumed from the deliberate commission of an unlawful act. *See* 6 GCA § 5106. Section 5106 is derived from CCP § 1962, which was used in a California court to find malice in similar factual circumstances involving runoff to neighboring properties. *Sturges v. Charles L. Harney, Inc.*, 165 Cal. App. 2d 306, 321 (1958). As established above, Government has property interests in the natural and historical resources of the affected area and has alleged injury resulting from deliberate commission of unlawful acts.

CONCLUSION

For all the above reasons, Government respectfully requests this Court grant leave to file the Second Amended Complaint, as is traditionally granted.[3]

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[3] Alternatively, Government requests leave to amend its pleading.

Dated this 3rd day of March, 2022.

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