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IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

18	UNITED STATES OF AMERICA,)	CIVIL CASE NO. 02-00022
)	
19	Plaintiff,)	
)	
20	v.)	UNITED STATES' RESPONSE TO
)	GOVERNMENT OF GUAM'S
21)	FINANCING PLAN AND
22	GOVERNMENT OF GUAM,)	RECEIVER'S REPORT
)	
23	Defendant.)	
	_____)	

1 Pursuant to the parties' Joint Report and the Court's Order (ECF Nos. 1391 at 20, 1405 at
2 2-3), the Government of Guam ("GovGuam") filed a Financing Plan and priority list on
3 September 30, 2014. ECF No. 1416 (hereafter "Financing Plan"). On October 1, 2014, the
4 Court ordered the Receiver and the United States to respond to GovGuam's Financing Plan.
5 ECF No. 1417. The Receiver filed its response in its Quarterly Report on October 9, 2014. ECF
6 No. 1422-1 at 36-39. The United States files this response pursuant to the Court's October 1,
7 2014 Order.

8 **I. BACKGROUND**

9 For almost a year, the parties and the Court have understood that the approximately
10 \$202.4 million in Limited Obligation (Section 30) Bonds, Series 2009A (the "Consent Decree
11 Bonds") will be insufficient to allow the Receiver to complete all of the work required by the
12 Consent Decree and certain other projects, not specified in the Consent Decree, which GovGuam
13 had identified as necessary to support the current operations of the Layon landfill ("Additional
14 Capital Projects").¹ ECF Nos. 1267-1 at 28 (Receiver's Quarterly Report), 1271 at 6 (Court
15 Order). On November 22, 2013, the Court ordered GovGuam to meet with the Receiver to
16 discuss development of a plan for financing the Additional Capital Projects. ECF No. 1271 at 6.
17 On March 17, 2014, the Court found that GovGuam had failed to meet with the Receiver to
18 discuss this financing issue. ECF No. 1319 at 19. Consequently, the Court issued another Order
19 regarding the Additional Capital Projects, stating "[s]ince these projects remain a Government of
20 Guam imposed requirement, the Receiver must complete these projects using the funds it
21 currently has at its disposal, which includes the \$4.5 million it annually reimburses to the
22 Government of Guam's General Fund." *Id.* at 21.

23 In its June 25, 2014 Quarterly Report, the Receiver recounted the efforts made to discuss
24 with GovGuam alternative funding sources for the Additional Capital Projects, but summarized
25 the results by stating that the process produced "no tangible results." ECF No. 1369-1 at 36.
26 Moreover, the Receiver explained what the Court and the United States also have acknowledged:

27
28 ¹ These Additional Capital Projects include the upgrades to the Dededo Residential Transfer
Station, Route 4 safety enhancements, and Dero Road upgrades. ECF No. 1271 at 6.

1 if GovGuam provides no viable alternate funding source, the Receiver must use Guam Solid
2 Waste Authority (“GSWA”) revenues to fund the Additional Capital Projects. Id.; ECF No.
3 1319 at 20 (Court Order); ECF No. 1330 at 14 (U.S. response); ECF No. 1378 at 5-6 (Court
4 Order). As the Receiver pointed out, reliance on these GSWA revenues has inevitable
5 consequences: the life of the Receivership must be extended, the transition of authority to the
6 GSWA Board must be delayed, and the Receiver will also be required to accumulate funds for
7 post-closure care of Ordod. ECF No. 1369-1 at 36.

8 On August 1, 2014, the Receiver, GovGuam, and the United States filed a Joint Report
9 regarding funding for the Additional Capital Projects and post-closure care of Ordod Dump. ECF
10 No. 1391. In the Joint Report, GovGuam committed to provide a financing plan and priority list
11 within 60 days. Id. at 20. On September 30, 2014, GovGuam submitted that Financing Plan
12 (ECF No. 1416), and immediately thereafter the Court directed the Receiver and the United
13 States to reply. ECF No. 1417.

14 **II. DISCUSSION**

15 GovGuam’s Financing Plan addresses four issues: (1) the Dero Road improvements;
16 (2) upgrades to residential transfer stations; (3) Route 4 safety enhancements; and (4) the cost of
17 post-closure care for the Ordod Dump. The first three issues concern the Additional Capital
18 Projects as referenced in footnote 1 above. As a matter of both regulatory compliance and
19 compliance with the Consent Decree, the United States takes special interest in the fourth issue,
20 post-closure financial assurance for the Ordod Dump. We set forth our positions in summary
21 form below regarding the four issues addressed in GovGuam’s Financing Plan. See also ECF
22 Nos. 1330 at 14-15, 1391 at 7-8, 20-21.

23 A. The Additional Capital Projects

24 After originally seeking to impose responsibility for these Additional Capital Projects on
25 the Receiver, GovGuam now proposes in its Financing Plan to: (1) remove the Dero Road
26 improvements project and its estimated cost from the ambit of the Consent Decree; and
27 (2) permanently close the Dededo Residential Transfer Station. ECF No. 1416 at 4-5.
28 GovGuam also asks the Court to “reconsider its previous Order and remove the Receiver-

1 imposed requirements of Route 4 Safety enhancements.” Id. at 8.

2 The United States’ position on these Additional Capital Projects is summarized below:

- 3 • We do not oppose a modification of the scope of the Dero Road project, but agree with
4 the Receiver’s proposal to repair the damage to Dero Road caused by the new sewer line
5 and years of heavy truck traffic destined for the Ordot Dump. ECF No. 1422-1 at 38.
6 Furthermore, GovGuam should be required to fund -- and the Receiver should
7 implement -- this work.
- 8 • We acknowledge that the Receiver does *not* recommend the closure of the Dededo
9 Residential Transfer Station. The Receiver correctly emphasized that this transfer station
10 is the most heavily used station on Guam and its closure could contribute to an increase
11 in illegal dumping. Id. at 38. Despite these serious drawbacks, however, we believe that
12 GovGuam retains the discretion to close this transfer station. ECF No. 1391 at 10.
13 Accordingly, we do not oppose the closure of the Dededo Residential Transfer Station
14 subject to this condition: GovGuam should be required to fund -- and the Receiver
15 should implement -- proper closure measures for the transfer station if GovGuam decides
16 to close it.
- 17 • We agree with the Receiver’s assessment that the Route 4 safety enhancements are
18 directly related to GovGuam’s obligation to provide a safe route to the Layon landfill.
19 ECF No. 1422-1 at 39; see also ECF No. 885 at 3-4. In this case, GovGuam not only
20 selected the location of the Layon landfill pursuant to the Consent Decree (ECF No. 55,
21 ¶ 9.a.), it also represented to the Court in July 2008 that it would fund road improvements
22 to allow safe access to the landfill (ECF No. 1391-3 at 1), and agreed in January 2012
23 that “safety would be enhanced on Route 4 by the construction of 4-foot shoulders on the
24 curves” (ECF No. 874 at 3). See ECF No. 1391 at 10-11. Given the significant safety
25 issues, as highlighted by the recent letter from Mayors of Villages near the Layon landfill
26 (ECF No. 1420 at 2-3), the Court should not reconsider its prior Order directing that
27 “DPW shall immediately proceed with the design and construction” of these Route 4
28 safety enhancements. ECF No. 888 at 3.

1 If the Court approves GovGuam’s proposal to remove the Dero Road project and close
2 the Dededo Residential Transfer Station, the \$19.9 million funding gap for the Additional
3 Capital Projects will be reduced. As the Court accurately concluded in its March 17, 2014 and
4 July 3, 2014 Orders, however, GovGuam had not funded these Additional Capital Projects itself;
5 therefore “the Receiver must complete these projects using the funds it currently has at its
6 disposal, which includes the \$4.5 million it annually reimburses to the Government of Guam’s
7 General Fund.” ECF Nos. 1319 at 21, 1378 at 5-6. GovGuam offered nothing in its Financing
8 Plan that changes the United States’ position on this financing issue.

9 B. Post-Closure Care Expenses for the Ordot Dump

10 As the Court previously explained:

11 Post-closure care expenses . . . are normally considered operating expenses
12 instead of capital costs. . . . “[t]ypically, funds are set aside throughout the life
13 of a landfill to provide for post-closure care after the facility is closed.” . . .
14 However, as with so many other things related to the Ordot Dump, the
15 Government of Guam did not set aside funds for this cost during the period it
operated the Ordot Dump, so it will have to pay for the post-closure cost on an
ongoing basis.

16 ECF No. 1243 at 16 n. 20 (internal citations omitted).

17 Notably, the current permit for the Layon landfill contains a “pledge of revenue,”
18 ensuring that appropriate funding will be set aside for Layon closure and post-closure costs:
19 “The Permittee shall establish a separate account for the closure and post closure of the [landfill].
20 Furthermore, a percentage of the tipping fee shall be allocated to this account.” See Guam
21 Environmental Protection Agency Municipal Solid Waste Landfill Facility Permit No. 09-015
22 MSWLF at 10-11 (Version 22-Nov-09). In accordance with this condition, the Receiver has
23 established this reserve account for the Layon landfill. See Table 12 (GSWA Reserves), ECF
24 1422-1 at 40.

25 In its Financing Plan for post-closure care at the Ordot Dump, GovGuam now “proposes
26 to establish a separate trust account for the accumulation of the post-closure care costs over the
27 next 30 years . . . [with an] initial deposit of \$1 million in seed money . . . and thereafter funded
28 by a monthly deposit of \$48,889 to be collected from the operations and revenues of GSWA.”

1 ECF No. 1416 at 9. Both Guam and federal regulations exempt federal and State owners of
2 landfills from certain financial assurance requirements. See, e.g., 22 G.A.R. § 23701; 40 C.F.R.
3 § 258.70. Under these circumstances, however, the United States categorically opposes
4 GovGuam’s proposal and agrees with the Receiver’s blunt assessment of it: GovGuam’s
5 “purported ‘Financing Plan’ is without any basis in reality. Instead, it seeks to use non-existent
6 funds to finance projects that must be paid for with real money.” ECF No. 1422-1 at 36.

7 Despite the deeply troubled history of its operation of the Ordot Dump, GovGuam,
8 through its Financing Plan, asks the Court simply to trust that this time it really will set aside on
9 an ongoing basis the funds it has never managed to set aside in 61 years of operating the Ordot
10 Dump. The United States again agrees with the Receiver’s position: based on GovGuam’s track
11 record, this claim simply has no credibility. Id. at 39.

12 The Receiver is not responsible for GovGuam’s failure to set aside funds for the cost of
13 post-closure care during GovGuam’s six decades of operating the Ordot Dump. However,
14 pursuant to the Court’s Appointment Order (ECF No. 239 at 15-16), the Receiver is now
15 responsible for implementing the Consent Decree and complying with the Guam and federal
16 regulations for post-closure care of the Ordot Dump. To that end, the Consent Decree requires
17 submission to the United States Environmental Protection Agency of a “100% post-closure care
18 and monitoring plan,” “complete information about closure plans, in compliance with
19 Government of Guam Regulations (22 G.A.R. § 23104),” and “a financial plan for funding those
20 actions identified in Paragraphs 8 and 9, over time, including the funding source or sources and a
21 schedule to secure funds for the capital and operating costs necessary to fully implement those
22 actions.” Consent Decree, ECF No. 55 at ¶¶ 8.b.i, 8.b.iii, and 10.a.

23 The Court’s Order authorized the Receiver, as required by the Consent Decree, to fund
24 post-closure care for the Ordot Dump on an ongoing basis from GSWA revenue until these post-
25 closure care funding obligations are met. ECF No. 1378 at 5-6. At this point, the Receiver’s
26 plan for assuring funding for post-closure care for the Ordot Dump, as described in the June 25,
27 2014 Quarterly Report (ECF No. 1369-1 at 37), is the only viable plan that comports with the
28 requirements of the Consent Decree.

1 If GovGuam proposed a viable plan to fund post-closure care on an ongoing basis, the
2 United States would be willing to consider the proposal. Consistent with the history of
3 GovGuam's "lack of financial commitment . . . toward funding Consent Decree projects" in this
4 case (ECF No. 239 at 10), however, GovGuam has not done so to date.

5 **III. CONCLUSION**

6 For the foregoing reasons, the United States requests that the Court: (1) impose
7 conditions on GovGuam's proposals to terminate the Dero Road project and permanently close
8 the Dededo Residential Transfer Station; and (2) reject GovGuam's Financing Plan with regard
9 to both the Route 4 safety enhancements and the post-closure care financial assurance for the
10 Ordot Dump. Before authority is transitioned from the Receiver to GSWA, the United States
11 requests the Court to require the Receiver:

- 12 (1) to submit a post-closure plan for the Ordot Dump that complies with applicable federal
13 and Guam requirements, and to obtain both regulatory approval from Guam EPA and the
14 United States' acceptance pursuant to the Consent Decree;
- 15 (2) to contract with a third-party operator to perform post-closure care in accordance with the
16 approved post-closure plan; and
- 17 (3) to fully fund a dedicated post-closure account with a third-party trustee, as approved by
18 the Court, for the first 30 years of post-closure care for the Ordot Dump.

19 Dated: October 22, 2014

/s/ Robert D. Mullaney
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