IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	Date:
	CIVIL NO. 6417-34-1
	MEMORANDUM OF THE NAVAJO NATION IN SUPPORT OF ITS MOTION TO DISMISS THE PETITION FOR DECLARATORY JUDGMENT AN RECOGNITION OF WATER RIGHTS FILED BY ATKINSON TRADING COMPANY, INC.

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Descriptive Summary:	Memorandum of the Navajo Nation in support of its motion to dismiss the Atkinson Trading Company's petition for declaratory relief.
Claimant Nos:	The Navajo Nation
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I. INTRODUCTION

The Navajo Nation ("Nation") respectfully moves the Special Master to issue a report recommending the dismissal of Atkinson Trading Co., Inc.'s *Petition for Declaratory Judgment and Recognition of Water Rights* (Sept. 15, 1997) ("ATC Petition").[1] In the

[1]This matter has been referred to the Special Master by the Court's order of Nov. 20, 1998. *See Minute Entry* at 6, CIV. No. 6417 (Nov. 20, 1998).

alternative, the Nation requests the Master to stay the issue of the Nation's jurisdiction to regulate the use of water by ATC until that question has been addressed in the first instance by the Nation, once the LCR Court has determined the nature and extent of ATC's water rights under state law.

The relief sought by ATC in its Petition is unusual and does not comport with the procedures governing the adjudication of water rights in these proceedings. ATC has asked the LCR Court to declare: (1) the extent and priority of ATC's water rights claimed under state law, ATC Petition, Prayer for Relief 1; (2) that the rights which it claims are protected under state law, ATC Petition, Prayer for Relief 4; (3) that the Nation may not assert jurisdiction over ATC's water rights, ATC Petition, Prayer for Relief 2-3; and (4) that ATC is entitled to inclusion in the final decree or settlement of water rights in the Little Colorado River general stream adjudication "in the same manner as all other non-Indian water rights," ATC Petition, Prayer for Relief 4.

To the extent that ATC seeks a determination of its water rights under state law, it must follow the statutory provisions and court rules governing this adjudication. ATC's rights will be adjudicated in due course; its attempt to short circuit those procedures should not be condoned. A suit. Second, at this stage of this case, the extent of ATC's rights under state law are not known and thus it is impossible to determine whether the application of Navajo law to those rights would impermissibly interfere with ATC's entitlement under state law. Third, as ATC is well aware, it must go to a tribal forum in the first instance to ascertain the proper interpretation of Navajo law relative to the exercise of its water rights on its lands within the Navajo Reservation. *See* Atkinson Trading Co. v. Navajo Nation, 866 F.Supp. 506 (D.N.M. 1994).

Finally, ATC's request to be included in the final decree or any settlement "in the same manner as all other non-Indian water rights" is nonsensical. All water rights are different and those differences must be reflected in any decree or final settlement. ATC must await the outcome of the litigation to determine how its rights will be treated relative to others claiming rights under state law. It certainly has no right to be treated identically to parties with different rights exercised under different circumstances.

In short, the ATC Petition serves no useful function and should be dismissed.

II. BACKGROUND

Because this is a motion to dismiss, the Nation does not dispute the allegations ATC has pleaded for purposes of this motion. Linder v. Brown & Herrick, 189 Ariz. 398, 402, 943 P.2d 758, 762 (Ct. App. 1997). The Nation provides additional background below from the record in the LCR adjudication, the statutes controlling this adjudication, and the provisions of the Navajo Nation Water Code ("NNWC").

1. ATC claims to hold title to certain property in fee simple within the external boundaries of the Navajo Reservation. ATC Petition ¶ 4. It further claims that this land was patented before Congress extended the Reservation to the area. Id. ¶¶ 4, 6.

2. ATC operates various businesses on its property. Id. ¶ 7.

3. The federal district court in New Mexico held that the Nation may impose its Hotel Occupancy Tax on guests of ATC's operations on the property. Atkinson Trading Co, Inc. v. Gorman, CIV. No. 97-1261 BB/LFG, slip op. (D.N.M. Aug. 14, 1998), *appeal docketed*, No. 98-2247 (10th Cir. Sept. 10, 1998).

4. The ATC Petition asserts that ATC owns two water rights under the laws of the State of Arizona**.** ATC Petition ¶ 8. ATC claims it is entitled to a water right for the continuous use of water on the lands since before March 26, 1919. Id. ¶ 8.a. ATC also claims a water right evidenced by Certificate No. 3930.0001 which it argues entitles it to use 24 million gallons of water per year from the Little Colorado River. Id. ¶ 8.b. The attached certificate refers to a priority date of December 8, 1965. Id., Exh. 1.

5. ATC asserts that it uses water on its property through two wells, allegedly on its property and which allegedly take water from the substream flow of the Little Colorado River. Id. ¶ 9.

6. Table C-1, entitled, "Other Statements of Claimant Associated with Water Uses Located on the Navajo Nation Lands" of the *Preliminary Hydrographic Survey Report on Navajo, Hopi, San Juan Southern Paiute and Zuni Lands in the Little Colorado River System* (Sept. 23, 1994) ("Tribal Lands HSR")**,** lists a Statement of Claimant Number 39-84050 for Atkinson's Ltd. of Arizona. According to Table C-1, ATC claimed a 1966 priority date for

groundwater usage. The Tribal Lands HSR further provides, "[p]ersons occupying inholdings who claim water rights solely under state law are not included in this Indian Lands HSR." Tribal Lands HSR at 102.

7. ARIZ. REV. STAT. ANN. § 45-256(A) describes the contents of the HSRs which the Arizona Department of Water Resources ("DWR") must furnish the Court. Among other things, DWR is required to "[c]onduct a general investigation or examination of the river system and source." ARIZ. REV. STAT. ANN. § 45-256(A)(3). DWR must also "[i]nvestigate or examine the facts pertaining to the claim or claims asserted by each claimant." ARIZ. REV. STAT. ANN. § 45-256(A)(4). Perhaps most importantly, it must "gather such other information as may be necessary or desirable for a proper determination of the relative rights of the parties." ARIZ. REV. STAT. ANN. § 45-256(A)(6).

8. The HSR and the objections to the HSR were the pleadings that defined the scope of the Silver Creek litigation. *See, e.g., Rules for Proceedings before the Special Master* § 7.01 (Nov. 1, 1991) ("Master's Rules") ("The Clerk's office shall prepare 'contested case files' for the objections filed to the HSR."). As the Master noted, "[t]he general adjudication statutes require objections to be made to the HSR and not directly to the statement of the claimant." *Minute Entry* at 7, CIV. Nos. 6417-033-9005 & 6417-033-9006 (consolidated) (Special Master Aug. 31, 1993).

9. Although ATC alleges that the Navajo Nation asserts jurisdiction to regulate the use of water on the ATC property, ATC Petition ¶ 16, that allegation is inconsistent with Exhibit 2 to the ATC Petition in which counsel for the Nation states only that the "Nation intends to pursue resolution of this issue through the tribal administrative and judicial system." ATC Petition, Exh. 2 at 1. The Nation has not yet determined the manner in which it will apply the NNWC in circumstances such as those alleged by ATC.

10. Under the NNWC, the Director of the Division of Natural Resources is authorized to enforce the provisions of the Code. NNWC § 1402. The Code requires that any party affected by an action must have actual notice of the action and "a fair and adequate opportunity to be heard." NNWC § 2002. The courts for the Navajo Nation are authorized to hear appeals from

such matters. NNWC § 2102. Sanctions for violations under the Code are subject to the Indian Civil Rights Act, 25 U.S.C. §§ 1301- 1341, and the Navajo Nation Bill of Rights, 1 N.T.C. §§ 1-9.

III. ATC'S REQUEST FOR A DECLARATION OF ITS WATER RIGHT UNDER STATE LAW IS NOT RIPE

ATC asks the LCR Court to declare that ATC has a right under state law to draw 24 million gallons of water per year from the subflow of the Little Colorado River with a priority date of 1919. ATC Petition ¶¶ 15, 21, 22, 23, 25, 26, 27; Prayer for Relief 1, 4. In asking for the immediate adjudication of its rights, ATC seeks to be treated differently than any other claimant in this massive adjudication and would thus subvert the general stream adjudication process in Arizona.

The purpose of Arizona general stream adjudications is to determine comprehensively all claims to rights to use water from a stream. ARIZ. REV. STAT. ANN. § 45-251(2). At the heart of the adjudication process are the statutorily required HSRs. Without an HSR and the resulting objections, the adjudication cannot proceed. For example, the filing of objections to the HSR governs the burden of going forward with the evidence in the proceedings. *See* Master's Rules § 13.05; *Memorandum Decision and Order* at 3, CIV. No. 6417-033-9005 (Special Master Aug. 11, 1993) ("Thus, the objectors have the burden of producing evidence in support of their objections."). The process of objecting to the HSR also affects the burden of persuasion in contested cases. *Memorandum Decision and Order* at 5, CIV. No. 6417-033-9005 (Special Master Aug. 11, 1993) ("Thus, the claimant's burden of persuasion will become significant in a contested case only when there has been an objection to all or a portion of the watershed file report *and* only after the objector has satisfied the burden of producing evidence sufficient to allow the Master to reach a decision that the objection is correct."). And unless an appropriate objection was filed at the outset, the Master has refused to permit evidence to be produced relative to the merits of a claim to a water right. *See Minute Entry* at 7-8 (Special Master Aug. 31, 1993).

No HSR has been prepared for the inholdings on the Navajo Reservation. Tribal Lands HSR at 102. Moreover, Judge Minker directed that the parties turn their attention to the adjudication of tribal rights before adjudicating the non-Indian rights. *Order*, No. 6417 (Jan. 27, 1994). Thus, the statutory predicates for the adjudication of the rights claimed by ATC do not exist at this time because no HSR exists. Without an HSR, there is no watershed file report to serve as the basis of an objection by the Nation and the United States. Moreover, the confusion concerning the ATC claim and its multiple and conflicting characterizations in the existing documents is precisely the sort of situation in which an HSR would be most helpful to the court and the parties. *See* Part II, ¶¶ 4, 5, *supra*. Accordingly, ATC's demand for special treatment of its claim cannot be reconciled with the statutory requirements that govern this adjudication.

ATC has two choices: either it can participate in the ongoing settlement discussions; or it can wait for an adjudication of its rights. Certainly, the fact that ATC has refused to participate in settlement discussions does not justify special treatment of ATC's claim by proceeding in the absence of the statutory predicates for the adjudication of water rights. The only way that ATC can ensure an acceptable treatment of its rights in the settlement is to participate in those negotiations. It has refused to do so with the result that its rights must be determined in accordance with the controlling statutory and judicial procedures.

In sum, ATC's request for a declaration of its rights under state law should be dismissed. Such a petition is not required for the adjudication of its rights and ATC has shown no justification for the special treatment which it now demands.

IV. ATC'S REQUEST THAT THE ADJUDICATION COURT INTERPRET AND APPLY NAVAJO LAW SHOULD BE DISMISSED

Of course, ATC's overriding motivation in filing its petition is to have the LCR Court determine the extent to which the Nation may exercise jurisdiction over ATC's use of water on its property. That request is fatally flawed for numerous reasons. First, the Nation -- the named respondent in the ATC Petition -- is immune from suit and the issue of the application of Navajo

law cannot be determined in its absence. Second, the determination of the validity of ATC's claimed right is a predicate to the resolution of the jurisdictional issues raised by ATC but that question has yet to be determined by the LCR Court and will not be adjudicated for many years under the existing procedures. Third, assuming arguendo that ATC has a right to use water on its lands under state law, the LCR Court must defer to the Nation to decide, at least in the first instance, the extent to which Navajo law will apply to the exercise of such rights under state law.

A. THE SOVEREIGN IMMUNITY OF THE NAVAJO NATION BARS THE DETERMINATION OF THE QUESTIONS CONCERNING THE APPLICATION OF NAVAJO LAW .

In asking the LCR Court to determine the extent to which the Nation may exercise regulatory authority over ATC's use of water on its property, ATC asserts that the Nation is "[t]he Respondent in this matter" and that the Court has jurisdiction over "the parties pursuant to the McCarran Amendment. . . ." ATC Petition ¶¶ 2, 3. Those allegations ignore the immunity of the Nation from suit and the limited nature of the waiver of sovereign immunity contained in the McCarran Amendment (codified as 43 U.S.C. § 666). As the Arizona Supreme Court explained, "[a]pplication of state adjudicatory procedures to water claims does not interfere with tribal self-government . . . ." United States v. Superior Court, 144 Ariz. 265, 276, 697 P.2d 658, 669 (1985). Here, in sharp contrast, ATC seeks a declaration of the extent to which the Nation may apply its own laws within the boundaries of its Reservation. The McCarran Amendment cannot be distorted to waive tribal immunity in such circumstances.

1. The Nation Is Immune from Suit .

The Nation is a federally recognized Indian tribe that is immune from suit. Indian tribes were self-governing before the coming of the Europeans, and still possess the basic attributes of sovereignty. United States v. Wheeler, 435 U.S. 313, 323 (1978). The Supreme Court has explained that tribal sovereignty,

> is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not

> withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id. (citations omitted). This Supreme Court reaffirmed this in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991):

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . . Congress has consistently reiterated its approval of the immunity doctrine.

Id. at 510 (citations omitted). The doctrine has been repeatedly affirmed. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), 118 S.Ct. 1700, 1702 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 172-173 (1977); United States v. United States Fidelity Guar. Co., 309 U.S. 506, 512 (1940). *See generally* Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 595 U.S. 1212 (1992); Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989); United States v. James, 980 F.2d 1314 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993).

Under the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, (Indian commerce clause), only Congress and the Nation itself have the power to waive the Nation's sovereign immunity. Martinez, 436 U.S. at 58; Wheeler, 435 U.S. at 323; Citizen Band Potawatomi Indian Tribe, 498 U.S. at 510; Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1053 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985). "It is settled that a waiver of [an Indian tribe's] sovereign immunity 'cannot be implied but must be unequivocally expressed.'" Martinez, 436 U.S. at 58 (*quoting* United States v. Testan, 424 U.S. 392, 399 (1976) (*quoting* United States v. King, 395 U.S. 1, 4 (1969))). *Accord* Greene v. Mt. Adams Furniture, 980 F.2d 590, 592 (9th Cir. 1992) (a waiver of sovereign immunity must be unequivocally expressed), *cert. denied sub nom*. Richardson v. Mt. Adams Furniture, 510 U.S.

1039 (1994); Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 594 (9th Cir.), *cert. denied*, 498 U.S. 824 (1990).

2. The McCarran Amendment Constitutes a Narrow Waiver of Immunity .

To be sure, the McCarran Amendment, a "virtually unique federal statute," is a waiver of the United States' sovereign immunity that permits state courts to adjudicate federal and tribal water rights. *See* United States v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983). The Nation intervened in the LCR adjudication to protect its interests that were subject to adjudication under the McCarran Amendment. The terms of the Amendment are narrow, however, and do not allow for the adjudication of the broad jurisdictional issues posed by ATC. The Amendment provides in relevant part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances.

43 U.S.C. § 666(a).

The Supreme Court has explained the limited purpose of the McCarran Amendment, stating "[t]he clear federal policy evinced by [the Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976). The Court further noted that "[t]he consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for the adjudication of water rights . . . ." Id. The Supreme Court's statements are consistent with the Senate Report on the McCarran Amendment

which reflects the concerns behind its enactment: the ability of the United States to invoke sovereign immunity and thus frustrate the adjudication of rights in various western streams. S. REP. NO. 82-755, at 5 (1951). Given the interlocking nature of water rights, the Senate expressed apprehension that the refusal of the federal government to participate in water rights cases would preclude the effective adjudication of such matters. Id.

Thus, the Supreme Court has held that in the appropriate circumstances, the McCarran Amendment may be invoked to adjudicate water rights which the United States holds in trust for the benefit of Indian tribes. Colorado River, 424 U.S. at 811-13; *see also* San Carlos Apache Tribe, 463 U.S. at 569-70.[2] But the need to ensure that the United States could be joined in comprehensive adjudications to determine all rights to use water from a stream system is a much different matter than a petition aimed at ascertaining the scope of tribal jurisdiction over activities taking place within an Indian reservation.

[2]The Court assumed that "Indian interests may be satisfactorily protected under regimes of state law." Colorado River, 424 U.S. at 812. *See also* San Carlos Apache Tribe, 463 U.S. at 571 (state court decisions that are alleged to violate Indian water rights will receive "a particularized and exacting scrutiny [before the Supreme Court] commensurate with the powerful federal interest in safeguarding those rights from state encroachment.").

3. The Issues Raised by ATC May Not Be Adjudicated under the McCarran Amendment's Limited Waiver of Sovereign Immunity .

The relief sought by ATC in its petition is far different than the adjudication and subsequent administration of water rights in state court authorized by the McCarran Amendment. For example, ATC states that it is entitled to a "declaratory judgment stating that the Navajo Nation has no authority to regulate ATC's use of water on ATC's fee land in any manner." ATC Petition ¶ 24. Likewise, ATC asks the Court to declare that "the Navajo Nation Water Code is inapplicable to ATC's water rights and ATC's use of water on its lands." Id. ¶ 25. These requests go far beyond the limited issues present in the ongoing stream adjudication to declare the competing rights of the various parties using water from the Little Colorado River. The LCR Court has not yet adjudicated those rights and it has not issued a decree governing the administration of those rights. Moreover, ATC does not allege that the Nation is interfering with its use of water, let alone that the Nation has interfered with the administration of rights under the jurisdiction of the LCR Court. Instead of seeking relief related to the adjudication and administration of its decreed rights, ATC strays far afield from the ongoing water rights adjudication and requests the Court to address the extent of tribal jurisdiction over water use on ATC's lands within the Reservation.

Because the portion of ATC's Petition seeking declaratory relief regarding the extent of the Nation's jurisdiction is not within the scope of a proceeding under the McCarran Amendment, that portion of the ATC Petition should be dismissed. As the Supreme Court has recently emphasized, the waiver of the United States' sovereign immunity in the McCarran Amendment must be strictly construed: "There is no doubt that waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text. Any such waiver must be strictly construed in favor of the United States, and not enlarged beyond what the language of the statues requires." United States v. Idaho, ex rel. Dir., Idaho Dep't of Water Resources, 508 U.S. 1, 6-7 (1993) (*quoting* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990); Ardestani v. INS, 502 U.S. 129, 137 (1991) (other citations omitted)). That reasoning applies here to foreclose the adjudication of the extent of Nation's jurisdiction over water use on its Reservation.

The fact that the Nation intervened in the ongoing McCarran Amendment proceedings in state court does not leave it open to claims such as those posed by ATC in its petition naming the Nation as respondent. In a similar situation in Citizen Band Potawatomi Indian Tribe, the Supreme Court rejected the contention that the filing of a claim by a tribe waived its immunity to suit for compulsory counterclaims:

> We rejected an identical contention over a half-century ago in United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511-512 (1940). In that case, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian Tribe because the Tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. Id., at 513. "Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits." Ibid.

498 U.S. at 509. To conclude, the sovereign immunity of the Nation bars the ATC Petition.

B. THE JURISDICTIONAL ISSUES RAISED BY ATC ARE PREMATURE AND SHOULD BE DISMISSED .

ATC's request that the LCR Court address the complex issue of the extent to which the Nation may wield jurisdiction over the exercise of a water right created under state law utilized within the exterior boundary of the Reservation is not ripe. It has not been established that ATC has a state law-based right and its claim to such a right will not be litigated for years. Moreover, while the Nation has been careful to avoid any suggestion that it lacks jurisdictional authority over ATC's use of water, there is no allegation in the ATC Petition that the Nation has interfered with ATC's use of water on its property. Indeed, the ATC Petition asserts that by its own terms the NNWC does not apply to its rights. ATC Petition ¶ 18. As a result, there is no reason to put the cart before the horse and attempt to adjudicate the extent of Navajo jurisdiction over water rights created under state law when there is no assurance that ATC even has a state law-based water right, and the ATC Petition does not assert any interference with the use of water by ATC.

Although Arizona has no "case or controversy" requirements analogous to the restriction imposed on federal courts by the United States Constitution, *see* U.S. CONST. art. III, § 2, cl. 1,

Arizona courts have long exercised judicial restraint to decline to decide issues not squarely before them, so that they do not issue mere advisory opinions. Schwab v. Matley, 164 Ariz. 421, 426, 793 P.2d 1088, 1093 (1990). The lack of any alleged harm in this case warrants such judicial restraint. "The ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur." Winkle v. City of Tucson, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). Moreover, "[t]he ripeness doctrine has been utilized in many instances to justify non-intervention by the courts when the complained of . . . action has not become final because of failure to exhaust administrative remedies." Arizona Downs v. Turf Paradise, Inc., 140 Ariz. 438, 445, 683 P.2d 443, 450 (Ct. App. 1984) (*citing* Hinz v. City of Phoenix, 118 Ariz. 161, 575 P.2d 360 (Ct. App. 1978); Stephens v. Industrial Comm'n of Arizona, 114 Ariz. 92, 559 P.2d 212 (Ct. App. 1977)). ATC has not exhausted its administrative remedies here; it has not even attempted an administrative appeal before the Navajo Department of Water Resources. Accordingly, the LCR Court should not issue the advisory declarations ATC requests, and should instead deny its motion.

C. THE LCR COURT SHOULD DEFER TO THE NAVAJO NATION TO DECIDE IN THE FIRST INSTANCE THE EXTENT TO WHICH NAVAJO LAW APPLIES TO ATC's WATER USE .

Putting aside the flaws that exist in the ATC Petition, the LCR Court should defer to the Nation to decide in the first instance the extent to which its laws apply to ATC's use of water on the Reservation. In this instance, the Nation has not yet spoken with regard to the exercise of its jurisdiction over the use of water by ATC. Thus, in order to act on the ATC Petition, the LCR Court must substitute its judgment for that of the Nation's administrative and judicial branches regarding the application of Navajo law to the unique circumstances presented by ATC's situation. Existing case law counsels strongly against such an intrusion on the Nation's sovereignty.

In National Farmers Union v. Crow Tribe of Indians, 471 U.S. 845 (1985), the United States Supreme Court held that Indian tribes retain the inherent authority to determine the extent to which tribal courts may exercise civil subject matter jurisdiction over non-Indians. The Court

pointed out that, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished. . . . We believe that examination should be conducted in the first instance in the Tribal Court itself." Id. at 855-56.

While jurisdiction in National Farmers Union was based on a federal question, the Supreme Court subsequently extended the exhaustion rule announced in that case to cover diversity cases as well. In Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987), the Court held that "the exhaustion rule announced in National Farmers Union applies" in a case based on diversity jurisdiction. Id. at 16. The Court recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty [and] [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Id. at 18. Thus, federal courts must decline to hear a challenge to tribal jurisdiction prior to exhaustion of available tribal remedies, whether jurisdiction in the federal courts is based on diversity or a federal question.

ATC should understand the need to exhaust tribal remedies before seeking assistance in another forum. In Atkinson Trading Co, Inc. v. Gorman, CIV. No. 97-1261 BB/LFG, slip op. (D.N.M. Aug. 14, 1998), *appeal docketed*, No. 98-2247 (10th Cir. Sept. 10, 1998), ATC objected to the imposition of the Navajo Nation Hotel Occupancy Tax as applied to ATC's customers. Id. at 1. ATC initially objected to the tax in federal court which dismissed the action without prejudice because ATC had not exhausted tribal remedies. *See* Atkinson Trading Co. v. Navajo Nation, 866 F.Supp. 506 (D.N.M. 1994). ATC then pursued its objection to the tribal tax before the Navajo Tax Commission, and appealed unsuccessfully to the Navajo Nation Supreme Court. Gorman, slip op. at 1-2. ATC subsequently sought a declaratory judgment from the United States District Court for the District of New Mexico that the Nation had no authority to impose its tax on ATC's customers. Id. at 2. There, as in the present case, ATC "argue[d] strenuously that, due to the fee-land status," id. at 8, of its land the Nation should not have jurisdiction to apply the Nation's laws to ATC. The district court found that, under the test for tribal jurisdiction over non-Indians announced in Montana v. United States, 450 U.S. 544, 565-66

(1981), the Nation could tax the hotel guests. Id. at 12-17.[3]

Here, as in the prior litigation over the application of the Nation's taxes to ATC's customers, ATC must first seek a determination from the Nation regarding the proper application of the Nation's laws to the particular circumstances of ATC's use of water on its lands within the boundaries of the Reservation. There has been no final resolution by the Nation of the extent to which its laws apply to the use of water by ATC or exactly how the tribal regulatory process would govern ATC's right to use of water under state law, assuming arguendo that ATC has such a right.

The fact that ATC has sought to by-pass the Nation and seek a declaration of the extent to which Navajo law applies to its use of water in state court rather than federal court is no basis to distinguish the clear holding of National Farmer's Union, Iowa Mutual, and Atkinson Trading Co. v. Navajo Nation. State courts, like federal courts, must decline from exercising jurisdiction to allow exhaustion of tribal remedies. The determination of tribal jurisdiction and the correct application of tribal law is properly developed in the first instance in tribal courts, consistent with the longstanding federal policy of promoting tribal self-government and self-determination, judicial economy, and allowing tribal courts to provide other courts with the benefit of their expertise in such matters. National Farmers Union, 471 U.S. at 856-857; Iowa Mutual, 480 U.S. at 15-17.

These policies require a state court to stay its hand until tribal courts have determined whether tribal jurisdiction exists:

> [E]ven if the Supreme Court intended its exhaustion holdings in

[3]Earlier, in Ashcroft v. United States Dep't of Interior, 679 F.2d 196 (9th Cir. 1982), ATC sought declaratory and injunctive relief against application of the Indian Trader Statutes, 25 U.S.C. §§ 261-264, federal laws enacted to protect Native Americans from exploitation by unethical traders. ATC argued that because its operations were located on non-Indian owned fee land, it was not located "on the Reservation" and therefore exempt from the regulations. Ashcroft, 679 F.2d at 198. The Ninth Circuit Court of Appeals disagreed, holding that the regulations applied to fee lands within the Reservation because: (1) the inherent sovereign power of the Navajo Nation, as it exists under the Montana test, justified the federal determination that the regulations applied to fee lands; and (2) application of the regulations to fee lands was necessary to effect the legislative intent underlying the Indian Trader Statutes. Id. at 199-200.

> National Farmers Union Ins. Cos. and Iowa Mutual Ins. Co. to constitute only a federal court procedural rule based upon, but not severable from, the federal policy of supporting tribal self-government and self-determination, deference to that same policy counsels that we also adopt the doctrine for the courts of this jurisdiction.

Drumm v. Brown, 716 A.2d 50, 63 (Conn. 1998). *See also* Calvello v. Yankton Sioux Tribe, 584 N.W.2d 108, 116-117 (S.D. 1998); Cohen v. Little Six, Inc., 543 N.W.2d 376, 381 & n.3 (Minn. Ct. App. 1996); Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379, 381 (Minn. Ct. App. 1995). Indeed, "both state courts and federal courts would undermine the ability of tribes to govern themselves by exercising jurisdiction over activities taking place on tribal lands." United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992). *Accord* Bowen v. Doyle, 880 F.Supp. 99 (W.D.N.Y. 1995) (even if state court has jurisdiction and the matter is not currently pending before tribal court, state courts must abstain from hearing suits arising on reservations until after tribal courts have resolved the issue).

Smith Plumbing Co., Inc. v. Aetna Cas. & Sur. Co., 149 Ariz. 524, 720 P.2d 499, *cert. denied*, 479 U.S. 987 (1986), provides further support for the LCR Court to decline to hear the issues which the ATC Petition raises. In Smith, the Arizona Supreme Court held that a materialman seeking relief against a surety for the sale of materials to a tribal entity did not need to exhaust tribal court jurisdiction since the dispute was between two non-Indians engaged in an activity that the Court deemed to be off-reservation. Id. at 529-31. The Court stated that "[a]s long as the state court does not attempt to assert jurisdiction over the Tribe, there is no violation of the policy against state infringement upon tribal self-government." Id. at 533. As the Court pointed out, "[t]he courts of this state may not, nor do they desire to, exercise authority over an Indian tribe." Id. at 531. In this case, ATC expressly requests the LCR Court to assume jurisdiction over the Nation despite the fact that ATC has not sought resolution of the jurisdictional question in the proper forum, specifically, the Navajo courts.

Finally, ATC claims that it would find resort to tribal remedies, and exhaustion thereof, distasteful because it views the Nation's adjudicatory procedures as discriminatory and as failing to provide constitutional protections to non-Indians. ATC Petition ¶¶ 19, 20. The United States

Supreme Court squarely addressed allegations of incompetence and bias in tribal courts in Iowa Mutual:

> We have rejected similar attacks on tribal court jurisdiction in the past. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in National Farmers Union, and would be contrary to the congressional policy promoting the development of tribal courts. Moreover, the Indian Civil Rights Act, 25 U.S.C. § 1302, provides non-Indians with various protections against unfair treatment in the tribal courts.

480 U.S. at 19 (other citations omitted).

The United States Supreme Court has characterized the Navajo Nation's government as "probably the most elaborate among tribes." Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985) (quoting H.R. REP. NO. 91-78 (1969)). Moreover, among those studying the operation of the Navajo judicial system, "[f]avoritism based either on tribal politics or on the race of the litigants has not been experienced." Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. REV. 275, 325 (1991). *See also* id. at 18-322 (discussing the strength of the Navajo courts in comparison to the courts of states and other tribes); id. at 324 ("the concern of some that Navajo courts may not be fair and impartial when considering the claims of non-Indian creditors is not supported by any objective standard"); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 287-88 (1998) ("When tribal courts have been subjected to intense scrutiny, as they have been in the last fifteen years, they have survived the test. Even investigations which began with apparent hostile intent have ended by stressing the strengths of tribal courts and noting that their weaknesses stem from lack of funding and not pervasive bias.") (footnotes omitted); id. at 352 ("My survey . . . indicates that tribal court judges work hard to make the tribal judicial system fair for all parties appearing before them."); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 489 (1998) ("an analysis of published tribal court opinions suggests that despite serious financial constraints, tribal courts have been no less protective of civil rights than have federal courts.").

ATC's concerns are unfounded and contrary to established federal law. Accordingly, the

LCR Court should avoid making any determination regarding the applicability of the NNWC to ATC's water uses. The proper forum for that determination is in Navajo tribal courts, yet ATC has failed to pursue its arguments in the Nation's administrative and judicial systems. If ATC wants its day in court on the matter, it can have it -- in the Nation's courts.

V. CONCLUSION

ATC may not circumvent the processes governing general stream adjudications, nor may it circumvent the law regarding tribal sovereign immunity and the need to defer to tribal determinations of the nature and extent of tribal jurisdiction. For the reasons stated above, the LCR Court should dismiss the ATC Petition.

Date:_____

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing Memorandum of the Navajo Nation in Support of its Motion to Dismiss the Petition for Declaratory Judgment and Recognition of Water Rights Filed by Atkinson Trading Company, Inc. in the U.S. Mail, first-class postage prepaid thereon, on this ___ day of May, 1999, addressed to the following:

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