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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	CIVIL NO. 6417-34-1 MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS OR IN THE ALTERNATIVE STAY

CONTESTED CASE NAME: *In re Atkinson's Ltd. Of Az. DBA Cameron Trading Post*

DESCRIPTIVE SUMMARY: The United States' memorandum of point and authorities in support of the motion to dismiss, or in the alternative, stay these proceedings filed herewith.

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INTRODUCTION

The present contested case involves an extraordinary amount of procedural irregularity. In particular, although this proceeding has been denominated a "contested case," it is not "(a) an individual case involving unresolved issues of law, fact, or both resulting from an objection filed to a Hydrographic Survey Report for a watershed; (b) an individual case involving unresolved issues of law, fact, or both resulting from an objection filed to a catalog of proposed water rights prepared by the Master for a watershed or a river system; or (c) a special proceeding for the consideration of federal water rights settlements, including those of Indian

tribes, commenced under and governed by the provisions of the Special Procedural Order Providing for the Approval of Federal Water Rights Settlement, Including Those of Indian Tribes issued by the Arizona Supreme Court on May 16, 1991." Rules For Proceedings Before the Special Master, § 1.06 (definition of "Contested case"). In the first place, there exists no final Hydrographic Survey Report ("HSR"), nor any catalog of proposed water rights prepared by the Master, which includes or purports to reference any water rights claimed on behalf of Atkinson's Ltd. Of Az. DBA Cameron Trading Post ("ATC"). This contested case therefore does not result from any objection to such an HSR or Master's catalog. The Court also can take judicial notice of the fact that there exists no federal water rights settlement, including any settlement of water rights of Indian tribes, in the present adjudication, and that the May 16, 1991 Special Procedural Order, referenced in the definition just quoted, is by its own terms applicable only to the Gila River adjudication, case Nos. W-1, W-2, W-3, and W-4 (consolidated) in the Superior Court of Arizona, Maricopa County. In consequence, this contested case is not a contested case within the previously promulgated meaning of that term.

With that lack of definition as background, there is considerable ambiguity about what it may mean to "dismiss" this proceeding and what rules may govern the filing of a motion to dismiss this proceeding. In order to meet the agreed-upon schedule for filing such motions, the United States has made the following assumptions: (1) notwithstanding the literal inconsistency between the character of this action and the definition of "contested case" just cited, the United States has assumed that the filing of motions in this matter is governed by §11.01 of the Rules For Proceedings Before the Special Master and, thus, by the Arizona Rules of Civil Procedure; and (2) that the "pleading" stating the claims for relief to which the United States must respond is the "Petition for Declaratory Judgment and Recognition of Water Rights" filed by ATC in Case No. 6417, the main adjudication, on September 12, 1997 ("ATC Petition").

If the Court or Special Master should find either of these assumptions to be in error, the United States respectfully requests an opportunity to file an amended motion to dismiss.

ARGUMENT

I. ATKINSON'S REQUEST FOR A DECLARATORY JUDGMENT FAILS TO STATE A RIPE CLAIM UPON WHICH RELIEF MAY BE GRANTED.

"The ripeness doctrine arises from a reluctance of the courts to become involved in the resolution of questions of a hypothetical or abstract nature. To that extent the doctrine is closely related to and, to a large extent, has evolved from the federal constitutional 'case or controversy' requirement." Arizona Downs v. Turf Paradise, Inc., 140 Ariz. 438, 444, 682 P.2d 443, 449 (App. 1984). Because Arizona's state constitution does not contain a "case or controversy" provision like that in the federal constitution, the state's courts may treat ripeness and related doctrines as rules of judicial restraint, rather than as constitutional limits on subject matter jurisdiction. See Sears v. Hull, 192 Ariz. 65, 71, 961 P.2d 1013, 1019 (1998); cf. Regional Rail Reorganization Act Cases, 419 U.S. 102,138 (1974) (ripeness issues involve both "Case or Controversy" considerations and judicial restraint). Nonetheless, the doctrines are waived "only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." Sears v. Hull, 961 P.2d at 1019.

A central rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)(cited in Arizona Downs, 140 Ariz. at 444-45, 682 P.2d at 449-50); see also, Anchorage v. United States, 980 F.2d 1320, 1325 (9th Cir. 1992).

Ripeness is a "question of timing." American-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d 445, 453 (9th Cir. 1991). Application of the doctrine requires consideration of two factors: (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." Abbott Laboratories, 387 U.S. at 149; Anchorage, 980 F.2d at 1323; American-Arab Anti-Discrimination Comm., 940 F.2d at 453. Analysis of ATC's Petition with regard to these factors demonstrates that ATC is not yet entitled to review of any issue it has raised.

A. ATC's Request For A Declaration Of Its Water Right Under State Law Is Not Ripe.

With respect to ATC's request that the Court declare that ATC has a right under state law to draw 24 million gallons of water per year from the sub-flow of the Little Colorado River with a priority date of 1919, the United States hereby adopts, and incorporates as though fully set forth herein, the arguments contained in the memorandum filed by the Navajo Nation in support of its motion to dismiss ATC's Petition.

B. ATC's Request For A Declaration That The Navajo Nation Has No Jurisdiction To Regulate, And That The Navajo Nation Water Code Is Inapplicable To, ATC's Use Of Water Is Not Ripe

1. ATC Has Not Identified Any Issue Concerning Action by The Navajo Nation That Is Fit For Review.

An issue's fitness for review turns on whether the issue is essentially legal and any relevant agency action is sufficiently final. Abbott Laboratories, 387 U.S. at 149-51. Although ATC has attempted to frame its petition to raise a narrow, essentially legal issue about the Navajo Nation's regulatory jurisdiction and the applicability of the Navajo Nation Water Code,

the absence of any allegation of final action by an agency of the Navajo Nation makes the claim unfit for review.

In interpreting the finality element of ripeness, a court "looks to whether the agency action represents the final administrative word to insure that judicial review will not interfere with the agency's decision-making process." California Dep't of Educ. v. Bennett, 833 F.2d 827, 833 (9th Cir. 1987).

> [T]he effect of [premature] judicial review . . . is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. . . . Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.

Federal Trade Comm'n v. Standard Oil Co. of California, 449 U.S. 232, 242 (1980) ("FTC v. Standard Oil").

Application of the finality requirement is based on "pragmatic" considerations. Abbott Laboratories, 387 U.S. at 149; California Dep't of Educ., 833 F.2d at 833. The United States Court of Appeals for the Ninth Circuit has explained these pragmatic elements as follows:

> 'It is the imposition of an obligation or the fixing of a legal relationship that is the indicium of finality of the administrative process.' Getty Oil Co. v. Andrus, 607 F.2d 253, 256 (9th Cir. 1979). Indicia of finality include: the administrative action challenged should be a definitive statement of an agency's position; the action should have a direct and immediate effect on the day-to-day business of the complaining parties; the action should have the status of law; immediate compliance with the terms should be expected; and the question should be a legal one.

Mt. Adams Veneer Co. v. United States, 896 F.2d 339, 343 (9th Cir. 1990) (citing FTC v. Standard Oil, 449 U.S. at 239-40). In general, courts treat the criteria of "finality" for purposes of ripeness analysis as being identical to the elements of "final agency action" under the federal Administrative Procedure Act, 5 U.S.C. § 704. Nonetheless, the Supreme Court's decisions

require finality whether the issues to be reviewed stem from the actions of federal agencies, as in Abbott Laboratories, or other governmental entities. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (action claiming regulatory taking without compensation by local planning commission).

It is impossible to find any of the specified indicia of finality in the allegations of ATC's petition. The only allegation in the ATC petition that comes close to suggesting the Navajo Nation has taken any action that might create a reviewable issue is in paragraph 16. That paragraph refers to, and in part mischaracterizes, a June 4, 1997 letter from Stanley M. Pollack, counsel of record in this lawsuit for the Navajo Nation, to William J. Darling, counsel of record in this lawsuit for ATC, which is attached as Exhibit 2 to ATC's petition. The ATC petition claims that the attached letter asserts the Navajo Nation "has taken the position that the Navajo Nation Water Code applies to ATC's use of water on its fee land." However, the letter itself, which is the best evidence of its own contents, asserts only that Mr. Pollack intends to "recommend that the Navajo Nation Department of Water Resources issue a notice of non-compliance with the Navajo Nation Water Code to the Cameron Trading Post in order to initiate" a tribal administrative and judicial procedure to determine whether the Navajo Nation Water Code applies to ATC's water use. The letter further requests Mr. Darling's cooperation in that process.[1]

The letter in question cannot be plausibly construed to "fix a legal relationship." The letter on its face anticipates a separate notice of non-compliance, to be issued in the

[1] The letter in question refers to a previous series of communications these two attorneys had concerning settlement negotiations between their respective clients and is arguably "evidence of conduct or statements made in compromise negotiations" which should not even be admissible, under Rule 408 of the Arizona Rule of Evidence. Much less should it be countenanced as the sole factual predicate for a new declaratory judgment action.

discretion of the Navajo DWR, would be necessary to initiate further administrative and judicial proceedings. The letter itself did nothing to provide a definitive statement of the Navajo Nation's position on applicability of the Water Code to ATC, had no effect on ATC's day-to-day business, could not have had the status of law, and required no immediate compliance by ATC. The letter's identification of ATC's point of diversion as being a "threshold issue," and its request for a legal description of the ATC property and the point of diversion, further indicates that the issue between the parties was not, at that point, "purely legal." Cf. Mt. Adams Veneer Co., 896 F.2d at 343.

If the notice of non-compliance was actually issued – a fact not alleged in ATC's Petition – the circumstances would bear some resemblance to those before the Supreme Court in FTC v. Standard Oil. There, an oil company initiated litigation based on an allegation that the FTC issued an administrative complaint without having "reason to believe" the company had violated the Federal Trade Commission Act and sought an order declaring the complaint unlawful and requiring it to be withdrawn.

The Supreme Court found the challenged issuance of an administrative complaint was not "a definitive statement of position." 449 U.S. at 241. The Court characterized the complaint as being only "a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." Id. After noting the opportunities for administrative appeal which could result in dismissal of the action even if initial proceedings on the complaint were adverse to the company, the Court observed that "[i]f instead the Commission enters an order requiring the respondent to cease and desist from engaging in the challenged practice the respondent still is not bound by the Commission's decision until judicial review is complete or the opportunity to seek review has lapsed." Id.

If the Navajo Nation ever issued ATC the notice of non-compliance contemplated by the June 4, 1997 letter cited in ATC's Petition, the matter then stood as far from finality as did the administrative action challenged in FTC v. Standard Oil. Like the administrative complaint in that case, a Navajo DWR notice of non-compliance has "no legal force or practical effect upon [ATC's] daily business other than the disruptions that accompany any major litigation," 449 U.S. at 243, and therefore cannot constitute final action by the Navajo Nation that would render the issues raised by ATC fit for judicial decision by this Court. The June 4, 1997 letter itself, which is the only Navajo Nation action cited by ATC's Petition, does not even constitute the beginning of a process that could result in a justiciable issue.

With regard to ATC's assertion, in paragraphs 19 and 20 of the Petition, that the Navajo Nation's exercise of regulatory jurisdiction over ATC's water uses would result in a "taking" of ATC's property without just compensation, this case is on all fours with Williamson County Regional Planning Comm'n: "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186.[2]

2. Withholding Review of the Issues Raised by the Petition Will Not Inflict any Hardship on ATC.

Under the hardship prong of the ripeness test, ATC must show that "withholding review of the issue would result in direct and immediate hardship and would entail more than possible financial loss." Anchorage, 980 F.2d at 1325-26. ATC, however, has not alleged that it will suffer any immediate, direct or significant hardship.

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[2] See also note 3, infra.

As discussed in connection with finality above, the June 4, 1997 letter, and the notice of non-compliance it contemplates, impose no hardship because they do not result in any direct impact on ATC. See id. at 1326. The cited actions by the Navajo Nation impose no present affirmative duties, require no immediate changes in ATC's conduct, and generally do not impact, in any direct way, ATC's day-to-day affairs. Nor does the ATC Petition allege anything to the contrary.

ATC's closest approach to an allegation of harm is in paragraphs 19 and 20 which assert that applying the Navajo Nation Water Code to, or even "granting the Navajo Nation authority to apply its Water Code to,"[3] ATC's water rights would impair those rights in some manner by changing them from property rights into revocable licenses. ATC's use of the subjunctive tense is most telling. ATC does not allege that any impairment of its water rights has, in fact, occurred. However, the "mere potential for future injury" associated with the possible application of the Navajo Nation Water Code to ATC's uses does not overcome the interest of the judiciary in delaying review. 980 F.2d at 1326. To the extent that ATC alleges any injury at all, it is "a hypothetical future injury" based on "expected," but not actual, action by the Navajo Nation. Cf. National Ass'n of Reg. Util. Com'rs v. Dept. of Energy, 851 F.2d 1424, 1429 (D.C. Cir. 1988).

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[3] It is not at all clear just who ATC believes could "grant" the authority in question to the Navajo Nation and thus effect the "taking" ATC alleges. The Navajo Nation either retains such authority as an aspect of its inherent sovereignty, or not. This Court is certainly without power to convey such authority to the Nation if the Nation does not already possess it. If the Navajo Nation does possess the authority to apply its Water Code to ATC, and, further, exercises that authority, there can be no Fifth Amendment taking because "Indian tribes are 'separate sovereigns pre-existing the Constitution,' and are thus unconstrained by constitutional limitations on federal or state authority." R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 981 (9th Cir. 1983) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 & n.7 (1978)). There may, however, be a remedy under Section 8 of the Navajo Nation Bill of Rights, 1 N.N.C. § 8, and other provisions of Navajo law, for "just compensation" for any such "taking."

Moreover, ATC's Petition is not consistent on this assertion of hypothetical harm. Paragraph 18 of the Petition asserts:

> The Navajo Nation Water Code ("Code") is inapplicable to ATC's use of water in accordance with the terms used in the Code itself. The Code deals solely with "waters of the Navajo Nation," which term does not include water rights privately owned by non-members of the Navajo Nation which are appurtenant to fee land owned by non-members of the Navajo Nation.

If this assertion is correct, as it may be assumed to be for purposes of assessing a motion to dismiss, Linder v. Brown & Herrick, 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997),[4] then

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[4] There is a certain tension between 22 N.N.C. § 1102, entitled "Application of the Code" and 22 N.N.C. § 1104, which defines the "waters of the Navajo Nation." Section 1102 provides:

> Upon the effective date of this Code, it shall be unlawful for any person within the territorial jurisdiction of the Navajo Nation, as defined in 7 N.N.C. § 254, to impound, divert, withdraw, otherwise make any use of, or take any action of whatever kind affecting the use of water within the territorial jurisdiction of the Navajo Nation unless the applicable provisions of this Code and regulations and determinations made hereunder have been complied with. No right to use water, from whatever sources, shall be recognized, except use rights obtained under and subject to this Code.

Section 1104 states:

> The waters of the Navajo Nation are defined as: (1) all waters reserved at any time for any purpose to the Navajo Nation, and to Navajo Indian lands by the Navajo Nation or by the United States including any waters which, in the course of nature or as the result of artificial works or artificial streamflow enhancement or weather modification methods, flow into or otherwise enhance such waters; (2) all waters held by the Navajo Nation through prior or existing use, appropriation, purchase, contract, gift, bequest, or other means of acquisition; (3) all surface and groundwaters which are contained within hydrologic systems located exclusively within the lands of the Navajo Nation; and (4) all groundwaters located beneath the surface of the lands held in trust by the United States of America for the Navajo Nation.

It appears at least possible that there are uses of water that are meant to be subject to the Code, but which are not uses of "waters of the Navajo Nation." Whether this is so, and what difference that circumstance might make for administration of the Code, could involve the interpretation of multiple inter-linking provisions of the Code. The last word on the proper construction and

ATC truly has no harm of which to complain. The assertions of paragraph 18 guarantee that the hypothetical consequences recounted in paragraphs 19 and 20 will never come to pass because, according to ATC, those consequences are precluded by the terms of the Navajo Nation Water Code itself. Any suggestions to the contrary in a notice of noncompliance issued to ATC may be errors which will be corrected through the Navajo administrative and judicial processes available to ATC. Intervention by this Court into those processes therefore "might prove to have been unnecessary." FTC v. Standard Oil, 449 U.S. at 232. The ripeness doctrine is precisely intended to preclude such premature and needless judicial action. Winkle v. City of Tucson, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997)("The ripeness doctrine prevents a court from rendering a premature judgment or opinion on a situation that may never occur.").

Although the ATC Petition does not expressly say so, it might be thought that the burden of having to litigate in the Navajo administrative and judicial system is itself a harm to ATC that would justify immediate judicial review. Even assuming that this burden would be greater in the Navajo forum than in this contested case proceeding, the Supreme Court has firmly repudiated the notion that the cost of litigation is a legally cognizable harm for purposes of ripeness analysis. FTC v. Standard Oil, 449 U.S. at 242-43 (although burden of responding to administrative action may be substantial, "it is different in kind and legal effect from the burdens" that satisfy pragmatic considerations of finality); Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); Petroleum Exploration, Inc. v. Public Service Comm'n, 304 U.S. 209, 222 (1938) ("the expense and annoyance of litigation is 'part of the social burden of living under government'").

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application of these provisions belongs exclusively to the Navajo Supreme Court. 22 N.N.C. § 2101. "Interpretation of a tribal ordinance is one of the duties of a tribal court." R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 983 (9th Cir. 1983).

ATC has failed to demonstrate that any hardship associated with the facts it alleges outweighs the Court's interest in adjudicating ripe controversies. There will not be any "hardship to the parties of withholding court consideration" of the matters ATC raises. Abbott Laboratories, 387 U.S. at 149. Because the issues raised by ATC also are not final and thus fit for review, this action should be dismissed for lack of ripeness.

II. ATC HAS NOT EXHAUSTED ITS TRIBAL REMEDIES.

In National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), the Court concluded that:

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. at 855-56. The Court further stated "that examination should be conducted in the first instance in the Tribal Court itself" so that "the forum whose jurisdiction is being challenged [is provided] the first opportunity to evaluate the factual and legal bases for the challenge."[5] Id. at 856. 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 without regard to the basis for jurisdiction in a competing non-tribal forum. 480 U.S. at 16. The more recent case of Strate v. A-1 Contractors, 520 U.S. 438 (1997), clarified that National Farmers Union and Iowa Mutual did not alter the substantive criteria for tribal civil authority over the activities of nonmembers of the tribe on non-Indian fee lands which were established in Montana v. United States, 450 U.S. 544

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[5] The Court's rationale for the tribal exhaustion doctrine is remarkably similar to that often given for the ripeness doctrine. See National Farmers Union, 471 U.S. at 856-57 (exhaustion allows "a full record to be developed" and "will provide other courts with the benefit of [tribal court] expertise . . . in the event of further judicial review"); Iowa Mutual, 480 U.S. at 16 ("proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors'").

(1981). Nonetheless, it is notable that, in Strate, tribal remedies were in fact exhausted on the issue of tribal jurisdiction before federal court review commenced. 520 U.S. at 444. Strate, therefore, in no way limited the exhaustion of tribal remedies rule established by National Farmers Union and Iowa Mutual.

ATC's Petition, at paragraph 19.g, acknowledges the existence of this doctrine of exhaustion of tribal remedies. Indeed, prior litigation initiated by ATC against the Navajo Nation concerning the same parcel of property involved here resulted in a dismissal based upon the doctrine. Atkinson Trading Company v. Navajo Nation, 866 F.Supp. 506 (D.N.M. 1994). Nonetheless, ATC seems to be operating under the misconception that it may evade this rule of federal Indian law, which is derived from the "federal policy of promoting tribal self-government," Iowa Mutual, 480 U.S. at 16,[6] by insinuating a challenge to the Navajo Nation's regulatory and judicial jurisdiction into this state court proceeding. However, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983); see also United States v. Superior Court, 144 Ariz. 265, 277, 697 P.2d 658, 670 (1985) ("Indian rights are conferred by federal law, and it is the federal substantive law which our courts must apply to measure those rights in the state adjudication.").

In Smith Plumbing Co., Inc. v. Aetna Casualty and Surety Co., 149 Ariz. 524, 720 P.2d 499 (1986), the Arizona Supreme Court considered the National Farmers Union decision and consistent opinions by the United States Court of Appeals for the Ninth Circuit in A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986); Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985); and Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983). The court found Smith to be distinguishable from those cases, however, because none of the parties to Smith had initiated proceedings in tribal court. 149 Ariz.

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[6] See also National Farmers Union, 471 U.S. at 856 ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

at 529, 720 P.2d at 504.[7] The court based its ruling on a finding that "[t]here has been no assertion of tribal jurisdiction" and concluded that, as a result, "[b]y hearing the merits of this case, the courts of Arizona will not be usurping legitimate exercise of asserted tribal court jurisdiction." Id.

Subsequent decisions by the Eighth, Ninth and Tenth Circuit Courts of Appeals have required exhaustion of tribal remedies even in the absence of a pre-existing tribal proceeding, particularly where a party seeks a declaration invalidating a tribe's assertion of jurisdiction. Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300-01 (8th Cir. 1994) ; Texaco v. Zah, 5 F.3d 1374, 1376 (10th Cir. 1993); Burlington Northern R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1991); see also Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. App. 1995); but see Drumm v. Brown, 245 Conn. 657, 684-697, 716 A.2d 50, 64-70 (1998) (exhaustion not required in absence of pending tribal court action, but exhaustion mandatory even where tribal court action commenced after initiation of proceedings in nontribal forum).

Smith provides no basis for evasion of the exhaustion rule in this case. Here ATC directly seeks a declaratory judgment determining the Navajo Nation's civil jurisdiction. The fact that there is no applicable waiver of the Nation's sovereign immunity which would permit this Court to exercise subject matter jurisdiction over ATC's request for such a judgment is discussed infra, at 15. However, if ATC cannot identify an "assertion of tribal jurisdiction" sufficient to distinguish this case from Smith and trigger the exhaustion rule imposed in National Farmers Union and Iowa Mutual, then ATC has stated no ripe claim for relief. See discussion supra, at 4 - 12. "If, on the other hand, [ATC] suffers from a justiciable imposition of [Navajo

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[7] Notably, Smith did not involve a request for declaratory judgment against a tribe. As discussed infra, at 17 , the court specifically acknowledged that "[t]he courts of this state may not, nor do they desire to, exercise authority over an Indian tribe." 149 Ariz. at 531, 720 P.2d at 506.

Nation] sovereign authority, then its position is substantively no different from the non-Indian defendants forced to exhaust tribal remedies before seeking relief in federal court." Burlington Northern R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1991).

Accordingly, ATC, at the least, must exhaust the remedies available to it in the Navajo administrative and judicial system before seeking a declaration in this Court concerning the Navajo Nation's jurisdiction over, and the applicability of the Navajo Nation's Water Code to, ATC's water uses.

III. THERE IS NO APPLICABLE WAIVER OF THE NAVAJO NATION'S SOVEREIGN IMMUNITY WITH RESPECT TO ATC'S REQUEST FOR A DECLARATORY JUDGEMENT CONCERNING THE NAVAJO NATION'S REGULATORY AUTHORITY OR THE APPLICABILITY OF THE NAVAJO NATION WATER CODE.

This Court would not have jurisdiction to grant ATC the declaratory relief it seeks concerning the Navajo Nation's regulatory jurisdiction and applicability of the Navajo Water Code even if the matter were ripe and ATC had exhausted its tribal remedies.

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. Turner v. United States, 248 U.S. 354, 358 (1919); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940); Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165, 172-173 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." United States v. United States Fidelity & Guaranty Co., supra, at 512.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991) ("Potawatomi"). Furthermore, as the Supreme Court has often stated: "It is settled

that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " Santa Clara Pueblo, 436 U.S. at 58 , quoting United States v. Testan, 424 U.S. 392, 399 (1976).

"Sovereign immunity is jurisdictional in nature." Federal Deposit Ins. Corp. v Meyer, 510 U.S. 471, 475 (1994). The burden is therefore upon ATC to plead an applicable waiver of the Navajo Nation's sovereign immunity. Ariz.R.Civ.P. 8(a)(1).

The only possible waiver of sovereign immunity mentioned in the ATC Petition is the McCarran Amendment, 43 U.S.C. § 666. ATC Petition at ¶ 3. However, as the Supreme Court acknowledged in San Carlos Apache, "the McCarran Amendment did not waive the sovereign immunity of Indians as parties to state comprehensive water adjudications." 463 U.S. at 566 n.17 (quoted in United States v. Superior Court, 144 Ariz. at 273, 697 P.2d at 666). The McCarran Amendment, by its terms, applies only to the United States. To be sure, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), and San Carlos Apache stand for the proposition that the McCarran Amendment's waiver is sufficient to allow for a binding adjudication of Indian water rights in state comprehensive water adjudications, by virtue of the United States' role as owner of those rights as trustee for the Indians. 463 U.S. at 566 n.17; cf. United States v. Superior Court, 144 Ariz. at 277, 697 P.2d at 670 ("By virtue of the McCarran Amendment, the state has jurisdiction over the United States as trustee of the Indian claims and has jurisdiction to adjudicate the subject matter of those claims." (Emphasis added.)). Nonetheless, neither these Supreme Court precedents, United States v. Superior Court, nor the language of the McCarran Amendment itself, suggest there is any waiver that would permit an Indian tribe to be haled before a state court for an adjudication of the extent of that tribe's own civil jurisdiction.[8]

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[8] It may be suggested that the Navajo Nation's intervention in the main adjudication implied a waiver of sovereign immunity to ATC's claim such that "the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it." Ariz.R.Civ.P. 8(a)(1). The Supreme Court has specifically precluded this inference. In Potawatomi, the tribe sued the

Indeed, the Arizona Supreme Court has explicitly stated that no such exercise of state court jurisdiction over an Indian tribe is possible: "The courts of this state may not, nor do they desire to, exercise authority over an Indian tribe. Both the Enabling Act (36 U.S. Stat 567) and the Arizona Constitution (Ariz. Const. Art 20 § 4) clearly forbid such assertion of jurisdiction." Smith, 149 Ariz. at 531, 720 P.2d at 506. This unambiguous statement of the law by the highest court in this state is controlling in this case, and dispositive of ATC's request for a declaratory judgment concerning the Navajo Nation's regulatory jurisdiction and the applicability of the Navajo Nation Water Code to ATC's water uses.

Oklahoma Tax Commission seeking injunctive relief and the Commission counterclaimed, arguing that the tribe waived its sovereign immunity by seeking the injunction "to the extent that the Commission's counterclaims were 'compulsory' under Federal Rule of Civil Procedure 13(a)" and that the court therefore "did not need any independent jurisdictional basis to hear" the counter claims. 498 U.S. at 509. The Court found no merit in the Commission's argument:

> We rejected an identical contention over a half-century ago in United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511-12 (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. . . . We uphold the Court of Appeals' determination that the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief.

Potawatomie, 498 U.S. at 509-10 (bracketed language added by the Court). The procedural confusion of the present contested case cannot hide the fact that ATC's requests for relief are, at best, the equivalent of the counterclaims and cross-claims for which no waiver of sovereign immunity was found in Potawatomi and U.S. v. U.S. Fidelity & Guaranty Co.

Conclusion

Based upon the foregoing arguments and the authorities cited, the United States urges the Court to dismiss this contested case, and ATC's Petition, for lack of ripeness and for lack of a waiver of the Navajo Nation's sovereign immunity that would permit this Court's exercise of subject matter jurisdiction. In the alternative, if the Court finds that ATC has stated a ripe claim within the Court's jurisdiction, the United States urges the Court to either dismiss this contested case without prejudice or stay it pending ATC's exhaustion of administrative and judicial remedies provided by the Navajo Nation.

Dated May 11, 1999.

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The original of the foregoing mailed this 11th day of May, 1999, to the Clerk of the Apache County Superior Court for filing. Copies of the foregoing mailed this 11th day of May, 1999, to all parties on the Court-approved mailing list for Case No. 6417-34-1.

Bradley S. Bridgewater