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

IN CHAMBERS (X) IN OPEN COURT ( )

SPECIAL MASTER JOHN E. THORSON
Presiding

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	) Date:)) **RESPONSE TO MOTIONS TO**) **DISMISS**) CIVIL NO. 6417-34-1)

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

HSR INVOLVED: None; referral of motion for declaratory judgment (see civil no. 6417 minute entry of Nov. 20, 1998)

DESCRIPTIVE SUMMARY: ATC's Response to Motions to Dismiss

PROCEEDING NO.: LC 148 (number assigned to prehearing conference to be scheduled pursuant to this minute entry)

NUMBER OF PAGES: 21, plus attachment (total 22)

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COMES NOW Intervenor Atkinson Trading Company, Inc., by and through its attorneys,

William J. Darling & Associates, P.A., and hereby requests that this Court deny the Motions to Dismiss filed herein by the United States and the Navajo Nation and as grounds therefor states as follows:

INTRODUCTION

In this action, Intervenor Atkinson Trading Company, Inc., ("ATC") seeks to have this Court determine the *type* of water rights it has in the waters of the Little Colorado River, that is, whether ATC has a state water right or a tribal license to use water. This issue arises in this case because the property to which these water rights are appurtenant is fee land surrounded by the Navajo Reservation. Both the preliminary Tribal Lands HSR and the Navajo Nation have incorrectly asserted that ATC's state water right is nothing more than a tribal license to use water;[1] and it has become apparent that this issue must be resolved before the case can proceed.

The positions taken by the parties herein mean that it is not just the usual questions of quantity, priority, and location of ATC's water rights that must be adjudicated herein, but also the type of water rights. This is, of course, an inherent issue in all water adjudications, but is rarely recognized as such because there is no dispute over the issue. In the unique context of this case, however, Judge Minker recognized that this additional issue must be decided before the case can proceed further. It is necessary to know what type of water rights ATC has before it can be determined how ATC's water rights will be dealt with in the adjudication or settlement of this case. Thus, the determination of this issue is an integral issue in this case and a necessary precedent to further proceedings in this case.

ARGUMENT

A. The Issue Before this Court

ATC's Petition seeks nothing more than to have this Court determine whether ATC has a state water right or a tribal license to use water. ATC raised this issue by seeking declaratory

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[1] See Table C-1 of the Tribal Lands HSR, which includes ATC's water rights as part of the tribal waters, and the letter from the Navajo Nation's Special Counsel for Water Rights dated June 4, 1997, a copy of which is attached to the Petition as Exhibit 2.

judgment on this basic issue and the sub-issues that arise thereunder, most notably, whether the Navajo Nation has the right to regulate ATC's water under the Navajo Nation Water Code.

In their Memorandums in Support of their Motions to Dismiss, the Navajo Nation and the United States have made various arguments attempting to show that it is premature for this Court to decide this issue at this time. This is incorrect under both the standards cited by the Motions to Dismiss and within the context of this case. This issue must be decided at this point, so that the parties and the Court will have the necessary information in order to proceed with settlement and/or adjudication of ATC's water rights.

In reviewing the Motions to Dismiss, this Court must take the allegations of ATC's Petition as true and may grant a dismissal only if ATC is not entitled to relief "under any facts susceptible of proof under the claims stated." Linder v. Herrick, 189 Ariz. 398, 943 P.2d 758 (Ct.App. 1997). Thus, any new allegations inserted by the United States and the Navajo Nation in their Motions must be ignored.

Furthermore, since this issue arose within a water adjudication, it is necessary to keep the purpose of the adjudication in mind while determining whether to hear this issue at this time. Under both state and federal law concerning general water adjudications, it is clear that water adjudications are intended to resolve **all** of the rights of the **all** of the claimants to the water system at issue.

Thus, under the Arizona law giving this Court jurisdiction over this case, a "general adjudication" is defined in §45-251(2) to mean "an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source." This language clearly includes issues regarding whether a water right is a state property right or a tribal revocable license, as this issue bears upon both the extent and priority of ATC's water rights.

Likewise, under federal law, the U.S. Supreme Court has noted that "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 819

(1976). The Court noted, additionally, that unified proceedings are best in such cases because of the highly interdependent nature of the relationships between such water rights. Id.

Thus, it is clearly this Court's duty to resolve all of the issues necessary to determine the extent and priority of the various water rights from the Little Colorado River. And, because of the situation of the parties herein, this includes a determination of the type of water right held by ATC.

The type of water right held by ATC must be determined before the remainder of the water adjudication can proceed because the type of right held by ATC determines which process will be used for further proceedings. If ATC has a state water right, as its water certificate shows, then ATC's water rights will be adjudicated or settled in the same manner as all other private holders of state water rights. On the other hand, if ATC has nothing more than a license from the Navajo Nation to use the Navajo Nation's water, as the preliminary Tribal HSR shows and the Navajo Nation has contended, then the adjudication of ATC's water rights will follow the procedures for tribal water.

Although ATC believes it is quite clear that it has a state water right, the actions of other parties in this suit have called this into question. Most clearly, the issue has been raised by the inclusion of ATC's water rights in the Tribal Lands HSR. In addition, the Navajo Nation has also insisted that this is a contested issue. See letter of Pollack dated June 4, 1997.[2]

The inclusion of ATC's water rights in the Tribal Lands HSR and the raising of this issue by the Navajo Nation make it clear that this issue must be decided before the adjudication proceeds. The determination of the type of water right ATC has is necessary so that the hydrographic survey reports in the case can be properly prepared, with ATC in the proper

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[2] The U.S. attempts to cast doubt upon the clear intent of this letter by carefully parsing the language contained therein. However, a simple reading of the letter shows quite clearly that the intent of the Navajo Nation in writing the letter was to threaten ATC with the application of the Navajo Nation Water Code to ATC's water rights. As such, the letter makes clear that there is, indeed, a present controversy between ATC and the Navajo Nation regarding whether the Navajo Nation Water Code applies to ATC's water rights, the basis for ATC's cite to the letter in these proceedings.

categories and, in the event of a settlement, so that ATC can be included with the proper group in the settlement.

If ATC's water right is not properly categorized in these proceedings, ATC will be gravely harmed by the conversion of its water right from a state water right to a tribal license to use water. This harm will be caused by the significant differences between a water right under Arizona law and a license to use water under the Navajo Nation Water Code ("NNWC"), 22 N.T.C. Chap. 7. The NNWC does not recognize water rights as property rights, but as revocable licenses that can be revoked, modified or amended at any time without compensation to the owner. Id. These licenses are not transferable without the consent of the Navajo Nation, even if the land is sold or the owner dies. Id. There is a substantial fee for the water used. Id. And, in times of shortage, uses are cut off according to a system which discriminates against non-Indian and commercial users. Id. Additionally, non-Indian water users in such systems have substantially fewer rights in the Navajo tribal system than they do in state courts.[3] Thus, in comparison to a state water right, which is an irrevocable, transferable, property right to a certain quantity of water without further fees, which can be curtailed in times of shortage only on a non-discriminatory basis determined by the date the right was acquired, the difference between the two types of water rights is obvious. Furthermore, the categorization of ATC's rights in this water adjudication will also affect ATC's rights in the event of a settlement.

B. The Issue is Ripe

From the information set forth above, it is clear that ripeness is not really an appropriate

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[3] The Navajo Nation spends a great deal of time in its Memorandum on its claim that the Navajo Nation court system is fair and unbiased. Navajo Memo. at 18-19. This is not really relevant, here, because the allegation in ATC's Complaint was not that the courts are unfair but that the rules applied by the courts are unfair. Additionally, new facts cannot be considered on a Motion to Dismiss. Linder v. Herrick, 189 Ariz. 398, 943 P.2d 758 (Ct.App. 1997). In any event, however, even a cursory review of Indian law cases will show that most of the rights American citizens take for granted in American courts are not available in tribal courts. For instance, in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the U.S. Supreme Court held that the equal protection clause of the Indian Civil Rights Act was basically unenforceable and allowed a tribe to discriminate on the basis of gender.

inquiry at this point in the case. The type of water right held by ATC and other inholders is a necessary issue without which the adjudication cannot proceed or completely settle all of the claims of all of the parties. The type of water right held by ATC is as much an issue in this case as any other contested element that comes before a court as part of the proof of the ultimate issue before that court. It is no different than the issue of the quantity of water to which ATC is entitled or the priority of ATC's right. It is an element to be proven as part of the larger case.

In arguing to the contrary, the United States is confusing the standards for bringing issues before the court with the standards for deciding the order in which the court should hear the issues before it. A court has the power to determine how to control the proceedings of the cases on its docket. This issue is a necessary issue in this case; and Judge Minker directed that this decision be made now because the decision is necessary to further proceedings in the case. The Court had the discretion to make this decision; and ripeness is not a concern in these circumstances.

In addition, the United States misstates the rules regarding ripeness and ignores the fact that ATC's petition was filed pursuant to the Arizona Declaratory Judgment Act. The federal case law cited by the United States herein is inapplicable for several reasons. First, the Arizona Declaratory Judgment Act, Ariz.St.Ann. §12-1831, et seq., supercedes this federal case law and makes it clear that ATC is entitled to a decision on this issue at this time. Second, the Arizona courts, apparently recognizing the vast differences between the federal system and its own system, have specifically stated that federal case law on this issue is inapplicable to Arizona cases and set a completely different standard for the decision of ripeness in these cases. And, finally, the cases cited by the U.S. do not support its claim that this issue is not ripe.

1. The Arizona Declaratory Judgment Act Applies

The Arizona Declaratory Judgment Act, Ariz.St.Ann. §12-1831, et seq., specifically entitles ATC to the relief that it seeks in this case. The Declaratory Judgment Act provides that:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be

claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.

Ariz.St.Ann. §12-1831. It also provides that:

> Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Ariz.St.Ann. §12-1832. Thus, the Act specifically applies to this case, in which ATC is seeking a declaration of its rights, status, and other legal relations with regard to its water rights and the Navajo Nation Water Code.

The Act also states that it is designed to be remedial and that its purpose "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." Ariz.St.Ann. §12-1842.

2. The Correct Standard for Ripeness

Within this context, the Arizona courts have held that federal precedent is inapplicable to questions arising under the Declaratory Judgment Act. Morton v. Pacific Const. Co., 36 Ariz. 97, 283 P. 281 (1929); Pena v. Fullinwider, 124 Ariz. 42, 601 P.2d 1326 (1979). Thus, the federal cases cited by the U.S. on the issue of ripeness have no application here.

Different standards for ripeness apply under the Arizona Declaratory Judgment Act. Under this Act, in order to be entitled to relief, the plaintiff must have a protectable interest such as a legal relation, status, or right and an assertion of the denial of it by the other party. Rivera v. City of Douglas, 132 Ariz. 117, 644 P.2d 271 (Ct.App. 1982). ATC has a protectable interest in the form of its water right; and the Navajo Nation has denied that right by claiming that the nature of ATC's water right as a state right must be litigated because of ATC's location within the exterior boundaries of the Navajo Reservation. See letter of Pollack dated June 4, 1997.

This is sufficient to entitle ATC to relief under the Declaratory Judgment Act:

> One purpose of actions for declaratory judgment is to provide a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy. . . . An action for a declaratory judgment is intended to serve as an instrument of preventive justice, to relieve litigants of the common law rule that no declaration of right may be judicially adjudged until that right has been violated, and to permit adjudication of rights or status without the necessity of a prior breach.

Elkins v. Vana, 25 Ariz.App. 122, 126, 541 P.2d 585, 589 (Ct.App. 1975).

Thus, the Arizona courts have held a declaratory judgment action to be appropriate where the plaintiff alleged that a municipal ordinance was void for lack of jurisdiction, Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939); where a no-fence order subjected the plaintiff to civil and criminal liability and caused him to curtail his grazing activity, Ricca v. Bojorquez, 13 Ariz.App. 10, 473 P.2d 812 (Ct.App. 1970); where the threat of prosecution by government officials curtailed the plaintiff's business activities, Planned Parenthood Committee of Phoenix, Inc., v. Maricopa County, 92 Ariz. 231, 375 P.2d 719 (1962); and where plaintiffs' employment interest was threatened by a letter from a public official making unconstitutional demands, Rivera v. City of Douglas, 132 Ariz. 117, 644 P.2d 271 (Ct.App. 1982).

In this case, ATC's right to water, an extremely valuable property right, is threatened by the Navajo Nation's assertion in the water adjudication that the Navajo Nation Water Code applies to that right and the inclusion of ATC's water claims in the Tribal Lands HSR. These actions have placed ATC in immediate jeopardy of losing its property right or having it converted to a revocable license. They have done so by causing ATC's claims to be processed in the same manner as tribal claims instead of the manner in which the claims of other private holders of state water rights are being processed.

This misclassification must be corrected, now, in order to assure that ATC will be treated appropriately throughout the remainder of the case, whether it is settled or litigated. ATC does not have to wait until the Navajo Nation attempts to prosecute ATC for a violation of the Navajo

Nation Water Code in order to have this issue decided by this Court. ATC stands to lose a valuable property right in this water adjudication and is entitled to a determination of its rights in this water adjudication.

The United States has argued that since the Navajo Nation has not yet prosecuted ATC under the Navajo Nation Water Code and ATC claims that the Water Code should not be applied to ATC under the terms of that statute, that this keeps the issue from being ripe. However, this is not correct under the Arizona cases cited above. Under these cases, it is clear that a threat to prosecute someone under a statute that affects a significant property right is sufficient to make an issue ripe for judicial review. As the Arizona Court of Appeals noted:

> Where a statute clearly and immediately affects the property rights of the citizen, he has an immediate and present controversy with reference to the validity of such statute, without further subjecting himself to a criminal prosecution or other severe penalties provided by the statute.

Planned Parenthood Center of Tucson, Inc. v. Marks, 17 Ariz.App. 308, 497 P.2d 534 (Ct.App. 1972), quoting 2 W. Anderson, Actions for Declaratory Judgments § 624 (2nd ed. 1951).

For this reason, this Court has no discretion regarding this claim, but is required to hear this declaratory judgment action, now. As the Arizona Supreme Court has stated:

> The discretion thus vested in a trial court is limited discretion and would be erroneously exercised in the event the court refused to render a declaratory judgment when the declaration otherwise comes within the scope of the Act and the judgment or decree would terminate the uncertainty or controversy.

Pena v. Fullinwider, 124 Ariz. 42, 45, 601 P.2d 1326, 1329 (1979).

3. The Issue is Ripe Under Federal Standards

Even if federal standards did apply to this case, the issue regarding the type of water rights held by ATC is ripe for decision under those standards. In its Memorandum in Support of its Motion to Dismiss, the United States has misstated the appropriate federal rule for cases such as this. The correct rule has two prongs: fitness of the issue for judicial decision and hardship to

the parties if court review is withheld. Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil & Gas Conservation of State of Montana, 792 F.2d 782 (9th Cir. 1986). As set forth in detail above, ATC can meet both of these requirements: a judicial decision of this issue is a necessary part of this water adjudication and, as part of this adjudication, ATC will lose the right to have the nature of its water right determined.

The United States has cited to cases regarding the actions of federal administrative agencies under the federal Administrative Procedures Act to support its claim that the test requires a final agency decision and a hardship to the parties. See U.S. Memorandum in Support of Motion to Dismiss, at p. 3-8, and cases cited therein. This is incorrect in two ways.[4] First, since this case does not involve a federal agency's rule-making power, these cases are inapplicable. Second, the test does not require that there be both a final agency decision and hardship to the parties. Rather, the test requires that the plaintiff show one or the other. Anchorage v. United States, 980 F.2d 1320 (9th Cir. 1992). Thus, where the Ninth Circuit found that there was no final agency decision, it then considered whether withholding court consideration would inflict a hardship on the plaintiff. Id. ATC has shown significant hardship in this case, as set forth in detail above. Accordingly, this issue is ripe even under the federal standards for ripeness.

C. The Navajo Nation Does Not Have Sovereign Immunity in this Case

The Navajo Nation and the U.S. also seek to avoid a decision on the necessary issue of the type of ATC's water right in this case by claiming that the Navajo Nation is entitled to sovereign immunity. This is incorrect, as the McCarran Amendment clearly waives the Navajo Nation's sovereign immunity in this water adjudication.

1. This Issue Comes Within the McCarran Amendment

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[4] In addition, the U.S. failed to mention that two of the cases heavily relied upon in this portion of its Memorandum have been overruled on other grounds. See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977), and American-Arab Anti-Discrimination Committee v. Thornburgh, 940 F.2d 445 (9th Cir. 1991), *amended and superseded by* 970 F.2d 501 (9th Cir. 1991).

This Court has jurisdiction over this case pursuant to the McCarran Amendment, 43 U.S.C. §666. The McCarran Amendment provides for a waiver of the United States' sovereign immunity "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". Id.

This is a suit both for the adjudication of ATC's water rights and for the administration of the rights ATC is determined to have in this action. This suit seeks to establish the type, quantity, location, and priority of the water rights that ATC has and to determine who will have continuing administrative authority over those rights. Accordingly, ATC's suit, including the issue regarding the type of ATC's right, comes within both of the subsections of the McCarran Amendment.

2. The McCarran Amendment Waives the Navajo Nation's Sovereign Immunity

As a Court conducting a water adjudication under the McCarran Amendment, this Court has jurisdiction over the Navajo Nation on all issues necessary to a final adjudication. As the Navajo Nation admits in its Memorandum, Congress has the ability to limit tribal sovereign immunity, Memo. at 9, citing Oklahoma Tax Comm'n. v. Citizen Bank Potawatomi Indian Tribe, 498 U.S. 505 (1991); and the McCarran Amendment does so with regard to water rights, permitting state courts to adjudicate tribal water rights. Memo. at 10, citing Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

The clear purpose of this waiver of sovereign immunity was "the avoidance of piecemeal adjudication of water rights in a river system." Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 819 (1976). Thus, this waiver must extend to all issues necessary in order to completely adjudicate the water rights of the parties. As was explained in detail above, the type of water right held by ATC is a necessary issue in this case. The water rights of the parties cannot be determined without this information. For this reason, the waiver extends to this issue, just as it would to any other issue that arises in the water adjudication.

3. There is No Limitation on this Waiver

The fact that this determination requires an inquiry into the jurisdiction of the Navajo

Nation does not affect this waiver. The Navajo Nation argues without support that the McCarran Amendment's waiver of sovereign immunity is a narrow waiver that does not encompass issues regarding the tribe's jurisdiction. However, this interpretation of the Amendment clearly conflicts with the broad language of the Amendment, the intent behind the Amendment, and previous practice under the Amendment.

The McCarran Amendment waives sovereignty for "the adjudication of rights to the use of water." This is extremely broad language that covers any case in which water rights are litigated. The only limitation contained within the Amendment is that the adjudication must be for a river system or source. This requirement is met in this case. Accordingly, this Court has jurisdiction over all issues regarding "the rights to the use of water" that arise within the context of this case, including the issue regarding the type of water right held by ATC.

This broad interpretation of the McCarran Amendment has been upheld by the courts due to the intent behind the Amendment:

> Not only the Amendment's language, but also its underlying policy, dictates a construction including Indian rights in its provisions. . . . the Senate report on the Amendment observed: 'In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights.'

Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976).

Furthermore, all previous water adjudications have, of necessity, made determinations regarding the jurisdiction of the tribes involved therein. It is simply not possible to avoid these issues in a water adjudication involving Indian tribes, although the issue may often remain unstated. A decision regarding the quantity and location of a tribe's water rights *vis-a-vis* those of other parties inherently requires a finding that the tribe does or does not have jurisdiction over certain water rights.

On this issue, the Navajo Nation also argues that it has not waived sovereign immunity for a counterclaim. Navajo Memo. at 12-13. Since this is not a counterclaim, but one of the original issues required by the water adjudication, these arguments have no applicability, here. Under Arizona law, water adjudications require determinations as to the extent and priority of various water rights. These determinations go hand-in-hand with questions regarding jurisdiction because jurisdiction over the water rights is a necessary element of these issues and a necessary result of these determinations.

Any time that this Court makes a decision that a private owner has a state water certificate for a certain amount of water, that decision is based upon an implicit finding that the state had jurisdiction to grant that water right; and a result of that decision is that the state has continued jurisdiction over that water right. Likewise, when the Court finds that a tribe has a right to use a certain amount of water, this entails a concomitant finding that the tribe has jurisdiction over that water.

Jurisdiction cannot be severed from these issues as the United States and the Navajo Nation argue in their Memorandums. It is, rather, one of the most basic elements before this Court and the ultimate result of the decisions issued by this Court on every single water right adjudicated herein. The issue has been explicitly placed before the Court with regard to ATC's claim because the Navajo Nation and the Tribal Lands HSR have raised a controversy about this usually uncontested element, not because ATC's claim is somehow unique or outside of the usual boundaries of a water adjudication.

D. ATC is Not Required to Exhaust its Remedies in Tribal Court

As a final matter, the Navajo Nation and the U.S. argue that ATC should be required to exhaust its remedies in tribal court before this issue can be decided in this water adjudication. However, because of the unique nature of water adjudications, the exhaustion requirement is inapplicable to such cases.

The U.S. Supreme Court has required, as a prudential matter, rather than as a matter of law, that in the absence of a Congressional enactment to the contrary, parties litigating the

jurisdiction of a tribe exhaust their remedies within tribal forums before bringing suit in federal court. See National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). But see Strate v. A-1 Contractors, 520 U.S. 438, 117 S.Ct. 1404, 1406 (1997) ("National Farmers' exhaustion requirement does not conflict with Montana . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.") and El Paso Natural Gas Co. v. Neztsosie, 119 S.Ct. 1430 (1999).

Of course, these cases are not binding on the state courts. And, in any event, this rule is of questionable application to this case, which does not involve suit in federal court, but in state court. The cases setting forth the exhaustion rule clearly contemplate a process in which tribal remedies are exhausted and then the case is taken to the federal court for a review of the tribal court's decision. See National Farmers, 471 U.S. at 956 (". . . the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.") Since a state court has no power to review a tribal court decision, this process cannot be followed here.

More importantly, however, this rule is inapplicable because it is limited by Congressional enactments. The Supreme Court noted in El Paso, 119 S.Ct. at 1437-1438 (1999), that where Congress has expressed an unmistakable preference for a specific forum, exhaustion of remedies in tribal court is not required. Thus, in El Paso, the Court held that since the Price-Anderson Act provided for removal of state court claims of liability for nuclear accidents to federal court, this expressed a preference for a federal forum, and:

> [a]ny generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts . . . Applying tribal exhaustion would invite precisely the mischief of "duplicative determinations" and consequent "inefficiencies" that the Act sought to avoid, and the force of the congressional concerns saps the two arguable justifications for applying tribal exhaustion of any plausibility in these circumstances.

Id. at 1438.

The same rationale has been applied in the area of bankruptcy proceedings, so that exhaustion of tribal jurisdictional issues is not required in bankruptcy cases because Congress has given federal bankruptcy courts the authority to determine these issues and exhaustion of remedies would simply delay the administration of the case. In re Pauline Haines d/b/a Polly's Place, No. 98-11797-13 (D.Mo. filed May 10, 1999).

This rationale applies equally to water adjudication cases under the McCarran Amendment. The Amendment states a clear Congressional preference for having such cases heard in the state courts, in order to avoid piecemeal decisions of interrelated issues. Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800, 819 (1976); see also Waters and Water Rights §15.02(b), p. 216 (Robert E. Beck, ed., 1991) (". . . the state courts are the forum of preference for the adjudication of water rights . . ."). Nor is this preference affected in any way by Arizona's constitutional disclaimer of jurisdiction over Native Americans. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

In a water adjudication such as this, where there are numerous tribal parties, requiring the parties to exhaust their remedies in tribal court raises the specter of conflicting decisions on water rights issued by a variety of tribal courts, all of which would affect the many interrelated claims of the parties herein, making a final resolution in state court impossible. This is exactly the result Congress sought to avoid by passing the McCarran Amendment. Colorado River, 424 U.S. at 819.

Congress has given state courts clear jurisdiction over these issues and over the tribes in the resolution of these issues, in order to obtain a complete resolution of all of the interrelated issues that arise in water adjudications. Id. Requiring exhaustion of tribal remedies will conflict with the intent of the McCarran Amendment and make water adjudications in state court completely unworkable. For this reason, exhaustion of tribal remedies in not required and is not appropriate in this case.

CONCLUSION

At some point in this water adjudication, this Court is going to have to decide whether

ATC has a state water right, with all that entails, or a tribal license to use water, with the accompanying limitations. This is a necessary element of the claims before this Court; and no final decree can be issued or settlement achieved until this issue is resolved. Judge Minker decided correctly that this is the proper time to resolve this issue; because it is necessary to have this information in order to make the next set of determinations regarding the placement of ATC's claim in an HSR and/or the category in which ATC belongs in a settlement.

The United States and the Navajo Nation seek to delay this decision with claims that it is not ripe, that the Navajo Nation has sovereign immunity, and that ATC is required to first bring this claim in Navajo court. These allegations are based upon an apparent misunderstanding of the current status of the issue in this case, as well as a mis-reading of the applicable case law.

Because a determination as to the type of water right held by ATC is a necessary element in the water adjudication properly before this Court, the ripeness doctrine is inapplicable. In addition, Arizona does not follow the rules cited by the United States regarding ripeness, but requires only that ATC have a protectable interest and that a party have denied that interest. ATC meets these requirements. Even if the federal standards regarding ripeness did apply, however, ATC can meet those requirements, here. This issue is a necessary element of an ongoing case; and ATC will be gravely harmed if a decision is not made in this case. Accordingly, this issue is ripe under any standards the Court chooses to consider.

The sovereign immunity defense raised by the Navajo Nation is equally lacking. This is a water adjudication. As such, this Court has jurisdiction over all claims of the parties to water of the Little Colorado River, including those of the Navajo Nation. As the Navajo Nation has admitted, the U.S. Supreme Court has specifically held that the McCarran Amendment waives tribal sovereign immunity in water adjudications. The McCarran Amendment does not limit the type of issues that come within this waiver. To the contrary, the broad language of the Amendment and the policy behind the Amendment of completely resolving all water claims require that all necessary issues be resolved, including the issue before this Court regarding the type of water right held by ATC. There is simply no way to resolve water adjudications

involving tribal rights without making determinations regarding a tribe's jurisdiction over those water rights. Thus, the McCarran Amendment's waiver of sovereign immunity applies to those issues in this case, as well.

Finally, the Navajo Nation and the United States have argued that ATC is required to exhaust its remedies in tribal court before bringing this issue before this Court. A simple review of the number of tribes and the number of issues involved in this case will make it clear that this would create a procedural nightmare for the entire adjudicatory process and ultimately make this adjudication impossible to resolve. Congress gave jurisdiction of water adjudications to state courts in order to achieve a universal resolution applying to all the parties and all the issues. This unique attribute of water adjudications places them squarely outside of the exhaustion rule, along with other cases that Congress has required be heard by specific courts. This is a necessary issue that must be resolved before this water adjudication can be completed. This court has exclusive jurisdiction over all such issues under the McCarran Amendment and the cases of the U.S. Supreme Court interpreting that Amendment. Accordingly, ATC is not required to exhaust its tribal remedies with regard to its claim to water rights.

WHEREFORE, Intervenor Atkinson Trading Company, Inc. respectfully requests that this Court deny the Motions to Dismiss filed herein by the United States and the Navajo Nation, and for such other and further relief as the Court deems just and appropriate in the circumstances.

WILLIAM J. DARLING & ASSOCIATES, P.A.

By_____

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On June 11, 1999, the original of the foregoing was Federal Expressed to the Clerk, Apache County Superior Court, for filing. Also, copies were mailed on ___ day of _____, 1999, to those parties appearing on the Court Approved Mailing List for this case (Attachment A).

_____
WILLIAM J. DARLING & ASSOCIATES, P.A.

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Attachment A

Court Approved Mailed List
Case No. 6417-34-1

Atkinson Trading Co. c/o Van Wyck & Vandermoer Robert B. Van Wyck 702 N. Beaver Flagstaff, AZ 86001	U.S. Department of Justice Indian Resources Section Attention: Bradley S. Bridgewater Suite 945, North Tower 999 18th Street Denver, CO 80202
Navajo Nation Department of Justice Attention: Stanley M. Pollack PO Box 2010 Window Rock, AZ 86515-2010	Navajo Nation c/o Greene, Meyer & McElroy Attention: Scott B. McElroy 1007 Pearl Street, Suite 200 Boulder, CO 80302
John E. Thorson, Special Master Arizona General Stream Adjudication 1501 W. Washington, Suite 228 Phoenix, AZ 85007	Department of Water Resources Adjudications Division 500 North Third Street Phoenix, AZ 85004-3903
Atkinson Trading Company PO Box 339 Cameron, AZ 86020	*Documents filed with:* Clerk of the Superior Court Apache County Attention: Water Case, Civil No. 6417-34-1 PO Box 667 St. Johns, AZ 85936