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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 REPORT OF THE SPECIAL MASTER

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

DESCRIPTIVE SUMMARY: The Special Master submits to the Superior Court his report recommending the dismissal, without prejudice, of Atkinson's Petition for Declaratory Judgment. Exceptions to this report must be filed by October 6, 1999.

NO. OF PGS – 28 pgs.; Appendix A - 2 pgs.; Appendix B – 1 pg.; Certificate of Service – 1 pg.: TOTAL – 32 pgs.

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I. Nature of the Proceedings

On September 12, 1997, Atkinson Trading Co., Inc., also known as Atkinson's Ltd. of Arizona, (hereinafter "Atkinson") filed a Motion to Intervene and a Petition for Declaratory Judgment and Recognition of Water Rights in the Little Colorado River Adjudication (hereinafter "Petition"). The Response of the Navajo Nation was filed on October 28, 1997, and Atkinson replied on November 18, 1997. At his December 12, 1997, status conference, Superior Court Judge Allen Minker, then presiding over the adjudication, refused to schedule Atkinson's motion and petition for hearing in view of comprehensive negotiations underway for settlement of many adjudication issues.

Almost a year later, on November 20, 1998, Judge Minker did agree to advance Atkinson's pleadings toward decision. He referred the matter to Special Master John E. Thorson for briefing and hearing. Since settlement discussions were still underway, Judge Minker advised the Master to "take into account the time requirements or other deadlines facing these parties . . . ." Minute Entry at 6 (Nov. 20, 1998).

The Special Master organized the referral from Judge Minker into this contested case. The Master issued his initial case management order on February 5, 1999, and designated the appropriate litigants as Atkinson's Ltd. of Arizona dba Cameron Trading Post; Chevron U.S.A., Inc.; and the Navajo Nation. Chevron previously filed Statement of Claimant No. 39-88848 that has been matched to the same land parcel covered by Atkinson's own Statement of Claimant No. 39-84050. Chevron did not respond to the case management order, and Atkinson advised the

Master that Chevron's right had been acquired by Atkinson. Accordingly, Chevron was dismissed from the contested case.

At the initial pretrial conference (scheduling), held telephonically on March 2, 1999, the Master scheduled the various legal issues raised by Atkinson. The Master determined that Atkinson's Motion to Intervene was moot because Atkinson was already a party to the Little Colorado River Adjudication since its filing of a statement of claimant form in 1984; therefore, the Motion to Intervene was ordered dismissed.

The United States participated in the pretrial conference as trustee of the Navajo Nation's water rights. Atkinson nominally opposed the United States' participation in the contested case until its basis for standing had been demonstrated. The Master ordered the United States to file a motion to intervene in the contested case and allowed Atkinson an opportunity to respond. The Master granted the United States' motion to intervene on April 9, 1999, and the United States was added as a litigant in this contested case.

The schedule adopted at the pretrial conference also afforded the Navajo Nation and the United States an opportunity to test Atkinson's central allegations by filing motions to dismiss Atkinson's Petition for Declaratory Judgment. These motions were filed by May 14, 1999. Atkinson filed a response on June 11, 1999, and the United States and Navajo Nation filed replies on June 30, 1999. Oral argument was not requested.

II. Basic Facts of the Case

Atkinson operates a trading post and related facilities known as Cameron Trading Post, a site on U.S. Highway 89 approximately 50 miles north of Flagstaff. Atkinson claims fee title based on a patent issued by the United States, but its lands became entirely surrounded by Navajo lands when reservation additions were made in 1934.

Atkinson claims two water rights in the adjudication: (1) a pre-1919 appropriative right established by Atkinson's predecessor in interest; and (2) a domestic use right acquired from Chevron (Standard Oil Company of California). Atkinson says that it uses two wells on its property to pump this water. Atkinson claims these wells pump from the subflow of the Little Colorado River, thus characterizing the water as appropriable water subject to adjudication in this general stream adjudication. Petition for Declaratory Judgment & Recognition of Water Rights at 3 (Sept. 12, 1997); *see also* ARIZ. REV. STAT. § 45-141(A) & -251(7) (Supp. 1998).

The dispute between Atkinson and the Navajo Nation appears to be an off-shoot of the overall settlement discussions underway in the adjudication. While the negotiators have often discussed "grandfathering" existing state law-based water rights in any settlement, Atkinson questions how state law-based water rights, located on private land within the external boundaries of an Indian reservation and owned by non-Indians ("inholders"), might be handled in a settlement.

III. Atkinson's Arguments for Declaratory Judgment

The specific reason prompting Atkinson's petition was a June 4, 1997, letter from Stanley M. Pollack, Special Counsel for Water Rights, Natural Resources Unit, Navajo Nation Department of Justice. Petition at Ex. 2. Because Atkinson and the Navajo Nation had failed to reach an agreement "as to the nature and extent of the ATC water right," Pollack told Atkinson he would recommend "that the Navajo Nation Department of Water Resources issue a notice of non-compliance with the Navajo Nation Water Code" in order to test the jurisdictional questions concerning Atkinson's water rights. *Id*.

Rather than wait for a notice of non-compliance, Atkinson filed its petition which essentially asks for a declaration that its water rights were established under state law, Petition at ¶ 15, that they are free from tribal regulation, *id*. at ¶ 24, and that the water rights should be included in the final state court adjudication decree "on the same basis as all other non-Indian water right owners, whether such final decree is achieved by settlement or adjudication," *id.* at ¶ 27. Atkinson argues that, if the state-based nature of its water rights is not recognized, the trading post will have little more than a revocable water use permit under the Navajo Nation Water Code.

In their motions to dismiss Atkinson's petition, the Navajo Nation and the United States argue that, as the Navajo Water Resources Department has taken no final action concerning Atkinson, the controversy is not ripe for judicial review, Atkinson has not alleged any immediate hardship, and, in any event, the Navajo

Nation has not waived its sovereign immunity for a declaratory judgment proceeding such as this.

Atkinson's petition is very similar to a proceeding it brought in the U.S. District Court for New Mexico in 1994. *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D. N.M. 1994). Atkinson sought a declaratory judgment against the Navajo Nation seeking relief from the Nation's hotel occupancy tax, income tax, and gross receipts tax as applied to the same commercial operations at Cameron, Arizona. The federal court dismissed the action, saying that Atkinson had failed to exhaust its remedies under tribal law, such as an administrative appeal or subsequent appeal to the Navajo Nation Supreme Court. The court also indicated that it would dismiss Atkinson's petition based on tribal immunity. *Id*. at 508 n. 4.

IV. Relevant Provisions of Navajo Nation Water Code

Since the potential application of the Navajo Nation Water Code [hereinafter "CODE"] is the main reason for Atkinson's petition, I will review the pertinent provisions of the Code. The Code is Title 22 of the Navajo Nation Code and was adopted by the Tribal Council in 1984. Because of the controversial nature of such codes, the Secretary of Interior generally imposed a moratorium on the approval of tribal water codes in 1975, and that moratorium continues. The Master understands that the Navajo Nation Water Code has not been approved by the Secretary, DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 859 (4th ed. 1998), and the Master is uncertain whether such approval was required for this code. Atkinson has not raised the Secretary's lack of approval as an issue in this case.

Under the Code, the Navajo Nation claims equitable title to "all of the waters of the Navajo Nation . . . ." CODE § 1103(a). Those waters are defined as (1) waters reserved by or to the Navajo Nation; (2) waters acquired by the Nation through appropriation or in some other way; (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 . . . ." *Id.* § 1104 (emphasis added).

The Code applies to any person within the "territorial jurisdiction of the Nation who attempts to use or divert these waters in some fashion." *Id.* § 1102. "Territorial jurisdiction" is defined elsewhere in Navajo law, 7 NATION CODE § 254 (Supp. 1984-85),[1] and generally conforms with the standard definition of "Indian Country," which means "(a) all land within the *limits* of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent*, ..." 18 U.S.C. § 1151 (1994) (emphasis added). A leading Indian law scholar indicates that, although this definition is part of the criminal code, it is used for civil jurisdictional purposes as well. Furthermore, "even land owned by non-Indians in fee simple . . . is still 'Indian country' if it is within the exterior boundaries of an Indian reservation." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 114 (3d ed. 1998).

[1] "The Territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians." 7 NATION CODE § 254 (Supp. 1984-85).

When the Code was adopted in 1984, existing water users were required to file a Description of Use within two years. This filing constituted an interim permit. CODE § 1605. Persons seeking to initiate new (post-1984) uses of water are required to obtain a permit through the Director of the Department of Natural Resources. CODE §§ 1603 & 1604. While unclear, the language seems to suggest that even pre-Code users must apply for such a permit to maintain their pre-Code uses. Atkinson apparently has not filed a Description of Use or any permit application.

Several provisions of the Code set forth criteria for the Director to use in considering permit applications. Many of these would be found in state water codes around the West. Atkinson, however, points to several provisions that it believes potentially diminish its property rights. For instance, the Code indicates that "[n]o right to use water, from whatever sources, shall be recognized, *except use rights* obtained under and subject to this Code." *Id*. § 1102 (emphasis added). In the event of "a conflict between water uses for the benefit of the Navajo Nation [or its members] and non-Navajo Nation projects or uses, . . . the Director . . . may grant such preference . . . which lie in the best interests of the Navajo Nation and its members." *Id*. § 1501(A). A committee of the Tribal Council is empowered to "assess individual water users a fair share of water" when "necessary for purposes and projects beneficial to a part or all of the Navajo Nation and the inhabitants thereof, ..." *Id*. § 1304. A fee is charged for commercial and industrial uses of water pursuant to a permit; but domestic, stockwatering, irrigation, and fish and wildlife uses are exempt. *Id*. § 1307.

Elsewhere, the Code describes a water use permit as "constitut[ing] nothing more than Navajo Nation permission to use the water within the territorial jurisdiction of the Navajo Nation. . . . No water use permit issued . . . shall be construed as creating or recognizing any right other than Navajo Nation permission to use water, nor shall any water use permit ripen into any interest other than such limited permission." *Id*. § 1705. Permits can be revoked by following other Code provisions, *id*. § 1706, but the limitations of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994), and the Navajo Bill of Rights, 1 NATION CODE §§ 1-9 (1977 & Supp. 1984-85) apply to such permit revocation or modification efforts. CODE § 1707.

A person violates the Code by knowingly using water or taking other actions without the authorization required by the Code. *Id*. § 2302. Sanctions for violation of the Code are civil. They are imposed by the Director (subject to the limitations of the Indian Civil Rights Act and the Navajo Bill of Rights), and may include the forfeiture of water rights and the assessment of costs and fees. *Id*. § 2305.

The procedure for imposing such a sanction is not entirely clear but appears to be set forth in "Subchapter 10: General Hearing Procedure." The Department is required to mail notice to a person charged with violating the Code and publishing and posting the notice. A hearing, presided over by an officer appointed by the Tribal Council's Resources Committee and governed by a liberal evidentiary standard, is held to provide the person with a "fair and adequate opportunity to be heard." *Id*. §§ 2002, 2005 & 2006. At the conclusion of the hearing, the hearing officer prepares findings of fact and conclusions of law and submits a proposed decision to the Director. The Director may modify and finalize the decision. *Id*. § 2009. An appeal

to the Navajo courts appears to be available, "Subchapter 11: Appeals," but the Code is confusing on whether the matter is first heard by the Navajo Court of Appeals or the Supreme Court of the Navajo Nation. *See* CODE § 2105; *but see id.* § 2101 (the Court of Appeals apparently was abolished when the Supreme Court was created).

I cannot guarantee how the Navajo Water Code and its many parts would be applied to Atkinson. I am confident that, based on factual assumptions most favorable to Atkinson, the Navajo administrative and judicial systems would reach a decision protective of Atkinson's rights. Atkinson appears not to claim or use waters that fall within the definition of the "waters of the Navajo Nation," previously described. If Atkinson is pumping from river subflow, as claimed, Atkinson is not diverting from a "hydrologic system located exclusively within the lands of the Navajo Nation," *id*. § 1104(3), as the Little Colorado River originates and ends outside reservation boundaries.

Even if Atkinson's water use falls within the definition of Navajo waters, the Indian Civil Rights Act prevents the Navajo Water Code being applied in a manner that would divest Atkinson's property rights established under a federal patent or state water law. *See, e.g.*, 25 U.S.C. § 1302(5) (no tribe shall "take any private property for a public use without just compensation") & § 1302(8) (1994) (no tribe shall "deny to any person . . . the equal protection of its laws or deprive any person of . . . property without due process of law"). The Supreme Court did hold in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that suits against a tribe under the Indian Civil Rights Act are barred by the tribe's sovereign immunity. A dispute about "whether an Indian tribe retains the power to compel a non-Indian property

owner to submit to the civil jurisdiction of a tribal court," however, is a federal question that can be heard by a federal court under 24 U.S.C. § 1331 (1994). *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985); *see also Cardin v. De La Cruz*, 671 F.2d 363, 365 (9th Cir. 1982) ("The crux of appellee's argument is that tribal regulation of his business runs afoul of the principles enunciated by the Supreme Court. . . . Since this action thus arises under federal common law, it falls within the general federal-question jurisdiction conferred by § 1331."). If tribal sovereign immunity is asserted, injunctive actions can be brought against individual tribal officials under the *Ex Parte Young* doctrine, 209 U.S. 123 (1908), if they lack authority for actions against a non-Indian; *see, e.g.*, *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1995) (enforcement of tribal employment law); *Burlington Northern R.R. Co. v. Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir. 1991), *cert. denied,* 505 U.S. 1212 (1992) (enforcement of tribal tax on right-of-way).

V. Relevant Federal Law

The questions raised in this case are only recent manifestations of the numerous state-tribal jurisdiction issues that have originated in Arizona and other western states. The first modern case to address the contest between state and tribal civil jurisdiction is *Williams v. Lee*, 358 U.S. 217 (1959), originated in Arizona when a non-Indian trader, operating on the Navajo Reservation, sued an Indian couple in state court for the nonpayment of goods. Since the sales transaction took place on the reservation and with Indians, the Court held that jurisdiction over the trader's cause of action was exclusively in tribal court.

As previously mentioned, Cameron Trading Post, although owned in fee by a non-Indian corporation, is located within "Indian country," as that term is defined in federal law. The question raised in this case, as in similar cases where a non-Indian is engaged in some activity on fee land within reservation boundaries, is whether the tribe, state, or both have jurisdiction over the activities of the non-Indian. Previous cases have demonstrated several possible outcomes.

A. Exclusive State Jurisdiction Over Non-Indian Activities

Montana v. United States, 450 U.S. 544 (1981), concerned the application of tribal fish and game regulations to non-Indians engaged in hunting and fishing on private fee lands within Indian country. The Court held that the "exercise of tribal power beyond what is necessary to protect tribal self-government . . . is inconsistent with the dependent status of the tribes . . . . [and the] regulation of hunting and fishing by non-members of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations . . . ." The Court concluded that the Tribe's fish and game ordinance could not be applied to the non-Indians. In the process, the Court summarized the law allowing tribal jurisdiction over non-Indians:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. . . .

Id. at 565 (citations omitted), and

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 566 (citations omitted).

In the water rights arena, *Holly v. Confederated Tribes & Bands of the Yakima Indian Reservation*, 655 F.Supp. 557 (E.D. Wash. 1985), *affirmed sub nom. Holly v. Totus,* 812 F.2d 714 (9th Cir. 1987), *cert. denied,* 484 U.S. 823 (1987), reaches the same result. The Yakima Nation in south-central Washington adopted a water code in 1977 (never approved by the Secretary of Interior) with provisions somewhat similar to the Navajo Nation Water Code, including the need to obtain a permit to use water, a preference for Indian uses, and the need to renew permits every ten years.

The State of Washington and non-Indian water users (mostly allottees who had bought their land from Indians) litigated the authority of the Yakima Nation to regulate water in excess of the reserved water right of the Tribe. The code applied to all areas of the reservation including an area where, because of past governmental negligence, 98,000 acres had been deeded to non-Indians leaving only 2,500 acres in tribal hands. Of the remaining 1.2 million acres of the reservation, only eight percent of the land was owned by non-Indians.

Preliminarily, the trial court determined that the water users had standing because they claimed "possessory and title interests in real property to which administration of the Yakima Nation Water Code allegedly represents an immediate threat of injury." 655 F. Supp. 548, 552. The trial court invalidated the penal provisions of the water code as they pertained to non-Indians and, finding

them unseverable from the remainder of the ordinance, struck down the entire code. *Id*. 553.

The court of appeals agreed that the penal provisions could not be applied to non-Indians but that these sections were severable from the remainder of the water code. The court instructed the trial court to review the remainder of the code. *Holly v. Totus*, 749 F.2d 37 (9th Cir. 1984) (unpublished).

Upon remand, the trial court concluded that the Nation had no inherent authority to regulate excess waters used by non-Indians on non-Indian land except where nonmembers enter into consensual relationships with the Nation or the conduct of the non-Indian has a direct effect on the political integrity, economic security, or health and welfare of the Nation. No such impacts resulted from use of excess water. The Nation had not offered any material fact suggesting such a threat; consequently, the ordinance was struck down. 655 F. Supp. 557, 558-59 (E.D. Wash. 1985), *aff'd*, 812 F.2d 714 (9th Cir. 1987) (unpublished). The court specifically added that it had not decided what government—state, tribal, or federal—should regulate excess waters. *Id*. 559.

B. Exclusive Tribal Jurisdiction Over Non-Indian Activities

In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Tribe was determined to have jurisdiction over the hunting and fishing activities of Indians and non-Indians alike. The Tribe had developed a mountain-top resort with associated fishing and hunting opportunities. The state had contributed little to these resource developments. The Tribe had adopted its own hunting and fishing

ordinances, but the state began arresting non-Indian hunters for killing game on the reservation, with tribal permits, but in violation of state law.

The state urged the Supreme Court to recognize concurrent state-tribal jurisdiction over non-Indian hunters and fishermen. In practical effect, the more restrictive features of state law then would trump the tribal ordinance. The state failing to show a legitimate regulatory interest or harmful off-reservation effect, the Court held that the Tribe had exclusive jurisdiction over non-Indians who hunted or fished on-reservation.

In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), the U.S. Court of Appeals reached a similar conclusion in a water rights case. The dispute concerned No Name Creek, a short, north-to-south creek located entirely within the boundaries of the Colville Reservation. A series of seven allotments had been created along the creek in 1917, of which four were held in trust by the United States for Indians. The middle two allotments were owned by a non-Indian who, after purchasing the land in 1948, obtained water right permits from the State of Washington.

The court rejected the lower court opinion that the state could regulate any excess water not reserved to the Tribes and cancelled the state permits. The court held that, while a tribe generally does not have jurisdiction over a non-Indian on fee land, the result is different, as a matter of inherent tribal sovereignty, when necessary to prevent conduct that "threatens or has some direct effect on the health and welfare of the tribe." *Id.* at 52. The court indicated that "[a] water system is a

unitary resource" and the ability to regulate water in the water-short West is an important tribal sovereign power. *Id.*

In other cases, the courts have upheld the application of tribal building, health, and safety regulations on non-Indian businesses located on fees lands, *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (unsanitary conditions in grocery store), as well as the regulation of the riparian water rights of non-Indians when they impinge upon tribal trust land, *Confederated Salish &Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982) (construction of docks, breakwaters, and other structures).

C. Mixed Jurisdiction Over Non-Indian Activities

In *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408 (1989), the Court split over the authority of the Tribes to impose zoning on two areas within the reservation. Over sixty percent of the reservation was closed to the public; of this land, only three percent had passed into fee ownership. The remaining forty percent of the reservation was open to the public and, in this area, almost half of the land was owned in fee. The question was whether tribal or county zoning codes would apply to the reservation. Not able to agree in a majority opinion, six members of the Court rendered judgment that the county had zoning authority over the open portion of the reservation. Five justices concurred that the Tribes had zoning jurisdiction over the closed area. On several occasions, these justices indicated that tribal interests were not "imperiled" by application of the country zoning code and that the Tribes lacked a substantial interest in governing

land use in the open portion of the reservation. The result was mixed regulation of non-Indian activities on the reservation.

D. Discussion

In discussing these cases, our situation appears different from *Colville* since the water course in question here, the Little Colorado River, is not entirely contained within reservation boundaries. Under *Montana,* the Navajo Nation likely could not extend its inherent tribal regulatory authority to Atkinson's use of its claimed state law-based water rights. An exception would be if the Nation could show that Atkinson's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 556; *Holly*, 655 F. Supp. at 558-59. Atkinson's conduct might have to threaten serious and substantial injury to tribal interests to satisfy at least some of the justices who participated in *Brendale*. 492 U.S. at 431 (White, J.); *id.* at 447 (Stevens, J.). Incidentally, if the Nation were able to show such serious and substantial injury and had received authorization from the U.S. Environmental Protection Agency, the Nation could promulgate water quality standards under section 518(e) of the Clean Water Act (tribes may be treated as a state) that might condition the water uses of inholders such as Atkinson. *See Montana v. U.S. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998) (the Tribes having identified the water quality threats of feedlots, mine tailings, landfills, slaughterhouses, and other major sources of pollution).

I need not reach any factual or legal conclusions about these issues since I believe that the adjudication court should first defer to tribal governmental

institutions for them to decide whether they have jurisdiction over Atkinson's use of water.

VI. Legal Analysis

A. Sovereign Immunity of Navajo Nation

This preliminary discussion complete, I address the central defense of the Navajo Nation, *i.e.*, its claimed sovereign immunity. Atkinson lists the Nation as the respondent to its petition. Atkinson asserts that the Navajo Nation is a party to the adjudication and the subject matter of the petition is within the jurisdictional scope granted the adjudication court under the McCarran Amendment.[2] Both the Navajo Nation and the United States respond that the Navajo Nation has not waived its sovereign immunity for this type of declaratory proceeding and the McCarran Amendment does not waive tribal immunity.

A prominent legal commentator has succinctly stated: "The principle that tribes enjoy the sovereign's common law immunity from suit is well established. The immunity extends to agencies of the tribes. It apples in both state and federal court. Tribal immunity extends to claims for declaratory and injunctive relief, not merely damages, ..." CANBY at 87 (citations omitted).

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[2]The McCarran Amendment, 43 U.S.C. § 666 (1994), provides:

> (a) Consent is 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 any 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, ...

The McCarran Amendment is a congressional waiver of sovereign immunity, but it only extends to the immunity otherwise available to the United States government. Under 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," *United States v. Superior Court*, 144 Ariz. 265, 277, 697 P.2d 658, 670 (1985), but "the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications. . . ." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n. 17 (1983) (emphasis in original).

Atkinson argues that since the Navajo Nation filed its own claims in the adjudication to protect independently its beneficial interest in its water rights, the Nation has waived its immunity sufficiently for the adjudication court to grant the requested declaratory relief. The relief sought by Atkinson, however, is beyond that necessary to "adjudicate the subject matter" of the tribal claims. Atkinson's petition requests a declaration that the Navajo Nation has no authority to regulate Atkinson's water use at Cameron "in any manner" and the Nation's water code "is inapplicable to ATC's water rights and ATC's use of water" at Cameron. Petition at 10.

Filing a complaint or, in this more limited circumstance, filing a statement of claimant in a state court adjudication, does not automatically waive a tribe's immunity to counterclaims (even compulsory counterclaims). *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (no waiver of immunity when tribe sought injunction against state tax assessment); *Pit River*

Home & Agric. Co-op Ass'n v. United States, 30 F.3d 1088 (9th Cir. 1994) (trespass action); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) (tribal action concerning ownership of land is not waiver of immunity from suit for interpretation of lease). By filing a statement of claimant, the Navajo Nation has consented to an adjudication of its water right claims and the consideration of claims or objections adverse to the Nation's claims. *See In re White*, 139 F.3d 1268 (9th Cir. 1998) (tribe's participation as creditor in bankruptcy proceeding constitutes consent to adjudicate its claim);*Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995) (quiet title action). By filing its claims, however, the Nation has not put the interpretation or application of its water code at issue.

B. Judicial Deference to Tribal Governmental Institutions

Even if the sovereign immunity claim of the Navajo Nation did not defeat the portions of Atkinson's petition concerning the Navajo Nation Water Code, the adjudication court would still be obliged to defer to tribal governmental institutions for clarification of their jurisdiction over Atkinson's claimed water rights.

Atkinson apparently has not challenged the threatened application of the Navajo Nation Water Code before either the tribal water resources department or the court system. The federal courts have required that parties exhaust their remedies in tribal court before suing in federal court. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). In a more recent decision, the U.S. Supreme Court reaffirmed this "exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction; . . . ." *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The Court, while holding that an on-reservation accident involving non-

Indians should be heard in state court, indicated that this exhaustion rule was a "prudential rule," based on comity. *Id*. at 453. *See also Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1134 (9th Cir. 1995) ("Allowing the tribal court to determine, as an issue of first impression, whether it properly has jurisdiction leaves open the possibility that such jurisdiction can later be challenged in federal court. . . . Technically, exhaustion is not a jurisdictional prerequisite, but is required as a matter of comity.").

Previously in the Gila River adjudication, I indicated that "[w]hile these cases arose in situations where federal courts were being asked to enjoin tribal activity, they describe a matter of comity that should govern this Court's relationship with the Tribal Courts within Arizona." Minute Entry at 3, *In re Application of Phelps Dodge Corp. for Preliminary Injunction*, No. W1-101 (Maricopa County Super. Ct. May 15, 1997). Such deference to tribal institutions is appropriate as it supports tribal self-government, avoids direct competition with tribal government, and taps the expertise of tribal courts and agencies. 480 U.S. at 16-19; *see also Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 508-12 (D. N.M. 1994). A very recent Ninth Circuit decision supports this conclusion. An insurer sought to avoid defending an unfair insurance practices claim in tribal court by initiating a separate action in federal court. The circuit court held that even when tribal court jurisdiction is unclear, a party must exhaust tribal remedies, including tribal appeals, before challenging tribal jurisdiction in federal court. *Allstate Indemnity Co. v. Stump*, ___ F.3d ___, 1999 WL 626855 (9th Cir. Aug. 19, 1999) (Schroeder, J.).

The adjudication court should not interject itself into the dispute between Atkinson and the Navajo Water Resources Department until that agency and the Navajo courts have considered Atkinson's jurisdictional arguments and the relevant federal law discussed earlier in this opinion has been considered and applied.

C. Atkinson's Other Claims for Declaratory Relief

Atkinson seeks a declaration that its water rights emanate under state law, a determination of the exact quantity and priority dates of those rights, and assurance that its rights will be included "in the final decree in the same manner as all other non-Indian water rights." Petition at 10, ¶¶ 1 & 4. This requested relief is not barred by the Navajo Nation's sovereign immunity, as the request is for a general clarification of the adjudication process and not specifically asserted against the Nation.

As a claimant in the Little Colorado River adjudication, Atkinson already has the opportunity to have its water rights determined in state court. The McCarran Amendment adjudication underway in the Little Colorado River basin provides for the unified, comprehensive determination of all water uses along a river system, whether the rights are founded in state or federal law. Normally, such claimed uses are considered by the court after the Arizona Department of Water Resources (ADWR) publishes a hydrographic survey report (HSR) for a watershed, after notice of the HSR has been served on all claimants in the river system, and after other water users have had an opportunity to object to the claimed uses as described in the HSR. ARIZ. REV. STAT. ANN. § 45-256 & -257 (Supp. 1998).

Atkinson desires to go to the front of the line and have its water rights determined first in the Little Colorado River adjudication. Except for major Indian and federal agency water right settlements that have been considered and approved under a specific Arizona Supreme Court order, Special Procedural Order Providing for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes (Ariz. Sup. Ct. May 16, 1991), and an occasional referral of a water title or emergency issue from another court, the accelerated consideration of individual water rights is unprecedented in this adjudication. To determine individual water rights apart from the HSR deprives thousands of adjudication claimants with notice of and an opportunity to object to the water right. The court and parties do not benefit from ADWR's technical work. The court would be besieged with other requests for early adjudication, and the court would be hard-pressed to develop criteria to distinguish among these requests.

Atkinson justifies its unprecedented request for early consideration by arguing that its water rights may soon be ignored or divested by the Navajo Nation. Atkinson refers to Pollack's June 4, 1997, letter and provisions of the tribal water code (providing water licenses rather than rights) to demonstrate its concerns. The trading post also suggests somewhat vaguely that, if its rights are not soon determined, they will not be grandfathered into the major settlement being developed for the adjudication. Atkinson offers no factual support for this fear.

The uncertainties of the adjudication process plague thousands of water users in the adjudication. "Do I have the right documents to prove the legal basis for my water right?" "Should I have claimed that well several miles from the creek?"

"How large are those senior, federal rights upstream?" "Will my priority date ever mean anything?" Atkinson has shown little to differentiate itself from all the other water users who must wait their turn to have their questions resolved.

What is certain, assuming the Little Colorado River adjudication proceeds to conclusion, is that Atkinson eventually will have its water right claims determined in state court. If for some reason Atkinson's water rights are not properly included in a settlement, Atkinson can move the court for relief at that time, when the reasons for exclusion are clearer; object to the proposed settlement; or initiate a special action proceeding to review the trial court's actions.

VII. Findings of Fact

Finding of Fact No. 1. The Navajo Nation has not, by any pleading or action in the Little Colorado River adjudication, waived its sovereign immunity against the relief requested in paragraph 2 ("[t]hat the Navajo Nation has no jurisdiction or authority to regulate ATC's use of water on ATC's Property in any manner") or paragraph 3 ("[t]hat the Navajo Nation Water Code is inapplicable to ATC's water rights and ATC's use of water on the Property") of Atkinson's prayer for relief. Petition at 10.

Finding of Fact No. 2. Atkinson has filed statements of claimant (or acquired statements previously filed) in the Little Colorado River adjudication that will be considered by state court in the normal course of the adjudication.

Finding of Fact No. 3. Atkinson has provided insufficient reasons why the adjudication of its claimed water rights should be accelerated.

Finding of Fact No. 4. Atkinson has failed to offer any material fact supporting its allegation that its claimed state-law water rights will not be included in the major settlement being negotiated in the Little Colorado River Adjudication.

VIII. Conclusions of Law

Conclusion of Law No. 1. The Navajo Nation has not waived its sovereign immunity against the relief requested in paragraphs 2 and 3 of the prayer for relief, set forth in Atkinson's petition.

Conclusion of Law No. 2. So long as the general stream adjudication continues and Atkinson's statements of claimant remain pending, they will be adjudicated in the normal course of the adjudication.

Conclusion of Law No. 3. To the extent Atkinson's statements of claimant are proven, the claimed water rights will be included in the final decree.

Conclusion of Law No. 4. Because Atkinson's claimed water rights are located on fee land within the external boundaries of the Navajo Reservation, the adjudication court should defer to the administrative and judicial institutions of the Navajo Nation to determine first what regulatory or judicial authority they have, if any, over the claimed, state law-based water rights of Atkinson.

IX. Motion for Approval of Master's Report and for Entry of Proposed Order

A. Based on the Findings of Fact and Conclusions of Law, the Master recommends that Atkinson's Petition for Declaratory Relief be dismissed, without prejudice, and this contested case be terminated.

B. The Master hereby submits a proposed order effectuating his recommendation. The proposed order appears as Appendix A to this report.

C. The Master hereby moves the Superior Court, under the provisions of Rule 53(h), ARIZONA RULES OF CIVIL PROCEDURE, to adopt his report and enter the proposed order after appropriate notice has been given.

X. Notice of Subsequent Proceedings

This report has been filed with the Clerk of the Court on September 15, 1999.

NOTICE IS HEREBY GIVEN that any litigants in this contested case may file an objection to the report on or before October 6, 1999.[3] Any such objection must be filed with the Clerk of the Superior Court, Apache County, Attn: Water Case, Civil No. 6417-34-1, P. O. Box 667, St. Johns, AZ 85936. Copies of objections must be served by mail on all persons appearing on the Court-approved mailing list for this contested case, attached hereto as Appendix B.

NOTICE IS ALSO GIVEN that, pursuant to a prior order of the court, oral argument will not be held unless specifically requested. Rule 53(h), ARIZONA RULES OF CIVIL PROCEDURE, provides that "[t]he court shall accept the master's findings of fact unless clearly erroneous. . . . [and the court] may adopt the report or may modify

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[3]The period for filing objections to the report includes the ten-day period, not including intermediate Saturdays, Sundays, and legal holidays, as specified by Rules 6(a) and 53(h), Ariz. R. Civ. Proc., and the additional five-day period required when service has been made by mail, as specified by Rule 6(e). Since the report does not cover an entire subwatershed or reservation, the 180-day period prescribed by ARIZ. REV. STAT. ANN. § 45-257(A)(2) (Supp. 1998) does not apply.

it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

RESPECTFULLY SUBMITTED this 15th day of September 1999.

JOHN E. THORSON
Special Master

Appendix A

Proposed Order

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 ORDER

THIS MATTER came before the court on the Petition for Declaratory Judgment and Recognition of Water Rights in the Little Colorado River Adjudication (Sept. 12, 1997) by Atkinson Trading Co.; consideration of the Petition having been referred to the Special Master; the Master having filed a report with the Clerk of the Court and provided notice to the involved parties; the Master having moved the court for an order approving the report; and the court having considered the report and being fully advised;

THE COURT FINDS that notice of the Master's report has been given as required by law and the period for filing objections to the report has passed;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The motion of the Special Master to approve the report is GRANTED.

2. The court approves and adopts the motions granted or denied by the Master during the contested case proceedings, the findings of fact, conclusions of law, and recommended dispositions set forth in the report.

3. The Petition for Declaratory Judgment, filed by Atkinson Trading Co., is dismissed without prejudice.

4. The contested case is concluded.

Dated this ___ day of October 1999.

_____
EDWARD L. DAWSON
Judge of the Superior Court

Appendix B

Court-approved Mailing List
Case No. 6417-34-1
(10 names)
Prepared by the Office of the Special Master
September 15, 1999

Atkinson's Ltd. of Az. dba Cameron Trading Post
P. O. Box 339
Cameron, AZ 86020

Atkinson Trading Co.
c/o William J. Darling & Assocs.
William J. Darling
Margaret P. Armijo
P. O. Box 3337
Albuquerque, NM 87190-3337

Atkinson Trading Co.
c/o Van Wyck & Vandemoer
Robert B. Van Wyck
702 N. Beaver
Flagstaff, AZ 86001

Navajo Nation Dep't of Justice
Attn: Stanley M. Pollack
P. O. Box 2010
Window Rock, AZ 86515-2010

Navajo Nation
c/o Greene, Meyer & McElroy
Attn: Scott B. McElroy
1007 Pearl Street, Suite 200
Boulder, CO 80302

U.S. Department of Justice
Indian Resources Section
Attn: Bradley S. Bridgewater
Suite 945, North Tower
999 18th Street
Denver, CO 80202

File all documents with:
Clerk of the Superior Court
Apache County
Attn: Water Case
Civil No. 6417-34-1
P. O. Box 667
St. Johns, AZ 85936

Provide a copy to:
John E. Thorson, Special Master
Arizona General Stream Adjudication
1501 W. Washington, Suite 228
Phoenix, AZ 85007

The Hon. Edward L. Dawson
Judge of the Superior Court
1400 E. Ash
Globe, AZ 85501

Department of Water Resources
Adjudications Division
500 North Third Street
Phoenix, AZ 85004-3903

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Report was mailed to the Clerk, Apache County Superior Court, this 15th day of September 1999 for filing. Also, a copy was mailed to those persons appearing on the Court-approved mailing list for this case (Appendix B).

_____
Kathy Dolge