

Stanley M. Pollack, Attorney ID 011046
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, Arizona 86515
(520) 871-6931

Scott B. McElroy
Alice E. Walker
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

Attorneys for the Navajo Nation

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

IN RE THE GENERAL ADJUDICATION) Date:
OF ALL RIGHTS TO USE WATER)
IN THE LITTLE COLORADO RIVER) CIVIL NO. 6417-34-1
SYSTEM AND SOURCE)
) **NAVAJO NATION'S REPLY TO**
) **ATKINSON TRADING CO., INC.'S**
) **RESPONSE TO MOTIONS TO DIS**
)
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)

Descriptive Summary:	Reply to Atkinson Trading Co., Inc.'s Response to Motions to Dismiss
Claimant Nos:	The Navajo Nation
Number of Pages:	7
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This memorandum replies to *Atkinson Trading Co., Inc.'s Response to Motions to Dismiss* (June 11, 1999) ("ATC's Response"). ATC's Response fails to address the contentions presented in the *Memorandum of the Navajo Nation in Support of its Motion to Dismiss the Petition for Declaratory Judgment and Recognition of Water Rights filed by Atkinson Trading Company, Inc.* (May 13, 1999) ("Navajo Memorandum").

**I. THE QUESTIONS RAISED BY THE ATC
PETITION ARE NOT APPROPRIATE FOR
RESOLUTION IN THE LCR ADJUDICATION.**

A. THE NATION’S SOVEREIGN IMMUNITY BARS THE ATC PETITION.

Contrary to the implication in ATC’s Response, its *Petition for Declaratory Judgment and Recognition of Water Rights* (September 15, 1997) (“ATC Petition”) does not merely request the LCR Court to adjudicate ATC’s water rights and to administer those rights under the decree in this case. To be sure, ATC asks the Court to declare its rights under state law. ATC Petition at 10. But ATC further asks the Court to declare “[t]hat the Navajo Nation has no jurisdiction or authority to regulate ATC’s use of water on ATC’s property in any manner.” *Id.* It also asks the Court to determine that the Navajo Nation Water Code (“NNWC”) does not apply to ATC’s use of water. *Id.* Rather than addressing the contentions by the Navajo Nation (“Nation”) that these expressly pleaded matters are not properly before the Court, ATC has chosen to argue merely that its claim of entitlement to a right to use water under state law should be adjudicated by the LCR Court -- a point over which there is no dispute.

The fundamental question posed by the ATC Petition is whether the Nation may apply its water code to ATC’s use of water within the boundaries of the Navajo Reservation. That is a far different question than the adjudication of ATC’s claim that it has a water right under state law that is subject to administration under the decree in this case. Stated another way, the question of the extent of the Nation’s jurisdiction over entities conducting business within its Reservation is not one of the issues covered by the waiver of immunity contained in the McCarran Amendment, 43 U.S.C. § 666. *See generally* Navajo Memorandum at 8-12. As the United States Supreme Court has counseled, the limited waiver found in the McCarran Amendment, like any other waiver of sovereign immunity must “not [be] enlarged beyond what the language of the statute requires.” *United States v. Idaho Dep’t of Water Resources*, 508 U.S. 1, 7 (1993) (citing *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983)). ATC is wrong when it tries to squeeze the broad jurisdictional issues which it has plead in its petition into the narrow scope of the McCarran Amendment’s waiver.

B. THE JURISDICTIONAL QUESTIONS RAISED IN THE ATC PETITION ARE PREMATURE.

Assuming *arguendo* that the Nation's sovereign immunity does not bar the ATC Petition, the issue which ATC raises with regard to the scope of the Nation's jurisdiction are premature and must be addressed in the proper sequence. Certainly, the issues are more complex than simply whether ATC has either (1) a right under state law or (2) the ability to use water under the NNWC. *See* ATC's Response at 3. The fact that ATC may have a right to use water under state law does not necessarily foreclose the Nation from regulating or administering that use in some fashion. The extent of the Nation's regulatory authority, however, cannot be answered in a vacuum but must be considered in the appropriate order.

The first question that must be addressed to resolve the issues posed by the ATC Petition is the disputed issue of whether ATC has any right to use water under state law. As described in the Navajo Memorandum at 5-7, the Arizona adjudication statutes and the rules governing the LCR Adjudication establish the applicable procedures for the adjudication of water rights in this case. Those procedures have not been followed with regard to the ATC claim. *See* Part II, *infra*. Only after those procedures are completed and ATC succeeds in its claim of a right to use water under state law, does the question of the extent to which the Nation may regulate or otherwise administer that use of water become ripe for determination. This Court, however, should defer to the Nation to determine in the first instance the scope of its regulatory authority over ATC's exercise of any water right it may have. *See* Navajo Memorandum at 14-20. The Nation has not yet definitively addressed that issue and ATC cannot point to any injury that it has suffered on account of the Nation's actions in connection with water use on the ATC property. As a result, the jurisdictional issues raised by ATC are premature and cannot be addressed at this time.

II. TO THE EXTENT THE ATC PETITION RAISES ANY ISSUES THAT ARE APPROPRIATE FOR RESOLUTION BY THE LCR COURT, THOSE ISSUES ARE NOT RIPE.

ATC fails to come to grips with the Nation's contentions that ATC's disputed claim to a water right under state law is not ripe for adjudication under the procedures that govern this case. ATC provides no justification for the special treatment it demands and there is no reason to treat

ATC any differently than any other state right claimant. If ATC wants to litigate its rights under state law, it must proceed in accordance with the rules that govern this litigation. There are no shortcuts.

ATC's bizarre invocation of the Arizona Declaratory Judgment Act, ARIZ. REV. STAT. ANN. § 12-1831 *et seq.* (1994), does not support its position that the statutory provisions governing water adjudications may be blithely disregarded.¹ As the Navajo Memorandum described in detail, the starting point for water adjudications is the preparation of the statutorily mandated HSRs by the Arizona Department of Water Resources. *See generally* Navajo Memorandum at 4-7. ATC does not address this critical point but instead attempts to invoke the Arizona Declaratory Judgment Act in an apparent effort to avoid these well-established requirements. ATC offers no support for its position and there is none.

In sum, the first step in determining whether ATC has a right to use water under state law is the preparation of an HSR. Because the standing order of the LCR Court is that the tribal rights will be adjudicated first, *Order*, Civ. No. 6417 (Jan. 27, 1994), ATC's request to have its rights adjudicated immediately cannot be met.

III. ATC MUST PARTICIPATE IN THE NEGOTIATIONS IF IT WISHES TO SETTLE ITS WATER RIGHTS.

Finally, ATC demands that its rights be included in the final decree "on the same basis as all other non-Indian water rights," whether this case is resolved by settlement or litigation. ATC Petition at 9.² If ATC wants to settle with the Nation, it must enter into settlement discussions. Although it is located on fee land in the Navajo Reservation, ATC claims the right to use water under state law and that its use is immune from the Nation's jurisdiction. The fact that the Nation may agree to such treatment for other water users who are located outside of the

¹To the extent that the ATC Petition constitutes an invocation of the Arizona Declaratory Judgment Act, neither the United States nor the Nation has waived its immunity to suit for such an action.

²Ironically, ATC actually requests disparate treatment in the litigation that would exempt it from the procedures followed for the adjudication of all other water rights.

Reservation and who are contributing to the settlement does not mean that the Nation would be willing to agree to similar treatment of ATC. Settlements are two-way streets and ATC must participate in accommodating the needs of the Nation if it wishes to have its interests protected in the settlement.

IV. CONCLUSION

For the reasons stated above and in the Navajo Memorandum and the *Memorandum in Support of United States' Motion to Dismiss or in the Alternative Stay* (May 11, 1999), the ATC Petition should be dismissed.

Date: _____

Respectfully submitted,
Stanley M. Pollack, Attorney ID 011046
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, Arizona 86515
(520) 871-6931

Scott B. McElroy
Alice E. Walker
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

Attorneys for the Navajo Nation

By: _____
Scott B. McElroy

CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing Navajo Nation's Reply to Atkinson Trading Co., Inc.'s Response to Motions to Dismiss in the U.S. Mail, first-class postage prepaid thereon, on this ___ day of June, 1999, addressed to the following:

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

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

Atkinson Trading Co.
c/o Van Wyck & Vandemoer, P.L.L.C.
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

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

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

John E. Thorson, Special Master
Arizona General Stream Adjudication
1501 W. Washington, Suite 228
Phoenix, AZ 85007

Department of Water Resources
Adjudications Division
500 N. Third St.
Phoenix, AZ 85004-3903
