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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 UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE STAY

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

DESCRIPTIVE SUMMARY: The United States replies to the "Response to Motions to Dismiss" filed by Atkinson Trading Co. Inc.

PROCEEDING NO.: LC 148

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The United States of America ("United States") hereby replies to the "Response to Motions to Dismiss" ("Response") filed herein by Atkinson Trading Company, Inc. ("ATC"). The ATC Response fails to respond to decisive arguments provided in the "Memorandum in Support of United States' Motion to Dismiss Or in the Alternative Stay" ("U.S. Memorandum") and otherwise fails to show that ATC's "Petition for Declaratory Judgment and Recognition of Water Rights" ("Petition") has stated a claim which upon which relief can be granted or which is within the subject matter jurisdiction of this Court.

I. THE "TYPE" OF WATER RIGHT HELD BY ATC IS IRRELEVANT

ATC asserts in its Response, at 3, that its Petition "seeks nothing more than to have this Court determine whether ATC has a state water right or a tribal license to use water." At the very least this characterization seems to overlook paragraph 1 of the Petition's prayer for relief, which asks the Court to quantify and determine the priority of ATC's rights as against all parties. Indeed, it seems to refer only to the portion of paragraph 4 of the Petition's prayer which seeks a determination that "ATC's water rights are property rights pursuant to the laws of the State of Arizona . . . ." If that is indeed all that ATC now seeks in this proceeding, the Response constitutes a belated attempt to effect significant amendment and simplification of the Petition, although it is not clear how the remaining issue identified by the Response is legally relevant to this water adjudication proceeding.

However, the remainder of the Response indicates that ATC does not actually intend to simplify these proceedings. Rather, ATC is suffering from confusion caused by its assumption that (1) the question of whether ATC's rights are subject to Navajo regulatory jurisdiction, and the Navajo Water Code, is the same as the question of what "type" of right ATC has, and that (2) this "type" of the right determines how the right will be adjudicated or settled. Both of these assumptions are erroneous, if they can be given any legally intelligible meaning at all.

The United States does not dispute that the question of whether ATC has a right to use water in the Little Colorado River system and source is within the subject-matter jurisdiction of this Court and within the scope of Civil Action No. 6417 ("the main case"). The United States assumes that in due course, this Court will determine whether ATC has any such right and, if so, what are the quantity, priority, and other elements of that right, and that in its attempt to establish its right ATC will offer evidence of beneficial use, including evidence of

prior state filings concerning its water right. The United States has no position on whether this means that ATC's right is a "state water right" or not. Indeed, ATC has cited no legal authority, from Arizona or elsewhere, which provides any definition whatsoever to the phrase "state water right" or to ATC's concept of the "type" of water right it holds.[1]

However, this Court's final judgment on ATC's right will not resolve issues concerning the Navajo Nation's jurisdiction over the exercise of that right, any more than a judgment quieting ATC's title to the property described on pages 1-2 of the Petition would resolve issues concerning the Navajo Nation's ability to tax or otherwise regulate activities on that property. It is undisputed that ATC holds fee title to its property and that, therefore, its rights to that property do not derive from the Navajo Nation. Nonetheless, that fact does not, by itself, resolve questions about the extent of the Navajo Nation's jurisdiction over activities on ATC's property, nor does it mean that ATC is freed from the obligation to exhaust tribal remedies in disputes about such jurisdiction. Atkinson Trading Co. v. Navajo Nation, 866 F.Supp. 506 (D.N.M. 1994). Similarly, a determination by this Court that ATC holds a water right, based on proof satisfying all requirements imposed by Arizona law, would not automatically decide questions about whether the Navajo Nation Water Code applies to that

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[1] The Response itself suggests only a circular definition: the "type" of right means whether or not it is subject to tribal jurisdiction, and the "type" of the right therefore determines whether it is subject to tribal jurisdiction. At other places, ATC seems to be confusing the issue of tribal jurisdiction with that of tribal ownership. See, e.g., Response page 15 ("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"). ATC can provide no authority for the proposition that tribal jurisdiction is limited to property owned by that tribe. See Montana v. United States, 450 U.S. 544, 565 (1981) ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands") Moreover, ATC's assertion is oblivious to the fact that the Navajo Nation owns fee lands located outside the boundaries of the reservation, which even the Navajo Nation concedes are not subject to the tribe's governmental jurisdiction.

property right or whether the Navajo Nation might otherwise have the authority to impose some conditions on the exercise of that right.

For reasons already discussed in detail in the Memorandum in Support of United States' Motion to Dismiss or in the Alternative Stay ("U.S. Memorandum"), e.g., at 10 n.4, determination of whether Navajo law applies to ATC's water use and, if so, what consequences there may be of that application, requires action by the Navajo Supreme Court interpreting the statutes in question. ATC's bald attempt to characterize the Navajo Nation Water Code on pages 5-6 of its Response, which is not even supported by spot cites to the particular provisions being characterized, is entitled to no credence by this Court whatsoever.

For these reasons, the "type" of water right ATC holds is a useless concept having no legal significance in these proceedings. Quantification of ATC's water right in the main case does not require, or imply, any resolution of issues concerning the extent, or effect, of Navajo Nation jurisdiction over the exercise of that right. Moreover, ATC's presumption that it can, by virtue of some decision in this contested case, dictate the terms upon which the United States and Navajo Nation will settle ATC's water right claims, is thoroughly misguided. Any such settlement will have to be negotiated, taking into account ATC's particular circumstances. The United States and Navajo Nation cannot be forced to settle with ATC on terms negotiated for parties in circumstances that are not comparable to ATC's.

II. SMITH PLUMBING CO., INC. V. AETNA CASUALTY AND SURETY CO. IS CONTROLLING.

ATC makes no mention of Smith Plumbing Co., Inc. v. Aetna Casualty and Surety Co, 149 Ariz. 524, 720 P.2d 499 (1986), discussed on pages 13 - 15 and 17 of the U.S.

Memorandum. As shown in the U.S. Memorandum, Smith not only acknowledged the need to consider the doctrine of exhaustion of tribal remedies in Arizona state court proceedings, but also interpreted the Arizona Enabling Act, 36 Stat. 567 (1910), and the Arizona Constitution, art. 20, § 4 (the "Disclaimer") to "clearly forbid" Arizona state courts from exercising authority over an Indian tribe. 149 Ariz. at 531, 720 P.2d at 506. Because ATC has provided no authority overruling this decision by the State's highest court, this Court is precluded from exercising jurisdiction over the Navajo Nation in this contested case for the purpose of acting on ATC's request for a declaratory judgment concerning the Navajo Nation's regulatory jurisdiction and the applicability of the Navajo Nation Water Code to ATC's water uses.[2]

III. THE MCCARRAN AMENDMENT DOES NOT WAIVE THE NAVAJO NATION'S SOVEREIGN IMMUNITY

Again, rather than responding to specific citations in the U.S. Memorandum, ATC attempts to conclude its case upon the simply false, assertion that "the U.S. Supreme Court has specifically held that the McCarran Amendment waives tribal sovereign immunity in water

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[2] The cases cited on pages 16 - 17 of the Response, in an attempt to argue that the tribal exhaustion requirement is somehow trumped by the McCarran amendment, are inapposite. This matter does not involve claims arising under the Price-Anderson Act whose specific terms were found to express "an unmistakable preference for a federal forum" in El Paso Natural Gas Co. v. Neztosie, ___ U.S. ____, 119 S.Ct. 1430, 1437 (1999). Although ATC's Response, at 17, cites Colorado River Water Cons. Dist. v. United States, 424 U.S. 800 (1976), for the proposition that the McCarran Amendment "states a clear Congressional preference for having [water adjudication] case heard in state courts," that case actually holds that "the McCarran Amendment in no way diminished the federal-district-court jurisdiction under [42 U.S.C.] § 1345." 424 U.S. at 809. In any event, the bulk of the issues raised by ATC's Petition are not water adjudication issues and neither the United States nor the Navajo Nation have suggested that the tribal exhaustion doctrine applies to the simple adjudication of ATC's water right. Likewise In re Pauline Haines d/b/a/ Polly's Place, No. 98-11797-13 (D.Mo. filed May 10, 1999), which is a very recent, and apparently unreported, district court decision still subject to appeal, is, by ATC's own characterization, a federal bankruptcy proceeding and by that fact alone distinguished from the present contested case.

adjudications." Response Brief at 19, see also page 12 ("the McCarran Amendment clearly waives the Navajo Nation's sovereign immunity in this water adjudication"). Specifically to the contrary is Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 566 n.17 (1983), quoted on page 16 of the U.S. Memorandum. See also United States v. Superior Court, 144 Ariz. 265, 273, 697 P.2d 658, 666 (1985) (also cited on page 16 of the U.S. Memorandum). ATC has cited no authority overruling San Carlos and Superior Court on this point and therefore has failed to meet the burden, imposed by Ariz.R.Civ.P. 8(a)(1), of affirmatively pleading an applicable waiver of sovereign immunity. ATC's Petition must therefore be dismissed.

IV. ATC'S PETITION RAISES NO RIPE ISSUE

ATC attempts to evade the import of ripeness caselaw cited in the U.S. Memorandum by citing cases which hold that federal court decisions are not precedent for the interpretation of Arizona's declaratory judgment statute. This is merely a straw man argument. No part of the discussion in the U.S. Memorandum is premised upon interpretation of the Arizona Declaratory Judgment Act, Ariz. Rev. Stat. Ann. § 12-1831. However, the U.S. Memorandum, at 3, did cite two Arizona state court cases, ignored by ATC, which indicate that ripeness analysis in Arizona follows the same conceptual framework established in federal cases, particularly Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). See Arizona Downs v. Turf Paradise, Inc, 140 Ariz. 438, 445, 682 P.2d 443, 450 (App. 1984) (citing Abbott).[3] Moreover,

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[3] ATC's assertion, Response at 11 n.4, that Abbott Laboratories has been "overruled" or "abrogated" by Califano v. Sanders, 430 U.S. 99 (1977) stretches credulity in the present context. The issue decided in Califano has no conceivable relevance to the present action. Notably, Arizona Downs cited Abbott Laboratories long after Califano, as did Assinibone & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation, 792 F.2d 782, 788 (9th Cir. 1986), which the ATC Response, at 11, cites as authoritative on the "correct" federal standard of ripeness. See also Ohio Forestry Assoc., Inc. v. Sierra Club, 523 U.S. 726,

there are numerous Arizona decisions which hold that actions under the Declaratory Judgment Act must, like other invocations of the courts' jurisdiction, present ripe and otherwise justiciable controversies.

In Arizona State Bd. Of Directors v. Phoenix Union High School, 102 Ariz. 69, 73, 424 P.2d 819, 823 (1967), the Arizona Supreme Court said:

> A declaratory judgment will be granted only when there is justiciable issue between the parties. No proceeding will lie under the declaratory judgment acts to obtain a judgment which is advisory only or which merely answers a moot or abstract question; a mere difference of opinion will not suffice.

(Citations omitted). As though anticipating the sort of arguments raised in the ATC Response at 8, the Arizona Court of Appeals stated, in Planned Parenthood Center of Tucson, Inc. v. Marks, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972) (cited for another proposition in ATC's Response at 10):

> even though the act is remedial and is to be liberally construed, it is well settled that a declaratory judgment must be based on an actual controversy which must be real and not theoretical. To vest the court with jurisdiction to render a judgment in a declaratory judgment action, the complaint must set forth sufficient facts to establish that there is a justiciable controversy. A 'justiciable controversy' arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination.

(Citations omitted, emphasis added.).

None of the cases cited by ATC are to the contrary, and all would meet the ripeness standards set forth in the U.S. Memorandum.[4] Rivera v. City of Douglas, 132 Ariz. 117,

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728, 118 S.Ct. 1665, 1667 (1998) (citing Abbott Laboratories, without qualification, as the source of the Supreme Court's standard of ripeness for agency action).

[4] ATC tries to create the misleading impression that there is some disagreement about what the federal standard is, claiming the "United States has misstated the appropriate federal rule for cases such as this." Response at 11. ATC goes on to assert: "[t]he correct rule has two prongs: fitness of the issue for judicial decision and hardship to the parties if court review is withheld." Id., citing Assiniboine (which, as earlier noted, merely cites the Abbott Laboratories test). This

644 P.2d 271 (Ct. App. 1982) (refusal to submit to polygraph test would result in immediate termination of employment); Elkins v. Vana, 25 Ariz. App. 122, 541 P.2d 585 (1975) (dispute about existing promissory notes); Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939) (challenge to final city action annexing property); Ricca v. Bojorquez, 13 Ariz. App. 10, 473 P.2d 812 (1970) (challenge to final action of Board of Supervisors issuing no-fence order encompassing plaintiff's property); Planned Parenthood Committee of Phoenix, Inc. v. Maricopa County, 92 Ariz. 231, 234 375 P.2d 719, 721 (1962) (parties stipulated that challenged directive had caused plaintiff's business activities to "come almost to a standstill"). In contrast to all of these cases, ATC, in the present matter, can point to no action by the Navajo Nation that "clearly and immediately affects the property rights" ATC claims. Planned Parenthood Center of Tuscon, 17 Ariz. App. at 312, 497 P.2d at 538 (quoting 2 W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 624 (2d ed. 1951).

ATC has identified only two actions which it claims make this action justiciable: (1) the June 4, 1997 letter from Stanley M. Pollack to William J. Darling attached as Exhibit 2 to ATC's Petition ("Pollack Letter"); and (2) the listing of ATC's Statement of Claimant in Table C-1 of the September 23, 1994, preliminary Hydrographic Survey Report for Indian Lands in the Little Colorado River System ("draft Indian Lands HSR"). Neither of these actions is conceivably final or such as to impose any immediate hardship on ATC.

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statement differs in no significant respect from the following statement on page 4 of the U.S. Memorandum (quoting Abbott Laboratories): "Application of the doctrine [of ripeness] requires consideration of two factors: (1) 'the fitness of the issues for judicial decision,' and (2) 'the hardship to the parties of withholding court consideration.'" In addition, contrary to ATC's assertion, Response at 11, the U.S. Memorandum nowhere asserts that both prongs of the test must be satisfied for an action to be ripe. Rather the United States argued there, as here, that ATC meets neither condition for ripeness.

With respect to the Pollack Letter, ATC takes issue with the United States' "careful parsing" of the document's terms. Response at 5 n.2. However, careful parsing of documents involved in litigation is one of the tasks that courts and lawyers are required to perform. The letter in question speaks for itself, and the U.S. Memorandum's "careful parsing" consists mainly of simply quoting the actual language of the document. U.S. Memorandum at 6 ATC's characterization of this communication as having an intent to "threaten" says more about ATC's state of mind, than it does about anything to be found on the face of the letter. As already argued in the U.S. Memorandum, at 6 – 7, without meaningful rebuttal by ATC, nothing about the Pollack Letter fixed any legal relationship between the Navajo Nation and ATC, or had any impact on ATC's day-to-day business. To this date, ATC has been unable to identify any way in which the Pollack Letter itself has harmed ATC. ATC still does not allege that the Pollack Letter was even followed by a notice of non-compliance, which itself would be insufficient to create a ripe action, for the reasons provided in the U.S. Memorandum at 7 – 8.

Likewise, ATC's assertion that the draft Indian Lands HSR creates a justiciable issue is ill-conceived. As indicated by the September 23, 1994, letter from the Special Master, which accompanied the draft Indian Lands HSR, all parties, including ATC will have an opportunity to submit comments for ADWR's consideration before the Indian Lands HSR is finalized. The document therefore is not a final agency action. Moreover, the Special Master's letter states, on page 5:

> In tables C-1 . . ., the preliminary HSR identifies the statements of claimant filed by persons who occupy land within the external boundaries of the reservation but who appear to claim water rights solely under state law. DWR has not determined whether these claims pertain to allotments or in-holders. Unless these claimants submit comments indicating that their statements are based on federal law, DWR intends to exclude these statements of claimant from the final Indian Lands HSR. These statements of claimant will be included in the HSR for the lower Little Colorado River watershed scheduled for later completion, but the

> claimants will not be allowed to claim a federal law basis for their water right at that time.

(Emphasis added.); see also draft Indian Lands HSR at 102. Thus, even if ATC does nothing, its claims will not be included in the final Indian Lands HSR.

Accordingly, the issues concerning tribal jurisdiction raised by ATC's Petition are not, under any applicable standard, ripe. The Petition must therefore be dismissed.

Conclusion

Because ATC's Petition identifies no ripe or otherwise justiciable issue, asks the Court to exercise jurisdiction over an Indian tribe in violation of the Enabling Act and Arizona Constitution as construed by Smith, and fails to allege any applicable waiver of the Navajo Nation's sovereign immunity, the United States respectfully submits that this contested case must be dismissed.

Dated: June 30, 1999

Respectfully submitted,

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The original of the foregoing mailed this 30th day of June, 1999, to the Clerk of the Apache County Superior Court for filing. Copies of the foregoing mailed this 30th day of June, 1999, to all parties on the Court-approved mailing list for Case No. 6417-34-1.

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