IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) CHICKASAW NATION and (2) CHOCTAW NATION OF OKLAHOMA, Plaintiffs, vs. (1) Mary Fallin, in her official capacity as Governor of the State of Oklahoma; (2) Rudolf John Herrmann, (3) Tom Buchanan, (4) Linda Lambert, (5) Ford Drummond, (6) Ed Fite, (7) Marilyn Feaver, (8) Kenneth K. Knowles, (9) Richard Sevenoaks, and (10) Joe Taron, each in her or his official capacity as a member of the Oklahoma Water Resources Board; (11) J.D. Strong, Executive Director of the Oklahoma Water Resources Board in his official capacity; (12) City of Oklahoma City, an Oklahoma municipal corporation; (13) Oklahoma City Water Utility Trust, a public trust for the benefit of the City of Oklahoma City, Defendants.	)	Case No. CIV-11-927-W

SECOND AMENDED COMPLAINT

I. NATURE OF THE ACTION

1. The plaintiffs, the Chickasaw Nation and Choctaw Nation of Oklahoma ("Plaintiff Nations") seek declaratory and injunctive relief to protect their federal rights-

including their present and future use water rights, regulatory authority over water resources, and right to be immune from state law and jurisdiction. Each of these rights is guaranteed to them by the Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 333 ("1830 Treaty"), and is protected by federal law. The Plaintiff Nations hold those rights within the territory set aside by Article 2 of that Treaty, as later modified by the 1866 Treaty of Washington, Act of Apr. 28, 1866, 14 Stat. 769 ("Treaty Territory"). The Plaintiff Nations' rights under those treaties, which are the "supreme Law of the Land," U.S. Const., art. VI, cl. 2, are prior and paramount to any water rights or regulatory authority claimed by the Defendants, and are protected by the disclaimer of authority over Indian rights and property on which Congress conditioned Oklahoma's statehood in the Oklahoma Enabling Act, Act of June 16, 1906, 34 Stat. 267 ("Oklahoma disclaimer"), as well as other controlling federal law.

2. The Plaintiff Nations also bring this action for a declaration that the Defendants Oklahoma City Water Utility ("Water Trust") and Oklahoma City have no right to use or occupy the Plaintiff Nations' lands for any purpose, including as a site for existing or additional pipelines or any other structures used to export water from the Treaty Territory to Oklahoma City, *i.e.*, the existing Atoka pipeline, any additional pipelines to be constructed parallel to that pipeline, or any other pipeline to be used to export water from the Treaty Territory.

3. The Plaintiff Nations depend on the Treaty Territory's water resources to fulfill the homeland purposes of their Treaties, which purposes include providing an environment with clean and healthy rivers and streams, abundant upland and aquatic

resources, pursuing economic development and self-sufficiency, and meeting the present and future needs of communities throughout their homeland. These water resources include, *inter alia*, those stored in Sardis Reservoir, a federal water storage facility, and Atoka Lake, a non-federal water storage facility, as well as the free flowing waters of the Kiamichi Basin, Clear Boggy Basin, and the other river systems located within the Treaty Territory. These waters are subject to the Plaintiff Nations' water rights, are critical to the maintenance of the instream flows on which the environment, habitats, and communities of the Treaty Territory rely, and are a key element of the local economy.

4. In June 2010, the members of the Defendant Oklahoma Water Resources Board, each of whom is sued in his or her official capacity (collectively the "Board"), entered into an agreement with the Water Trust that purports to sell to the Water Trust all of the Board's rights, if any, to store waters of the Kiamichi Basin in Sardis Reservoir and to effectively control withdrawals of water from such facility. Storage Contract Transfer Agreement Between Oklahoma City Water Utilities Trust and State of Oklahoma Water Resources Board (June 15, 2010) ("June 2010 agreement"). Defendants' representations have made plain that a fundamental element of the June 2010 agreement's consideration is the promise, to be implemented by the Board, to issue a water-use permit that would purport to grant the Water Trust the right to withdraw water from the Sardis Reservoir and/or Kiamichi Basin in an annual amount equal to roughly ninety percent (90%) of Sardis's estimated dependable yield.

5. As contemplated by its arrangement with the Board, the Water Trust submitted its prerequisite application for the issuance of such water-use permit, and the

Board's administrative proceedings on such application are now awaiting formal notice and hearing. Recently, the Water Trust publicly reaffirmed its intent to move forward with acquiring this permit. Defendants' actions manifest their collective arrogation of unilateral authority to control the withdrawal and export of water from the Treaty Territory pursuant to permits issued in state administrative proceedings as well as the right to sell that water outside the Treaty Territory and even, with State legislative approval, out-of-state. Defendants' actions demonstrate their flawed conclusion that they have complete license to execute each element of this plan, and to do so unconstrained by the Plaintiff Nations' Treaty-protected rights to and regulatory authority over Treaty Territory water resources. Indeed, in the June 2010 agreement, the Board and the Water Trust assert "[t]he plenary jurisdiction and authority of the State over water in the State pursuant to State and Federal law, including but not limited to water in Sardis Reservoir and the Kiamichi River and its tributaries," which they further assert "shall not be affected by the transfer of storage rights and obligations under [the June 2010 agreement.]" *Id*. § 2.4. Defendants' contentions are contrary to federal law.

6. The Plaintiff Nations' rights to and regulatory authority over Treaty Territory water resources are prior and paramount to any water rights claimed by or derived from the Defendants in the Treaty Territory under state law, and federal law preempts interference with the Plaintiff Nations' rights by Defendants. Accordingly, the Defendants cannot simply disregard the existence of those rights as they act in furtherance of their own assertion of dominion and control so that such resources might be severed and exported from their natural hydrologic systems and Plaintiff Nations'

Treaty Territory. To allow the Defendants to so act would deny the Plaintiff Nations any real opportunity to protect Treaty Territory water resources and, effectively, appear to render meaningless the Plaintiff Nations' rights to and regulatory authority over those resources. If the Defendants succeed in unilaterally selling Treaty Territory water resources, the Plaintiff Nations' ability to protect and enforce their water rights would be severely prejudiced.

7. Consideration of the Plaintiff Nations' water rights, particularly the impact of the withdrawal and export of Treaty Territory water resources on those rights, cannot lawfully occur within the auspices of the State's administrative proceedings, which are done on only a piecemeal, *i.e.*, on a permit application-by-permit application basis, which is the Defendants' manifest plan. At a minimum, the export of water beyond the Treaty Territory under color of such a permit constitutes an effort to illegally expropriate such waters in violation of the Plaintiff Nations' federal rights, including *inter alia* their Treaty right to be free from the exercise of state jurisdiction, the Oklahoma disclaimer, and the McCarran Amendment, 43 U.S.C. § 666. The McCarran Amendment provides the only means authorized by Congress for any state to adjudicate tribal water rights that arise under federal law and are therefore subject to restraints on use or alienation under federal law. State administrative proceedings conducted on a non-comprehensive, *i.e.*, permit application-by-permit application basis, such as that initiated by the Water Trust for Kiamichi Basin waters, are contrary to the purposes and objectives of the McCarran Amendment, and fail to satisfy its requirements.

8. The Plaintiff Nations could not adequately protect their Treaty-based water rights and regulatory authority from piecemeal diminishment by the Defendants through state administrative proceedings in any event. *First*, the Board has already determined that the State has plenary jurisdiction and authority over those waters under State and Federal law, a position that denies the existence of the Nations' rights. Thus, it would be futile for the Nations to seek to protect their rights in those proceedings. *Second*, to participate in those proceeding, the Plaintiff Nations would have to relinquish their Treaty right to be free from the application of state jurisdiction and waive their sovereign immunity. Any process that requires an Indian tribe to relinquish one treaty right in order to protect others is unjust and violates federal law. In sum, the Defendants' reliance on a process that denies the Plaintiff Nations any opportunity to protect their water rights and regulatory authority violates federal law.

9. At the pretrial conference held in this case on November 3, 2011, counsel for the Board stated that the Board intends to file a state court action on or before February 1, 2012, which will seek a stream system adjudication under state law, in purported reliance on the McCarran Amendment. That action, if filed, will not have any effect on the violations of federal law that this action seeks to remedy, nor would the filing of a state court action have any impact on the harm to the Nations that would result from the Board's use of piecemeal state administrative proceedings, such as the Water Trust's pending water-use permit application, to effectuate the withdrawal, export, and sale of Treaty Territory waters. Furthermore, the statutory scheme for the adjudication of water rights in a stream system that is available under state law does not satisfy the

substantive and procedural requirements of the McCarran Amendment. And as a result, the Nations' water rights are not subject to adjudication under that statutory scheme. Finally, even assuming, *arguendo*, that this Court determines that the State statutory scheme is otherwise adequate under the McCarran Amendment, the questions of federal law presented in this action should be decided by the Court, as the State Courts of Oklahoma lack jurisdiction over these questions. For these reasons, the federal questions presented in this action concerning the Nations' water rights and regulatory authority over water resources must be decided by this Court in the exercise of federal jurisdiction.

10. Given Plaintiff Nations' longstanding yet wholly disregarded effort to commence government-to-government negotiations with the State of Oklahoma ("State") on these critical issues, the initiation of this action is the only means available to the Plaintiff Nations to protect their Treaty rights and the critical water resources of their promised and federal-law protected homeland.

II. PARTIES

11. Plaintiff Chickasaw Nation is a federally recognized Indian tribe, with a governing body duly recognized by the United States Secretary of the Interior, that possesses those rights, sovereign authority, and immunity from the application of state law and state jurisdiction that are guaranteed by its Treaties with the United States, other federal law, and the Chickasaw Nation Constitution.

12. Plaintiff Choctaw Nation of Oklahoma is a federally recognized Indian tribe, with a governing body duly recognized by the United States Secretary of the Interior, that possesses those rights, sovereign authority, and immunity from the

application of state law and state jurisdiction that are guaranteed by its Treaties with the United States, other federal law, and the Choctaw Nation Constitution.

13. Defendant Mary Fallin is the Governor of the State of Oklahoma, exercising those authorities delegated to her by the Oklahoma Constitution and state law, and is sued in her official capacity. As Governor, she is vested with the "Supreme Executive power" of the state of Oklahoma, Okla. Const. art. VI, § 2, and is directed to "cause the laws of the State to be faithfully executed, and shall conduct in person or in such manner as may be prescribed by law, all intercourse and business of the State with other states and with the United States. . . ." *Id*. art. VI, § 8.

14. Defendants Rudolf John Herrmann, Tom Buchanan, Linda Lambert, Ford Drummond, Ed Fite, Marilyn Feaver, Kenneth K. Knowles, Richard Sevenoaks, and Joe Taron, each of whom is sued in her or his official capacity, are members of the Oklahoma Water Resources Board ("Board"), an agency of the State of Oklahoma exercising certain powers and duties delegated under Title 82 of the Oklahoma Statutes. *See* Okla. Stat. tit. 82, § 1085.1.

15. Defendant J.D. Strong is the Executive Director of the Board, and is sued in his official capacity.

16. Defendant City of Oklahoma City, an Oklahoma municipal corporation, is a city within and the capital of the State of Oklahoma, organized under the laws of the State of Oklahoma. Oklahoma City is not within the Plaintiff Nations' Treaty Territory.

17. Defendant Oklahoma City Water Utility Trust ("Water Trust"), formerly the Oklahoma City Municipal Improvement Authority, is a public trust charged under

state law and its organic documents to function as the primary policy-making body for the Oklahoma City Water and Wastewater Utilities.

III. JURISDICTION AND VENUE

18. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1362 because it states substantial questions of federal law arising under the United States Constitution, treaties between the United States and Plaintiff Nations, and federal statutory and common law, and is brought by federally recognized Indian tribes with governing bodies duly recognized by the United States Secretary of the Interior.

a. The treaties under which this Court has jurisdiction are the Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 333; the 1837 Treaty of Doaksville, Act of Jan. 17, 1837, 11 Stat. 573; the Treaty of Doaksville, Act of Nov. 4, 1854, 10 Stat. 1116; the 1855 Treaty of Washington, Act of June 22, 1855, 11 Stat. 611 and the 1866 Treaty of Washington, Act of Apr. 28, 1866, 14 Stat. 769, which are the "supreme Law of the Land," U.S. Const., art. VI, cl. 2.

b. The federal statutes under which this Court has jurisdiction include the following: (1) Act of Congress of April 26, 1906, § 27, 34 Stat. 137, 148, which provides that Plaintiff Nations' property "shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of the said tribes . . . ;" (2) Act of Congress of June 16, 1906, § 1, 34 Stat. 267, which required as a precondition to the formation of the State of Oklahoma that the residents of such state disclaim any authority to interfere with "the rights of person or property pertaining to the Indians" or

"to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights . . . ."; (3) the Indian Non-Intercourse Act, 25 U.S.C. § 177, which precludes any transfer, alienation, or sale of tribal property without express federal authorization; (4) the Indian Right-of-Way Act, 25 U.S.C. §§ 323-328; and (5) the McCarran Amendment, 43 U.S.C. § 666, which provides the sole basis on which a state may seek to exercise jurisdiction over tribal rights to water resources.

19. This Court also has jurisdiction under federal common law because the Plaintiff Nations' claims arise under decisions of the federal courts that deny Oklahoma any civil-adjudicatory and/or civil-regulatory jurisdiction over matters arising in Indian country or otherwise against or affecting the sovereign interests of federally recognized Indian tribes or their property except and only insofar as expressly authorized by federal statute. This case also arises under the federal common law that protects the Plaintiff Nations' possessory rights to their lands, and authorizes an Indian tribe to bring an action to protect their lands.

20. Venue is proper in this Court under 28 U.S.C. § 1391(b) because all of the defendants reside within the State of Oklahoma and State's capitol is located in Oklahoma City, Oklahoma, which lies within the jurisdictional boundaries of this Court and, furthermore, many of the events giving rise to the claims herein occurred within those jurisdictional boundaries.

IV. ALLEGATIONS COMMON TO ALL CLAIMS

A. Early History and the Removal Treaties

21. The peoples of the Chickasaw and Choctaw Nations occupied the area now within the southeastern United States from time immemorial. Their first recorded contact with Europeans resulted from Hernando de Soto's *circa* 1540 exploration of the lower Mississippi River. Prior to and throughout the American Revolutionary War, the Chickasaw and Choctaw Nations were active in the international relations of the American colonies. Treaty relations between the United States and Plaintiff Nations began very early in the history of the American Republic. *See*, *e.g.*, Treaty of Hopewell with the Choctaw Nation, Act of Jan. 3, 1786, 7 Stat. 21; Treaty of Hopewell with the Chickasaw Nation, Act of Jan. 10, 1786, 7 Stat. 24.

22. The early treaties recognized the right of the Chickasaw and Choctaw Nations to remain in their aboriginal homelands. But after the Louisiana Purchase in 1803, the United States began to pressure the Plaintiff Nations to remove from their aboriginal homelands to a *new* homeland west of the Mississippi River.

23. The United States first sought to remove the Choctaw Nation to lands in the Arkansas Territory, which were promised to the Choctaw under the Treaty of Doak's Stand, Oct. 18, 1820, 7 Stat. 210. The United States failed to secure those lands from non-tribal incursion and settlement, however, and watching this telling federal failure – which occurred *before* any removal commenced – Choctaw citizens refused to leave their homes. *Choctaw Nation v. Oklahoma*, 397 U.S. at 620, 623-24 (1970). The Treaty of January 20, 1825, 7 Stat. 234, was then negotiated, in which the Choctaw Nation was

forced to cede the Arkansas Territory lands (of which it had never taken formal possession) back to the United States in exchange for promises of a new homeland, further west, in the Indian Territory. *Choctaw Nation*, 397 U.S. at 624.

24. When the removal of the Plaintiff Nations to the Indian Territory by the United States was delayed for various reasons, the southern states sought to displace the Plaintiff Nations from their homes unilaterally, in violation of their Treaty rights. *See generally, e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Responding to this pressure, President Andrew Jackson announced the Indian removal policy, which was followed by Congress's passage of the Indian Removal Act of 1830, 4 Stat. 411.

25. Shortly thereafter, the Choctaw Nation and the United States entered into the Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 333 ("1830 Treaty"). Article 2 of the 1830 Treaty describes the new homeland set aside for the Choctaw Nation (the "Treaty Territory") as follows:

> The United States under a grant specially to be made by the President of the U.S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to insure to them while they shall exist as a nation and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork; if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning.

Id.

26. Article 4 of the 1830 Treaty guarantees tribal self-government and tribal jurisdiction over all persons and property within the Treaty Territory and promises that no state shall ever interfere with those rights and that the Treaty Territory will never be part of any state:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or state shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian affairs.

Id.

27. Two years later, and under pressure to remove, the Chickasaw Nation signed the Treaty of Pontitock Creek, Act of Oct. 20, 1832, 7 Stat. 381, acknowledging in the preamble to the Treaty that:

> The Chickasaw Nation find themselves oppressed in their present situation; by being made subject to the laws of the States in which they reside. . . . Rather than submit to this great evil, they prefer to seek a home in the west, where they may live and be governed by their own laws. And believing that they can procure for themselves a home, in a country suited to their wants and condition, provided they had the means to contract and pay for same, they have determined to sell their country and hunt a new home.

Id. pmbl. The Chickasaw Nation's "home in the west" was ultimately found in the lands previously secured to the Choctaw Nation by the Treaty of Dancing Rabbit Creek.

28. The 1837 Treaty of Doaksville, Act of Jan. 17, 1837, 11 Stat. 537, secured to the Chickasaw Nation a "Chickasaw District" within the Choctaw Nation's system of government, and guarantied rights of homeland ownership and occupancy to the Chickasaw Nation "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws) . . . ." *Id.* art. 1. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995) (recognizing that art. 1 of the 1837 Treaty applied the 1830 Treaty to the Chickasaw Nation).

29. The physical removal of the Plaintiff Nations' citizens – the infamous Trail of Tears – took place under brutal conditions. Alexis de Tocqueville, who witnessed the Choctaw Nation's removal, offered this bleak testimony:

> It is impossible to conceive the extent of the sufferings which attend these forced emigrations. They are undertaken by a people already exhausted and reduced; and the countries to which the newcomers betake themselves are inhabited by other tribes which receive them with jealous hostility. Hunger is in the rear; war awaits them, and misery besets them on all sides.

De Tocqueville, Alexis, DEMOCRACY IN AMERICA 345 (Colonial Press 1900 ed.) (1835).

30. Many tribal citizens perished before reaching the promised Indian Territory lands – including Chickasaw Nation Chief Tishomingo, that tribal nation's respected leader throughout the difficult removal era and after whom the Chickasaw Nation named its Indian Territory capital.

B. Events Subsequent to Removal

31. As the United States Supreme Court has recognized, the Plaintiff Nations' Indian Territory lands were, for most purposes, "to be considered as *an independent country*." *Atlantic & P. R. Co. v. Mingus*, 165 U.S. 413, 435-36 (1897) (emphasis added). Once resettled in those lands, Plaintiff Nations' citizens turned to establish their new Indian Territory home by organizing new governmental, legal, economic, and educational systems. In 1842, President John Tyler consummated the sovereign-to-sovereign homeland transaction solemnly covenanted in the 1830 Treaty by conveying patented fee title in accord with the Treaty's pledge of permanency and guaranteed self-government. 1830 Treaty, art. 4.

32. By the 1855 Treaty of Washington, 11 Stat. 611, Plaintiff Nations' combined tribal systems were again made independent of each other, although the common ownership of the Treaty Territory, the 1842 patent, and the rights to self-government secured under prior treaties remained in force. The 1855 Treaty affirmed and implemented Plaintiff Nations' joint title – with the Choctaw Nation holding an undivided 75% interest and the Chickasaw Nation holding an undivided 25% interest in the entirety of the sovereign estate. This allocation remains effective today.

33. During this period – but for the incidence of debilitating drought – Plaintiff Nations relied on the rivers and streams of their sovereign estate as the primary avenues of commerce, using those systems to transport goods produced within the Treaty Territory to markets further abroad. Plaintiff Nations established and regulated ferry crossings for purposes of managing their emerging road systems; they also facilitated

and, when needed, oversaw the development of water supply systems to support their combined populations.

34. Following the American Civil War, the Plaintiff Nations' Treaty Territory was reduced when they were required to cede to the United States all Indian Territory lands held by treaty west of the 98th Meridian. 1866 Treaty of Washington, art. 3, Act of Apr. 28, 1866, 14 Stat. 769. This cession altered the western boundary of the Treaty Territory. Today that territory encompasses all or part of twenty-two counties in the State of Oklahoma – the counties of Atoka, Bryan, Carter, Choctaw, Coal, Garvin, Grady, McClain, Murray, Haskell, Hughes, Jefferson, Johnston, Latimer, LeFlore, Love, Marshall, McCurtain, Pittsburgh, Pontotoc, Pushmataha, and Stephens. Notwithstanding the United States' reduction of the Nations' Treaty Territory, their Treaty-protected rights to sovereign self-government, which includes rights to the ownership and regulation of tribal water resources, were reaffirmed throughout that larger portion of the Treaty Territory that the Nations retained.

35. Non-tribal hunger for the Plaintiff Nations' lands continued to grow during the late 19th and early 20th centuries, and on the eve of Oklahoma's statehood, Congress satisfied that hunger with the enactment of the Act of April 26, 1906, 34 Stat. 137, which allotted the Plaintiff Nations' lands to individuals – tribal and non-tribal – alike. While the Plaintiff Nations lost much of their sovereign estate as a result, Congress made no provision for allotment to diminish the Nation's water rights held by virtue of their treaties and the Removal-era homeland-for-homeland transaction among the federal and tribal sovereigns.

36. Instead, those interests *not* alienated under the 1906 Act were retained by the United States in trust for the Plaintiff Nations' benefit. *See id*. § 27; *accord* 25 U.S.C. § 1779(7); *Choctaw Nation*, 397 U.S. at 627.

37. Congress subsequently provided for Oklahoma's statehood under the terms of the Oklahoma Enabling Act, Act of June 16, 1906, 34 Stat. 267. In so doing, Congress protected the Treaty rights of the Plaintiff Nations by requiring Oklahoma to disclaim any authority to interfere with "the rights of person or property pertaining to the Indians" or "to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights . . . ." *Id*. § 1. The disclaimer clause in the Oklahoma Enabling Act "is a general reservation of federal and tribal jurisdiction over 'Indians, their lands, [and] property,'" *Indian County, U.S.A. v. Okla. Tax Comm'n*, 829 F.2d 967, 979 (10th Cir. 1987), and disclaims both "proprietary" and "governmental authority." *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 712 n.2 (10th Cir. 1989). Such provision, in accord with the well-established Indian canon, was meant – and must be construed – to protect retained tribal rights notwithstanding the advent of the new state. In sum, as a matter of federal law, Oklahoma's very formation was conditioned on its agreement not to disturb tribal rights or interfere with superior federal authority.

C. The Plaintiff Nations' Legal Interests in Treaty Territory Waters

38. The waters of the Treaty Territory include *inter alia*: (a) the Kiamichi Basin, a river system located in the heart of the Treaty Territory, that includes two major federal storage facilities, Sardis Reservoir and Hugo Reservoir; (b) the Clear Boggy

Basin, a river system, also located in the heart of the Treaty Territory, that also includes two major storage facilities, Atoka Lake, a non-federal facility, and McGee Creek Reservoir, a federal facility located south and east of Atoka Lake; (c) all or part of twenty-nine other surface water systems, which include a total of eleven federal and thirty-three state and local water storage facilities. Neither the waters stored in the three federal and one non-federal facilities specifically referenced above, nor the vast majority of the other surface and groundwater resources of the Treaty Territory, stored or free flowing, have been definitively adjudicated or otherwise allocated consistent with the McCarran Amendment.

39. The Plaintiff Nations depend on the waters of the Treaty Territory to fulfill the homeland purposes for which that territory was set aside under the 1830 Treaty. Those purposes include protecting and enhancing the environmental quality and productivity of the Treaty Territory lands, waters, and natural and cultural resources, pursuing economic self-sufficiency, and meeting the growing needs of their communities. The Plaintiff Nations depend on those waters to meet their present and future needs with respect to these and other lawful purposes.

40. As a matter of policy and practice, Plaintiff Nations have not objected and (do not object) to the productive use of tribal water resources for the economic and environmental health of the Treaty Territory communities and residents. Instead, the Plaintiff Nations have consistently worked with local communities, interests, and residents to ensure appropriate stewardship and management of territorial water resources for the benefit of the regional economy and environment. They have, however, *never*

consented to the proposed or actual export of water resources from the Treaty Territory – including Defendants' proposed export of Kiamichi Basin waters or their actual and ongoing export of Clear Boggy Basin waters.

41. The 1830 Treaty secures to the Plaintiff Nations sovereign and proprietary rights to lands and waters in the Treaty Territory and protects those rights from interference by the State. *Id.* arts. 2 and 4. The 1830 Treaty granted those rights to the Plaintiff Nations as a political society, *see Choctaw Nation*, 397 U.S. at 632 n.8, and established the Plaintiff Nations as autonomous sovereigns "in lieu of a prospective State." *Id*. at 638 (Douglas, J., concurring). The Plaintiff Nations' land and water rights are now held in trust by the United States under Section 27 of the 1906 Act, 34 Stat. 137, 148.

42. The water rights held by the Nation under the 1830 Treaty are prior and paramount to any water rights or regulatory authority in Treaty Territory waters claimed under State law. Those rights have never been abrogated, as Congress recently acknowledged in the Arkansas Riverbed Settlement Act, which approved a settlement to which both Plaintiff Nations were parties, declaring that "no provision of [the Act] shall be construed to extinguish or convey any water rights of the Indian Nations in the Arkansas River or any other stream . . . ." 25 U.S.C. § 1779c(b)(2)(B).

43. Under the 1830 Treaty, the Plaintiff Nations' sovereign estate also includes the stream beds and banks within their treaty territory. *Choctaw Nation*, 397 U.S. at 634-35; *see also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 82-83 (1922); *compare Montana v. United States*, 450 U.S. 544, 555 n.5 (1981) (emphasizing unique

status of the American Indian tribal nations of Indian Territory in this regard). The ownership of those lands by the Plaintiff Nations under the 1830 Treaty is an essential attribute of their sovereignty and includes the power to regulate the use of those waters. Those rights were granted to the Plaintiff Nations before Oklahoma became a State, and thus "the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926) (citations omitted).

44. Under Article 4 of the 1830 Treaty, the Plaintiff Nations have the right of self-government and jurisdiction over their lands and waters as well as an immunity – which is guaranteed also by the federal common law of Indian affairs – from the application of state law and the exercise of state jurisdiction. Article 4 states expressly that "no Territory or state shall ever have a right to pass laws for the government" of the Plaintiff Nations. *Id*. art. 4. Article 4 "provides for the [Plaintiff Nations'] sovereignty within Indian country," *Oklahoma Tax Comm'n*, 515 U.S. at 466, and "guaranteed to the [Plaintiff Nations] 'the jurisdiction and government of all the persons and property that may be within their limits.'" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978). This authority includes the right to regulate the Plaintiff Nations' Treaty Territory water resources.

45. In sum, as the United States Supreme Court has recognized, the United States' conveyance to Plaintiff Nations under the 1830 Treaty included "*virtually complete sovereignty*" over the entire sovereign estate, including sovereign title to the submerged lands throughout Plaintiff Nations' Treaty Territory, and left the federal

government, at least within the bounds of Indian Territory, with no interest to convey to Oklahoma upon statehood. *Choctaw Nation,* 397 U.S. at 635 (emphasis added); *cf. Brewer-Elliott,* 260 U.S. at 87-88 (concerning pre-statehood conveyance of portion of Cherokee Nation's sovereign estate to Osage Nation).

46. When Congress provided for Oklahoma's admission to the Union in 1906, it further protected the Plaintiff Nations' sovereign authority and estate by conditioning Oklahoma's admission on its citizens' forever disclaiming any ability to interfere with tribal rights or superior federal authority on the subject. *See* Act of June 16, 1906, § 1, 34 Stat. 267.

D. The Defendant Water Trust's and Oklahoma City's Use and Occupancy of Chickasaw Nation Lands

47. The United States holds in trust for the Chickasaw Nation the following described property (the "subject Chickasaw lands"):

> North Half (N½) of South Half (S½) of Southwest Quarter (SW¼) and the North Half (N½) of Southwest Quarter (SW¼) of Section Thirteen (13), Township One (1) North, Range Nine (9) East of the Indian Base and Meridian, containing 120 acres, more or less. . .

Warranty Deed Conveying Property onto United States in Trust (May 9, 1941). A life estate in the subject Chickasaw lands was previously held in trust by the United States for Mattie Cogburn, a member of the Chickasaw Nation, and prior to that those lands were held by Margaret Cogburn, also a member of the Chickasaw Nation.

48. The subject Chickasaw lands are located within the Nations' Treaty Territory. The Chickasaw Nation has a federal right to the possession of the subject Chickasaw lands.

49. In 1964, the Water Trust constructed a 110 mile long, 60 inch concrete pipeline to export water from Atoka Lake to Oklahoma City. The Atoka pipeline crosses the subject Chickasaw lands. The Water Trust operates the Atoka pipeline across the subject Chickasaw lands without the authorization required by federal law or the consent of the Chickasaw Nation.

50. The Water Trust intends to construct a second Atoka pipeline, parallel to the existing pipeline, and is also considering construction of a parallel third Atoka pipeline. Planning activities in connection with those proposals are ongoing. If constructed parallel to the existing Atoka pipeline, the two additional pipelines would also cross the subject Chickasaw lands. These activities threaten the subject Chickasaw lands.

51. The Chickasaw Nation has a federal right to the possession of the subject Chickasaw lands as a matter of federal common law and pursuant to federal statutes. In 1790, Congress enacted the first Indian Nonintercourse Act. 1 Stat. 137 (1790). This statute was re-enacted in 1802 and then again in 1834, and is currently codified in Title 25 of the United States Code as follows:

> § 177. Purchases or grants of lands from Indians. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant

> of the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000.

25 U.S.C. § 177. This statute prohibits the Water Trust's use of the subject Chickasaw lands.

52. In 1948, Congress authorized the Secretary of the Interior to grant rights of way over Indian lands:

> § 323. Rights-of-way for all purposes across any Indian lands. The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

25 U.S.C. § 323

53. The Secretary of the Interior's regulations provide that "[n]o right-of-way shall be granted over and across any tribal land . . .without the prior written consent of the tribe." 25 C.F.R. § 169.3(a).

54. The Secretary of the Interior has never granted or approved any right-of-way or easement authorizing the Water Trust or Oklahoma City to use or occupy the subject Chickasaw lands. The Chickasaw Nation has never consented to any such grant or approval.

55. The occupancy and use of the subject Chickasaw lands by the Water Trust and Oklahoma City is in violation of federal law.

E. State Officials' Prior Recognition of the Nations' Interests in Treaty Territory Water Resources, And the Defendants' Subsequent Change of Position

56. At an earlier time, State officials acknowledged the Plaintiff Nations' interests in the Treaty Territory waters by seeking their participation in a proposed interstate transaction involving Kiamichi Basin waters. Substantive negotiations over the State's proposal were conducted in apparent good faith, but no agreement was finalized.

57. Similarly, in an agreement arising from the litigation of *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472 (N.D. Okla. 2009), the State recognized that "'the Cherokee Nation has substantial interests in lands, water and other natural resources located within the Illinois River Watershed though the extent of those interests has not been fully adjudicated,'" which interests the state and tribal sovereigns intended to protect for their mutual benefit. *Id.* at 475 (quoting Agreement By and Among the State of Oklahoma and the Cherokee Nation (May 19, 2009)). As the United States Supreme Court recognized in *Atlantic & P.R. Co. v. Mingus*, 165 U.S. 413 (1897), the Nations' Treaty-protected rights to and throughout their Treaty Territory are analogous to those secured to the Cherokee Nation under its treaties. *Id*. at 436.

58. State officials also earlier conceded that the Indian Non-Intercourse Act, 25 U.S.C. § 177, appears on its face to apply to any transfer of tribal water rights and that the Board may be preempted from exercising jurisdiction over such rights. *See* Def. Mot. to

Dismiss Amended Complaint and Brief in Support at 24, *Tarrant Reg'l Water Dist. v. Herrmann,*2010 WL 2817220 (W.D. Okla. Jan. 12, 2010) (No. CIV-07-0045-HE).

59. But Defendants – as well as other Oklahoma planners, policy makers, and regulators – now presume the unilateral state-law right to withdraw, export, and sell the waters of the Treaty Territory to satisfy claimed needs outside of the Treaty Territory, including out-of-state, without recognition or consideration of controlling federal law that protects the Plaintiff Nations' water resource rights.

60. Furthermore, exports of water from the Treaty Territory have been proposed and even implemented by Defendants *without* consultation with the Plaintiff Nations and *without* regard for Plaintiff Nations' rights or the adverse economic and environmental impact to Plaintiff Nations and the citizens, communities, and residents of the Treaty Territory. The Water Trust presently withdraws and transfers Clear Boggy Basin waters to Oklahoma City for purposes of its municipal water supply via a 110-mile long pipeline with a ninety million gallon/day capacity. The Water Trust's diversions of Clear Boggy Basin waters occur in such volumes and are subject to such poor oversight and control as to regularly convert Atoka Lake to a muddy hole – a result that imposes adverse economic and environmental impacts on local communities and sparks considerable local and regional concern and opposition. Defendants have also proposed and continue to consider the sale of Treaty Territory water resources out of state.

61. Sardis Reservoir and the Kiamichi Basin are the latest focus of Defendants' plan to withdraw, export, and sell water resources of the Treaty Territory. Sardis Reservoir was built by the United States Army Corps of Engineers ("Army Corps")

pursuant to a 1974 contract with the Oklahoma Water Conservation Storage Commission ("Storage Commission"), a state agency that was dissolved in 1979. Okla. Stat. tit. 82, § 1085.38. Under the 1974 contract, the Army Corps agreed to build Sardis Reservoir and the Storage Commission agreed, on the State's behalf, to pay costs associated with its construction. The Board assumed the obligations of the Storage Commission after it was dissolved.

62. The State subsequently refused to meet its repayment obligations under the 1974 contract, and as a result, the Army Corps was forced *twice* to file suit to compel compliance. Ultimately, the Army Corps obtained a 2009 settlement decree that: (a) specifies the amount of the State's then-present default as twenty-one million seven hundred eighty-three thousand eight hundred and nine dollars ($21,783,809), which the settlement decree provides may be satisfied by a one-time payment of twenty-seven million eight hundred fourteen thousand two hundred and sixty-two dollars ($27,814,262); (b) provides for a future storage use debt obligation of thirty-eight million two hundred two thousand seven hundred ninety-seven dollars ($38,202,797); and (c) imposes an ongoing operation, management, and replacement obligation of one hundred forty-seven thousand and two hundred dollars($147,200) per year. *United States v. Oklahoma*, No. Civ-98-00521, at 2-4 (N.D. Okla. Sept. 3, 2009).

63. In June 2010, seeking to initiate a *new* export of water resources from the Treaty Territory, the Defendants executed an agreement that purports to establish a quid pro quo between the parties – the Water Trust's assumption of all obligations under the 1974 Sardis contract and a one-time payment of fifteen million dollars ($15,000,000) in

exchange for the Board's issuance of a water-use permit that secures to the Water Trust control of approximately ninety percent (90%) of the Sardis facility's sustainable yield, all of which is to be effectuated under an asserted state plenary jurisdiction over and control of water. Such asserted (and incorrect) state plenary authority notwithstanding, the June 2010 agreement purports to vest the Water Trust with ultimate authority over the future use-permitting of Kiamichi Basin waters stored in the Sardis Reservoir. Pursuant to this agreement, the Water Trust has already caused to be paid to the Board approximately twenty-nine million dollars ($29,000,000) to satisfy the adjudicated present-use debt under the 1974 Sardis contract and the ongoing operation, maintenance, and replacement obligations, likewise thereunder. The fifteen million dollar ($15,000,000) payment and issuance of the water-use permit remain outstanding.

64. Seeking to avoid litigated conflict over the right to manage and allocate the Sardis Reservoir and Kiamichi Basin resources, Plaintiff Nations have consistently and emphatically asserted their rights and interests and requested the commencement of meaningful government-to-government negotiations before Defendants took any precipitous action. Defendants, however, have failed to offer any meaningful or constructive response.

65. Likewise, the United States Department of the Interior's Assistant Secretary for Indian Affairs wrote to the Board requesting that it delay action on the Board-Water Trust transaction until such time as appropriate government-to-government negotiations could be structured and held. Such request was ignored.

F. The Illegality of the Defendants' Claimed Right and Actions to Withdraw, Export, Buy, and Sell Treaty Territory Waters

66. In March 2010, notwithstanding the Plaintiff Nations' longstanding efforts to initiate meaningful government-to-government negotiations with the State, the Water Trust filed with the Board an amended application for a permit to appropriate and use nearly 90% of Sardis Reservoir's estimated annual sustainable yield. The issuance of that permit by the Board – a promised act that was central to the June 2010 agreement – would vest the Water Trust under state law with the purported authority to withdraw, export, and sell water from the Treaty Territory in violation of the Plaintiff Nations' federally protected rights; these waters make a significant contribution to the environmental health of the Treaty Territory and to the instream flows of its rivers and streams, on which the Plaintiff Nations rely for homeland purposes. In June of 2011, the Water Trust publicized its intent to proceed with its already initiated plans to obtain that permit.

67. As shown by the June 2010 agreement and the actions taken to implement it, the Defendants contend they have a unilateral state law right to withdraw, export, and sell Treaty Territory water resources without regard to the Plaintiff Nations' Treaty-based water rights and regulatory authority, or the impact of such actions on those rights and the present and future water needs of the Plaintiff Nations. The Board and the Water Trust expressly recite in the June 2010 agreement that the State has "plenary jurisdiction . . . over water in the State pursuant to State and Federal law, including but not limited to water in the Sardis Reservoir and the Kiamichi River and its tributaries. . . ." *Id*. § 2.4.

This provision is contrary to federal law because the State does not have plenary jurisdiction and authority over Treaty Territory water resources, and Defendants' reliance on it constitutes a continuing violation of federal law, which includes an illegal attempt to evade the restriction on alienation of tribal property imposed by 25 U.S.C. § 177. Instead, the Treaty Territory water resources are subject to the prior and paramount water rights held by the Plaintiff Nations under the 1830 Treaty, and to the Nations' sovereign power to regulate the use of those waters. *See supra* at ¶¶38-46. In addition, the exercise of State jurisdiction over water resources in which the Nations have an interest is barred by the jurisdictional disclaimer on which Oklahoma's statehood was conditioned. *See supra* at ¶46. For the same reasons, the provision of the June 2010 agreement that purports to authorize the sale of water outside the Treaty Territory, *id*. § 2.6(c), is contrary to federal law.

68. Nevertheless, the Board presumes to possess the unilateral right to withdraw, export, and sell waters from their basin of origin and the Nations' Treaty Territory through piecemeal administrative proceedings that do not provide for a comprehensive adjudication of correlative rights. Since the Defendants do not, in fact, possess such unilateral authority, they may not use the Plaintiff Nations' Treaty Territory as a "water farm" and convert tribal water resources into a commodity controlled by them, as is their manifest plan. Such actions violate federal law by seeking the unlawful withdrawal, export, and sale of Treaty Territory water resources at such time, under such conditions, in such amounts, and to such persons or entities (including those out-of-state)

as the Defendants unilaterally determine to allow. Such unilateral action by the Defendants violates and is preempted by federal law.

69. Defendants' actions based on and in furtherance of their presumed authority under state law violate the Plaintiff Nation's federal rights to and regulatory authority over Treaty Territory water resources. The magnitude of harm associated with this violation is illustrated by, *inter alia*, the fact that there is only one present withdrawal and export of waters from the Treaty Territory (*i.e.*, the Water Trust's actual and ongoing diversions from the Clear Boggy Basin), yet there are currently on file with the Board seven additional water-use permit applications that seek authorization for trans-basin exports of Treaty Territory waters in a cumulative amount that exceeds one million nine hundred thousand (1,900,000) acre feet per year, *i.e.*, more than *ten* times the Water Trust's current diversion or proposed new withdrawal and export from the Kiamichi Basin.

70. Federal law does not allow the Defendants to simply deny the existence and disregard the legal effect of the Plaintiff Nation's Treaty-based water rights and regulatory authority over water resources of their promised homeland. The Plaintiff Nations' rights to and regulatory authority over water resources, which are held under the 1830 Treaty and other federal law, are prior and paramount to any rights to and regulatory authority over those same water resources claimed by or derived from the Defendants under state law, and federal law preempts Defendants' interference with the Plaintiff Nations' rights. Furthermore, the sale of tribal water resources is prohibited by the Indian Non-Intercourse Act, 25 U.S.C. § 177, and federal common law. Those same

laws preclude the future diversion of waters from the Kiamichi and Clear Boggy Basins except in accordance with a final determination made in a general stream adjudication of the water resources of the Treaty Territory that is lawfully initiated, and satisfies the substantive and procedural requirements of the McCarran Amendment.

71. Defendant's continued denial and attempted usurpation of tribal rights would also violate federal law by depriving the Plaintiff Nations any meaningful opportunity to protect their right to the water resources from being severed from their natural hydrologic system to be exported from the Treaty Territory and sold as a commodity. Indeed, the Plaintiff Nation's regulatory authority over Treaty Territory water resources would be meaningless if the Defendants could succeed in their unilateral scheme.

72. The Defendant's exclusive reliance on piecemeal state administrative proceedings to allocate water resources in the Treaty Territory, such as the proceedings initiated by the Water Trust's application to withdraw Kiamichi Basin waters and transfer them for consumptive use outside of the relevant basin of origin, also undermines the purposes and objectives behind the McCarran Amendment. While state statutes authorize an adjudication to determine "all rights to the use of water" from a system stream," those same statutes provide that "neither the bringing of such suit nor an adjudication in such a suit shall be a condition precedent to the granting of permits and licenses as authorized by this act." Okla. Stat. tit. 82, § 105.6. In other words, state law controlling water-use permitting proceedings summarily rejects the comprehensiveness requirement that is central to the McCarran Amendment and purports to authorize the Board to issue permits

for substantial trans-basin exports of water outside the context of any adequate adjudication. What is more, the only water rights considered or recognized in such state-law permit proceedings are those alleged under *appropriative* theory and based on *consumptive* uses, *e.g.*, Okla. Stat. tit. 82, §§ 105.2, 105.12, which precludes state water administrators from even considering non-appropriative federal law water rights possessed by American Indian tribal nations. A determination of rights to Treaty Territory waters by the Defendants in reliance on such a narrow state-law system is contrary to federal law and disregards and violates Plaintiff Nations' paramount federal rights – particularly when considered in light of the current and proposed large-scale water exports from the Treaty Territory.

73. The Plaintiff Nations cannot adequately protect their water rights and regulatory authority over water resources through state administrative proceedings in any event; to participate in those proceedings, the Plaintiff Nations would have to relinquish their Treaty right to be free from the application of state jurisdiction and waive their sovereign immunity. And as shown by the June 2010 agreement, the Board has already concluded that the State has plenary jurisdiction and authority over those waters, *id*. § 2.4, a position that denies the existence of the Nations' rights. Thus, it would be futile for the Nations to seek to protect their rights in those proceedings. The Defendants' reliance on piecemeal state administrative proceedings to authorize the withdrawal and export of Treaty Territory waters also forces a Hobson's choice on the Plaintiff Nations: (1) accede to the withdrawal, export and sale of water from the Treaty Territory at such times, under such conditions, in such amounts, to such persons or entities, and for such purposes as the

Board authorizes in its administrative proceedings; or (2) relinquish their Treaty-protected right to be free from the application of state law and the exercise of state jurisdiction, waive their federally-protected sovereign immunity from state judicial and administrative proceedings, and participate in State water-use permit proceedings as, when and where necessary to protect their rights. By trying to force the Plaintiff Nations to make this choice, the Defendants violate the Oklahoma disclaimer and Plaintiff Nations' Treaty-based water rights and regulatory authority, as well as their Treaty right to be free from the exercise of state jurisdiction. In sum, the Defendants' reliance on state administrative proceedings to authorize the withdrawal and export of Treaty Territory waters denies the Plaintiff Nations any opportunity to protect their water rights and regulatory authority over water resources in violation of federal law.

74. The Plaintiff Nations have no means of protecting their Treaty rights other than through this action. Securing an agreement with the State is not an option because it would require the State's consent, and the State has so far refused to engage in any meaningful intergovernmental negotiation of such an agreement with Plaintiff Nations. Nor can the Plaintiff Nations stand silent while their federal rights are violated in hopes that future opportunities to assert those rights will arise. Were the Plaintiff Nations not to seek protection for their Treaty-based water rights now and by this action, and instead allow the Defendants to withdraw, export, and sell water resources of the Treaty Territory at will – the Plaintiff Nations' water rights and present and future use and reliance on Treaty Territory water resources would suffer substantial diminishment and harm. At the same time, the growing out-of-Territory reliance on Treaty Territory water resources that

would have been severed from their natural hydrologic system and sold to others by the Defendants would make the later assertion of the Plaintiff Nations' rights substantially more difficult.

G. The Questions of Federal Law Presented in This Action Should be Decided by This Court Regardless of Whether the Board Files an Action in State Court

75. At the pretrial conference held in this case on November 3, 2011, counsel for the Board stated that the Board intends to file an action in state court on or before February 1, 2012, which will seek a stream system adjudication under state law, in purported reliance on the McCarran Amendment. That action, if filed, will not have any effect on the violations of federal law that this action seeks to remedy. This is so because the Board will continue to rely on piecemeal state administrative proceedings to authorize permits for single users, including the Water Trust's permit application pursuant to the June 2010 agreement. As a result, the violations of federal law that this action seeks to remedy and which arise from the defendants' reliance on piecemeal state administrative proceedings in an effort to expropriate, *i.e.*, the withdrawal, export, and/or sale of Treaty Territory waters outside the Treaty Territory, will not be affected by the Board's planned action. Nor would the planned state court action, if filed, have any impact on the harm to the Plaintiff Nations from the Defendants' continuing violations of federal law, as set forth in this complaint. Furthermore, the state administrative proceedings used by the Board to authorize the expropriation of water from the Treaty Territory by issuing permits through its non-comprehensive procedures and proceedings will continue to be inadequate to protect the Nations' rights for the reasons shown *infra* at ¶80. In sum,

Defendants' claimed plenary authority over Treaty Territory water resources is contrary to and violates federal law, and this is so whether or not the Board seeks to initiate a stream system adjudication under state law that purports to rely on the McCarran Amendment. Moreover, that action has not been filed. And even if it is filed, whether and if so the extent to which the water rights of the Plaintiff Nations will be subject to adjudication in that action is speculative because the position of the United States, whom the Board would presumably seek to join, is now unknown. Thus, the questions of federal law on which this action is based should be decided by this Court in the exercise of its jurisdiction under 28 U.S.C. §§ 1331 and 1362, *see supra* at ¶¶18-20, whether or not the Board files its planned state court action at some point in the future.

76. Furthermore, a state court proceeding under the McCarran Amendment cannot resolve the questions presented in this case. The consent to join the United States as a defendant pursuant to the McCarran Amendment, 43 U.S.C. § 666, is available only "(1) for the adjudication of rights to the use 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." *Id.* § 666(a)(1)-(2).

77. As the Supreme Court has made clear, "'the administration of such rights' in § 666(a)(2) must refer to the rights described in (1) for they are the only ones which in this context 'such' could mean; . . ." *United States v. Dist. Court in and for the County of Eagle*, 401 U.S. 520, 524 (1971). Thus, the waiver of the immunity under § 666(a)(2) is

applicable with respect to the *administration* of water rights "'only after a general stream determination under [§ 666(a)](1) has been made.'" *Wyoming v. United States*, 933 F. Supp. 1030, 1036 (D. Wyo. 1996) (quoting *South Delta Water Agency v. United States*, 767 F.2d 531, 541 (9th Cir. 1985)). "Quite simply, if 'there has been no prior adjudication of relative general stream water rights . . . there can be no suit for administration of such rights within the meaning of the McCarran Amendment.'" *Id.* (quoting *South Delta*, 767 F.2d at 541). Accordingly, the McCarran Amendment does not provide a state court with any authority to seek to administer tribal water rights until after a general stream adjudication that comports with the McCarran Amendment's substantive and procedural requirements has been completed. Such basic rule applies to Defendants and precludes and preempts any unilateral state-law pre-adjudication effort to administer waters within the Treaty Territory in any manner that would accomplish the withdrawal, export, and/or sale of such waters from their respective basin of origin and/or the Treaty Territory itself.

78. The McCarran Amendment does not waive the sovereign immunity of the Plaintiff Nations as parties to a state court general stream adjudication. *San Carlos Apache Tribe*, 463 U.S. at 566 n.17. Instead, the waiver is limited to the Indian water rights asserted by the United States in such proceedings. *Id*.

79. The McCarran Amendment does not authorize a state court to adjudicate questions of Indian title or tribal jurisdiction. Nor do Defendants have any other authority to adjudicate such rights in the State Courts of Oklahoma. Instead, federal law bars the State Courts from exercising jurisdiction over or applying state law to adjudicate

the Plaintiff Nations' rights. 1830 Treaty, art. 4; Oklahoma Enabling Act, § 1, Act of June 16, 1906, 34 Stat. 267. The disclaimer clause in the Oklahoma Enabling Act "is a general reservation of federal and tribal jurisdiction over 'Indians, their lands, [and] property,'" *Indian County, U.S.A. v. Okla. Tax Comm'n,* 829 F.2d 967, 979 (10th Cir. 1987), and disclaims both "proprietary" and "governmental authority." *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 712 n.2 (10th Cir. 1989). As a result, the defendants have no authority to seek to adjudicate the Nations' Treaty-based regulatory jurisdiction over Treaty Territory water resources in a State Court proceeding that relies on the McCarran Amendment.

80. Furthermore, the statutory scheme for the adjudication of water-use claims in a stream system that is available to the Board under state law violates federal law and fails to satisfy the substantive and procedural requirements of the McCarran Amendment. The water rights held in trust for the Nations by the United States are therefore not subject to adjudication under that statutory scheme. The deficiencies in the state statutory scheme that support this conclusion include, but are not limited to, the following:

a. The statute authorizing the Board to initiate a suit to determine all rights to the use of water from a stream system requires that "[t]he cost of such suit, including the costs on behalf of the state, shall be charged against each of the parties thereto in proportion to the amount of water rights allotted." Okla. Stat. tit. 82, § 105.6. Imposing these costs as a condition of the Nations' and the United States' participation in an action brought by the Board under this provision violates federal law. *See United States v. Idaho*, 508 U.S. 1, 9-10 (1993) (McCarran Amendment does not waive

immunity of the United States from state filing fees); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17 (1983) (McCarran Amendment does not abrogate Indian tribes' sovereign immunity).

b. The same statute that authorizes the Board to initiate an adjudication to determine "all rights to the use of water" from a stream system also expressly provides that "neither the bringing of such suit nor an adjudication in such a suit shall be a condition precedent to the granting of permits and licenses as authorized by this act." Okla. Stat. tit. 82, § 105.6. By simultaneously authorizing a stream system adjudication and declaring that such an adjudication is not necessary to obtain rights to the use of water in that system, § 105.6 fails to satisfy the comprehensiveness requirement of the McCarran Amendment which authorizes only "comprehensive actions involving the determination of *all* rights in a particular water system." *Wagoner County Rural Water Dist. v. Grand River Dam Auth.*, 577 F.3d 1255, 1260 (10th Cir. 2009) (citing *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 555 (10th Cir. 2000)). Furthermore, the Board will continue to rely on piecemeal state administrative proceedings to grant permits for single users. The proceedings on those permits will be binding only on the parties to those proceedings and pursuant to the State's administrative system, cannot be reduced once issued. Furthermore, once a party has received its permit under this administrative system, there is no requirement in the statutory provision for court adjudications for such party to ever be made to join such adjudication. Accordingly, the continued use of those administrative permit proceedings fails to satisfy the comprehensiveness requirement of the McCarran Amendment. Finally, the state administrative proceedings used by the

Board to grant permits for single users are not adjudications under the McCarran Amendment, as the Board takes final action on such permit applications, and its determinations are subject to review only in accordance with the State Administrative Procedures Act. *See* Okla. Stat. tit. 82, § 105.12(A).

c. The stream adjudication provided by state statute also does not satisfy the McCarran Amendment because it does not require all users to participate in the suit. Okla. Stat. tit. 83, § 105.7 provides that any users or claimants "*may* be made a party to the suit" and "*may* intervene" but makes no provision for requiring the joinder of *all* claimants or users; in fact, § 105.7 expressly provides that "[n]o person not a party to the suit shall be bound by the decree therein. . . ," thus rendering any such decree "partial" at best and falling far short of McCarran's comprehensiveness requirement.

d. The State statutory scheme governing water-use rights asserts that "all rights to the use of water in a definite stream in this state are governed by [Okla. Stat. tit. 60, § 60] and other laws in Title 82 of the Oklahoma Statutes, which laws are *exclusive* and supersede the common law." Okla. Stat. tit. 60, § 60(B) (emphasis added). And under that statutory scheme, prestatehood water rights are recognized only "to the extent to which the priority has not been lost in whole or in part pursuant to Section 105.16 of [Title 82]" and "when the same shall have been perfected as provided by this act and rules and regulations adopted by the Board." Okla. Stat. tit. 82, § 105.2(B)(1). The water rights held by the Nations under the 1830 Treaty are not subject to recognition under this statutory scheme.

e. State statutes prohibit any person, including any "federal government agency" from making beneficial use of water without first applying for a permit from the Board. Okla. Stat. tit. 82, § 105.9. The effect of this provision is to subject applications for water use permits made by the United States to the requirements of the state permitting process, even for *in situ* uses.

f. Other than acknowledging a limited form of modified riparianism, State statutes governing water-use authorize only the recognition of rights based on *appropriative* theory, *see, e.g.,* Okla. Stat. tit. 82, §§ 105.2, 105.12, which precludes recognition of the non-appropriative federal law water rights secured to the Nations by the 1830 Treaty. For example, state statutes do not authorize a water right to be recognized based on the identification of future needs, *see* Okla. Stat. tit. 82, §§ 105.16 (imposing a seven year time limit to put water to beneficial use except as otherwise authorized by the Board pursuant to a schedule imposed by the Board); 105.17 (reversion to the public of water authorized but not put to use as in accordance with permit terms), with the exception of water to be used by the United States following its construction of certain works in accordance with Okla. Stat. tit. 82, § 105.29. These limitations deny recognition of tribal water rights based on future needs. *See Arizona v. Californi*a, 373 U.S. 546, 600-601 (1963) (tribal water rights may be recognized to meet future needs).

g. The State statutes governing water-use authorize only recognition of rights based on consumptive uses. Okla. Stat. tit. 82, §§ 105.2(A) ("[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water"); 105.12(A)(2) (applicant must show an "inten[t] to put the water [to] a beneficial use"). This excludes

consideration of tribal instream flow claims advanced to insure clean and healthy rivers that will support abundant upland and aquatic species. *See United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1984) (recognizing tribal right to water to protect tribal fish and wildlife resources); *Arizona v. California*, 373 U.S. at 599-600 (1963) (recognizing tribal right to water in order to make reservation "livable").

h. The State statutes governing water use authorize the issuance of permits for trans-basin export, that is "the transportation of water use for use outside the stream system wherein the water originates," Okla. Stat. tit. 82, § 105.12(A)(4), and expressly provide that the quantity of water authorized for use by such permits shall not be reduced based on a subsequent review of water needs within the area of origin, *id*. § 105.12(B)-(C). These provisions make trans-basin exports of water authorized by a permit permanently unavailable for future use, and thus deny recognition of any tribal right to the future use of such waters.

81. Even assuming, *arguendo*, that the State statutory scheme is otherwise adequate to adjudicate water rights under § 666(a)(1) of the McCarran Amendment, this Court should decide the federal questions presented in this action. State court is an improper forum for adjudicating the Plaintiff Nations' water rights or regulatory authority over water resources within the Treaty Territory due to the historic hostility that state courts have shown towards tribal rights, which federal courts have acknowledged in the development of Indian law jurisprudence. *See Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754-55 (1998) (reversing Oklahoma Court of Civil Appeals' decision holding that tribe could be sued in state court for breach of contract);

Harjo v. Kleppe, 420 F. Supp. 1110 (D.C.C. 1976) ("During [early 20th century] there was a continued clamor from the white citizens of Oklahoma, which had achieved statehood on November 16, 1907, for Congress to finally wind up the affairs of the Five Tribes so that the development of the state could proceed unimpaired by the continuing rights of the Indians."). Most recently in 2010, Oklahoma voters overwhelmingly approved a ballot initiative to amend the Oklahoma Constitution to forbid state courts from considering or relying upon international law when deciding cases, and international law is defined to include "treaties" with tribes, *Awad v. Ziriax*, 754 F. Supp.2d 1298, 1301 (W.D. Okla. 2010) (quoting State Question 755), thus constitutionally limiting even the jurisdiction of state courts to address, *inter alia*, the questions of tribal treaty interpretation that would be necessary for resolution of the matters the Nations bring before this court in this action. Unfortunately, hostility towards tribal rights has not disappeared, which is why federal court is the proper forum for the Nations to assert their federal rights.

V. CAUSES OF ACTION

COUNT 1
DECLARATORY JUDGMENT

82. Plaintiff Nations incorporate by reference and restate all allegations of paragraphs 1 through 81 as if fully set forth herein.

83. This action is brought pursuant to and in accord with the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, to seek a declaration of the rights and other legal

obligations and relations of the parties named hereinunder and pursuant to the laws of the United States.

84. There exists an actual case and controversy between Plaintiff Nations and Defendants relating to Defendants' ongoing and unlawful attempt to authorize under state law the withdrawal, export, and sale of rights to Treaty Territory waters that are subject to the Plaintiff Nations' superior claim of federally protected water rights and regulatory authority over water resources. The Plaintiff Nations assert that Defendants' attempt to do so is preempted by and violates the Plaintiff Nations' Treaty-based water rights, regulatory authority over waters within the Treaty Territory, and immunity from the application of state law and state jurisdiction, which rights are also protected by the disclaimer in the Oklahoma Enabling Act, and other federal law. The Plaintiff Nations further assert that the only lawful basis on which the Defendants may seek an adjudication of Plaintiff Nations' water rights is pursuant to a general stream adjudication that satisfies the substantive and procedural requirements of 43 U.S.C. § 666(a)(1). The Plaintiff Nations also assert that the only lawful basis on which the Defendants may seek authority to *administer* those rights is pursuant to an adjudication, lawfully initiated after the general stream adjudication has been concluded, that satisfies the substantive and procedural requirements of 43 U.S.C. § 666(a)(2). Counsel for the Board recently stated that the Board intends to file an action in state court that would purportedly rely on the McCarran Amendment, 43 U.S.C. § 666. At the same time, however, the Board will continue to process, through piecemeal state administrative proceedings, the Water Trust's water-use permit application for purposes of effecting a large-scale withdrawal,

export, and sale of waters from their basin of origin and the Nations' Treaty Territory. The Plaintiff Nations contend that the action the Board plans to file will not have any effect on the violations of federal law that this action seeks to remedy, nor will it have any impact on the harm to the Nations that results from the use of piecemeal state administrative proceedings to allocate water rights in the Treaty Territory. The Plaintiff Nations further assert that this Court should proceed to decide the federal questions presented in this case whether or not the Board files a State court action. The Plaintiff Nations also contend that the State statutory scheme for the adjudication of water-use claims in a stream system violates federal law and fails to satisfy the substantive and procedural requirements of the McCarran Amendment, and that the Nations' water rights are therefore not subject to adjudication under that statutory scheme. Finally, even assuming *arguendo* that this Court determines that the State statutory scheme is otherwise adequate under the McCarran Amendment, the Plaintiff Nations contend that the fundamental questions of federal law on which the Nations' water rights and regulatory authority over water resources are based should be decided by this Court, and that the State Courts of Oklahoma lack jurisdiction over these questions in any event.

85. Plaintiff Nations seek to have this Court declare that the Defendants Water Trust and Oklahoma City have no right to use or occupy the Plaintiff Nations' lands for any purpose, including the export of water through the Atoka pipeline, any line or lines to be built parallel to the Atoka pipeline, or any other pipeline to be used to export Treaty Territory waters.

86. Plaintiff Nations seek to have this Court declare that the June 2010 agreement entered into by Defendants is contrary to federal law because the State does not have "plenary jurisdiction and authority" over all water in the State, that the Defendants' agreement to the contrary therefore constitutes an ongoing violation of federal law, which includes an illegal attempt to evade the restriction on alienation of tribal property imposed by 25 U.S.C. § 177, that the Defendants do not have the right to withdraw, export, and sell Treaty Territory waters pursuant to that claimed authority, and that the issuance of a water-use permit pursuant to the June 2010 agreement would violate federal law because the state administrative proceedings that the agreement provides are to be used for that purpose do not provide any opportunity for the Nations to protect their water rights.

87. The Plaintiff Nations seek to have this Court declare that:

a. The 1830 Treaty secures to the Plaintiff Nations sovereign and proprietary rights to waters in the Treaty Territory, and regulatory authority over those waters, that are prior and paramount to any water rights or regulatory authority in Treaty Territory waters claimed under State law.

b. The Plaintiff Nations' water rights and regulatory authority over Treaty Territory water resources includes rights to the use and dominion over water to fulfill the homeland purposes of the 1830 Treaty by meeting present and future needs for: (i) consumptive uses within the Nations' homeland, (ii) the maintenance of instream flows for purposes of maintaining, protecting, and enhancing the environmental, economic, and cultural health and well-being of the Nations' homeland, and (iii) the quiet

enjoyment of such rights by the Nations, exclusive of any interference under color of state law or state jurisdiction.

c. The Plaintiff Nations' water rights and regulatory authority over Treaty Territory water resources bar the Defendants from withdrawing, exporting and selling Treaty Territory water resources without the consent of the Nations.

88. The Plaintiff Nations seek to have this Court declare that a state court proceeding under the McCarran Amendment cannot resolve the questions presented in this case in any event. The consent to join the United States as a defendant pursuant to the McCarran Amendment, 43 U.S.C. § 666, is available only "(1) for the adjudication of rights to the use 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." *Id.* § 666(a)(1)-(2). The McCarran Amendment does not waive the sovereign immunity of the Plaintiff Nations. Instead, the waiver applies only to the Indian water rights asserted by the United States in a proceeding that is properly brought under § 666(a)(1). *Id*. Furthermore, the limited waiver of federal sovereign immunity provided by § 666(a)(2) applies *only after* a general stream adjudication brought under § 666(a)(1) *has been completed* and a determination of such rights has been made. As a result, the McCarran Amendment does not provide a state court with any authority to seek to administer tribal water rights until after a general stream adjudication that comports with the McCarran Amendment's substantive and procedural requirements has been completed. Finally, the

McCarran Amendment does not authorize a state court to adjudicate questions of Indian title or tribal jurisdiction. Nor do Defendants have any other authority to adjudicate such rights in the State Courts of Oklahoma. As a result, the defendants have no authority to seek to adjudicate the Nations' Treaty-based regulatory authority over Treaty Territory water resources in a State Court proceeding that relies on § 666(a)(2)'s limited waiver of federal sovereign immunity. Those issues can be adjudicated only in this action and by this Court.

89. Plaintiff Nations seek to have this Court declare that the statutory scheme for the adjudication of water-use claims in a stream system that is available to the Board under state law violates federal law and fails to satisfy the substantive and procedural requirements of the McCarran Amendment, and that the water rights held in trust for the Nation by the United States are therefore not subject to adjudication under that statutory scheme.

90. Plaintiff Nations seek to have the Court declare as a matter of federal law that any action by the Defendant(s), or anyone of them, on the Water Trust's water-use permit application associated with the June 2010 agreement, or other action that purports to authorize the withdrawal and export of water resources from any point within the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769, to any point outside the Treaty Territory (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) is preempted by and violates the Plaintiff Nations' federally-protected water rights, their right to control water resources in

the Treaty Territory, and their federally-protected immunity from the application of state law and state jurisdiction, unless such proceedings are conducted as part of a comprehensive adjudication of water rights that includes the water resources of the Treaty Territory, that is lawfully initiated, and that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which standard is not satisfied by either the present state-law water-use permit system on which Defendants rely, or the statutory scheme for the adjudication of water-use claims in a stream system that is available under state law.

91. Alternatively, Plaintiff Nations seek to have the Court declare as a matter of federal law that any action by the Defendant(s), or anyone of them, on the Water Trust's water-use permit application associated with the June 2010 agreement, or other action that purports to authorize the withdrawal and export of water resources from any point within the Kiamichi Basin and/or Clear Boggy Basin to any point outside the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769, (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) is preempted by and violates the Plaintiff Nations' federally-protected water rights, their rights to control water resources in the Kiamichi Basin and/or the Clear Boggy Basin, and their federally-protected immunity from the application of state law and state jurisdiction, unless such proceedings are conducted as part of a comprehensive adjudication of water rights that includes the water resources of the Kiamichi Basin and/or Clear Boggy Basin, that is lawfully initiated, and that satisfies the substantive and

procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which standard is not satisfied by either the present state-law water-use permit system on which Defendants rely, or the statutory scheme for the adjudication of water-use claims that is available under state law.

COUNT 2
INJUNCTIVE RELIEF AGAINST THE DEFENDANTS

92. Plaintiff Nations incorporate by reference and restate all allegations of paragraphs 1 through 91 as if fully set forth herein.

93. In furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶¶82-91, the Plaintiff Nations seek permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application associated with the June 2010 agreement.

94. In furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶82-91, the Plaintiff Nations seek permanent injunctive relief barring the Defendants from seeking to adjudicate the water rights held in trust for the Nation by the United States under the statutory scheme for the adjudication of water-use claims in a stream system that is available under state law.

95. In furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶82-91, the Plaintiff Nations seek permanent injunctive relief barring the Defendants from purporting to determine the nature, quantity, priority, or basis of the water rights held in trust for the Nation by the United States, or any part or portion thereof, through

the direct or indirect application of state law, including under the statutory scheme for the adjudication of water-use claims in a stream system that is available under state law.

96. In furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶¶82-91, the Plaintiff Nations seek permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application associated with the June 2010 agreement and forbidding any individual or collective attempt by any or all Defendant(s) or their successors to authorize the withdrawal and export (including by means of a natural channel) of water resources from any point within the Treaty Territory as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769 to any point, place, or location outside thereof (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory), unless and until a general adjudication thereof that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, has been completed.

97. Alternatively, in furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶¶82-91, Plaintiff Nations seek permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application associated with the June 2010 agreement and forbidding any individual or collective attempt by any or all Defendant(s) or their successors to authorize the withdrawal and export (including by means of natural channel) of water resources from any point within the Kiamichi Basin and/or Clear Boggy Basin to any point outside the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat.

333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769, (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory), unless and until a general adjudication thereof that satisfies the substantive and procedures requirements of the McCarran Amendment, 43 U.S.C. § 666, has been completed.

VI. PRAYER FOR RELIEF

98. Plaintiff Nations incorporate by reference and restate all allegations of paragraphs 1 through 97 as if fully set forth herein.

99. Based upon the above allegations of fact and law, Plaintiff Nations pray for a judgment against the Defendants as follows:

(a) A declaration that the Defendants Water Trust and Oklahoma City have no right to use or occupy the Plaintiff Nations' lands for any purpose, including the export of water through the Atoka pipeline, any line or lines to be built parallel to the Atoka pipeline, or any other pipeline to be used to export Treaty Territory waters.

(b) A declaration that the June 2010 agreement entered into by Defendants is contrary to federal law because the State does not have "plenary jurisdiction and authority" over all water in the State, that the Defendants' agreement to the contrary therefore constitutes a continuing violation of federal law, which includes an illegal attempt to evade the restriction on alienation of tribal property imposed by 25 U.S.C. § 177, that the Defendants do not have the right to withdraw, export, and sell Treaty Territory waters pursuant to that claimed authority, and that the issuance of a water-use permit pursuant to the June 2010 agreement would violate federal law because

the state administrative proceedings that the agreement provides are to be used for that purpose do not provide any opportunity for the Nations to protect their water rights.

(c) A declaration that:

(1) The 1830 Treaty and other sources of federal law secure to the Plaintiff Nations sovereign and proprietary rights to waters in the Treaty Territory, and regulatory authority over those waters, that are prior and paramount to any water rights or regulatory authority in Treaty Territory waters claimed under State law. Although Plaintiff Nations do not concede the Board's authority to issue permits, Plaintiff Nations will not challenge any current use of water pursuant to any existing permits.

(2) The Plaintiff Nations' water rights and regulatory authority over Treaty Territory water resources includes rights to the use and dominion over water to fulfill the homeland purposes of the 1830 Treaty by meeting present and future needs for: (i) consumptive uses within the Nations' homeland, (ii) the maintenance of instream flows for purposes of maintaining, protecting, and enhancing the environmental, economic, and cultural health and well-being of the Nations' homeland, and (iii) the quiet enjoyment of such rights by the Nations, exclusive of any interference under color of state law or state jurisdiction.

(3) The Plaintiff Nations' water rights and regulatory authority over Treaty Territory water resources bar the Defendants from withdrawing, exporting and selling Treaty Territory water resources without the consent of the Nations.

(d) A declaration that a state court proceeding under the McCarran Amendment cannot resolve the questions presented in this case in any event. The consent to join the United States as a defendant pursuant to the McCarran Amendment, 43 U.S.C. § 666, is available only "(1) for the adjudication of rights to the use 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." *Id.* § 666(a)(1)-(2). The McCarran Amendment does not waive the sovereign immunity of the Plaintiff Nations. Instead, the waiver applies only to the Indian water rights asserted by the United States in a proceedings that is properly brought under § 666(a)(1). *Id*. Furthermore, the waiver of the immunity under § 666(a)(2) is applicable *only after* a general stream adjudication brought under § 666(a)(1) *has been completed* and a determination of such rights has been made. As a result, the McCarran Amendment does not provide a state court with any authority to seek to administer tribal water rights until after a general stream adjudication that comports with the substantive and procedural requirements of the Act has been completed. Finally, the McCarran Amendment does not authorize a state court to adjudicate questions of Indian title or tribal jurisdiction. Nor do Defendants have any other authority to adjudicate such rights in the State Courts of Oklahoma. As a result, the defendants have no authority to seek to adjudicate the Nations' Treaty-based regulatory authority over Treaty Territory water resources in a State Court proceeding that relies on

§ 666(a)(2)'s limited waiver of federal sovereign immunity. Those issues can be adjudicated only in this action and by this Court.

(e) A declaration that the statutory scheme for the adjudication of water-use claims in a stream system that is available to the Board under state law violates federal law and fails to satisfy the substantive and procedural requirements of the McCarran Amendment, and that the water rights held in trust for the Nation by the United States are therefore not subject to adjudication under that statutory scheme.

(f) A declaration that any action by the Defendant(s), or anyone of them, on the Water Trust's water-use permit application associated with the June 2010 agreement, or other action that purports to authorize any withdrawal and export of water resources from any point within the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769, to any point outside the Treaty Territory (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) is preempted by and violates the Plaintiff Nations' federally-protected water rights, their right to control water resources in the Treaty Territory, and their federally-protected immunity from the application of state law and state jurisdiction, unless such proceedings are conducted as part of comprehensive adjudication of water rights that includes the water resources of the Plaintiff Nations' Treaty Territory, that is lawfully initiated, and that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which standard is not satisfied by the present state law

water use permit system on which Defendants rely or by the statutory scheme for the adjudication of water use claims that is available under state law.

(g) A declaration that any action by the Defendant(s), or anyone of them, on the Water Trust's water-use permit application associated with the June 2010 agreement, or other action that purports to authorize the withdrawal and export of water resources from any point within the Kiamichi Basin and/or Clear Boggy Basin to any point outside the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769 (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) is preempted by and violates the Plaintiff Nations' federally-protected water rights, their rights to control water resources in the Kiamichi Basin and/or Clear Boggy Basin and their federally-protected immunity from the application of state law and state jurisdiction, unless such proceedings are conducted as part of a comprehensive adjudication of water rights that includes the water resources of the Plaintiff Nations' Treaty Territory, that is lawfully initiated, and that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which standard is not satisfied by the present state law water use permit system on which Defendants rely or by the statutory scheme for the adjudication of water use claims that is available under state law.

(h) Permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application associated with the June 2010 agreement.

(i) Permanent injunctive relief barring the Defendants from seeking to adjudicate the water rights held in trust for the Nation by the United States under the statutory scheme for the adjudication of water-use claims in a stream system that is available under state law.

(j) Permanent injunctive relief barring the Defendants from purporting to determine the nature, quantity, priority, or basis of the water rights held in trust for the Nation by the United States, or any part or portion thereof, through the direct or indirect application of state law, including under the statutory scheme for the adjudication of water-use claims in a stream system that is available under state law.

(k) Permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application associated with the June 2010 agreement and forbidding any individual or collective attempt by any or all Defendant(s) or their successors to authorize any withdrawal and transport (including by means of natural channel) of water resources from any point within the Treaty Territory as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769, to any point, place, or location outside thereof (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory), unless and until a comprehensive adjudication thereof that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, has been completed.

(l) Permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application

associated with the June 2010 agreement and forbidding any individual or collective attempt by any or all Defendant(s) or their successors to authorize the withdrawal and transport (including by means of a natural channel) of surface water resources from any point within the Kiamichi Basin and/or Clear Boggy Basin to any point outside the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769 (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory), unless and until a comprehensive adjudication thereof that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, has been completed.

(m) A monetary judgment for all attorneys' fees and costs incurred in this action; and

(n) such further relief as the Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of court will transmit a Notice of Electronic Filing to the following ECF registrants:

Craig B. Keith
Brian M. Nazarenus
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Patrick R. Wyrick
M. Daniel Weitman
Neal Leader
Lynn H. Slade
William C. Scott
Maria O'Brien

I hereby certify that on the 26th day of January, 2012, I served the attached document by e-mail on the following, who are not registered participants of the ECF System:

Douglas B. L. Endreson
Peng Wu

s/ Michael Burrage
Michael Burrage