

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

(1) CHICKASAW NATION and )  
(2) CHOCTAW NATION OF OKLAHOMA, )

Plaintiffs, )

vs. )

Case No. CIV-11-927-W

(1) MARY FALLIN, in the 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. )

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**OPENING BRIEF IN SUPPORT OF DEFENDANT GOVERNOR  
MARY FALLIN'S MOTION TO DISMISS AMENDED COMPLAINT  
FOR LACK OF JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)  
OR, ALTERNATIVELY, ON ABSTENTION GROUNDS**

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	iii
INTRODUCTION .....	1
The Tribes’ Claims .....	2
Summary of Argument.....	4
ARGUMENTS AND AUTHORITIES .....	4
I.    The Tribes Lack Standing and Their Claims are Not Ripe for Review .....	4
A.    The Tribes lack standing to bring their Water Permit Claim because they do not allege a concrete injury, because any injury is traceable to the Governor, and because the relief they seek would redress any injury .....	4
1.    The Tribes have failed to demonstrate “injury in fact” .....	5
2.    The Tribes have failed to demonstrate any injuries that would be redressed by the relief they seek.....	8
B.    The Tribes’ Water Permit, Jurisdiction, and Rights Declaration Claims are not ripe for judicial resolution.....	9
1.    The Tribes’ Water Permit Claims are not ripe because they are premised only on contingent future events that may not occur as anticipated or that may not occur at all.....	10
2.    The Tribes’ Jurisdiction and Rights Declaration Claims are not ripe because they are premature efforts to assert abstract disputes .....	11
3.    The Tribes’ Complaint raises numerous questions of mixed law and fact .....	12
4.    The Tribes will not suffer hardship from the Court’s declining judicial intervention as to any of their claims .....	13
C.    The Tribes lack standing to assert the Contract Invalidation Claim and that challenge is not ripe .....	14
II.   Considerations Of Wise Judicial Administration Require This Court to Defer to the State General Stream Adjudication.....	14
A.    The policies underlying the McCarran Amendment support abstention.....	18

**TABLE OF CONTENTS**

	<b>Page</b>
B. The limited progress in federal court supports abstention .....	19
C. The involvement of state water law counsels abstention .....	20
D. Participation by the United States in the state court adjudications.....	21
E. The Oklahoma State Court Adjudication proceeding is adequate.....	21
CONCLUSION .....	25

**TABLE OF AUTHORITIES**

**Page**

**UNITED STATES SUPREME COURT CASES**

*Ariz. v. San Carlos Apache Tribe*,  
463 U.S. 545 (1983) ..... *passim*

*California v. United States*,  
438 U.S. 645 (1978) ..... 20

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

*Lujan v. Defenders of Wildlife*,  
504 U.S. 555 (1992) ..... 5, 6

*Nat'l Park Hospitality Ass'n v. Dep't of Interior*,  
538 U.S. 803 (2003) ..... 14

*Smith v. Bayer Corp.*,  
131 S. Ct. 2368, \_\_\_ U.S. \_\_\_ (2011) ..... 3

*Texas v. United States*,  
523 U.S. 296 (1998) ..... 10

*United States v. Dist. Ct. Eagle Cnty.*,  
401 U.S. 520 (1971) ..... 23

*United States v. Idaho*,  
508 U.S. 1 (1993) ..... 25

**OTHER FEDERAL COURT CASES**

*City of Hugo v. Nichols*,  
656 F.3d 1251 (10th Cir. 2011) ..... 8

*Coalition for Sustainable Res., Inc. v. U.S. Forest. Serv.*,  
259 F.3d 1244 (10th Cir. 2001) ..... 12

*Crawford v. United States*,  
796 F.2d 924, 928 (7th Cir. 1986) ..... 2

**TABLE OF AUTHORITIES**

**Page**

*In re Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam*,  
484 F. Supp. 778 (D. Ariz. 1980)..... 17, 20

*Initiative & Referendum Inst. v. Walker*,  
450 F.3d 1082 (10th Cir. 2006)..... 10, 11

*Jicarilla Apache Tribe v. United States*,  
601 F.2d 1116 (10th Cir. 1979)..... 21, 24

*Phelps v. Hamilton*,  
122 F.3d 1309 (10th Cir. 1997)..... 3

*Roe # 2 v. Ogden*,  
253 F.3d 1225 (10th Cir. 2001)..... 10, 12

*Sierra Club v. Yeutter*,  
911 F.2d 1405 (10th Cir. 1990).....5, 6, 9-10, 12, 13, 24

*Tarrant Reg’l Water Dist. v. Hermann*,  
656 F.3d 1222 (10th Cir. 2011) (“*Tarrant II*”)..... 11

*Tarrant Reg’l Water Dist. v. Hermann*,  
2010 U.S. Dist. LEXIS 72442 (W.D. Okla. 2010) (“*Tarrant I*”)..... 11-13

*United States v. Anderson*,  
736 F.2d 1358 (9th Cir. 1984)..... 6, 24

*United States v. Bluewater-Toltec Irrigation Dist.*,  
580 F. Supp. 1434 (D.N.M. 1984)..... 15, 16, 18-20, 25

*Utah v. Babbitt*,  
137 F.3d 1193 (10th Cir. 1998)..... 6

**FEDERAL STATUTES**

28 U.S.C. § 2283 ..... 3

43 U.S.C. § 666 .....3, 15, 16, 21-23

Act of April 26, 1906, § 27..... 7

**TABLE OF AUTHORITIES**

**Page**

**STATE STATUTES**

82 O.S. § 105.6 .....	21, 23, 25
82 O.S. § 105.7 .....	21, 22, 23
82 O.S. § 105.8 .....	21, 22, 23
82 O.S. § 105.9 .....	23
Idaho Code § 42-1414 .....	25

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendant Mary Fallin, Governor of the State of Oklahoma, submits this Brief in Support of Motion to Dismiss the Second Amended Complaint (“Complaint”) [Doc. No. 62] of the Choctaw Nation of Oklahoma and Chickasaw Nation (“Tribes”).<sup>1</sup>

## INTRODUCTION

In their Second Amended Complaint, the Tribes assert a host of ill-defined claims against the Governor—claims that are premature, not grounded in fact, and which seek remedies from injuries that may never occur.<sup>2</sup> As a result, the Tribes lack standing to assert those claims, and their claims are not ripe for this Court’s review.

Even if this Court were to conclude it had jurisdiction, pursuant to the abstention doctrine of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (“*Colorado River*”), the Court should dismiss the Tribes’ claim for a declaration of the general nature of the Tribes’ water rights and regulatory authority, as well as the Tribes’ request that the Court prevent the State from initiating a comprehensive stream system adjudication.

Indeed, even the Tribes admit that a comprehensive stream system adjudication is “the only means authorized by Congress for any state to adjudicate tribal water rights.” *See, e.g.*, Complaint, ¶ 7. As a result, the OWRB has filed a general stream adjudication,

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<sup>1</sup> The Oklahoma Water Resources Board Defendants have filed a separate Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(7) and 19, and Governor Fallin also joins in that Motion.

<sup>2</sup> The Tribes also sued individually named Members and the Executive Director of the Oklahoma Water Resources Board (“OWRB”) and the City of Oklahoma City and its Water Trust (collectively “City/Trust”).

requesting the Oklahoma Supreme Court to exercise original jurisdiction over a comprehensive adjudication of the waters identified in the Complaint. *See Oklahoma Water Resources Bd. v. United States*, Okla. Sup. Ct. No. 110375 (“the State Court Adjudication”).<sup>3</sup> Because of the long-standing federal policy of deferring to such state court proceedings, this Court should defer to the State Court Adjudication concerning those claims.

### **The Tribes’ Claims**

As against the Governor and the OWRB Defendants, the Complaint requests declaratory and permanent injunctive relief for essentially four claims:

1. Permanent injunctive relief against the OWRB’s continued consideration of, and the entry of any relief under, the Application for Permit to Use Surface or Stream Water (“Application”) that Defendant Oklahoma City Water Utility Trust filed with the OWRB for water for Oklahoma City’s future use, Complaint, ¶¶ 99(h) and (k); and against the OWRB’s granting *any* permit or taking other action that authorizes moving waters of the alleged 22-County “Treaty Territory” (collectively the “Water Permit Claims”). *See id.* ¶ 99(k), (l).

2. A declaration that no Oklahoma state court can determine the Tribes’ water rights or regulatory authority over tribally claimed waters or have jurisdiction over a comprehensive general stream adjudication invoking the waiver of federal sovereign

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<sup>3</sup> The OWRB’s Petition for a General Stream Adjudication is attached as Exhibit 1 to this Brief. The attachment of exhibits to briefs under Rules 12(b)(1) (and under Rules 12(b)(7) and 19) does not convert a motion to dismiss on jurisdictional grounds to one for summary judgment on the merits. *See Fed R. Civ. P. 12(d); Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986).

immunity under the McCarran Amendment, 43 U.S.C. § 666, Complaint, ¶ 99(d), and, therefore, that this Court has exclusive jurisdiction to determine the Tribes' water rights and water-administration authority, *id.*; and injunctive relief against any State proceeding intended for that purpose (collectively, the "Jurisdiction Claims").<sup>4</sup> Complaint, ¶¶ 99(i), (j).

3. A declaration of the general nature of the Tribes' claimed water and water-administration rights (the "Rights Declaration Claims"). *Id.* ¶¶ 99(c)(1)-(3).

4. A declaration that the June 2010 Transfer Agreement between the OWRB and the Oklahoma City Water Utility Trust "is contrary to federal law" (the "Contract Invalidation Claim"). *Id.* ¶ 99(b).

These four essential claims can be boiled down even further as claims to (1) federally protected rights to use so-called "Treaty Territory" water for at least three purposes, *see id.* ¶ 87(b)(i)-(iii), and (2) "regulatory authority" over all "Treaty Territory water resources." *Id.* ¶¶ 44, 87(a).

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<sup>4</sup> The Tribes' request that this Court enjoin state court proceedings is contrary to the mandate of the Anti-Injunction Act, which provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act contains "three specifically defined exceptions," which "though designed for important purposes, are narrow and are not [to] be enlarged by loose statutory construction." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375, \_\_\_ U.S. \_\_\_, \_\_\_ (2011) (quoted authority omitted, alteration in original); *see also Phelps v. Hamilton*, 122 F.3d 1309, 1324-25 (10th Cir. 1997). Because none of these three limited exceptions apply here, now that a state court proceeding is filed, the claim to enjoin the state court stream adjudication must be dismissed.

### Summary of the Argument

The dispositive deficiencies of the Complaint are its:

1. utter failure to identify the lands the Tribes claim their rights pertain to,
2. failure to identify any current need or use for the water that is impaired or imperiled by the actions taken by the Governor or OWRB,
3. failure to identify any current intent or capacity to administer or regulate whatever water resources they may claim, and
4. failure to identify an imminent injury to be averted.

As a result of these failures, the Tribes have failed to demonstrate that they have standing and that their case is ripe. The Complaint should be dismissed under Rule 12(b)(1).

But even were this a justiciable case, the issues the Tribes try to present under their Jurisdiction and Rights Declaration Claims are presented and will be resolved in the State Court Adjudication. Thus, the abstention doctrine of *Colorado River* and *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983) (“*San Carlos Apache*”), compels this Court to dismiss or stay this action—at least as to those claims—pending the outcome of State Court Adjudication.

### ARGUMENTS AND AUTHORITIES

#### **I. The Tribes Lack Standing and Their Claims Are Not Ripe for Review.**

##### **A. The Tribes lack standing to bring their Water Permit Claim because they do not allege a concrete injury, because any injury is traceable to the Governor, and because the relief they seek would redress any injury.**

The Water Permit Claims seek to enjoin the OWRB from taking any further action on the Oklahoma City Water Utility Trust’s Application and any action that would authorize any use of water from the 22-County alleged “Treaty Territory” outside that area, even if transported by watercourse. Complaint ¶¶ 99(k), (l). Even if the Tribes’

allegations were supportable as to certain rights related to the Tribes' limited lands, they would not, and do not, allege a concrete and "actual or imminent injury" requiring the relief they seek. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

To meet their burden of establishing standing, the Tribes must show (1) a concrete "injury in fact" that is not merely conjectural or hypothetical; (2) a "causal connection" between the Governor's or OWRB's alleged conduct and that injury; and, (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560 (quoted authority omitted). Because the Tribes allege only uncertain, future injury, not causally connected to Governor's or OWRB's actions, which cannot be redressed by this Court, the Tribes' Water Permit Claim must be dismissed for lack of standing

1. The Tribes have failed to demonstrate "injury in fact."

Any water use authorized in the state permit proceeding is subject to any prior or paramount water rights held by the Tribes. *See Sierra Club v. Yeutter*, 911 F.2d 1405, 1419 (10th Cir. 1990) ("*Yeutter*"). The Tribes therefore have not and cannot demonstrate "injury in fact" because any federal right the Tribes may have will not be impacted by the state permit proceeding.

In *Yeutter*, the Sierra Club sought a declaration that the Wilderness Act, 16 U.S.C. §1131-1136, created federal water rights in certain wilderness areas under the Forest Service's jurisdiction. *Yeutter*, 911 F.2d at 1417. The plaintiffs argued that those water rights were threatened "by the operation of the Colorado [state water law] postponement doctrine, which [could] subordinate the priority of wilderness water rights if the Forest

Service failed to assert the rights in state water courts.” *Id.* at 1419. Rejecting that argument, the Tenth Circuit determined that “federal reserved water rights, as creatures of federal law, are protected from extinguishment under state law by the Supremacy Clause.” *Id.*

As was the case in *Yeutter*, the Tribes’ federally protected water rights cannot be extinguished by the state law permitting process, nor can they be extinguished by any permit granted by the OWRB.<sup>5</sup>

Additionally, even if, contrary to the holding in *Yeutter*, the Tribes might at some point be injured by the state law permitting process, the Water Permitting Claim must still be dismissed because those injuries are entirely too speculative to constitute an injury-in-fact under the *Lujan* standard. The Tribes are speculating that two different events will occur in the future: 1) they speculate that they will be found to have water rights that will be affected by the granting of the Oklahoma City Water Utility Trust’s permit application or any other permit application, and 2) they speculate that after a lengthy hearing process that has yet to even begin, the OWRB will issue a permit to the Oklahoma City Water Utility Trust that will affect their speculated tribal rights. If either of these entirely speculative events does not occur, the alleged injury will not occur.

Standing does not exist when the underlying claims rely on a bald allegation that an injury will occur at some future time. *Utah v. Babbitt*, 137 F.3d 1193, 1212 (10th Cir.

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<sup>5</sup> The Tribes incorrectly argue that the OWRB is preempted from issuing permits under state law. Complaint, ¶¶ 6, 70, 77. Rather, the OWRB may issue permits under state law, but does so subject to the Tribes’ remaining water rights, if any. *See United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984).

1998). Here, the Tribes fail to allege facts demonstrating that the pending permit process poses a concrete, actual or imminent threat of harm to their interests. What they allege (without quotation or specific citation) is that the June 2010 Transfer Agreement commits the OWRB to grant the Oklahoma City Water Utility Trust's permit application. That allegation is completely contrary to the plain language of Section 2.4 of the Transfer Agreement, which clearly states the Trust still must obtain water-use permits from the OWRB, and Section 2.7 states that the contract "provides no authority to the City or [the Trust] to use water." *See* June 2010 Transfer Agreement attached as Exhibit 3 to Brief of the Oklahoma Water Resources Board's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(7), and 19. Moreover, the Army Corps of Engineers ("Corps"), which constructed the Sardis Reservoir pursuant to a 1974 contract with the OWRB, has taken the position that the June 2010 Transfer Agreement is not valid without Corps approval. *See* May 20, 2010 Letter from Department of the Army to Brad Henry, Governor of Oklahoma (attached as Exhibit 2); 1974 Contract Art. 10 ("The User shall not transfer or assign this contract or any rights acquired thereunder . . . without the approval of the Secretary of the Army . . . ") (attached as Exhibit 1 to Brief of the Oklahoma Water Resources Board's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(7), and 19).

Moreover, the Tribes' lands have largely been transferred by allotment to individual tribal members or to non-members, and all rights retained by the Tribes are subject to the federal allotment actions. *See* Act of April 26, 1906, § 27. The Tribes have only limited remaining water rights, if any, and, as the Tribes concede, the nature and

magnitude of those rights still needs to be determined in an appropriate water adjudication. *See* Complaint, ¶ 84 (“[T]he only lawful basis on which the Defendants may seek an adjudication of Plaintiff Tribes’ water rights is pursuant to a general stream adjudication that satisfies the substantive and procedural requirements of 43 U.S.C. § 666(a)(1).”). And, as discussed in Part II, *infra*, the OWRB has initiated a general stream adjudication, which will determine the relative rights of all of the users in the Basins, including any rights the Tribes’ may have under federal or State law. The adjudication will end in a decree, which will be administered to ensure the Tribes’ rights, if any, are not impacted by state water users.

2. The Tribes have failed to demonstrate any injuries that would be redressed by the relief they seek.

To establish redressability, the Tribes must show that “a favorable court judgment is likely to relieve the party’s injury.” *City of Hugo v. Nichols*, 656 F.3d 1251, 1264 (10th Cir. 2011). In *City of Hugo*, the City of Hugo and a Texas city filed suit against the OWRB, seeking a declaration that “certain Oklahoma laws governing the [OWRB’s] water allocation decision [were] unconstitutional.” *Id.* at 1254. The Tenth Circuit determined that the Texas city failed to demonstrate redressability, because even if the Tenth Circuit found the law unconstitutional, the OWRB would not be required to grant the disputed permit. *Id.* at 1264. Here, as in *City of Hugo*, an order by this Court enjoining the state permit proceeding or declaring the June 2010 Transfer Agreement invalid will not remedy any injury to the Tribes’ water rights.

With respect to the Tribes' Water Permit Claim, even if this Court could enjoin the state permit proceeding or invalidate the Transfer Agreement, that remedy would not override or impede the operation and effect of the numerous enactments of federal law that have affected the Tribes' rights and the federal water storage and withdrawal agreements. Moreover, the relief sought in this case is completely unnecessary since any federal water rights are protected "from extinguishment under state law by the Supremacy Clause." *Yeutter*, 911 F.2d at 1419. Consequently, the relief the Tribes seek here will have no legal or practical effect.

**B. The Tribes' Water Permit, Jurisdiction, and Rights Declaration Claims are not ripe for judicial resolution.**

The same facts that deprive the Tribes of standing compel the conclusion that their Water Permit, Jurisdiction, and Rights Declaration Claims are not ripe for review. The OWRB's initiation of a general stream adjudication, however, is an additional fact that tips the scale further in favor of a finding that these claims are not ripe.

In the general stream adjudication, and consistent with the McCarran Amendment, the OWRB named, among other defendants, the United States on its own behalf and on behalf of the Tribes. As set forth in Part II, *infra*, it is beyond dispute that state courts have jurisdiction to determine the nature, quantity, and priority date of federal water rights. *See Colorado River*, 424 U.S. at 817-20. The filed State Court Adjudication effectively invokes the waiver of the United States' immunity by force of the McCarran Amendment. Thus, the State Court Adjudication will determine the relative rights among water users in the Basins, including the rights, if any, of the United States and the Tribes.

Until the Tribes' rights have been adjudicated, the Tribes' Water Permit Claim, Jurisdictional Claim, and Declaration Claim are abstract and speculative.

“The ripeness doctrine cautions a court against premature adjudication of disputes involving administrative policies or decisions not yet formalized and felt in a concrete way by the challenging parties.” *Roe # 2 v. Ogden*, 253 F.3d 1225, 1231 (10th Cir. 2001). As the Tenth Circuit has explained:

[T]he purpose of the ripeness doctrine is: to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

*Yeutter*, 911 F.2d at 1415 (quoted authority omitted). Courts “evaluate . . . the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration.” *Id.* (quoted authority omitted). In evaluating ripeness the “central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1097 (10th Cir. 2006) (quoted authority omitted); *Texas v. United States*, 523 U.S. 296, 300 (1998).

Under these standards, the Tribes' Complaint fails to demonstrate that their claims are ripe for judicial review.

1. The Tribes' Water Permit Claims are not ripe because they are premised only on contingent future events that may not occur as anticipated or that may not occur at all.

Even if granting the Oklahoma City Water Utility Trust's Application could affect the Tribes' rights (and it cannot), the Tribes' Water Permit claims are premised only on

contingent future events that may not occur as anticipated or may not occur at all. *See Initiative & Referendum Inst.*, 450 F.3d at 1097. Instead, any concern that the outcome of the permit proceeding will affect the Tribes' rights is simply hypothetical without knowing whether the OWRB will approve the permit application and at what volumes, whether Oklahoma City will receive the approvals and financing necessary to construct a pipeline to transport water from Sardis Reservoir, and whether Oklahoma City's future use of water from the Sardis Reservoir conflict with the Tribes' rights and use. Given the hypothetical and speculative nature of the Tribes' Water Permit Claims, the Tribes' request that this Court enjoin the permit proceeding is premature and not ripe for review.

2. The Tribes' Jurisdiction and Rights Declaration Claims are not ripe because they are premature efforts to address abstract disputes.

The Tenth Circuit affirmed the Western District of Oklahoma in declining to prematurely address complex issues because, whether tribes retain regulatory and use rights "is fraught with complex questions of federalism, tribal sovereignty, and the reserved water rights doctrine. We should not resolve the issue unless and until it is determined what rights the [Tribes have] to Oklahoma surface water." *Tarrant Reg'l Water Dist. v. Hermann*, 656 F.3d 1222, 1250 (10th Cir. 2011) ("*Tarrant II*").

Here, as in *Tarrant*, it is an open question whether the Tribes retain water rights and what those rights may be. *See Tarrant Reg'l Water Dist. v. Hermann*, 2010 U.S. Dist. LEXIS 72442, at \*11 (W.D. Okla. 2010) ("*Tarrant I*"). The *Tarrant I* court acknowledged that the Apache Tribe may have federally protected rights but that "any meaningful answer to that question is likely to be the result of major and separate

litigation all by itself.” *Id.* Here, the Tribes seek a declaration that they have certain types of rights to alleged “Treaty Territory water resources” and undefined “regulatory authority over” those water resources. Complaint, ¶¶ 87(a), (b). Beyond referencing a 22-County area, they do not identify the lands to which the rights assertedly apply, ignoring the complex history of federal actions affecting tribal lands. The Tribes then compound the uncertainty as to factual setting by asserting an undefined “regulatory authority” over whatever water resources they may have. These inquiries involve complex issues of interpretation of treaty language, congressional acts, the effects of allotment, and characteristics of specific types of rights. Determinations regarding such consequential issues cannot be made in the abstract. This determination will, and should, be made in the State Court Adjudication.

3. The Tribes’ Complaint raises numerous questions of mixed law and fact.

In their attempt to present context-dependent claims to rights to use and regulate water resources across a 22-county area, the Tribes ignore that such claims are not purely legal and fail to present the factual setting necessary to determine all such rights.

So here, as in *Yeutter*, the Tribes’ Complaint raises questions of fact or mixed questions of law and fact, which cannot be answered in the abstract, but which will be determined in the state court general stream adjudication. The Tribes’ claims to water and regulation simply cannot be divorced from the lands to which they allegedly apply. Given the numerous questions of fact and mixed questions of law and fact, “greater caution is required prior to concluding an issue is ripe for review.” *Coalition for Sustainable Res., Inc. v. U.S. Forest. Serv.*, 259 F.3d 1244, 1250 (10th Cir. 2001). These

questions are not ripe for review and can and should be answered during the State Court Adjudication.

4. The Tribes will not suffer hardship from the Court's declining judicial intervention as to any of their claims.

The Tribes have not demonstrated that they will suffer a “direct and immediate impact” nor have the Tribes demonstrated any “risk [that is] more than hypothetical.” *Roe # 2*, 253 F.3d at 1231. Here, the City’s permit application, if granted, will not affect the primary conduct of the day-to-day business of the Tribes. With respect to the Jurisdiction Claims and Rights Declaration Claims, the Tribes can show no concrete, present injury they will suffer from allowing the issues they advance to be decided in the State forum the McCarran Amendment encourages decide such issues. *See San Carlos Apache*, 463 U.S. at 569. The Tribes have simply not demonstrated that there will be “irremediable adverse consequences flowing from postponing judicial review.” *Yeutter*, 911 F.2d at 1416; *see also Tarrant I*, 2010 U.S. Dist. LEXIS 72442. at \*11 n.10 (“The extent of the contingencies and collateral issues also suggests that the relative hardship to plaintiff from withholding a legal determination of some sort at this juncture is relatively slight.”).

The uncertain and tenuous nature of the Tribes’ claims, combined with the filed general stream adjudication, counsels for this Court’s “forbearance” and a conclusion that the Tribes’ Permit Claims, Jurisdiction Claims, and Rights Declaration Claims are not ripe and should be dismissed under Fed. R. Civ. P. 12(b)(1).

**C. The Tribes lack standing to assert the Contract Invalidation Claim and that challenge is not ripe.**

The Tribes' request for a declaration that the June 2010 Transfer Agreement is contrary to federal law is based solely upon their objection to language in the Agreement that the State has "plenary jurisdiction" over water in the State. Complaint, ¶ 67. However, the Complaint alleges no concrete effect of the Agreement on the Tribes' rights. The 2010 Transfer Agreement transfers only those rights that the OWRB received from the Corps in the 1974 Contract, so the mere transfer of those rights cannot adversely affect the Tribes. Additionally, the 1974 Contract expressly provides that the Corps must approve any transfer of the rights granted by the 1974 Contract, which the Corps has thus far declined to do. (*See* Exhibit 1 to Brief of the Oklahoma Water Resources Board's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(7), and 19.).

The 2010 Transfer Agreement "does not command anyone to do anything or to refrain from doing anything; [it] does not grant, withhold, or modify any formal legal license, power, or authority; [it] does not subject anyone to any civil or criminal liability; [and it] creates no legal rights or obligations." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003). This claim should be dismissed.

**II. Considerations of Wise Judicial Administration Require this Court to Defer to the State General Stream Adjudication.**

This Court should exercise its discretion and stay or dismiss this case. Just as Congress intended, the Tribes' claims will be addressed in the State Court Adjudication, a general stream adjudication the OWRB has filed pursuant to Oklahoma law that invokes the waiver of federal immunity from suit under the McCarran Amendment.

The Adjudication Petition names, among others, the United States, on its own behalf, on behalf of the Tribes, and on behalf of Restricted Allotment Holders, as well as Oklahoma City and the Water Trust. The Tribes' rights to use and regulate water resources within their former "Treaty Territory" can and will be adjudicated in the state general stream adjudication. Resolving the issues presented here in the State Court Adjudication is consistent with Congress' goal in enacting the McCarran Amendment to allow federal, including tribal, rights to be determined along with the relative rights of all other users in the Basins. *See Colorado River*, 424 U.S. at 819 ("The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals." (emphasis added)). Thus, "application of traditional principles of [wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" warrant deference to the state court proceeding. *San Carlos Apache*, 463 U.S. at 551-52 (quoting *Colorado River*, 424 U.S. at 817) (alteration in original); *see also United States v. Bluewater-Toltec Irrigation Dist.*, 580 F. Supp. 1434, 1443 (D.N.M. 1984) ("*Bluewater*") (the "policy underlying the McCarran Amendment and principles of sound judicial administration necessitate deferring to the state court general adjudication").

The McCarran Amendment, enacted in 1952, embodies an overarching federal policy of deference to state law, state courts, and state process to resolve competing federal- and state-law claims to water resources.

As interpreted by *Colorado River*, the policies and doctrines underlying the McCarran Amendment counsel in favor of deferring to state court adjudication here: “[A] number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system.” 424 U.S. at 819. The Court further explained that “actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.” *Id.*; accord *Bluewater*, 580 F. Supp. at 1443 (“The McCarran Amendment, which allows the United States to be joined as a defendant in a water rights adjudication, implicitly recognizes that a comprehensive state system for the adjudication of water rights promotes a unified and consistent determination of water rights.”).

The Supreme Court identified five factors for determining whether a district court should abstain: (i) of greatest weight, the policies underlying the McCarran Amendment favoring a comprehensive resolution in state court, rather than piecemeal federal and state court determinations; (ii) the relative progress of the state and federal court cases; (iii) the importance of state law issues; (iii) the relative convenience of the state and federal forums;<sup>6</sup> and, (iv) the adequacy of the state court proceeding. *Colorado River*, 424 U.S. at 820; *San Carlos Apache*, 463 U.S. at 570; see also *Bluewater*, 580 F. Supp. at 1444.

*San Carlos Apache* is particularly instructive here. State water rights claimants filed petitions in state court to initiate general stream adjudications. *San Carlos Apache*,

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<sup>6</sup> Here, both the federal district court and the state court are located in Oklahoma City. Thus, this factor does not weigh in favor of one forum or the other.

463 U.S. at 557. In response, several tribes filed suit in federal court seeking, similar to the Tribes' requested relief here, "declaratory and injunctive relief preventing any further adjudication of their rights in state court, and independent federal determinations of their water rights." *Id.* at 558. The district court remanded the removed federal actions to state court and dismissed the federal actions without prejudice. *Id.*<sup>7</sup>

The Supreme Court affirmed the district court's decision to abstain based on its review of the *Colorado River* factors. Significantly, *San Carlos Apache* expressly rejected the same argument the Tribes advance here, that the Arizona Enabling Act's "disclaimer clause" prohibited state jurisdiction. *Id.* at 561. Observing that "a substantial majority of Indian land—including most of the largest Indian reservations—lies in States subject to such Enabling Acts," 463 U.S. at 561 (citing, among others, Oklahoma's Enabling Act), the Court was "convinced that, whatever limitation the Enabling Acts or federal policy may have originally placed on state-court jurisdiction over Indian water rights, those limitations were removed by the McCarran Amendment." *Id.* at 564. The Court concluded: "The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications." *Id.* at 569.

Against this backdrop, it is clear that application of the *Colorado River* factors compels the conclusion that this Court should dismiss the Tribes' Complaint.

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<sup>7</sup> *In re Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (D. Ariz. 1980) ("*Granite Reef*"), *aff'd*, *San Carlos Apache*, 463 U.S. 545 (1983).

**A. The policies underlying the McCarran Amendment support abstention.**

The fundamental policy underlying the McCarran Amendment, to foster a single, comprehensive resolution and avoid piecemeal litigation of water rights in a river system, *San Carlos Apache*, 463 U.S. at 569-70, strongly favors abstention here. This factor is the “most important consideration in *Colorado River*, and the most important consideration in any federal water suit concurrent to a comprehensive state proceeding.” *Id.* Here, the Tribes seek a declaration of their rights to use and regulate water resources in the Basins, *see* Complaint, ¶ 87. The State Court Adjudication will determine the relative rights among all of the parties, including the United States as trustee for the Tribes and any Restricted Allotment Holders. The McCarran Amendment’s legislative history confirms the interrelated nature of federal and state water rights:

In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and *by reason of the interlocking of adjudicated rights on any stream system*, any order or action affecting one right affects all such right . . . . It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.”

*See Colorado River*, 424 U.S. at 810-11 (quoting S. Rep. No. 755, 4-5) (emphasis added).

McCarran disfavors the Tribes’ attempt to have this Court declare the Tribes’ rights to use and regulate water resources divorced from and without regard to the state regulatory process with which the Tribes’ rights are intertwined. Rather, “[c]onsiderations of wise judicial administration weigh heavily against concurrent state and federal proceedings in

this matter and in favor of a general adjudication that will occur in state court.” *Bluewater*, 580 F. Supp. at 1444.

**B. The limited progress in federal court supports abstention.**

Here, both the federal and state court actions are in their infancy. The Tribes filed their original complaint on August 18, 2011. [Doc. No. 1] This Court scheduled a pre-trial conference on November 3, 2011, and ordered the parties into mediation on that date [Doc No. 52]. Three “all party” meetings have been held in the mediation, and the mediation continues under the Court’s Agreed Mediation Order entered January 5, 2012. On November 11, 2011, the Tribes filed their Amended Complaint [Doc. No. 53], to which the City Defendants filed an Answer on January 25, 2012 [Doc. No. 59], the day before the Tribes filed a Second Amended Complaint [Doc. No. 62]. OWRB filed its Application for Original Jurisdiction and Petition for Adjudication in the State Court Adjudication on February 10, 2012, less than a month after the Second Amended Complaint was filed and before any briefing of the merits was filed in this Court. The nascent stage of both actions supports this Court’s deferring to the state court proceeding.

Neither the prior filing of this action nor the initiation of the mediation counsel against abstention. “Merely because the federal action was filed first does not bar dismissal.” *Bluewater*, 580 F. Supp. at 1445. Here, the case before the Court has not “progressed to any appreciable degree.” *Id.*; see also *Colorado River*, 424 U.S. at 820 (noting the “absence of proceedings in the District Court other than filing of the complaint, prior to the motion to dismiss”).

Although the mediation is taking place under the umbrella of this Court's orders, the Governor will agree to continuing the mediation under comparable State court orders. Thus, deferring to the state court action will not impair the purposes of the mediation. *See, e.g., Bluewater*, 580 F. Supp. at 1445 (although the United States had spent \$300,000 on a hydrographic survey for the federal suit, survey may be of use in the state court proceeding). The relative progress of the two actions does not militate against abstention.

**C. The involvement of state water law counsels abstention.**

The deference to state court jurisdiction under McCarran is presaged by over a century of federal deference to state control and regulation of its water resources. *See California v. United States*, 438 U.S. 645, 648-79 (1978). The far-reaching and disruptive nature of the Tribes' challenge to Oklahoma's ability to regulate water within its boundaries implicates important state water law considerations and weighs heavily in favor of dismissal. *See Granite Reef*, 484 F. Supp. at 784 ("This Court is compelled toward the opinion that the intense local concern in actions of the present type weigh heavily in favor of the exercise of federal judicial restraint and nonintervention."). Additionally, the Tribes' claims in this case implicate critical rights of many state water claimants, as well as the United States, in its own behalf and on behalf of the Tribes and Restricted Allotment Holders. The determination of the non-federal claimants' water rights will depend upon state law. Additionally, the Tribes' claims that Oklahoma cannot initiate an adjudication that invokes the McCarran Amendment's waiver of federal immunity requires the first-ever interpretation of Oklahoma's adjudication statute, 82

O.S. §§ 105.6-105.8. Thus, the pervasive involvement of state law weighs heavily in favor of deferring to the state court proceeding.

**D. Participation by the United States in the State Court Adjudications.**

The OWRB has joined the United States in the State Court Adjudication in its own behalf and on behalf of the Tribes and Restricted Allotment Holders. Indeed, McCarran was intended to foster just such federal participation in state court adjudications. *See Colorado River*, 424 U.S. at 809 (concluding “that the state court had jurisdiction over Indian water rights under the [McCarran] Amendment.”).

**E. The Oklahoma State Court Adjudication proceeding is adequate.**

The federal courts have repeatedly rejected elsewhere the arguments the Tribes advance in their Complaint as to the sufficiency of the Oklahoma adjudication statute. Under the McCarran Amendment, Oklahoma state courts have jurisdiction to adjudicate and administer federal water rights, including tribal water rights. In *San Carlos Apache*, the Court reiterated: “The McCarran Amendment, as interpreted in *Colorado River*, *allows and encourages* state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications.” *San Carlos Apache*, 463 U.S. at 569 (emphasis added).

The Tenth Circuit has recognized that federal water rights “are subject to the management and control of the United States but that any collision between private rights and federal rights does not affect the validity of the proceedings or the right of the States to maintain suit for water adjudication.” *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1127 (10th Cir. 1979) (quoted authority and alterations omitted). Thus, it is

clear that Oklahoma state courts have jurisdiction to undertake a general water rights adjudication, which includes adjudicating any rights the Tribes' rights may claim.

The Tribes' other challenges leveled at the Oklahoma statutory scheme also fail. *See* Complaint, ¶¶ 80(a)-(h). Contrary to the conclusory allegations of the Tribes' Complaint, Oklahoma has an adequate process under state law to adjudicate both federal and state water rights, as well as address the asserted regulatory authority of the Tribes.

*a. Oklahoma statutes authorize a comprehensive adjudication satisfying the McCarran Amendment:* Contrary to the Complaint's contention, *see* Complaint, ¶¶ 80(b-c), the Oklahoma General Stream Adjudication Statute is comprehensive, as it provides for the Board to join "any person who is using or who has used water from the stream or who claims the right or who might claim the right to use water from the stream." 82 O.S. § 105.7. Additionally, the Oklahoma statute provides for intervention as of right to "any person who is using or who has used or who claims the right to use water from the stream." *Id.* The statute provides that the rights of all users joined shall be determined *inter sese* as to the priority, amount, purpose and place of use of all claims to water and as to all claimants in any given stream system under applicable law and that such rights shall be entered in a Final Decree. 82 O.S. §§ 105.7, 105.8. The statute provides that the Final Decree shall bind all those who are parties to the action, 82 O.S. § 105.8, and the Adjudication Petition's provision for notice to all unknown claimants will allow for persons with notice consistent with due process to be bound.

The dispositive question as to whether an action is sufficiently comprehensive to satisfy the waiver provision of the McCarran Amendment is whether all known claimants

to the waters of the stream system have been joined or provided notice and whether those rights will be determined *inter sese*. *Colorado River*, 424 U.S. at 819-20. In the adjudication, the OWRB has named and will join all known claimants to the use of water within the Basins and the United States in its capacity as trustee for any claims made by the Tribes and on behalf of all Restricted Allotment Holders. Accordingly, the state action is sufficiently comprehensive to comprise a general stream adjudication for all purposes including the waiver of the immunity of the United States to allow the determination of federally protected tribal and restricted individual claims to water. *See United States v. Dist. Ct. Eagle Cnty.*, 401 U.S. 520, 524-26 (1971) (Colorado adjudication procedures were sufficiently comprehensive because relative rights of all users would be determined even though all users were not joined or rights adjudicated at the same time); *see also Colorado River*, 424 U.S. at 810.

The fact that Oklahoma, like almost all other Western states, has an administrative permit system, *see, e.g.*, 82 O.S. §§ 105.9, does not affect OWRB's ability to initiate a comprehensive stream system adjudication under the Oklahoma adjudication statute, 82 O.S. §§ 105.6-105.8, that effectively invokes the federal immunity waiver under the McCarran Amendment.<sup>8</sup> In any event, in the State Court Adjudication, the OWRB will join any permittee or licensee, and any permit or license ultimately will be subject to the outcome of the State Court Adjudication. The Oklahoma

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<sup>8</sup> Contrary to the Tribes' contention, the "piecemeal" adjudication the McCarran Amendment was designed to avoid references duplicative, concurrent state and federal adjudications – not state permitting proceedings. *Colorado River*, 424 U.S. at 819; *San Carlos Apache*, 463 U.S. at 565-66.

application and permit process does not adjudicate rights, as a final matter *inter sese*, and all such rights, including federal rights, are as a matter of law ultimately subject to any rights determined in the general stream adjudication. This parallel system exists throughout the Western water states. *See, e.g., United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (“[A]ny permits issued by the State would be limited to excess water. If those permits represent rights that may be empty, so be it.”). Moreover, any federal rights are “protected from extinguishment under State law by the Supremacy Clause.” *See Yeutter*, 911 F.2d at 1419.

*b. The Tribes’ rights can be determined under Oklahoma’s statutory scheme:* Contrary to the contentions of the Complaint, *see* Complaint, ¶ 80(d-h), federal law provides the State Court Adjudication authority to determine water rights arising under both state and federal law, including all claims made by or on behalf of the Tribes. *See Colorado River*, 424 U.S. at 809-10; *San Carlos Apache*, 463 U.S. at 568-70. OWRB has requested the state court determine all state law-based claims to water under the applicable provisions of state law and all claims made by the United States on behalf of itself, the Tribes, and Restricted Allotment Holders under applicable federal and state law. *See Jicarilla Apache Tribe*, 601 F.2d at 1126-30. Thus, an adjudication in state court does not deny the recognition of any tribal rights.

*c. United States’ immunity from the costs of an adjudication:* The Tribes are simply incorrect that federal immunity from adjudication costs, *see* Complaint, ¶ 80(a), prevents an Oklahoma adjudication. Like many other general stream adjudication statutes throughout the western United States, the Oklahoma General Stream

Adjudication statute provides 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.” 82 O.S. § 105.6; *see, e.g.*, Idaho Code § 42-1414. The costs of such suit can be imposed on all water rights claimants with the exception of the United States. *See United States v. Idaho*, 508 U.S. 1, 8 (1993). This provision of Oklahoma law is no impediment to an adjudication under the Oklahoma statute.

In sum, if this Court does not dismiss for lack of jurisdiction on standing and ripeness grounds, application of the *Colorado River* factors requires this Court to dismiss this action in deference to the State Court Adjudication. *See Bluewater*, 580 F. Supp. at 1443.

### CONCLUSION

The Court should dismiss the Tribes’ Second Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), because the Tribes lack standing to assert the claims of the Complaint and their claims are not ripe for review. Moreover, even if this Court concludes that it may have jurisdiction, considerations of wise judicial administration require deferring to the concurrent state court general stream adjudication under the federal courts’ *Colorado River* abstention doctrine.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of February, 2012, a true and complete copy of the within and foregoing **BRIEF IN SUPPORT OF DEFENDANT GOVERNOR MARY FALLIN'S MOTION TO DISMISS AMENDED COMPLAINT FOR LACK OF JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1) or, ALTERNATIVELY, ON ABSTENTION GROUNDS** was electronically transmitted to the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

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

**CHICKASAW NATION and** )  
**CHOCTAW NATION OF OKLAHOMA,** )  
 )  
**Plaintiffs,** )  
 )  
**vs.** )  
 )  
**MARY FALLIN, in the official capacity** )  
**as Governor of the State of Oklahoma; et al.** )

**Case No. CIV-11-927-W**

**EXHIBITS TO  
BRIEF IN SUPPORT OF DEFENDANT GOVERNOR  
MARY FALLIN'S MOTION TO DISMISS AMENDED COMPLAINT  
FOR LACK OF JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)  
OR, ALTERNATIVELY, ON ABSTENTION GROUNDS**

- EXHIBIT 1** Oklahoma Water Resources Board's Petition for a General Stream Adjudication filed February 10, 2012
- EXHIBIT 2** May 20, 2010 Letter from Department of the Army to Hon. Brad Henry, Governor, State of Oklahoma

Case No. **#110375**

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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Oklahoma Water Resources Board,

Petitioner,

vs.

The United States on behalf of the Choctaw Nation of Oklahoma,  
a federally recognized Indian Tribe;  
the United States on behalf of the Chickasaw Nation, *et al.*,

Respondents.

FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
FEB 10 2012  
MICHAEL S. RICHIE  
CLERK

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APPLICATION TO ASSUME ORIGINAL JURISDICTION

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TABLE OF CONTENTS

	PAGE
<b>The Impetus for the Request</b> .....	1
<i>Brush v. Comm’r of Int. Rev.</i> , 300 U.S. 352, 366 (1937) .....	1
Title 82, § 105.6 .....	2
McCarran Amendment, 43 U.S. C. § 666 .....	2
<b>The Reasons Why the Court Should Assume Original Jurisdiction</b> .....	3
<i>The Oklahoma Comprehensive Water Plan, Executive Report</i> .....	4
<b>The Specific Relief Requested</b> .....	5

2

**IN THE SUPREME COURT OF OKLAHOMA**

Oklahoma Water Resources Board,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No.
	)	
The United States on behalf of the	)	
Choctaw Nation of Oklahoma,	)	
a federally recognized Indian Tribe;	)	
the United States on behalf of the	)	
Chickasaw Nation,, <i>et al.</i> ,	)	
	)	
Respondents.	)	

**Application to Assume Original Jurisdiction**

Petitioner, the Oklahoma Water Resources Board (the "OWRB") requests that the Court assume original jurisdiction over the Petition attached hereto. (See App. 1). In support of the Application and Petition, Petitioner would show this Court the following:

**The Impetus for the Request**

The importance of the issues presented in the Application to the State, its cities and towns, and citizens cannot be overstated. The matters presented in this Application to Assume Original Jurisdiction directly concern the ability of the State and its cities and towns to continue to supply water for public, commercial, industrial, agricultural, and domestic uses. As United States Supreme Court Justice Southerland noted in *Brush v. Comm'r of Int. Rev.*, 300 U.S. 352, 366 (1937), "[C]onservation and distribution of water in sufficient quantity and in a state of purity is as vital as air." *Id.* (emphasis added).

For more than a decade now, as the economic potential in water and water transfer or sale has become increasingly apparent, both the Chickasaw Nation and Choctaw Nation of

Oklahoma (the “Tribes”) have claimed various rights to the waters in Southeast Oklahoma, including:

- The Tribes have claimed a right to regulate the water in over twenty-two counties—not just the right to regulate water located on their scattered patches of tribal lands.
- The Tribes have claimed that the OWRB cannot issue certain permits for water in the Kiamichi River, Muddy Boggy Creek, and Clear Boggy Creek stream systems (collectively, the “Basins”) **until a comprehensive stream-wide adjudication of all water rights within those Basins under the McCarran Amendment, 43 U.S.C. § 666, has been completed.**

In short, the Tribes, over the past decade, have made various attempts to inject uncertainty into the State’s ability to regulate the waters within the southeast corner of the State, and in particular the Basins, threatening water rights under existing and pending state permits — all part of a concerted effort to coerce the State into entering into a compact or agreement giving the Tribes water rights, including the power to regulate waters in the Basins

In light of the need for certainty and security in Oklahoma water rights and administration, and considering these tribal claims, the OWRB, in accordance with the power vested in it under Title 82, § 105.6, has determined that the best interests of the claimants to the use of water from the Basins will be served by a determination of all rights to the waters in the stream systems of the Basins, and have authorized the initiation of such an adjudication.

Fortunately, Congress recognized that such comprehensive stream-wide water right adjudications cannot take place absent adjudication of federal rights. Thus, in 1952 Congress passed the McCarran Amendment, 43 U.S.C. § 666, which permits the joining of the United States to determine its interests, including any federally protected rights of Native American tribes or nations or individual owners of “allotted,” formerly tribal lands, and federal

instrumentalities, in a comprehensive stream-wide adjudication in state court.<sup>1</sup> Thus, neither the sovereign immunity of the United States nor of the Tribes prohibits such an adjudication in state court. In such an adjudication, the water rights of various classes of entities and individuals are determined, including the rights of:

- Federal, state, and tribal sovereigns,
- Individual owners of federal protected allotments of former tribal lands (“Restricted Allotment Holders”),
- Current OWRB water use permit holders,
- OWRB water use permit applicants, and
- Other water users who may have vested rights to the use of water in the Basins.

#### **The Reasons Why the Court Should Assume Original Jurisdiction**

In this Application, the OWRB asks this Court, in the exercise of its power to issue declaratory rulings in original proceedings, to assume original jurisdiction over the stream-wide adjudication presented in the accompanying Petition—through the use of a Special Referee or Special Master (who would be paid by the parties). This Application is made both because of the *publici juris* nature of the matter presented, and the importance of the relative speed with which the matter could be concluded through this Court’s exercise of original jurisdiction. This Court’s assumption of jurisdiction would have the following advantages:

- Stream-wide adjudication would be completed much more rapidly, because appeals and remands to district court would be avoided, thus, resulting in completing the adjudication many years, if not decades, quicker than district court actions.

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<sup>1</sup> General stream adjudications are quite common, as they are the congressionally recognized method for determining the rights of all claimants to the waters of a stream system. All 18 western states have laws allowing for general stream adjudications. In fact, general stream adjudications are currently occurring in 13 of the 18 western states. The various adjudication statutes in the 18 western states are very similar. The general stream adjudication statutes of New Mexico, North Dakota and South Dakota are the most similar to Oklahoma’s statute. New Mexico currently has 12 active adjudications, and over 20% of the water in New Mexico has been adjudicated through general stream adjudications like the one that the OWRB requests be initiated in this Court by the attached Petition.

- Procedural matters regarding service of parties, including determining who must be joined to have a comprehensive adjudication, could be determined as the matter proceeded, without corrective action requiring remand to the trial court, which in extreme cases could require an entire re-adjudication.
- As these cases are complex, and take years and at times decades to complete, district court dockets would not be consumed by such adjudication.
- This Court’s assumption of jurisdiction would avoid important matters affecting the entire State from being decided by local judges, who are subject to local political pressures.
- The Court could select a Special Master or Referee with expertise in the area—expertise not available from the district court bench.

In a very real sense, the future of the State of Oklahoma is at issue here. The Legislature can pass all sorts of laws creating “business friendly” atmospheres within the State to boost the State’s economy and job growth, but unless the State has the ability—free of doubt caused by un-adjudicated water rights or tribal regulatory claims—to regulate and provide the water necessary for private, agricultural and industrial use, the State could become an economic dust bowl. As the State’s Comprehensive Water Plan recognizes:

Water, more than any other element or natural resource, has reached a crucial level of importance to Oklahomans...It drives the state’s agricultural industry through the irrigation of wheat, hay, corn, and other crops, and in sustaining cattle, sheep, chickens, hogs, horses, and aquaculture operations. It is integral to oil and gas production as well as more conventional industries and mining operations that rely upon withdrawals from surface and groundwater sources. Water is counted upon to generate power and support countless environmental and recreational uses. With less water or limited access to it, Oklahoma’s quality of life is threatened and its economy ceases to grow.

*The Oklahoma Comprehensive Water Plan, Executive Report at 3.*

Only this Court's exercise of original jurisdiction and the appointment of a Special Master or Referee can efficiently provide the certainty needed for the State's continued ability to regulate and provide water to all its citizens.

**The Specific Relief Requested**

For these reasons, Petitioner requests this Court to assume original jurisdiction over the Petition, and appoint a Special Referee to hear the matter initiated by the Petition. Unlike the usual cases where the Court is asked to assume original jurisdiction, the jurisdictional and merits questions should not be, and as a practical matter cannot be, addressed simultaneously. Thus, the only issue before the Court at this time is the question of whether it should assume original jurisdiction. If original jurisdiction is assumed, a Special Referee can be assigned, and then the merits of the adjudication can be litigated to the Special Referee subject to this Court's efficient review. If the Court declines to exercise original jurisdiction, Petitioner asks the Court to transfer the case to the district court of its designation.

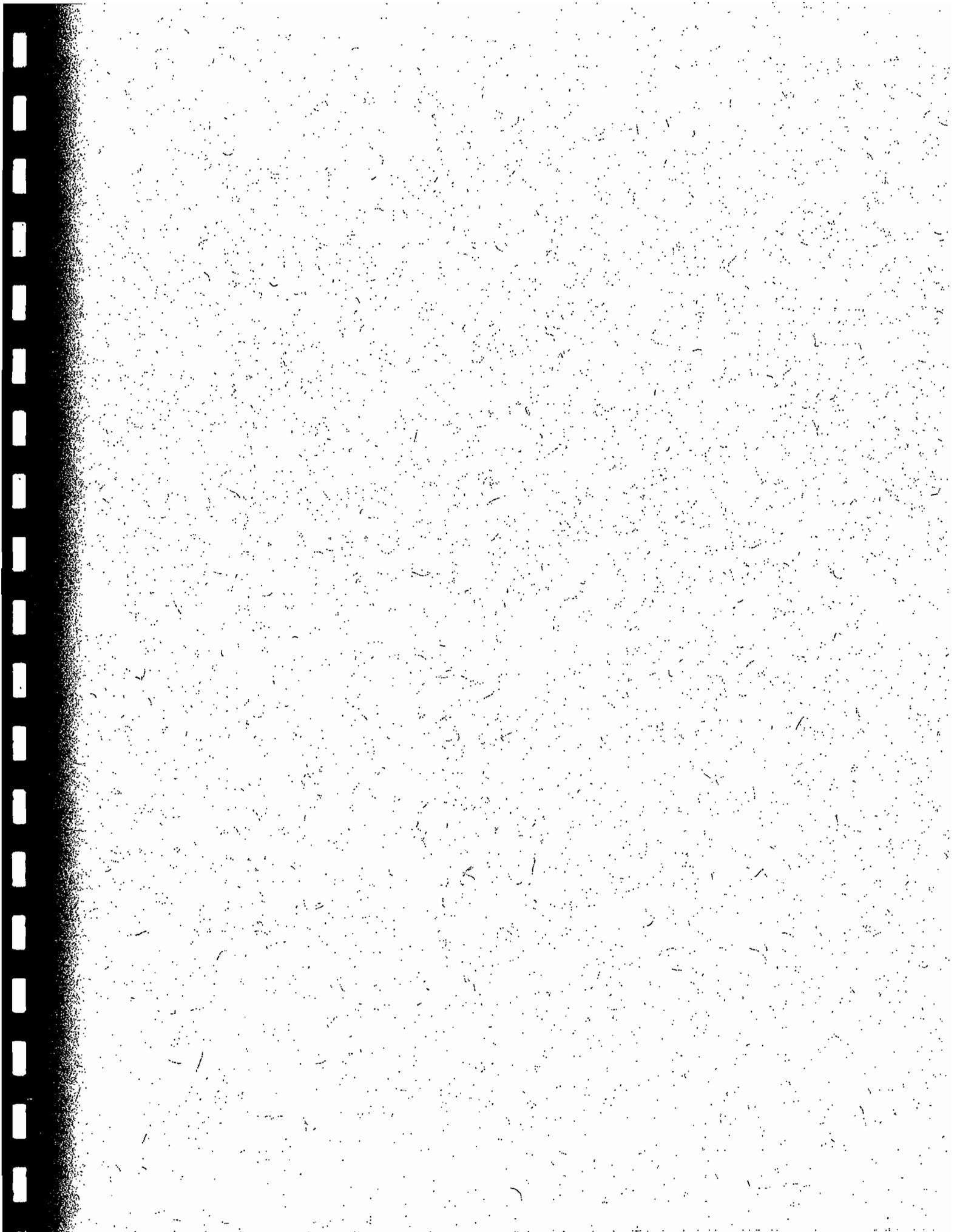
Respectfully submitted,



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*Counsel for Petitioner*



## **ATTACHED APPENDIX**

### **Number**

### **Description**

**1**

**Petition over which Petitioner asks the Court to assume jurisdiction, or, alternatively, transfer to a district court of Petitioner's designation.**

IN THE SUPREME COURT OF OKLAHOMA

Oklahoma Water Resources Board, )  
)  
Petitioner, )  
)  
vs. )  
)  
United States of America; )  
United States Department of Interior, )  
a federal agency; )  
United States Bureau of Reclamation, )  
a federal agency; )  
United States Army Corps of Engineers, )  
a federal agency; )  
the United States on behalf of the )  
Choctaw Nation of Oklahoma, )  
a federally recognized Indian Tribe; )  
the United States on behalf of the )  
Chickasaw Nation, )  
a federally recognized Indian Tribe; )  
the United States on behalf of individual )  
members of the Choctaw Nation of )  
Oklahoma; )  
the United States on behalf of individual )  
members of the Chickasaw Nation; )  
the Oklahoma Water Resources Board; )  
the Oklahoma City Water Utilities Trust; )  
the City of Oklahoma City; )  
McGee Creek Authority; )  
Donald Leslie; )  
Hugo Municipal Authority; )  
Antlers Public Works Authority; )  
Department of Tourism & Recreation; )  
Department of Wildlife Conservation; )  
Patrick Miller; )  
Talihina Public Works Authority; )  
Merlan Debolt, M.D. )  
Louise A. Redman; )  
Clyde & Donnie Corbin; )  
Latimer County Rural Water District No. 2; )  
Donna Addington McSpadden; )  
Sardis Lake Water Authority; )  
Pushmataha County Rural Water District )  
No. 3; )  
Decker Revocable Trust; )

Danny W. Wilson; )  
 Dale Jackson; )  
 Bueford R. Lockhart; )  
 David and Leo Ralston; )  
 SCS Materials LP; )  
 William S. Howard; )  
 William S. and Brenda G. Howard; )  
 Big Mac Tank Trucks LLC; )  
 Michael Smith; )  
 Roland Brents; )  
 Town of Fort Towson; )  
 Western Farmers Electric Cooperative; )  
 M.E.N.S. Ranch )  
 J. T. Hutson; )  
 Meridian Aggregates Company, LP; )  
 Carl Boykin; )  
 Donna Addington-McSpadden; )  
 Bill Price; )  
 Meridian Aggregates Company; )  
 Jonathan David Burns; )  
 Clayton Chamber of )  
 Commerce, Inc; )  
 Sardis Water Resources Board Inc.; )  
 Tarrant Regional Water District; )  
 Upper Trinity Regional Water District; )  
 David Lynn Brown; )  
 Central Oklahoma Master Conservancy )  
 District; )  
 North Texas Municipal Water District; )  
 Choctaw County Economic Development )  
 Authority; )  
 Town of Kiowa; )  
 Louie Le Flore; )  
 Bromide Public Works Authority; )  
 Doyle Dean and Debrah J. Arnold; )  
 City of Ada; )  
 Coalgate Public Works Authority; )  
 W. E. Reeves; )  
 Howard Nelson; )  
 Bill Moore; )  
 Wiley and Donna Harrison; )  
 Charles and Conita Tipton; )  
 Dunn's Fish Farm of Arkansas Inc.; )  
 Oklahoma Gas and Electric Company; )  
 Eddie and Ronnie Bowen; )

Roy and Bea Hall; )  
 City of Atoka; )  
 County Commissioners of Atoka County; )  
 Southern Oklahoma Development Trust; )  
 Walter Woolley, Jr.; )  
 Jack G. Emerson; )  
 Lilly Cannon; )  
 B. L. Little; )  
 Thomas G. Lewis Revocable Trust; )  
 Duane Tomek and Susane Stockton )  
 Austin LeMay; )  
 Rick and Kathy Clayton; )  
 Carol A. Tomlin, Trustee; )  
 James C. Lollar Trust; )  
 Arbuckle Area Council; )  
 Oklahoma State University )  
 Vegetable Research Station; )  
 Mack Alford Correctional Center; )  
 Ron Willis; )  
 Wapanucka Public Works Authority; )  
 Bobby D. and Debbie Wall; )  
 Jack Wayne Jensen; )  
 Jimmy L. and Rita D. Nix; )  
 DHM Enterprises Inc.; )  
 Gerald Clifford Wilson; )  
 GHB Farms, Inc.; )  
 Hughes County Rural Water District No. 2; )  
 Robinson Bros. Park Inc.; )  
 Tyson Foods Inc.; )  
 Delbert A. Harden; )  
 Jamie W. and Earlene Howard; )  
 Will Alan King; )  
 Roger and Cindy Stinchcomb; )  
 Joyce Ferguson; )  
 BC Wetlands LTD; )  
 W. S. Jr. and Mary Frances Webb; )  
 Edgemont Beef; )  
 Richard J. and Mary Elizabeth Helton; )  
 Stream Natural Resources LC; )  
 Cedar Valley Nursery Inc.; )  
 J. M. and Shelby Welch; )  
 W-7 Swine Farms Inc.; )  
 Kenneth and Mary Alice Battles; )  
 Robert M. and Susan E. Reinauer; )  
 Howell Family Trust; )

Acie V. Hayes, Jr.; )  
Michael and Kara McBrayer; )  
Mallard Farms LLC; )  
Jeffrey Allen Barker; )  
City of Coalgate; )  
L. Ray Wood; )  
Chester Bench; )  
Boggy River Ranch LLC; )  
John Troyer; )  
WACCAW Development LLC; )  
Mustang Stone Quarries LLC; )  
Wayman L. Garnett; )  
St. Mary Land and Exploration Co.; )  
Arcadia Farm LLC; )  
TransCanada Keystone Pipeline LP; )  
City of Midwest City; )  
City of Tecumseh; )  
Redark Development Authority; )  
David Hull; )  
National Coal County; )  
City of Lehigh; )  
Holnam, Inc.; )  
Stonewall Public Works Authority; )  
City of Stringtown; )  
City of Tupelo; )  
Mrs. Winifred Borders; )  
Marion and Louise Borders; )  
Chapman Family Revocable Trust; )  
Lee O. Harrington; )  
R.W. Borders; )  
Allen Public Works Authority; )  
Atoka County Rural Water District No. 2; )  
Atoka County Rural Water District No. 3; )  
Greg A. Turpin; )  
Johnston County Rural Water, Sewer and )  
Solid Waste Management District No. 4; )  
Harold V. Merriman; )  
Caddo Public Works Authority; )  
Troy Morris; )  
Lyndle Ellis; )  
Clyde D. Lacey; )  
Weaver Jackson; )  
Susie M. Humphries; )  
Carlton W. Corbin; )  
Frezell Calvin; )

Bill Morrow; )  
 Oklahoma State University, Wes Watkins )  
 Agriculture Research and Extension Center; )  
 Town of Boswell; )  
 Wingard Water Corporation; )  
 Johnny Stinnet; )  
 Allen Public Works Authority; )  
 G.O. Philpot; )  
 Hughes County Rural Water District No. 6; )  
 Charles Wayne Borders; )  
 Nancy K. McDougal Revocable Trust; )  
 Town of Soper; )  
 Helen J. Smith; )  
 Greg and Ines Turpin; )  
 Choctaw County Rural Water District No. 1; )  
 Roy and Shirley Mobbs; )  
 David Mobbs; )  
 Doyle and Selma Foreman; )  
 Donald R. and Sherley Marie Zaicek; )  
 Southeastern Oklahoma Land Co.; )  
 Bryan County Rural Water, Sewer and Solid )  
 Waste Management District No. 6; )  
 Will Grote; )  
 G. Hump Ltd.; )  
 Mungle Corporation; )  
 Don Brents; )  
 Weyerhaeuser Co.; )  
 Eugene Hill; )  
 Roger Buchanan; )  
 Mike and Luisa Selman; )  
 Jack and John Johnson; )  
 Albert and Kathryn Holloway; )  
 Mr. and Mrs. Robert Ballard; )  
 W7 Land Co.; )  
 Dennis Harden; )  
 and all persons claiming or who may claim )  
 rights to the waters or use of the waters )  
 of the Kiamichi, Muddy Boggy or Clear )  
 Boggy Basin stream system in the )  
 State of Oklahoma, )  
 Respondents. )

**PETITION OF THE OKLAHOMA WATER RESOURCES BOARD  
FOR A GENERAL STREAM ADJUDICATION IN THE KIAMICHI,  
MUDDY BOGGY AND CLEAR BOGGY BASIN STREAM SYSTEMS**

Petitioner, the Oklahoma Water Resources Board (“OWRB” or “Board”), through this Petition for a General Stream Adjudication in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems, requests the Court commence a general stream adjudication in the Kiamichi Basin, Muddy Boggy Basin and Clear Boggy Basin stream systems (collectively “the Basins”) pursuant to the facts and allegations as set forth herein. This Petition presents a matter of great public importance to the State of Oklahoma and its citizens as set forth below. As the basis for its Petition, the OWRB states as follows:

**BACKGROUND AND NATURE OF THE ACTION**

**A. Basis for and nature of the action.**

1. Claims by the Choctaw Nation of Oklahoma and the Chickasaw Nation (collectively hereinafter “the Tribes”) have given rise to disputes over rights in and to the use and administration of water in the portions of southeastern Oklahoma known as the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems. These disputes concern and affect current and future water supplies for Oklahoma municipalities, other public and private entities, and individuals.

2. This is an action for a comprehensive general stream adjudication to determine all claims to the rights to the use of water within the Basins pursuant to 82 O.S. §§ 105.6 through 105.8 (“Oklahoma General Stream Adjudication Statute”) and to provide for the administration of such rights pursuant to an Interim Administrative Order and Final Decree as requested herein.

3. A general stream adjudication, in contrast to a private dispute among limited users or claimants, requires the joinder of all known claimants and a determination as between the State and each as to the other (*inter sese*) of all claims within a defined stream system and their relative

priorities pursuant to all applicable federal and state law necessary for the determination of such claims.

4. A general stream adjudication involves “all of the rights of various owners on a given stream.” *Dugan v. Rank*, 372 U.S. 609, 618 (1963). The purpose of a general stream adjudication is to address the claims of the various owners within a given stream system in order to be able to effectively and efficiently allocate and administer the available water resources based on the relative priorities of the rights. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976) (“*Colorado River*”).

5. The Oklahoma General Stream Adjudication Statute provides a comprehensive scheme for the adjudication of all water rights within a given stream system whether those claims to water arise under state or federal law.

6. The waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems are public waters subject to appropriation for beneficial uses as provided by Oklahoma law or as otherwise recognized by federal law.

7. Various individuals and entities claim rights to the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems. The claims to all rights relating to water or the use of such water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems have never been finally determined in a comprehensive general stream adjudication.

8. The water resources of the State belong to the public and are subject to rights of use and the development of a water right through application to the OWRB and application of water to beneficial use under state law. The State’s control over water use and allocation within its boundaries is supported by over two centuries of federal deference to, and acknowledgment of, state primacy vis-à-vis water within state boundaries as expressly recognized by the McCarran

Amendment, 43 U.S.C. § 666 ( “the McCarran Amendment”), described below. *See, e.g., United States v. City and Cnty. of Denver*, 656 P.2d 1, 9 (Colo. 1983) (“[B]y enacting the McCarran Amendment, Congress recognized that the western states have a legitimate interest in and responsibility for the allocation of water resources within their borders including determination and adjudication of the water rights claimed by the United States.”); *see also California v. United States*, 438 U.S. 645, 677 (1978). In limited instances, claims to water can arise under federal rather than state law, including in the context of claims asserted by, or on behalf of, Indian Tribes or Nations. Under the McCarran Amendment such federal rights are subject to adjudication and determination in state court in a comprehensive general stream adjudication and administration pursuant to the adjudication and a final decree.

9. The Tribes, federally recognized Indian Tribes, each claim rights to water arising under federal law in the Basins. OWRB has determined that the Tribes’ claims and other factors have created the need to commence a comprehensive general stream adjudication to determine the relative rights of all claims in the Basins whether such claims arise under state or federal law.

10. A determination by this Court of all of the claims of each defendant as between the State of Oklahoma and through OWRB and *inter sese* as to the waters of the Basins is necessary for the effective and uniform use, administration and supervision of the waters of the respective stream systems.

11. All claims to the right to water or to use water within the Basins, whether arising under state or federal law, are subject to adjudication in state court pursuant to the Oklahoma General Stream Adjudication Statute in conformance with the McCarran Amendment for purposes of waiver of the immunity of the United States on its own behalf and on behalf of water claims of Indian Tribes.

12. This action requests this Court adjudicate all claims to the waters or use of waters of the Basins and enter a Final Decree determining all claims and the administration thereof.

**A. The McCarran Amendment authorizes state court adjudication and administration of all federal claims to water, including claims made by or on behalf of Indian Tribes.**

1. The McCarran Amendment provides for state adjudication and administration of federally claimed water rights and waives the immunity of the United States as to the adjudication and administration of all federally based claims to water from suit in state court. *See Colorado River*, 424 U.S. at 809.

2. The McCarran Amendment provides in pertinent part:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights . . . .

43 U.S.C. § 666.

3. The waiver of immunity provided by the McCarran Amendment applies to allow suits to determine the rights of the United States and, accordingly, of any Indian Tribe, Nation, or individual Indian held or protected by the United States on behalf of such Tribe, Nation, or individual Indian. *See Colorado River*, 424 U.S. at 805.

4. Language contained in a State's Enabling Act at the time of statehood disclaiming jurisdiction over Indian lands or territory is not a bar to the McCarran Amendment's waiver of sovereign immunity as to tribal claims. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 564 (1983) ("*San Carlos Apache*").

5. The United States Supreme Court has repeatedly affirmed the importance of deference to state court jurisdiction with regard to the adjudication of rights to water and administration thereof. *See Colorado River*, 424 U.S. at 819-20; *San Carlos Apache*, 463 U.S. at

567-68; *United States v. Dist. Ct. In & For Eagle Cnty., Colo.*, 401 U.S. 520, 525 (1971) (“*Eagle County*”) (United States amenable to suit in Colorado state court pursuant to Colorado general adjudication statute for all claims by the United States); *United States v. Dist. Ct. In & For Water Div. No. 5, Colo.*, 401 U.S. 527, 529 (1971) (same).

6. The McCarran Amendment reflects the intent that “it is clear that the States have the control of the water within their boundaries, [and] it is essential that each and every owner along a given water course, including the United States must be amenable to the laws of the State, if there is to be a proper administration of the water law as it has developed over the years.” S. Rep. No. 755, 82<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 6 (1951).

7. In order for the waiver provided by the McCarran Amendment to be effective, the suit must be comprehensive in nature and join all known claimants to the water of a river system or other source. Consistent with the overarching federal deference to State control and regulation of water resources in determining whether a general stream adjudication is sufficiently comprehensive for purposes of the waiver of immunity supplied by the McCarran Amendment, courts have generally deferred to the choices made by individual States in general stream adjudication statutes. *See, e.g., Eagle County*, 401 U.S. at 525; *United States v. Oregon*, 44 F.3d 758, 767 (9th Cir. 1994); *In re General Adjudication of all Rights to Use Water in the Gila River System & Source*, 857 P.2d 1236, 1247-48 (Ariz. 1993) (“*Gila River*”); *United States v. Bluewater Toltec Irrigation Dist.*, 580 F. Supp. 1434, 1438 (D.N.M. 1984), *aff’d sub nom.*, 806 F.2d 986 (10th Cir. 1986) (“*Bluewater Toltec*”).

8. The Oklahoma General Stream Adjudication statute contemplates and provides for a comprehensive suit as contemplated by the McCarran Amendment.

**A. Overview of Oklahoma’s General Stream Adjudication Statute**

1. Pursuant to 82 O.S. § 105.6, the OWRB is vested with the authority to file suit on behalf of the State to determine the rights to the use of water from any stream system within the State where the Board has determined that the interests of all the claimants to use of the water from the stream system would be best served by such a determination.

2. Once commenced, the Board is directed to “diligently prosecute such action to a final adjudication,” 82 O.S. § 105.6, and to “furnish data necessary for the determination of the rights involved” as requested by the Court. 82 O.S. § 105.7.

3. Like many other general stream adjudication statutes throughout the western United States, the Oklahoma General Stream Adjudication statute provides 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.” 82 O.S. § 105.6; *see, e.g.*, Idaho Code § 42-1414. The costs of such suit can be imposed on all water rights claimants with the exception of the United States. *See United States v. Idaho*, 508 U.S. 1, 8 (1993) (McCarran Amendment did not waive immunity for State imposition of the costs of a general stream adjudication, but the United States must participate in a state court proceeding relative to all federal claims).

4. The Oklahoma General Stream Adjudication Statute is comprehensive as it provides for the Board to join “any person who is using or who has used water from the stream or who claims the right or who might claim the right to use water from the stream . . . .” 82 O.S. § 105.7. Additionally, the Oklahoma General Stream Adjudication Statute provides for intervention as of right to “any person who is using or who has used or who claims the right to use water from the stream.” *Id.*

5. The Oklahoma General Stream Adjudication Statute provides that the rights of all users joined shall be determined *inter sese* as to the priority, amount, purpose and place of use of all claims to water and as to all claimants in any given stream system under applicable law and that such rights shall be entered in a Final Decree. 82 O.S. §§ 105.7, 105.8. The statute provides that the Final Decree shall bind all those who are parties to the action. 82 O.S. § 105.7.

6. The Oklahoma General Stream Adjudication Statute authorizing the Board to file a general stream adjudication is discretionary; OWRB is not obligated to file a general stream adjudication unless it determines such an action would be in the best interests of the claimants in the stream system. The statute recognizes OWRB's independent authority and obligation to grant permits and licenses as those matters come before it without regard to the filing of a general stream adjudication. 82 O.S. § 105.6 ("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").

**A. Oklahoma's General Stream Adjudication Statute provides for a comprehensive general stream adjudication as contemplated by the McCarran Amendment.**

1. The dispositive question as to whether a general stream adjudication is sufficiently comprehensive to allow for the waiver of immunity contemplated by the McCarran Amendment is whether the Board has in fact sought to join all known claimants to the waters of the stream system and whether those rights will be determined *inter sese*. In this action OWRB has named and will join all known claimants to the water or use thereof within the Basins by naming all known claimants to the waters of the respective stream systems and the United States in its capacity as trustee for any and all claims made by the Tribes, and the United States on behalf of all persons holding rights to allotments of the Tribes' former lands the title to which remains held in trust by the United States or subject to federal restrictions on alienation ("Restricted Allotment Holders").

2. Because the OWRB has or will join in this action all known claimants in the respective stream systems who claim rights to the use of water under applicable state or federal law, the action before the Court is sufficiently comprehensive to constitute a general stream adjudication for purposes of the McCarran Amendment. *See, e.g., United States v. Oregon*, 44 F.3d at 768-70 (Oregon's general stream adjudication sufficiently comprehensive for purposes of McCarran Amendment although it excluded all state-permitted users after 1909 and all claims to groundwater); *Gila River*, 857 P.2d at 1247-48 (Arizona general stream adjudication statute, which excluded some categories of use and users, was sufficiently comprehensive for purposes of McCarran Amendment).

3. The Oklahoma General Stream Adjudication Statute provides that the rights of all users joined shall be determined *inter sese* as to the priority, amount, purpose and place of use of all claims to water and as to all claimants in the Basins. 82 O.S. §§ 105.6, 105.8. Accordingly, this action is sufficiently comprehensive to comprise a general stream adjudication for all purposes including the waiver of the immunity of the United States and the determination of federally protected tribal and individual claims to water. *See San Carlos Apache*, 463 U.S. at 564-69 (Arizona stream adjudication statutes sufficiently comprehensive to adjudicate tribal claims to water); *see also Eagle County*, 401 U.S. at 525-26 (Colorado adjudication procedures sufficiently comprehensive where relative rights of all users determined even though all users not joined or rights adjudicated at the same time).

4. This action is sufficiently comprehensive for the purposes of the McCarran Amendment because, even if all respondents are not joined at the commencement of the action, OWRB will join all required claimants in due course. *See Eagle County*, 401 U.S. at 525-26; *Bluewater Toltec*, 580 F. Supp. at 1438-39.

5. As a matter of law any decree entered pursuant to the Oklahoma General Stream Adjudication Statute as a result of this general stream adjudication will be binding on parties to the action and, in accordance with principles of due process, on those currently unknown claimants provided adequate notice and who choose not to join or participate. *See generally* Hutchins, W.A., Water Rights Laws in the Nineteen Western States, Vol. II, Chap. 15 at 510 (1974). The Oklahoma General Stream Adjudication Statute explicitly provides for this legally acceptable approach. 82 O.S. § 105.7.

6. The McCarran Amendment was not designed to avoid state permitting processes contemporaneous with a general stream adjudication, but rather to avoid “piecemeal” and duplicative state and federal stream adjudications. *Colorado River*, 424 U.S. at 819; *San Carlos Apache*, 463 U.S. at 565-66. Thus, the recognition in the Oklahoma General Stream Adjudication Statute that OWRB has independent authority and obligation to grant permits as those matters come before it, *see* 82 O.S. § 105.6, does not affect the validity of a general stream adjudication proceeding brought pursuant to the statute. Regardless, OWRB will join any permittee, and any permit will be subject ultimately to the outcome of this adjudication. The application and permit process does not adjudicate rights, as a final matter *inter sese*, and all such rights, including federal rights, are as a matter of law ultimately subject to any rights determined by this Court in a general stream adjudication. Moreover, any federal rights are “protected from extinguishment under State law by the Supremacy Clause.” *See Sierra Club v. Yeutter*, 911 F.2d 1405, 1419 (10th Cir. 1990); *see also United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (“[A]ny permits issued by the State would be limited to excess water. If those permits represent rights that may be empty, so be it.”).

7. Although the United States is immune from the imposition of costs in this general stream adjudication, *see United States v. Idaho*, 508 U.S. at 8, the imposition of fees on other claimants is not a bar to the adjudication of the claims of the United States including tribal claims, in state court pursuant to the Oklahoma General Stream Adjudication Statute. *See id.* (United States must participate in state court proceeding relative to all claims).

8. OWRB seeks in this action to determine rights to water or the use thereof in the Basins arising under both state and federal law including all claims made by or on behalf of the Tribes or Restricted Allotment Holders. *See Colorado River*, 424 U.S. at 811-12; *San Carlos Apache*, 463 U.S. at 564. OWRB requests the Court determine all state law-based claims to water under the applicable provisions of state law and all claims made by the United States on behalf of itself, the Tribes, and Restricted Allotment Holders under applicable federal law and state law to the extent applicable. *See Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1126-30 (10th Cir. 1979) (McCarran Amendment provides for joinder of United States “as a party defendant in the state court even though the suit arises under state law and the federally reserved rights involve an interpretation and application of federal law”).

9. This Court’s determination of all state and federal claims is appropriate notwithstanding allegations of historic “hostility” of state courts to tribal claims. *See Colorado River*, 424 U.S. at 812 and *San Carlos Apache*, 463 U.S. at 551-52; *see also United States v. Oregon*, 44 F.3d at 771-72 (rejecting claims of the United States that Oregon state adjudication statute was ineffective for purposes of McCarran as it allowed federal rights to be initially determined in allegedly biased state administrative proceeding); *In re General Adjudication of the Big Horn River System*, 753 P.2d 76, 114-15 (Wyo. 1988) (rejecting a claim that the Wyoming State

Engineer may be unfair.) This general stream adjudication is properly before the state courts of Oklahoma.

### JURISDICTION AND VENUE

10. This action arises under both state and federal law for the purposes of adjudication and administration of water rights within the State of Oklahoma in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

11. Jurisdiction and venue rests in this Court pursuant to the Oklahoma General Stream Adjudication Statute, 82 O.S. §§ 105.6 through 105.8, specifically authorizing the OWRB to initiate suit and prosecute to completion an action for a comprehensive general stream adjudication, and pursuant to Art. 7, § 4 of the Oklahoma Constitution, authorizing this Court to exercise its original jurisdiction, and to grant the relief requested in the Petition.

12. The Supreme Court of Oklahoma has original jurisdiction over this action because of the significant issues of public interest and policy relating to the allocation, use and administration of the waters of the State and the determination of the federal rights to water, including the rights of the Tribes and Restricted Allotment Holders within the State.

13. For purposes of joinder of the United States, the immunity of the United States and its agencies, and the immunity of the United States as to claims to water made by or on behalf of the Tribes or Restricted Allotment Holders, is waived pursuant to 43 U.S.C. § 666.

14. The claims of the United States, if any, on its own behalf and on behalf of the Tribes and Restricted Allotment Holders arise under federal law over which this Court has jurisdiction. 43 U.S.C. § 666; *Colorado River*, 424 U.S. at 809.

15. The Board, at its December 13, 2011 meeting, determined that the interests of all claimants in the Basins will be served by the commencement and completion of a comprehensive general stream adjudication.

#### PARTIES

16. Petitioner OWRB brings this action on its own behalf and on behalf of the State of Oklahoma. OWRB is the state agency established under Oklahoma law charged with the duty to allocate and administer the waters of the State, including filing a general stream adjudication for purposes of determining the rights to water and the use thereof within any stream system within the State.

17. Respondents are all persons or entities claiming rights or interests to the waters of the Kiamichi, Muddy Boggy or Clear Boggy Basin stream systems in the State of Oklahoma.

18. Petitioner OWRB has identified, named, and will join all claimants known to it in this adjudication through: (1) a review of all applications and permits on file with the OWRB; (2) a review of all previous non-comprehensive adjudications in the respective Basins including *Oklahoma City v. State Bd. of Pub Affairs, et al.*, No. 10217 (Atoka County Dist. Ct. 1958); OWRB Final Order No. 9, March 9, 1965; OWRB Final Order No. 12, March 9, 1965; and (3) identification and review of all interests and claims of the United States, including the claims of the Tribes and Restricted Allotment Holders.

19. These claimants fall into three general categories: sovereigns and governmental entities (including their agencies); current permit holders; and permit applicants. Additionally, OWRB will publish notice to notify any unknown claimants to water within each of the Basins.

**a. Sovereigns**

1. Respondent United States, United States Department of Interior, may claim to hold in trust for and/or claim on behalf of the Tribes, claims to water rights or rights to water within the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems pursuant to federal law. “[T]he United States is the proper party defendant in any general water rights adjudication proceeding, whether brought in federal or state court, relating to federally created water rights, including those reserved for use by the Indian Tribes.” *Jicarilla Apache Tribe*, 601 F.2d at 1127.

2. Respondent United States may hold in trust and/or may claim water rights or rights to water within the Kiamichi, Muddy and Clear Boggy Basin stream systems on behalf of Restricted Allotment Holders who currently own interests in land formerly allotted and currently held in trust or subject to federal restraints on alienation.

3. Respondent United States Army Corps of Engineers (“Corps”) may claim rights to storage or other rights to water in Sardis Lake pursuant to the Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1187; *see also* Flood Control Act of 1936, chap. 688, 49 Stat. 1570, 1571 (currently codified as 33 U.S.C. § 701a (2011)); Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 297, 319 (currently codified as 43 U.S.C. § 390b (2011)); and rights to storage or other rights to water in Hugo Reservoir pursuant to the Flood Control Acts of 1936 and 1962.

4. Respondent United States Bureau of Reclamation may claim rights to storage or other rights regarding the impoundment of or the rights to the use of water in McGee Creek Reservoir pursuant to Public Law 94-423, the Reclamation Act of 1902, and all acts amendatory or supplementary thereto.

5. Petitioner OWRB may claim rights to the storage and use of water pursuant to that certain contract entered into with the Corps on February 2, 1974 for rights to the use of storage capacity in Sardis Reservoir ("1974 Contract"). In June 2010, the State of Oklahoma entered into a Storage Contract Transfer Agreement to allow the Oklahoma City Water Utilities Trust to acquire all of the State's rights title and interest to the 1974 Contract. That transfer agreement has not yet been approved by the Corps.

6. Respondent the 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"). Oklahoma City may claim rights to the storage and use of water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems pursuant to permits, contracts or applications pending with the OWRB.

7. Respondent Oklahoma City Water Utilities Trust is a public trust authorized under state law to function as the primary policy-making body for the Oklahoma City Water and Wastewater Utilities. The Oklahoma City Water Utilities Trust may claim rights to store and use water pursuant to permits, contracts or applications held in trust for the use and benefit of Oklahoma City in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

8. Respondent Hugo Municipal Authority is an Oklahoma public water trust formed for the benefit of the City of Hugo, Oklahoma. The Hugo Municipal Authority may claim rights to the storage and use of water pursuant to that certain contract entered into with the Corps on October 30, 1972, and approved on October 22, 1974 for rights to the use of storage capacity in Hugo Reservoir.

9. Respondent McGee Creek Authority is an entity formed under federal law, Public Law 94-423, § 701, for the purpose of developing, financing, operating and maintaining

the water supply in McGee Creek Reservoir. It is comprised of the Southern Oklahoma Development Trust, the County of Atoka, the Oklahoma City Water Utilities Trust and the City of Oklahoma City. The McGee Creek Authority may claim rights to store or otherwise utilize the waters of McGee Creek Reservoir.

**a. Current Permit Holders**

1. According to the records of the OWRB, the following Respondents currently hold active permits for the right to divert and use the surface waters of the Kiamichi Basin stream system: Donald Leslie, Hugo Municipal Authority, Antlers Public Works Authority, Oklahoma Department of Tourism and Recreation, Oklahoma Department of Wildlife Conservation, Patrick Miller, Talihina Public Works Authority, Merlen Debolt, M.D., Louise A. Redman, Clyde and Donnie Corbin, Latimer County Rural Water District No. 2, Donna Addington-McSpadden, Sardis Lake Water Authority, Pushmataha County Rural Water District No. 3, Dirk Decker, Decker Revocable Trust, Danny W. Wilson, Dale Jackson, Bueford R. Lockhart, David and Leo Ralston, SCS Materials LP, William S. Howard, William S. and Brenda G. Howard, Big Mac Tank Trucks LLC, and Michael Smith.

2. According to the records of the OWRB, the following Respondents currently hold active permits for the right to divert and use the groundwater underlying the Kiamichi Basin stream system area: Roland Brents, Town of Fort Towson, Western Farmers Electric Cooperative, J. T. Hutson, Meridian Aggregates Company, LP, Carl Boykin, Donna Addington-McSpadden, Bill Price, Meridian Aggregate Company, M.E.N.S. Ranch and Jonathan David Burns.

3. According to the records of the OWRB, the following Respondents currently hold active permits for the right to use the surface waters of the Muddy Boggy and/or Clear Boggy Basin stream systems: Town of Kiowa, Louie Le Flore, City of Oklahoma City,

Bromide Public Works Authority, Doyle Dean and Debrah J. Arnold, City of Ada, Coalgate Public Works Authority, W. E. Reeves, Department of Wildlife Conservation, Howard Nelson, Bill Moore, Wiley and Donna Harrison, Charles and Conita Tipton, Dunn's Fish Farm of Arkansas Inc., Oklahoma Gas & Electric Company, Eddie and Ronnie Bowen, Roy and Bea Hall, City of Atoka, County Commissioners of Atoka County, Southern Oklahoma Development Trust, Walter Woolley, Jr., Jack G. Emerson, Lilly Cannon, B. L. Little, Thomas G. Lewis Revocable Trust, Austin LeMay, Rick and Kathy Clayton, Carol A. Tomlin, Trustee, James C. Lollar Trust, Arbuckle Area Council, Department of Tourism & Recreation, Oklahoma State University Vegetable Research Station, Mack Alford Correctional Center, Ron Willis, Wapanucka Public Works Authority, Bobby D. and Debbie Wall, Jack Wayne Jensen, Jimmy L. and Rita D. Nix, DHM Enterprises Inc., Gerald Clifford Wilson, GHB Farms, Inc., Hughes County Rural Water District No. 2, Robinson Bros. Park Inc., Tyson Foods Inc., Delbert A. Harden, Jamie W. and Earlene Howard, Will Alan King, Roger and Cindy Stinchcomb, Joyce Ferguson, BC Wetlands LTD, W. S. Jr. and Mary Frances Webb, Edgemont Beef, Richard J. and Mary Elizabeth Helton, Stream Natural Resources LC, Cedar Valley Nursery Inc., J. M. and Shelby Welch, W-7 Swine Farms Inc., Kenneth and Mary Alice Battles, Robert M. and Susan E. Reinauer, Howell Family Trust, Acie V. Hayes, Jr., Michael and Kara McBrayer, Mallard Farms LLC, Jeffrey Allen Barker, City of Coalgate, L. Ray Wood, Chester Bench, Boggy River Ranch LLC, John Troyer, Mustang Stone Quarries LLC, WACCAW Development LLC, Wayman L. Garnett, St. Mary Land & Exploration Company, Arcadia Farm LLC, c/o Commercial Law Group, Duane Tomek and Susane Stockton, and TransCanada Keystone Pipeline LP.

4. According to the records of the OWRB, the following Respondents currently hold active permits for the right to divert and use the groundwater underlying the Muddy

Boggy and/or Clear Boggy Basin stream system area: City of Lehigh, Holnam, Inc., Stonewall Public Works Authority, City of Stringtown, City of Tupelo, Mrs. Winifred Borders, Marion and Louise Borders, Chapman Family Revocable Trust, Lee O. Harrington, R.W. Borders, Allen Public Works Authority, Atoka County Rural Water District No. 2, Atoka County Rural Water District No. 3, Greg A. Turpin, Johnston County Rural Water, Sewer and Solid Waste Management District No. 4, Harold V. Merriman, Caddo Public Works Authority, Troy Morris, Lyndle Ellis, Clyde D. Lacey, Weaver Jackson, Susie M. Humphries, Carlton W. Corbin, Frezell Calvin, Bill Morrow, Oklahoma State University, Wes Watkins Agriculture Research and Extension, Town of Boswell, Wingard Water Corporation, Johnny Stinnet, Allen Public Works Authority, G.O. Philpot, Hughes County Rural Water District No. 6, Charles Wayne Borders, Town of Soper, Greg and Ines Turpin, Choctaw County Rural Water District No. 1, Roy and Shirley Mobbs, David Mobbs, Doyle and Selma Foreman, Donald R. and Sherley Marie Zaicek, Southeastern Oklahoma Land Co., Bryan County Rural Water, Sewer and Solid Waste Management District No. 6, Will Grote, G. Hump Ltd., Mungle Corporation, Hughes County Rural Water District No. 2, Coalgate Public Works Authority, Robinson Bros. Park Inc., Gerald Clifford Wilson, GHB Farms, Inc., Bromide Public Works Authority, Nancy K. McDougal Revocable Trust, Helen J. Smith, and Tyson Foods Inc.

**a. Permit Applicants**

1. According to the records of the OWRB, the following Respondents currently have applications on file with the OWRB for claims to the use of the waters of the Kiamichi Basin stream system: City of Oklahoma City, Clayton Chamber of Commerce, Inc., Sardis Water Resources Board Inc., Sardis Lake Water Authority, Hugo Municipal Authority, Tarrant Regional Water District, William S. and Brenda G. Howard, Upper Trinity Regional Water District, David Lynn Brown, Central Oklahoma Master Conservancy District, North Texas Municipal Water

District, Choctaw County Economic Development Authority, and Pushmataha County Rural Water District No. 3.

2. According to the records of the OWRB, the following Respondents currently have applications on file with the OWRB for claims to the use of the waters of the Muddy Boggy and/or Clear Boggy Basin stream system: City of Midwest City, City of Tecumseh, Redark Development Authority, David Hull, National Coal County, WACCAW Development LLC, Upper Trinity Regional Water District, and North Texas Municipal Water District.

**a. Other**

1. Based on information and belief, the following respondents may claim rights to the groundwater of the Kiamichi Basin stream system: Don Brents, Weyerhaeuser Co., Eugene Hill, and Roger Buchanan.

2. Based on information and belief, the following respondents may claim rights to the surface waters of the Muddy and Clear Boggy Basin stream system: Mike and Luisa Selman.

3. Based on information and belief, the following respondents may claim rights to the groundwater of the Muddy and Clear Boggy Basin stream system: Marion and Louise Borders, Jack & John Johnson, Mr. and Mrs. Robert Ballard, Albert and Kathryn Holloway, W7 Land Co., and Dennis Harden.

1. Pursuant to 82 O.S. § 105.24 and OWRB Rule, codified at Oklahoma Administrative Code 785: 20-9-5, all applicants or permittees claiming a right to the use of water in any stream system are required to provide OWRB with the current name and address of the claimant of such right. OWRB will join or substitute parties in this action as necessary based on such information as it may be received.

## FACTS

2. The Kiamichi Basin stream system is comprised of the Kiamichi River and its tributaries. The Basin has a drainage area of 1,830 square miles and the Kiamichi River flows through six (6) Oklahoma counties Atoka, Choctaw, Latimer, LeFlore, Pittsburg and Pushmataha. The Kiamichi River arises in the Ouachita National Forest in extreme western Arkansas, enters Oklahoma in southeastern LeFlore County, then meanders for 172 miles prior to its termination at the Red River in Choctaw County, Oklahoma. The Basin includes the tributaries of Jackfork, Cedar, Buck and Ten Mile Creeks and the impoundments of Sardis and Hugo Lake. A map depicting the boundaries of the Kiamichi Basin is attached hereto as Exhibit A.

3. The waters of the Kiamichi Basin stream system are used or claimed for agricultural, municipal, domestic, recreational, commercial, industrial and instream flow purposes by the various respondents named herein.

4. The Muddy Boggy Basin and Clear Boggy Basin stream system are collectively referred to as the Boggy Basin. The Boggy Basin is comprised of the Muddy Boggy Creek and Clear Boggy Creek and their tributaries and the impoundments of Atoka Lake and McGee Creek Reservoir. The Boggy Basin has a drainage area of approximately 2,429 square miles and includes parts of the counties of Pontotoc, Hughes, Pittsburg, Atoka, Johnson, Bryan, Pushmataha, and Choctaw counties in southeastern Oklahoma. The basin is about 70 miles long and has a maximum width of about 30 miles. A map depicting the boundaries of the Muddy Boggy and Clear Boggy Basin is attached hereto as Exhibit A.

5. The waters of the Muddy Boggy Basin and Clear Boggy Basin stream system are used or claimed for agricultural, municipal, domestic, recreational, commercial, industrial and instream flow purposes by the various respondents named herein.

6. The Tribes are federally recognized Indian Tribes that claim to have federally created water rights or rights to water held in trust for their benefit or subject to federal restraints on alienation by the United States within the Kiamichi, Muddy and Clear Boggy Basin stream systems.

7. The Tribes base their claims on several treaties.

a. First, the Tribes rely upon a September 27, 1830 Treaty, 7 Stat. 333, pursuant to which the United States issued a patent on March 23, 1842 granting land to the Choctaw Nation “in fee simple” to “inure to [the Choctaw Nation], while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States, or with their consent.”

b. Second, through two treaties executed in 1837, 11 Stat. 373, and 1854, 10 Stat. 1116, the Tribes agreed that the Chickasaw Nation “shall have the privilege of forming a district within the limits of [the Choctaw] country, to be held 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, to be called the Chickasaw district of the Choctaw Nation.”

c. Third, in an 1855 Treaty, 11 Stat. 611, the United States defined the boundaries of the Tribes’ collective lands as encompassing what is now the portion of the state of Oklahoma lying south of the main Canadian and the Arkansas Rivers.

d. Fourth, in an 1866 Treaty, 14 Stat. 769, the Choctaw and Chickasaw Nations ceded to the United States all lands west of the 98<sup>th</sup> meridian, leaving the Tribes the lands east of the 98<sup>th</sup> meridian in between the main Canadian and the Arkansas Rivers and the Red River. That area encompasses all or portions of the following current Oklahoma counties: Atoka, Bryan, Carter, Choctaw, Coal, Garvin, Grady, Haskell, Hughes, Jefferson, Johnston, Latimer, LeFlore, Love, McClain, McCurtain, Marshall, Murray, Pittsburg, Pontotoc, Pushmataha, and Stephens.

1. After 1866, Congress enacted a series of laws which gradually put in force a body of state laws applicable to Indians as well as non-Indians and which led to the extinguishment of the Tribes' title to lands through allotment of those lands to individual, enrolled members.

a. Between 1870 and 1891, Congress passed laws which established United States Courts with jurisdiction over civil actions within the area described by the 1866 Treaty, among other areas, and made the laws of the State of Arkansas applicable to Indians and non-Indians alike. *See, e.g.*, 25 Stat. 783 (March 1, 1889); 26 Stat. 81 (May 2, 1890).

b. On March 3, 1893, Congress established the Dawes Commission to negotiate with the Tribes, among other tribes or nations, "for the purpose of extinguishment of the national or tribal title to any lands" held by those tribes or nations either "by cession of the same or some part thereof to the United States, or by the allotment or division of the same in severalty. . . ." *See* 27 Stat. 645.

c. Thereafter, on April 23, 1897, the Tribes and the United States entered into the Atoka Agreement which provided, among other things, that the Tribes' lands should be allotted; that town sites would be reserved from allotment, sold, and the proceeds distributed *pro rata* to the enrolled members of the Tribes; and that tribal government should continue only until March, 1906. The Curtis Act of June 28, 1898, 30 Stat. 495, ratified and confirmed the Atoka Agreement.

d. The Atoka Agreement was subsequently modified by a 1902 Supplemental Agreement, 32 Stat. 641, which, among other things, specified regulations for the allotment of the Tribes' land and significantly curtailed the powers of the Tribes' Councils.

e. In its Annual Report for the year ending June 30, 1902, the Dawes Commission declared that the Supplemental Agreement "embraces provisions far-reaching in effect, and which, if ratified by the tribes, will practically complete the disintegration of the Choctaw and

Chickasaw commonwealths and effect the installment of new political and social conditions and tenures common to the States and Territories.” 57<sup>th</sup> Cong., 2d. Sess., H. Doc. No. 5 at 11 (1903).

f. Pursuant to the Atoka Agreement, as modified by the 1902 Supplemental Agreement, all but a tiny fraction of the approximately 11,660,951 acres of the lands described by the 1866 Treaty were either allotted or sold with the proceeds of sale being distributed to the enrolled members of the Tribes.

g. Upon information and belief, today, the total of (i) lands held in trust by the United States for the benefit of the Tribes, (ii) lands owned by the Tribes, and (iii) trust or restricted allotments held by or for the benefit of enrolled members of the Tribes amounts to less than 3% of the lands described by the 1866 Treaty.

1. Sardis Reservoir, previously named Clayton Reservoir, was authorized by Congress pursuant to the Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1187. *See also* Flood Control Act of 1936, chap. 688, 49 Stat. 1570, 1571 (currently codified as 33 U.S.C. § 701a (2011)); Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 297, 319 (currently codified as 43 U.S.C. § 390b (2011)). The Flood Control Acts under which Sardis Reservoir was authorized required the Corps to construct and maintain Sardis Reservoir for purposes of providing storage for municipal and other purposes. Construction of Sardis Reservoir began in 1974 and was completed in 1983.

2. Pursuant to the federal authorizing legislation, the Corps was required to enter into contracts for the use of water stored in Sardis Reservoir. In 1974 the Corps entered into a contract for the storage and use of the water supply available from Sardis Lake with the Water Conservation Storage Commission, a predecessor to the OWRB, and OWRB is now vested with all right, title and interest in the 1974 Contract.

3. In June 2010, OWRB and the Oklahoma City Water Trust entered into a contract (“Transfer Agreement”) by which the Trust would acquire the rights to use the storage capacity in Sardis Reservoir that were previously held by the State of Oklahoma pursuant to the 1974 Contract. The Transfer Agreement requires the approval of the Corps. The Corps has not yet approved the transfer.

4. McGee Creek Reservoir was constructed by the United States Bureau of Reclamation pursuant to Public Law 94-423 and in accordance with federal Reclamation Law. Pub. L. No. 94-423, § 701. McGee Creek Reservoir was authorized for the purposes of storing, regulating, and conveying water for municipal and industrial uses. Public Law 94-423 further provided the “permanent right to use the reservoir and related facilities” to the contracting entity. *Id.* § 705(d).

5. McGee Creek Reservoir impounds waters from McGee Creek and other small streams, which are all tributaries of the Muddy Boggy River. The McGee Creek Authority was established to develop, finance, operate and maintain the water supply in McGee Creek Reservoir and serves as the contracting entity. *See* H.R. 110-460. The McGee Creek Authority includes the Southern Oklahoma Development Trust, the County of Atoka, the Oklahoma City Water Utilities Trust, and the City of Oklahoma City.

6. Public Law 101-514 authorized the Secretary to enter into a contract with the McGee Creek Authority, which ultimately allowed the McGee Creek Authority to become responsible for operating and maintaining the project. *See* Pub. L. No. 101-514. The Bureau of Reclamation, however, retains title to the McGee Creek project facilities. *See* H.R. 111-460. Thus, although the Bureau of Reclamation owns the reservoir, the Authority has ownership title to the project office, aqueduct and appurtenances, and other operation and maintenance related facilities. *Id.* Consistent

with Public Law 94-423, the McGee Creek Authority “shall have a permanent right to use the reservoir and related facilities of the McGee Creek project.” Pub. L. No. 94-423 § 705(d).

7. Atoka Lake was constructed by Oklahoma City in 1964. The lake supplies water to Oklahoma City. In 1974, the Lake Atoka Reservation Association was created by Oklahoma City, the Oklahoma City Water Utilities Trust, and the City of Atoka to administer the reservoir. In addition to Oklahoma City, the City of Atoka and the Atoka County Rural Water District No. 2 both use water from Atoka Lake.

8. The Corps began construction of Hugo Reservoir in 1967 pursuant to the Flood Control Acts of 1936 and 1962. Construction was completed in 1974. The Reservoir was constructed for the purposes of flood control, water supply, fish and wildlife management, and recreation. Storage for water quality was added as a project purpose under Public Law 86-88. The Corps continues to operate Hugo Reservoir. Hugo Reservoir’s storage capacity is 158,617 acre-feet. The Hugo Municipal Authority has a water storage supply contract with the Corps.

**COUNT I**  
**(Adjudication of Water Rights)**

9. Petitioner OWRB brings this suit to adjudicate all claims to the right to divert, impound, or use the water of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems in the State of Oklahoma under applicable state and federal law.

10. Respondents each claim or may claim a right to impound, divert, or otherwise use or control the waters of the Kiamichi, Muddy and Clear Boggy Basin stream systems.

11. An adjudication of the rights of all claimants *inter sese* to impound, divert, or use the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems is necessary to determine and settle claims to the water resources of the respective stream systems and to promote

lawful and orderly administration of the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

12. This general stream adjudication seeks a determination of the nature, extent, place and purpose of use and relative priority of the water rights and the rights to use or control the water of all persons or entities, public or private within the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems whether those rights to water arise under federal or state law.

13. Petitioner OWRB seeks a Final Decree determining and setting forth as to all claimants to the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems the source, priority, amount, point of diversion, periods and purpose and place of use of such claims or other right to water.

**COUNT II**  
**(Administration of Water Rights)**

14. Petitioner OWRB brings this suit to allow for the administration of the rights adjudicated pursuant to a Final Decree issued by this Court.

15. Upon determination of the source, amount, point of diversion, periods, purpose and place of use and relative priorities of all the rights to water within the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems, this action seeks a determination of the rights of OWRB to administer all rights decreed herein pursuant to a Final Decree or other orders of this Court.

16. Accordingly, Petitioner OWRB seeks entry of a Final Decree setting forth the administration of the rights adjudicated and decreed in this action pursuant to applicable law.

17. Prior to entry of a Final Decree, Petitioner OWRB requests this Court enter an Interim Administrative Order providing for the orderly administration of the claims to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems pursuant to all applicable law.

## PRAYER FOR RELIEF

**WHEREFORE**, Petitioner, the Oklahoma Water Resources Board, prays that the Court:

1. Adjudicate all rights to water or the use of the water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

2. Appoint a Special Referee to take evidence and make a report to the Court on all questions of fact and law, which report shall determine all general and specific issues of fact properly arising in this action and make such findings of fact and conclusions of law as may be necessary.

3. Order the respondents to appear and fully describe what rights, if any, they claim to the use of, control, or right to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin steam systems and specifically state:

- a. When said water right was initiated;
- b. The point of diversion for the water right;
- c. The place of use of such water right;
- d. The source of water;
- e. The purpose of use of the water;
- f. The amount of water claimed for the specific use;
- g. If the claim is based on non-consumptive or future uses of water, the specific basis for such non-consumptive use and basis for a claim for the future use(s); and
- h. Such other matters as may be necessary to define a particular right and its priority.

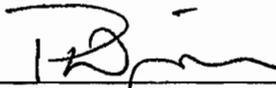
1. Determine and define the water rights of each of the respondents and enter a Final Decree stating:

- a. The water rights adjudged each party;
  - b. The source, priority, amount, points of diversion, periods, purpose and place of use of each right;
  - c. If such right is based on non-consumptive or future uses, the basis and parameters for such non-consumptive or future use;
  - d. That any right determined and adjudged is subject to any valid riparian uses, if any, as may be allowed or recognized by applicable law; and
  - e. Such other matters as may be necessary to define a particular right or its priority.
1. Assess the costs of this action as against all respondents with the exception of the United States, as provided for pursuant to 82 O.S. § 105.6.
  2. Allow joinder or intervention of additional parties from time to time as it appears necessary to determine and adjudicate all the rights to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems and to allow a comprehensive general stream adjudication.
  3. Enter an Interim Administrative Order providing for the orderly administration of the water resources in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems by the OWRB pending a Final Decree in this action including all rights of the Tribes, if any.
  4. Determine the appropriate administration of all such water rights finally determined in the Final Decree.
  5. Determine all related matters necessary or appropriate to the adjudication and administration of the rights brought before the Court.
  6. Grant such other relief as is necessary and proper to enter an Interim Administrative Order and Final Decree to adjudicate and administer the rights to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

Respectfully submitted,

On behalf of the Petitioner Oklahoma Water  
Resource Board

**OKLAHOMA OFFICE OF THE ATTORNEY  
GENERAL**

By:  \_\_\_\_\_

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***Counsel for Petitioner***



**EXHIBIT 1**

Oklahoma Water Resources Board's Petition for a General Stream Adjudication,  
filed February 10, 2012

Case No. **#110375**

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**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

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**Oklahoma Water Resources Board,**

**Petitioner,**

**vs.**

**The United States on behalf of the Choctaw Nation of Oklahoma,  
a federally recognized Indian Tribe;  
the United States on behalf of the Chickasaw Nation, *et al.*,**

**Respondents.**

**FILED  
SUPREME COURT  
STATE OF OKLAHOMA  
FEB 10 2012  
MICHAEL S. RICHIE  
CLERK**

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**APPLICATION TO ASSUME ORIGINAL JURISDICTION**

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**EXHIBIT 1**

**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>The Impetus for the Request .....</b>	<b>1</b>
<i>Brush v. Comm'r of Int. Rev.</i> , 300 U.S. 352, 366 (1937) .....	1
<b>Title 82, § 105.6 .....</b>	<b>2</b>
<b>McCarran Amendment, 43 U.S. C. § 666 .....</b>	<b>2</b>
<b>The Reasons Why the Court Should Assume Original Jurisdiction .....</b>	<b>3</b>
<i>The Oklahoma Comprehensive Water Plan, Executive Report .....</i>	4
<b>The Specific Relief Requested .....</b>	<b>5</b>

**IN THE SUPREME COURT OF OKLAHOMA**

Oklahoma Water Resources Board,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No.
	)	
The United States on behalf of the	)	
Choctaw Nation of Oklahoma,	)	
a federally recognized Indian Tribe;	)	
the United States on behalf of the	)	
Chickasaw Nation,, <i>et al.</i> ,	)	
	)	
Respondents.	)	

**Application to Assume Original Jurisdiction**

Petitioner, the Oklahoma Water Resources Board (the “OWRB”) requests that the Court assume original jurisdiction over the Petition attached hereto. (See App. 1). In support of the Application and Petition, Petitioner would show this Court the following:

**The Impetus for the Request**

The importance of the issues presented in the Application to the State, its cities and towns, and citizens cannot be overstated. The matters presented in this Application to Assume Original Jurisdiction directly concern the ability of the State and its cities and towns to continue to supply water for public, commercial, industrial, agricultural, and domestic uses. As United States Supreme Court Justice Southerland noted in *Brush v. Comm’r of Int. Rev.*, 300 U.S. 352, 366 (1937), “[C]onservation and distribution of water in sufficient quantity and in a state of purity is as vital as air.” *Id.* (emphasis added).

For more than a decade now, as the economic potential in water and water transfer or sale has become increasingly apparent, both the Chickasaw Nation and Choctaw Nation of

Oklahoma (the “Tribes”) have claimed various rights to the waters in Southeast Oklahoma, including:

- The Tribes have claimed a right to regulate the water in over twenty-two counties—not just the right to regulate water located on their scattered patches of tribal lands.
- The Tribes have claimed that the OWRB cannot issue certain permits for water in the Kiamichi River, Muddy Boggy Creek, and Clear Boggy Creek stream systems (collectively, the “Basins”) **until a comprehensive stream-wide adjudication of all water rights within those Basins under the McCarran Amendment, 43 U.S.C. § 666, has been completed.**

In short, the Tribes, over the past decade, have made various attempts to inject uncertainty into the State’s ability to regulate the waters within the southeast corner of the State, and in particular the Basins, threatening water rights under existing and pending state permits — all part of a concerted effort to coerce the State into entering into a compact or agreement giving the Tribes water rights, including the power to regulate waters in the Basins

In light of the need for certainty and security in Oklahoma water rights and administration, and considering these tribal claims, the OWRB, in accordance with the power vested in it under Title 82, § 105.6, has determined that the best interests of the claimants to the use of water from the Basins will be served by a determination of all rights to the waters in the stream systems of the Basins, and have authorized the initiation of such an adjudication.

Fortunately, Congress recognized that such comprehensive stream-wide water right adjudications cannot take place absent adjudication of federal rights. Thus, in 1952 Congress passed the McCarran Amendment, 43 U.S.C. § 666, which permits the joining of the United States to determine its interests, including any federally protected rights of Native American tribes or nations or individual owners of “allotted,” formerly tribal lands, and federal

instrumentalities, in a comprehensive stream-wide adjudication in state court.<sup>1</sup> Thus, neither the sovereign immunity of the United States nor of the Tribes prohibits such an adjudication in state court. In such an adjudication, the water rights of various classes of entities and individuals are determined, including the rights of:

- Federal, state, and tribal sovereigns,
- Individual owners of federal protected allotments of former tribal lands (“Restricted Allotment Holders”),
- Current OWRB water use permit holders,
- OWRB water use permit applicants, and
- Other water users who may have vested rights to the use of water in the Basins.

#### **The Reasons Why the Court Should Assume Original Jurisdiction**

In this Application, the OWRB asks this Court, in the exercise of its power to issue declaratory rulings in original proceedings, to assume original jurisdiction over the stream-wide adjudication presented in the accompanying Petition—through the use of a Special Referee or Special Master (who would be paid by the parties). This Application is made both because of the *publici juris* nature of the matter presented, and the importance of the relative speed with which the matter could be concluded through this Court’s exercise of original jurisdiction. This Court’s assumption of jurisdiction would have the following advantages:

- Stream-wide adjudication would be completed much more rapidly, because appeals and remands to district court would be avoided, thus, resulting in completing the adjudication many years, if not decades, quicker than district court actions.

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<sup>1</sup> General stream adjudications are quite common, as they are the congressionally recognized method for determining the rights of all claimants to the waters of a stream system. All 18 western states have laws allowing for general stream adjudications. In fact, general stream adjudications are currently occurring in 13 of the 18 western states. The various adjudication statutes in the 18 western states are very similar. The general stream adjudication statutes of New Mexico, North Dakota and South Dakota are the most similar to Oklahoma’s statute. New Mexico currently has 12 active adjudications, and over 20% of the water in New Mexico has been adjudicated through general stream adjudications like the one that the OWRB requests be initiated in this Court by the attached Petition.

- Procedural matters regarding service of parties, including determining who must be joined to have a comprehensive adjudication, could be determined as the matter proceeded, without corrective action requiring remand to the trial court, which in extreme cases could require an entire re-adjudication.
- As these cases are complex, and take years and at times decades to complete, district court dockets would not be consumed by such adjudication.
- This Court's assumption of jurisdiction would avoid important matters affecting the entire State from being decided by local judges, who are subject to local political pressures.
- The Court could select a Special Master or Referee with expertise in the area—expertise not available from the district court bench.

In a very real sense, the future of the State of Oklahoma is at issue here. The Legislature can pass all sorts of laws creating “business friendly” atmospheres within the State to boost the State's economy and job growth, but unless the State has the ability—free of doubt caused by un-adjudicated water rights or tribal regulatory claims—to regulate and provide the water necessary for private, agricultural and industrial use, the State could become an economic dust bowl. As the State's Comprehensive Water Plan recognizes:

Water, more than any other element or natural resource, has reached a crucial level of importance to Oklahomans...It drives the state's agricultural industry through the irrigation of wheat, hay, corn, and other crops, and in sustaining cattle, sheep, chickens, hogs, horses, and aquaculture operations. It is integral to oil and gas production as well as more conventional industries and mining operations that rely upon withdrawals from surface and groundwater sources. Water is counted upon to generate power and support countless environmental and recreational uses. With less water or limited access to it, Oklahoma's quality of life is threatened and its economy ceases to grow.

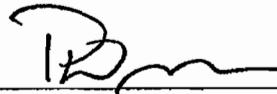
*The Oklahoma Comprehensive Water Plan, Executive Report at 3.*

Only this Court's exercise of original jurisdiction and the appointment of a Special Master or Referee can efficiently provide the certainty needed for the State's continued ability to regulate and provide water to all its citizens.

**The Specific Relief Requested**

For these reasons, Petitioner requests this Court to assume original jurisdiction over the Petition, and appoint a Special Referee to hear the matter initiated by the Petition. Unlike the usual cases where the Court is asked to assume original jurisdiction, the jurisdictional and merits questions should not be, and as a practical matter cannot be, addressed simultaneously. Thus, the only issue before the Court at this time is the question of whether it should assume original jurisdiction. If original jurisdiction is assumed, a Special Referee can be assigned, and then the merits of the adjudication can be litigated to the Special Referee subject to this Court's efficient review. If the Court declines to exercise original jurisdiction, Petitioner asks the Court to transfer the case to the district court of its designation.

Respectfully submitted,



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*Counsel for Petitioner*



**ATTACHED APPENDIX**

**Number**

**Description**

**1**

**Petition over which Petitioner asks the Court to assume jurisdiction, or, alternatively, transfer to a district court of Petitioner's designation.**



Danny W. Wilson; )  
Dale Jackson; )  
Bueford R. Lockhart; )  
David and Leo Ralston; )  
SCS Materials LP; )  
William S. Howard; )  
William S. and Brenda G. Howard; )  
Big Mac Tank Trucks LLC; )  
Michael Smith; )  
Roland Brents; )  
Town of Fort Towson; )  
Western Farmers Electric Cooperative; )  
M.E.N.S. Ranch )  
J. T. Hutson; )  
Meridian Aggregates Company, LP; )  
Carl Boykin; )  
Donna Addington-McSpadden; )  
Bill Price; )  
Meridian Aggregates Company; )  
Jonathan David Burns; )  
Clayton Chamber of )  
Commerce, Inc; )  
Sardis Water Resources Board Inc.; )  
Tarrant Regional Water District; )  
Upper Trinity Regional Water District; )  
David Lynn Brown; )  
Central Oklahoma Master Conservancy )  
District; )  
North Texas Municipal Water District; )  
Choctaw County Economic Development )  
Authority; )  
Town of Kiowa; )  
Louie Le Flore; )  
Bromide Public Works Authority; )  
Doyle Dean and Debrah J. Arnold; )  
City of Ada; )  
Coalgate Public Works Authority; )  
W. E. Reeves; )  
Howard Nelson; )  
Bill Moore; )  
Wiley and Donna Harrison; )  
Charles and Conita Tipton; )  
Dunn's Fish Farm of Arkansas Inc.; )  
Oklahoma Gas and Electric Company; )  
Eddie and Ronnie Bowen; )

Roy and Bea Hall; )  
City of Atoka; )  
County Commissioners of Atoka County; )  
Southern Oklahoma Development Trust; )  
Walter Woolley, Jr.; )  
Jack G. Emerson; )  
Lilly Cannon; )  
B. L. Little; )  
Thomas G. Lewis Revocable Trust; )  
Duane Tomek and Susane Stockton )  
Austin LeMay; )  
Rick and Kathy Clayton; )  
Carol A. Tomlin, Trustee; )  
James C. Lollar Trust; )  
Arbuckle Area Council; )  
Oklahoma State University )  
Vegetable Research Station; )  
Mack Alford Correctional Center; )  
Ron Willis; )  
Wapanucka Public Works Authority; )  
Bobby D. and Debbie Wall; )  
Jack Wayne Jensen; )  
Jimmy L. and Rita D. Nix; )  
DHM Enterprises Inc.; )  
Gerald Clifford Wilson; )  
GHB Farms, Inc.; )  
Hughes County Rural Water District No. 2; )  
Robinson Bros. Park Inc.; )  
Tyson Foods Inc.; )  
Delbert A. Harden; )  
Jamie W. and Earlene Howard; )  
Will Alan King; )  
Roger and Cindy Stinchcomb; )  
Joyce Ferguson; )  
BC Wetlands LTD; )  
W. S. Jr. and Mary Frances Webb; )  
Edgemont Beef; )  
Richard J. and Mary Elizabeth Helton; )  
Stream Natural Resources LC; )  
Cedar Valley Nursery Inc.; )  
J. M. and Shelby Welch; )  
W-7 Swine Farms Inc.; )  
Kenneth and Mary Alice Battles; )  
Robert M. and Susan E. Reinauer; )  
Howell Family Trust; )

Acie V. Hayes, Jr.; )  
Michael and Kara McBrayer; )  
Mallard Farms LLC; )  
Jeffrey Allen Barker; )  
City of Coalgate; )  
L. Ray Wood; )  
Chester Bench; )  
Boggy River Ranch LLC; )  
John Troyer; )  
WACCAW Development LLC; )  
Mustang Stone Quarries LLC; )  
Wayman L. Garnett; )  
St. Mary Land and Exploration Co.; )  
Arcadia Farm LLC; )  
TransCanada Keystone Pipeline LP; )  
City of Midwest City; )  
City of Tecumseh; )  
Redark Development Authority; )  
David Hull; )  
National Coal County; )  
City of Lehigh; )  
Holnam, Inc.; )  
Stonewall Public Works Authority; )  
City of Stringtown; )  
City of Tupelo; )  
Mrs. Winifred Borders; )  
Marion and Louise Borders; )  
Chapman Family Revocable Trust; )  
Lee O. Harrington; )  
R.W. Borders; )  
Allen Public Works Authority; )  
Atoka County Rural Water District No. 2; )  
Atoka County Rural Water District No. 3; )  
Greg A. Turpin; )  
Johnston County Rural Water, Sewer and )  
Solid Waste Management District No. 4; )  
Harold V. Merriman; )  
Caddo Public Works Authority; )  
Troy Morris; )  
Lyndle Ellis; )  
Clyde D. Lacey; )  
Weaver Jackson; )  
Susie M. Humphries; )  
Carlton W. Corbin; )  
Frezell Calvin; )

Bill Morrow; )  
Oklahoma State University, Wes Watkins )  
Agriculture Research and Extension Center; )  
Town of Boswell; )  
Wingard Water Corporation; )  
Johnny Stinnet; )  
Allen Public Works Authority; )  
G.O. Philpot; )  
Hughes County Rural Water District No. 6; )  
Charles Wayne Borders; )  
Nancy K. McDougal Revocable Trust; )  
Town of Soper; )  
Helen J. Smith; )  
Greg and Ines Turpin; )  
Choctaw County Rural Water District No. 1; )  
Roy and Shirley Mobbs; )  
David Mobbs; )  
Doyle and Selma Foreman; )  
Donald R. and Sherley Marie Zaicek; )  
Southeastern Oklahoma Land Co.; )  
Bryan County Rural Water, Sewer and Solid )  
Waste Management District No. 6; )  
Will Grote; )  
G. Hump Ltd.; )  
Mungle Corporation; )  
Don Brents; )  
Weyerhaeuser Co.; )  
Eugene Hill; )  
Roger Buchanan; )  
Mike and Luisa Selman; )  
Jack and John Johnson; )  
Albert and Kathryn Holloway; )  
Mr. and Mrs. Robert Ballard; )  
W7 Land Co.; )  
Dennis Harden; )  
and all persons claiming or who may claim )  
rights to the waters or use of the waters )  
of the Kiamichi, Muddy Boggy or Clear )  
Boggy Basin stream system in the )  
State of Oklahoma, )  
)  
)  
Respondents. )

**PETITION OF THE OKLAHOMA WATER RESOURCES BOARD  
FOR A GENERAL STREAM ADJUDICATION IN THE KIAMICHI,  
MUDDY BOGGY AND CLEAR BOGGY BASIN STREAM SYSTEMS**

Petitioner, the Oklahoma Water Resources Board (“OWRB” or “Board”), through this Petition for a General Stream Adjudication in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems, requests the Court commence a general stream adjudication in the Kiamichi Basin, Muddy Boggy Basin and Clear Boggy Basin stream systems (collectively “the Basins”) pursuant to the facts and allegations as set forth herein. This Petition presents a matter of great public importance to the State of Oklahoma and its citizens as set forth below. As the basis for its Petition, the OWRB states as follows:

**BACKGROUND AND NATURE OF THE ACTION**

**A. Basis for and nature of the action.**

1. Claims by the Choctaw Nation of Oklahoma and the Chickasaw Nation (collectively hereinafter “the Tribes”) have given rise to disputes over rights in and to the use and administration of water in the portions of southeastern Oklahoma known as the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems. These disputes concern and affect current and future water supplies for Oklahoma municipalities, other public and private entities, and individuals.

2. This is an action for a comprehensive general stream adjudication to determine all claims to the rights to the use of water within the Basins pursuant to 82 O.S. §§ 105.6 through 105.8 (“Oklahoma General Stream Adjudication Statute”) and to provide for the administration of such rights pursuant to an Interim Administrative Order and Final Decree as requested herein.

3. A general stream adjudication, in contrast to a private dispute among limited users or claimants, requires the joinder of all known claimants and a determination as between the State and each as to the other (*inter sese*) of all claims within a defined stream system and their relative

priorities pursuant to all applicable federal and state law necessary for the determination of such claims.

4. A general stream adjudication involves “all of the rights of various owners on a given stream.” *Dugan v. Rank*, 372 U.S. 609, 618 (1963). The purpose of a general stream adjudication is to address the claims of the various owners within a given stream system in order to be able to effectively and efficiently allocate and administer the available water resources based on the relative priorities of the rights. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 804 (1976) (“*Colorado River*”).

5. The Oklahoma General Stream Adjudication Statute provides a comprehensive scheme for the adjudication of all water rights within a given stream system whether those claims to water arise under state or federal law.

6. The waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems are public waters subject to appropriation for beneficial uses as provided by Oklahoma law or as otherwise recognized by federal law.

7. Various individuals and entities claim rights to the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems. The claims to all rights relating to water or the use of such water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems have never been finally determined in a comprehensive general stream adjudication.

8. The water resources of the State belong to the public and are subject to rights of use and the development of a water right through application to the OWRB and application of water to beneficial use under state law. The State’s control over water use and allocation within its boundaries is supported by over two centuries of federal deference to, and acknowledgment of, state primacy vis-à-vis water within state boundaries as expressly recognized by the McCarran

Amendment, 43 U.S.C. § 666 (“the McCarran Amendment”), described below. *See, e.g., United States v. City and Cnty. of Denver*, 656 P.2d 1, 9 (Colo. 1983) (“[B]y enacting the McCarran Amendment, Congress recognized that the western states have a legitimate interest in and responsibility for the allocation of water resources within their borders including determination and adjudication of the water rights claimed by the United States.”); *see also California v. United States*, 438 U.S. 645, 677 (1978). In limited instances, claims to water can arise under federal rather than state law, including in the context of claims asserted by, or on behalf of, Indian Tribes or Nations. Under the McCarran Amendment such federal rights are subject to adjudication and determination in state court in a comprehensive general stream adjudication and administration pursuant to the adjudication and a final decree.

9. The Tribes, federally recognized Indian Tribes, each claim rights to water arising under federal law in the Basins. OWRB has determined that the Tribes’ claims and other factors have created the need to commence a comprehensive general stream adjudication to determine the relative rights of all claims in the Basins whether such claims arise under state or federal law.

10. A determination by this Court of all of the claims of each defendant as between the State of Oklahoma and through OWRB and *inter sese* as to the waters of the Basins is necessary for the effective and uniform use, administration and supervision of the waters of the respective stream systems.

11. All claims to the right to water or to use water within the Basins, whether arising under state or federal law, are subject to adjudication in state court pursuant to the Oklahoma General Stream Adjudication Statute in conformance with the McCarran Amendment for purposes of waiver of the immunity of the United States on its own behalf and on behalf of water claims of Indian Tribes.

12. This action requests this Court adjudicate all claims to the waters or use of waters of the Basins and enter a Final Decree determining all claims and the administration thereof.

**A. The McCarran Amendment authorizes state court adjudication and administration of all federal claims to water, including claims made by or on behalf of Indian Tribes.**

1. The McCarran Amendment provides for state adjudication and administration of federally claimed water rights and waives the immunity of the United States as to the adjudication and administration of all federally based claims to water from suit in state court. *See Colorado River*, 424 U.S. at 809.

2. The McCarran Amendment provides in pertinent part:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights . . . .

43 U.S.C. § 666.

3. The waiver of immunity provided by the McCarran Amendment applies to allow suits to determine the rights of the United States and, accordingly, of any Indian Tribe, Nation, or individual Indian held or protected by the United States on behalf of such Tribe, Nation, or individual Indian. *See Colorado River*, 424 U.S. at 805.

4. Language contained in a State's Enabling Act at the time of statehood disclaiming jurisdiction over Indian lands or territory is not a bar to the McCarran Amendment's waiver of sovereign immunity as to tribal claims. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 564 (1983) ("*San Carlos Apache*").

5. The United States Supreme Court has repeatedly affirmed the importance of deference to state court jurisdiction with regard to the adjudication of rights to water and administration thereof. *See Colorado River*, 424 U.S. at 819-20; *San Carlos Apache*, 463 U.S. at

567-68; *United States v. Dist. Ct. In & For Eagle Cnty., Colo.*, 401 U.S. 520, 525 (1971) (“*Eagle County*”) (United States amenable to suit in Colorado state court pursuant to Colorado general adjudication statute for all claims by the United States); *United States v. Dist. Ct. In & For Water Div. No. 5, Colo.*, 401 U.S. 527, 529 (1971) (same).

6. The McCarran Amendment reflects the intent that “it is clear that the States have the control of the water within their boundaries, [and] it is essential that each and every owner along a given water course, including the United States must be amenable to the laws of the State, if there is to be a proper administration of the water law as it has developed over the years.” S. Rep. No. 755, 82<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 6 (1951).

7. In order for the waiver provided by the McCarran Amendment to be effective, the suit must be comprehensive in nature and join all known claimants to the water of a river system or other source. Consistent with the overarching federal deference to State control and regulation of water resources in determining whether a general stream adjudication is sufficiently comprehensive for purposes of the waiver of immunity supplied by the McCarran Amendment, courts have generally deferred to the choices made by individual States in general stream adjudication statutes. *See, e.g., Eagle County*, 401 U.S. at 525; *United States v. Oregon*, 44 F.3d 758, 767 (9th Cir. 1994); *In re General Adjudication of all Rights to Use Water in the Gila River System & Source*, 857 P.2d 1236, 1247-48 (Ariz. 1993) (“*Gila River*”); *United States v. Bluewater Toltec Irrigation Dist.*, 580 F. Supp. 1434, 1438 (D.N.M. 1984), *aff’d sub nom.*, 806 F.2d 986 (10th Cir. 1986) (“*Bluewater Toltec*”).

8. The Oklahoma General Stream Adjudication statute contemplates and provides for a comprehensive suit as contemplated by the McCarran Amendment.

**A. Overview of Oklahoma's General Stream Adjudication Statute**

1. Pursuant to 82 O.S. § 105.6, the OWRB is vested with the authority to file suit on behalf of the State to determine the rights to the use of water from any stream system within the State where the Board has determined that the interests of all the claimants to use of the water from the stream system would be best served by such a determination.

2. Once commenced, the Board is directed to “diligently prosecute such action to a final adjudication,” 82 O.S. § 105.6, and to “furnish data necessary for the determination of the rights involved” as requested by the Court. 82 O.S. § 105.7.

3. Like many other general stream adjudication statutes throughout the western United States, the Oklahoma General Stream Adjudication statute provides 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.” 82 O.S. § 105.6; *see, e.g.*, Idaho Code § 42-1414. The costs of such suit can be imposed on all water rights claimants with the exception of the United States. *See United States v. Idaho*, 508 U.S. 1, 8 (1993) (McCarran Amendment did not waive immunity for State imposition of the costs of a general stream adjudication, but the United States must participate in a state court proceeding relative to all federal claims).

4. The Oklahoma General Stream Adjudication Statute is comprehensive as it provides for the Board to join “any person who is using or who has used water from the stream or who claims the right or who might claim the right to use water from the stream . . . .” 82 O.S. § 105.7. Additionally, the Oklahoma General Stream Adjudication Statute provides for intervention as of right to “any person who is using or who has used or who claims the right to use water from the stream.” *Id.*

5. The Oklahoma General Stream Adjudication Statute provides that the rights of all users joined shall be determined *inter sese* as to the priority, amount, purpose and place of use of all claims to water and as to all claimants in any given stream system under applicable law and that such rights shall be entered in a Final Decree. 82 O.S. §§ 105.7, 105.8. The statute provides that the Final Decree shall bind all those who are parties to the action. 82 O.S. § 105.7.

6. The Oklahoma General Stream Adjudication Statute authorizing the Board to file a general stream adjudication is discretionary; OWRB is not obligated to file a general stream adjudication unless it determines such an action would be in the best interests of the claimants in the stream system. The statute recognizes OWRB's independent authority and obligation to grant permits and licenses as those matters come before it without regard to the filing of a general stream adjudication. 82 O.S. § 105.6 ("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").

**A. Oklahoma's General Stream Adjudication Statute provides for a comprehensive general stream adjudication as contemplated by the McCarran Amendment.**

1. The dispositive question as to whether a general stream adjudication is sufficiently comprehensive to allow for the waiver of immunity contemplated by the McCarran Amendment is whether the Board has in fact sought to join all known claimants to the waters of the stream system and whether those rights will be determined *inter sese*. In this action OWRB has named and will join all known claimants to the water or use thereof within the Basins by naming all known claimants to the waters of the respective stream systems and the United States in its capacity as trustee for any and all claims made by the Tribes, and the United States on behalf of all persons holding rights to allotments of the Tribes' former lands the title to which remains held in trust by the United States or subject to federal restrictions on alienation ("Restricted Allotment Holders").

2. Because the OWRB has or will join in this action all known claimants in the respective stream systems who claim rights to the use of water under applicable state or federal law, the action before the Court is sufficiently comprehensive to constitute a general stream adjudication for purposes of the McCarran Amendment. *See, e.g., United States v. Oregon*, 44 F.3d at 768-70 (Oregon's general stream adjudication sufficiently comprehensive for purposes of McCarran Amendment although it excluded all state-permitted users after 1909 and all claims to groundwater); *Gila River*, 857 P.2d at 1247-48 (Arizona general stream adjudication statute, which excluded some categories of use and users, was sufficiently comprehensive for purposes of McCarran Amendment).

3. The Oklahoma General Stream Adjudication Statute provides that the rights of all users joined shall be determined *inter sese* as to the priority, amount, purpose and place of use of all claims to water and as to all claimants in the Basins. 82 O.S. §§ 105.6, 105.8. Accordingly, this action is sufficiently comprehensive to comprise a general stream adjudication for all purposes including the waiver of the immunity of the United States and the determination of federally protected tribal and individual claims to water. *See San Carlos Apache*, 463 U.S. at 564-69 (Arizona stream adjudication statutes sufficiently comprehensive to adjudicate tribal claims to water); *see also Eagle County*, 401 U.S. at 525-26 (Colorado adjudication procedures sufficiently comprehensive where relative rights of all users determined even though all users not joined or rights adjudicated at the same time).

4. This action is sufficiently comprehensive for the purposes of the McCarran Amendment because, even if all respondents are not joined at the commencement of the action, OWRB will join all required claimants in due course. *See Eagle County*, 401 U.S. at 525-26; *Bluewater Toltec*, 580 F. Supp. at 1438-39.

5. As a matter of law any decree entered pursuant to the Oklahoma General Stream Adjudication Statute as a result of this general stream adjudication will be binding on parties to the action and, in accordance with principles of due process, on those currently unknown claimants provided adequate notice and who choose not to join or participate. *See generally* Hutchins, W.A., *Water Rights Laws in the Nineteen Western States*, Vol. II, Chap. 15 at 510 (1974). The Oklahoma General Stream Adjudication Statute explicitly provides for this legally acceptable approach. 82 O.S. § 105.7.

6. The McCarran Amendment was not designed to avoid state permitting processes contemporaneous with a general stream adjudication, but rather to avoid “piecemeal” and duplicative state and federal stream adjudications. *Colorado River*, 424 U.S. at 819; *San Carlos Apache*, 463 U.S. at 565-66. Thus, the recognition in the Oklahoma General Stream Adjudication Statute that OWRB has independent authority and obligation to grant permits as those matters come before it, *see* 82 O.S. § 105.6, does not affect the validity of a general stream adjudication proceeding brought pursuant to the statute. Regardless, OWRB will join any permittee, and any permit will be subject ultimately to the outcome of this adjudication. The application and permit process does not adjudicate rights, as a final matter *inter sese*, and all such rights, including federal rights, are as a matter of law ultimately subject to any rights determined by this Court in a general stream adjudication. Moreover, any federal rights are “protected from extinguishment under State law by the Supremacy Clause.” *See Sierra Club v. Yeutter*, 911 F.2d 1405, 1419 (10th Cir. 1990); *see also United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (“[A]ny permits issued by the State would be limited to excess water. If those permits represent rights that may be empty, so be it.”).

7. Although the United States is immune from the imposition of costs in this general stream adjudication, *see United States v. Idaho*, 508 U.S. at 8, the imposition of fees on other claimants is not a bar to the adjudication of the claims of the United States including tribal claims, in state court pursuant to the Oklahoma General Stream Adjudication Statute. *See id.* (United States must participate in state court proceeding relative to all claims).

8. OWRB seeks in this action to determine rights to water or the use thereof in the Basins arising under both state and federal law including all claims made by or on behalf of the Tribes or Restricted Allotment Holders. *See Colorado River*, 424 U.S. at 811-12; *San Carlos Apache*, 463 U.S. at 564. OWRB requests the Court determine all state law-based claims to water under the applicable provisions of state law and all claims made by the United States on behalf of itself, the Tribes, and Restricted Allotment Holders under applicable federal law and state law to the extent applicable. *See Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1126-30 (10th Cir. 1979) (McCarran Amendment provides for joinder of United States “as a party defendant in the state court even though the suit arises under state law and the federally reserved rights involve an interpretation and application of federal law”).

9. This Court’s determination of all state and federal claims is appropriate notwithstanding allegations of historic “hostility” of state courts to tribal claims. *See Colorado River*, 424 U.S. at 812 and *San Carlos Apache*, 463 U.S. at 551-52; *see also United States v. Oregon*, 44 F.3d at 771-72 (rejecting claims of the United States that Oregon state adjudication statute was ineffective for purposes of McCarran as it allowed federal rights to be initially determined in allegedly biased state administrative proceeding); *In re General Adjudication of the Big Horn River System*, 753 P.2d 76, 114-15 (Wyo. 1988) (rejecting a claim that the Wyoming State

Engineer may be unfair.) This general stream adjudication is properly before the state courts of Oklahoma.

### JURISDICTION AND VENUE

10. This action arises under both state and federal law for the purposes of adjudication and administration of water rights within the State of Oklahoma in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

11. Jurisdiction and venue rests in this Court pursuant to the Oklahoma General Stream Adjudication Statute, 82 O.S. §§ 105.6 through 105.8, specifically authorizing the OWRB to initiate suit and prosecute to completion an action for a comprehensive general stream adjudication, and pursuant to Art. 7, § 4 of the Oklahoma Constitution, authorizing this Court to exercise its original jurisdiction, and to grant the relief requested in the Petition.

12. The Supreme Court of Oklahoma has original jurisdiction over this action because of the significant issues of public interest and policy relating to the allocation, use and administration of the waters of the State and the determination of the federal rights to water, including the rights of the Tribes and Restricted Allotment Holders within the State.

13. For purposes of joinder of the United States, the immunity of the United States and its agencies, and the immunity of the United States as to claims to water made by or on behalf of the Tribes or Restricted Allotment Holders, is waived pursuant to 43 U.S.C. § 666.

14. The claims of the United States, if any, on its own behalf and on behalf of the Tribes and Restricted Allotment Holders arise under federal law over which this Court has jurisdiction. 43 U.S.C. § 666; *Colorado River*, 424 U.S. at 809.

15. The Board, at its December 13, 2011 meeting, determined that the interests of all claimants in the Basins will be served by the commencement and completion of a comprehensive general stream adjudication.

#### PARTIES

16. Petitioner OWRB brings this action on its own behalf and on behalf of the State of Oklahoma. OWRB is the state agency established under Oklahoma law charged with the duty to allocate and administer the waters of the State, including filing a general stream adjudication for purposes of determining the rights to water and the use thereof within any stream system within the State.

17. Respondents are all persons or entities claiming rights or interests to the waters of the Kiamichi, Muddy Boggy or Clear Boggy Basin stream systems in the State of Oklahoma.

18. Petitioner OWRB has identified, named, and will join all claimants known to it in this adjudication through: (1) a review of all applications and permits on file with the OWRB; (2) a review of all previous non-comprehensive adjudications in the respective Basins including *Oklahoma City v. State Bd. of Pub Affairs, et al.*, No. 10217 (Atoka County Dist. Ct. 1958); OWRB Final Order No. 9, March 9, 1965; OWRB Final Order No. 12, March 9, 1965; and (3) identification and review of all interests and claims of the United States, including the claims of the Tribes and Restricted Allotment Holders.

19. These claimants fall into three general categories: sovereigns and governmental entities (including their agencies); current permit holders; and permit applicants. Additionally, OWRB will publish notice to notify any unknown claimants to water within each of the Basins.

**a. Sovereigns**

1. Respondent United States, United States Department of Interior, may claim to hold in trust for and/or claim on behalf of the Tribes, claims to water rights or rights to water within the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems pursuant to federal law. “[T]he United States is the proper party defendant in any general water rights adjudication proceeding, whether brought in federal or state court, relating to federally created water rights, including those reserved for use by the Indian Tribes.” *Jicarilla Apache Tribe*, 601 F.2d at 1127.

2. Respondent United States may hold in trust and/or may claim water rights or rights to water within the Kiamichi, Muddy and Clear Boggy Basin stream systems on behalf of Restricted Allotment Holders who currently own interests in land formerly allotted and currently held in trust or subject to federal restraints on alienation.

3. Respondent United States Army Corps of Engineers (“Corps”) may claim rights to storage or other rights to water in Sardis Lake pursuant to the Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1187; *see also* Flood Control Act of 1936, chap. 688, 49 Stat. 1570, 1571 (currently codified as 33 U.S.C. § 701a (2011)); Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 297, 319 (currently codified as 43 U.S.C. § 390b (2011)); and rights to storage or other rights to water in Hugo Reservoir pursuant to the Flood Control Acts of 1936 and 1962.

4. Respondent United States Bureau of Reclamation may claim rights to storage or other rights regarding the impoundment of or the rights to the use of water in McGee Creek Reservoir pursuant to Public Law 94-423, the Reclamation Act of 1902, and all acts amendatory or supplementary thereto.

5. Petitioner OWRB may claim rights to the storage and use of water pursuant to that certain contract entered into with the Corps on February 2, 1974 for rights to the use of storage capacity in Sardis Reservoir (“1974 Contract”). In June 2010, the State of Oklahoma entered into a Storage Contract Transfer Agreement to allow the Oklahoma City Water Utilities Trust to acquire all of the State’s rights title and interest to the 1974 Contract. That transfer agreement has not yet been approved by the Corps.

6. Respondent the 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”). Oklahoma City may claim rights to the storage and use of water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems pursuant to permits, contracts or applications pending with the OWRB.

7. Respondent Oklahoma City Water Utilities Trust is a public trust authorized under state law to function as the primary policy-making body for the Oklahoma City Water and Wastewater Utilities. The Oklahoma City Water Utilities Trust may claim rights to store and use water pursuant to permits, contracts or applications held in trust for the use and benefit of Oklahoma City in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

8. Respondent Hugo Municipal Authority is an Oklahoma public water trust formed for the benefit of the City of Hugo, Oklahoma. The Hugo Municipal Authority may claim rights to the storage and use of water pursuant to that certain contract entered into with the Corps on October 30, 1972, and approved on October 22, 1974 for rights to the use of storage capacity in Hugo Reservoir.

9. Respondent McGee Creek Authority is an entity formed under federal law, Public Law 94-423, § 701, for the purpose of developing, financing, operating and maintaining

the water supply in McGee Creek Reservoir. It is comprised of the Southern Oklahoma Development Trust, the County of Atoka, the Oklahoma City Water Utilities Trust and the City of Oklahoma City. The McGee Creek Authority may claim rights to store or otherwise utilize the waters of McGee Creek Reservoir.

**a. Current Permit Holders**

1. According to the records of the OWRB, the following Respondents currently hold active permits for the right to divert and use the surface waters of the Kiamichi Basin stream system: Donald Leslie, Hugo Municipal Authority, Antlers Public Works Authority, Oklahoma Department of Tourism and Recreation, Oklahoma Department of Wildlife Conservation, Patrick Miller, Talihina Public Works Authority, Merlen Debolt, M.D., Louise A. Redman, Clyde and Donnie Corbin, Latimer County Rural Water District No. 2, Donna Addington-McSpadden, Sardis Lake Water Authority, Pushmataha County Rural Water District No. 3, Dirk Decker, Decker Revocable Trust, Danny W. Wilson, Dale Jackson, Bueford R. Lockhart, David and Leo Ralston, SCS Materials LP, William S. Howard, William S. and Brenda G. Howard, Big Mac Tank Trucks LLC, and Michael Smith.

2. According to the records of the OWRB, the following Respondents currently hold active permits for the right to divert and use the groundwater underlying the Kiamichi Basin stream system area: Roland Brents, Town of Fort Towson, Western Farmers Electric Cooperative, J. T. Hutson, Meridian Aggregates Company, LP, Carl Boykin, Donna Addington-McSpadden, Bill Price, Meridian Aggregate Company, M.E.N.S. Ranch and Jonathan David Burns.

3. According to the records of the OWRB, the following Respondents currently hold active permits for the right to use the surface waters of the Muddy Boggy and/or Clear Boggy Basin stream systems: Town of Kiowa, Louie Le Flore, City of Oklahoma City,

Bromide Public Works Authority, Doyle Dean and Debrah J. Arnold, City of Ada, Coalgate Public Works Authority, W. E. Reeves, Department of Wildlife Conservation, Howard Nelson, Bill Moore, Wiley and Donna Harrison, Charles and Conita Tipton, Dunn's Fish Farm of Arkansas Inc., Oklahoma Gas & Electric Company, Eddie and Ronnie Bowen, Roy and Bea Hall, City of Atoka, County Commissioners of Atoka County, Southern Oklahoma Development Trust, Walter Woolley, Jr., Jack G. Emerson, Lilly Cannon, B. L. Little, Thomas G. Lewis Revocable Trust, Austin LeMay, Rick and Kathy Clayton, Carol A. Tomlin, Trustee, James C. Lollar Trust, Arbuckle Area Council, Department of Tourism & Recreation, Oklahoma State University Vegetable Research Station, Mack Alford Correctional Center, Ron Willis, Wapanucka Public Works Authority, Bobby D. and Debbie Wall, Jack Wayne Jensen, Jimmy L. and Rita D. Nix, DHM Enterprises Inc., Gerald Clifford Wilson, GHB Farms, Inc., Hughes County Rural Water District No. 2, Robinson Bros. Park Inc., Tyson Foods Inc., Delbert A. Harden, Jamie W. and Earlene Howard, Will Alan King, Roger and Cindy Stinchcomb, Joyce Ferguson, BC Wetlands LTD, W. S. Jr. and Mary Frances Webb, Edgemont Beef, Richard J. and Mary Elizabeth Helton, Stream Natural Resources LC, Cedar Valley Nursery Inc., J. M. and Shelby Welch, W-7 Swine Farms Inc., Kenneth and Mary Alice Battles, Robert M. and Susan E. Reinauer, Howell Family Trust, Acie V. Hayes, Jr., Michael and Kara McBrayer, Mallard Farms LLC, Jeffrey Allen Barker, City of Coalgate, L. Ray Wood, Chester Bench, Boggy River Ranch LLC, John Troyer, Mustang Stone Quarries LLC, WACCAW Development LLC, Wayman L. Garnett, St. Mary Land & Exploration Company, Arcadia Farm LLC, c/o Commercial Law Group, Duane Tomek and Susane Stockton, and TransCanada Keystone Pipeline LP.

4. According to the records of the OWRB, the following Respondents currently hold active permits for the right to divert and use the groundwater underlying the Muddy

Boggy and/or Clear Boggy Basin stream system area: City of Lehigh, Holnam, Inc., Stonewall Public Works Authority, City of Stringtown, City of Tupelo, Mrs. Winifred Borders, Marion and Louise Borders, Chapman Family Revocable Trust, Lee O. Harrington, R. W. Borders, Allen Public Works Authority, Atoka County Rural Water District No. 2, Atoka County Rural Water District No. 3, Greg A. Turpin, Johnston County Rural Water, Sewer and Solid Waste Management District No. 4, Harold V. Merriman, Caddo Public Works Authority, Troy Morris, Lyndle Ellis, Clyde D. Lacey, Weaver Jackson, Susie M. Humphries, Carlton W. Corbin, Frezell Calvin, Bill Morrow, Oklahoma State University, Wes Watkins Agriculture Research and Extension, Town of Boswell, Wingard Water Corporation, Johnny Stinnet, Allen Public Works Authority, G.O. Philpot, Hughes County Rural Water District No. 6, Charles Wayne Borders, Town of Soper, Greg and Ines Turpin, Choctaw County Rural Water District No. 1, Roy and Shirley Mobbs, David Mobbs, Doyle and Selma Foreman, Donald R. and Sherley Marie Zaicek, Southeastern Oklahoma Land Co., Bryan County Rural Water, Sewer and Solid Waste Management District No. 6, Will Grote, G. Hump Ltd., Mungle Corporation, Hughes County Rural Water District No. 2, Coalgate Public Works Authority, Robinson Bros. Park Inc., Gerald Clifford Wilson, GHB Farms, Inc., Bromide Public Works Authority, Nancy K. McDougal Revocable Trust, Helen J. Smith, and Tyson Foods Inc.

**a. Permit Applicants**

1. According to the records of the OWRB, the following Respondents currently have applications on file with the OWRB for claims to the use of the waters of the Kiamichi Basin stream system: City of Oklahoma City, Clayton Chamber of Commerce, Inc., Sardis Water Resources Board Inc., Sardis Lake Water Authority, Hugo Municipal Authority, Tarrant Regional Water District, William S. and Brenda G. Howard, Upper Trinity Regional Water District, David Lynn Brown, Central Oklahoma Master Conservancy District, North Texas Municipal Water

District, Choctaw County Economic Development Authority, and Pushmataha County Rural Water District No. 3.

2. According to the records of the OWRB, the following Respondents currently have applications on file with the OWRB for claims to the use of the waters of the Muddy Boggy and/or Clear Boggy Basin stream system: City of Midwest City, City of Tecumseh, Redark Development Authority, David Hull, National Coal County, WACCAW Development LLC, Upper Trinity Regional Water District, and North Texas Municipal Water District.

**a. Other**

1. Based on information and belief, the following respondents may claim rights to the groundwater of the Kiamichi Basin stream system: Don Brents, Weyerhaeuser Co., Eugene Hill, and Roger Buchanan.

2. Based on information and belief, the following respondents may claim rights to the surface waters of the Muddy and Clear Boggy Basin stream system: Mike and Luisa Selman.

3. Based on information and belief, the following respondents may claim rights to the groundwater of the Muddy and Clear Boggy Basin stream system: Marion and Louise Borders, Jack & John Johnson, Mr. and Mrs. Robert Ballard, Albert and Kathryn Holloway, W7 Land Co., and Dennis Harden.

1. Pursuant to 82 O.S. § 105.24 and OWRB Rule, codified at Oklahoma Administrative Code 785: 20-9-5, all applicants or permittees claiming a right to the use of water in any stream system are required to provide OWRB with the current name and address of the claimant of such right. OWRB will join or substitute parties in this action as necessary based on such information as it may be received.

FACTS

2. The Kiamichi Basin stream system is comprised of the Kiamichi River and its tributaries. The Basin has a drainage area of 1,830 square miles and the Kiamichi River flows through six (6) Oklahoma counties Atoka, Choctaw, Latimer, LeFlore, Pittsburg and Pushmataha. The Kiamichi River arises in the Ouachita National Forest in extreme western Arkansas, enters Oklahoma in southeastern LeFlore County, then meanders for 172 miles prior to its termination at the Red River in Choctaw County, Oklahoma. The Basin includes the tributaries of Jackfork, Cedar, Buck and Ten Mile Creeks and the impoundments of Sardis and Hugo Lake. A map depicting the boundaries of the Kiamichi Basin is attached hereto as Exhibit A.

3. The waters of the Kiamichi Basin stream system are used or claimed for agricultural, municipal, domestic, recreational, commercial, industrial and instream flow purposes by the various respondents named herein.

4. The Muddy Boggy Basin and Clear Boggy Basin stream system are collectively referred to as the Boggy Basin. The Boggy Basin is comprised of the Muddy Boggy Creek and Clear Boggy Creek and their tributaries and the impoundments of Atoka Lake and McGee Creek Reservoir. The Boggy Basin has a drainage area of approximately 2,429 square miles and includes parts of the counties of Pontotoc, Hughes, Pittsburg, Atoka, Johnson, Bryan, Pushmataha, and Choctaw counties in southeastern Oklahoma. The basin is about 70 miles long and has a maximum width of about 30 miles. A map depicting the boundaries of the Muddy Boggy and Clear Boggy Basin is attached hereto as Exhibit A.

5. The waters of the Muddy Boggy Basin and Clear Boggy Basin stream system are used or claimed for agricultural, municipal, domestic, recreational, commercial, industrial and instream flow purposes by the various respondents named herein.

6. The Tribes are federally recognized Indian Tribes that claim to have federally created water rights or rights to water held in trust for their benefit or subject to federal restraints on alienation by the United States within the Kiamichi, Muddy and Clear Boggy Basin stream systems.

7. The Tribes base their claims on several treaties.

a. First, the Tribes rely upon a September 27, 1830 Treaty, 7 Stat. 333, pursuant to which the United States issued a patent on March 23, 1842 granting land to the Choctaw Nation “in fee simple” to “inure to [the Choctaw Nation], while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States, or with their consent.”

b. Second, through two treaties executed in 1837, 11 Stat. 373, and 1854, 10 Stat. 1116, the Tribes agreed that the Chickasaw Nation “shall have the privilege of forming a district within the limits of [the Choctaw] country, to be held 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, to be called the Chickasaw district of the Choctaw Nation.”

c. Third, in an 1855 Treaty, 11 Stat. 611, the United States defined the boundaries of the Tribes’ collective lands as encompassing what is now the portion of the state of Oklahoma lying south of the main Canadian and the Arkansas Rivers.

d. Fourth, in an 1866 Treaty, 14 Stat. 769, the Choctaw and Chickasaw Nations ceded to the United States all lands west of the 98<sup>th</sup> meridian, leaving the Tribes the lands east of the 98<sup>th</sup> meridian in between the main Canadian and the Arkansas Rivers and the Red River. That area encompasses all or portions of the following current Oklahoma counties: Atoka, Bryan, Carter, Choctaw, Coal, Garvin, Grady, Haskell, Hughes, Jefferson, Johnston, Latimer, LeFlore, Love, McClain, McCurtain, Marshall, Murray, Pittsburg, Pontotoc, Pushmataha, and Stephens.

1. After 1866, Congress enacted a series of laws which gradually put in force a body of state laws applicable to Indians as well as non-Indians and which led to the extinguishment of the Tribes' title to lands through allotment of those lands to individual, enrolled members.

a. Between 1870 and 1891, Congress passed laws which established United States Courts with jurisdiction over civil actions within the area described by the 1866 Treaty, among other areas, and made the laws of the State of Arkansas applicable to Indians and non-Indians alike. *See, e.g.*, 25 Stat. 783 (March 1, 1889); 26 Stat. 81 (May 2, 1890).

b. On March 3, 1893, Congress established the Dawes Commission to negotiate with the Tribes, among other tribes or nations, "for the purpose of extinguishment of the national or tribal title to any lands" held by those tribes or nations either "by cession of the same or some part thereof to the United States, or by the allotment or division of the same in severalty. . . ." *See* 27 Stat. 645.

c. Thereafter, on April 23, 1897, the Tribes and the United States entered into the Atoka Agreement which provided, among other things, that the Tribes' lands should be allotted; that town sites would be reserved from allotment, sold, and the proceeds distributed *pro rata* to the enrolled members of the Tribes; and that tribal government should continue only until March, 1906. The Curtis Act of June 28, 1898, 30 Stat. 495, ratified and confirmed the Atoka Agreement.

d. The Atoka Agreement was subsequently modified by a 1902 Supplemental Agreement, 32 Stat. 641, which, among other things, specified regulations for the allotment of the Tribes' land and significantly curtailed the powers of the Tribes' Councils.

e. In its Annual Report for the year ending June 30, 1902, the Dawes Commission declared that the Supplemental Agreement "embraces provisions far-reaching in effect, and which, if ratified by the tribes, will practically complete the disintegration of the Choctaw and

Chickasaw commonwealths and effect the installment of new political and social conditions and tenures common to the States and Territories.” 57<sup>th</sup> Cong., 2d. Sess., H. Doc. No. 5 at 11 (1903).

f. Pursuant to the Atoka Agreement, as modified by the 1902 Supplemental Agreement, all but a tiny fraction of the approximately 11,660,951 acres of the lands described by the 1866 Treaty were either allotted or sold with the proceeds of sale being distributed to the enrolled members of the Tribes.

g. Upon information and belief, today, the total of (i) lands held in trust by the United States for the benefit of the Tribes, (ii) lands owned by the Tribes, and (iii) trust or restricted allotments held by or for the benefit of enrolled members of the Tribes amounts to less than 3% of the lands described by the 1866 Treaty.

1. Sardis Reservoir, previously named Clayton Reservoir, was authorized by Congress pursuant to the Flood Control Act of 1962, Pub. L. No. 87-874, § 203, 76 Stat. 1173, 1187. *See also* Flood Control Act of 1936, chap. 688, 49 Stat. 1570, 1571 (currently codified as 33 U.S.C. § 701a (2011)); Water Supply Act of 1958, Pub. L. No. 85-500, § 301, 72 Stat. 297, 319 (currently codified as 43 U.S.C. § 390b (2011)). The Flood Control Acts under which Sardis Reservoir was authorized required the Corps to construct and maintain Sardis Reservoir for purposes of providing storage for municipal and other purposes. Construction of Sardis Reservoir began in 1974 and was completed in 1983.

2. Pursuant to the federal authorizing legislation, the Corps was required to enter into contracts for the use of water stored in Sardis Reservoir. In 1974 the Corps entered into a contract for the storage and use of the water supply available from Sardis Lake with the Water Conservation Storage Commission, a predecessor to the OWRB, and OWRB is now vested with all right, title and interest in the 1974 Contract.

3. In June 2010, OWRB and the Oklahoma City Water Trust entered into a contract (“Transfer Agreement”) by which the Trust would acquire the rights to use the storage capacity in Sardis Reservoir that were previously held by the State of Oklahoma pursuant to the 1974 Contract. The Transfer Agreement requires the approval of the Corps. The Corps has not yet approved the transfer.

4. McGee Creek Reservoir was constructed by the United States Bureau of Reclamation pursuant to Public Law 94-423 and in accordance with federal Reclamation Law. Pub. L. No. 94-423, § 701. McGee Creek Reservoir was authorized for the purposes of storing, regulating, and conveying water for municipal and industrial uses. Public Law 94-423 further provided the “permanent right to use the reservoir and related facilities” to the contracting entity. *Id.* § 705(d).

5. McGee Creek Reservoir impounds waters from McGee Creek and other small streams, which are all tributaries of the Muddy Boggy River. The McGee Creek Authority was established to develop, finance, operate and maintain the water supply in McGee Creek Reservoir and serves as the contracting entity. *See* H.R. 110-460. The McGee Creek Authority includes the Southern Oklahoma Development Trust, the County of Atoka, the Oklahoma City Water Utilities Trust, and the City of Oklahoma City.

6. Public Law 101-514 authorized the Secretary to enter into a contract with the McGee Creek Authority, which ultimately allowed the McGee Creek Authority to become responsible for operating and maintaining the project. *See* Pub. L. No. 101-514. The Bureau of Reclamation, however, retains title to the McGee Creek project facilities. *See* H.R. 111-460. Thus, although the Bureau of Reclamation owns the reservoir, the Authority has ownership title to the project office, aqueduct and appurtenances, and other operation and maintenance related facilities. *Id.* Consistent

with Public Law 94-423, the McGee Creek Authority “shall have a permanent right to use the reservoir and related facilities of the McGee Creek project.” Pub. L. No. 94-423 § 705(d).

7. Atoka Lake was constructed by Oklahoma City in 1964. The lake supplies water to Oklahoma City. In 1974, the Lake Atoka Reservation Association was created by Oklahoma City, the Oklahoma City Water Utilities Trust, and the City of Atoka to administer the reservoir. In addition to Oklahoma City, the City of Atoka and the Atoka County Rural Water District No. 2 both use water from Atoka Lake.

8. The Corps began construction of Hugo Reservoir in 1967 pursuant to the Flood Control Acts of 1936 and 1962. Construction was completed in 1974. The Reservoir was constructed for the purposes of flood control, water supply, fish and wildlife management, and recreation. Storage for water quality was added as a project purpose under Public Law 86-88. The Corps continues to operate Hugo Reservoir. Hugo Reservoir’s storage capacity is 158,617 acre-feet. The Hugo Municipal Authority has a water storage supply contract with the Corps.

**COUNT I**  
**(Adjudication of Water Rights)**

9. Petitioner OWRB brings this suit to adjudicate all claims to the right to divert, impound, or use the water of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems in the State of Oklahoma under applicable state and federal law.

10. Respondents each claim or may claim a right to impound, divert, or otherwise use or control the waters of the Kiamichi, Muddy and Clear Boggy Basin stream systems.

11. An adjudication of the rights of all claimants *inter sese* to impound, divert, or use the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems is necessary to determine and settle claims to the water resources of the respective stream systems and to promote

lawful and orderly administration of the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

12. This general steam adjudication seeks a determination of the nature, extent, place and purpose of use and relative priority of the water rights and the rights to use or control the water of all persons or entities, public or private within the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems whether those rights to water arise under federal or state law.

13. Petitioner OWRB seeks a Final Decree determining and setting forth as to all claimants to the waters of the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems the source, priority, amount, point of diversion, periods and purpose and place of use of such claims or other right to water.

**COUNT II**  
**(Administration of Water Rights)**

14. Petitioner OWRB brings this suit to allow for the administration of the rights adjudicated pursuant to a Final Decree issued by this Court.

15. Upon determination of the source, amount, point of diversion, periods, purpose and place of use and relative priorities of all the rights to water within the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems, this action seeks a determination of the rights of OWRB to administer all rights decreed herein pursuant to a Final Decree or other orders of this Court.

16. Accordingly, Petitioner OWRB seeks entry of a Final Decree setting forth the administration of the rights adjudicated and decreed in this action pursuant to applicable law.

17. Prior to entry of a Final Decree, Petitioner OWRB requests this Court enter an Interim Administrative Order providing for the orderly administration of the claims to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems pursuant to all applicable law.

**PRAYER FOR RELIEF**

**WHEREFORE**, Petitioner, the Oklahoma Water Resources Board, prays that the Court:

1. Adjudicate all rights to water or the use of the water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

2. Appoint a Special Referee to take evidence and make a report to the Court on all questions of fact and law, which report shall determine all general and specific issues of fact properly arising in this action and make such findings of fact and conclusions of law as may be necessary.

3. Order the respondents to appear and fully describe what rights, if any, they claim to the use of, control, or right to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin steam systems and specifically state:

- a. When said water right was initiated;
- b. The point of diversion for the water right;
- c. The place of use of such water right;
- d. The source of water;
- e. The purpose of use of the water;
- f. The amount of water claimed for the specific use;
- g. If the claim is based on non-consumptive or future uses of water, the specific basis for such non-consumptive use and basis for a claim for the future use(s); and
- h. Such other matters as may be necessary to define a particular right and its priority.

1. Determine and define the water rights of each of the respondents and enter a Final Decree stating:

- a. The water rights adjudged each party;
- b. The source, priority, amount, points of diversion, periods, purpose and place of use of each right;
- c. If such right is based on non-consumptive or future uses, the basis and parameters for such non-consumptive or future use;
- d. That any right determined and adjudged is subject to any valid riparian uses, if any, as may be allowed or recognized by applicable law; and
- e. Such other matters as may be necessary to define a particular right or its priority.

1. Assess the costs of this action as against all respondents with the exception of the United States, as provided for pursuant to 82 O.S. § 105.6.

2. Allow joinder or intervention of additional parties from time to time as it appears necessary to determine and adjudicate all the rights to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems and to allow a comprehensive general stream adjudication.

3. Enter an Interim Administrative Order providing for the orderly administration of the water resources in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems by the OWRB pending a Final Decree in this action including all rights of the Tribes, if any.

4. Determine the appropriate administration of all such water rights finally determined in the Final Decree.

5. Determine all related matters necessary or appropriate to the adjudication and administration of the rights brought before the Court.

6. Grant such other relief as is necessary and proper to enter an Interim Administrative Order and Final Decree to adjudicate and administer the rights to water in the Kiamichi, Muddy Boggy and Clear Boggy Basin stream systems.

Respectfully submitted,

On behalf of the Petitioner Oklahoma Water  
Resource Board

**OKLAHOMA OFFICE OF THE ATTORNEY  
GENERAL**

By:  \_\_\_\_\_

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*Counsel for Petitioner*



**EXHIBIT 2**

**May 20, 2010 Letter from Department of the Army to  
Hon. Brad Henry, Governor, State of Oklahoma**



**DEPARTMENT OF THE ARMY**  
U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT  
1645 SOUTH 101st EAST AVENUE  
TULSA, OKLAHOMA 74128-4809

**MAY 20 2010**

Executive Office

**SUBJECT: Transfer of Sardis Lake Water Storage; Judgment in Favor of United States of America in case of *United States of America v. State of Oklahoma, et al.*, No. 98-C-521-E, United States District Court for the Northern District of Oklahoma**

Honorable Brad Henry  
Governor, State of Oklahoma  
State Capitol Building  
2300 North Lincoln, Room 212  
Oklahoma City, OK 73105

Dear Governor Henry:

It has come to our attention that the State of Oklahoma is considering the transfer of its water storage rights in Sardis Lake to entities in the State (see enclosed letter of November 13, 2009, from the Oklahoma State Treasurer to the City Manager for the City of Oklahoma City). It is not clear exactly what storage rights the parties are considering transferring. We find it prudent to remind you that any transfer is subject to the provisions of Article 10 of the contract between the United States and the Oklahoma Water Resources Board which was the subject of the litigation in the above styled case.

Article 10 of the contract prohibits the transfer or assignment of any of the State's rights and responsibilities under the Contract of April 9, 1974, without the approval of the Secretary of the Army. Accordingly, no purported assignment would be legally proper or permissible until such approval is obtained. To date, no request to approve any transfer or assignment has been provided to the United States.

In addition, we believe it is appropriate to point out that a transfer of storage would not convey any water rights. Article 2 of the contract makes it clear that the user of the storage space has full responsibility to acquire, in accordance with State laws and regulations, any and all water rights needed for utilization of the storage provided under the contract.

Please be advised that in the absence of prior approval by the Assistant Secretary of the Army (Civil Works), who has been delegated authority to approve water supply agreements, the Army Corps of Engineers will not recognize any transfer or assignment of water storage rights in the Corps' Sardis Lake nor any transfer or assignment of the responsibilities set forth in the State's water supply storage contract. In addition, since the proposal between the State and the

**EXHIBIT 2**

-2-

City includes the transfer of the State's payment obligations under the United States District Court Order dated September 3, 2009, that assignment would be subject to approval by the District Court for it to be valid.

Sincerely,



Eugene Snyman  
Lieutenant Colonel, U.S. Army  
Acting District Commander

Enclosure

Copies Furnished:

Mr. J.D. Strong  
Oklahoma Secretary of the Environment  
3800 North Classen Blvd.  
Oklahoma City, OK 73118

Mr. Scott Meacham  
Oklahoma State Treasurer  
2300 N. Lincoln Blvd., Room 217  
Oklahoma City, OK 73105

Sen. Glenn Coffee  
President Pro Tempore  
Oklahoma State Senate  
2300 N. Lincoln Blvd., Room 422  
Oklahoma City, OK 73105

Rep. Chris Benge  
Speaker of the House  
Oklahoma House of Representatives  
2300 N. Lincoln Blvd., Room 401  
Oklahoma City, OK 73105

Mr. James Couch  
City Manager  
City of Oklahoma City  
200 N. Walker  
Oklahoma City, OK 73102

Mr. Fred Disheroon  
Special Litigation Counsel  
Environment and Natural Resources Division  
U. S. Department of Justice  
Post Office Box 7397  
Ben Franklin Station  
Washington, DC 20044



**SCOTT MEACHAM  
OKLAHOMA STATE TREASURER**

November 13, 2009

James Couch  
City Manager  
City of Oklahoma City  
200 N. Walker  
Oklahoma City, OK 73102

RE: Sardis Lake Water

Dear Mr. Couch,

Thank you for your letter dated October 21, 2009, concerning the offer by Oklahoma City (the "City") and the Oklahoma City Water Utilities Trust (the "Water Trust") to purchase water storage contract rights in Lake Sardis. During our meeting on that same date, you verbally indicated the City and the Water Trust would increase the cash amount of the offer to \$15 million. I have reviewed your offer with the Governor, President Pro Tempore of the Senate, Speaker of the House and Secretary of the Environment, who in turn consulted with the Oklahoma Water Resources Board ("OWRB").

The agreement to sell, assign and transfer the storage rights will be reduced to writing in a contract between the City/Water Trust and the State of Oklahoma (the "State") acting through OWRB that addresses the following general points:

1. The City/Water Trust will accept and assume all of the State's contractual obligations to the United States Army Corps of Engineers, including both present and future use obligations, including but not limited to ongoing obligations regarding operations and maintenance, as established by the contract between the State and the United States dated February 16, 1974, the payment obligations set forth in the Order dated September 3, 2009, filed in the United States District Court for the Northern District of Oklahoma, Civil Action No. 98-CV-00521, and obligations of an existing subcontract for storage with the Sardis Lake Water Authority.

James Couch, City Manager  
November 13, 2009  
Page 3

2. In addition to assuming the obligation described in paragraph 1, the City/Water Trust will pay the State the sum of fifteen million dollars (\$15,000,000) before July 1, 2010.
3. The State will sell, assign and transfer to the City/Water Trust or any designated entity or contractual affiliation of Central Oklahoma municipal governments and/or public trusts (hereafter "Purchaser") all rights to storage of water in Lake Sardis hold by the State under the February 16, 1974 contract with the United States, with sufficient storage to yield 20,000 acre feet reserved for local and regional use. Please note that OWRB by rule had previously reserved this 20,000 acre feet of water.
4. Purchaser shall file an application, or Purchaser may seek to rely on applications previously filed by the City/Water Trust, with the OWRB for a permit to appropriate water from Lake Sardis storage with a 40 year schedule of use and the Purchaser's payment obligations hereunder shall be conditioned on the issuance of such permits. The OWRB will promptly review and process the application under existing laws on use of water.
5. The State through the OWRB agrees to not authorize consumptive use of water from water supply storage at Lake Sardis, except for the 20,000 acre-feet for local and regional use, without the prior written consent of the City/Water Trust.
6. It is anticipated that the water supply storage being conveyed hereunder will ultimately used to benefit several central Oklahoma communities through the formation of the Central Oklahoma Regional Water Utilities Trust and/or water services contracts.
7. The City/Water Trust and Purchaser shall not sell any of the water taken from the storage being conveyed outside of Oklahoma.
8. A mutually agreeable lake level management plan will be entered into between the parties.

If you find the terms of this proposed sale to be acceptable, please indicate by return letter and I will have the attorneys for the OWRB start drafting the actual contract for sale in conformity with these terms. Incidentally, I spoke with the Secretary of Environment concerning your desire to make the conveyance and agreement effective February 16,

James Couch, City Manager  
November 13, 2009  
Page 3

1974, and he did not believe that to be legally possible. Therefore, this letter assumes an effective date as of the date of conveyance.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Meacham", with a long horizontal flourish extending to the right.

Scott Meacham, State Treasurer  
Secretary of Finance and Revenue

SM/sp

**Linda G. Darnell**

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**From:** okwd\_ecf\_notice@okwd.uscourts.gov  
**Sent:** Friday, February 10, 2012 1:29 PM  
**To:** okwdecf@okwd.uscourts.gov  
**Subject:** Activity in Case 5:11-cv-00927-W Chickasaw Nation et al v. Fallin et al Brief

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**U.S. District Court**

**Western District of Oklahoma[LIVE]**

**Notice of Electronic Filing**

The following transaction was entered by Slade, Lynn on 2/10/2012 at 2:29 PM CST and filed on 2/10/2012

**Case Name:** Chickasaw Nation et al v. Fallin et al  
**Case Number:** 5:11-cv-00927-W  
**Filer:** Mary Fallin  
**Document Number:** 65

**Docket Text:**

**BRIEF IN SUPPORT of Motion to Dismiss Amended Complaint for Lack of Jurisdiction Pursuant to Fed. R. CIV. P. 12(b)(1) by Mary Fallin. (Attachments: # (1) Exhibit, # (2) Exhibit, # (3) Exhibit)(Slade, Lynn)**

**5:11-cv-00927-W Notice has been electronically mailed to:**

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**Document description:**Exhibit

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