

**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-C

(1) Mary Fallin, in her official capacity as )  
Governor of the State of Oklahoma; )

(2) Rudolf John Herrmann, )

(3) Tom Buchanan, )

(4) Linda Lambert, )

(5) Ford Drummond, )

(6) Ed Fite, )

(7) Marilyn Feaver, )

(8) Kenneth K. Knowles, )

(9) Richard Sevenoaks, and )

(10) Joe Taron, each in her or his official )  
capacity as a member of the )

Oklahoma Water Resources Board; )

(11) J.D. Strong, Executive Director of the )  
Oklahoma Water Resources Board )

in his official capacity; )

(12) City of Oklahoma City, an Oklahoma )  
municipal corporation; )

(13) Oklahoma City Water Utility Trust, )  
a public trust for the benefit of the City of )  
Oklahoma City, )

Defendants. )  
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**COMPLAINT**

**I. NATURE OF THE ACTION**

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

including their present and future use water rights, regulatory authority over water resources, and right to be immune from state law and jurisdiction. Each of these rights is guaranteed to them by the Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 333 (“1830 Treaty”), and is protected by federal law. The Plaintiff Nations hold those rights within the territory set aside by Article 1 of that Treaty, as later modified by the 1866 Treaty of Washington, Act of Apr. 28, 1866, 14 Stat. 769 (“Treaty Territory”). The Plaintiff Nations’ rights under those treaties, which are the “supreme Law of the Land,” U.S. Const., art. VI, cl. 2, are prior and paramount to any water rights or regulatory authority claimed by the Defendants, and are protected by the disclaimer of authority over Indian rights and property on which Congress conditioned Oklahoma’s statehood in the Oklahoma Enabling Act, Act of June 16, 1906, 34 Stat. 267 (“Oklahoma disclaimer”), as well as other controlling federal law.

2. The Plaintiff Nations depend on the Treaty Territory’s water resources to fulfill the homeland purposes of their Treaties, which purposes include providing an environment with clean and healthy rivers and streams, abundant upland and aquatic resources, pursuing economic development and self-sufficiency, and meeting the present and future needs of communities throughout their homeland. These water resources include, *inter alia*, those stored in Sardis Reservoir, a federal water storage facility, and Atoka Lake, a non-federal water storage facility, as well as the free flowing waters of the Kiamichi Basin, Clear Boggy Basin, and the other river systems located within the Treaty Territory. These waters are subject to the Plaintiff Nations’ water rights, are critical to

the maintenance of the instream flows on which the environment, habitats, and communities of the Treaty Territory rely, and are a key element of the local economy.

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

4. As contemplated by its arrangement with the Board, the Water Trust submitted its prerequisite application for the issuance of such water-use permit, and the Board’s administrative proceedings on such application are now awaiting formal notice and hearing. Recently, the Water Trust publicly reaffirmed its intent to move forward with acquiring this permit. Defendants’ actions manifest their collective arrogation of unilateral authority to control the withdraw and export of water from the Treaty Territory pursuant to permits issued in state administrative proceedings as well as the right to sell that water outside the Treaty Territory and even, with State legislative approval, out-of-

state. Defendants' actions demonstrate their flawed conclusion that they have complete license to execute each element of this plan unconstrained by the Plaintiff Nations' Treaty-protected rights to and regulatory authority over Treaty Territory water resources. Indeed, in the June 2010 agreement, the Board and the Water Trust assert "[t]he plenary jurisdiction and authority of the State over water in the State pursuant to State and Federal law, including but not limited to water in Sardis Reservoir and the Kiamichi River and its tributaries," which they further assert "shall not be affected by the transfer of storage rights and obligations under [the June 2010 agreement.]" *Id.* § 2.4. Defendants' contentions are contrary to federal law.

5. The Plaintiff Nations' rights to and regulatory authority over Treaty Territory water resources are prior and paramount to any water rights claimed by or derived from the Defendants in the Treaty Territory under state law, and federal law preempts interference with the Plaintiff Nations' rights by Defendants. Accordingly, the Defendants cannot simply disregard the existence of those rights as they act in furtherance of their own assertion of dominion and control so that such resources might be severed and exported from their natural hydrologic systems and Plaintiff Nations' Treaty Territory. To allow the Defendants to so act would deny the Plaintiff Nations any real opportunity to protect Treaty Territory water resources and, effectively, appear to render meaningless the Plaintiff Nations' rights to and regulatory authority over those resources. If the Defendants succeed in unilaterally selling Treaty Territory water resources, the Plaintiff Nations' ability to protect and enforce their water rights would be severely prejudiced.

6. Consideration of the Plaintiff Nations' water rights, including the impact of the withdrawal and export of Treaty Territory water resources on those rights, cannot lawfully be done through state administrative proceedings on a piecemeal basis, which is the Defendants' manifest plan. Control of the matter through such proceedings would violate and would be preempted by the Plaintiff Nations' federal rights, including *inter alia* their Treaty right to be free from the exercise of state jurisdiction, the Oklahoma disclaimer, and the McCarran Amendment, 43 U.S.C. § 666. The McCarran Amendment provides the only means authorized by Congress for any state to adjudicate tribal federal law water rights. State administrative proceedings on permit applications for single users, such as that initiated by the Water Trust for Kiamichi Basin waters, are contrary to the purposes and objectives of the McCarran Amendment.

7. The Plaintiff Nations could not adequately protect their Treaty-based water rights and regulatory authority from piecemeal diminishment by the Defendants through state administrative proceedings in any event. To participate in those proceeding, the Plaintiff Nations would have to relinquish their Treaty right to be free from the application of state jurisdiction and waive their sovereign immunity. Any process that requires an Indian tribe to relinquish one treaty right in order to protect others is unjust and violates federal law. And particularly given Plaintiff Nations' longstanding yet wholly disregarded effort to commence government-to-government negotiations with the State of Oklahoma ("State") on these critical issues, the initiation of this action is the only means available to the Plaintiff Nations to protect their Treaty rights and the critical water resources of their promised and federal-law protected homeland.

## II. PARTIES

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

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

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

11. Defendants Rudolf John Herrmann, Tom Buchanan, Linda Lambert, Ford Drummond, Ed Fite, Marilyn Feaver, Kenneth K. Knowles, Richard Sevenoaks, and Joe Taron, each of whom is sued in her or his official capacity, are members of the Oklahoma Water Resources Board (“Board”), an agency of the State of Oklahoma exercising certain

powers and duties delegated under Title 82 of the Oklahoma Statutes. *See* Okla. Stat. tit. 82, § 1085.1.

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

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

14. Defendant Oklahoma City Water Utility Trust ("Water Trust"), formerly the Oklahoma City Municipal Improvement Authority, is a public trust charged under state law and its organic documents to function as the primary policy-making body for the Oklahoma City Water and Wastewater Utilities.

### III. JURISDICTION AND VENUE

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

a. The treaties under which this Court has jurisdiction are the Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat. 333; the 1837 Treaty of Doaksville, Act of Jan. 17, 1837, 11 Stat. 573; the Treaty of Doaksville, Act of Nov. 4, 1854, 10 Stat. 1116; the 1855 Treaty of Washington, Act of June 22, 1855, 11 Stat. 611 and the 1866

Treaty of Washington, Act of Apr. 28, 1866, 14 Stat. 769, which are the “supreme Law of the Land,” U.S. Const., art. VI, cl. 2.

b. The federal statutes under which this Court has jurisdiction include the following: (1) Act of Congress of April 26, 1906, § 27, 34 Stat. 137, 148, which provides that Plaintiff Nations’ property “shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of the said tribes . . . ;” (2) Act of Congress of June 16, 1906, § 1, 34 Stat. 267, which required as a precondition to the formation of the State of Oklahoma that the residents of such state disclaim any authority to interfere with “the rights of person or property pertaining to the Indians” or “to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights . . . .”; (3) the Indian Non-Intercourse Act, 25 U.S.C. § 177, which precludes any transfer, alienation, or sale of tribal property without express federal authorization; and (4) the McCarran Amendment, 43 U.S.C. § 666, which provides the sole basis on which a state may seek to exercise jurisdiction over tribal rights to water resources.

16. This Court also has jurisdiction because the Plaintiff Nations’ claims also arise under federal common law, which denies Oklahoma any civil-adjudicatory and/or civil-regulatory jurisdiction over matters arising in Indian country or otherwise against or affecting the sovereign interests of federally recognized Indian tribes or their property except and only insofar as expressly authorized by federal statute.

17. Venue is proper in this Court under 28 U.S.C. § 1391(b) because all of the defendants reside within the State of Oklahoma and State’s capitol is located in

Oklahoma City, Oklahoma, which lies within the jurisdictional boundaries of this Court and, furthermore, many of the events giving rise to the claims herein occurred within those jurisdictional boundaries.

#### **IV. ALLEGATIONS COMMON TO ALL CLAIMS**

##### ***A. Early History and the Removal Treaties***

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

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

20. The United States first sought to remove the Choctaw Nation to lands in the Arkansas Territory, which were promised to the Choctaw under the Treaty of Doak's Stand, Oct. 18, 1820, 7 Stat. 210. The United States failed to secure those lands from non-tribal incursion and settlement, however, and watching this telling federal failure –

which occurred *before* any removal commenced – Choctaw citizens refused to leave their homes. *Choctaw Nation v. Oklahoma*, 397 U.S. at 620, 623-24 (1970). The Treaty of January 20, 1825, 7 Stat. 234, was then negotiated, in which the Choctaw Nation was forced to cede the Arkansas Territory lands (of which it had never taken formal possession) back to the United States in exchange for promises of a new homeland, further west, in the Indian Territory. *Choctaw Nation*, 397 U.S. at 624.

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

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

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

River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning.

*Id.*

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

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

*Id.*

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

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

they had the means to contract and pay for same, they have determined to sell their country and hunt a new home.

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

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

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

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

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

27. Many tribal citizens perished before reaching the promised Indian Territory lands – including Chickasaw Nation Chief Tishomingo, that tribal nation's respected

leader throughout the difficult removal era and after whom the Chickasaw Nation named its Indian Territory capital.

**B. Events Subsequent to Removal**

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

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

30. During this period – but for the incidence of debilitating drought – Plaintiff Nations relied on the rivers and streams of their sovereign estate as the primary avenues of commerce, using those systems to transport goods produced within the Treaty

Territory to markets further abroad. Plaintiff Nations established and regulated ferry crossings for purposes of managing their emerging road systems; they also facilitated and, when needed, oversaw the development of water supply systems to support their combined populations.

31. Following the American Civil War, the Plaintiff Nations' Treaty Territory was reduced when they were required to cede to the United States all Indian Territory lands held by treaty west of the 98th Meridian. 1866 Treaty of Washington, art. 3, Act of Apr. 28, 1866, 14 Stat. 769. This cession altered the western boundary of the Treaty Territory. Today that territory encompasses all or part of twenty-two counties in the State of Oklahoma – the counties of Atoka, Bryan, Carter, Choctaw, Coal, Garvin, Grady, McClain, Murray, Haskell, Hughes, Jefferson, Johnston, Latimer, LeFlore, Love, Marshall, McCurtain, Pittsburgh, Pontotoc, Pushmataha, and Stephens.

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

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

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

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

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

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

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

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

including Defendants' proposed export of Kiamichi Basin waters or their actual and ongoing export of Clear Boggy Basin waters.

38. The 1830 Treaty secures to the Plaintiff Nations sovereign and proprietary rights to lands and waters in the Treaty Territory and protects those rights from interference by the State. *Id.* arts. 1 and 4. The 1830 Treaty granted those rights to the Plaintiff Nations as a political society, *see Choctaw Nation*, 397 U.S. at 632 n.8, and established the Plaintiff Nations as autonomous sovereigns "in lieu of a prospective State." *Id.* at 638 (Douglas, J., concurring). The Plaintiff Nations' land and water rights are now held in trust by the United States under Section 27 of the 1906 Act, 34 Stat. 137, 148.

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

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

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

41. Under Article 4 of the 1830 Treaty, the Plaintiff Nations have the right of self-government and jurisdiction over their lands and waters as well as an immunity – which is guaranteed also by the federal common law of Indian affairs – from the application of state law and the exercise of state jurisdiction. Article 4 “provides for the [Plaintiff Nations’] sovereignty within Indian country,” *Oklahoma Tax Comm’n*, 515 U.S. at 466, and “guaranteed to the [Plaintiff Nations] ‘the jurisdiction and government of all the persons and property that may be within their limits.’” *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978). This authority includes the right to regulate the Plaintiff Nations’ Treaty Territory water resources.

42. In sum, as the United States Supreme Court has recognized, the United States’ conveyance to Plaintiff Nations under the 1830 Treaty included “*virtually complete sovereignty*” over the entire sovereign estate, including sovereign title to the submerged lands throughout Plaintiff Nations’ treaty territory, and left the federal government, at least within the bounds of Indian Territory, with no interest to convey to Oklahoma upon statehood. *Choctaw Nation*, 397 U.S. at 635 (emphasis added); *cf.*

*Brewer-Elliott*, 260 U.S. at 87-88 (concerning pre-statehood conveyance of portion of Cherokee Nation's sovereign estate to Osage Nation).

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

***D. The Illegality of the Defendants' Attempt to Withdraw, Export, Buy, and Sell Treaty Territory Waters***

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

45. Similarly, in an agreement arising from the litigation of *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472 (N.D. Okla. 2009), the State recognized that “the Cherokee Nation has substantial interests in lands, water and other natural resources located within the Illinois River Watershed though the extent of those interests has not been fully adjudicated,” which interests the state and tribal sovereigns intended to protect for their mutual benefit. *Id.* at 475 (quoting Agreement By and Among the State of Oklahoma and the Cherokee Nation (May 19, 2009)).

46. State officials also earlier conceded that the Indian Non-Intercourse Act, 25 U.S.C. § 177, appears on its face to apply to any transfer of tribal water rights and that the

Board may be preempted from exercising jurisdiction over such rights. *See* Def. Mot. to Dismiss Amended Complaint and Brief in Support at 24, *Tarrant Reg'l Water Dist. v. Herrmann*, 2010 WL 2817220 (W.D. Okla. Jan. 12, 2010) (No. CIV-07-0045-HE).

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

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

49. Sardis Reservoir and the Kiamichi Basin are the latest focus of Defendants' plan to withdraw, export, buy, and sell water resources of the Treaty Territory. Sardis

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

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

51. In June 2010, seeking to initiate a *new* export of water resources from the Treaty Territory, the Defendants executed an agreement that purports to establish a quid pro quo between the parties – the Water Trust’s assumption of all obligations under the

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

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

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

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

55. As shown by the June 2010 agreement and the actions taken to implement it, the Defendants contend that they have the right to withdraw, export, buy and sell Treaty Territory water resources without regard to the Plaintiff Nations' Treaty-based water rights and regulatory authority thereover, or the impact of such actions on those rights and the present and future water needs of the Plaintiff Nations. Notably, the Board and the Water Trust expressly recite in the June 2010 agreement that the State has “plenary jurisdiction . . . over water in the State pursuant to State and Federal law, including but not limited to water in the Sardis Reservoir and the Kiamichi River and its tributaries. . . .” Contrary to federal law, the Board presumes to possess the unilateral right to authorize the Water Trust to withdraw and transfer Treaty Territory waters under

State law through piecemeal administrative proceedings that do not provide for a comprehensive adjudication of correlative rights.

56. Since the Defendants do not, in fact, possess such unilateral authority, they may not use the Plaintiff Nations' Treaty Territory as a "water farm" and convert tribal water resources into a commodity controlled by them, as is their manifest plan. Such actions violate federal law by seeking the unlawful withdrawal, export, and sale of Treaty Territory water resources at such time, under such conditions, in such amounts, and to such persons or entities (including those out-of-state) as the Defendants unilaterally determine to allow. Such unilateral action by the Defendants violates and is preempted by federal law.

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

58. Federal law does not allow the Defendants to simply deny the existence and disregard the legal effect of the Plaintiff Nation's Treaty-based water rights and

regulatory authority over water resources of their promised homeland. The Plaintiff Nations' rights to and regulatory authority over water resources, which are held under the 1830 Treaty and other federal law, are prior and paramount to any rights to and regulatory authority over those same water resources claimed by or derived from the Defendants under state law, and federal law preempts interference with the Plaintiff Nation's rights by Defendants. Furthermore, the sale of tribal water resources is prohibited by the Indian Non-Intercourse Act, 25 U.S.C. § 177, and federal common law. Those same laws preclude the future diversion of waters from the Kiamichi and Clear Boggy Basins unless and until a general stream adjudication of the water resources of the Treaty Territory is lawfully initiated and satisfies the substantive and procedural requirements of the McCarran Amendment.

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

60. The Defendant's exclusive reliance on piecemeal state administrative proceedings to allocate water resources in the Treaty Territory also undermines the purposes and objectives behind the McCarran Amendment, 43 U.S.C. § 666. State administrative proceedings on permit applications for single users, such as that initiated

by the Water Trust for Kiamichi Basin waters, do not satisfy the requirements of the McCarran Amendment. While state statutes authorize an adjudication to determine “all rights to the use of water” from a system stream,” those same statutes provide that “neither the bringing of such suit nor an adjudication in such a suit shall be a condition precedent to the granting of permits and licenses as authorized by this act.” Okla. Stat. tit. 82, § 105.6. In other words, state law controlling water-use permitting proceedings summarily rejects the comprehensiveness requirement that is central to the McCarran Amendment and purports to authorize the Board to issue permits for substantial trans-basin exports of water without initiating such an adjudication. What is more, the only water rights considered or recognized in such state-law permit proceedings are those alleged under *appropriative* theory and based on *consumptive* uses, *e.g.*, Okla. Stat. tit. 82, §§ 105.2, 105.12, which precludes state water administrators from even considering non-appropriative federal law water rights possessed by American Indian tribal nations. Administration of Treaty Territory waters by the Defendants in reliance on such a narrow state-law system is contrary to federal law and disregards and violates Plaintiff Nations’ paramount federal rights – particularly when considered in light of current and proposed large-scale water exports.

61. The Plaintiff Nations cannot adequately protect their rights through state administrative proceedings in any event; to participate in those proceedings, the Plaintiff Nations would have to relinquish their Treaty right to be free from the application of state jurisdiction and waive their sovereign immunity. The Defendants’ exclusive reliance on piecemeal state administrative proceedings to authorize the withdrawal and export of

Treaty Territory waters thus forces a Hobson's choice on the Plaintiff Nations: (1) accede to the withdrawal and transfer of water from the Treaty Territory at such times, under such conditions, in such amounts, to such persons or entities, and for such purposes as the Board authorizes in its administrative proceedings; or (2) relinquish their Treaty-protected right to be free from the application of state law and the exercise of state jurisdiction, waive their federally-protected sovereign immunity from state judicial and administrative proceedings, and participate in State water use permit proceedings as, when and where necessary to protect their rights. By forcing the Plaintiff Nations to make this choice, the Defendants violate the Oklahoma disclaimer and Plaintiff Nations' Treaty-based water rights and regulatory authority, as well as their Treaty right to be free from the exercise of state jurisdiction.

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

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

63. Conversely, the Defendants have at their disposal a lawful basis for seeking an adjudication of Plaintiff Nations' rights and regulatory authority over Treaty Territory water resources, namely the initiation of a general stream adjudication that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666 – a standard that the present state-law permit system on which Defendants rely does not satisfy. Outside of such a proceeding, Defendants' claimed authority over Treaty Territory water resources is contrary to and violates federal law.

## **V. CAUSES OF ACTION**

### **COUNT 1**

#### ***DECLARATORY JUDGMENT***

64. Plaintiff Nations incorporate by reference and restate all allegations of paragraphs 1 through 63 as if fully set forth herein.

65. This action is brought pursuant to and in accord with the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, to seek a declaration of the rights and other legal obligations and relations of the parties named herein under and pursuant to the laws of the United States.

66. There exists an actual case and controversy between Plaintiff Nations and Defendants relating to Defendants' ongoing and unlawful attempt to authorize under state law the withdrawal, export, purchase, and sale of rights to Treaty Territory waters that are subject to the Plaintiff Nations' superior claim of federally protected water rights and

regulatory authority over water resources. The Plaintiff Nations assert that Defendants' attempt to do so is preempted by and violates the Plaintiff Nations' Treaty-based water rights, regulatory authority over waters within the Treaty Territory, and immunity from the application of state law and state jurisdiction, which rights are also protected by the disclaimer in the Oklahoma Enabling Act. The Plaintiff Nations further assert that the only lawful basis on which the Defendants may seek an adjudication of Plaintiff Nations' water rights and regulatory authority thereover is the initiation of a general stream adjudication that satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which requirements are not satisfied by the piecemeal state-law administrative proceedings on which Defendants presently rely.

67. Plaintiff Nations seek to have the Court declare as a matter of federal law that unless and until a comprehensive adjudication of water rights is lawfully initiated that includes the water resources of the Treaty Territory and satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which standard is not satisfied by the present state-law water-use permit system on which Defendants rely, any action by the Defendant(s), or anyone of them, on the Water Trust's water-use permit application associated with the June 2010 agreement, or other action that purports to authorize the withdrawal and export of water resources from any point within the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769, to any point outside the Treaty Territory (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) pursuant to the state-law water-use

permitting system on which Defendants' presently rely is preempted by and violates the Plaintiff Nations' federally-protected water rights, their right to control water resources in the Treaty Territory, and their federally-protected immunity from the application of state law and state jurisdiction.

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

**COUNT 2**  
***INJUNCTIVE RELIEF AGAINST STATE OFFICIALS***

69. Plaintiff Nations incorporate by reference and restate all allegations of paragraphs 1 through 68 as if fully set forth herein.

70. In furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶72, Plaintiff Nations' also seek permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application associated with the June 2010 agreement and forbidding any individual or collective attempt by any or all Defendant(s) or their successors to authorize the withdrawal and export (including by means of a natural channel) of water resources from any point within the Treaty Territory as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769 to any point, place, or location outside thereof (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) unless and until a general adjudication thereof that satisfies the McCarran Amendment, 43 U.S.C. § 666, has been completed.

71. Alternatively, in furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶68, Plaintiff Nations' seek permanent injunctive relief barring the Defendants, or any one of them, from taking any further action on the Water Trust's water-use permit application associated with the June 2010 agreement and forbidding any individual or collective attempt by any or all Defendant(s) or their successors to authorize the withdrawal and transport (including by means of natural channel) of water resources

from any point within the Kiamichi Basin and/or Clear Boggy Basin to any point outside the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769, (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) unless and until a general adjudication thereof that satisfies the McCarran Amendment, 43 U.S.C. § 666, has been completed.

## **VI. PRAYER FOR RELIEF**

72. Plaintiff Nations incorporate by reference and restate all allegations of paragraphs 1 through 71 as if fully set forth herein.

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

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

export outside the Treaty Territory) pursuant to the state-law water-use permitting system on which Defendants' presently rely, is preempted by and violates the Plaintiff Nations' federally-protected water rights, their right to control water resources in the Treaty Territory, and their federally-protected immunity from the application of state law and state jurisdiction.

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

(c) A declaration that that unless and until a comprehensive adjudication of water rights is lawfully initiated that includes the water resources of the Plaintiff Nations' Treaty Territory and satisfies the substantive and procedural requirements of the McCarran Amendment, 43 U.S.C. § 666, which standard is not satisfied by the present state-law water-use permit system on which Defendants rely, any action by the Defendant(s), or anyone of them, on the Water Trust's water-use permit application

associated with the June 2010 agreement, or other action that purports to authorize the withdrawal and transport of water resources from any point within the Kiamichi Basin and/or Clear Boggy Basin to any point outside the Treaty Territory, as defined by art. 2 of the Treaty of Dancing Rabbit Creek, 7 Stat. 333, as modified by art. 3 of the 1866 Treaty of Washington, 14 Stat. 769 (including transfers of water within the Treaty Territory which are then held for export outside the Treaty Territory) is preempted by and violates the Plaintiff Nations' federally-protected water rights, their rights to control water resources in the Kiamichi Basin and/or Clear Boggy Basin and their federally-protected immunity from the application of state law and state jurisdiction.

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

- (e) A monetary judgment for all attorneys' fees and costs incurred in this action; and
- (f) such further relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Michael Burrage

Michael Burrage, OBA #1350

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
Chickasaw Nation and Choctaw Nation of Oklahoma
(b) County of Residence of First Listed Plaintiff Pontotoc
(c) Attorney's (Firm Name, Address, and Telephone Number)
Michael Burrage, Whitten Burrage, 1215 Classen Drive, Oklahoma City, OK 73103 405-516-7800

DEFENDANTS
(1) Mary Fallin, in her official capacity as Governor of the State of Oklahoma;
County of Residence of First Listed Defendant Oklahoma
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State PTF DEF
Citizen of Another State
Citizen or Subject of a Foreign Country

IV. NATURE OF SUIT (Place an "X" in One Box Only)
Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity).
28 USC 1331, 1362, United States Constitution
Brief description of cause.
Injunctive Relief

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$
CHECK YES only if demanded in complaint.
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE West, 5:11-cv-506-W; 5:10-cv-50-V
DOCKET NUMBER

DATE 08/18/2011
SIGNATURE OF ATTORNEY OF RECORD s/ Michael Burrage

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example: U.S. Civil Statute: 47 USC 553  
Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.