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

(1) CHICKASAW NATION and (2) CHOCTAW NATION OF OKLAHOMA, Plaintiffs, vs. (1) MARY FALLIN, in 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.	)	Case No. CIV-11-927-W

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

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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").[1]

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.[2] 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,

[1] 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.

[2] 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").[3] 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

[3] 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").[4] 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).

[4] 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.[5]

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.

[5] 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. <u>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.</u>

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;[6] 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*,

[6] 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.*[7]

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.

[7] *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.[8] 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

[8] 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 10th 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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