

Case No.

#110375

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Oklahoma Water Resources Board,

Petitioner,

vs.

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

Respondents.

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SUPREME COURT
STATE OF OKLAHOMA
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BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION

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Brief in Support of Application to Assume Original Jurisdiction

The future of Oklahoma's water supply is at stake. The Chickasaw and Choctaw Nations have claimed rights to all of the water in the water-rich Southeastern corner of the State—and the power to regulate all water resources in that area. In support of those claims, they have sued the State and Oklahoma City in federal court, in an attempt to place both the State's water regulating machinery and Oklahoma City's water supply in limbo pending a determination of the Tribes' rights (if any) to the water resources in what they call their "Treaty Territory"—a vast expanse of all or parts of 22 southeastern Oklahoma counties. The Tribes ask the federal court to (among other things) enjoin the State from (1) issuing permits to waters from the 22 southeastern Oklahoma counties (2) allowing water to be transported out of the 22 southeastern Oklahoma counties, until the State completes a comprehensive adjudication of the rights of all claimants to those waters; and, (3) adjudicating the rights of the Tribes, other federally-based claimants, and other users and claimants, erroneously contending the State's statutes cannot comply with the "comprehensiveness" requirements of the McCarran Amendment .

The attached Petition, (see App. 1), initiates the comprehensive adjudication that the Tribes claim is necessary but the Tribes erroneously contend is unavailable under Oklahoma law. The Court should assume original jurisdiction over the Petition because 1) the case is of critical importance to the State of Oklahoma and its citizens, 2) an original jurisdiction action will allow for a swifter and less costly resolution of the case, and 3) an original jurisdiction action will allow this court to appoint a Special Referee suited for a complex adjudication of water rights, who will be insulated from the political pressures that would surely accompany the case if it were filed in a county within the Basins. The Tribes' claims cast a cloud over Oklahoma's ability to

plan its water future. This Court, not a federal court, should determine these issues and resolve the competing federal and state law based claims.

Background Information

1. In recent months, the Chickasaw and Choctaw Nations have filled the television airways with commercials with pictures of Oklahoma streams and the lakes they supply. More recently, the Tribes have greatly increased the airing of their commercials so that the commercials are akin to a public relations blitzkrieg, and they have even added full-page newspaper ads and editorials. One of the primary messages of this media campaign is that the Tribes are stewards of the land and protectors of the waters and natural resources of the region.

2. The Tribes' *actions*, however, send a different message:

- The Choctaw Nation commissioned a study on how much money it could make selling southeastern Oklahoma's water to Texas.
- In the Tribes' last attempt to enter into a cooperative water agreement with the State, the Tribes wanted fifty percent (50%) of all money from the sales of water to Texas and elsewhere.
- Since filing their current lawsuit against the State, and prior to the beginning of mediation, the Tribes' lawyers indicated that they were interested in exploring ways to sell or share in the revenues from the sale of water from the region.
- In an April 11, 2011 New York Times article entitled "Indians Join Fight for an Oklahoma Lake's Flow," which quoted Choctaw Chief Gregory Pyle and Chickasaw Nation attorney Stephen Greetham, the Tribes' goals were described as, "assuming the water is valuable, [the Tribes] want to share in the profits from selling or leasing it."
- While claiming to be in favor and giving priority to water needs of urban Oklahoma—Oklahoma City and Tulsa—the Tribe filed a lawsuit in federal court seeking a court order finding that Oklahoma City has no right to use its present pipeline—the

pipeline that has provided water to Oklahoma City for the last 50 years.

- The Tribes' lawsuit also claimed that the Oklahoma Water Resources Board should be prevented from taking any action on permit applications for the region until the State had completed a comprehensive stream-wide adjudication. When the State responded to this claim by indicating that the State would file such an adjudication, the Tribes reversed course, complaining that the State should not file a stream-wide adjudication as it was not necessary.
- In addition to this reversal of course, the Tribes now tell us that the lawsuit is not about earning money from the sale of water to Texas and elsewhere.

3. In short, the Tribes' *actions* and public relations posturing and its lawsuit send mixed messages. The Tribes' actions over the years indicate their interest is in making money from the sale of water to Texas. They now disavow that interest. They claimed that a comprehensive stream-wide adjudication was a prerequisite to the State issuing water permits — they now disavow that claim.

4. Because of the Tribes' reversals of course and conflicting positions and claims, the State has no way of knowing whether the Tribes' primary motive is no longer to make hundreds of millions of dollars selling water to Texas and elsewhere (which is what their study indicated was possible). None of this is clear. The Tribes' mixed messages and actions make it impossible to know.

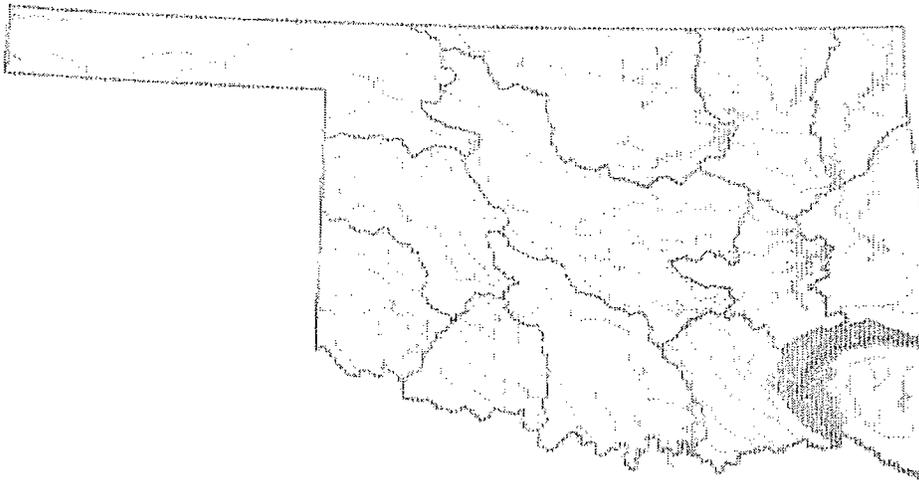
5. What is clear is that the Tribes claim they have the right to regulate and control one hundred percent (100%) of the waters in the 22 counties in southeastern Oklahoma, despite the fact the Tribes' "Indian Country" composes perhaps 3% or less of the land within those 22 counties. The Tribes claim:

- The power to determine who gets the water.
- The power to determine where the water will go.
- The power to regulate how the water will be used in the future under present permits.

Relevant Facts

1. The Kiamichi River begins near Mena, Arkansas along the Oklahoma/Arkansas border, then flows westward near Big Cedar in the Ouachita National Forest in LeFlore County. It meanders into Pushmataha County and is joined by Jackfork Creek, which is impounded by Sardis Reservoir, before turning southwestward then back to the east and south before entering Choctaw County. Just south of the county line, the Kiamichi is impounded by Hugo Lake prior to entering the Red River. *See fig.1.*

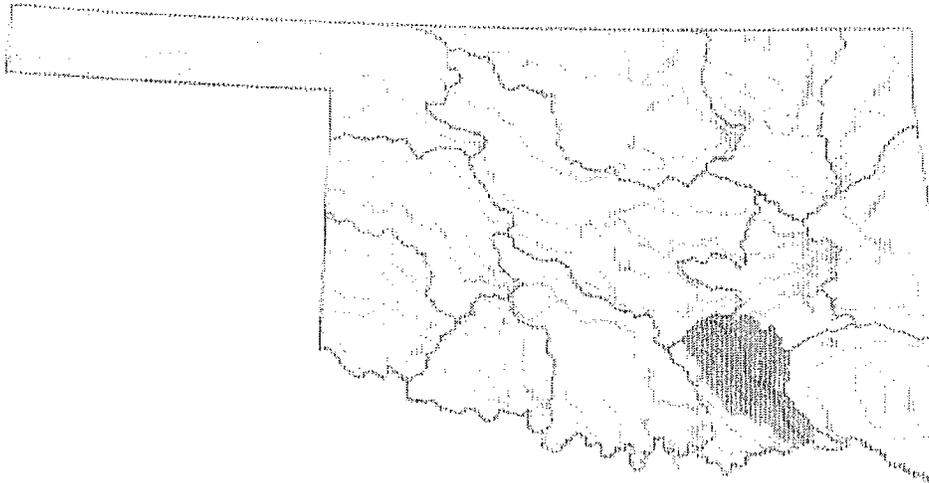
Fig. 1



2. Muddy Boggy Creek and its large tributary, Clear Boggy Creek (120 miles long), originate near Ada, in Pontotoc County. The two rivers flow generally parallel to each other in a southeasterly path prior to converging in western Choctaw County. From there, the Muddy

Boggy flows to its confluence with the Red River near Hugo. Two of Oklahoma City's water supply lakes in the southeast, Atoka Lake and McGee Creek Reservoir, lie on tributaries of the Muddy Boggy. *See* fig. 2.

Fig.2



3. The Petition attached to this Application, (see App. 1), initiates a comprehensive adjudication of the water rights of all claimants to the waters in the Kiamichi, Muddy Boggy, and Clear Boggy Basins (“Basins”).¹

4. The allocation, use, and administration of water resources is generally a matter of state law. However, some specific types of water rights arise under federal law. Two significant categories of “federal” water rights are claims asserted by Indian tribes under federal law on their own behalf or asserted on their behalf by the United States and such claims asserted on behalf of Restricted Allotment Holders. In 1952, recognizing that absent a waiver of immunity for the United States, such federal claims could not be adjudicated along with state

¹ Generally speaking, a basin is the portion of land drained by a river and its tributaries.

based rights, Congress passed the McCarran Amendment. 43 U.S.C. § 666. The McCarran Amendment waives the sovereign immunity of the United States for the limited purpose of a water rights adjudication and provides that the United States consents to be joined in general stream adjudications in state court. The McCarran Amendment *expressly* authorizes state courts to adjudicate Indian water rights through a comprehensive stream-wide adjudication. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983).

5. The adjudication commenced pursuant to the attached Petition is sufficiently comprehensive in full compliance with the McCarran Amendment with regard to the waiver of the immunity of the United States, because it joins or notifies all known and expected claimants to water rights of the Basin, including the United States and those it represents.

6. Prosecution of a comprehensive adjudication is imperative now because the Tribes have filed a federal lawsuit against Governor Mary Fallin, the individual members and Executive Director of the Oklahoma Water Resources Board (“the OWRB”) (collectively, “the State”), the City of Oklahoma City, and the Oklahoma City Water Utility Trust (collectively, “Oklahoma City”), claiming the unilateral right to use and regulate the waters in all or part of 22 southeastern Oklahoma counties and the Kiamichi, Clear Boggy, and Muddy Boggy Basins—three of the most prolific stream systems in the state, and a source of water for the state’s largest city. The Tribes at first argued that they were entitled to a McCarran Amendment adjudication to determine their rights, and asked the federal court to enjoin the State from (1) taking any action on permits to appropriate water from the 22 southeastern Oklahoma counties, and (2) allowing water to be transported out of the 22 southeastern Oklahoma counties until the a comprehensive adjudication to determine the Tribes’ rights complying with the McCarran

Amendment is conducted. In response, the State informed the federal court of the OWRB's intention to promptly initiate just such an adjudication, so that the Tribes' and others' rights could be finally and conclusively determined.²

7. The Tribes promptly amended their complaint. They now seek, among other things, an injunction *preventing* the OWRB from initiating a comprehensive adjudication to determine the Tribes' claimed rights. The Tribes admit that "the McCarran Amendment provides the only means authorized by Congress for any state to adjudicate tribal water rights that arise under federal law", *see* Amended Complaint at ¶ 7, but claim that Oklahoma courts are incapable of accomplishing what Congress has authorized. They thus—remarkably—ask the federal court to enjoin the State from even attempting to do what Congress said it should.

8. Despite the Tribes' amended claims, the OWRB intends to complete the adjudication initiated by the attached Petition, which fully complies with the McCarran Amendment. The OWRB is confident that Oklahoma law and courts are sufficient and capable of such an undertaking, and, as even the Tribes acknowledge, such an adjudication is exactly how Congress has indicated claims like these should be resolved.

9. Petitioner has filed this Application to Assume Original Jurisdiction and Petition in the Oklahoma Supreme Court because the action initiated by the Petition is one of unprecedented *publici juris*, which needs to be decided as expeditiously as possible. An original jurisdiction action is thus proper, and the best available mechanism by which to satisfy the public's interest in a swift and final resolution to the underlying controversy.

² The OWRB is the state entity statutorily authorized to initiate such an adjudication. 82 O.S. § 105.6.

10. Pursuant to Art. 7, Sec. 4 of the Oklahoma Constitution, this Court has the power to exercise its original jurisdiction, and to grant the relief requested in the Petition. *See Ethics Comm'n v. Cullison*, 1993 OK 37, 850 P.2d 1069 (recognizing Supreme Court's authority to grant declaratory relief).

Summary of the Argument

The Court has likely never entertained an application to assume original jurisdiction as important to the public interest as this one. Water is the State's most vital natural resource and the State has spent more than a century crafting a comprehensive regulatory scheme designed to most efficiently allocate that resource, so that the water needs of Oklahomans can be met. The Tribes have called that regulatory scheme into question, and have taken actions that imminently threaten the State's ability to protect the health, safety, and welfare of its citizens through regulation of its water resources. As a result, it is critically important that the Tribes' claims be finally adjudicated, so that there can be certainty as to the State's power to regulate the waters within its borders.

The Petition over which the OWRB asks this Court to assume original jurisdiction initiates an action that will provide that certainty. The adjudication will finally decide the rights of all claimants to the waters of Basins, including the rights of the Nations, Restricted Allotment Holders, and federal instrumentalities. The *publici juris* standard that the court applies in deciding applications such as this is easily satisfied by this adjudication.

For many of the same reasons, it is critical that this case be decided as swiftly as possible. All claimants to the waters of the Basins need to know their respective rights to the water—sooner, rather than later. An original jurisdiction action is the quickest way to achieve

finality. Additionally, this is the type of case that, if decided by a district court, will most certainly be appealed at least once to this court. Given the pressing need for a timely final decision, it makes sense for this Court to accept original jurisdiction over this case now, rather than later, because if brought in district court, this Court will have to decide these issues eventually.

Additionally, the Court's assumption of original jurisdiction will allow the Court to identify and appoint a Special Referee to hear the matter. While no Oklahoma court has conducted an adjudication such as this, adjudications in other states have proven to be time intensive and lengthy, often necessitating a specially-appointed judge who has both the time and expertise to undertake such a proceeding. Hearing the case in this manner prevents a district court's docket being overwhelmed by a case of such magnitude and complexity—which is certainly a benefit to all other litigants before the district court on other matters.

Lastly, most of the claimants who will be joined as parties reside in the Basins. The appointment of a Special Referee will allow the case to be heard by a judge insulated from the political pressures that would surely accompany the case if it were filed in a county within the Basins.

Argument and Authorities

I. The Court should assume original jurisdiction because the adjudication is of critical importance to the State of Oklahoma and to the health, safety, and general welfare of its citizens.

When a matter involves a controversy over which both the Supreme Court and the district courts have concurrent jurisdiction (as here), the Supreme Court has the discretion to decide whether to assume original jurisdiction. *See Keating v. Johnson*, 1996 OK 61 ¶¶ 9-11, 918 P.2d

51, 55. The decision generally turns on 1) the extent to which the case concerns the public interest (*i.e.*, whether it is *publici juris*); and 2) the need for an expeditious decision. *Id.*

Turning first to the public interests at stake, the United States Supreme Court has recognized that a state's interest in regulating the use of water within the state's borders is "at the core of its police power." *Sporhase v. Nebraska*. 458 U.S. 941, 956 (1982). This is appropriately so. Water is essential for human survival, and the state government's most fundamental function is to protect the health, safety, and well-being of its citizens.

Oklahoma has been doing just that since statehood. The people of Oklahoma have twice gone to the polls and amended Oklahoma's Constitution to address management and utilization of the State's water resources. Art. X, Secs. 27A and 39. The Oklahoma Legislature has enacted a comprehensive statutory scheme governing the management and allocation of Oklahoma's water resources. *See* 82 O.S. §§ 1-1801.4. The OWRB has promulgated comprehensive rules and regulation for the administration of Oklahoma's water, Okla. Admin. Code §§ 785:1-1-1-55-7-10, and has primary responsibility for regulating water use appropriation and permitting, water quality monitoring and standards, water supply planning, and water resource mapping. And just recently, the OWRB completed the 2012 update to the Oklahoma Comprehensive Water Plan. The 3,500 page technical and policy assessment was based on dozens of technical studies and the input received through the public's participation at over 100 public meetings. The plan includes a statewide assessment of water supplies, future projections of demand, and methods and plans for alleviating anticipated deficits of particular concern over the next 50 years. The plan's Water Policy Recommendations section presents, for formal legislative consideration, dozens of suggested measures to address Oklahoma's key water issues and problems—all

premised on the notion that it is the State which has the primary authority and responsibility to address those water issues and problems.

In sum, ignoring that the State of Oklahoma has spent more than a century exercising sole regulatory authority over the state's water resources (and with great success), the Nations now allege that the State of Oklahoma has neither the right nor the authority to so regulate the water resources at issue, and that instead they have the sole and plenary authority to regulate those waters within all 22 counties in southeastern Oklahoma. If those claims proved successful, existing rights confirmed under Oklahoma law would be in jeopardy and more than a century of Oklahoma water law would be turned on its head. Moreover, the decades of work and millions of dollars that the State has invested in developing regulations, standards, and expertise in administering water State-wide, and developing and implementing the Oklahoma Comprehensive Water Plan, would be wasted, as control of primary sources of Oklahoma stream water would be yanked from the State's hands.

It is hard to imagine a case involving greater public interests than these.

II. The Court's exercise of original jurisdiction will allow for an expeditious final resolution of claims and issues of critical importance to the State, the Nations, and all other claimants to the water resources at issue.

Given the Tribes' expansive claims to the waters of the Basins, security of water supplies statewide requires a prompt determination of the Tribes' and others' competing claims, which can only be supplied by a comprehensive adjudication. Only through exercise of this Court's original jurisdiction can the needed answers be provided within the timeframe the questions demand.

Comprehensive stream adjudications like the one initiated by the attached Petition generally take some time to complete. If the OWRB is forced to litigate in district court, this litigation will play itself out over a span of many years. There will likely be interlocutory appeals along the way, and there will certainly be an appeal of the final decree by at least one of the many parties. So unlike a typical case, where this Court's refusal to exercise original jurisdiction might increase the total time necessary to litigate the case from one year to two, refusal in this case might very well increase the total time necessary to litigate this case from five years to ten, or perhaps even ten years to twenty. All the while, the State's water supply will remain in limbo. Remember, the Tribes are asking a federal court to enjoin the State from authorizing any withdrawals of water from all 22 counties in southeastern Oklahoma. Put another way, if the Oklahoma City metropolitan area were to suffer a significant drought, and need to temporarily increase exports from water rich southeastern Oklahoma in order to satisfy its water needs, the State, if enjoined, will be unable to authorize those increased exports—at least until the adjudication is complete. Even if the federal court correctly rejects the Tribes' unsupportable injunction claims, the cloud of uncertainty will remain until an adjudication answers the central questions.

Quite obviously, with their federal lawsuit the Tribes aim to be saboteurs of the State's water-regulatory machinery and of Oklahoma City's carefully-laid plans to secure water for its citizens. The Tribes seemingly hope that their obstructionist tactics will strong-arm the State into ceding them some right to the water at issue. It is the Tribes' continued ability to inject uncertainty into the marketplace that underpins their efforts. As a result, it is critically important that there be a prompt, final determination of the validity of the Nations' claims to the water.

III. The Court's exercise of original jurisdiction will allow for the appointment of a Special Referee suited for the specialized issues that will arise, who will be insulated from the political pressures that would accompany the case if filed in a county within the Basins.

If the OWRB files its Petition in district court, the case will be assigned to a district court judge who likely has no experience adjudicating water rights, tribal or otherwise, and who suddenly finds his or her docket overwhelmed by a single case of unprecedented size, scope, and importance and complexity. That would be a disservice to the district court, the parties, and all other litigants on that judge's docket.

But if the Court assumes original jurisdiction, the Court will be able to appoint a Special Referee of its choosing to hear the case. The United States Supreme Court has original jurisdiction over controversies between States, and those controversies have historically included disputes over water. *See* 28 U.S.C. § 1251(a); *see, e.g., Montana v. Wyoming*, 131 S. Ct. 1765, 563 U.S. ____ (2011). In those cases, a special master is appointed, typically a retired judge who has the time to focus on such a time-intensive case, and who in many cases has some expertise or experience in the underlying subject matter.

A similar approach would make sense here. The adjudication will not look like a typical district court civil action, and that is because no Oklahoma district court has ever conducted such an adjudication. Thus, the Court should appoint a Special Referee with the time and experience necessary to handle the case. The referee will adjudicate the claims, and will make a report and recommendation to the Court.³ The Court will thus function in a role quite similar to its normal

³ Adjudications in other states have proven that the appointed Special Referee will have a great deal of flexibility in creating procedures that make the case manageable. For example, in the Gila River adjudication in Arizona and the Snake River adjudication in Idaho, the Special Masters set up websites
(continued...)

role as an appellate court. The parties, on the other hand, will have the benefit of a Referee with the time and flexibility to handle the unique demands of a case like this.

Additionally, the typical concerns the Court might have about departing from its role as primarily an appellate court do not exist here. As explained above, this is not the type of case that a district court is better suited to hear, because no Oklahoma district court has ever heard a case like this. Thus, in terms of experience and expertise, there is nothing to be gained by having the case heard by a district court.

IV. The Petition and Oklahoma law provide a comprehensive stream adjudication complying fully with the McCarran Amendment, and this Court should make the critical assessment of Oklahoma's authority to adjudicate federal rights.

As set out in detail in the Petition, Oklahoma law and the Petition provide a comprehensive stream system adjudication that complies fully with the McCarran Amendment. To be comprehensive in nature, the McCarran Amendment requires the adjudication suit to join all known claimants to the water of a river system or other source. *See e.g., United States v. Dist. Ct. In & For Eagle County, Colorado*, 401 U.S. 520, 525 (1971). The Petition and Oklahoma's adjudication statutes satisfy that standard because the Petition will join all holders of or applicants for OWRB water use permits and all known or expected claimants or property owners who may claim water in the Basins. (See App.1, Petition ¶¶ 43-45).

³(...continued)

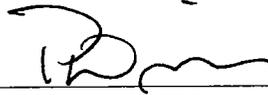
to ease the burdens on claimants, attorneys, and the court. *See* <http://www.srba.state.id.us/SRBA1.HTM> and <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/Index.asp>. Claimants in those cases can access the websites for standard forms created for various actions they might want to take in the case (*see, e.g.,* <http://www.srba.state.id.us/srba2.htm>), to access pleadings filed in the case, to see the court's calendar, and to access administrative and other orders entered by the court.

This case, particularly in light of the Tribes' federal court action, presents the critical question whether federal or State courts should determine how, and whether, Oklahoma's state and federally protected water rights are adjudicated and administered. Reflecting overarching federal deference to State control and regulation of water resources, the Supreme Court and lower federal courts consistently defer to individual States' choices in determining whether a general stream adjudication is sufficiently comprehensive for McCarran Amendment purposes. *See, e.g., Dist. Ct. In & For Eagle County, Colorado*, 401 U.S. at 525; *United States v. Oregon*, 44 F.3d 758, 767-68 (9th Cir. 1994). While the Tribes assert a laundry list of challenges to the effectiveness of a hypothetical Oklahoma law adjudication, those contentions either have been rejected when raised in other States' adjudications or are contradicted by the Petition itself. (See App. 1, Petition ¶¶ 21-35). Because the Tribes' claims require determination of issues arising under Oklahoma's adjudication statute, those claims present important issues of Oklahoma law and policy. This Court should assume original jurisdiction over the Petition to address those issues in the first instance.

Conclusion

Because of (i) the unprecedented public importance of this action, (ii) the need for a swift resolution, and (iii) the benefit gained by appointing a Special Referee, this Court should assume original jurisdiction over the OWRB's petition and appoint a Special Referee to hear the case. If the Court declines to exercise original jurisdiction, Petitioner asks the Court to transfer the case to the district court of its designation.

Respectfully submitted,



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