

**TESTIMONY OF GWENDENA LEE-GATEWOOD, TRIBAL CHAIRWOMAN  
OF THE WHITE MOUNTAIN APACHE TRIBE  
FORT APACHE INDIAN RESERVATION, ARIZONA**

**SENATE COMMITTEE ON INDIAN AFFAIRS**

S.3168 - A bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to modify the enforceability date for certain provisions, and for other purposes.

**Wednesday, March 23, 2022**

**Chairman Schatz, Vice Chairwoman Murkowski and members of the Committee:** Thank you for the opportunity to testify in support of S.3168 - A bill to amend the White Mountain Apache Tribe Water Rights Quantification Act of 2010 to modify the enforceability date for certain provisions, and for other purposes. Thank you also to Senators Kelly and Sinema for sponsoring this legislation.

My name is Gwendena Lee-Gatewood, and I am the Chairwoman of the White Mountain Apache Tribe. We live on the Fort Apache Indian Reservation upon aboriginal lands that we have occupied since time immemorial. Our Reservation is located about 200 miles Northeast of Phoenix in the White Mountain Region of East Central Arizona.

The Tribe's current water sources and infrastructure have been and continue to be grossly inadequate to meet the current demands and needs of our Reservation communities. Fortunately, subsequent to our agreeing to a quantification of our aboriginal and federally reserved water rights in 2009 with various state parties following decades of litigation, Congress enacted the White Mountain Apache Tribe Water Rights Quantification Act ("Quantification Act")(P.L. 111-291). The cornerstone of that Act is the authorization for the design and construction of the White Mountain Apache Tribe Rural Water System (the "Rural Water System" or "RWS")(P.L. 111-291), which will provide a secure, safe, and dependable water supply for the Tribe and its members and ensure a long-term and reliable water supply for the Tribe for current and future generations.

Recognizing the importance of the Act and the RWS Project, Congress has previously approved two amendments to the Act to address cost-overruns and the resulting delays in the required environmental review, including: (1) clarification that \$78,500,000 (before indexing) in federal funds for "water-related economic development projects" authorized in the Act may be used for the RWS Project (See Pub. L. 115-227); and (2) a two-year extension of the enforceability date of the Act to April 30, 2023, to ensure that the Secretary of the Interior has sufficient time to issue the required ROD and publish the relevant statement of findings for the RWS Project. (See the FY2020 Consolidated Appropriations Act, Section 206 Department of the Interior-General Provisions.)

Unfortunately, since the passage of the above amendments, the Tribe has learned that the costs for the RWS will exceed the costs authorized in the underlying Act, even when factoring in the

additional flexibility to use previously authorized water-related economic development funds for the project. The associated engineering issues have also delayed dam design and the environmental review process, thus necessitating the need to extend the enforceability date by two years.

If this issue is not resolved, the completion of the Rural Water System project will be threatened, thereby increasing the ultimate cost to the United States and delaying the delivery of life-sustaining drinking water to our reservation communities. Consequently, the Tribe is seeking a final amendment to: (1) increase the federal funds authorized to complete the RWS Project to address cost-overruns; and (2) extend the enforceability date to April 30, 2025, to allow sufficient time for dam design and the environmental review associated with the project to be completed.

### **Fort Apache Indian Reservation and the Tribe's Reserved Water Rights**

The Tribe holds full beneficial title to 1.66 million acres of trust land in the east central highlands of the State of Arizona. The Tribe's Fort Apache Indian Reservation was established by Executive Order in 1871. We have retained actual, exclusive use and occupancy of our aboriginal lands within the boundaries we agreed to, and which were later designated by the Executive Orders dated November 9, 1871, and December 14, 1872, without exception, reservation, or limitation since time immemorial. The Tribe's vested property rights, including its aboriginal and other federal reserved rights to the use of water, often referred to as *Winters Doctrine Water Rights*, that underlie, border and traverse our lands, have never been extinguished by the United States and are prior and paramount to all rights to the use of water in the Upper Salt River drainage, the primary tributary in the adjudication of the water rights in the Gila River Basin.

Except for a small portion of the Reservation that drains to the Little Colorado River Basin, virtually our entire Reservation drains to the Salt River. The headwaters and tributaries of the Salt River arise on our Reservation and are the principal sources of water for the Tribe and the greater metropolitan Phoenix area. Specifically, 78 percent of the water in Theodore Roosevelt Reservoir located north of the Phoenix Valley is contributed from our Reservation; at Saguaro Lake reservoir, further South, 60 percent of the water is contributed from our Reservation; and below the confluence of the Verde River and Salt River, near Granite Reef Dam, Scottsdale, 42 percent of the water comes from our Reservation. The importance of achieving implementation of our 2009 Water Rights Quantification Agreement is essential to the well-being of the White Mountain Apache Tribe and the downstream water users in the Phoenix Valley.

### **White Mountain Apache Tribe Water Rights Quantification Act of 2010**

In 2010, Congress approved the historic White Mountain Apache Tribe Water Rights Quantification Act as part of the Claims Resolution Act of 2010 (P.L. 111-291). The legislation was sponsored by the entire Arizona delegation at the time. The Quantification Act resolved the Tribe's water-related damage and reserved water rights claims against the United States, the State of Arizona, and a number of state parties regarding rights in the Little Colorado River and the Gila River (Salt River and Tributaries thereto). In consideration for the Tribe waiving its

water related claims and prior reserved rights, the Act authorized funding for the construction of the Rural Water System comprised of a dam and reservoir, treatment plant, and 55 miles of pipeline to serve virtually every Reservation community. In addition, the Act also authorized funding for, among other things: (1) cost-overruns for the Rural Water System (Sec. 312(e)) and (2) “water-related economic development projects” as part of the WMAT Settlement Fund (Sec. 312(b)).

The White Mountain Apache Tribe Water Rights Quantification Agreement, which was respectfully negotiated amongst all parties, was formally approved by the White Mountain Apache Tribe and all parties, including the Secretary of the Interior, and subsequently approved by the Superior Courts (Apache County and Maricopa County Superior Court) of the State of Arizona on December 18, 2014. The White Mountain Apache Tribe Water Rights Quantification Settlement Judgment and Decree was filed in Maricopa County and Apache County on March 15, 2015. The Judgments and Decrees become enforceable on the date that the White Mountain Apache Tribe Water Rights Quantification Act becomes enforceable with the publication by the Secretary of the Record of Decision allowing the construction of the Rural Water System project to go forward.

### **The Tribe’s Drinking Water Crisis**

The driving force behind the 2009 water rights settlement and the 2010 Quantification Act was the long-standing need to provide a reliable and safe water supply and delivery system to the members of the White Mountain Apache Tribe. The Tribe and Reservation residents are in urgent need of a long-term solution for their drinking water needs. Currently, the Tribe is served by the Miner Flat Well Field. Well production has fallen sharply and is in irreversible decline. Over the last decade, well production has fallen by more than 60%. A small diversion project on the North Fork of the White River was constructed several years ago to compensate for the precipitous loss of well production, but was only a temporary fix. Drinking water shortages remain a chronic problem. The Tribe experiences annual summer drinking water shortages, and there is no prospect for groundwater recovery as there is little or no groundwater on the Reservation. The quality of the existing water sources threatens the health of our membership and other Reservation residents, including the Indian Health Service Regional Hospital and State and Bureau of Indian Affairs schools. The only viable solution is the replacement of failing groundwater resources with surface water from the North Fork of the White River.

Without reservoir storage behind Miner Flat Dam, a feature authorized by the Act, the unregulated stream flows of the North Fork of the White River, supplemented by a sharply reduced Miner Flat Well Field, are together inadequate to meet current, much less future, community demands of the White Mountain Apache Tribe in the Greater Whiteriver Area, Cedar Creek, Carrizo, and Cibecue, where 95% of the Reservation population resides. Nor can we maintain a minimum flow in the North Fork of the White River. Therefore, Miner Flat Dam is necessary to store 8,600 acre-feet of water during runoff periods for release and enhancement of the North Fork of the White River to not only meet demands of the Reservation Rural Water System, but to maintain a minimum flow required for aquatic and riparian habitat preservation and enhancement.

In sum, the Rural Water System will replace the failing groundwater well system and enable the Tribe to construct a secure, safe and reliable drinking water supply for the current 17,000 White Mountain Apache Tribal members and residents living on our Reservation and to meet the increasing drinking water needs of the Reservation for a future population of nearly 40,000 persons in the decades to come.

### **Need for Amendment**

Unfortunately, as work on the design and geotechnical study of the proposed dam site for the Rural Water System has taken place, the Tribe together with Reclamation and its consultants have identified additional cost-overruns beyond what was initially contemplated at the time Congress passed the first amendment to the Act. These additional costs were discovered after the Tribe conducted further review of the project with the assistance of HDR, the Engineer of Record (EOR) for the WMAT. In 2019, WMAT worked with Reclamation on a new drilling program to further define the site characteristics and to prepare the Viability Assessment (VA) of the Miner Flat Dam, a key component of the RWS. In the course of this work, the Tribe's consulting engineers altered the design to address seepage and stability issues at the dam site, which resulted in an increased cost estimate for the project.

We have continued to work closely with the U.S. Bureau of Reclamation and believe we are close to reaching consensus to address the design issues discussed above so that the RWS can be built and the settlement finalized. In October 2021, the VA was finalized and it concluded that: (1) the dam is viable with the foundation treatments proposed; (2) the dam will meet national dam safety criteria; and (3) the dam will effectively regulate the North Fork of the White River for the Rural Water System with relatively small and controllable seepage losses.

The upper end of the costs for options in the VA required an additional funding amount of approximately \$250 million to complete HDR's proposal for construction of Miner Flat Dam. The increased funding amount also includes the cost for the dam, pipelines, pumping stations, water tanks, water treatment plant, diversion to the water treatment plant and all other elements of the WMAT RWS. The additional funding is for all features of the WMAT RWS and includes construction contingencies and "non-contract" costs (such as NEPA compliance, Clean Water Act compliance, NHPA compliance, project planning, design, construction observation, administration of construction contracts with builders of the project features awarded contracts in a competitive bidding process, and Reclamation oversight, among other costs not listed).

In November 2021, the Bureau of Reclamation asked WMAT to prepare an "addendum" to the Final VA to address the costs of an additional design option that would include an underground concrete wall across the full breadth of the valley of the North Fork of the White River as deep as the basement complex and to depths of 150 to 350 feet depending on location across the Valley. WMAT complied and directed HDR to prepare a cost estimate of the option proposed by Reclamation and a second less costly option that would provide a more robust treatment of the foundation than had been provided in the Final VA to reach common ground with Reclamation.

Reclamation recognized the need to reach a consensus on foundation design and accepted a WMAT invitation for a workshop in Denver in late February 2022. The workshop helped Reclamation and the EOR agree on a foundation treatment option that will address Reclamation's concerns. It is my understanding that cost estimates of that option should be completed in the next several weeks by HDR and shared with Reclamation for review. The Tribe is hopeful that it will reach consensus on a sum certain with Reclamation in the very near future that will be close to HDR's cost estimate.

Finally, because of the above delays associated with the RWS, the deadline for the enforceability date of the Act also must be extended by two years to 2025 so that the dam design and required environmental review of the project can be completed. As noted, one of the requirements for the Act to become enforceable is the issuance by the Department of the Interior of a ROD for the RWS and publication by the Secretary of the Interior of a statement of findings in the Federal Register authorizing construction. WMAT and Reclamation are working cooperatively to ensure steady progress to complete 30% design of Miner Flat Dam, the critical path to the ROD, ahead of the April 30, 2025, date for enforceability of the Quantification Act as proposed in the amendment.

Ultimately, the importance of our water rights settlement and the WMAT Rural Water System to the health and welfare of our people cannot be overstated. As noted in the previous legislative history, reservoir storage on the North Fork of the White River is key to the ability of my Tribe to use its settled water rights and deliver water to the communities on the Reservation. Absent storage we cannot capture runoff, prevent its escape from the Reservation, and use it beneficially during drier seasons. We must ensure the timely design and completion of the RWS by resolving the cost issue now, not later. This legislation would clarify that we have adequate funding to complete the project and time to complete the dam design and required environmental review. If these issues are not resolved, the water settlement and the completion of the project will be threatened, which would increase the ultimate cost to the United States, delay the delivery of life-sustaining drinking water to our Reservation communities and the membership of the White Mountain Apache Tribe, and bring uncertainty to the Tribe and its settling parties in the Gila River Adjudication.

Chairwoman Gwendena Lee-Gatewood