

**TESTIMONY OF RONNIE LUPE, TRIBAL CHAIRMAN
THE WHITE MOUNTAIN APACHE TRIBE
FORT APACHE INDIAN RESERVATION, ARIZONA
SENATE COMMITTEE ON INDIAN AFFAIRS**

**Dirksen Senate Office Building, Room 628
White Mountain Apache Tribe Water Rights Quantification Act of 2009 (S. 313)**

April 2, 2009

Chairman Dorgan, Vice Chairman Barrasso and members of the Committee:

Thank you for the opportunity to testify in support of S. 313, the White Mountain Apache Tribe Water Rights Quantification Act of 2009. My name is Ronnie Lupe. I am the Tribal Chairman of the White Mountain Apache Tribe. We live on the Fort Apache Indian Reservation upon aboriginal lands which 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 as illustrated in the attached map.

S. 313 will quantify, preserve, recognize, and settle the reserved water rights of the White Mountain Apache Tribe in perpetuity, provide Tribal waivers and releases of claims regarding all State law water users in the Gila River and Little Colorado River basins and against United States (except for the United States acting as trustee on behalf of other Indian Tribes).¹

The White Mountain Apache 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 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 its lands, have never been extinguished by the United States and are prior and paramount to all rights to the use of water in the Gila River drainage, of which the Salt River is a major source.

Except for a small portion of the Reservation that drains to the Little Colorado River Basin, virtually the 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, the downstream Cities of Avondale, Chandler, Gilbert, Glendale,

¹ Tribal waivers of potential water related breach of trust claims against the United States far exceed the authorization in S.313 for approximately \$166 million in federal appropriations for (1) the OM&R Trust Fund for the Miner Flat Project; (2) existing lakes infrastructure enhancement; (3) fish hatchery repair, rehabilitation and expansion; (4) fisheries Center; (5) repair of existing irrigation systems; (6) forest management study and Sawmill retooling to accommodate smaller diameter trees; (7) snowmaking infrastructure; and (8) future lake development.

Mesa, Peoria, Phoenix, Scottsdale and Tempe; the Salt River Reclamation Project and the Roosevelt Water Conservation District, among other parties to the Gila River and Little Colorado Adjudication Proceedings.

In 1985, the United States in its capacity as the Tribe's Trustee, filed a substantial reserved water rights claim in the name of the White Mountain Apache Tribe to the Salt River as part of the Gila River Adjudication Proceedings still pending in the Maricopa County Superior Court, State of Arizona. It also filed claims for the Tribe in its capacity as trustee in the Little Colorado River Adjudication Proceedings also still pending in the Apache County Superior Court, State of Arizona.

At the urging of the Tribe, the United States amended its water rights filings for the Tribe in the Little Colorado River and the Gila River General Stream Adjudications in September 2000, to assert the Tribe's prior and paramount, aboriginal and federal reserved rights to the transbasin aquifer sources that sustain the base flow of the Tribe's Reservation springs and streams. The amended claim filed by the United States in its capacity as trustee for the Tribe, specifically recognizes the Tribe's unbroken chain of aboriginal title and time immemorial priority rights to the base flow of the springs and streams, and the contribution to those surface waters by rainfall and snowmelt runoff on the Tribe's Reservation.

For decades, the White Mountain Apache Tribe has asserted its rights to preserve, protect, use and develop its aboriginal and federally reserved water rights. As late as the 1950s, a physical confrontation became imminent between the Tribe and downstream water claimants when the Tribe began to develop outdoor recreation lakes on its Reservation trust lands by diverting water from Reservation streams. This activity was considered a threat to water supplies in the Salt River system by downstream water users in the Phoenix Metropolitan area and was vigorously opposed. A litany of water right controversies involving the White Mountain Apache Tribe, the United States in its role as the Tribe's conflicted trustee, and the Salt River Valley Reclamation Project has predominated throughout the 20th century, all of which will be resolved by S. 313.

Since the appointment of a Federal Negotiating Team by the Secretary of the Interior in 2004, we have met and negotiated in good faith with the downstream water users and claimants in both the Gila River and Little Colorado River Adjudication Proceedings to reach an honorable, dignified and equitable quantification and settlement of our Tribe's reserved water rights.

The White Mountain Apache Tribe Water Rights Quantification Agreement, which was respectfully negotiated amongst all parties, has been concluded and has been formally approved by the White Mountain Apache Tribe and by the majority of the downstream parties' respective governing bodies in the greater Phoenix Metropolitan area, including the Board of Directors of the Salt River Project and the Central Arizona Water Conservation District (CAWCD). The remaining City approvals are only a matter of formality and scheduling, and will be completed by the end of April 2009.

The Tribe's sizable and senior water rights claims in the pending Gila River and

Little Colorado River Adjudication Proceedings have generated considerable uncertainty regarding the availability of Salt River water supplies currently used by the downstream Salt River Project, which serves the greater Phoenix Metropolitan area. As many as 3.5 million people depend in large part upon the water sources that arise on the Fort Apache Indian Reservation to which the White Mountain Apache Tribe claims sufficient water to meet its present and future needs. The WMAT Water Rights Quantification Act of 2009, which will authorize and confirm the Parties' Settlement Agreement will resolve uncertainties among all of the parties and claimants in both the Gila River and Little Colorado River Basins.

S. 313 will also resolve potential claims by the White Mountain Apache Tribe against the United States for water related breach of trust damage claims that could potentially result in liability far in excess of the funding authorized by S. 313. Specifically, beginning with the completion of Roosevelt Dam for the Salt River Reclamation Project in 1911, the trustee United States, acting by and through its principal agent, the Secretary of the Interior, has as a matter of policy, suppressed, neglected, ignored, and opposed the reserved water use rights of the White Mountain Apache Tribe. These policies, fostered by an inherent conflict of interest on the part of the Secretary, favored development of the non-Indian Salt River Project at the expense of the welfare of the White Mountain Apache Tribe.

For example, as set forth in greater detail in the Tribe's Paper² on the liability of the United States for water related, breach of trust damage claims, the Secretary of the Interior in the 1960s intentionally destroyed thousands of Cottonwood trees and other riparian vegetation along the Tribe's streams to increase water runoff to the Salt River Valley and Roosevelt Reservoir. The Secretary also cleared thousands of acres of Juniper trees under the auspices of rangeland restoration for the purpose of increasing runoff. The ecosystem damage from this action continues and is ongoing. The cost of riparian restoration is in the millions of dollars.

Another example of a water related, breach of trust damage claim that will be waived by the Tribe in S. 313, are damages to water rights resulting from the doubling of the annual allowable cut of the Tribe's commercial forests by the Secretary for the purpose of increasing water runoff from the Tribe's Reservation to Roosevelt Reservoir.

Other potential water related, breach of trust damage claims, *inter alia*, which are discussed in the Liability Paper and that will be waived by S. 313, will be claims arising from:

- an historic failure to maintain approximately 90 miles of irrigation ditches on the Reservation (waived after funding received to repair)
- failure to support future OM&R expenses for the Miner Flat Dam Project Rural Water System (waived after OM&R Trust Fund established)
- an historic failure to meet the trust obligation to provide a safe drinking water supply for the Tribe,

² This Paper, outlining the potential liability of the United States for breach of trust for water related damage claims, will be filed with the Secretary of the Interior.

- suppression of agricultural irrigation to date,
- expense of litigating the Tribe's reserved water rights claims,
- failure of the Secretary to reserve Tribe 's water from contracts issued downstream for storage after Roosevelt Dam was originally built in 1911,
- failure of the Secretary to set aside New Conservation Storage (NCS), for the White Mountain Apache Tribe in the 1995-96 enlargement of Roosevelt Reservoir (result is that Tribe compelled to obtain 25,000 acre-feet of CAP instead of Salt River Water valued by SRP at \$6,000 per ac ft),
- failure of the United States to assert the reserved water rights of the White Mountain Apache Tribe in the EIS for the reallocation of CAP water, and
- holding the trustee United States harmless by the Tribe relinquishing 26,000 acre-feet diversion annually for the Reservation's Bonito Prairie area.

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 8 years, well production has fallen by 50%, and temporary replacement wells draw from the same source aquifer that is being exhausted. The Tribe experiences chronic summer drinking water shortages. There is no prospect for groundwater recovery. The quality of the existing water sources threatens the health of our membership and other Reservation residents, including the IHS Regional Hospital and State and BIA schools. The only viable solution is replacement of failing groundwater with surface water from the North Fork of the White River. A small water diversion system along the White River (North Fork Diversion Project) will help the Tribe's short term drinking water needs, but this is only a temporary measure to replace the quickly failing well field.

Without reservoir storage behind Miner Flat Dam, a feature authorized by S. 313, the stream flows of the North Fork of the White River, supplemented by short-term capacity of the Miner Flat Well Field, are together inadequate to meet community demands of the White Mountain Apache Tribe for the Greater Whiteriver Area, Cedar Creek, Carrizo and Cibecue and to maintain a minimum flow in the North Fork of the White River. The demands of the Tribe for its Rural Water System as proposed in HR 1065 and S. 313 will dry up the North Fork of the White River before 2020, even in combination with a supplemental supply from the Miner Flat Well Field. Therefore, Miner Flat Dam is necessary to store 6,000 acre feet of water during runoff periods for release and enhancement of the North Fork of the White River to meet demands of the Reservation rural water system and maintain a minimum flow for aquatic in riparian habitat preservation and enhancement.

The WMAT Rural Water System, including the Miner Flat Dam Storage Facility, water treatment plant, and pipeline to deliver drinking water to Reservation communities is the cornerstone of the WMAT Water Rights Quantification Act of 2009 and the Settlement Agreement. The Quantification Act and Settlement Agreement will confirm the Tribe's and other settling parties' water rights without prolonged, protracted and expensive litigation that began in 1979, and could last for decades more. The Miner

Flat Project will replace the failing groundwater well system and enable the Tribe to construct a secure, safe and reliable drinking water supply for the current 15,000 White Mountain Apache Tribal members and residents living on our Reservation and will meet the increasing drinking water needs of the Reservation for a future population of nearly 40,000 persons in the decades to come. *See attached Miner Flat Reservoir and Pipeline Location Map.*

Last year, on September 11, 2008, I testified in support of S. 3128, the White Mountain Apache Tribe Rural Water System Loan Authorization Act, which became law on October 10, 2008 (Pub. L.110-390). The \$9.8 million authorized by that law will allow the Tribe to complete within the next two to three years, the design, engineering, planning, and federal environmental compliance for the proposed Miner Flat Dam drinking water system thereby saving millions of dollars in construction costs that inflation will generate with delay in the design and construction of our project.

In settlement negotiations, the White Mountain Apache Tribe agreed to relinquish its water rights claims on Bonito Prairie, totaling 26,000 acre feet annually for irrigation, and opted instead for rehabilitation of existing recreation lakes, development of new recreation lakes, forest management and timber manufacturing improvements, snowmaking at our ski area and other economic development features embraced by S. 313. These provisions in S. 313 are essential to our future and were a significant factor in reaching the settlement agreement, now before Congress for approval, with the downstream parties.

Conclusion

The White Mountain Apache Tribe appreciates the opportunity to appear before the Committee, the co-sponsorship of S. 313 by Arizona Senators Jon Kyl and John McCain, and unanimous support of S. 313 by the settling State parties to the White Mountain Apache Water Rights Quantification Agreement.