

**Testimony of Ronnie Lupe, Tribal Chairman
White Mountain Apache Tribe
Fort Apache Indian reservation, Arizona**

**Hearing before the House Natural Resources Committee
Subcommittee on Water and Power**

**Longworth House Office Building, Room 1334
White Mountain Apache Tribe Water Rights Quantification Act of 2009 (H.R. 1065)**

July 21, 2009

To: The Honorable Grace F. Napolitano, Chairwoman, and the Honorable Tom McClintock, Ranking Member, and members of the Subcommittee:

Thank you for the opportunity to testify in support of the White Mountain Apache Tribe Water Rights Quantification Act of 2009, H.R. 1065, ("Quantification Act"). My name is Ronnie Lupe and I am the Tribal Chairman of the White Mountain Apache Tribe. We number about 15,000 people. We live on the Fort Apache Indian Reservation ("Reservation"), established November 9, 1871, on 1.66 million acres of 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. (See attached map).

Origin of Tribe's Vested Property Rights to Water

The White Mountain Apache Tribe has retained actual, exclusive, use and occupancy of its aboriginal lands within Reservation 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, which include its aboriginal and other federal reserved rights to the use of water, often referred to as Winters Doctrine Water Rights, that underlies, borders and traverses its lands, have never been extinguished by the United States and are prior and paramount to all other rights to the use of water in the Gila River drainage, of which the Salt River is a major source.

Headwaters of Salt River System on Tribal Land

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. See attached location map referenced above. 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, 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.

United States in Capacity as Tribe's Trustee Files Reserved Water Rights Claim

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

Tribe's Reserved Water Rights Claim Inclusive of Base Flow

At the urging of, and in collaboration with 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.

Historical Conflict

For decades, the White Mountain Apache Tribe has asserted its right 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 by impounding water from streams within the Reservation's exterior boundaries. 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, characterized the relationship the Tribe had with the Salt River Reclamation Project and downstream water users throughout the 20th century.

The Tribe's sizable and senior water rights claims in the pending Gila River and Little Colorado River Adjudication Proceedings generated considerable uncertainty regarding the availability of Salt River water supplies used by the downstream Salt River Project, which serves the greater Phoenix Metropolitan area. As many as 3.5 million people downstream 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.

Tribe's Aboriginal and Reserved Water Rights Quantified by 2009 Agreement

This year, the White Mountain Apache Tribe Water Rights Quantification Agreement, ("Quantification Agreement") was formally approved and signed by the

White Mountain Apache Tribe and by the downstream parties' respective governing bodies, including the Governor of the State of Arizona, Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users Association, Roosevelt Water Conservation District, Arizona Water Company, the Cities of Avondale, Chandler, Glendale, Peoria, Mesa, Phoenix, Show Low, Scottsdale, Tempe, Gilbert, Buckeye Irrigation Company, Buckeye Water Conservation and Drainage District, and the Central Arizona Water Conservation District (CAWCD). The Quantification Agreement is an honorable, dignified and equitable quantification and settlement of our Tribe's reserved water rights.

The Quantification Agreement that was approved and signed by all the parties except the United States, (the United States does not sign the Quantification Agreement until H.R. 1065 is enacted by Congress), provides that the Tribe is permitted to *divert* for beneficial use, approximately 99,000 + acre-feet annually, so long as the *depletion* from any diversion does not exceed 52,000 acre-feet annually.

This water use right was negotiated by the Tribe and state parties and reflects a water budget that will provide sufficient water to satisfy the Homeland purpose of our Reservation. The water budget includes present and future water needed for domestic and commercial purposes through the year 2100, irrigation, stock ponds, recreation lakes, storage reservoirs, federal fish hatcheries on our land, livestock, our sawmill, outdoor recreational resort housing development, and mineral development.

H.R. 1065

H.R. 1065 will authorize, confirm, and implement the Quantification Agreement and will thereby resolve uncertainties among all of the parties and claimants in both the Gila River and Little Colorado River Basins. The Act 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, including the United States (except for the United States acting as trustee on behalf of other Indian Tribes).

Tribal Claims Waived by Quantification Agreement Outlined in Liability Paper

H.R. 1065 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 H.R.1065. 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 Liability Paper, that has been submitted to the Department of Interior and to appropriate House congressional

staff, the Secretary of the Interior in the 1950s and early 60's 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, not for the benefit of the White Mountain Apache Tribe, but for the benefit of the downstream water users in the Phoenix Metropolitan area. The ecosystem damage from this action continues and is ongoing. The cost of riparian restoration is in the hundreds of millions of dollars.

Another example of a water related, breach of trust damage claim that will be waived by the Tribe in H.R. 1065, 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 for the benefit of the Salt River Reclamation Project.

Other potential water related, breach of trust damage claims, *inter alia*, which are discussed in the Liability Paper and that will be waived by H.R. 1065, will be claims arising from:

- an historic failure to maintain approximately 90 miles of irrigation ditches on the Reservation (waived after federal 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,
- suppression of irrigation development,
- 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 was compelled to obtain 25,000 acre-feet of CAP instead of retaining 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 relinquishing 26,000 acre-feet diversion annually (valued by SRP at \$6,000 per acre foot), that had been earmarked for economic development on the Reservation's Bonito Prairie area.

Value of Tribal Waivers

The value of tribal waivers of potential water related breach of trust claims against the United States, as outlined in the Tribe's Liability Paper, far exceeds the authorization in H.R. 1065 for a dam, reservoir and drinking water system (\$127 million) ("Miner Flat Reservoir Project"), the OM&R Trust Fund (\$50 million) for the Miner Flat Reservoir

Project, and the \$116 million authorized for "wet water economic development, supported by all parties (except the United States), for: (1) existing lakes infrastructure enhancement (\$23,675,000); (2) fish hatchery repair, rehabilitation and expansion (\$7.5 million); (3) a fisheries center (\$5 million); (4) repair of existing, but neglected BIA irrigation systems (\$4.95 million); (5) forest management study and Sawmill retooling to accommodate smaller diameter trees and reduce forest fire risk (\$25 million); (6) snowmaking infrastructure (\$25 million); and (7) future recreational lake development (\$25 million).

Drinking Water Crisis

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.

Reservoir Storage a Necessity

Without reservoir storage behind Miner Flat Dam, a feature authorized by H.R. 1065, 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 H.R. 1065 will dry up the North Fork of the White River by 2020 or earlier, even in combination with a supplemental, diminished water source 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 Miner Flat Project 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.

Environmental Impact

The dam and reservoir will be environmentally beneficial. The flow at the site of the proposed miner flat dam and reservoir averages 60,500 acre-feet annually. The dam will not alter the average annual flow of the North Fork of the White River at the dam or along the first 15 miles of river below the dam. It will only regulate the flow, storing

water during periods of runoff and releasing like amounts of water during periods of seasonal low flow. The project can store and release a maximum of 6,000 acre-feet (the active conservation storage) on a seasonal, annual or multi-year basis. These releases are beneficial between the dam and the Alchesay National Fish Hatchery because they enhance the quantity of flow during low flow periods, such as May and June, and enhance the quality by lowering temperature, which has been historically problematic for the hatchery. The temperature is lowered by releasing cold water at depth in the reservoir. Miner Flat Dam will not stop the annual flow of the North Fork of the White River, but will only regulate the River's annual flow. The operating plan for the releases will meet environmental requirements.

Funding Consideration for Quantification Agreement

Funding for the WMAT Rural Drinking Water System, including the Miner Flat Dam Storage Facility, water treatment plant, and pipeline to deliver drinking water to Reservation communities is an indispensable component of the Quantification Act and Quantification Agreement.

The language approved by all of the signing parties declares that the entire Drinking Water System, including the Miner Flat Dam, reservoir, treatment plant and pipeline, pumping stations and other infrastructure, shall *be held in trust* by the United States for the use and benefit of the White Mountain Apache Tribe. This is consistent with other authorized Bureau of Reclamation Indian rural water projects such as: Garrison Diversion Unit, Mni Wiconi, Fort Peck, North Central/Rocky Boy's, Santee Sioux, and Cheyenne River.

The Quantification Agreement and H.R. 1065 also provide that the Tribe waives any future OM&R cost claims against its trustee, the United States, upon establishment of a OM&R Trust Fund, the interest of which will be used to pay for the annual estimated OM&R cost of \$2.1 million for the Miner Flat Project. This is the deal the Tribe made with the signing parties in consideration for quantifying its substantial reserved water rights claim in the Salt River and Little Colorado River systems, waiving substantial damage claims, and relinquishing a considerable reserved water right in exchange for, and in reliance upon, funding for a safe drinking water system and for “wet water” economic development.

Conclusion

The White Mountain Apache Tribe is thankful for the opportunity to present testimony before this important Subcommittee and expresses its appreciation to Congresswoman Ann Kirkpatrick for introducing H.R. 1065, the companion bill to S.313, which was co-sponsored by our United States Senators Jon Kyl and John McCain. The Tribe also thanks the signing parties to the White Mountain Apache Water Rights Quantification Agreement for their continuous support of H.R. 1065.