

RECEIVED

NOV 26 1986

FORT APACHE INDIAN  
AGENCY  
WHITERIVER, ARIZ.

Resolution No. 86-361

RESOLUTION OF THE  
WHITE MOUNTAIN APACHE TRIBE OF THE  
FORT APACHE INDIAN RESERVATION

WHEREAS, Chairman Reno Johnson, in his November 12, 1986 Report . . . to Members of the Tribal Council and Members of the White Mountain Apache Tribe respecting the above-entitled case - - having fully reviewed the facts offered in evidence at the trial on the merits - - referred to the Court's October 23, 1986 Order requiring the parties to engage in "good-faith settlement negotiations"; and

WHEREAS, the Department of Justice, on November 3, 1986, purposed that the Tribe should present to the Department ". . . a settlement rationale and a monetary range acceptable to the Tribe. . . ."; and

WHEREAS, the Court repeatedly admonished Chairman Johnson and Counsel fully to review the Court's informal rulings, utilizing Tribe's expert witnesses for that purpose; and

WHEREAS, Chairman Johnson, in strict conformity with the Court's direction, convened a meeting of the Tribal Council, all members being present, at 1:00 p.m. on Wednesday, November 12, 1986, continuing with recesses through to 4:00 p.m., November 14, 1986; and

WHEREAS, Chairman Johnson presiding at that meeting, there were reviewed by Chairman Johnson and Counsel, as directed by the Court, the rulings and comments of the Court respecting both the evidence offered and credibility of Plaintiff Tribe's witnesses; and

WHEREAS, in further conformity with the directions of the Court, Plaintiff Tribe's expert witnesses in the fields of water resources, soils and geology, grazing resources, and timber resources, utilizing documentary and demonstrative evidence, summarized for the Tribal Council the significant aspects of their testimony in support of Plaintiff Tribe's claims for damages for continuing wrongs presently totalling One Billion Three Hundred Million Dollars (\$1,300,000,000), to restore Plaintiff Tribe's Fort Apache Indian Reservation which has been devastated due to the intentional mismanagement by Secretaries of the Interior, including incumbent Secretary Donald P. Hodel, for the

benefit of the Secretarial Salt River Federal Reclamation Project; and  
WHEREAS, predicated upon the in-depth analysis presented to the Tribal Council, governing body of Plaintiff White Mountain Apache Tribe, and after careful deliberations, it has been determined that:

FRAUD HAS BEEN AND IS BEING PRACTICED UPON PLAINTIFF  
TRIBE BY SUCCESSIVE SECRETARIES OF THE INTERIOR  
INCLUDING INCUMBENT DONALD P. HODEL

#### The Court's Jurisdiction

1. Counsel reviewed for the Tribal Council that Congress, being fully aware of the fraud historically practiced by successive Secretaries of the Interior, upon Indian Tribes frequently, as here, acting in concert with the Attorney General of the United States, waived without reservation the sovereign immunity of the United States from suit conferring jurisdiction upon the then Indian Claims Commission - - now the United States Claims Court - - of sufficient breadth ". . . to include all possible claims." In specific terms the jurisdictional provisions for which money damages could be recovered by Indian Tribes include fraud and duress of the character practiced by successive secretaries of the Interior upon Plaintiff Tribe.

2. The Tribal Council was fully advised that the Court refused to accept Plaintiff Tribe's evidence and legal contentions that the Secretary of the Interior has in the past and is tortiously mismanaging Plaintiff Tribe's Reservation for the benefit of the Secretarial Reclamation Projects which utilize Salt River water.

#### Fraudulent Mismanagement of Plaintiff Tribe's Water Resources

3. Plaintiff White Mountain Apache Tribe offered sound evidence that, after the year 1897, when the Fort Apache Indian Reservation was established, the then Secretary of the Interior, successors and subordinates of that official, including the incumbent Donald P. Hodel, have fraudulently mismanaged Plaintiff Tribe's Fort Apache Indian Reservation, which by design encompasses the drainage of the Upper Salt River Valley, for the benefit of the Secretarial Salt River and Central Arizona Federal Reclamation Projects.

4. The fraudulent mismanagement of Plaintiff Tribe's Fort Apache Indian Reservation by the Secretaries of the Interior, including the incumbent Secretary Hodel, has been to impress illegally upon Plaintiff Tribe's Reservation, including its Salt River water resources, a servitude which has been effectively enforced with the result that all of

the Salt River water arising on Plaintiff Tribe's Reservation, subject to minimal exceptions, flows off and away from Plaintiff Tribe's Reservation for the benefit of the Salt River and Central Arizona Federal Reclamation Projects constructed and now operated through contracts with water districts.

5. Successive Secretaries of the Interior claimed as against Plaintiff Tribe all of the Salt River waters excepting those small quantities of water which were used by the Tribe from time immemorial and such additional small quantities of Salt River water which were actually used by Plaintiff Tribe and its members in the 1870s.

6. Plaintiff Tribe by oral, documentary, and demonstrative evidence offered proof at the trial that the successive Secretaries of the Interior and subordinates of those officials, including personnel in the Bureau of Indian Affairs, have intentionally mismanaged Tribe's forest and grazing lands with the objective of delivering downstream not only all of the natural flow of the Salt River, subject to the minimum quantities referred to above, but also all the waters that could be "induced" artificially to flow away from the Reservation by manipulation of the vegetative cover, including Tribe's forests, on the Reservation.

a. Conservation and Production of Salt River Water Controls BIA's Forest Management Practices

7. From the year 1897 to 1910 Plaintiff Tribe's forests were not harvested commercially by reason of their importance in conserving Salt River water for the non-Indian water users in the Lower Salt River Valley. Indeed, Plaintiff Tribe's forests were transferred away from Plaintiff Tribe to the United States Forest Service, Department of Agriculture, with the objective of protecting those forests as a means of conserving the Salt River water for the benefit of downstream, non-Indian water users. When the transfer of Tribe's forests was found to be illegal, those forests were restored to the Tribe but the Secretarial management policy of Tribe's forests, as it relates to Salt River water for the benefit of non-Indian water users, was unchanged.

8. In 1910 Roosevelt Dam, principal component of the Salt River Project, was closed. By that closure, the Secretary effectively committed all of the Salt River water to the non-Indian water users to the Tribe's continuing damage. Thereafter the Secretarial policies respecting the forest management practices on Plaintiff Tribe's Reservation underwent at least two drastic changes. Plaintiff Tribe's forests would not be maintained in a "decadent" state to conserve water for the Salt River Federal Reclamation

Project. Rather the Secretary would manage the Tribe's forests to produce the maximum quantity of water for the Project, which would be impounded in Roosevelt Reservoir.

9. Upon the closure of Roosevelt Dam to impound Salt River water, the Bureau of Indian Affairs undertook to contract for the first sale of Plaintiff Tribe's timber. A contract was negotiated into in 1918 adhering to a policy that today is ongoing of cutting out the heart of Plaintiff Tribe's invaluable pine forests. Pursuant to that first contract, Unit #1, the Bureau of Indian Affairs, with full knowledge of the consequences, contracted for the virtual clear-cutting of Plaintiff Tribe's pine forest in the highest water producing area on the Reservation. That production of Salt River water from Tribe's forest was a critical element in the forest practices is well established by the intensive hydrological study conducted by the Bureau of Indian Affairs in the Paradise Creek area with the manifest objective of determining the consequences of managing the Tribe's forests to produce water for the Secretarial Salt River Federal Reclamation Project.

10. Successive Secretaries of the Interior continue the policy of harvesting Tribe's timber in the areas and at the elevations which would yield the largest quantities of Salt River water for the Secretary's Projects.

11. Proof of Plaintiff Tribe's charges of fraudulent mismanagement of its Reservation by the Secretaries of the Interior is well established in the record by these facts: Due to overgrazing, subsequently reviewed, the pinyon-juniper had vastly proliferated throughout the Reservation together with other noxious plant life. That disaster to Tribe's grazing resources had vastly reduced the quantity of water flowing off and away from the Tribe's Reservation. The Secretary of the Interior, the Salt River Valley Water Users' Association (which manages the Project for the Secretary), the United States Geological Survey, the Bureau of Indian Affairs, and indeed Plaintiff Tribe, that had been fraudulently misled as to the Secretarial objectives, undertook to eliminate the pinyon-juniper and other noxious growth attributable directly to Secretarial mismanagement. That program did not produce for the Secretarial non-Indian projects the quantity of water originally anticipated.

12. Confronted with the sharp reduction of flow of Salt River water off and away from the Reservation due to the proliferation of pinyon juniper and other noxious plants, a Secretarial determination was made fraudulently to mismanage Tribe's forests through overcutting and broadcast burning to enhance stream flow for the Salt River Federal Reclamation Project and now the Central Arizona Federal Reclamation Project. That policy was predicated upon the concepts advanced by Dr. Wilm, working closely with the

Bureau of Indian Affairs foresters. Dr. Wilm projected an enhanced water supply for the Salt River Federal Reclamation Project by increasing the cut to 90,000,000 board feet annually. The Bureau of Indian Affairs arrived at an 89,000,000 board feet annual allowable cut. In the ultimate, the Bureau of Indian Affairs adopted the policy of 92,000,000 board feet annual allowable cut - - a fraudulent secretarial plan to manage Tribe's forests to produce water.

13. Neither the Secretary of the interior, including incumbent Secretary Hodel, nor the Bureau of Indian Affairs informed Plaintiff Tribe that the Secretarial policy was drastically to cut Tribe's forests in excess of net growth.

14. It was not until the Tribe, at great cost, undertook its own investigations that it ascertained that the Bureau of Indian Affairs, when it adopted the annual allowable cut of 92,000,000 board feet, was requiring Plaintiff Tribe to harvest timber at a rate of millions of board feet annually in excess of net growth.

15. Plaintiff Tribe's proof, predicated upon its own investigation, establishes that the Secretary of the Interior is overcutting Plaintiff Tribe's forests by 43,000,000 board feet annually and overcutting Plaintiff Tribe's invaluable pine and mixed-conifer forests by 41,000,000 board feet annually. It is admitted by the Bureau of Indian Affairs that the annual allowable cut enforced upon Plaintiff Tribe by the Bureau of Indian Affairs is 33,000,000 board feet annually in excess of net growth. Tribe's data establishes that at 60,000,000 board feet annual cut the Bureau of Indian Affairs was harvesting timber at a rate of 20,000,000 board feet annually in excess of growth and that at 85,000,000 board feet annual cut in the pine and mixed-conifer forests there is a 41,000,000 board feet annual cut in excess of net growth.

16. It is likewise admitted by Secretary Hodel that the cutting of Plaintiff Tribe's forests in excess of net growth is rapidly eliminating all of the quality timber, the 3s and 4s class trees. Disastrous economic consequences to Plaintiff Tribe's forest products industry have necessarily ensued.

17. It is also admitted that successive Secretaries of the Interior, including incumbent Secretary Hodel, made no economic study or determination as to the consequences to the Tribe from the clandestine overcutting of its forests. It was fraudulent for successive Secretaries of the Interior, including incumbent Secretary Hodel, to adopt - - without the Tribe's knowledge - - a policy of drastically overcutting Plaintiff Tribe's forest for a period of almost twenty years without first determining the economic impact upon Plaintiff Tribe of converting its saw-log forest to

pulp-wood forest, the necessary consequence of the policy of overcutting.

18. Not only did Plaintiff Tribe's investigations reveal the fraud of overcutting the forests, it made a determination, based upon those investigations, that the overcutting would reduce the basal area of forest land to a level which produces a maximum quantity of Salt River water to flow off and away from the Reservation. There is thus established the unvarying policy of successive Secretaries of the Interior, including incumbent Secretary Hodel, to manage Tribe's Reservation as a source of water for the non-Indian water users in the Lower Salt River Basin.

19. Chairman Johnson and Counsel informed the Tribal Council of the tentative decision of the Court to adopt the position of the Department of Justice argument ". . . that is legally valid, and that is the argument that you aren't damaged until you are damaged. . ." Tribe's damages were estimated by the Court to be approximately \$3,000,000. The Tribe, in light of the Secretarial mismanagement of its forests through overcutting since 1918, giving rise to the present disastrous lull, calculates its damages to be - - supported by the record - - many times the sum mentioned.

b. Secretarial Destruction of Tribe's Grazing Lands With Attendant Accelerated Erosion To Enhance Salt River Flow

20. Concurrent with the closure in 1910 of Roosevelt Dam and the commitment by the Secretary of the Interior of all the Salt River water to the non-Indian water users served by the Salt River Federal Reclamation Project, the Secretary of the Interior - - with full knowledge of the devastation that would ensue - - permitted non-Indian livestock owners to graze upwards to 100,000 head of livestock on Plaintiff Tribe's Reservation. There were two immediate disastrous consequences for Plaintiff Tribe stemming from that illegal action by the Secretary of the Interior:

(1) a very rapid enhancement of Salt River water flowing away from Plaintiff Tribe's Fort Apache Indian Reservation with a concomitant depletion of soil moisture; and

(2) the commencement of accelerated erosion at the headwaters and throughout the length of the streams arising on the Reservation.

21. In a dramatically short time between 1917 and 1925, the Secretary's policy of overgrazing had destroyed the native grasses. Moreover, the denuded soils on the Reservation, being subjected to accelerated erosion, vastly

increased the sedimentation into Roosevelt Reservoir. To prevent that sedimentation, the Secretary of the Interior, not for the benefit of the Tribe but to preserve the storage capacity of Roosevelt Reservoir, drastically reduced the number of non-Indian livestock grazing on the Reservation.

22. In keeping with the fraud practiced by the Secretary of the Interior upon Plaintiff Tribe - - having markedly destroyed Tribe's grazing lands, rendering tens of thousands of acres valueless - - the Secretary of the Interior had the gross temerity to turn the destroyed grazing lands back to the Tribe and seeks now to fix responsibility on the Tribe for that official's own malicious wrongdoing.

23. There are two principal phases of the damages experienced by the Tribe stemming from the Secretarial policy of overgrazing Tribe's Reservation:

(1) accelerated gully and sheet erosion throughout the entire Reservation; and

(2) the disastrous decline in the livestock carrying capacity of Plaintiff Tribe's grazing lands.

24. By reason of ongoing character of sheet erosion throughout the entire Reservation, as fully established by Plaintiff Tribe's oral, documentary, and demonstrative evidence, Plaintiff Tribe is today suffering continuing wrongs by reason of the fact that its Reservation is being literally washed away due to the tortious acts of the Secretary. Plaintiff Tribe offered proof that the costs of restoring Plaintiff Tribe's lands to their former highly productive state constituted the only reasonable measure of damages. That concept was rejected by the Court.

25. Moreover, Plaintiff Tribe established the magnitude of the measurable monetary damages it is experiencing due to the drastic reduction of the carrying capacity of its grazing lands from 41,000 AUMs in the Reservation's pristine state to the grossly diminished 17,000 AUMs as of today.

26. Irrespective of the intentional devastation of Tribe's Reservation by the Secretarial policy of overgrazing by non-Indian livestock, the Court calculated the damages for both the accelerated erosion and drastic reduction of carrying capacity on the Reservation to be between \$4,000,000 and \$6,000,000.

c. Proliferation of Pinyon-Juniper and Noxious Weeds Throughout Reservation Attributable to Secretarial Overgrazing

27. Comprehensive proof was offered by Plaintiff Tribe to establish the fact by tree rings that the age of the pinyon-juniper so widely proliferated throughout the Reservation coincides completely with the effectuation of the Secretarial 1910 policy to permit non-Indian livestock to destroy Plaintiff Tribe's grazing lands. Though the inceptive period coincides exactly with the availability of storage for the non-Indian water users from Roosevelt Reservoir, the full disastrous impact of the consequences of that proliferation and wide intrusion of noxious plants through the Reservation did not become apparent until half a century subsequent to the Secretarial overgrazing policy initiated in 1910. It was not until the pinyon-juniper and noxious growth became all-pervasive throughout the Reservation and had matured sufficiently to consume huge quantities of Salt River water that the Secretary took politically expedient action for the benefit of the non-Indian water users.

28. As occurred in connection with the sedimentation in the late teens and early twenties, the Secretary of the Interior undertook broadly to eliminate the pinyon-juniper and other noxious growth not for the Tribe's benefit but to enhance stream flow away from Plaintiff Tribe's Reservation. When that program failed adequately to provide water, the Secretary of the Interior - - while fraudulently misleading Plaintiff Tribe as to the Secretary's real objective - - adopted the policy of destroying Plaintiff Tribe's forests to enhance the flow of Salt River water away from the Reservation, as reviewed above.

29. The continuing Secretarial wrong, giving rise to the great damage experienced by the Tribe from the proliferation of pinyon-juniper and the intrusion of noxious plants upon the Reservation was in the 1910-1925 period of the Secretarial policy of overgrazing and not, as apparently misconceived by the Court in the 1950-1960 period, when the Secretary undertook to eradicate both the juniper and the other noxious plants. Otherwise stated, the inception of the continuing wrong stemming from pinyon-juniper and other noxious growth occurred upward to a quarter of a century antecedent to the year 1946 rather than 20 years thereafter, as misperceived by the Court.

d. Secretarial Suppression of Water Resources Development on Tribe's Reservation

30. Stark contrasts stand out in the record of this case respecting the Secretarial preferences for the non-Indian Salt River water users over Plaintiff Tribe as a Salt River water user from time immemorial. Except for the minimal quantities of Salt River water used by Plaintiff Tribe in the 1870s, the successive Secretaries suppressed



all water resource development on the Reservation.

31. Not only did the Secretary of the Interior in 1903, if not before, commit all of the waters of the Salt River to the non-Indian water users with the exceptions noted, the Secretaries of the Interior vastly subsidized the construction of the Salt River Federal Reclamation Project for the Benefit of non-Indian water users and adheres to that discriminatory policy today.

32. The Secretarial discrimination against Plaintiff Tribe and the suppression of water resource development is fully defined and explicitly declared in this policy declaration from the 1944 Post War Program limiting Plaintiff Tribe's rights to the 1870 water uses:

"All of the reservation from its highest elevation to its lowest has been filed on by the Salt River Water Users Association and the consumption of every drop of water on this reservation is watched by this association because of the need for the same in the Salt River Valley. The entire reservation is the watershed for the Roosevelt Dam and the Water Users Association. Much of the eastern and the entire northern boundary follows the crest of the White Mountains and the Mogollon Rim and all drainage within boundaries leads to the Roosevelt Dam, while those on the northeast and north boundary lead to the Little Colorado and into the Colorado River Basin proper. Any large expansion of the irrigation within the reservation, except the improvement of those many small projects established by the military long before the construction of the Roosevelt Dam and its subsidiary dams, is blocked by the Salt River Valley Water Users Association. Therefore, irrigation within the reservation constitutes merely the improved irrigation facilities for the better utilization of the unquestioned water rights."

\* \* \* \*

"As stated in other sections of this report, we must not labor under the theory that we can irrigate a lot more land within the reservation. Every drop of water has been filed on and the courts will only give us that which has

been in use before these filings were made as an acre of ground in the Salt River Valley will raise three times as much produce as it will on the Fort Apache Indian Reservation."

33. It is significant that although the non-Indian water users have been and are being vastly subsidized by the Secretary of Interior in their use of Salt River water, Plaintiff Tribe was forced to offer proof that it could finance on its own in the early 1900s an irrigation project to utilize water in excess of the minimal quantities utilized in the 1870s by the Tribe. If comprehended, the maximum damages allowed to the Tribe the Court for the suppression by the Secretary of Tribe's water resource development is limited to \$4,700,000.

BE IT RESOLVED, on the background of the adoption by Congress of the Indian Claims Commission Act, broadly expressing the intent that Indian Tribes are entitled to monetary relief for damages of the character experienced by Plaintiff White Mountain Apache Tribe. Plaintiff Tribe, through its Tribal Council, therefore

RESPECTFULLY PETITIONS THIS COURT to consider the intentional, tortious mismanagement of Plaintiff Tribe's entire Fort Apache Indian Reservation by successive Secretaries of the Interior, including incumbent Donald P. Hodel, which intentional mismanagement has resulted in gravely damaging Plaintiff Tribe's natural resources, including the following:

- (a) Tribe's Salt River reserved rights to the use of water;
- (b) The permanent destruction of thousands of acres of Plaintiff Tribe's grazing lands;
- (c) The serious impairment of the balance of Plaintiff Tribe's grazing lands, including the diminution of the carrying capacity of those grazing lands;
- (d) The continuing and expanding accelerated erosion throughout Tribe's Reservation which, together with the ever-expanding proliferation of pinyon-juniper and other noxious plants will ultimately destroy the remaining grazing lands; and
- (e) The ongoing destruction of Tribe's forest; and further

RESPECTFULLY PETITIONS THIS COURT to order the parties in their good-faith negotiations to seek amicably to resolve the full extent of the costs of restoration of Plaintiff Tribe's Fort Apache Indian Reservation, to the extent that restoration is physically possible.

The foregoing resolution was on November 12, 1986, duly adopted by a vote of 11 for and 0 against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article V, Section 1 (a, e, f, h, i, and t) of the Amended Constitution and Bylaws of the Tribe, ratified by the Tribe June 27, 1958, and approved by the Secretary of the Interior on May 29, 1958, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984)

  
\_\_\_\_\_  
Chairman of the Tribal Council

  
\_\_\_\_\_  
Secretary of the Tribal Council