

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

WHEREAS, the Tribal Council by Resolution No. 10-94-321 directed the Tribal Council Secretary to post the proposed amendments to the Government Code to repeal Chapter Seven, entitled Hazardous Materials Commission and to adopt Chapter One of the Environmental Code, providing for the establishment of a Tribal Hazardous Substances Emergency Plan, in each district for a minimum of 10 days as required by the constitution.

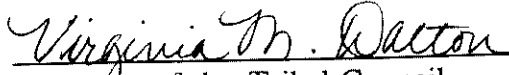
WHEREAS, the Council Secretary advised the Tribal Council that said proposed ordinance has been posted in accordance with that directive; and

WHEREAS, the Tribal Council having received no opposition to the proposed Environmental Code concludes that Ordinance No. 194 establishing Chapter One of the Environmental Code and rescinding Chapter Seven of the Government Code should be enacted.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby enacts Ordinance No. 194 establishing Chapter One of the Environmental Code and rescinding Chapter Seven of the Government Code of the White Mountain Apache Tribe.

The foregoing resolution was on November 7, 1994, duly adopted by a vote of nine for and zero against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article IV, Section 1 (a), (f), (h), (i), (q), (s), (t) and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993, and approved by the Secretary of the Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

  
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Chairman of the Tribal Council

  
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Secretary of the Tribal Council

ORDINANCE OF THE  
WHITE MOUNTAIN APACHE TRIBE OF THE  
FORT APACHE INDIAN RESERVATION  
ENVIRONMENTAL CODE OF THE  
WHITE MOUNTAIN APACHE TRIBE

CHAPTER ONE  
ESTABLISHMENT OF A TRIBAL HAZARDOUS  
SUBSTANCES EMERGENCY PLAN

[Note: This ordinance repeals Chapter Seven of the Government Code, Hazardous Materials Commission, and adds Chapter ONE to the Environmental Code]

SECTION 1.1      PURPOSE

This Chapter establishes a Tribal program for improved hazardous chemicals management in order to maintain a clean, healthy, and safe environment on the Fort Apache Indian Reservation. This Chapter establishes a Tribal Emergency Response Commission and a Local Emergency Planning Committee. This Chapter also sets forth facility notification requirements necessary for the development and implementation of a Tribal Emergency Response Plan. Additionally, the chapter contains reporting requirements which provide the Tribal community with important information on the nature, location, and quantity of hazardous chemicals in their community.

SECTION 1.2      DEFINITIONS

In this ordinance, unless otherwise provided:

1. "Commission" means the Tribal Emergency Response Commission.
2. "Committee" means a Local Emergency Planning Committee appointed by the Commission.
3. "Extremely Hazardous Substance", "Hazardous Chemical," and "Toxic Chemical" have the meaning set forth in Section 329 of Title III, 42 U.S.C. § 11049, and regulations promulgated under Title III, currently found at 40 CFR § 355 et seq.
4. "Emergency Response Organization" means any tribal, other governmental, or private entity equipped or created for responding to environmental, health, or other emergencies. This definition includes, among other

things, federal agencies and their departments, police departments, hospitals, fire departments, emergency airlift or other medical response entities, and environmental clean-up or containment crews or companies.

5. "Facility" means all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and which are owned and operated by the same person (or by any person which controls, is controlled by, or under common control with such person). Facility shall include manmade structures as well as all natural structures in which chemicals are purposely placed or removed through human means such that it functions as a containment structure for human use. For purposes of emergency release notification, the term includes motor vehicles, rolling stock, and aircraft.
6. "Person" means any individual, trust, firm, joint stock company, corporation (including government and tribal corporations), partnership, association, State, Federal Government or Division or Agency thereof, Tribe, municipality, commission, political subdivision of a State or Tribe, or interstate body. However, nothing in this Code shall constitute of waiver of Tribal Sovereign Immunity.
7. "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles) of any hazardous chemical, extremely hazardous substance, toxic chemical, or CERCLA hazardous substance.
8. "CERCLA Hazardous Substance" means a substance on the list defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (P.L. 96-510; 94 Stat. 2767), as amended by SARA, and regulations promulgated under CERCLA, currently located at 40 CFR § 302.4.
9. "SARA" means the Superfund Amendments and Reauthorization Act of 1986 (P.L. 99-499).
10. "Title III" means Title III of SARA, the federal Emergency Planning and Community Right-to-Know Act of 1986, as amended, found at 42 U.S.C. § 11001.
11. "Reservation" means the Fort Apache Indian Reservation.

SECTION 1.3

RELATIONSHIP TO OTHER LAW

This article does not:

1. Affect or modify the obligations or liabilities of any person under federal law.

SECTION 1.4

TRIBAL EMERGENCY RESPONSE COMMISSION; POWERS AND DUTIES

- A. The Tribal Emergency Response Commission of the White Mountain Apache Tribe shall be immediately established.
- B. The Commission shall be composed of seven members: the director, manager, or chief, or their respective designees, of the (1) Tribal Police Department, (2) White Mountain Apache Tribal Fire and Rescue - Whiteriver (Tribal Fire and Rescue), (3) Tribal Emergency Medical Services, (4) Tribal Safety Department, (5) Tribal Planning Department (or other named Tribal department with primary responsibility for environmental protection and natural resources on the Reservation), (6) Tribal Legal Department, and (7) the Tribal Health Authority and may include 2 additional persons selected from the categories listed at Section 1.6B. The Chairperson of the Commission shall be the Chief of Tribal Fire and Rescue - Whiteriver, unless otherwise appointed by the Chairperson of the Tribal Council, by and with the advice and consent of the Tribal Council, from among the members of the Commission. The Chairperson of the Commission shall also appoint a coordinator for the Commission, who shall serve as the central contact for the regulated facilities.
- C. Any member of the Commission may be removed by the Tribal Council upon the recommendation of a quorum of the Commission for inefficiency, neglect of duty, malfeasance, misfeasance or nonfeasance in office. A commission member may also be removed voluntarily upon request and approval by a quorum of the Commission and approval of the Tribal Council. Members of the Commission and the Chairperson of the Commission shall serve until so removed.
- D. The members of the Commission shall serve without compensation but are eligible for reimbursement or prepayment for travel and other expenses incurred while fulfilling duties of the Commission.
- E. The Commission shall meet as often as necessary and may organize itself into such support committees as necessary to implement this chapter and Title III on this

Reservation. The full Commission shall meet at least semi-annually, but preferably, on a quarterly basis. The Commission may adopt internal operating rules.

- F. A majority of the Commission shall constitute a quorum to transact business. When a vacancy occurs in the Commission, the remaining commissioners may exercise all the powers of the Commission until the vacancy is filled. The Commission shall annually elect a Vice-Chairperson to act in the absence or disability of the Chairperson or in case of vacancy in the office of Chairperson.
- G. The Commission may maintain offices and hold regularly scheduled meetings in any place within the exterior boundaries of the Reservation. Sessions of the Commission shall be public, with notice provided through local media, including radio or news publication. The Commission shall develop rules providing for such reasonable notice, including provisions for emergency or other not regularly scheduled meetings. All proceedings of the Commission shall be shown on its record, which shall be a public record. The vote of each member shall be recorded. The Commission shall develop rules for maintaining such public record.
- H. The Commission shall administer this chapter and rules adopted under this chapter. The Commission shall administer Title III on the Reservation and may conduct whatever activities are necessary to implement this article and Title III on the Reservation. The Commission possesses all the authority and responsibilities of a Tribal Emergency Response Commission for purposes of Title III, as set forth in this chapter.

#### SECTION 1.5

#### COMMISSION; GENERAL POWERS

- A. The Commission has full power, jurisdiction and authority to:
  - 1. Formulate and adopt rules, regulations and forms for affecting the purposes of this chapter. The authority to adopt rules includes establishing:
    - a. Procedures for handling public information requests.
    - b. Procedures and implementing programs for chemical emergency planning and preparedness.
    - c. Community right-to-know program reporting requirements.

- d. Release reporting requirements, which may include reporting requirements in addition to those required by Federal law.
  - e. Means for supervising the activities of a Local Emergency Response Committee (LERC) if one is established under Section 1.6 of this ordinance.
2. Procure by contract the temporary or intermittent services of experts or consultants if such services are to be performed on a part-time or fee-for-services basis and do not involve the performance of administrative duties.
  3. Prepare and coordinate proposals for federal grants available under Title III and any other relevant programs. The Commission may accept on behalf of the Tribe any reimbursement, grant, or gift, that may become available for purposes of this chapter. The Commission shall transmit any such monies to the Tribal treasurer for deposit in an account set up for the specific use of the Commission in fulfilling its duties.
  4. Establish standard operating procedures for hazardous materials management and emergency response for members of the Commission and any department, enterprise, business, contractor or private party operating within the exterior boundaries of the Reservation.
  5. Collect, collate and publish statistical and other information relating to hazardous materials within the exterior boundaries of the Reservation. The Commission shall prepare an annual report on hazardous materials management and emergency response for submission to the Tribal Council by December 31st of the reporting year. Tribal Fire and Rescue - Whiteriver shall provide computer support to implement and perform Commission duties and shall maintain a Centralized Hazardous Materials Database.
  6. Conduct or participate in investigations of causes, origins, and circumstances of hazardous materials incidents within the exterior boundaries of the Reservation or affecting the Reservation populace or environment.
  7. Provide training, and seek funding for such training, in the control, containment,

transportation, and handling of hazardous materials and cooperate with other governments (local, state and federal), institutions and groups to provide and further such training.

8. Employ specialized testing services to evaluate evidence and conditions involved in hazardous materials incidents subject to the availability of funding for said purposes.
9. Any action taken by the Commission pursuant to Section 1.5 A1, 2, 3, and 4 shall be taken only upon approval by the Tribal Council.

SECTION 1.6

LOCAL EMERGENCY PLANNING COMMITTEE

- A. The Reservation is designated as one emergency planning district for the purposes of preparing and implementing an Emergency Response Plan.
- B. The Commission shall appoint members of a Local Emergency Planning Committee for the district. The Committee may include in addition to the Commission members, one or more representative from each of the following enumerated groups or organizations:
  1. Elected Tribal officials
  2. Law enforcement, civil defense, fire fighting, first aid, health, local environmental, hospital and transportation personnel.
  3. Broadcast and print media.
  4. Community groups.
  5. Owners or operators of facilities subject to the requirements of this article.
- C. The Committee shall appoint a chairperson and shall adopt procedural rules by which the Committee shall function including the requirements set forth in § 301 of Title III. Such rules shall be effective upon approval by the Tribal Council.
- D. The Commission, as it deems appropriate, may modify the designation of emergency planning districts in part A of this section. The Commission may also modify its appointments to the Local Emergency Planning Committee(s). Members of the public may petition the Commission to modify the membership of the Local Emergency Planning Committee(s).

- E. The Commission shall, for the purposes of organizational simplicity and efficiency, serve as the Committee, unless 2 or more emergency planning districts are created for the Reservation at which time two separate committees will be created pursuant to the provisions of this code.

SECTION 1.7

COMPREHENSIVE EMERGENCY RESPONSE PLANS

- A. The Committee shall comply with § 303 of Title III.
- B. Based on information from the Commission and Tribal Departments, as well as information obtained from facilities subject to this chapter and Title III, the Committee shall prepare and annually review an Emergency Response Plan in order to address emergencies due to releases from facilities and transportation vehicles in its emergency planning district. After completing the Emergency Response Plan, the Committee shall provide a copy of the plan to the Tribal Council and submit a copy to the Commission. The Commission shall review the plan and make recommendations to the Committee on revisions that may be necessary to ensure that it meets the requirements of this chapter or any rules adopted under this chapter. The Commission shall further ensure that the plan is coordinated with the emergency response plans of adjoining emergency planning districts, as applicable.
- C. The Committee shall evaluate the need for resources necessary to develop, implement, and exercise the Emergency Response Plan in its district and shall make recommendations to the Commission with respect to the need for additional resources that may be required and the means for providing such additional resources.
- D. The Emergency Response Plan shall include the provisions listed in § 303C of Title III, such as a Hazards Analysis, and, in addition, shall include:
1. The Identification of emergency response organizations (ERO) in, adjacent to, or otherwise available to the district. The EROs shall work with the Commission in making determinations necessary to implement the Emergency Response Plan.
  2. A description of specialized equipment, facilities, personnel and emergency response organizations available in the district to respond to releases subject to this section.
  3. Mutual aid agreements with other jurisdictions, and any allocation of emergency response resources for responding to releases subject to this section, if



applicable.

**SECTION 1.8**

**EXTREMELY HAZARDOUS SUBSTANCES**

Unless otherwise provided in this chapter, a substance is subject to the requirements of this code if it is an extremely hazardous substance as listed and published by the administrator of the United States Environmental Protection Agency, or its successor, and it is held in quantities at or above the threshold planning quantity as established pursuant to § 302 of Title III, currently found at 40 CFR § 355, Appendix A and B, or as that section may be amended or revised in the future.

**SECTION 1.9**

**FACILITIES SUBJECT TO EMERGENCY PLANNING;  
FACILITY EMERGENCY RESPONSE PLANS**

- A. A facility is subject to emergency planning requirements if a substance identified under Section 1.8 is present at the facility in an amount at or in excess of the threshold planning quantity for that substance.
- B. The owner or operator of a facility subject to this section shall notify the Commission that such facility is subject to the requirements of this chapter pursuant to § 302 of Title III.
- C. The Commission may designate additional facilities which are subject to this Chapter. The designation shall be accomplished after notification to the facility of the proposed designation.
- D. The owner or operator of a facility subject to this chapter shall provide to the Committee the identity of a facility representative who will participate in the emergency planning process as the facility emergency coordinator pursuant to § 303 of Title III.
- E. Upon request, the owner or operator of a facility subject to this chapter shall provide to the Committee any information necessary for developing and implementing the emergency plan. Such information may include:
  - 1. Names, addresses and emergency telephone numbers of facility emergency coordinator and alternate.
  - 2. Description of employee emergency response training and facility emergency preparedness programs.
  - 3. Description of appropriate emergency equipment necessary to respond to a release.

4. Description of emergency response procedures including notification procedures and evacuation plans in the event of a release.
  5. Identification of transport routes and transportation methods used to transport extremely hazardous substances to and from the facility.
  6. Identification of hazardous substances or hazardous chemicals present at the facility, including submittal of Material Safety Data Sheets or other information as provided for in this Chapter.
- F. Facilities shall work with the Commission and Committee to reduce, to the maximum extent practicable, inventories of Extremely Hazardous Substances, hazardous chemicals, and toxic chemicals.

**SECTION 1.10**      **EMERGENCY NOTIFICATION OF REPORTABLE RELEASES**

- A. If a release of a reportable quantity of an extremely hazardous substance or CERCLA hazardous substance occurs from a facility or transportation vehicle, the owner or operator of the facility or transportation vehicle or unit, except as excluded under 40 CFR § 355.40, shall immediately notify Tribal Fire and Rescue (1st) and the White River Police Department (2nd). Such notification shall be in accordance with § 304 of Title III and regulations promulgated thereunder, which are currently found at 40 CFR § 355.
- B. The notification shall occur immediately after the facility emergency coordinator or designee, or operator or owner of the transportation vehicle has knowledge of the reportable release, unless impracticable under the circumstances. The notice of the reportable release shall include the following to the extent known at the time of the notice and as long as no delay in responding to the emergency results:
1. The specific location of the release.
  2. The chemical name or identity of substances released and a description of the container or vessel from which the release occurred.
  3. An estimate of the quantity of substances which were released into the environment.
  4. The time and duration of the release.
  5. The medium or media into which the release

occurred.

6. Any known or anticipated acute or chronic health risks associated with the release and, where appropriate, advice regarding medical attention necessary for exposed individuals.
  7. Proper precautions to take as a result of the release, including evacuation and other proposed response actions.
  8. The name and telephone number of the person or persons to be contacted for further information.
- C. Within thirty days after a reportable release, the owner or operator of a facility where a release occurred requiring notification pursuant to this section shall submit to the Committee and to the Commission a written follow-up emergency notice, in accordance with section 304 of Title III, stating and updating the information originally provided pursuant to subsection A of this section and including the following additional information:
1. Actions taken to respond to and contain the release.
  2. Any known or anticipated acute or chronic health risks associated with the release.
  3. If appropriate, advice regarding medical attention necessary for exposed individuals.
  4. Measures which have been or will be taken at the facility to avoid a reoccurrence of similar releases.
- D. After any additional information becomes known, the owner or operator shall update the notice in writing within seven calendar days.

**SECTION 1.11    LISTS OF HAZARDOUS CHEMICALS; MATERIAL SAFETY DATA SHEETS**

- A. For the purposes of this Chapter only, the Tribe references the standards set forth in 29 CFR § 1910.1200 [Hazard Communication] regarding hazardous chemicals and Material Data Safety Sheets ("MSDS"), derived from the Occupational Health and Safety Act of 1970 (P.L. 91-593; 84 Stat. 1590).

- B. A person who owns or operates a facility which is subject to emergency planning under this Chapter, shall submit to the Committee, the Commission, and the fire department with jurisdiction over the facility a MSDS for each chemical, or a list of hazardous chemicals stored, handled, or processed at the facility pursuant to § 311 of Title III and regulations establishing minimum threshold levels adopted under that Act, currently found at 40 CFR § 370.
- C. If a list of hazardous chemicals is submitted under this section it shall include:
1. Information prescribed by § 311 of Title III.
  2. The chemical abstract service registry number applicable to each such chemical and substance, if available.
  3. An indication of whether the owner elects to withhold information about the hazardous chemical or extremely hazardous substance from disclosure as a trade secret.
- D. On request of the Committee, the Commission, or the fire department with jurisdiction over the facility, an owner or operator of a facility who has submitted a list pursuant to this section shall also submit the MSDS for any chemical on the list to the requesting agency. On request by any person, the Committee may make available a MSDS or transmit the request to the Commission which shall make the MSDS available, subject to the trade secret provisions and regulations adopted under Title III. If the Committee or Commission does not have the requested MSDS, the Committee or Commission shall request the MSDS from the facility owner or operator. The facility owner or operator shall make the MSDS available within thirty days after receiving the request to the Committee or Commission and the Committee or Commission shall make the MSDS available to the requesting person subject to the trade secret provisions and regulations adopted under Title III.
- E. Within three months after discovery by an owner or operator of a facility of significant new information concerning an aspect of a hazardous chemical for which a list or MSDS was submitted, or within three months of after a facility obtains a new hazardous chemical subject to the reporting requirements of this section, the owner or operator shall update and submit a revised list or MSDS to the Committee, the Commission and the fire department with jurisdiction over the facility.

SECTION 1.12      EMERGENCY AND HAZARDOUS CHEMICAL INVENTORY FORM

- A. A person who owns or operates a facility which is required to provide a MSDS or chemical listing under Section 1.11 shall submit to the Committee, the Commission, and the fire department with jurisdiction over the facility, an emergency and hazardous chemical inventory form prepared by the commission and in substantial conformance with that developed by EPA pursuant to § 312 of Title III as well as comply with § 312 of Title III and regulations adopted under that Act, currently found at 40 CFR § 370.40.
- B. The inventory form shall be submitted on or before March 1 of each year, and shall contain data on hazardous chemicals present at the facility during the preceding calendar year above minimum thresholds established in regulations under § 312 of Title III. The owner or operator shall submit a "tier II form."
- C. The tier II inventory form shall contain the following information:
1. The chemical name or the common name of the chemical as provided on the material safety data sheet and the CAS number.
  2. An estimate, in ranges, of the maximum amount of the hazardous chemical present at the facility at any time during the preceding year.
  3. An estimate, in ranges, of the average daily amount of the hazardous chemical present at the facility during the previous year.
  4. A brief description of the manner of storage of hazardous chemical.
  5. The location of the hazardous chemical at the facility.
  6. An indication of whether the owner elects to withhold location information or other information about a specific hazardous chemical from disclosure to the public as a trade secret.
- D. An owner or operator of a facility subject to this section shall submit the information required by this section on the inventory form provided by the Administrator of the United States Environmental Protection Agency unless the Commission establishes its

own form which prescribes identical content as prescribed by 40 CFR § 370.40.

- E. For purposes of this section, Tier II forms are the forms established under 40 CFR § 370.

**SECTION 1.13 TOXIC CHEMICAL RELEASE FORMS; DEFINITIONS**

- A. For purposes of this section:

1. "Administrator" means the Administrator of the United States Environmental Protection Agency.
2. "Manufacture" means to produce, prepare, import or compound a toxic chemical.
3. "Process" means the preparation of a toxic chemical after its manufacture for distribution in commerce either:

(1) In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance, or

(2) As part of an article containing the toxic chemical. Process also applies to the processing of a toxic chemical contained in a mixture or trade name product.

- B. In order to implement § 313 of Title III the owner or operator of a facility subject to the requirements of this section and § 313 of Title III and regulations adopted under that Act shall complete a toxic chemical release form as supplied by the Administrator, pursuant to § 313 of Title III, or as supplied by the Commission, for each toxic chemical listed by the Administrator pursuant to § 313 of Title III that was manufactured, processed or otherwise used in quantities exceeding the toxic chemical threshold quantity as established in § 313 of Title III and regulations promulgated under that Act during the preceding calendar year at that facility. The regulations are currently found at 40 CFR § 372. The form shall be submitted to the Administrator and to the Commission on or before July 1 of each year and shall contain data reflecting releases during the preceding calendar year.
- C. The release forms required under this section are intended to provide information to the Tribe and to the

public, including citizens of communities surrounding facilities covered by this section. The release form shall be available consistent with the trade secret provisions of Title III to inform persons about releases of toxic chemicals to the environment and to assist Tribal agencies in reducing chemical releases.

**SECTION 1.14 INSPECTION BY TRIBAL FIRE AND RESCUE OR TRIBAL SAFETY OFFICER**

- A. For the purposes of this Chapter, upon reasonable notice, Tribal Fire and Rescue or the Tribal Safety Officer may enter and inspect facilities in order to determine compliance with this chapter and for gathering information on hazardous chemicals for the purposes of emergency planning. Facilities over which Tribal Fire and Rescue has jurisdiction shall allow on-site inspection and shall provide to the department specific location information on hazardous chemicals at the facility.
- B. Tribal Fire and Rescue, and any other authorized officer, may execute a search warrant issued by the Tribal Court in matters arising under this Chapter. Such warrant shall issue with or without a showing of probable cause that an offense has been or is being committed. If issued without probable cause, the applicant Tribal Fire and Rescue must show that the inspection is a part of a neutral scheme of inspection and review pursuant to this ordinance.
- C. The Tribal Court of the White Mountain Apache tribe has jurisdiction upon the filing of a verified complaint by the Tribal Fire and Rescue to issue a warrant for the inspection of a facility subject to this Chapter. If necessary, the warrant shall be executed with the assistance of the White Mountain Apache Tribal Police.
- D. At the time of such inspection, the manager or the manager's designee shall, upon inquiry, advise Tribal Fire and Rescue of the existence and location of any substance whose character is unknown, but which is suspected of being subject to regulation under this ordinance. Tribal Fire and Rescue shall be allowed access to such substance and, if it is subject to such regulation, Tribal Fire and Rescue may assist the inspected party to undertake proper storage and handling, or disposal. Tribal Fire and Rescue shall not, however, be responsible for such disposal, and that responsibility shall remain at all times with the facility and its manager(s).

**SECTION 1.15 VIOLATION; PENALTIES AND INJUNCTIVE RELIEF**

- A. *Civil penalties.* Any person, excluding tribal entities or tribal corporations, who fails to comply with the provisions of this ordinance shall be subject to civil penalties of up to \$25,000 per day for each day during which the violation continues. In the case of a second or subsequent violation, any such person may be subject to civil penalties of up to \$75,000 for each day the violation continues.
- B. *Criminal penalties.* Any person subject to the criminal jurisdiction of the White Mountain Apache Tribe who knowingly and willfully fails to comply with the provisions of this ordinance shall, upon conviction, be fined not more than \$5,000 or imprisoned for not more than one (1) year, or both for each violation.
- C. *Injunctive relief.* Upon proper application to the Tribal Court through the Tribal Attorney's Office, an injunction may be issued to compel action or to prohibit action in order to achieve compliance with this ordinance.

**SECTION 1.16 IMMINENT DANGERS**

- A. The Tribal Court of the White Mountain Apache Tribe has jurisdiction upon the filing of a verified complaint by the Commission through the Tribal Attorney's Office to restrain any hazardous materials, conditions, practices, or transportation in any place within the exterior boundaries of the Fort Apache Indian Reservation which could reasonably be expected to cause death or serious physical harm. Such authority may be immediately utilized where it does not reasonably appear that the imminence of such danger cannot be eliminated through other lawful available means. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct or remove the imminent danger and may prohibit the presence of any individual in locations or under conditions where such imminent danger exists; except, however, that individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations or where a cessation of operations is necessary to permit such to be accomplished in a safe and orderly manner shall not be so restrained.
- B. Upon filing of any such complaint the Tribal Court of the White Mountain Apache Tribe has jurisdiction to grant



such injunctive relief of temporary restraining order pending final order pursuant to this Chapter. The proceeding shall be as provided by the White Mountain Apache Rules of Civil Procedure.

- C. Whenever and as soon as the Commission or its authorized representative concludes the conditions or practices described in subsection A exist in any place within the exterior boundaries of the Fort Apache Indian Reservation, it shall inform the general public or specific population affected of the relief being requested.

**SECTION 1.17**      **NOT A CONSENT TO BE SUED OR WAIVER OF SOVEREIGN IMMUNITY**

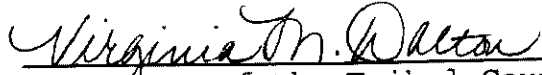
The establishment of the Commission and the Committee and the authority granted to it by this Chapter shall not constitute consent to be sued nor a waiver of the sovereign immunity of the White Mountain Apache Tribe, its agents, or representatives in any manner whatsoever.

**SECTION 1.18**      **SEVERABILITY**

If any provision of this Chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable.

The foregoing ordinance was on November 07, 1994 duly adopted by a vote of nine for and zero against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article IV, Section 1 (a), (f), (h), (i), (q), (s), (t) and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993 and approved by the Secretary of the Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

  
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Chairman of the Tribal Council

  
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Secretary of the Tribal Council

RESOLUTION  
OF THE WHITE MOUNTAIN APACHE TRIBAL COUNCIL,  
IN THE EXERCISE OF THE TRIBE'S SOVEREIGN POWERS PROCLAIMING:  
TRIBE'S ABORIGINAL TITLE TO THE FORT APACHE INDIAN RESERVATION  
AND TO TRIBE'S ABORIGINAL SALT RIVER RIGHTS

PHASE I

I. TRIBE'S ABORIGINAL TITLE TO FORT APACHE INDIAN RESERVATION:

A. Tribe's Sovereignty, Dating From Time Immemorial

WHEREAS, the White Mountain Apache Tribe is a sovereign with inherent powers of dominion and self-government over and within the Fort Apache Indian Reservation, and has exercised those sovereign powers from time immemorial, which sovereign powers are derived from the will of the members of the Tribe through countless generations, and not from any grant of power from the United States Trustee, from Mexico, or from Spain;<sup>1</sup> and

WHEREAS, the White Mountain Apache Tribe, throughout a millennium, as a sovereign, exercised Tribe's inherent power of dominion and self-government in the actual, exclusive, continuous use and occupancy of approximately 10,000,000 acres of land, in an area now referred to as Southeastern Arizona;<sup>2</sup> and

WHEREAS, throughout that millennium, the White Mountain Apache Tribe, as a sovereign, retained its exclusive use and occupancy of its ancient tribal homelands by successfully waging warfare, against other Native American Tribes, the Spanish, the Mexicans, and the Army of the United States;<sup>3</sup> and

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<sup>1</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), "The Indian nation had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessor of the soil, from time immemorial,...." ; *United States v. Kagama*, 118 U.S. 375 (1886); *White Mountain Apache Tribe v. Bracker*, *State of Arizona, et al.*, 448 U.S. 136 (1980), in which the Supreme Court of the United States sets forth a wealth of precedent. On page 151 of *Bracker*, the Supreme Court declares: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations," citing *United States v. Mazurie*, 419 U.S. 544, 558 (1975); See also *United States v. Wheeler*, 435 U.S. 313, 322-323(1978). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory;" See *United States v. Antelope*, 430 U.S. 641, 648 (1978).

*White Mountain Apache Tribe v. United States*, 21 Ind.Cl.Comm. 189, 192, 205-214, 217-220 (1969), [Tribe's] Aboriginal Title Lands, pp. 11.

<sup>3</sup> *Ibid.*, p. 205-218.

WHEREAS, the White Mountain Apache Tribe's immunity from suit, a critical element of Tribe's inherent sovereign powers, has become of transcendent importance as ever increasing political, economic, and social pressures, are brought to bear upon the Tribe from powerful special interests outside of Tribe's Reservation, which desire to seize and to take from the Tribe the natural resources of which Tribe's Fort Apache Indian Reservation is comprised, particularly Tribe's invaluable aboriginal Salt River rights to the use of water. 4

B. Tribe's Aboriginal Title to Reservation  
Derived From Sovereignty

WHEREAS, after upwards of fifteen (15) years of harsh and brutal warfare waged by the United States Army against the Tribe, as a sovereign, in an attempt to exterminate the White Mountain Apache Tribe and deprive the Tribe of its aboriginal tribal homelands, the military leaders of the United States, comprehending the futility of attempting to subjugate by force the White Mountain Apache Tribe, "...recommended that a reservation be set apart for the Western Apaches [ of which

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<sup>4</sup> The Supreme Court, in its *Santa Clara Pueblo v. Martinez* Decision, 436 U.S. 49, 58 (1978), citing an abundance of unvarying precedence concluded: "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers..."

It is settled that a waiver of sovereign immunity 'cannot be implied, but must be unequivocally expressed.'" ...*Santa Clara's* reasoning, relative to Tribal immunity from suit, is summarized in these terms: "Even in matters involving commercial and domestic relations, we have recognized that 'subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves,' may 'undermine the authority of the Tribal Court...and hence...infringe on the right of the Indians to govern themselves.'" (pg. 59). It has been authoritatively declared "when consent to be sued is given, the terms of the consent established the boundary of the Court's jurisdiction...a waiver of sovereign immunity is to be strictly construed." *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320, (CA 10, 1982), citing *Reynolds v. United States*, 643 F.2d, 703, 713, (CA 10, 1982) cert.den. 454 U.S. 817 (1981).

Congressional Plenary Power: Tribe's immunity from suit is commensurate with that of the United States and Tribe's immunity may be waived by the Congress of the United States, albeit subject to being strictly construed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Respecting the Tribe's immunity from suit, as it relates to the powers of Congress, the Supreme Court, in its *Santa Clara* Decision, states: "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But, without 'congressional authorization,' the 'Indian Nations are exempt from suit.'" Arizona Recognizes Tribe's Immunity From Suit: See, *Morgan v. Colorado Indian Tribe*, 103 Ariz. 425, 428, 443 Pac. 421, 424 (1968); See, *White Mountain Apache Tribe v. Shelley*, 107 Ariz. 4, 480 Pac. 654 (1971), See, *S.Unique Ltd., an Arizona Corporation, v. Gila River Pima-Maricopa Indian Community*, 136 Ariz. 378, 380-381; 674 Pac. 2nd, 1376 (1984).

the White Mountain Apache Tribe was a dominant factor] within their aboriginal territory<sup>5</sup>;" and

WHEREAS, the President of the United States, pursuant to the agreement between sovereigns, the United States Trustee, and the White Mountain Apache Tribe, that a Reservation for the Tribe would be created within Tribe's "aboriginal territory," title to which was derived from Tribe's status as a sovereign, maintaining actual, exclusive, continuous occupancy and use of that territory, designated by the Executive Orders dated November 9, 1871 and December 14, 1872, without exception, reservation, or limitation, the White Mountain Apache Indian Reservation, comprised of Tribe's "aboriginal territory," which aboriginal title was retained by the White Mountain Apache Tribe, not ceded by the Tribe to the United States;<sup>6</sup> and

WHEREAS, the Executive Orders of 1871 and 1872 effectuated the agreement between sovereigns, the United States Trustee, and the Tribe, to end the Apache War setting apart a segment of Tribe's aboriginal homelands as Tribe's White Mountain Apache Indian Reservation, the 1897 Congressional Enactment creating Tribe's Fort Apache Indian Reservation, separating it from the San Carlos Reservation,

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<sup>5</sup> *White Mountain Apache Tribe v. United States*, 21 Ind.Cl.Comm. 189, 214-218, para. 10, American Period, p. 218, "[The United States] successively curtailed and diminished [ the White Mountain Apache Indian Reservation] by a series of Executive Orders, including those issued August 5, 1873, July 21, 1874, April 27, 1876; January 26, 1877; March 31, 1877, and December 22, 1902."

<sup>6</sup> *Ibid.*; p. 218; It was found as a fact by the Indian Claims Commission that in 1871, President Grant, directed Commissioner Vincent Colyer to proceed to Arizona to take appropriate action to locate the Apache Indians on a suitable reservation. By a letter dated September 5, 1871, Colyer recommended the creation of the White Mountain Indian Reservation described in the letter dated January 31, 1870, by Major H. M. Robert. That description was adopted in the Executive Orders of November 9, 1871 and December 14, 1872, pp. 11, Aboriginal Title Lands There, Tribe's Indian title aboriginal lands are described, pp. 12. The Indian Claims Commission likewise found as a fact that May 1, 1873 "...marks the date on which the United States took from the Western Apache Indians their Indian title to all of their aboriginal lands located outside of the boundaries of the reservation established by the Executive Orders of November 9, 1871 and December 14, 1872. By December 14, 1872, the United States unequivocally manifested its intention to deprive the Western Apache Indians of their occupancy and use of their aboriginal lands outside of the reservation...." Hence, Tribe asserts its aboriginal title to the lands of which Tribe's Fort Apache Indian Reservation is comprised by reason of the fact that the Tribe's title to that land was not extinguished, for as stated by the Supreme Court "extinguishment cannot be lightly implied." *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941).

constitutes the Legislative Confirmation of Tribe's aboriginal title to its Reservation dating from time immemorial without exception, reservation, limitation, or diminishment;<sup>7</sup> and

C. Tribe's Aboriginal Title to Reservation  
Equivalent to Fee-Simple Absolute Title

WHEREAS, the Supreme Court has repeatedly declared that a Tribe's aboriginal title to its Reservation is equivalent to a fee-simple absolute title<sup>8</sup> which is, in the contemplation of the law, the largest and most extensive interest in real property that can be enjoyed, including but not limited to rights to the use of water, surface and groundwater, forest, oil, minerals of all character, and all other natural resources;<sup>9</sup> and

WHEREAS, the White Mountain Apache Tribe, retained for itself, did not cede to the United States, that part of its ancient tribal homeland, of which the Fort Apache Indian Reservation is comprised, has vested in it as part of its aboriginal title. "...the right of occupancy with all of its beneficial incidents...the right...of undisturbed possession of the soil from time immemorial;"<sup>10</sup> and

WHEREAS, the White Mountain Apache Tribe, in the words of Winans, has vested in it

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<sup>7</sup> Act of June 7, 1897; ch. 2; 30 Stat. 62, 64.

<sup>8</sup> *United States v. Shoshone*, 304 U.S. 111, 115, 117 (1938); *United States v. Santa Fe Railroad Co., et seq.*, 314 U.S. 339, 345-346 (1941) quoting from *Mitchel v. United States*, 34 U.S. 711, 746 (1835), *Santa Fe*, likewise citing *Cramer v. United States*, 261 U.S. 219, 228-229 (1923), declaring in substance the United States recognizes aboriginal title absent "...any statute or other formal government action..." See also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, et seq (1974), *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 et seq, (1985).

<sup>9</sup> Vol. 4. Thompson, Commentaries on the Modern Law of Real Property, Sec. 1864, p. 470 (repl. 1979) "The fee simple absolute. -- The modern fee simple absolute represents the highest concentration of rights and privileges in the hands of an individual that can arise in a particular stage of the political economy. In a fee simple absolute all possible rights and privileges with respect to land are either in control of the individual owner or of the sovereign." Restatement of the Law of Property, The American Institute, through (1992), Sec. 15, Estate in Fee Simple Absolute. "An Estate in fee simple Absolute is an estate in fee simple which is not subject to a special limitation...or a condition subsequent...or an executory limitation..." Vol. 2. Powell on Real Property, Sec. 190, Characteristics [1] -- Estates in fee simple absolute "Such an estate can be either possessory or non-possessory. If possessory, [as here] its characteristics include the rules regulating relationships with neighbors as to lateral and subjacent support, as to nuisances, and as to the adjustments of conflicting claims to the available resources of nature, such as streams of water, percolating water, surface water, oil, and minerals."

<sup>10</sup> *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938).

aboriginal title to the Fort Apache Indian Reservation, and is possessed of rights, the exercise of which, by the Tribe, are not subject to a shadow of impediment, which rights were retained by the White Mountain Apache Tribe, were not granted by the Tribe to the United States, and those retained rights are "...continuing against the United States and its grantees, as well as against the State and its grantees;"<sup>11</sup> and

## II. TRIBE'S ABORIGINAL TITLE TO SALT RIVER RIGHTS FROM TIME IMMEMORIAL

### A. Tribe's Aboriginal Salt River Rights and their Priority from Time Immemorial, Interest in Real Property

WHEREAS, the White Mountain Apache Tribe, retained without exception, reservation, limitation, or diminishment, aboriginal title to Tribe's Fort Apache Indian Reservation, with all of the constituent elements of that title, including Tribe's priceless aboriginal Salt River rights to the use of water, which are interests in real property of the highest dignity;<sup>12</sup> and

WHEREAS, the White Mountain Apache Tribe, when it retained its title to the aboriginal Salt River rights to the use water, likewise retained as inseparable from Tribe's title to the aboriginal Salt River rights, Tribe's priority for those rights which dates from time immemorial, thus Tribe's aboriginal Salt River rights 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 affluent;<sup>13</sup> and

WHEREAS, the White Mountain Apache Tribe's title to all aboriginal rights to the use of water

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<sup>11</sup> *United States v. Winans*, 198 U.S. 371, 382 (1905).

<sup>12</sup> *Rickey Land & Cattle Co v. Miller & Lux*, 152 Fed. 11, (CA 9, 1907); 218 U.S. 258 (1910); *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land and Water Co., et al.*, 245 Fed. 9, (CA 9, 1917). *New Brantner Extension Ditch Co. v. Cramer et al.*, 141 Pac. 498 (1914); *Taylor v. Hulett, et al.*, 97 Pac. 37, 38 (1908). It is most relevant here that Arizona's Supreme Court, in the Matter of the Rights to the Use of the Gila River, 171 Ariz. 230; 830 Pac. 2nd 442, 447 (1992) declares that water rights are property rights, a private property [here Tribal] which will be treated as property rights. *Wiel, Water Rights in the Western States*, 3rd Ed., Vol. 1, Sec. 18, pgs. 20-21; Sec. 283, pp. 298-300; Sec. 285, p. 301. See also, Vol. 5A, Powell on Real Property, Sec. 710 [1] et seq., The Nature of the Water Right.

<sup>13</sup> See, *Nichols v. McIntosh*, 19 Colo. 22; 34 Pac. 278, 280 (1893); *Hutchins, The California Law of Water Rights, "Property Characteristics,"* pg. 120 et seq; *Vonberg v. Farmers Irrigation District*, 132 Neb. 12; 270 N.W. 835 (1937); *Whitmore v. Murray City*, 107 Utah 445; 154 Pac. 2nd 748, 751 (1944); *International Paper Co. v. United States*, 282 U.S. 399 (1931).

within the Fort Apache Indian Reservation, attaches to all of the surface and groundwaters within that Reservation, and likewise attaches to all of the waters in the mainstream of the Salt River, together with all of the waters in the numerous tributaries of that stream, as displayed on the following page, which border upon, arise within, traverse, underlie or are encompassed within Tribe's Reservation; and<sup>14</sup>

B. Tribe's Reservation, Source of Salt River and Numerous Tributaries of It<sup>15</sup>

WHEREAS, the White Mountain Apache Tribe refers to the fact that a court of competent jurisdiction has declared that: "If the mountains and forests are the most striking physical features of the reservation,... [the White Mountain Apache Tribe] would regard as its paramount resource the Salt River. 'Practicably the entire Reservation drains to the Salt River...,'" all as graphically displayed on the Plate set forth on the following page;<sup>16</sup> and

WHEREAS, the White Mountain Apache Tribe was found as a fact, by the Court of Federal Claims, of having a history, prior to creation of Tribe's Reservation in 1871 - 1872, of exercising its aboriginal rights to the use of water in the Salt River and the tributaries of that stream for purposes of agriculture, including the production of corn, wheat, beans, and vegetables in quantities sufficient to satisfy "...an estimated 25 percent..." of the Tribe's diet;<sup>17</sup> and

WHEREAS, the White Mountain Apache Tribe was declared as a matter of law, by the Court of Federal Claims, as having vested in it title to *Winters* Doctrine rights to the use of

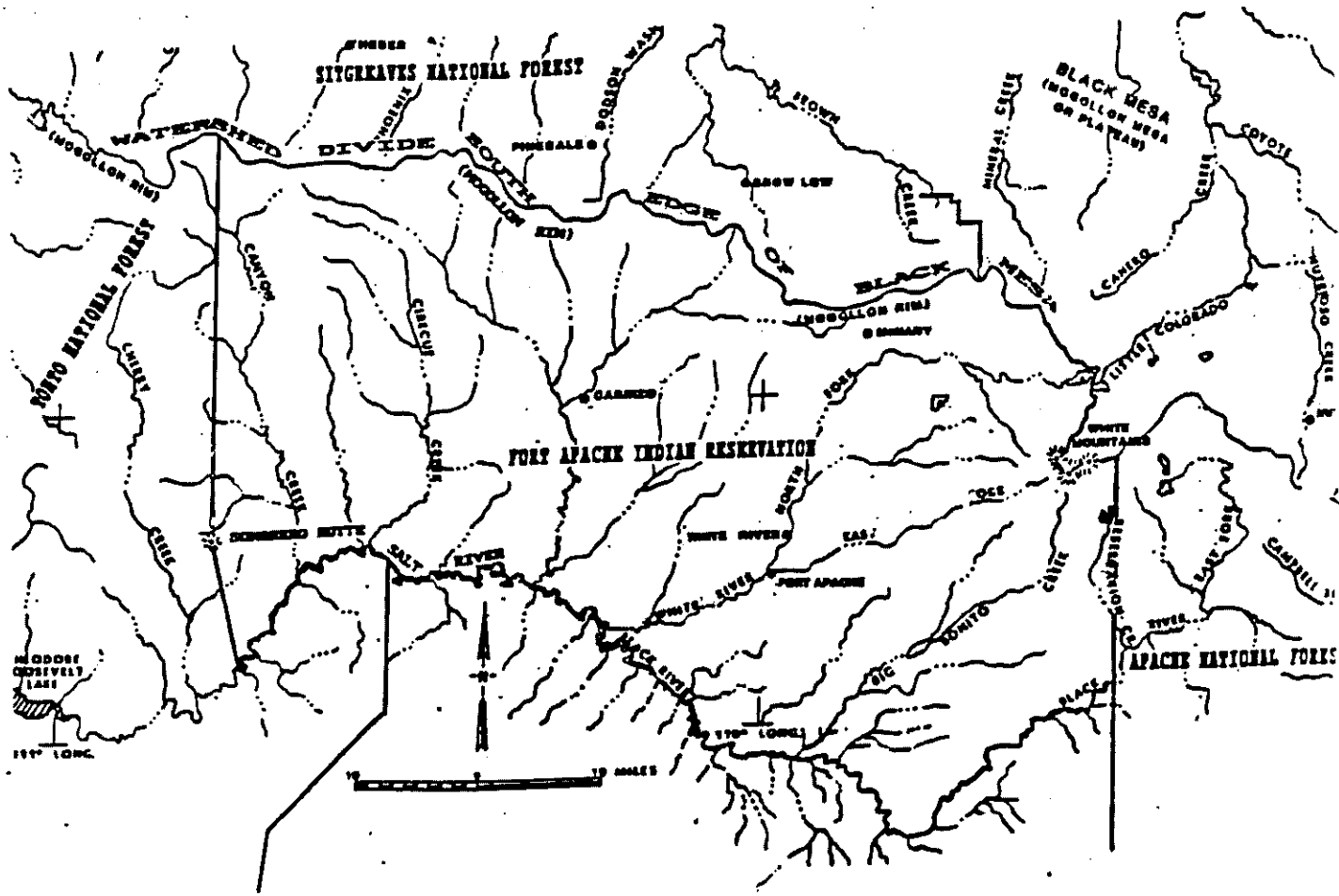
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<sup>14</sup> *Cohen's Handbook of Federal Indian Law*, 1982 Ed., Scope of Rights, p. 585.

<sup>15</sup> *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 622-623, describing and graphically displaying Salt River and numerous tributaries of that stream as they pertain to Tribe's Fort Apache Indian Reservation.

<sup>16</sup> *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 622 (1987).

<sup>17</sup> *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 622, *See*, Plate displaying Salt River Drainage within Fort Apache Indian Reservation, pg. 623.



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water in the Salt River and the tributaries of that stream,<sup>18</sup> which aboriginal rights are prior and paramount to the claims asserted for the Salt River Project by the Salt River Valley Water Users Association;<sup>19</sup> and

<sup>18</sup> *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 638 (1987).

<sup>19</sup> *Ibid*. Respecting Tribe's aboriginal rights to the use of water in the Salt River, See Cohen's Handbook on Federal Indian Law, (1982 Ed.) pgs. 591, *et seq.*, "Winters Doctrine, 6. Priority of Right."

"Fundamentally, the United States as Trustee for the Indians, preserved...the title to the rights to the use of water which the Indians' [as here] had 'reserved' for themselves;" *Winters v. United States*, 207 U.S. 564, 576 (1908); In summary, respecting the aboriginal rights to the use of water of the Tribes which were before the Supreme Court in *Winters*, the Court states: "The Government is asserting the rights of the Indians,"...title to which the Tribe's there involved retained, as here, for themselves. The Court, thereafter, reviewed and defined the title of the rights to the use of water which the Tribes could exercise within the reservation. "The reservation was part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for their habits and wants of a nomadic and uncivilized people... The Indians had command of the lands and the waters -- command of all beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turn to agriculture and the arts of civilization."

See *Winters v. United States*, 143 Fed. 740, (CA 9, 1906); *Winters v. United States*, 148 Fed. 684 (CA 9, 1906); *Conrad Investment Co. v. United States*, 161 Fed. 829, 832, 835, (CA 9, 1908); *United States*



### III. MEASURE OF TRIBE'S ABORIGINAL SALT RIVER RIGHTS

#### A. Tribe's Aboriginal Salt River Rights, Adequate to Meet Present and Future Requirements

WHEREAS, the White Mountain Apache Tribe, although it has title vested in it to aboriginal Salt River rights to the use of water with a priority from time immemorial, which aboriginal rights are adequate to fulfill all of Tribe's water requirements for all beneficial purposes, now and in the future, nevertheless, recognizes that it is confronted by the State of Arizona's W-1 *et seq.*, Gila River General Adjudication Proceeding, which probably constitutes the gravest threat to the Tribe's long history dating from time immemorial, which constitutes a threat not only to Tribe's priceless aboriginal rights to the use of water in a hostile State Court, but likewise pertains to Tribe's status as a governmental entity with inherent sovereign powers, exercised in both dominion and self government over and within Tribe's Reservation; and

WHEREAS, the White Mountain Apache Tribe fully expects the State of Arizona in the Gila River W-1 Proceedings aggressively to attack the claims of the White Mountain Apache Tribe, and seeks to limit the Tribe in the same manner concerning which it failed in the case of *Arizona v. California*,<sup>20</sup> and

WHEREAS, the White Mountain Apache Tribe has been fully informed that the State of Arizona vigorously attempted in the case of *Arizona v. California*,<sup>21</sup> drastically to constrict the measure of the rights to the use of water of the Indians involved in that proceeding, to a quantity of water reasonably required to meet "foreseeable needs" which, in the words of the Supreme Court, means "...the number of Indians," resulting in the Court's rejection in *Arizona v. California*, of Arizona's contention, declaring that: "How many Indians there will be, and what their future needs will be can only be guessed," declaring that it would adhere to the concepts of the Special

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*v. Ahtanum Irrigation District*, 236 Fed. 2d, 321 (CA 9, 1956); 330 Fed.2d 897 (CA 9, 1964), 338 Fed.2d 307 (CA 9, 1964); *cert.den.* 381 U.S. 964 (1965).

<sup>20</sup> See, *Infra.*, Phase II, p. 13, *et seq.*

<sup>21</sup> *Arizona v. California*, 373 U.S. 546, 599-601 (1963).

Master in the case respecting the water requirements for the Tribes there involved;<sup>22</sup> and

B. "Practicably Irrigable Acres," PIA -- Measure of Tribe's Aboriginal Rights

WHEREAS, the White Mountain Apache Tribe, although not a party to the *Arizona v. California* proceedings, has reviewed in-depth the course pursued by the Special Master, the Report of whom was markedly relied upon by the Supreme Court in its hallmark decision, and is the predicate for the Final Decree entered by the Supreme Court in *Arizona v. California*;<sup>23</sup> and

WHEREAS, the White Mountain Apache Tribe has carefully analyzed the objectives of the Special Master in preparing the Report to the Court, the methods and techniques utilized in the formulation of that Report, predicated upon these controlling concepts: a. The quantity of water required by the Tribes should be adequate "...to satisfy the future as well as the present needs of the Indian Reservations,"<sup>24</sup> b. To adjudicate to the Tribes there involved, rights to the use of water adequate to provide annually a supply of water sufficient "...to irrigate all of the practicably irrigable acreage on the reservations;"<sup>25</sup> and

WHEREAS, the White Mountain Apache Tribe is convinced that if it is awarded the quantity of water adequate to irrigate its practicably irrigable acres, all as hereafter set forth, the Tribe will be awarded a quantity of Salt River water sufficient to provide the White Mountain Apache Tribe the quantities of water from that source for all beneficial uses, now and in the future, upon which a sound, continuing, economic base can be established, thus providing a "wholly adequate" permanent home and

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<sup>22</sup> *Ibid*.

<sup>23</sup> *See*, Report, dated January 16, 1961, from the Special Master to the Supreme Court, 364 U.S. 940, (1961); *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Arizona v. California, et al.*, 376 U.S. 340 (1964).

<sup>24</sup> *Arizona v. California*, 373 U.S. 546, 600 (1963).

<sup>25</sup> *Ibid*.

abiding place, now and in the future, for the Tribe and its ever expanding<sup>26</sup> membership; and

WHEREAS, the White Mountain Apache Tribe has directed that intensive scientific studies be conducted within the Fort Apache Indian Reservation, both as to population projections, soils, water requirements, crops, and related data, which has resulted in this determination of the Tribe's "practicably irrigable acreage within the Fort Apache Indian Reservation," the annual water requirement for each acre of practicably irrigable land, and the total quantity of water annually to be provided through the exercise by the Tribe of its aboriginal Salt River rights to the use of water:

Practicably irrigable acreage (PIA) -- 49,800 acres

Reasonable annual Salt River water requirement -- 5.3 acre-feet for each PIA.

Total Annual Salt River Water Requirement -- 260,000 acre-feet annually of Salt River water.

#### IV. TRIBE MAY EXERCISE TRIBE'S ABORIGINAL SALT RIVER RIGHTS FOR ANY BENEFICIAL PURPOSE

##### A. Key to Tribal Prosperity, Exercise of Tribe's Aboriginal Salt River Rights For All Purposes

WHEREAS, the White Mountain Apache Tribe, when, as a sovereign, retained Tribe's aboriginal title to the Fort Apache Indian Reservation, there was and is vested in the Tribe, title to all of the constituent elements of title to the land itself, including, but not limited to, aboriginal rights to the use of water, all surface water, percolating

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<sup>26</sup> Here, the Tribe is demanding recognition of its title to aboriginal Salt River rights which can be exercised for any and all beneficial purposes. The *Winans* Decision, 198 U.S. 371, 381, (1905), speaks of the Indian title, antecedent to any limitation by treaty or otherwise: "...the exercise of which there was not a shadow of impediment." In *Winters*, 207 U.S. 564, 576 (1908), the decision states that Indian title -- the fee simple absolute title -- which the Tribe holds -- aboriginal title -- is of this character: "The Indians had command of the lands and the waters -- command of all their beneficial use, whether kept for hunting, and grazing roving herds of stock, or turn to agriculture and the arts of civilization." Tribe's aboriginal Salt River rights are commensurate with the *Winters*' and *Winans*' principles of law, which are governing here.

water, groundwater, forest, rangelands, fisheries, wildlife, aesthetics, and all other constituent elements of which an estate in fee-simple absolute title is comprised;<sup>27</sup> and

WHEREAS, the White Mountain Apache Tribe recognizes that full development of Tribe's rich natural resources, referred to above, must be predicated upon the exercise of Tribe's aboriginal Salt River rights to the use of water for a vast variety of uses, involving municipal, domestic, mineral,<sup>28</sup> industrial, recreation, and all of the other related uses; and

WHEREAS, the White Mountain Apache Tribe, as part of the reservation development, must, of necessity, undertake to restore, rehabilitate, and resuscitate the vast area of highly valuable, once luxuriant rangelands, which were devastated during a century commencing in 1895 to date, due to the mismanagement of Tribe's rangelands by the United States Trustee, which permitted non-Indian livestock in vast numbers, far in excess of the carrying capacity of Tribe's once excellent rangelands, which overgrazed Tribe's Reservation, resulting in this critical finding by the Court of Federal Claims: "Since the Government initiated and condoned the stocking conditions that produced overgrazed rangelands, in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted...Just as the Government must bear responsibility for erosion damage to the rangelands caused by overgrazing while the land was under its supervision, it must also be held liable for any loss in carrying capacity of the rangeland due to juniper infestation brought about by overgrazing....";<sup>29</sup> and

WHEREAS, the White Mountain Apache Tribe must, necessarily, exercise its priceless

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<sup>27</sup> *Supra*, p. 4, ftns. 7, 8, 9.

<sup>28</sup> Located within Tribe's Reservation are minerals including iron rich deposits that have been commercially developed at one time. There are numerous other metallic deposits. An abundance of gypsum is found on the Reservation. Moreover, throughout the Reservation, there are gravel deposits and construction materials which should be developed commercially, all of which requires the exercise of Tribe's Salt River aboriginal rights.

<sup>29</sup> *White Mountain Apache Tribe v. Arizona*, 11 Cl.Ct. 614, 659, 660, 661 (1897).

aboriginal Salt River rights to restore and rehabilitate the Fort Apache Indian Reservation, it must also provide a wholly adequate and completely safe supply of municipal water to the communities throughout the Fort Apache Indian Reservation, to provide domestic uses, where required, and, thereby, "to make the Reservation livable,"<sup>30</sup> and to bring about changed conditions on the Reservation imperatively required to fulfill the commitment by the Trustee that Tribe's permanent homeland would be both an economic and socially acceptable area in which the Tribe may live and prosper for all time; and

B. Within the Measure of Tribe's Aboriginal Rights,  
They May Be Exercised for all Purposes

WHEREAS, the White Mountain Apache Tribe, acting in accordance with its inherent sovereign powers within the Fort Apache Indian Reservation, in the exercise, management, and control of Tribe's aboriginal Salt River rights to the use of water, has determined that Tribe will utilize the full quantity of Tribe's annual legal entitlement to Salt River water for any and all beneficial purposes, limited, nevertheless, to the maximum annual water requirements for Tribe's practicably irrigable acreage, all as reviewed and documented above;<sup>31</sup> and

WHEREAS, the White Mountain Apache Tribe's determination in the exercise of its sovereign power beneficially to use all of the waters of the Salt River within its legal entitlement, for any and all beneficial uses, is predicated upon the basic principles of *Winans*,<sup>32</sup> and *Winters*,<sup>33</sup> which opinions of the Supreme Court declared that when, as here, aboriginal rights to the use of water are being exercised by the Tribe, those rights may be utilized for any and all beneficial purposes without a "shadow of impediment,"<sup>34</sup> and

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<sup>30</sup> *Arizona v. California*, 373 U.S. 546, 599 (1963), decree entered 376 U.S. 340 (1964).

<sup>31</sup> *Supra.*, p. 10

<sup>32</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905).

<sup>33</sup> *Winters v. United States*, 207 U.S. 564, 576 (1908).

<sup>34</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905); *Cohen* citing *Arizona v. California*, states that: "Indians and Indian tribes may need water for purposes other than those for which their rights were originally reserved. Such needs may require changes in the nature or place of use." See, *Cohen's Handbook*

WHEREAS, the White Mountain Apache Tribe will exercise its aboriginal Salt River rights for any and all purposes, it specifically intends to exercise those rights to restore, rehabilitate, and resuscitate its rangelands, which were devastated by the Trustee's failure properly to administer them, for municipal, domestic, agricultural, industrial, mineral development, generation of electricity, forestry and range restoration and rehabilitation, aesthetics, fish and wildlife, recreation, maintenance of in-stream flow levels, and any other beneficial purpose which may now and in the future be developed.

## PHASE II

### I. THE UNITED STATES TRUSTEE'S OBLIGATION TO PRESERVE AND PROTECT TRIBE AGAINST ARIZONA'S AGGRESSIONS

#### A. Constitution is the Predicate for Tribe's Status As a Beneficiary of the National Trustee

WHEREAS, the White Mountain Apache Tribe, in the closing years of the Twentieth Century, is confronted with an ever-increasing threat from the State of Arizona, acting behind the guise of the ongoing Gila River General Adjudication Proceedings, W-1, *et seq.*, which, if not prevented by an exercise of the Supreme Law of the United States, pursuant to the Constitution, will, in the ultimate, enter upon Tribe's Reservation and will destroy Tribe's inherent sovereign power, pursuant to which the Tribe exercises dominion and self-government over and within the Fort Apache Indian Reservation, by seeking to impose Arizona's control and management over Tribe's priceless aboriginal Salt River rights to the use of water, and thus markedly

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*of Federal Indian Law*, 1982 Ed., p. 592; The question of using reserved rights for other than agriculture was discussed by the Special Master in *Arizona v. California*. After stating that the measure of Indian rights to the use of water for the Reservations along the Colorado River was to be determined by "practicably irrigable acres," he explained: "This does not necessarily mean, however, that water reserved for Indian Reservations may not be used for purposes other than agriculture and related uses...The measurement used in defining the magnitude of the water rights is the amount of water necessary for agriculture and related purposes because this was the initial purpose of the reservation, but the decree establishes the property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow." *Ibid.*, See Cohen's Handbook of Federal Indian Law, 1982 Ed., p. 588, *et seq.* "Measure of the Right;" p. 590, "Priority of the Right;" "Change and Place or Nature of Use," p. 592, *et seq.*

denigrating Tribe's inherent sovereign power of dominion and self-government within the Fort Apache Indian Reservation;<sup>35</sup>and

WHEREAS, the White Mountain Apache Tribe, predicated upon the Constitution of the United States and unvarying precedence, asserts that only the United States of America -- no state -- is empowered to take, seize, diminish, abridge, or in any way denigrate Tribe's inherent sovereign powers within and over Tribe's Fort Apache Indian Reservation, nor is any other authority empowered to seize or denigrate Tribe's vested aboriginal title to Tribe's Fort Apache Indian Reservation, <sup>36</sup> which title includes Tribe's aboriginal *Winters* Doctrine Salt River rights to the use of water, the Tribe asserting, moreover, that the Constitutional Power of the National Government to seize and to take the Tribe's Reservation, or any interest in that Reservation, including Tribe's aboriginal Salt River rights, is conditioned upon the payment to the Tribe of just compensation for the value of Tribe's aboriginal Salt

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<sup>35</sup> The McCarran Amendment -- Suits for adjudication of water rights -- Joinder of United States as Defendant; 43 U.S.C. 666, "(a). Consent is given to join the United States as a Defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." The Supreme Court, in its *Colorado River Water Conservation District v. United States* Decision, 424 U.S. 800 (1976), declared that the McCarran Amendment, 43 U.S.C. 666, has waived the sovereign immunity of the United States to comprehensive state water rights adjudication, conferring upon state court's jurisdiction to adjudicate Indian water rights held in trust by the United States. The Tribe takes vigorous objection to this statement in the Colorado Decision, pgs. 812-813, in which the Supreme Court declares: "Mere subjection of Indian rights to legal challenge in State Court...would no more imperil those rights than would a suit brought by the Government in District Court for their declaration...The Government has not abdicated any responsibility fully to defend Indian rights in State Court, and Indian interest may be satisfactorily protected under regimes of state law," See, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), See also, pg. 570-571. "Nothing we say today should be understood to represent even the slightest retreat from the general proposition we expressed so recently in *New Mexico v. Mescalero Apache*...Because of their sovereign status, [Indian] tribes and the reservation lands are insulated in some respect by a 'historic immunity from state and local control,'...and Tribes retained any aspect of the historical sovereignty, 'not inconsistent with the overriding interest of the National Government.'"

<sup>36</sup> *Worcester v. Georgia*, 31 U.S. 515, 561 (1832); *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 et seq., (1980); See also *Cherokee Nation v. Georgia*, 30 U.S. 1, 15; (1831); *United States v. Creek Nation*, 295 U.S. 103 (1976); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1944).

River rights, including, but not limited to, the invaluable priority of those rights, all as provided for in the Fifth Amendment of the Constitution of the United States;<sup>37</sup> and WHEREAS, the White Mountain Apache Tribe petitions the United States Trustee fully to exercise its Constitutional Powers to preserve and to protect the White Mountain Apache Tribe from the destructive consequences of the State of Arizona wrongfully entering upon Tribe's Reservation, based upon a false interpretation of the McCarran Amendment,<sup>38</sup> to exercise jurisdiction over Tribe's invaluable aboriginal Salt River rights to the use of water, and in that connection refers to the fact that the Indian Commerce Clause, in the Constitution, empowers the Congress of the United States "...to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes,"<sup>39</sup> and the vast powers which were conferred upon the National Trustee pursuant to that proviso; and

WHEREAS, the White Mountain Apache Tribe asserts, moreover, that the Trustee's Constitutional Power, pursuant to the Indian Commerce Clause, is only part of the Constitutional Powers upon which the United States Trustee, can rely in preserving and protecting Tribe's sovereignty and its invaluable aboriginal Salt River rights against Arizona's attempted illegal intrusion upon Tribe's Reservation, for there is vested in Congress the power "...to dispose of and make all needful Rules and Regulations respecting the property belonging to the United States," which includes the Tribe's priceless aboriginal Salt River rights to the use of water, which

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<sup>37</sup> The Fifth Amendment of the Constitution provides, among other things, that "No person shall be...deprived of life, liberty, and property without due process of law; nor shall private property be taken for public use, without just compensation;" *United States v. Gerlach Livestock Co.*, 339 U.S. 725 (1950), *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 73 (1913); *Ashwander v. TVA*, 297 U.S. 288, 330 (1936).

<sup>38</sup> See *Infra.*, p. 19.

<sup>39</sup> Art. 1, Sec. 8, Cl. 3, (Emphasis supplied); See, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 133, 151, (1980); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973), ftn 7 "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derived from federal responsibility for regulating Commerce with the Indian tribes...." The Supreme Court, in *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), having quoted the language of the Indian Commerce Clause, makes this statement. "These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restriction on their free actions. The shackles imposed on this power, in the [Articles of] confederation are discarded "



are held in trust, managed and controlled by the United States Trustee for Tribe's benefit,<sup>40</sup> precluding Arizona's illegal efforts to trespass upon Tribe's Reservation, and to inject Arizona's laws onto Tribe's Reservation, or to control Tribe's aboriginal rights to the use of water;<sup>41</sup> and

WHEREAS, the White Mountain Apache Tribe, confronted with a deadly crisis of survival with the State of Arizona, refers to the Supremacy Clause of the Constitution of the United States, which explicitly declares that: "This Constitution and the Laws of the United States, which shall be made in Pursuance thereof,...shall be the supreme Law of the Land...."<sup>42</sup> which proviso has repeatedly been declared to subvert state

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<sup>40</sup> Constitution of the United States, Article IV, Sec. 3, Cl. 2, See, *United States v. Winans*, 198 U.S. 371 (1905); *Winters v. United States*, 143 Fed. 740, 749 (CA 9, 1906); *Winters v. United States*, 207 U.S. 564, 575-576 (1908); *Conrad Investment Co. v. United States*, 161 Fed. 829, 832, 836 (CA 9, 1908); *Worcester v. Georgia*, 31 U.S. 515, 560-561 (1832). Chief Justice Marshall, in *Worcester v. Georgia*, underscores the fundamental basis why the United States Trustee must aggressively protect the White Mountain Apache Tribe from entry by the State of Arizona upon Tribe's Fort Apache Indian Reservation, under the pretext of fulfilling the states obligation in the Gila River General Adjudication Proceedings, with the attendant destruction of Tribe's status as a governmental agency with inherent sovereign powers of dominion and self-government over and within the Fort Apache Indian Reservation. Justice Marshall effectively explains the legal consequences of the United States becoming the Trustee for the White Mountain Apache Tribe, to end the Apache War which resulted in the Tribe's peaceful entry upon its Reservation in 1871-1872: "...the settled doctrine of the law of nations is, that a weaker power does not surrender its independence -- its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state." It was on that background that Chief Justice Marshall, continuing in his *Worcester* Decision, established the precedent that the United States Trustee, should preserve and protect an Indian Tribe against the threats of Arizona's government using these terms: "The Cherokee nation, then, is a distinct community occupying its own territory, [as here] with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

The act of the state of Georgia, under which the Plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. "

<sup>41</sup> See, *Infra.*, p. 18, *et seq.*

<sup>42</sup> See, Article VI, National Supremacy Clause, Clause II: "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all treaties made, or which shall be made...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; Anything in the Constitution or Laws of any State to the Contrary notwithstanding." Repeatedly, Chief Justice Marshall, in his famous opinions, utilized the Supremacy Clause to eliminate the aggressive attempts of the states to exercise power which resides in the National Government. *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Gibbons v. Ogden*, 22 U.S. 1, (1824); Chief Justice Marshall in *Worcester v. State of Georgia*, as reviewed and documented above, emphasized the sovereign powers of the Indian Nation, Tribes, and people, stressing the trust relationship between the Native American Tribes and the National Government as Trustee, and

laws to the Supremacy Clause of the United States, when, as here, the State laws threaten the power and authority, not only of the National Government, but likewise the Tribe's sovereignty, Tribe's dominion and control over Tribe's Fort Apache Indian Reservation, and Tribe's Salt River rights to the use of water;<sup>43</sup> and

B. Tribe, in Restoring, Rehabilitating, Resuscitating, Its Reservation, Exercises Full and Exclusive Control of All Natural Resources and Pre-empts Any State Control

WHEREAS, the White Mountain Apache Tribe, from time immemorial, in the exercise of its inherent sovereign powers, has utilized, managed, regulated, controlled, and administered Tribe's natural resources, including Tribe's aboriginal Salt River rights to the use of water,<sup>44</sup> of which Tribe's Fort Apache Indian Reservation is comprised, with the objective of achieving an internal, self-sustaining, integrated, economic, and social community that will guarantee the perpetuation now and in the future of Tribe's rangelands, forests lands, minerals, surface and groundwaters, and all other resources for the benefit of the Tribe and its members, now and in perpetuity; and

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rejected the efforts of the State of Georgia to encroach upon the sovereign powers of the Tribe there involved.

<sup>43</sup> *Worcester v. Georgia*, 31 U.S. 515, 561, (1832). In *Worcester v. Georgia*, Chief Justice Marshall declared that: "...the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundaries that separates the Cherokee country from Georgia; guaranty to them all the lands within their boundary; solemnly pledge the faith to the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself." Those judicial statements are clearly applicable to the laws enacted by the State of Arizona [Arizona Rev. Stat. 45-104, *et seq*] which, among other things, provide the powers that are conferred upon the Director of the Department of Water Resources, [Arizona Rev. Stat. 45-257, *et seq*] which contemplate that official will effectively supplant the Tribal Council as the governing body respecting the administration, control, and regulation of Tribe's aboriginal Salt River rights to the use of water.

<sup>44</sup> The White Mountain Apache Tribe "...had an established history of agriculture," pursuant to which the Tribe engaged in irrigated farming, using Salt River water diverted from the East Fork of the White River and elsewhere within the area which now comprises Tribe's Fort Apache Indian Reservation, establishing undeniable proof of Tribe's pre-historic exercise of its aboriginal Salt River rights, and the management of its other resources from time immemorial. See, *White Mountain Apache Tribe v. United States*, 21 Ind.Cl.Comm, 189, 208, *et seq.*, (1969); *Western Apache Ecology -- Farming*, See, *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 622, (1987).

WHEREAS, the White Mountain Apache Tribe, confronted with devastation of Tribe's Reservation through mismanagement by the Trustee, has undertaken broadly as a sovereign to develop a long range plan to restore, rehabilitate, and resuscitate Tribe's range and forest lands, which have been irreparably damaged by a century of mismanagement by the United States Trustee, concerning which, as reviewed above, a court has found that: "...[the Trustee] initiated and condoned the stocking conditions that produced overgrazed rangelands, in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted," which is, today, literally washing away Tribe's Reservation;<sup>45</sup> and

WHEREAS, the White Mountain Apache Tribe, as a sovereign, is seeking to achieve in cooperation with the United States Trustee, without interference from the State of Arizona, a sound, economic, and social base, which can only be achieved if the Tribe is free to exercise its Salt River rights to the use of water, in its broad program to revitalize its severely damaged range and forest lands;<sup>46</sup> and

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<sup>45</sup> *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 622, 659 (1987); In addition to the accelerated erosion due to the mismanagement by the United States Trustee of Tribe's rangelands, the Court likewise found: "...overgrazing pre-disposed the affected range to the spread of juniper. Just as a Government must bear responsibility for erosion damages to the rangelands caused by overgrazing while the land was under its supervision, it must also be held liable for any loss in carrying capacity of the rangelands due to juniper infestation brought about by overgrazing and not climate." *Ibid.*, p. 660-661. The magnitude of the Trustee's mismanagement of Tribe's rangelands, and the fact that the erosion is continuing today, as is the spread of the juniper growth, renders it imperative for the Tribe fully to exercise its sovereign power of dominion and self-government to arrest the erosion, and to take appropriate action to stop the spread of the juniper growth. Dr. Joe Elliott, Tribe's Ecological Consultant, has stated very effectively that the degradation of Tribe's Reservation, due to the Trustee's mismanagement, "...was so severe that the enclosed range area [enclosed with the objective of seeking to have it recover] had not improved in the 40 year period." *Ibid.*, p. 653; The Tribe, only by strict regulation and control of both the land and water, can accomplish the imperative need of stopping the destructive aspects of the accelerated erosion, which is continuing to devastate the Tribe's Reservation. Dr. Elliott explains that the soil is so depleted that it cannot be restored without a comprehensive program using both the land and water to irrigate it. Another factor requiring the Tribe to exercise its sovereign power to preserve and to protect its Reservation by arresting, if possible, the accelerated erosion which, approximately 70 years ago, was devastating the Reservation, all as described in the Court's decision: "...storm waters come down off the mountains in such torrents that it destroys the agricultural lands along the stream beds....This has resulted in such terrible erosion that it has washed away at least 50 percent of the lands formerly cultivated by the Apache Indians, 10 to 15 years ago. Each of the remaining 50 percent has been left so high and dry, and in such minor areas, that water cannot be put on it at a cost which will justify reclaiming it...."

<sup>46</sup> In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325-335 (1983); citing Bracker, it is stated: "We have stressed that Congress' objective of furthering Tribal self-government encompasses far

WHEREAS, assuming arguendo only, the White Mountain Apache Tribe's sovereign immunity from suit was waived by the McCarran Amendment, 43 U.S.C. 666, nevertheless, that waiver pertains only in regard to the jurisdiction of the courts of Arizona, and not to the jurisdiction of the State's administrative bodies, its officials, or agencies,<sup>47</sup> for the "adjudication" of Tribe's aboriginal Salt River rights to the use of water in the Gila River General Adjudication Proceedings, W-1, *et seq.*, and predicated upon the concepts of strict interpretation of the McCarran Amendment, the Tribe denies that the laws, rules, and regulations of Arizona respecting the administration, regulation, and control of water resources within the State of Arizona, have application within the boundaries of the Fort Apache Indian Reservation, and the White Mountain Apache Tribe explicitly denies that the laws, rules, and regulations, and the jurisdiction and authority of the Department of Water Resources and the Director of that Department, have any application to the White Mountain Apache Tribe or to its Fort Apache Indian Reservation including Tribe's aboriginal Salt River rights to the use of water, and the State of Arizona and its

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more than encouraging Tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'Tribal self-sufficiency and economic development.' ... Thus, when a Tribe undertakes an enterprise under the authority of federal law, an assertion of state authority must be viewed against any interference with the successful accomplishment of the federal purpose." Here, state control of the water resources on the Reservation would, most assuredly, defeat any hope of restoration, rehabilitation, or resuscitation; *ibid.*, pgs. 335-336, and citations.

<sup>47</sup> Ariz. Rev. Stat. 45-104, *et seq.*; See, Ariz. Rev. Stat. 45-105 as amended April 25, 1994, *et seq.*, all other statutes pertaining to that power and related authority, 45-251, *et seq.*; 45-256; 45-257 (3). The last cited statute purports to confer upon the Director of the Department of Water Resources, the power and authority to administer the Final Judgment entered in the case predicated upon the Court's continuing jurisdiction; (See also, Proposed Re-enactment of that Provision in H.B. 2276, Sec. 45-257 B. 4, *et seq.*) The White Mountain Apache Tribe denies the McCarran Amendment, 43 U.S.C. 666, providing for the adjudication of Tribe's aboriginal rights to the use of water, does not, in any way, alter, modify, or diminish Tribe's sovereign power within the Reservation to administer and control Tribe's aboriginal rights to the use of water; See in that connection, *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983). There, the Supreme Court rejected any contention that the McCarran Amendment, 43 U.S.C. 666, in any way denigrated, modified, or reduced Tribe's inherent sovereign power. On the subject, the Supreme Court stated there that: "Nothing we say today [in regard to the enforcement of the McCarran Amendment in those proceedings] should be understood to represent even the slightest retreat from the general proposition we expressed so recently in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 332, 'Because of their sovereign status, [Indian] tribes and their reservations lands, are insulated in some respects with a 'historic immunity' from state and local control,' ...and tribes retained any aspect of their historical sovereignty, not 'inconsistent with the overriding interest of the National Government.'" *Ibid.*, p. 570-571.

laws, agents and agencies, are barred and precluded from entry upon, or having application within, Tribe's Fort Apache Indian Reservation;<sup>48</sup> and

WHEREAS, the White Mountain Apache Tribe, having peacefully negotiated the end of the Apache War and the entry upon Tribe's Reservation, predicated upon the agreement with the Government of the United States, which made commitments in perpetuity with the Tribe including, but not limited to, the explicit obligations provided for in the Constitution,<sup>49</sup> and the guarantee to the White Mountain Apache Tribe that it could exclusively exercise its sovereign power of dominion and self-government without interference within the boundaries of its Reservation, all as set forth and documented above,<sup>50</sup> presents these specific demands to the principal agents of the United States, Tribe's Trustee, the Attorney General of the United States, and the Secretary of the Interior, and that those officials, their agents, and agencies, assist the White Mountain Apache Tribe in effectuating the exclusion and barring of Arizona, its laws, agents, and agencies, from intruding upon Tribe's Fort Apache Indian Reservation, or having any application or control within Tribe's Reservation as they pertain to the prosecution of the Gila River General Adjudication Proceedings and, to that end, request those officials of the National Government to provide the White Mountain Apache Tribe with all necessary funding, for all purposes, to effectuate this Resolution of the White Mountain Apache Tribe, in which it seeks to preserve and protect its inherent sovereign powers and Tribe's dominion and self government over and within Tribe's Fort Apache Indian Reservation;<sup>51</sup> and

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<sup>48</sup> See above p. 2, ftn. 4, See also *United States v. Sherwood*, 312 U.S. 384, 386-387 (1941), The Tribe's immunity from suit is commensurate with the immunity of the United States and the waiver of Tribe's immunity is strictly construed.

<sup>49</sup> See, *Supra.*, p. 15 *et seq.*

<sup>50</sup> *Supra.*, p. 1, *et seq.*

<sup>51</sup> See *Supra.*, p. 14, *et seq.* The Indian Commerce Clause, Art. 1, Sec. 8, Cl. 3: Congress empowered "to regulate Commerce...with the Indian tribes; Art. IV, Sec. 3, C. 2; Property Clause: Congress "...to dispose of and make all needful Rules and Regulations respecting the property belonging to the United States," Art. VI, Cl. 2, Constitution and Laws "...the supreme Law of the Land."

WHEREAS, the White Mountain Apache Tribe, having presented to the Attorney General and the Secretary of the Interior, its demand for protection against the State of Arizona, its laws, agents, and agencies, likewise fully commits to both the Attorney General and the Secretary of the Interior, all of Tribe's resources with the objective of preserving, protecting, and maintaining Tribe's inherent sovereign powers, Tribe's Reservation, and all of the resources of which it is comprised, both now and in the future, believing that the Constitutional commitments made to the Tribe, by the United States Trustee, cannot be defeated by Arizona or any other force outside of the Reservation.

### PHASE III

- I. TRIBAL COUNCIL REJECTS REPRESENTATION BY DEPARTMENT OF JUSTICE IN GILA RIVER PROCEEDINGS -- TRIBE MUST SEEK ALL ALTERNATIVE REMEDIES TO PRESERVE ITS SOVEREIGNTY AND ABORIGINAL SALT RIVER RIGHTS
  - A. Department of Justice Is, Today, Failing Properly to Represent the Tribe in the Gila River Proceedings

WHEREAS, the White Mountain Apache Tribe has attempted repeatedly to avoid the disaster of being a party to the Gila River General Adjudication Proceedings, W-1, *et seq.*, which included attempting to obtain relief in the Federal District Court for Arizona, and in the Court of Appeals for the Ninth Circuit,<sup>52</sup> in which the Tribe reviewed in detail the grave impropriety of the Department of the Interior and the Department of Justice, representing the Tribe in view of the history that the Secretary of the Interior had attempted, albeit illegally, to commit all of the Tribe's Salt River rights to the use of water to the Salt River Federal Reclamation Project and, indeed, constructed the Salt River Federal Reclamation Project on the predicate of taking all of the Tribe's rights to the use of water, which issues were fully reviewed by the Court of

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<sup>52</sup> *White Mountain Apache Tribe v. Hodel*, 784 Fed.2d, 921 (CA 9, 1986); *White Mountain Apache Tribe v. Hodel*, 840 Fed.2d, 675 (CA 9, 1988); Note, the Tribe in those proceedings charged the Secretary of the Interior -- not the United States of America-- with failing properly to perform its fiduciary obligations.

Federal Claims, in which that Court declared the Tribe's "*Winters* Doctrine rights" had not been taken, but that the title continued to reside in the Tribe;<sup>53</sup> and

WHEREAS, the White Mountain Apache Tribe, adhering to the concepts of *Arizona v. California*, reviewed and documented above,<sup>54</sup> and predicated upon intensive field investigations and scientific analysis, made these determinations relative to the measure of the Tribe's aboriginal rights to the use of water in the Salt River, with a priority from time immemorial: Within the Fort Apache Indian Reservation, there are 49,800 "practicably irrigable acres," with an annual water requirement of 5.3 acre-feet to the acre; with a total annual right to divert and utilize 260,000 acre-feet of Salt River water annually, though that quantity of Salt River water is determined on the basis of agricultural requirements for the "practicably irrigable acreage," that water can, nevertheless, be utilized for any beneficial purpose, all as reviewed and documented above;<sup>55</sup> and

WHEREAS, the White Mountain Apache Tribe refers to the fact that over the Tribe's vigorous objections and repeated attempts to modify the claim which was filed by the Department of Justice, purportedly on behalf of the Tribe, on January 4, 1985, that claim is gravely deficient for these and other reasons: (1) The claim is not made on the basis of "practicably irrigable acres," which is mandated by *Arizona v. California*; (2) The Department of Justice claims 19,900 acres of irrigable land, with an annual water requirement of 3.5 acre-feet to the acre -- for a total of 71,362 acre-feet annually -- grossly inadequate -- and must be contrasted and rejected on the basis of Tribe's valid and effective claim for the White Mountain Apache Tribe of 260,000 acre-feet of Salt River water annually, predicated upon 49,800 "practicably irrigable acres;"<sup>56</sup> and

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<sup>53</sup> *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614, 629, 638 (1985).

<sup>54</sup> *See, Supra*, p. 8, et seq., 373 U.S. 546, 599-601 (1963).

<sup>55</sup> *Ibid.*, p. 8, et seq., "Measure of Tribe's Aboriginal Salt River Rights."

<sup>56</sup> *See Supra*, p. 10; Predicated upon the claim filed on behalf of the Tribe, it is impossible to determine the basis upon which the claims for municipal, domestic, recreation, and other water uses were

WHEREAS, the White Mountain Apache Tribe and its representatives, over a ten (10) year period, have repeatedly met with and communicated with the Department of Justice and its staff, petitioning them adequately to represent the Tribe, and to present to the State Court a claim to rights for the use of water predicated upon "practicably irrigable acres," seeking 260,000 acre-feet of water annually, which water can be used for all beneficial purposes, and without exception, the Department of Justice has met and discussed the Tribe's claim, reviewed them and rejected them, maintaining its present grossly inadequate posture in the Gila River General Adjudication Proceedings; and

B. Failure of the Department of Justice to Claim Aboriginal Salt River Rights on Behalf of the Tribe

WHEREAS, the White Mountain Apache Tribe, predicated upon the statements contained in this Resolution, including the documentation, asserts that the Tribe retained title to aboriginal rights to the use of water, with a priority from time immemorial, which can be used for any purpose, which is in stark contrast to the claim of the Department of Justice, is as follows: "The doctrine of federal reserved water rights is judicially created and dates back, at least, to *Winters v. United States*,..." it is plain and serious error to urge that the *Winters* Doctrine is court created, the Tribe must reject that assertion, and rejects the Department of Justice's attempt to pervert the basic precepts of the *Winters* Doctrine, claiming, in grave error, that it was the United States that reserved the rights for the Indians in the *Winters* Decision, for as that decision correctly declares, it was the Tribe that reserved the rights, and it was tribal rights that were being claimed by the United States;<sup>57</sup> and

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determined, or how the Department of Justice could present hydroelectric power claims, excluding from those claims Miner Flat Dam.

<sup>57</sup> Brief filed by the Department of Justice in the Supreme Court of the State of Arizona, October 7, 1994. This is evidence of the perversion of the *Winters* Doctrine by the Department of Justice. Continuing to discuss the doctrine, the brief states: "Thus, *Winters* held that the federal government, by setting aside the Indian reservation, had also impliedly confirmed to the Indians a reservation of a portion of the waters of the adjoining stream for the Indians' use." Continuing to pervert the meaning of *Winters*, the Department of Justice says this: "The Court stated that '[t]he power of the [federal] government to reserve the waters and exempt them from appropriation under the state law is not denied, and could not be.'" It will



C. Tribes Remains Immune From Arizona's Water Resources, Laws, and Agencies

WHEREAS, the White Mountain Apache Tribe asserts that although it is contended, there has been a waiver of Tribe's sovereign immunity, as it pertains to the adjudication of rights to the use of water, there has been no waiver pursuant to the McCarran Amendment, or otherwise, of Tribe's sovereign powers within and over Tribe's Fort Apache Indian Reservation, and that sovereign power of the White Mountain Apache Tribe excludes from Tribe's Fort Apache Indian Reservation and Tribe's aboriginal rights to the use of water, application of Arizona's laws, rules, regulations, or the power and authority of agents and agencies with the State of Arizona, which have application to the administration and control of non-Indian rights to the use of water, and, as emphasized above, the Tribal Council of the White Mountain Apache Tribe closes and precludes any exercise within the Tribe's Fort Apache Indian Reservation of the power and authority of the State of Arizona respecting any of Tribe's resources, including its aboriginal Salt River rights to the use of water;<sup>58</sup> and

WHEREAS, the White Mountain Apache Tribe rejects, as grossly in error, the acceptance by the Department of Justice of the laws, rules, and regulations, and agencies of the State of Arizona, which are not part of the judicial department empowered to adjudicate the rights to the use of water in the Gila River General Adjudication but, rather than resisting the laws of Arizona, the Department of Justice accedes to the laws of that

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be remembered, as reviewed and detailed above on p. 7, the Supreme Court in *Winters* said: "The Government is asserting the rights of the Indians,..." title to which the Tribe, there involved, retained, as here, for themselves. In simplest terms, the Department of Justice is perverting the language of the Supreme Court's Decision further to denigrate the title to Tribe's aboriginal rights. In a filing made by the Department of Justice on January 4, 1985 with the "Department of Water Resources," not the Maricopa County Court, it is likewise stated: "The legal basis for this claim is the federal reserved water rights doctrine, as recognized by the Supreme Court of the United States...the claim asserted herein is based on the intention of the Congress and the President to create a homeland..." for the Tribe in a geographical area where water would be essential to the life of the Indian people and for the animals they hunted and the crops they raised and for the development for the arts of civilization. In simplest terms, the Department of Justice has undertaken totally to denigrate the status of Tribe's basic aboriginal rights with a priority date from time immemorial.

<sup>58</sup> See, *Supra*, p. 2, fn. 4; See, pgs. 13-21, fn. 35, *et seq.*

state and the power of the Department of Water Resources, and seeks to permit those laws and the Department of Water Resources to function within Tribe's Fort Apache Indian Reservation, in clear violation of Tribe's sovereign immunity which, as emphasized repeatedly above, has not been waived in any sense or fashion by the McCarran Amendment as to the administrative laws and regulations of the State of Arizona, which pertain to non-Indian rights to the use of water, but has no application to Tribe's aboriginal rights to the use of water;<sup>59</sup> and

WHEREAS, the White Mountain Apache Tribe is fully cognizant of and completely aware of the disastrous consequences experienced by the Indian Tribes on the Wind River Reservation in Wyoming, in the Big Horn litigation, in which litigation the Department of Justice purported to represent, but totally failed properly to represent, the Tribes on the Wind River Reservation, which resulted in the Supreme Court of the State of Wyoming affirming a judgment which: (1) Vastly constricted the use by the Tribe of its water rights to purposes of agriculture and none other; (2) Sharply constricted the acreage upon which water could be used primarily predicated upon harsh economic concepts; (3) Precluded the exercise of Tribe's rights to the use of water for mineral and forestry development, irrespective of the fact that those resources were specifically referred to in the Tribe's treaty; (4) Precluded tribal use of water for "...instream flow for fishery purposes;" (5) Destroyed the Tribe's sovereign powers over its rights to the use of water, and totally subverted the Tribe's sovereign powers respecting the administration of those resources to the power and control of the State of Wyoming;<sup>60</sup> and

WHEREAS, the White Mountain Apache Tribe will not tolerate, nor will it be subjected to, the total disaster experienced by the Wind River Tribes in the *Big Horn* litigation by the entry upon Tribe's Reservation of the State of Arizona, which, in the words of

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<sup>59</sup> *Ibid.*

<sup>60</sup> *In the General Adjudication of all Rights to the Use of Water in the Big Horn River System*, 753 Pac.76 (1988); *In Re Adjudication, et seq., Big Horn River...*835 Pac. 2d 273 (1992).

*Kagama*,<sup>61</sup> is Tribe's "deadliest enemy," and predicated upon that decision, the Tribe, as stated above, has closed the Fort Apache Indian Reservation to the State of Arizona, its laws, its agents, and agencies, and will take whatever action is requisite to effectuate that closure; and

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe, that the Attorney General of the United States, as Chief Officer of the Department of Justice, be informed that the White Mountain Apache Tribe has determined that: (1) The McCarran Amendment did not waive Tribe's sovereign immunity within Tribe's Reservation, as it pertains to Tribe's aboriginal Salt River rights to the use of water, and has not subjected Tribe's aboriginal rights to the use of water to the control, management, and regulation of the State of Arizona; and (2) The McCarran Amendment did not, in any way, denigrate, diminish, or, in any sense, replace the Tribe's inherent sovereign powers of dominion and self-government within the Fort Apache Indian Reservation, as it pertains to the Tribe's invaluable aboriginal rights to the use of water, and that the Fort Apache Indian Reservation is closed to the State of Arizona, its laws, its regulations, its agents and agencies, and that in the administration of the Gila River General Adjudication Proceedings, W-1, *et seq.*, the Tribe will insist upon the enforcement of its closure against the State of Arizona, all as set forth in this Resolution; and

BE IT FURTHER RESOLVED that the Attorney General of the State of Arizona be informed that the Tribe will not permit entry upon Tribe's Fort Apache Indian Reservation of any official, agent, or agencies of the State of Arizona, as they pertain to the prosecution in the Gila River General Adjudication Proceedings, with particular reference to the Director of the Department of Water Resources, and the Tribe is prepared to take whatever action is requisite to enforce the Tribe's edict that Tribe's

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<sup>61</sup> *United States v. Kagama*, 118 U.S. 375, 384 (1886).

Reservation is closed to the State of Arizona, its laws, agents, and agencies for that purpose; and

BE IT FURTHER RESOLVED that the Attorney General of the United States be likewise informed that the White Mountain Apache Tribe rejects, as totally in error, the assertions by the Department of Justice, that Tribe's aboriginal rights to the use of water are "federal reserved rights," and that the concepts of the *Winters* Doctrine are judicially created, and that the Department of Justice, forthwith, take action in the Gila River General Adjudication to correct the mistaken declaration that Tribe's rights are federal reserved rights and to state that Tribe's rights are aboriginal rights to the use of water, which may be exercised for any beneficial purpose, and which rights are to be measured by the "practicably irrigable acreage," all as reviewed and set forth above in this Resolution;<sup>62</sup> and

BE IT FURTHER RESOLVED that the Chairman of the White Mountain Apache Tribe, Tribe's General and Special Counsel, take all necessary action fully to effectuate the principles and concepts upon which this Resolution has been formulated and adopted.

The foregoing resolution was on December 12, 1994 duly adopted by a vote of ten for and zero against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article IV, Section 1 (a), (f), (i), (s), (t), and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993, and approved by the Secretary of the Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).

**RECEIVED**

MAR 03 1995

**FORT APACHE INDIAN AGENCY  
WHITERIVER, ARIZONA**

  
Chairman of the Tribal Council

  
Secretary of the Tribal Council

<sup>62</sup> *Supra*, p. 10.