

## Calendar No. 260

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2d Session }

SENATE

{ REPORT  
111-119

### TO RESOLVE WATER RIGHTS CLAIMS OF THE WHITE MOUNTAIN APACHE TRIBE IN THE STATE OF ARIZONA, AND FOR OTHER PURPOSES

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JANUARY 21, 2010.—Ordered to be printed

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Mr. DORGAN, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

together with

### ADDITIONAL VIEWS

[To accompany S. 313]

The Committee on Indian Affairs, to which was referred the bill (S. 313) to resolve water rights claims of the White Mountain Apache Tribe in the State of Arizona, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

### PURPOSE

The purpose of S. 313 is to authorize and confirm the White Mountain Apache Tribe's water settlement and authorize funding for a drinking water project on the Tribe's reservation in Arizona.

### BACKGROUND

The Tribe is located on the Fort Apache Indian Reservation, which was established on November 9, 1871. The Reservation is over 2,600 square miles covering some 1.66 million acres in the White Mountains of east central Arizona.

The headwaters and tributaries of the Salt River originate on the Reservation and are the primary source of water for the Tribe and the downstream cities of Avondale, Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale, and Tempe, the Salt River

Project, the Roosevelt Water Conservation District, and other parties to the Gila River and Little Colorado River Adjudication proceedings. Because the Salt River system is a major source of water for the Phoenix metropolitan area, any claim against the system creates uncertainty among many of Arizona's water users.

*Claims filed on behalf of the White Mountain Apache Tribe*

On behalf of the Tribe, the United States, in its capacity as trustee of the Tribe's reserved water rights, filed claims to approximately 180,000 acre-feet of water annually from the Salt River system in the pending Gila River Adjudication in Arizona. The United States also filed claims to water on behalf of the Tribe in the Little Colorado River Adjudication, which is also pending in Arizona.

*The Settlement and major provisions of S. 313, as amended*

After years of negotiation, the Tribe and the non-federal parties<sup>1</sup> entered into a Quantification Agreement (the "Agreement" or "Settlement"), which would, among other things, resolve the Tribe's claims to water by allocating to it a total annual depletion amount of 52,000 acre-feet per year and a maximum annual diversion amount of approximately 99,000 acre-feet per year through a combination of surface water, underground water, and Central Arizona Project (CAP) water sources. The Tribe and all of the non-federal parties have approved the Settlement.

A significant portion of the CAP water allocated to the Tribe will come from the pool of CAP water set aside in the Arizona Water Settlements Act (P.L. 108-451, Sec. 104(a)(1)(A)(iii)) for future Arizona Indian water settlements. Under the Settlement, the Tribe may, with the approval of the Secretary of the Interior, enter into leases within Maricopa, Pinal, Pima, and Yavapai counties for the temporary (not to exceed 100 years) delivery of any portion of the Tribe's CAP water.

The centerpiece of S. 313 and the Agreement is the authorization of construction and funding for a drinking water project on the Tribe's Reservation—the Miner Flat Project. The Project will consist of a dam, reservoir, treatment plant, and water delivery pipeline. The Project will serve the Reservation's 15,000 residents and accommodate a growing population.

Currently, a small well field serves the drinking water needs of the majority of the residents on the Tribe's Reservation, and production from the wells has declined significantly over the last few years. As a result, the Tribe has experienced chronic drinking water shortages. The Tribe is constructing a small diversion project on the North Fork of the White River on the Reservation this year. The Tribe indicates that when the project is completed it will replace most of the lost production from the existing well field, but will not produce enough water to meet the current peak demand of the Tribe's population. The Project would provide a long-term solution for the Tribe's drinking water shortages.

<sup>1</sup>The non-federal parties to the Settlement include the State of Arizona; the Tribe; the Salt River Project Agricultural Improvement and Power District; the Salt River Valley Water Users' Association; the Roosevelt Water Conservation District; the Arizona Water Company; the cities of Phoenix, Mesa, Tempe, Chandler, Glendale, Scottsdale, Avondale, Peoria and Show Low; the Town of Gilbert; the Buckeye Irrigation Company; the Buckeye Water Conservation and Drainage District; and the Central Arizona Water Conservation District.

S. 313 and the Settlement also provide the Tribe opportunities to utilize its water quantified in the Agreement.

S. 313 authorizes approximately \$292 million in federal appropriations. Of this, \$126 million is authorized to construct the Miner Flat Project (Project). Some funding for the Project may be available from sources other than appropriations. In addition to appropriations, the Secretary of the Interior may access other sources of funding available for Indian water settlements. The remaining \$166 million in the bill's federal appropriations are authorized for (1) a \$50 million operation, maintenance, and replacement fund; and (2) a fund for water related resource management and economic development opportunities on the Reservation. For the settlement to become legally binding on all the parties, \$126,193,000 must be appropriated by October 31, 2015. No other appropriations are required for the settlement to become enforceable. Finally, in addition to federal appropriations, non-federal parties will contribute an additional \$152 million in financial and in-kind contributions.

*Tribe's claims against the U.S. that would be waived under S. 313*

The Tribe would provide waivers and releases of its water rights claims in exchange for the water rights quantified in S. 313 and the Agreement; the funds for the Miner Flat Project and for its operation, maintenance, and replacement; and rehabilitation of existing irrigation systems.

The Tribe claims that the United States has breached its trust obligations to the Tribe by suppressing, neglecting, and opposing the reserved water rights of the Tribe. Specifically, the Tribe claims that the United States breached its trust obligations to the Tribe by intentionally destroying thousands of trees and other riparian vegetation along the Tribe's streams to increase water runoff to the Salt River and Theodore Roosevelt Reservoir. The Tribe also claims that the United States cleared thousands of acres of juniper trees and doubled the annual allowable cut of its commercial forests in several reservation watersheds for the purpose of increasing runoff. According to the Tribe, the ecosystem damage from the United States' actions is still negatively affecting the Reservation. Under the Settlement, the Tribe would waive these claims against the United States.

The Tribe would also waive its other breach of trust claims against the United States for, among others things (1) historic failure to maintain approximately 90 miles of irrigation ditches on the Reservation; (2) historic failure to meet the trust obligation to provide a safe drinking water supply for the Tribe; (3) suppression of agricultural irrigation; (4) failure of the Secretary to reserve the Tribe's water from contracts issued downstream for storage in Roosevelt Dam; (5) failure of the Secretary to set aside New Conservation Storage for the Tribe in the 1995–96 enlargement of Roosevelt Reservoir; and (6) failure of the United States to assert the reserved water rights of the Tribe in the Environmental Impact Statement for the reallocation of CAP water.

The Tribe would also waive its claims existing prior to the enforcement date of this legislation against the United States for any claim for allowing trespass, use, and occupancy on the Tribe's Reservation in, on, or along the Black River. The Tribe, however, re-

tains past, present, and future claims against Freeport McMoRan Copper & Gold, Inc., formerly known as Phelps Dodge, in S. 313 for trespass, use, and occupancy of the Reservation in, on, or along the Black River (“Black River Claims”). The legislation does not affect the ability of the Tribe or Freeport McMoRan Copper & Gold, Inc. to assert any claims or defenses against each other regarding the Black River Claims.

#### LEGISLATIVE HISTORY

In the 110th Congress, Senator Kyl introduced S. 3473, the White Mountain Apache Tribe Water Rights Quantification Act of 2008, and the bill was referred to the Committee on Indian Affairs. No action was taken on S. 3473.

In the 111th Congress, a similar bill, S. 313, was introduced on January 26, 2009 by Senator Kyl. Senator McCain is a cosponsor. The bill was referred to the Committee on Indian Affairs. On April 2, 2009, the Committee held a hearing on S. 313. On September 10, 2009, at an open business meeting, the Committee considered S. 313, and a substitute amendment was offered by Senator Barrasso on behalf of Senator Kyl. The Committee approved the substitute amendment and ordered the bill to be favorably reported, with an amendment, to the Senate.

#### SUMMARY OF THE SUBSTITUTE AMENDMENT

During an open business meeting on September 10, 2009, the Committee considered and approved an amendment in the nature of a substitute to S. 313. Like the original bill, the amendment in the nature of the substitute (1) approves, ratifies, and confirms the Settlement resolving the Tribe’s water-related claims in the Gila River and Little Colorado River Adjudications; (2) resolves the Tribe’s claims for money damages against the United States; (3) authorizes the Tribe to execute certain waivers of claims against the United States and other parties; and (4) authorizes funding for the Project and water-related economic development projects benefiting the Tribe.

The substitute amendment, in large part, responds to concerns raised by the Administration. It also makes a number of technical changes to the bill.

Section 7, authorizing the water system, is amended in several places. In particular, the amendment addresses the Administration’s concern that the legislation directs the Secretary to hold the Project in trust for the benefit of the Tribe in perpetuity. Instead, the amendment authorizes the United States to convey title to the Project to the Tribe if certain conditions are met—one condition, contained in section 12(b)(3)(B), is that \$50 million is appropriated for the operation, maintenance, and replacement of the Miner Flat Project.

Section 9, including waivers and releases of claims, amends Section 12 of the introduced bill in several places. As introduced, S. 313 requires that a number of conditions be met by October 31, 2013, in order for the bill’s waiver provisions to take effect. One of the conditions is that approximately \$126 million be deposited in a newly created fund for the construction of the Miner Flat Project. In order to allow for more time to secure appropriations for the

project, the amendment extends the enforceability deadline by two years to 2015.

In addition, at the Administration's request, the substitute amendment (1) adds the retention of claims language included in the underlying Quantification Agreement; and (2) authorizes a waiver of the Tribe's trespass claims against the United States relating to the construction of an existing diversion dam on the Black River. Section 12, authorizing appropriations, amends section 16 of the introduced bill in several places. In order to resolve a potential cost issue, the substitute amendment modifies the funding mechanism for the planning, engineering, design, environmental compliance, and construction of the Miner Flat Project.

One of the funding mechanisms modified by the substitute amendment relates to the Emergency Fund for Indian Safety and Health ("Emergency Fund") that was established by Title 6 of Public Law 110-293, 25 U.S.C. 443c. In the introduced bill, up to \$100 million of the Emergency Fund was authorized to be transferred to the White Mountain Apache Tribe Water Rights Settlement Account if the Secretary determined that annual appropriations were not adequate to complete the Miner Flat Project by the settlement enforceability date. The substitute amendment would require that up to \$50 million be transferred from the Emergency Fund to the White Mountain Apache Water Rights Settlement Subaccount not later than 90 days after the date of enactment of the Act. The substitute amendment also provides that a separate amount, up to \$50 million, may be transferred from the Emergency Fund to the White Mountain Apache Tribe Water Rights Settlement Subaccount if the Secretary determines that annual appropriations will not be sufficient to complete required actions before the settlement enforceability deadline.

While it is the intent of the Committee and bill sponsor that the funding mechanisms in the substitute amendment only apply to the water settlement portion of the Emergency Fund, the Committee notes that the law governing the Emergency Fund requires that the funds be spent according to an Emergency Plan developed jointly by the Attorney General, the Secretary of the Interior, and the Secretary of Health and Human Services. The Committee expects that an Emergency Plan should be completed prior to any funds in the Emergency Fund being distributed. Further, there is no intent that the provisions of the substitute amendment to S. 313 authorize transfers of funds from the amounts set aside for Indian health and public safety pursuant to section 601(f) of Title 6 of Public Law 110-293, 25 U.S.C. 443c(f).

Without increasing the cost of the bill, section 12 of the substitute amendment also includes an authorization for any cost overruns of the Project up to \$25 million. If there are any cost overruns, a corresponding amount would be deducted from the other appropriations authorized in the legislation, resulting in no net increase cost to the bill.

#### SECTION-BY-SECTION ANALYSIS OF S. 313 (SUBSTITUTE AMENDMENT)

##### *Section 1. Short title*

Section 1 provides the short title of the bill as the "White Mountain Apache Tribe Water Rights Quantification Act of 2009."

### *Section 2. Findings and purpose*

Section 2(a) provides that the White Mountain Apache Tribe, the State of Arizona, and the parties to the Quantification Agreement have agreed to permanently quantify the water rights of the Tribe and settle the Tribe's pending claims in the Gila River and Little Colorado River Adjudications in Arizona. It also provides that it is federal policy to settle Indian water rights claims without lengthy and costly litigation.

Section 2(b) states that the bill's purposes are to: (1) Authorize, ratify, and confirm the Agreement as defined in the legislation; (2) authorize and direct the Secretary to execute the Agreement; (3) authorize the appropriations necessary for the United States to meet its obligations under the Agreement; and (4) permanently resolve certain damage claims and all water rights claims of the Tribe.

### *Section 3. Definitions*

This section defines important terms in S. 313.

### *Section 4. Approval of the agreement*

This section authorizes, ratifies, and confirms the Agreement. It also requires the Secretary in implementing the Agreement to comply with the National Environmental Policy Act, the Endangered Species Act, and all other applicable federal environmental laws.

### *Section 5. Tribal water rights*

Section 5(a) provides that the Secretary shall hold the Tribe's water rights in trust and that they cannot be lost by forfeiture or abandonment.

Sections 5(b), (c), and (d) describe the reallocation of and costs associated with CAP water allocated to the Tribe under the Agreement.

Section 5(e) requires the Tribe to enact a tribal water code to govern its water rights.

### *Section 6. Contracts*

Section 6 (a) directs the Secretary to enter into the contract as defined in the legislation to provide, among other things, that the Tribe may enter into contracts or options to lease, contracts to exchange, or options to exchange tribal CAP water in four counties within the State of Arizona.

Section 6(b) specifies the requirements of the contract.

Section 6(c) ratifies, authorizes, and confirms the contract.

Section 6(d) directs the Secretary to execute the contract.

Section 6(e) describes the fees and charges applicable to tribal CAP water.

Section 6(f) provides that no tribal CAP water may be leased, exchanged, forborne or otherwise transferred by the Tribe outside of the State of Arizona.

Section 6(g) ratifies, confirms, and authorizes the leases of tribal CAP water attached as exhibits to the Agreement.

*Section 7. Authorization of rural water system*

Sections 7(a) through (d) authorize the planning, design, and construction of the Miner Flat Project and describe its components, service area, and construction requirements.

Section 7(e) provides that the Secretary is authorized to convey title to the Project to the Tribe after publication in the Federal Register of a statement of findings providing that the conditions specified in this subsection have been satisfied.

Section 7(g) discusses the applicability of the Indian Self-Determination and Education and Assistance Act (25 U.S.C. 450, et seq.) and directs any contracts entered into under this subsection to include the necessary terms to ensure the appropriate stewardship of federal funds.

Section 7(h) requires that the Tribe provide at no cost to the Secretary all land that the Secretary deems necessary for the Project.

*Section 8. Satisfaction of claims*

Section 8(a) provides that the benefits to the Tribe and its members under the bill are in full satisfaction of the Tribe's and its members' claims for water rights and injuries to water rights.

Section 8(b) provides that the Agreement's maximum annual diversion amounts and maximum annual depletion amounts apply to uses of water on any lands outside the Reservation subsequently determined to be part of the Reservation and to uses of water on any fee lands within the Reservation put into trust and made part of the Reservation.

Section 8(c) provides that the Act is not intended to recognize or establish any individual right to water.

*Section 9. Waiver and release of claims*

Section 9(a) authorizes the United States to execute certain waivers of claims in either its capacity as trustee for the Tribe and its members or in its own right. It also authorizes the Tribe to execute waivers in its own capacity and for its members.

Section 9(b) reserves certain rights of and retains certain claims by the Tribe on its own behalf and its members, and the United States as trustee for the Tribe and its members, or in its own right.

Section 9(c) establishes the conditions and timing under which the waivers are effective.

Section 9(d) provides that the enforceability date of the Settlement will be the date that the Secretary publishes a statement of findings in the Federal Register concerning a number of listed conditions. Section 9(d) also provides that, if the Secretary has not published these findings by October 31, 2015, then section 9 providing waivers and releases of claims will not become effective. It also establishes the extent of the water rights available for use on land held in trust for the Tribe and its members.

Section 9(e) provides that there is no effect on the right of the United States to take certain actions relating to human health, safety, or the environment.

Section 9(f) provides that except as specified in the legislation, there is no effect on rights to water for land outside the Reservation boundaries or off-reservation trust land.

Section 9(g) provides that entitlements to water are to be satisfied from the water resources set forth in the Agreement and the legislation.

Section 9(h) sets forth certain prohibited objections of the Tribe and the United States as trustee for the Tribe.

*Section 10. White Mountain Apache Tribe Water Rights Settlement Subaccount*

Section 10(a) establishes the White Mountain Apache Tribe Water Rights Settlement Subaccount within the Lower Colorado River Basin Development Fund. The subaccount consists of the amounts appropriated to the subaccount pursuant subsections (a) and (d) of Section 12, and other amounts as are available, including \$2 million from the State of Arizona as provided in subparagraph 13.3 of the White Mountain Apache Tribe Water Rights Quantification Agreement dated January 13, 2009.

Section 10(b) establishes the conditions for expenditures and withdrawals of all or part of the White Mountain Apache Tribe Water Rights Settlement Subaccount, enforcement of those conditions, limitation on the liability of federal officials, requirements for an expenditure plan by the Tribe, and requirements for annual tribal reporting.

Section 10(c) specifies that the White Mountain Apache Tribe Water Rights Settlement Subaccount is not to be distributed on a per capita basis.

Section 10(d) establishes that amounts in the White Mountain Apache Tribe Water Rights Settlement Subaccount are not to be made available until the enforceability date.

*Section 11. Miscellaneous provisions*

Section 11(a) waives the sovereign immunity of the United States and the Tribe for certain specified civil actions under the Agreement and the Act.

Section 11(b) provides that this Act does not quantify or otherwise affect the water rights or claims of any other Indian tribe other than the Tribe.

Section 11(c) provides a limitation on liability of the United States and directs the Tribe to indemnify the United States for stated purposes.

Section 11(d) provides that the Reclamation Reform Act of 1982 (43 U.S.C. 390aa et seq.) does not apply in specified circumstances.

Section 11(e) transfers and restores to the Tribe and the San Carlos Apache Tribe certain specified portions of named secretarial power site reserves located on the Fort Apache Indian Reservation and the San Carlos Apache Reservation, respectively.

Section 11(f) provides that the lease or exchange of tribal CAP water shall not affect any future allocation or reallocation of CAP water by the Secretary.

Section 11(g) provides that, except with respect to certain restored lands and off-Reservation trust land acquired prior to January 1, 2008, the Tribe may only obtain additional lands taken into trust by the United States through an Act of Congress. It further provides that after-acquired trust lands outside the Reservation shall not include federal reserved water rights and that certain restored lands shall have water rights pursuant to Section 8(b).



Section 11(h) amends Section 3(b)(2) of the White Mountain Apache Tribe Rural Water System Loan Authorization Act (Public Law 110–390; 122 Stat. 4191) to extend the loan repayment commencement date from January 1, 2013 to January 1, 2016 in order to coincide with the Act’s enforceability date.

*Section 12. Authorization of appropriations*

Section 12(a) authorizes appropriations of \$126,193,000 for White Mountain Apache Tribe Rural Water System planning, engineering, design, environmental compliance, and construction including Bureau oversight activities.

Section 12(b) establishes within the Treasury the White Mountain Apache Tribe Settlement Fund, authorizes for deposit an appropriation of \$113,500,000, and prescribes the uses thereof. It also establishes within the Treasury the White Mountain Apache Tribe Maintenance Fund, authorizes for deposit an appropriation of \$50,000,000, and prescribes the uses thereof. It further directs the Secretary to manage and invest the funds and establishes the availability date and conditions for expenditures and withdrawals.

Section 12(c) provides for adjustments to the appropriated amounts in Subsections 12(a) and (b) based upon certain cost indices.

Section 12(d) authorizes a total transfer of up to \$100,000,000 from the Emergency Fund for Indian Safety and Health to the White Mountain Apache Tribe Water Rights Settlement Subaccount. The \$100,000,000 total is the result of two potential transfers. First, if funding is available in the Emergency Fund for Indian Safety and Health account within 90 days from the date of enactment of this bill, the Secretary is required to transfer up to \$50,000,000 from the Emergency Fund to the White Mountain Apache Tribe Water Rights Settlement Subaccount. Second, beginning on January 1, 2012, if the Secretary determines that the enforceability date set out in the bill is not going to be met because the amounts authorized under section 9(a) have not been appropriated, a subsequent transfer of up to \$50,000,000 from the Emergency Fund is authorized.

Section 12(e) authorizes an appropriation of \$2,500,000 for operation, maintenance, and replacement costs of the White Mountain Apache Tribe Rural Water System and provides its availability shall continue until satisfaction of the conditions in Subsection 12(g). It further authorizes use of the White Mountain Apache Tribe Maintenance Fund beginning January 1, 2021 for operation, maintenance, and replacement costs of the White Mountain Apache Tribe Rural Water System.

Section 12(f) authorizes an appropriation of up to \$25,000,000 for WMAT Rural Water System cost overruns. If there are any cost overruns, a corresponding amount would be deducted from the appropriations authorized in 12(b)(2)(B) of the legislation, resulting in no net increase cost to the bill.

Section 12(g) provides conditions for expenditures and withdrawals of appropriated amounts deposited in the White Mountain Apache Tribe Maintenance Fund.

*Section 13. Antideficiency*

Section 13 limits the liability of the United States for failure to carry out obligations or activities required by the Act.

*Section 14. Repeal on failure of enforceability date*

Section 14 repeals S. 313 if the Secretary does not publish the statement of findings under Subsection 9(d) by October 31, 2015 effective beginning on November 1, 2015 and provides for return to the Treasury of amounts appropriated under subsections (a), (b), (d), and (e) of section 12 along with any interest. It further provides for return of other amounts deposited in the White Mountain Apache Tribe Water Settlement Subaccount along with any interest to the respective sources.

*Section 15. Compliance with environmental laws*

Section 15 provides that the Secretary, in carrying out the Act, must comply with applicable federal environmental laws and regulations.

## COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business meeting on September 10, 2009, the Committee on Indian Affairs, by voice vote, adopted S. 313 with an amendment in the nature of a substitute and ordered the bill reported to the Senate, with the recommendation that the Senate do pass S. 313 as reported.

## COST AND BUDGETARY CONSIDERATIONS

*S. 313—White Mountain Apache Tribe Water Rights Quantification Act of 2009*

Summary: S. 313 would approve and ratify a settlement agreement between the White Mountain Apache Tribe and the state of Arizona. The agreement would resolve tribal claims to water rights in the state. As part of that agreement, the bill would authorize the appropriation of funds to construct a rural water system to deliver water to tribal lands. The bill also would establish two trust funds for the tribe to protect and restore tribal lakes and forests, conduct certain economic development projects, and operate and maintain the rural water system. Finally, the bill would authorize appropriations for the Department of the Interior (DOI) to operate and maintain the water system until it is conveyed to the tribe.

Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 313 would increase discretionary spending by \$134 million over the 2010–2019 period and \$66 million after 2019. CBO also estimates that enacting S. 313 would increase direct spending by \$125 million over the 2010–2019 period and \$22 million after 2019. Enacting the legislation would not affect revenues.

S. 313 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) because it would require the tribe to enact a tribal water code and prohibit it from objecting to the drilling or use of some wells. CBO estimates that the cost of complying with those mandates would be small and far below

the threshold established in UMRA (\$69 million in 2009, adjusted annually for inflation).

S. 313 contains no private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 313 is shown in the following table. The costs of this legislation fall within budget functions 300 (natural resources and environment) and 450 (community and regional development).

|   | By fiscal year, in millions of dollars— |      |      |      |      |      |      |      |      |      |               | 2010–<br>2019 |
|---|---|------|------|------|------|------|------|------|------|------|---------------|---------------|
|   | 2010                                    | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2010–<br>2014 | 2010–<br>2019 |
| CHANGES IN SPENDING SUBJECT TO APPROPRIATION <sup>1</sup> |   |      |      |      |      |      |      |      |      |      |               |               |
| Settlement Fund:  |   |      |      |      |      |      |      |      |      |      |               |               |
| Estimated Authorization Level .....                       | 0                                       | 0    | 0    | 0    | 0    | 0    | 132  | 0    | 0    | 0    | 0             | 132           |
| Estimated Outlays .....                                   | 0                                       | 0    | 0    | 0    | 0    | 0    | 132  | 0    | 0    | 0    | 0             | 132           |
| DOI Operation & Maintenance:                              |   |      |      |      |      |      |      |      |      |      |               |               |
| Estimated Authorization Level .....                       | 0                                       | 0    | 0    | 0    | 0    | 0    | *    | *    | *    | *    | 0             | 2             |
| Estimated Outlays .....                                   | 0                                       | 0    | 0    | 0    | 0    | 0    | *    | *    | *    | *    | 0             | 2             |
| Total Changes:  |   |      |      |      |      |      |      |      |      |      |               |               |
| Estimated Authorization Level .....                       | 0                                       | 0    | 0    | 0    | 0    | 0    | 132  | *    | *    | *    | 0             | 134           |
| Estimated Outlays .....                                   | 0                                       | 0    | 0    | 0    | 0    | 0    | 132  | *    | *    | *    | 0             | 134           |
| CHANGES IN DIRECT SPENDING                                |   |      |      |      |      |      |      |      |      |      |               |               |
| Rural Water System: <sup>2</sup>                          |   |      |      |      |      |      |      |      |      |      |               |               |
| Estimated Budget Authority .....                          | 0                                       | 0    | 0    | 0    | 0    | 0    | 50   | 40   | 30   | 20   | 0             | 140           |
| Estimated Outlays .....                                   | 0                                       | 0    | 0    | 0    | 0    | 0    | 44   | 37   | 25   | 19   | 0             | 125           |

<sup>1</sup> Excludes amounts authorized to be appropriated for a Tribal Maintenance Fund because CBO expects those amounts would not be needed until 2021.

<sup>2</sup> CBO estimates that an additional \$22 million would be spent for the water system after 2019.

Note: DOI = Department of the Interior; \* = less than \$500,000.

Amounts may not sum to totals because of rounding.

Basis of estimate: For this estimate, CBO assumes that S. 313 will be enacted by the end of calendar year 2010 and that the necessary amounts will be appropriated when the settlement becomes effective. The enforcement of the settlement agreement depends on the completion of a number of actions by federal, state, local, and tribal entities. CBO expects that those actions will be completed early in fiscal year 2016. The estimated costs for the authorized water projects are based on information from DOI and on historical spending patterns for similar activities.

The White Mountain Apache Tribe and several other parties have signed a settlement agreement resolving a water-rights dispute in northeast Arizona. The United States would become a party to that agreement upon enactment of S. 313, provided that certain other conditions are met. Among those conditions, the Secretary of the Interior would have to publish a statement of findings in the Federal Register indicating that all parties have executed the agreement; the U.S. district court would have to issue a decree concerning the agreement; sufficient funds to construct a rural water system, which CBO estimates would cost \$147 million, would have to be deposited into the White Mountain Apache Tribe Water Rights Settlement Subaccount; and Arizona would have to appropriate \$2 million for the construction of the rural water system.

Should the Secretary not publish the required statement of findings by October 31, 2015, verifying that all conditions necessary to execute the agreement have been met, the agreement would not take effect, and no federal funds could be spent after that date.

*Spending subject to appropriation*

S. 313 would authorize the appropriation of funds for a variety of activities to benefit the White Mountain Apache Tribe. The bill would authorize appropriations to construct a rural water system and to protect and restore tribal lakes and forests, conduct certain economic development projects, and operate and maintain the rural water system. Assuming appropriation of the necessary amounts, CBO estimates that implementing the settlement agreement would increase discretionary spending by \$134 million over the 2010–2019 period and \$66 million after 2019.

Most of the amounts authorized to be appropriated by S. 313 would be allowed to accrue interest on unspent amounts. CBO considers the authority to spend amounts credited as interest on unspent balances of appropriated funds to be an increase in direct spending as discussed later in this cost estimate. CBO expects that funds would be appropriated in the year the settlement becomes effective. If the Congress chose to appropriate funds prior to the year in which those funds would be spent, interest would accrue on the unspent balances, and the legislation's estimated impact on direct spending would be larger.

Settlement Fund. The bill would authorize the appropriation of about \$114 million (plus additional amounts needed because of increases in construction costs) for the White Mountain Apache Tribe Settlement Fund. CBO expects that those funds would be appropriated near the beginning of fiscal year 2016—the enforcement date of the settlement. Funds would be used to protect and restore tribal lakes and forests and for certain economic development projects. CBO expects that the entire amount in the fund (including

adjustments for inflation) would be recorded as an outlay of \$132 million in 2016.

Payments to certain tribal trust funds that are held and managed in a fiduciary capacity by the federal government on behalf of Indian tribes are treated as payments to a nonfederal entity. As a result, CBO expects that the entire amount deposited into the settlement fund would be recorded as an outlay in 2016 when the funds could be spent by the tribe. Subsequently, any use of such funds and interest payments to the tribe would have no effect on the federal budget.

**DOI Operation & Maintenance.** The bill would authorize the appropriation of \$2.5 million for DOI to operate and maintain the new rural water system until 2021 when funds from the tribal maintenance fund could be spent. CBO estimates that operating and maintaining the rural water system would cost about \$500,000 a year over the 2016–2020 period.

**Tribal Maintenance Fund.** The bill would authorize the appropriation of \$50 million (plus additional amounts needed because of increases in construction costs) for the White Mountain Apache Tribe Maintenance Fund. CBO expects that those funds would be appropriated in fiscal year 2021 when the funds could be spent. Funds would be used to operate and maintain the rural water system. CBO expects that the entire amount in the fund (including adjustments for inflation) would be recorded as an outlay of \$66 million in 2021.

**Rural Water System Subaccount.** The bill would authorize the appropriation of \$126 million (plus additional amounts needed because of increases in construction costs) to build a rural water system for the tribe. Following enactment of S. 313, however, the Secretary of the Interior would be authorized to use funds from the Future Indian Water Settlement subaccount established under Public Law 108–451 and designated to implement Indian water settlements in Arizona. CBO expects that amounts in that account would be used to execute the settlement. The expenditure of those funds would increase direct spending (see Direct Spending section, below).

CBO assumes that the full amount necessary to construct the rural water system would be expended from the Future Indian Water Settlement Subaccount, resulting in direct spending. If, instead, the Congress appropriated funds for that purpose, it would reduce the amounts expended from that subaccount and lower the legislation’s estimated impact on direct spending.

The bill also would require the Secretary of the Treasury to transfer such sums as are available—up to \$50 million—from the Emergency Fund for Indian Safety and Health (established under Public Law 110–293) to the rural water system subaccount in 2010. Because no funds have been appropriated for the emergency fund, CBO expects that no funds would be available for transfer to the subaccount in 2010.

#### *Direct spending*

**Future Indian Water Settlement Subaccount.** The Arizona Water Settlements Act (Public Law 108–451) established this subaccount and authorized it to receive up to \$250 million of receipts from the Lower Colorado River Basin Development Fund, with deposits into

the subaccount starting by January 2010. The Colorado River Basin Development Fund collects receipts from the users of the Central Arizona water project and certain other receipts from the sale of electricity generated at federal water projects. Those amounts are available for federal agencies to spend without further appropriation for a variety of purposes including operating and maintaining certain water projects. The Arizona Water Settlements Act provided that amounts deposited in the Future Indian Water Settlement Subaccount may be used for Indian water rights settlements in Arizona approved by the Congress subsequent to its enactment.

CBO expects that funds from the Future Indian Water Settlement Subaccount would be used to construct the rural water system on tribal lands. Based on information from DOI, CBO also expects that the tribe would enter into a contract with the federal government under the Indian Self-Determination and Education Act, which allows Indian tribes to assume responsibilities for programs, functions, and services or activities that would otherwise be carried out by the federal government. Because CBO expects the tribe to assume responsibility for constructing the water system, we expect that construction of that system would begin in 2016 when the tribe would spend funds designated for that purpose. We estimate that constructing the water system would increase direct spending by \$125 million over the 2016–2019 period and by \$22 million after 2019.

Interest Earnings on the Settlement Fund and the Maintenance Fund. Because we expect that funds would be appropriated for both the settlement and maintenance funds during the fiscal years in which those funds would be needed, we estimate that accrued interest earnings would total less than \$500,000 and spending of that interest would have a negligible impact on direct spending.

Estimated impact on state, local, and tribal governments: S. 313 would require the White Mountain Apache Tribe to enact policies that would govern tribal water rights and would prohibit the tribe from objecting to the use of some existing wells or the drilling of new wells pursuant to future adjudication proceedings, as detailed in the agreement. Those provisions would be intergovernmental mandates as defined in UMRA because they would place statutory requirements on the tribe that are separate from provisions of the agreement. CBO estimates that the cost of complying with those mandates would be small and well below the threshold established in UMRA (\$69 million in 2009, adjusted annually for inflation). Furthermore, amounts authorized for the settlement fund could be used to develop the tribal water code.

Other provisions of the bill would benefit the tribe. Any costs to the tribe from those provisions would be incurred voluntarily as a result of entering into the settlement agreement.

Estimated impact on the private sector: S. 313 contains no private-sector mandates as defined in UMRA.

Estimate prepared by: Federal costs: Jeff LaFave; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Marin Randall.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## EXECUTIVE COMMUNICATIONS



## United States Department of the Interior

BUREAU OF RECLAMATION  
Washington, DC 20240

NOV 10 2009

IN REPLY REFER TO:

The Honorable Byron Dorgan  
Chairman, Senate Committee on  
Indian Affairs  
United States Senate  
Washington, DC 20510

Dear Chairman Dorgan:

In response to your request, this letter presents the views of the Administration regarding S. 313, the "White Mountain Apache Tribe Water Rights Quantification Act," as reported by the Committee on Indian Affairs on September 10, 2009.

I want to begin by emphasizing that for over twenty years, the federal government has acknowledged that negotiated Indian water rights settlements are preferable to protracted and divisive litigation. Our policy of support for negotiations is premised on a set of general principles including that the United States participate in water settlements consistent with its responsibilities as trustee to Indians; that Indian tribes receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; that Indian tribes should realize value from confirmed water rights resulting from a settlement; and that settlements are to contain appropriate cost-sharing proportionate to the benefits received by all parties benefiting from the settlement. Ultimately this Administration's goal is to engage with settlement parties early so that we can address issues during negotiation rather than waiting until legislation is introduced in Congress.

At the heart of this bill are provisions ratifying and approving the White Mountain Apache Quantification Agreement dated January 13, 2009, a settlement reached between the tribe and other non-federal parties regarding the quantification of the Tribe's water rights in Arizona. S. 313 requires the Bureau of Reclamation to plan, design, construct, operate, maintain, replace, and rehabilitate a rural water system to serve the White Mountain Apache tribe. The rural water system authorized through this bill would replace and expand the current water delivery system on the Reservation, which relies on a diminishing groundwater source and is quickly becoming insufficient to meet the needs of the Reservation population. The Reservation's need for reliable and safe drinking water is not in question. S. 313 also establishes a trust fund for the operation and maintenance of the system to be constructed. This legislation is the culmination of

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cooperative negotiations among the Tribe and many non-Indian water users throughout northern and central Arizona. The negotiations were focused on the need for a long term solution to the problems of an inadequate Reservation domestic water supply and quantifying the Tribe's water rights. The parties are to be commended for their determined efforts to reach an agreement as well as the work they have continued to put into amending the settlement legislation to address the Administration's concerns.

I testified before the House Committee on Natural Resources, Subcommittee on Water and Power on July 21, 2009, on House companion bill H.R. 1065. The House legislation was identical to S. 313 prior to the amendments made by the Senate Committee on Indian Affairs during the markup. As reflected by the changes made in the marked up version of S. 313, substantial work has been done and refinements made to this settlement by the parties and the Arizona delegation. We would like to continue to work with the parties and the sponsors to address certain remaining concerns to make this a settlement that the Administration could support. This set of comments focuses on the areas in this legislation that were improved by the Senate markup as well as those areas where the Administration believes additional work and changes to the legislation are needed.

First, we note with approval changes made in the Findings contained in section 2 of S. 313. Although we do not consider a Findings section to be necessary and would prefer to omit it, if it is included, it should reflect Federal policy accurately. We especially appreciate the emphasis in section 2(a)(5) on the positive results of achieving certainty concerning the Tribe's water rights, which include assisting the Tribe in achieving self-determination and self-sufficiency, as well as providing opportunities for economic development for the entire region.

Second, new definitions of the Lower Basin Development Fund and Indian tribe are acceptable. Third, the Administration notes that changes in the wording at the beginning of section 5(a) do not change the substance of the Tribe's federal reserved water rights as quantified under this Act but could raise implementation questions. We would like to further discuss this section with the parties.

Fourth, the Administration's testimony on the House bill raised serious concerns with the provision in section 7(e) of the authorizing legislation that provides that the WMAT Rural Water System will be held in trust by the United States. The unusual and explicit statement in the legislation establishing the trust has the effect of creating substantial financial and other obligations on the part of the United States. Moreover, as the testimony emphasized, the Administration believes transferring title to the domestic water supply system is more consistent with concepts of self determination and tribal

sovereignty and more in keeping with other recent legislation that provides tribes with assets and opportunities that they then can control as reservation economies and conditions evolve. We believe that this approach of offering assistance with the goal of tribal self-sufficiency is preferable to creating an expectation that the Federal government will be responsible for permanently operating and subsidizing reservation infrastructure.

Following the House testimony, we are pleased to note that the sponsors and parties to S. 313 have made changes to this provision of the bill that are a significant start in the right direction. New language in the bill as marked up authorizes the transfer of title to the Tribe once a series of criteria have been met. As we have explained to the proponents of this settlement, the new language is an improvement over the original language. However the bill should establish a clearer requirement that the Tribe assume ownership for the system and should be consistent with the processes laid out in the Aamodt settlement (S. 1105) and the Crow settlement (S. 375). An attachment to this letter includes language that we recommend to satisfy our concerns. We will continue to work with the parties to the settlement to achieve appropriate and workable language.

Fifth, we note with approval changes made following markup in section 7(g) providing appropriate requirements for the use of a contract under the Indian Self Determination Act in the context of this settlement. The amended language allows the Secretary of the Interior to require appropriate accounting and review measures so that the Secretary will have the tools to ensure that Federal funds are expended as intended if the Tribe exercises the option of constructing the rural water system itself through a Self Determination Act contract.

Sixth, while improvements have been made to the waivers contained in section 9 of S. 313, including the addition of a retention section that is largely consistent with the retention section in other pending settlements, as well as a waiver of claims against the United States with respect to Freeport McMoran Copper and Gold, Inc.'s occupation of reservation lands, the Administration continues to have concerns about the waiver section. An attachment to this letter includes language that we recommend to satisfy our concerns.

Seventh, we have technical concerns regarding the edits made in section 10 regarding the White Mountain Apache Tribe Water Rights Settlement Subaccount. To be consistent with the provisions in section 7(g) that would apply if the Tribe exercises its option to enter into a contract with the Bureau of Reclamation under which it would plan, design, and construct the rural water system called for under this Act, this subaccount should consist of funds appropriated to the Secretary of the Interior. The provisions that have been added to this section at section 10(b)(1) allowing the Tribe to "withdraw any portion of the White Mountain Apache Tribe Water Rights Settlement Subaccount" are not consistent with the concept of a Self Determination Act contract as laid out in section 7(g). The Administration believes that the money authorized to be appropriated for planning, design, and construction of the rural water system in section 12(a) should be

appropriated to the Secretary to carry out the activities authorized in section 7. The funds should either be used by Reclamation to construct the rural water system or else be transferred to the Tribe within the sideboards of an Indian Self Determination Act contract as described in section 7(g). There should be no provisions in section 10 allowing the money appropriated for these purposes to be withdrawn by the Tribe. As the Administration stated in its testimony before the House, the legislation needs to clarify whether the Secretary is being called upon to establish a trust fund to be controlled by the Tribe or to accomplish the construction through an Indian Self-Determination and Education Assistance Act (ISDEAA) contract.

Eighth, the United States objects to Section 11(a) -- which waives the sovereign immunity of the United States for "interpretation or enforcement of this Act or the Agreement" in "a United States or State court." This subsection should be eliminated. This waiver is unnecessary, as demonstrated by the absence of such a waiver in similar bills, such as S. 1105, the Aamodt Litigation Settlement Act, and S. 375, the Crow Tribe Water Rights Settlement Act. Further, this provision will engender additional litigation -- and likely in competing state and federal forums -- rather than resolving the water rights disputes underlying adjudication.

Ninth, the Administration has some concerns about section 12 of S. 313 after markup. There are some aspects of this section that are improvements. For example, authorizing funding for water development activities to be carried out directly by the Tribe rather than the Secretary is consistent with the goals of self-determination and self-sufficiency and will allow the Tribe to prioritize what projects to carry out with available funds. The Administration also notes with approval section 12(f) of the bill, providing that if the Secretary determines that the amount authorized to be appropriated for planning, design, and construction of the rural water system is not sufficient, up to \$25 million can be transferred from the trust fund established for tribal water development to the account being used to cover the costs of the rural water system. This provision puts the risk of a cost overrun upon the Tribe rather than upon the Federal government and reduces the risk to the Federal government of approving this settlement prior to the completion of further studies to better determine the true cost of developing the rural water system as called for under this Act.

However there are other aspects of this section that raise questions. Most critically, the Administration still has questions about what would constitute an appropriate amount of federal funding for the funds that would be established under section 12 of S. 313. Our analysis of this would include consideration of (1) the uses to which the \$113.5 million development fund would be put (which are not clearly specified, given the amount of latitude given to the Tribe in section 12(b)(2)(C) to spend the funds in a number of very different ways); (2) the potential for a non-Federal contribution, based on any non-Indian benefits received, to the settlement; and (3) the appropriate size of a trust fund to subsidize the operation, maintenance and repair (OM &R) costs of the domestic water supply system.

Also, the Administration notes that only \$4.95 million of the \$113.5 million authorized to be appropriated in section 12(b)(2)(B) is tied to settlement implementation. Other than the \$4.95 million provided for rehabilitation of irrigation systems on the reservation (which must be appropriated in order for a part of the tribal waivers to come into effect), the Administration does not believe the money authorized for the development fund is consideration for this settlement. Given the benefits being obtained by the Tribe under this settlement, the Administration would consider the approximately \$109 million of additional funding for a development fund authorized under this bill to be excessive if it were viewed as settlement consideration. This \$109 million of funding is subject to appropriations and not a part of the conditions precedent that must be accomplished in order for this settlement to be final.

In addition, we are still analyzing the provisions in section 12(d) mandating the transfer of any available funds up to \$50 million from the Emergency Fund for Indian Safety and Health established by 22 U.S.C. 7601 et. seq.. This provision appears to place the settlement approved for the White Mountain Apache Tribe as the top priority for any funds made available from the Emergency Fund for Indian Safety and Health. This provision appears to directly undermine the provisions of the original authorization bill specifying that the funding be allocated in accordance with a Secretarial plan.

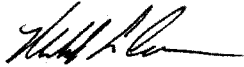
As an overarching issue that remains in the post-markup legislation, we note that the bill would require all of the funding for the rural water system to be appropriated by October 31, 2015. This is only two years later than in the bill as introduced. The bill seems to contemplate that all the funding will be appropriated before Reclamation, or the Tribe under an Indian Self Determination Act contract, is capable of actually completing construction. Given the realities of federal budgeting, it would be much more realistic to provide a longer period to budget for what are ultimately determined to be the appropriate federal costs of this system. To the extent that one of the factors driving the settlement proponents to ask for this money upfront is a desire for waivers that come into effect earlier, we would suggest that they look at other settlements involving construction where waivers are able to come into effect but are subject to nullification if construction does not get completed within the time frame established in the settlement agreement and authorizing legislation.

The Administration does not object to two technical changes that were made during the markup of the House companion to this legislation by the Subcommittee on Water and Power of the House Natural Resources Committee on September 30, 2009. In addition to the changes that were adopted during the Senate markup, at the House markup clarifying changes were made in sections 7(e)(2)(C) (eliminating language that set an apparent limit on the time period during which title to the rural water system can be transferred) and section 12(g) (clarifying that accrued interest as well as appropriated funds available in the Maintenance Fund would be accessible when the given criteria are met).

While we still have concerns with this bill, the Administration is committed to working with Congress and all parties concerned in developing a settlement that the Administration can fully support. If the parties continue to negotiate with the same good faith they have shown thus far, we are hopeful that an appropriate and fair settlement can be reached that will contribute to long-term harmony and cooperation among the parties.

Thank you for the opportunity to present these views for the record.

Sincerely,



Michael L. Connor  
Commissioner

cc: The Honorable John Barrasso  
Vice Chair, Senate Committee on Indian Affairs

Attachment 1: Title Transfer Language

(a) Conveyance of the WMAT rural water system.—

(1) IN GENERAL.—Subject to paragraph (2), on completion of the construction of the WMAT rural water system, the Secretary shall convey to the White Mountain Apache Tribe all right, title and interest to the system, including any land or interests in land located within the boundaries of the Reservation that is acquired by the United States for the construction of the WMAT rural water system.

(2) CONDITIONS FOR CONVEYANCE. — The Secretary shall not convey the WMAT rural water system under paragraph (1) until the Secretary makes a finding that:

(A) Operating Criteria, Standing Operating Procedures, an Emergency Action Plan, and first filling and monitoring criteria have been established for the system;

(B) the system is substantially complete;

(C) the funds authorized to be appropriated under section 12(b)(3)(B) have been appropriated and deposited in the WMAT Maintenance Fund; and

(D) the White Mountain Apache Tribe has been afforded a period not to exceed one year to operate the system with the assistance of the Bureau after the system is substantially complete and Standard Operating Procedures have been established.

(3) Liability. —

(A) In General. — Effective on the date of the conveyance under this subsection, the United States shall not be held liable by any court for damages of any kind arising out of any act, omission, or occurrence relating to the land or facilities conveyed, other than damages caused by acts of negligence committed by the United States, or by employees or agents of the United States, prior to the date of conveyance.

(B) Tort Claims. — Nothing in this section increases the liability of the United States beyond the liability provided in chapter 171 of title 28, United States Code (commonly known as the “Federal Tort Claims Act”).

## Attachment 2

This document includes the edits that the Administration requests in the waiver section of the WMAT settlement legislation in redline form.

## SEC. 9. WAIVER AND RELEASE OF CLAIMS.

## (a) In General.—

(1) CLAIMS AGAINST THE STATE AND OTHERS.—Except as specifically retained in subsection (b)(1) and notwithstanding any provisions to the contrary in the Agreement, the Tribe, on behalf of itself and its members, and the United States, acting in its capacity of trustee for the Tribe and its members, as part of the performance of their obligations under the Agreement, are authorized to execute a waiver and release of any claims against the State (or any agency or political subdivision of the State), or any other person, entity, corporation, or municipal corporation under Federal, State, or other law for all—

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(A)(i) past, present, and future claims for water rights for the reservation and off-reservation trust land arising from time immemorial and, thereafter, forever; and

(ii) past, present, and future claims for water rights arising from time immemorial and, thereafter, forever, that are based on aboriginal occupancy of land by the Tribe, its members, or their predecessors;

(B)(i) past and present claims for injury to water rights for the reservation and off-reservation trust land arising from time immemorial through the enforceability date;

(ii) past, present, and future claims for injury to water rights arising from time immemorial and, thereafter, forever, that are based on aboriginal occupancy of land by the Tribe and its members, or their predecessors; and

(iii) claims for injury to water rights arising after the enforceability date for the reservation and off-reservation trust land resulting from off-reservation diversion or use of water in a manner not in violation of the Agreement or State law; and

(C) past, present, and future claims arising out of or relating in any manner to the negotiation, execution, or adoption of the Agreement, an applicable settlement judgement or decree, or this Act.

(2) CLAIMS AGAINST TRIBE.—Except as specifically retained in subsection (b)(3) and notwithstanding any provisions to the contrary in the Agreement, the United States, in all its capacities (except as trustee for an Indian tribe other than the Tribe), as part of the performance of its obligations under the Agreement, is authorized to execute a waiver and release of any and all claims against the Tribe, its members, or any agency, official, or employee of the Tribe, under Federal, State, or any other law for all—

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(A) past and present claims for injury to water rights resulting from the diversion or use of water on the reservation and on off-reservation trust land arising from time immemorial through the enforceability date;

(B) claims for injury to water rights arising after the enforceability date resulting from the diversion or use of water on the reservation and on off-reservation trust land in a manner not in violation of the Agreement; and

(C) past, present, and future claims arising out of or related in any manner to the negotiation, execution, or adoption of the Agreement, an applicable settlement judgement or decree, or this Act.

(3) CLAIMS AGAINST UNITED STATES.—Except as specifically retained in subsection (b)(2) and notwithstanding any provisions to the contrary in the Agreement, the Tribe, on behalf of itself and its members, as part of the performance of the obligations of the Tribe under the Agreement, is authorized to execute a waiver and release of any claim against the United States, including agencies, officials, or employees of the United States (except in the capacity of the United States as trustee for other Indian tribes), under Federal, State, or other law for any and all—

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(A)(i) past, present, and future claims for water rights for the reservation and off-reservation trust land arising from time immemorial and, thereafter, forever; and

(ii) past, present, and future claims for water rights arising from time immemorial and, thereafter, forever that are based on aboriginal occupancy of land by the Tribe, its members, or their predecessors;

(B)(i) past and present claims relating in any manner to damages, losses, or injuries to water, water rights, land, or other resources due to loss of water or water rights (including damages, losses, or injuries to hunting, fishing, gathering, or cultural rights due to loss of water or water rights, claims relating to interference with, diversion, or taking of water, or claims relating to failure to protect, acquire, or develop water, water rights, or water infrastructure) within the reservation and off-reservation trust land that first accrued at any time prior to the enforceability date;

(ii) past, present, and future claims for injury to water rights arising from time immemorial and, thereafter, forever that are based on aboriginal occupancy of land by the Tribe, its members, or their predecessors; and

(iii) claims for injury to water rights arising after the enforceability date for the reservation and off-reservation trust land resulting from the off-reservation diversion or use of water in a manner not in violation of the Agreement or applicable law;

(C) past, present, and future claims arising out of or relating in any manner to the negotiation, execution, or adoption of the Agreement, an applicable settlement judgment or decree, or this Act;

(D) future claims relating in any manner to the availability and appropriation



of United States funds to carry out the provisions of the Agreement or this Act:

(E) past and present claims relating in any manner to pending litigation of claims relating to the water rights of the Tribe for the reservation and off-reservation trust land;

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(F) past and present claims relating to the operation, maintenance, and replacement of existing irrigation systems on the reservation constructed prior to the enforceability date that first accrued at any time prior to the enforceability date, which waiver shall only become effective on the full appropriation and payment to the Tribe of \$4,950,000 authorized by section 12(b)(2)(B);

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(G) future claims relating to operation, maintenance, and replacement of the WMAT rural water system, which waiver shall only become effective on the full appropriation of funds authorized by section 12(b)(3)(B) and the deposit of those funds in the WMAT Maintenance Fund;

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(H) past and present breach of trust and negligence claims for damage to the land and natural resources of the Tribe caused by riparian and other vegetative manipulation by the United States for the purpose of increasing water runoff from the reservation that first accrued at any time prior to the enforceability date; and

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(I) past and present claims for trespass, use, and occupancy of the reservation in, on, and along the Black River that first accrued at any time prior to the enforceability date.

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(4) EFFECT ON CLAIMS. —Nothing in this Act expands, diminishes, or in any way impacts any claim the Tribe may assert, or any defense the United States may assert, concerning title to lands outside the current boundary of the reservation.

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(b) Reservation of Rights and Retention of Claims.—

(1) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS BY TRIBE AND UNITED STATES.—

(A) IN GENERAL.—Notwithstanding the waiver and release of claims authorized under subsection (a)(1), the Tribe, on behalf of itself and the members of the Tribe, and the United States, acting as trustee for the Tribe and members of the Tribe, shall retain any right—

(i) subject to subparagraph 16.9 of the Agreement, to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members of the Tribe under the Agreement or this Act in any Federal or State court of competent jurisdiction;

(ii) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe under the judgment and decree entered by the court in the Gila River adjudication proceedings;

(iii) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe under the judgment and decree entered by the court in the

Little Colorado River adjudication proceedings;

(iv) to object to any claims by or for any other Indian tribe, Indian community or nation, or dependent Indian community,

~~Deleted: or the United States on behalf of such a tribe, community, or nation;~~

(v) to participate in the Gila River adjudication proceedings and the Little Colorado River adjudication proceedings to the extent provided in subparagraph 14.1 of the Agreement;

(vi) to assert any claims arising after the enforceability date for injury to water rights not specifically waived under this section;

(vii) to assert any past, present, or future claim for injury to water rights against any other Indian tribe, Indian community or nation, dependent Indian community, or allottee; and

~~Deleted: or the United States on behalf of such a tribe, community, nation, or allottee~~

(viii) to assert any past, present, or future claim for trespass, use, and occupancy of the reservation in, on, or along the Black River against Freeport-McMoRan Copper & Gold, Inc., Phelps Dodge Corporation, or Phelps Dodge Morenci, Inc. (or a predecessor or successor of those entities), including all subsidiaries and affiliates of those entities.

(B) AGREEMENT.—On terms acceptable to the Tribe and the United States, the Tribe and the United States are authorized to enter into an agreement with Freeport-McMoRan Copper & Gold, Inc., Phelps Dodge Corporation, or Phelps Dodge Morenci, Inc. (or a predecessor or successor of those entities), including all subsidiaries and affiliates of those entities, to resolve the claims of the Tribe relating to the trespass, use, and occupancy of the reservation in, on, and along the Black River.

(2) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS BY TRIBE AGAINST UNITED STATES.—Notwithstanding the waiver and release of claims authorized under subsection (a)(3) and notwithstanding any provisions to the contrary in the Agreement, the Tribe, on behalf of itself and the members of the Tribe, shall retain any right—

(A) subject to subparagraph 16.9 of the Agreement, to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members under the Agreement or this Act, in any Federal or State court of competent jurisdiction;

(B) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members under the judgment and decree entered by the court in the Gila River adjudication proceedings;

(C) to assert claims for injuries to, and seek enforcement of, the rights of the Tribe and members under the judgment and decree entered by the court in the Little Colorado River adjudication proceedings;

(D) to object to any claims by or for any other Indian tribe, Indian community or nation, or dependent Indian community;

~~Deleted: or the United States on behalf of such a tribe, community, or nation~~

(E) to assert past, present, or future claims for injury to water rights or any

other claims other than a claim to water rights, against any other Indian tribe, Indian community or nation, ~~or dependent Indian community;~~

~~(F) to remedies, privileges, immunities, powers, and claims not specifically waived under this Act; and~~

~~(G) to assert any claim arising after the enforceability date for a future taking by the United States of reservation land, off-reservation trust land, or any property rights appurtenant to that land, including any water rights set forth in paragraph 4.0 of the Agreement.~~

**(3) RESERVATION OF RIGHTS AND RETENTION OF CLAIMS BY UNITED STATES.**

Notwithstanding the waiver and release of claims authorized under subsection (a)(2), the United States shall retain any right to assert any claim not specifically waived in that subsection.

**(c) Effectiveness of Waiver and Releases.**—Except as otherwise specifically provided in subparagraphs (E) and (F) of subsection (a)(3), the waivers and releases under subsection (a) shall become effective on the enforceability date.

**(d) Enforceability Date.**—

**(1) IN GENERAL.**—This section takes effect on the date on which the Secretary publishes in the Federal Register a statement of findings that—

(A)(i) to the extent the Agreement conflicts with this Act, the Agreement has been revised through an amendment to eliminate the conflict; and

(ii) the Agreement, as so revised, has been executed by the Secretary, the Tribe, and the Governor of the State;

(B) the Secretary has fulfilled the requirements of sections 5 and 6;

(C) the amount authorized by section 12(a) has been deposited in the White Mountain Apache Tribe Water Rights Settlement Subaccount;

(D) the State funds described in subparagraph 13.3 of the Agreement have been deposited in the White Mountain Apache Tribe Water Rights Settlement Subaccount;

(E) the Secretary has issued a record of decision approving the construction of the WMAT rural water system in a configuration substantially similar to that described in section 7;

(F) the judgments and decrees substantially in the form of those attached to the Agreement as exhibits 12.9.6.1 and 12.9.6.2 have been approved by the respective trial courts; ~~and~~

~~(G) the waivers and releases authorized and set forth in subsection (a) have been executed by the Tribe and the Secretary.~~

**(2) FAILURE OF ENFORCEABILITY DATE TO OCCUR.**—If, because of the failure of the enforceability date to occur by October 31, 2015, this section does not become effective, the Tribe and its members, and the United States, acting in the capacity of trustee for the Tribe and its members, shall retain the right to assert past, present,

~~Deleted: , or the United States on behalf of such a tribe, community, or nation~~

~~Deleted: (F) to assert claims arising after the enforceability date for injury to water rights resulting from the drilling of wells or pumping of water from land located within national forest land as of the effective date of the Agreement in the south 1/2 of T. 9 N., R. 24 E.; south 1/2 of T. 9 N., R. 25 E.; north 1/2 of T. 8 N., R. 24 E.; north 1/2 of T. 8 N., R. 25 E.; or:~~

~~(i) title to that land is no longer retained by the United States; or,~~  
~~(ii) water from that land is transported off the land for municipal or industrial use;~~  
~~(G) to assert any claims arising after the enforceability date for injury to water rights not specifically waived under this section;~~

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and future water rights claims and claims for injury to water rights for the reservation and off-reservation trust land.

(3) NO RIGHTS TO WATER.—On the occurrence of the enforceability date, all land held by the United States in trust for the Tribe and its members shall have no rights to water other than those specifically quantified for the Tribe and the United States, acting in the capacity of trustee for the Tribe and its members, for the reservation and off-reservation trust land pursuant to paragraph 4.0 of the Agreement.

(e) United States Enforcement Authority.—Nothing in this Act or the Agreement affects any right of the United States to take any action, including environmental actions, under any laws (including regulations and the common law) relating to human health, safety, or the environment.

(f) No Effect on Water Rights.—Except as provided in paragraphs (1)(A)(ii), (1)(B)(ii), (3)(A)(ii), and (3)(B)(ii) of subsection (a), nothing in this Act affects any rights to water of the Tribe, its members, or the United States acting as trustee for the Tribe and members, for land outside the boundaries of the reservation or the off-reservation trust land.

(g) Entitlements.—Any entitlement to water of the Tribe, its members, or the United States acting as trustee for the Tribe and members, relating to the reservation or off-reservation trust land shall be satisfied from the water resources granted, quantified, confirmed, or recognized with respect to the Tribe, members, and the United States by the Agreement and this Act.

(h) Objection Prohibited.—Except as provided in subsection (b)(2)(F), the Tribe and the United States acting as trustee for the Tribe shall not—

(1) object to the usage of any well located outside the boundaries of the reservation or the off-reservation trust land, as in existence on the enforceability date; or

(2) object to, dispute, or challenge after the enforceability date the drilling of any well or the withdrawal and use of water from any well in the Little Colorado River adjudication proceedings, the Gila River adjudication proceedings, or any other judicial or administrative proceeding.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact that would be incurred in carrying out S. 313. The Committee believes that the regulatory impact of S. 313 will be minimal.

## ADDITIONAL VIEWS

On September 10, 2009, this Committee held a business meeting and voted to report S. 313, the White Mountain Apache Tribe Water Rights Quantification Act of 2009 (the “legislation” or S. 313). On November 10, 2009, the Administration, through Commissioner of the Bureau of Reclamation Michael L. Connor, submitted a views letter (“Views Letter”) regarding the legislation as reported by the Committee.

The Views Letter acknowledges that “[a]s reflected by the changes made in the marked up version of S. 313, substantial work has been done and refinements made to this settlement by the parties and the Arizona delegation.” (Views Letter, p. 2). The Views Letter notes with approval a number of changes that the White Mountain Apache Tribe (the “Tribe”) agreed to make in response to the Administration’s concerns relating to, among other things, (1) the findings, (2) the definitions, (3) potential cost overruns of the Miner Flat Dam and Reservoir (the “Miner Flat Project”), (4) funding for water development activities, and (5) the contract provisions under the Indian Self Determination Act. The Views Letter also emphasizes improvements in areas such as (1) waivers and (2) the title transfer of the Miner Flat Project.

The White Mountain Apache Tribe (the “Tribe”) has sent Senator Kyl and me a letter that responds to the issues raised by Commissioner Connor in the Views Letter. I would like to submit portions of the responses from the Tribe’s letter so that the Report also reflects the Tribe’s responses to the letter:

\* \* \* \* \*

### **1. The Conditions Required for the U.S. to Convey to the Tribe the Miner Flat Project Are Reasonable and Appropriate Given the Complex Nature of the Project**

At the Administration’s request, the Tribe agreed to accept title to the Miner Flat Project once the following three conditions have been met: (1) The project is declared substantially complete; (2) the funds authorized to be appropriated for the operation, maintenance, and replacement (“OM&R”) of the project have been deposited into the WMAT Maintenance Fund; and (3) the Tribe has operated the project for five years. S. 313, Section 7(e)(2). Commissioner Connor believes “this new language is an improvement over the original language.” (Views Letter, p. 3)

The Views Letter, however, recommends several changes, none of which the Tribe believes are necessary or warranted. For example, it recommends reducing the time period that the Tribe is required to operate the project from five years to one year. The Miner Flat Project is a relatively complex municipal water supply project comprised of a dam, reservoir, water treatment plant, 55 mile long

water transmission pipeline, several pumping stations, and connected distribution systems. The Tribe will need to operate the project for several years before it has the requisite experience and technical expertise to accept title to the project from the United States. It is unreasonable for the United States to expect the Tribe to have the requisite expertise to operate a Reservation-wide drinking water system in only one year. Finally, the language in the bill concerning the title transfer is eminently reasonable since at least seven other previously authorized Reclamation Indian drinking water projects are held in trust in perpetuity by the United States.

The Views Letter also recommends language limiting the liability of the United States associated with the Miner Flat Project that becomes effective once the conditions for conveyance have been met. S. 313, however, already authorizes a waiver of any claims the Tribe may have against the United States relating to the OM&R of the Miner Flat Project. (The waiver becomes effective once the funds authorized under the legislation for the OM&R are deposited into the WMAT Maintenance Fund. See S. 313, Section 9(a)(3)(F).) As a result, the additional language concerning the United States' liability is unnecessary.

## **2. The Waivers Are Appropriate and Consistent With Previous Arizona Indian Water Settlements**

Attachment 2 of the Views Letter recommends several unnecessary revisions regarding waiver language. For example, the changes suggested to the introductory paragraphs in section 9(a)(1), (2), and (3) are editorial changes that add nothing to the clarity of the waivers. The first suggested change of switching the word "provided" to "specifically retained" is unnecessary since the referenced subparagraphs make it absolutely clear that the Tribe and the United States "shall retain" any claims listed in the subparagraph. The second suggested change of adding the words "and notwithstanding any provision to the contrary in the Agreement" creates confusion over the effect of the waivers by creating the implication that some provision of the underlying settlement agreement ("Agreement") is inconsistent with the language of the waivers. There is no inconsistency between the waivers and the Agreement and neither the Department nor anyone else has identified any such inconsistency. If there were an inconsistency, which there is not, that should be addressed directly by revising the language of the Agreement, not adding some imprecise wording to the waivers.

The suggested addition of a new subparagraph 9(a)(3)(D) to the Tribe's waiver of claims against the United States is unnecessary in light of the language of section 13 of the legislation, which incorporates the federal Antideficiency Act. This proposed wording has never been used in any prior Arizona Indian water settlements legislation and the inclusion of the proposed language in this instance could be used as an argument to infer that such a claim was not waived in the earlier settlements. The inclusion of the antideficiency provision is sufficient protection against such claim under federal law.

The suggested deletion of the words "or the United States on behalf of such a tribe, community, nation or allottee" from the reten-

tions set forth in subparagraphs 9(b)(1)(A)(iv), (vii), and (b)(2)(D) and (E) would preclude the Tribe from objecting to conflicting water claims and claims for injuries to the water rights of the Tribe when those claims are asserted by the United States on behalf of another tribe. In essence, the United States is creating the dichotomy where the Tribe could object to those claims if they were asserted directly by another tribe, but not when the United States was asserting the claims on behalf of another tribe. The suggestion of this language deletion raises serious questions whether the United States is breaching its trust responsibility to the Tribe and not protecting the water rights the Tribe is securing through this settlement. The language proposed for deletion has been included in several of the prior Arizona Indian water settlement agreements.

The Tribe opposes the proposed addition of language to subparagraph 9(b)(2)(F) in Attachment 2, as it injects concepts not addressed by the waivers since they are, by their terms, limited to waivers and retentions of claims. No such proposed language has been included in any prior Arizona water settlement act or agreement.

The Tribe is opposed to deletion of section 9(b)(2)(F) as suggested in Attachment 2 to the Views Letter. The suggested deletion of language essential for the protection of the Tribe's ground water and surface water rights accentuates the conflict of interests that permeates the Department of Interior's trust obligation to the Tribe. The current language was inserted to protect the Tribe's Northern boundary for a distance of 12 miles where it abuts the National Forest. Presently, there is no threat to the Tribe's agreed to water use rights. The Tribe has constructed a housing development along the northern boundary. Future Tribal plans project up to as many as 30,000 homes and commercial development along this 12 mile corridor next to national forest lands. If national forest lands along this common boundary are traded or sold, or if the Forest Service allows pumping of water from national forest land along the Tribe's boundary for non-Indian municipal use, injury could occur to the Tribe's water rights as agreed to in the Agreement. The current reservation of rights and retention of claims by the Tribe is necessary to protect the integrity of the Tribe's water rights in the Agreement.

The addition of the proposed new subparagraph 9(d)(1)(G) is unnecessary since the definition of the Agreement includes all of the attached exhibits, which includes the waivers, and subsection 9(d)(1)(A)(ii) already requires the Tribe and the Secretary to execute the waivers as part of the Agreement.

The Tribe also objects to the proposed language in section 9(a)(4) of Attachment 2 of the Views Letter. The Tribe has a long-standing claim (unrelated to water) that approximately 16,000 acres of reservation land along the 1871 Executive Order Northern boundary of the Fort Apache Indian Reservation were erroneously surveyed outside of the Tribe's reservation and placed in the National Forest. The language that the Views Letter proposes in the subsection entitled, "Effect On Claims," is not necessary and confuses the issue. For example, Attachment 2 uses the term "concerning title to lands outside the current boundary of the reservation." It is the Tribe's position that title to the erroneously surveyed 16,000 acres



never changed and remains within the 1871 Executive Order boundaries. A survey error cannot change Executive Order boundaries of a reservation. Also, the suggested use of the term “current boundary of the reservation,” implies that the boundary has changed or that the “current boundary” is an established fact. The present language in S. 313, section 3, Definitions, (20) Reservation—appropriately deals with the survey claim by stating that the depiction of the reservation on a map attached to the Agreement as Exhibit 2.81 does not constitute an admission by the Tribe with regard to any dispute between the Tribe and the United States concerning the legal boundary of the reservation. The recently suggested language is unnecessary and raises more issues than it resolves.

### **3. The White Mountain Apache Tribe Water Rights Settlement Subaccount**

Section 10 establishes the White Mountain Apache Tribe Water Rights Settlement Subaccount for the planning, design, and construction of the Miner Flat Project for the Tribe. Funding in the Subaccount established under section 10 consists of funds from (1) the Lower Colorado River Basin Development Fund; (2) amounts appropriated under section 12(a); (3) the Emergency Fund for Indian Safety and Health; and (4) Arizona state funds provided under subparagraph 13.3 of the Agreement.

The Views Letter states that section 10(b)(1)(A) as written allows the White Mountain Apache Tribe to “withdraw any portion of the White Mountain Apache Tribe Water Rights Settlement Subaccount.” The Views Letter suggests that because of this, the provision is inconsistent with the concept of an Indian Self-Determination and Education Assistance Act (ISDEAA) contract as laid out in section 7(g). Accordingly, the Views Letter states the legislation should be changed to clarify whether the Secretary is being called upon to establish a trust fund to be controlled by the Tribe or to accomplish the construction of the Miner Flat Project under the Act through an ISDEAA contract.

The Views Letter excerpt from section 10(b)(1)(A) is incomplete. Section 10(b)(1)(A), read in its entirety, unequivocally states that the Tribe may only withdraw amounts from the Subaccount on approval of the Secretary and then only pursuant to a ISDEAA agreement with the Secretary under section 7(g). The Subaccount is under the control of the Secretary, not the Tribe. Moreover, section 10(b)(1)(B) states that the Tribe under a section 7(g) ISDEAA agreement with the Secretary shall only use amounts from the Subaccount for (1) the planning, design, and construction of the Miner Flat Project, including sums necessary for the Bureau of Reclamation to carry out its oversight of the planning, design and construction of the Miner Flat Project, (2) to pay any outstanding balance on the loan authorized by the White Mountain Apache Tribe Rural Water System Loan Authorization Act (Pub. L. 110–390; 122 Stat. 4191), and (3) to carry out required environmental compliance activities associated with planning, design, and construction of the Miner Flat Project.

Section 7(g)(2) referenced in section 10(b)(A) and (B), provides that any contract with the Tribe entered pursuant to the ISDEAA

“for the purpose of carrying out any provision of this Act shall incorporate such provisions regarding periodic payment of funds, timing for the use of funds, transparency, oversight, reporting, and accountability as the Secretary determines to be necessary (at the sole discretion of the Secretary) to ensure appropriate stewardship of Federal funds.” No stronger language is required in the legislation to place the Subaccount under the control of the Secretary and subject to the requirements of the ISDEAA.

#### **4. The Limited Waiver of Sovereign Immunity Is Appropriate**

The Views Letter’s objection to the breadth of the waiver of sovereign immunity in section 11(a) for the enforcement or interpretation of the legislation or the Agreement would leave some of the beneficiaries of the legislation and the Agreement without an effective remedy to enforce some of the provisions of the legislation or the Agreement if they were violated by the Tribe or the United States. There is no risk of additional litigation from this waiver unless either the United States or the Tribe allegedly violates the legislation or the Agreement. In that event, the adversely affected beneficiaries of the settlement should be able to seek to enforce the bargain approved by Congress and the parties. This waiver is also the same as the one included in the Gila River Indian Community Water Rights Settlement Act of 2004.

#### **5. The Amount of Federal Funding for the Settlement Is Appropriate and Justified**

The Views Letter questions whether the \$113.5 million authorized to be established under section 12 is an appropriate amount of federal funding. In that regard, it states that the uses to which the \$113.5 million fund would be put are not clearly specified because of the latitude given to the Tribe in section 12(b)(2)(C) to spend the funds in a number of very different ways. This is contradictory to what the Views Letter states in the first paragraph of its ninth point that “. . . authorizing funding for water development activities to be carried out directly by the Tribe rather than the Secretary is consistent with the goals of self-determination and self-sufficiency and will allow the Tribe to prioritize what projects to carry out with available funds.”

The WMAT Settlement Fund was negotiated by the Tribe to fund water related economic development projects such as, rehabilitation of fish hatcheries and existing recreational lakes facilities, repair and rehabilitation of existing irrigation systems neglected by the Bureau of Indian Affairs, protection, restoration, and economic development of forest and watershed health, and other water related economic development projects utilizing the Tribe’s retained water rights. The Views Letter is incorrect when it states that the \$113.5 million authorized to be appropriated to the Secretary is not part of the consideration for settlement of the Tribe’s reserved water rights. The Views Letter is correct that \$4.95 million of the \$113.5 million authorized to be appropriated for repairs to the irrigation system is contingently tied to a waiver by the Tribe of a breach of trust claim against the federal government. The waiver becomes ef-

fective upon appropriation of the \$4.95 million to rehabilitate the irrigation system.

The \$109 million of remaining funding would be subject to appropriations and is not a condition precedent that must be accomplished in order for the settlement to be final and enforceable, but that does not mean that the \$109 million is not consideration for the settlement. The Tribe is aware that these appropriations are not a condition precedent for the settlement to become effective and that the United States is not liable to the Tribe if it fails to appropriate these funds under S. 313. The authorization of these appropriations, however, is of great value to the Tribe and is part of the consideration of the settlement.

The Tribe negotiated for the authorizations for appropriations for wet water development in exchange and in consideration for relinquishing approximately 25,000 acre-feet of Salt River Water annually. The Salt River Project places a value of \$6,000 per acre foot for Salt River Water. The Tribe relinquished Salt River Water with an 1871 priority date valued at \$150 million annually in exchange for and in consideration for funding for wet water development. The 25,000 acre-feet annually is part of the original 180,000 acre-feet diversion right claimed by the United States in 1985 for the Tribe in the general stream adjudications.

The Views Letter also ignores the Tribe's agreement to waive its breach of trust claims against the federal government, the Tribe's trustee, for its total failure to stop the Phelps Dodge Corp., now known as Freeport Copper and Gold Inc., from trespassing on the Tribe's land since 1944. Hundreds of millions of dollars in profit were made by Freeport from the construction of a diversion dam on the Black River, half of which is on the Tribe's reservation trust land. The trespass is still ongoing. The Tribe waived its very valuable trespass and unjust enrichment claim against the United States in exchange for anticipated Administration support of S. 313, but that support has not been forthcoming as evidenced by the Views Letter that questions the amount of the Federal Government's contribution to the Tribe's water rights settlement.

The value of other potential breach of trust claims against the United States that will be waived by the Tribe and which are summarized in the Tribe's Liability Paper dated August 19, 2009, and addressed to Pam Williams, Director of the Secretary's Indian Water Rights Office, far exceeds the total federal contribution to the Tribe's water rights settlement, including the cost of the Miner Flat Project, which without question, is a trust obligation of United States (Views Letter at 1, "The Reservation's need for reliable and safe drinking water is not in question.").

Mentioned, but not addressed by the Views Letter, is the trust fund to subsidize the OM&R costs of the domestic water supply system to be constructed under S. 313. The Tribe's expert consultants have estimated that the OM&R trust obligation would cost the United States approximately \$2.163 million a year. Once the OM&R trust fund in the amount of \$50 million is established under section 12(b)(3), the United States shall be relieved of paying annual OM&R expenses of the trust obligation. Assuming inflation at 3% annually, the Tribe will be required to subsidize the \$50 million trust fund within 28 years; assuming a 4% return on invest-

ment of the trust fund by the Tribe, it will take 42 years. Stated another way, assuming a 100 year lifetime of the Miner Flat Project, the United States is being relieved of \$84 million in taxpayer expense if the trust fund cannot achieve more than a 4% rate of return with an average annual inflation rate of 3%.

In sum, the Views Letter is dismissive, without citation or viable argument, of the value of the Tribe's waiver in S. 313 of potential water related breach of trust claims against the United States.

#### **6. The Use of Funds for the WMAT Settlement From the Emergency Fund for Indian Safety and Health Is Consistent With the Underlying Authorization**

Under Title VI of the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008 (P.L. 110-293) (the "Act"), Congress established the Emergency Fund for Indian Safety and Health ("Emergency Fund") and authorized up to \$1 billion over a five-year period for water supply projects that are part of congressionally approved water settlements. The Miner Flat Project fits squarely within this criterion. Accordingly, S. 313, as reported, authorizes the use of a limited amount of funds from the Emergency Fund for the construction of the Miner Flat Project. The Views Letter argues that this provision undermines the language in the Act specifying that the funding be allocated in accordance with a Secretarial plan. While the Act requires the Administration to prepare this plan by July 30, 2009, it has failed to do so. Therefore, the Administration cannot require that S. 313 comply with a plan it has failed to prepare.

#### **7. The Parties Have Agreed To Extend the Time To Secure Federal Funding for the Project**

The Views Letter correctly points out the challenges associated with securing the federal funding necessary to implement the settlement by 2015. As a result, the parties have agreed to extend that date until 2020.

JOHN MCCAIN.

## CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 313 as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

Subsection (b)(2) of P.L. 110-390, 122 Stat. 4191—TERMS AND CONDITIONS OF LOAN.—The loan provided under subsection (a) shall—(1) be at a rate of interest of 0 percent; and (2) be repaid over a term of 25 years, beginning on January 1, **[2013]** 2016.

