

**Mark R. Chino
President
Mescalero Apache Tribe**

**Testimony on Mescalero Apache Tribe Leasing Authorization Act
House Bill 1461**

September 22, 2011

Chairman Young and Committee Members:

Thank you for having this hearing on House Bill 1461, introduced by Representative Pearce, to authorize the Mescalero Apache Tribe to lease its adjudicated water rights.

The Mescalero Apache Tribe is located on the Mescalero Apache Indian Reservation in the White and Sacramento Mountains of south central New Mexico, which is within the Tribe's aboriginal territory. The Reservation is home to the majority of Mescalero Apache Tribal members and is known for its natural beauties and abundant resources.

We are a treaty tribe, having entered into a treaty with the United States on July 1, 1852. Our treaty, known as the "Treaty with the Apaches," promised that the Tribe would have a permanent homeland in its aboriginal territory and impliedly reserved sufficient water to meet the Tribe's historic, current and future water requirements.

In 1975, the State of New Mexico sued the United States in state court to determine a certain portion of the water rights of the United States and the Mescalero Apache Tribe in the Pecos Stream System. The suit, *State ex rel. Reynolds v. Lewis et al.*, was filed pursuant to the McCarran Amendment, 43 United States Code, Section 666. First, the court had to determine whether the McCarran amendment, which waived the United States' sovereign immunity for suit in state court to determine water rights in a stream system, allowed for the adjudication of the rights of the Mescalero Apache Tribe. In 1975, after the issue was appealed, the New Mexico Supreme Court held that the waiver contained in the McCarran Amendment did allow for adjudication of the Tribe's water rights.

The case was remanded to the state district court in Chaves County, New Mexico, for a determination of the Tribe's water rights. The Tribe intervened in the action as a party defendant and a trial was held to determine the Tribe's water rights.

After the trial, on July 11, 1989, the state court held that the Tribe was entitled to a consumptive water right for its historic, current and future requirements in the amount of 2,322.4 acre feet per year. But, the state court held that the Tribe would have five different priority dates. On appeal, the New Mexico Court of Appeals affirmed the consumptive water rights award of 2,322.4 acre feet per year and reversed the five different priority dates. The Court of Appeals held that the Tribe's priority date is that of the "Treaty with the Apaches," July 1, 1852. See 116 N. M. 194.

After many years of litigation, a portion of the Tribe's water rights in the Pecos Stream System have been adjudicated.

At present, the Tribe has been approached by its governmental neighbors to lease water. There is a need for water that the Tribe can meet. Additionally, the Tribe will be able to use proceeds from water rights leasing to fund basic governmental services.

Federal law imposes certain restrictions on the alienation of the Tribe's property. See 25 United States Code, Section 177. In particular, the Tribe cannot lease its water without federal legislation authorizing the same.

House Bill 1461 will provide such federal legislation. The Tribe will be authorized to lease its adjudicated water rights for a period not to exceed 99 years. There are no budgetary concerns with the passage of House Bill 1461 as implementation of the bill does not require any appropriations or expenditures. The legislation holds the United States harmless if there is any loss or other detriment resulting from any lease, contract or other arrangement entered into pursuant to the Bill, if passed.

The other treaty tribes in New Mexico have been authorized to lease their water rights for a period not to exceed 99 years. See the Navajo Nation Settlement Act, Public Law 111-11, Act of March 30, 2009, and the Jicarilla Apache Tribe Settlement Act, Section 7 of Public Law 102 - 441, 106 Stat. 2239. Under state law, owners of water rights can lease their water rights. The Mescalero Apache Tribe is seeking the same right to lease water.

Lastly, I am pleased to inform the Committee that I have met with John D'Antonio, New Mexico State Engineer, and he informed me that the State of New Mexico does not oppose this Bill. Mr. D'Antonio sees this legislation as a win - win situation for the State and the Tribe.

This concludes my written testimony.