

RESOLUTION NO. ~~195~~-22
OF THE GOVERNING BODY OF THE
YAVAPAI-APACHE NATION

A Resolution Authorizing Submittal of a Request to the Bureau of Indian Affairs
Pursuant to 25 C.F.R. § 89.41 *et seq.* for FY2023 Federal Funding to Assist the
Nation in Paying Attorneys' Fees for Water Rights Litigation and
Water Rights Settlement Negotiations

- WHEREAS:** The Yavapai-Apache Tribal Council (“Council”) is authorized to represent the Yavapai-Apache Nation (“Nation”) and act on all matters that concern the health and welfare of the Nation, and to make decisions not inconsistent with or contrary to the Constitution of the Yavapai-Apache Nation (“Constitution”) as provided by Article V (a) of the Constitution; and
- WHEREAS:** The Council is authorized to negotiate and enter into agreements with federal, state and local governments as provided by Article V (b) of the Constitution; and
- WHEREAS:** For many years, the Nation has worked diligently, both through litigation and water rights settlement negotiations, to assert and protect its water rights in the Verde River watershed as part of the Gila River General Stream Adjudication pending in the Maricopa County Superior Court of Arizona; and
- WHEREAS:** The Nation continues its commitment to pursuing a settlement of its water rights and claims in the Gila River Adjudication, and has committed substantial resources, including its own financial resources, toward this end; and
- WHEREAS:** The Nation must litigate issues in the Gila River Adjudication in order to assert and protect its water rights and water rights claims; and
- WHEREAS:** The Nation’s Special Legal Counsel for Water Rights, Montgomery & Interpreter, PLC, continues to represent the Nation in the Gila River and Little Colorado River Adjudications and in negotiations for an Indian water rights settlement for the Nation; and
- WHEREAS:** The Nation does not have sufficient Tribal funds to pay for all of the attorneys’ fees that will be required by the Nation during FY2023 for its effective participation in the above-referenced cases to protect its interests and to engage in water rights settlement negotiations; and
- WHEREAS:** In accordance with federal regulations at 25 C.F.R. §89.41 *et seq.*, funding may be available from the United States to assist the Nation in paying for

attorneys' fees for these important cases and for the negotiation of an Indian water rights settlement for the Nation and the Nation desires to submit a request to the Bureau of Indian Affairs for said funding.

NOW THEREFORE BE IT RESOLVED that the Chairwoman or Vice-Chairman are authorized and directed to prepare and submit to the Bureau of Indian Affairs a request for the above-referenced FY2023 federal funding to be used to pay the Nation's attorneys' fees and related legal expenses incurred in asserting and protecting the Nations water rights in the Gila River Adjudication, to monitor the Little Colorado River Adjudication, and to engage in water rights settlement negotiations with various parties for a federal Indian water rights settlement for the Nation.

BE IT FURTHER RESOLVED that all future correspondence and communications regarding this Resolution and the Application requesting attorney's fees shall be sent to the attention of the Chairwoman and to the Nation's Attorney General, and the Attorney General shall be responsible for administering any funds received under the request for funding authorized by this Resolution and shall do so in accordance with any required budget approvals and authorizations as may be given by the Tribal Council and in accordance with applicable federal regulations.

BE IT FINALLY RESOLVED that the Chairwoman, and Vice-Chairman, or either of them, are hereby authorized to execute all documents as may be necessary to apply for, receive and thereafter use any federal funding received for the purposes for which grant funds are requested under this Resolution, or as otherwise authorized by federal law and regulations, and to take such further action as deemed necessary to carry out the intent and purposes of this Resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was adopted by an affirmative vote of the Tribal Council at a regular meeting of the Tribal Council, with a quorum present, on 10-20, , 2022, by a vote of 8 in favor, 0 opposed and 0 abstaining, pursuant to the authority contained under the Constitution of the Yavapai-Apache Nation.



Tanya Lewis, Chairwoman

ATTEST:


Karla Reimer, Council Secretary

Approved as to Form:


Office of the Attorney General

EXHIBIT A

YAVAPAI-APACHE NATION

**FY2023 APPLICATION FOR ATTORNEYS' FEES
PURSUANT TO 25 C.F.R. PART 89**

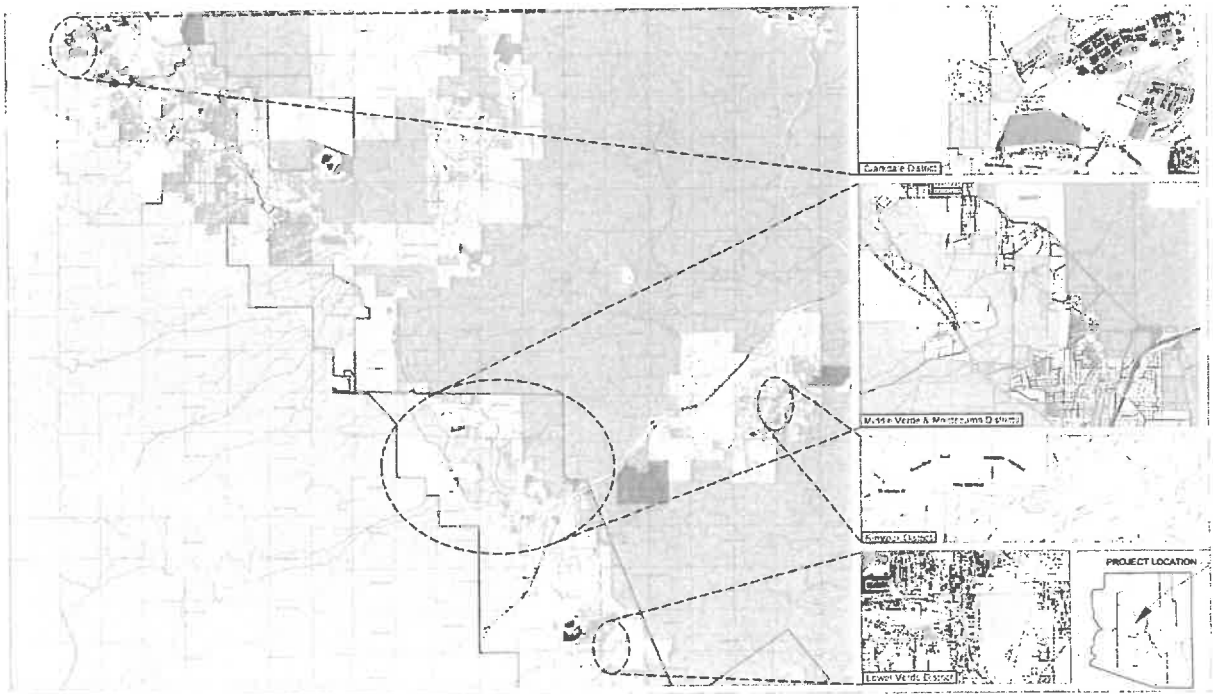
October 20, 2022



**YAVAPAI-APACHE NATION'S
FY2023 APPLICATION FOR ATTORNEYS' FEES
PURSUANT TO 25 C.F.R. PART 89**

1. **TYPE OF APPLICATION:** This Application is for Attorneys' Fees.
2. **HISTORICAL OR OTHER RELEVANT/GENERAL BACKGROUND INFORMATION.**
This request for Attorneys' Fees involves:
 - a. **Gila River Adjudication/Little Colorado River Adjudication:** Continuation of legal representation in the Gila River General Stream Adjudication involving the water rights of the Nation, and monitoring of the Little Colorado River Adjudication for issues of broad legal significance.
 - b. **Water Rights Settlement Negotiations:** Continuation of water rights settlement negotiations for the Yavapai-Apache Nation.

The Yavapai-Apache Nation is a federally recognized Indian Tribe pursuant to the Apache Treaty of 1852, 10 Stat. 979, and Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984. The Nation's Reservation consists of more than 1,800 acres located in Central Arizona in the Verde Valley, within and near the communities of Camp Verde and Clarkdale, Arizona. The Nation currently has more than 2,600 enrolled tribal members.



The Verde River runs through the heart of the Yavapai-Apache Reservation and it is a critical tribal homeland water supply for the Nation. Yet, historical and ongoing upstream development in the Verde River watershed, unregulated groundwater pumping and surface water diversions threaten the continued flows and vitality of the Verde River in the Verde Valley and on the Yavapai-Apache Reservation.

A. THE GILA RIVER GENERAL STREAM ADJUDICATION

The quantification of the water rights of the Yavapai-Apache Nation and its Reservation are currently pending in a McCarran Amendment¹ adjudication in the consolidated case captioned, *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, W1-4, Maricopa County Superior Court, State of Arizona (“Gila River Adjudication”).²

The Nation and the United States have both filed Statements of Claimant (“SOCs”) in the Gila River Adjudication asserting aboriginal, federal reserved, and other water rights necessary to maintain the Nation and its tribal members in their permanent tribal homeland.³ Although the Gila River Adjudication was initiated in the 1970’s, the progress in the Adjudication to adjudicate federal reserved water rights for the tribes involved was slow until the last few years.

However, pursuant to the Case Management Order dated March 4, 2020, the Adjudication Court set a deadline of **January 6, 2023**, for the Nation, and the United States as the Nation’s trustee, to update the SOC’s for the Nation’s water rights, while also directing the Arizona Department of Water Resources (“ADWR”) to prepare several technical reports, including the delineation of the subflow zone of the Verde River and its tributaries, the technical report related to potential *de minimis* uses that would be subject to a streamlined adjudication, and the schedule for the preparation of the Hydrographic Survey Reports (HSRs) for each subwatershed. For the Nation’s claims, the Nation and United States must be prepared to provide a substantial amount of technical information to ADWR to assist in its preparation of the HSR for the Lower Verde Valley Subwatershed where the Nation’s Reservation is located. As such, the Nation’s attorneys will be substantially engaged in preparing the Nation’s claims over the next fiscal year.

Although the Nation is diligently working to achieve a water rights settlement, if the Nation is unable to achieve a settlement despite its best efforts with the potential settling parties, the Nation must be prepared to litigate its water rights claims in the Adjudication. While a

¹ 43 U.S.C. § 666 (1952).

² For additional information on the Gila River Adjudication, see <https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/gila.asp>.

³ See Yavapai-Apache Nation Statement of Claimant No. 39-50059, filed November 27, 1985, <https://infoshare.azwater.gov/docushare/dsweb/Get/SOCDoc-74825/09a8X.PDF>; and U.S. Statement of Claimant 39-54025, filed November 29, 1985, <https://infoshare.azwater.gov/docushare/dsweb/Get/SOCDoc-83661/051eX.PDF>.

substantial amount of valuable technical work has been done to date, a significant amount of additional work is still required to complete the Nation's preparation for possible litigation. This technical work must be coordinated and defined as needed by the Nation's legal counsel, which requires significant attorney time and effort. As such, attorneys' fees funding is necessary to support this task as part of the Nation's legal representation in the Adjudication.

Multiple Contested Cases

Additionally, in the past few years, the Adjudication's pace has increased and a multitude of matters which are significant to the Nation's water rights claims are presently before the Court. The Special Master has initiated more than 100 contested cases for the San Pedro River watershed, in which the Nation, and the United States on behalf of the Nation, objected many years ago, to ensure the ability to participate in the cases, which could create foundational legal principles in the Adjudication that are critical to the assertion and protection of the Nation's water rights. As a result, the Nation's attorneys have been required to participate in these contested cases in current litigation while also monitoring the cases for significant issues of broad legal importance which are arising.

Further, the Navajo and Hopi contested cases in the Little Colorado River Adjudication⁴ are proceeding, which are the first tribes in the Adjudications to be placed on a litigation track for determination of their water rights claims. The Nation's attorneys must monitor these cases to identify issues of broad legal importance that may affect the Nation's claims and to assist the Nation in properly preparing for the time when the Special Master will designate the Nation's water rights claims as a contested case.

The Nation must monitor and participate in the Gila River and Little Colorado River Adjudications to the extent necessary to protect the Nation's legal position with respect to its water rights and claims. Without this participation by the Nation's Water Rights Attorneys, issues would not always be spotted and brought to the United States attention as potentially impacting the United States' claims for the water rights of the Nation. As such, the Nation's Water Rights Attorneys not only protect the Nation's legal position but also serve a valuable role in informing the United States attorneys of potential issues arising in the various contested cases within the Adjudications.

B. WATER RIGHTS SETTLEMENT NEGOTIATIONS

A Federal Indian Water Rights Negotiating Team for the Nation was appointed on July 6, 2011. The Nation and its Federal Team are currently fully engaged in water rights settlement negotiations. During FY2022, the Federal Team, the Nation and the Salt River Project,

⁴ The Little Colorado River Adjudication is also a McCarran Amendment adjudication of the Little Colorado River watershed in Arizona in the case captioned, *In Re the Rights to Use All Water in the Little Colorado River System and Source*, CV6417, Apache County Superior Court. The Judge and Special Master appointed to the Gila River Adjudication are also appointed to administer the Little Colorado River Adjudication, and thus, the cases, in many instances, follow parallel tracts. For additional information on the Little Colorado Adjudication. See <https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/littleColorado.asp>.

engaged in a Value Planning Study (“VPS”) to evaluate the various potential water supply sources for the Nation’s water settlement. The results of the VPS will be completed within a matter of weeks of the filing of this application for attorney’s fees, which will then require the continuing engagement of the parties to craft a settlement utilizing sources of water that are mutually agreed upon. The Nation’s attorneys expect to be engaged in hundreds of hours devoted to settlement negotiations in FY2023. It is critical for the Nation to have its own legal counsel to perform negotiations work if it is to timely complete the work required for these water rights negotiations – negotiations that are showing a substantial potential for success.

3. **TRIBAL RESOLUTION.** Attached as **Exhibit A.**

4. **TRIBE’S FINANCIAL STATEMENT.** The Nation’s current financial statement is on file with the Bureau of Indian Affairs, and thus, is not re-attached here. The financial statement demonstrates that the Nation does not possess sufficient tribal funds or assets to pay for the legal services necessary to protect and defend the Nation’s water rights, as such funds are otherwise required to support the Nation’s delivery of other critical governmental services.

The Nation’s financial statements are confidential and contain sensitive proprietary financial information of the Nation, which, if disclosed, will result in substantial harm to the sovereign, business, and legal interests of the Nation. The Nation asserts, at minimum, that its financial statements are subject to a Freedom of Information Act (FOIA) exemption under Exemption 4. Therefore, the Nation requests that the United States refuse to release the Nation’s financial statement to any person or entity requesting its disclosure pursuant to FOIA, and further, that the Nation be immediately informed if a person or entity has made such a request.

5. **STATEMENT OF RESOURCES.** The Nation does not possess sufficient tribal funds or assets to pay for the legal services required.

6. **EXCEPTIONS UNDER 25 C.F.R. PART 89 UNDER WHICH APPLICATION IS SUBMITTED.**

A. 25 C.F.R. § 89.41 (b) and (d) - The United States Has a Conflict of Interest with the Nation in the Gila River Adjudication, and for Water Rights Settlement Negotiations in Contravention to the Rights and Interests of the Nation

The United States has an irreconcilable conflict of interest when it comes to litigation and negotiations on behalf of the Nation for the Nation’s water rights and claims in the Gila River Adjudication.

First, the United States has filed Statements of Claimant in the Adjudication for numerous federal agencies and departments, including, *inter alia*, the Fish & Wildlife Service, Bureau of Land Management, and the USDA, Forest Service. Many of these claims are for the same waters that the Nation requires to satisfy its aboriginal, federal reserved, and other water rights.

Second, the United States is charged with the trust responsibility of representing other Indian Tribes in Arizona with water rights and claims to the same water sources that are claimed by the Nation in the Adjudication. In various facets of the Adjudication and in other Arizona water cases, the United States has made legal arguments at the trial court and appellate level that do not fully support the Nation's water rights claims (such as the *Globe Equity No. 59 forfeiture issue*), due to the unique factual circumstances of those cases versus the circumstances of the Nation.

Third, as part of the process of settlement negotiations, the United States is required to assess its own downside risk if the Nation's water rights are not settled. See Phase II, 1.a. of the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 FR 9223 (March 12, 1990). There exists a high possibility that the Nation will be required to assert claims against the United States for breach of trust responsibility, failure to adequately protect the Nation's water rights, as well as other claims matters related to the Nation's water resources. Therefore, the faithfulness of the United States in pursuing the settlement cannot be completely relied upon, as the Nation and the United States both have interests that are adverse to each other.

Fourth, the water rights claims made by the United States on behalf of the Nation have differed substantially from the water rights claims made by the Nation on its own behalf. In the Adjudication, the Nation's has asserted a right to 4,266.26 acre-feet of water annually, plus in-stream flow for certain tribal homeland purposes. In contrast, the United States' Statement of Claimant on behalf of the Nation seeks only 2,657 acre-feet annually, with no in-stream flow. While both Statements of Claimant must be updated to account for new information and the new lands added to the Reservation (among other factors), the Nation still cannot rely on the United States' claim, as the Nation's own claim will likely be more comprehensive than the claim made by the United States on its behalf.

Fifth, the Nation itself has the best information about its water rights claims, including in particular its cultural and religious needs and uses of water. While the Nation may be willing to share this information with the United States pursuant to the Common Interest Confidentiality Agreement between the Nation and the United States' Federal Indian Water Rights Negotiating Team, the compilation and disclosure of such information must still be directed by legal counsel for the Nation to protect the Nation's interests.

Sixth, no full and final settlement of the Nation's water rights can occur without the consent of the Nation itself. Since the Nation cannot fully rely on the United States' representations due to the United States' inherent conflicts of interest discussed above, the Nation must have its own independent legal representation to assist it in determining whether a settlement would be fair, adequate, and reasonable.

Seventh, as discussed above, the United States has taken directly adverse legal positions in other cases within Arizona involving water rights for other Indian tribes⁵ that may harm the water rights and claims of the Yavapai-Apache Nation, particularly the Nation's Ditch Rights,

⁵ See *United States v. Gila Valley Irr. Dist.*, 859 F.3d 789 (9th Cir. 2017).

which are some of the earliest priority water rights the United States holds on behalf of the Nation.

B. 25 C.F.R. § 89.41(e) – A Substantial Possibility for a Water Rights Settlement Exists

The Nation and the Federal Negotiating Team have been and continue to be actively engaged in water rights settlement negotiations in a serious effort to secure the water rights necessary for the Yavapai-Apache Nation. The Nation’s attorneys have been working directly with the Federal Team and the Secretary’s Indian Water Rights Office and meeting with parties and stakeholders in the development of mutually agreeable solutions for the settlement. With this multi-layered effort underway, there is a substantial possibility for the achievement of a water rights settlement for the Yavapai-Apache Nation, and the Nation requires Attorneys’ Fees to assist it in accomplishing this objective in partnership with the United States.

6. DESCRIPTION OF THE ISSUE AND SCOPE OF WORK, APPROXIMATE COURT DATES AND TIME FRAMES FOR LITIGATION.

Issue. As discussed above, Attorneys’ Fees are required for (1) participation in the adjudication of the water rights of the Yavapai-Apache Nation in the Gila River General Stream Adjudication and monitoring of the Little Colorado River Adjudication; and (2) the continuation of water rights settlement negotiations for the Yavapai-Apache Nation. This work requires the careful involvement and assistance of the Nation’s Water Rights Attorneys.

Scope of Work. To address the issues, the Nation’s Attorneys would engage in the following work over the course of a year with expected timeframes and deadlines set forth below:

Gila River and Little Colorado Adjudications	Continue to monitor contested cases in the Gila River and Little Colorado Adjudications for legal issues that impact the legal position of the Nation’s water rights and participate as necessary.	Ongoing
	Continue research and coordination of efforts to collect and prepare the evidence necessary to support the Nation’s water rights claims, amend the Nation’s Statement of Claimant, and interface with the Bureau of Indian Affairs and Department of Justice to coordinate efforts in this area.	Nation’s and United States’ Amended Claims Must Be Filed On or Before January 6, 2023
	Prepare for litigation of the Nation’s water rights claims in the Gila River Adjudication in the event a water rights settlement is not achieved.	Ongoing
Water Rights Settlement Negotiations	Engage in water rights settlement negotiations with negotiating parties.	Ongoing Multi-Year Effort

Time Frame for Litigation. Pursuant to the Special Master’s Minute Entry Order filed 3/4/2020,⁶ the Court has now turned its attention to the Verde River Watershed and the claims made for and on behalf of the Nation. The current deadlines for the Verde River Watershed are as follows:

Verde River Watershed Deadlines (last updated 10/12/2022)	
Deadline	Due Date
Subflow Zone Delineation (Contested Case W1-106)	
ADWR Subflow Tech Report Due (for the Main Verde & Sycamore Canyon)	December 31, 2021
Objections Due to Subflow Technical Report (for the Main Verde & Sycamore Canyon)	May 2, 2022
Discovery Concludes on Objections to Tech Report (for Main Verde & Sycamore Canyon)	March 17, 2023
Trial Begins on Objections to Tech Report (for Main Verde & Sycamore Canyon)	August 17, 2023
ADWR Subflow Tech Report Due (for Remainder of Verde)	April 30, 2023
Objections Due to Subflow Technical Report (for Remainder of Verde)	October 27, 2023
YAN / US Claims	
Amendments to Statements of Claimant by Yavapai-Apache Nation and United States on Behalf of the Nation for Claims in Lower Verde Valley/Sycamore Subwatersheds Due	January 6, 2023
United States' Amended Claims for Federal Water Rights in Lower Verde Valley/Sycamore Subwatersheds Due	January 6, 2023
HSR for Sycamore Subwatershed	
ADWR Preliminary HSR for Sycamore Subwatershed Due	January 5, 2024
Comments Due to Preliminary HSR for Sycamore Subwatershed	July 3, 2024
ADWR Final HSR for Sycamore Subwatershed Due	January 10, 2025
HSR for Lower Verde Valley Subwatershed	
ADWR Preliminary HSR for Lower Verde Valley Subwatershed Due	June 6, 2025
Comments Due to Preliminary HSR for Lower Verde Valley Subwatershed	December 3, 2025
ADWR Final HSR for Lower Verde Valley Subwatershed Due	June 3, 2026
De Minimis (Domestic, Stock, Wildlife Watering and Stockpond)	
ADWR Report Due to Court if Domestic Use is Potentially De Minimis	December 3, 2021
Comments Due to ADWR Domestic Use Report (30 days after Report filed)	January 7, 2022
ADWR Technical Report Due re De Minimis Uses re Domestic, Stock, Wildlife Watering and Stockpond Uses Due	August 29, 2022
Objections Due to ADWR Technical Report re De Minimis Uses	October 28, 2022

⁶ Link to 3/4/2020 Minute Entry Order [here](#).

HSR for Little Chino Subwatershed	
United States' Amended Claims for Federal Water Rights in the Little Chino Subwatershed Due	January 5, 2026
ADWR Preliminary HSR for Little Chino Subwatershed Due	June 2, 2028
Comments Due to Preliminary HSR for Little Chino Subwatershed	November 29, 2028
ADWR Final HSR for Little Chino Subwatershed Due	May 29, 2029

8. BREAKDOWN OF LEGAL SERVICES.

Issue	Attorney Rate (\$/hr)*	Number of Attorney Hours**	Total***
Gila River and Little Colorado Adjudications	\$280	650	\$182,000
Water Rights Settlement Negotiations	\$280	950	\$266,000
		Total:	\$448,000

*The Attorney Hourly Rate is effective for the calendar year. The Attorney Hourly Rate increased by \$5 in subsequent calendar years.

**The number of attorney hours is an estimate based upon the past experience of the Tribe's Special Legal Counsel for Water Rights. However, the actual hours of attorney effort that will be required in any given year fluctuates and is driven in large part by the Court's prioritization of issues and contested cases, which must be monitored by the Tribe's Attorneys.

***The term of this estimate is for one year of effort.

****The Nation's Special Legal Counsel for Water Rights also represent the Pascua Yaqui Tribe for water rights in the Gila River Adjudication. The tribes have a similar aligned interest in monitoring the conduct of the Adjudications. Where the Attorneys work jointly benefits the tribes, the Attorneys "split-bill" their time and effort between the tribes which results in a significant costs savings per hour.

9. ATTORNEY CONTRACT. A copy of the Nation's Special Counsel Attorney Contract for water rights is attached as **Exhibit B**.

The Nation's Special Counsel Attorney Contract is confidential and contains sensitive proprietary financial and legal information of the Nation, which, if disclosed, will result in substantial harm to the sovereign, business, and legal interests of the Nation. The Nation asserts, at a minimum, that its Special Counsel Attorney Contract is subject to a Freedom of Information Act (FOIA) exemption under Exemption 4. Therefore, the Nation requests that the United States refuse to release the Nation's Special Counsel Attorney Contract, attached hereto, to any person or entity requesting its disclosure pursuant to FOIA, and further, that the Nation be immediately informed if a person or entity has made such a request.

10. CERTIFICATES OF GOOD STANDING. The Nation's Water Rights Legal Counsel, Ms. Susan B. Montgomery, and Ms. Robyn L. Interpreter, are Attorneys in Good Standing before the State of Arizona, the Federal District Court for the District of Arizona, the 9th Circuit Court

of Appeals and the United States Supreme Court. Their Certificates of Good Standing from the State of Arizona are attached as **Exhibit C**.