

CENTER FOR  BIOLOGICAL DIVERSITY

*Protecting endangered species and wild places through science, policy, education, and environmental law.*

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March 6, 2003

ANSAC  
1700 W. Washington, Room 304  
Phoenix, AZ 85007

Postmarked  
3/6/03  
**received**  
3-13-03 *glm*

Dear Commission,

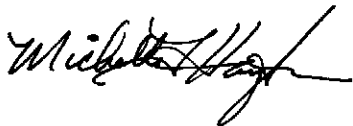
RE: Navigability of San Pedro River

The Center for Biological Diversity (CBD) is a non-profit, public interest, conservation organization whose mission is twofold: (1) to conserve imperiled native species and their threatened habitat, and (2) to fulfill the continuing educational goals of our membership and the general public in the process.

We submit the enclosed document dated June 30, 1999 as evidence regarding the navigability of the San Pedro River.

We look forward to participating in this process. Please contact Ms. Michelle Harrington at 602.246.6498 or [mharrington@biologicaldiversity.org](mailto:mharrington@biologicaldiversity.org), or Robin Silver at 602.246.4170 or [rsilver@biologicaldiversity.org](mailto:rsilver@biologicaldiversity.org), for any further information. Our mailing address is Center for Biological Diversity, P.O. Box 39629, Phoenix, AZ 85069-9629.

Sincerely,



Michelle T. Harrington  
Phoenix Area Coordinator



Robin D. Silver, M.D.  
Conservation Chair

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015

*Jaguar*  
*Grizzly Bear*  
*Mexican Gray Wolf*  
*Alexander Archipelago Wolf*  
*San Bernadino Kangaroo Rat*  
*Spotted Bat*  
*Southwestern Willow Flycatcher*  
*Mexican Spotted Owl*  
*Yellow-billed Cuckoo*  
*Northern Goshawk*  
*Cactus Ferruginous Pygmy Owl*  
*Apache Goshawk*  
*Peregrine Falcon*  
*Coastal Cactus Wren*  
*Queen Charlotte Goshawk*  
*California Gnatcatcher*  
*Huachuca Tiger Salamander*  
*Chiricahua Leopard Frog*  
*Razorback Sucker*  
*Colorado River Squawfish*  
*Loach Minnow*  
*Spikedace*  
*Rio Grande Cutthroat Trout*  
*Redband trout*  
*Gila Chub*  
*Apache Trout*  
*Sonoran Chub*  
*Colorado River Cutthroat Trout*  
*Bonytail Chub*  
*Totoaba*  
*Vaquita*  
*Beluga Whale*  
*San Diego Fairy Shrimp*  
*San Xavier Talussnail*  
*Delhi Sands flower-loving fly*  
*Laguna Mountain Skipper Butterfly*  
*Herme's Copper Butterfly*  
*Dunn's Skipper Butterfly*  
*Quino Checkerspot Butterfly*  
*Thorne's Hairstreak Butterfly*  
*Arizona Willow*  
*Western Lily*  
*Winkler Cactus*  
*Short-leaved Stone Crop*  
*Peeble's Navajo Cactus*  
*Huachuca Water Umbel*  
*California Orcutt Grass*  
*Canelo Hills Ladies Tresses*  
*Short-Leaved Dudleya*  
*Thread-Leaved Brodiaea*  
*Cuyamaca Lake Downingia*  
*Laguna Mountains Aster*  
*Del Mar Sand Aster*  
*Encinitas Coyote Bush*  
*Encinitas Spineflower*  
*Orcutt's Spineflower*  
*Encinitas Bacheris*  
*San Diego Thornmint*  
*Otay Meas Mint*  
*San Diego Coyote Thistle*  
*Chiricahua Dock*  
*Otay Tarweed*  
*Dehesa Nolina*  
*Big-Leaved Crown Beard*  
*Del Mar Manzanita*  
*Parish's Meadow Foam*  
*Spaulding's Catchfly*  
*California Red-legged Frog*



Protecting and restoring the natural  
ecosystems and native species of western  
North America

June 30, 1999

**Mr. Bill Childress**  
 Program Manager  
 US Bureau of Land Management  
 Sierra Vista

**Mr. Gary Bauer**  
 Acting Arizona State Director  
 US Bureau of Land Management  
 Phoenix

**Mr. Tom Fry**  
 Director  
 US Bureau of Land Management  
 Washington, DC

**Mr. David Harlow**  
 Arizona Field Office Supervisor  
 US Fish and Wildlife Service  
 Phoenix

**Ms. Nancy Kaufman**  
 Regional Director  
 US Fish and Wildlife Service  
 Albuquerque

**Ms. Jamie Clark**  
 Director  
 US Fish and Wildlife Service  
 Washington, DC

**Mr. Bruce Babbitt**  
 Secretary  
 US Department of the Interior  
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Ms. Jane Dee Hull  
Governor  
State of Arizona  
Phoenix

Ms. Rita Pearson  
Director  
Arizona Department of Water Resources  
Phoenix

Mr. Les Thompson  
Chairman  
Cochise County Board of Supervisors  
Bisbee

Mr. Tom Hessler  
Mayor  
City of Sierra Vista

Mr. James Crawford  
Mayor  
City of Benson

Ms. Carole Vaughn  
Mayor  
Huachuca City

Dear Mmes. Kaufman, Clark, Hull, Pearson, Vaughn, and Messrs. Childress, Bauer, Fry, Harlow, Babbitt, Thompson, Hessler, and Crawford,

RE: Notice of Intent to Sue:

1. the Bureau of Land Management (BLM) and the US Fish and Wildlife Service (Service), to remedy violations of Sections 2, 4, 7, and 9 of the Endangered Species Act (ESA), and
2. Notice of Intent to Sue the State of Arizona, Arizona Department of Water Resources (ADWR), the Cochise County Board of Supervisors, and the cities of Sierra Vista, Huachuca City, and Benson, to remedy violations of Section 9 of the ESA. (Notice of Intent to Sue)

These violations concern Huachuca Water Umbel, Southwestern Willow Flycatcher, Southwestern Willow Flycatcher Critical Habitat, and proposed Huachuca Water Umbel Critical Habitat. These violations primarily involve failure to control the increasing local groundwater pumping that is killing the San Pedro River.

## Introduction

The San Pedro River is the last living river in the Southwest. It is home to the most extensive surviving expanse of the rarest forest type in North America, the cottonwood/willow gallery or broadleaf riparian association forest.

The San Pedro River is acknowledged to be one of the last great relatively intact, surviving ecosystems on Earth. Four hundred and eighty nine species of birds, mammals, fish, amphibians, and reptiles reside there. Nearly one half of the 800 total North American bird species frequent the San Pedro River at some point in their lives. The San Pedro River supports the second highest number of mammal species in the world. This is second only to the montane forests of Costa Rica.

San Pedro River base flows, or stream flows during the driest time of the year, come from water discharged or seeping from the underground aquifer directly into the River. Water in the aquifer comes primarily from the Huachuca Mountains to the west of the River.

There is a direct hydrological connection between the water in the underground aquifer and the surface water, or actual stream flow, of the San Pedro River. Groundwater pumping in the area intercepts water that ordinarily provides the River's base flows.

US Geological Survey(USGS) stream flow data shows that low flows in the San Pedro River have decreased 67% in the last fifty years, from 1943 to 1992. (USGS Website) ADWR findings are similar. ADWR models estimate that base flows in the San Pedro River have declined by approximately 50% in the period of 1935 - 1991. (Correll, S. W., Corkhill, F., Lovvik, D., and Putman, F., 1996, A Groundwater Flow Model of the Sierra Vista Subwatershed of the Upper San Pedro Basin - Southeastern Arizona, Arizona Department of Water Resources, Hydrology Division, Modeling Report 10, 107p.)

The River no longer flows year round north of the Palominas/Hereford area and base flows have dramatically decreased as the River progresses northwards. The situation has progressed so dramatically that in July 1997, the San Pedro River at the Charleston Narrows was nearly completely dry for the first time. The effects of local groundwater pumping are most apparent at the Charleston Narrows where exposed bedrock forces the San Pedro River's entire sub-surface flow to the surface.

At Huachuca City, the Babocomari River, which used to flow into the San Pedro River, is dry. At Benson, the San Pedro River is also now dry.

Because of these diminishing baseflows, the San Pedro River is now dying. These base flows continue diminishing because of increasing local groundwater pumping.

The State of Arizona and ADWR directly control groundwater pumping. The State of Arizona, the Cochise County Board of Supervisors, and the cities of Sierra Vista, Huachuca City, and Benson control increasing, local groundwater dependent development.

Federal law mandates that the BLM and the Service protect federally listed species and Critical Habitat. To date, BLM and the Service refuse to initiate readily available mechanisms to control the groundwater pumping destroying the San Pedro River, its endangered species, Critical Habitat and unique recovery potential. In addition, the Service is responsible for producing Recovery Plans for federally protected species. Recovery Plans offer guidance for improving the plight of federally protected species to the point that they no longer require protection.

In spite of great fanfare, local, State and Federal efforts have produced no significant curtailment of the increasing groundwater pumping. The San Pedro River is dying because of a decade of cruel, calculated intransigence by these entities.

Most of the Huachuca Water Umbel on Earth survives on the San Pedro River within the San Pedro Riparian National Conservation Area (SPRNCA). Most of the Umbel found within the SPRNCA lives from the Hereford Bridge northwards to approximately one mile north of Highway 90. The Huachuca Water Umbel is a federally listed and protected endangered plant with proposed Critical Habitat within the SPRNCA. Except for another violation of law by the Service, Critical Habitat for Water Umbel, including the SPRNCA, should have already been officially designated.

The Southwestern Willow Flycatcher is also federally listed and protected as endangered. Critical Habitat for the Flycatcher has been designated along the San Pedro River from the Hereford Bridge to the Interstate 10 bridge at Benson.

A significant portion of Yellow-billed Cuckoo depends on the San Pedro River for their survival. Except for yet another violation of law by the Service, Yellow-billed Cuckoo should have already be listed and protected as endangered, and Critical Habitat, including the SPRNCA, should have already been designated. Violations of law by the Service regarding Critical Habitat for Water Umbel and regarding listing and Critical Habitat for Yellow-billed Cuckoo are currently being addressed in Federal court.

The San Pedro River, particularly the SPRNCA, represents habitat critical for the recovery of the Gila Topminnow, Desert Pupfish, Spikedace, Loach Minnow, and Razorback Sucker. On April 15, 1994, the Service stated:

"...The long-term survival of an endangered or threatened species may require implementation of recovery actions as well as basic protection. Preclusion of recovery opportunities may jeopardize survival. The purposes of Congress in setting forth the Endangered Species Act are very clear. Section 2(b) of the Act states:

"The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved..."

Conserve is defined in section 3(3) to mean:

"...to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary..."

Thus, the conservation of any threatened or endangered species under the Act clearly requires recovery of that species and protection of ecosystems which would support that recovery. Loss of significant portions of recovery habitat would then be contrary to the purposes of the Act...A major recovery strategy for endangered and threatened southwestern fishes is their reestablishment within historic range...We believe the upper San Pedro River basin (above Saint David) is among the most promising recovery habitat for native Gila River Fishes, including the Gila Topminnow, desert pupfish, spikedace, loach minnow, and

razorback sucker..."

(U.S. Fish and Wildlife Service, Final Endangered Species Act Section 7 Biological Opinion on the Transportation and Delivery of Central Arizona Project Water to the Gila River Basin (Hassayampa, Agua Fria, Salt, Verde, San Pedro, Middle and Upper Gila Rivers and Associated Tributaries) in Arizona and New Mexico, document #2-21-90-F-119, April 15, 1994.)

The Endangered Species Act mandates that all Federal agencies "conserve endangered species." Section 2 of the ESA states:

**"FINDINGS, PURPOSES, AND POLICY**

**SEC. 2. ...**

**(c) POLICY.-**

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act ["(b) PURPOSES.-The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species..."]

Section 4 of the ESA requires that the Service produce a Recovery Plan for each endangered species that will provide for recovery to the level of removal of necessity for listing protection for that species. Section 4 states:

**"DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES**

**Sec. 4. ...**

**(f)(1) RECOVERY PLANS.-**The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in development and implementing recovery plans, shall, to the maximum extent practicable- ...

**(B) incorporate in each plan-**

**(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;**

**(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species**

be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal..."

Adversely affecting a federally listed and protected endangered species without a formal Section 7 consultation with the Service is illegal. Adverse modification of Critical Habitat without a formal Section 7 consultation with the Service is also illegal. Section 7, states:

#### "INTERAGENCY COOPERATION

##### SEC. 7.

###### (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.-

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species..."

Adversely affecting a federally listed and protected endangered species violates Section 9 of the ESA. This is called a "taking". "Taking" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." (Babbitt v. Sweet Home Chapter for a Great Oregon [115 S. Ct. 2407 {1995}]) Section 9 states:

## "PROHIBITED ACTS

### SEC. 9.

#### (a) GENERAL.-

(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to...

(B) take any such species within the United States or the territorial sea of the United States...

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

(2) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of plants listed pursuant to section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to...

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act."

Increasing agricultural and residential groundwater pumping in the Palominas/Hereford area, controlled by Cochise County, the State of Arizona, and ADWR, have now caused stretches of the River to stop flowing year round. Increasing groundwater pumping from the City of Sierra Vista (which includes Ft. Huachuca) continue to cause declining base flows to the north. Data from ADWR, USGS, BLM, and others confirm this fact.

Groundwater dependent development in the Palominas/Hereford area, as well as in areas to the north that are not within the City of Sierra Vista or Huachuca City, are controlled by the Cochise County Board of Supervisors and the State of Arizona. New agricultural groundwater pumping requires permitting by ADWR. Groundwater dependent development within the cities of Sierra Vista, Huachuca City, and Benson are controlled by their respective city councils, as well as by ADWR.

ADWR has the authority to protect aquifers from excessive groundwater pumping by designating any area as an Active Groundwater Management Area (AMA) or an Irrigation Non-Expansion Area (INA). In areas designated as an AMA, groundwater users of wells pumping more than 35 gallons per minute must have permits to withdraw groundwater. New irrigation uses are prohibited. Only historic irrigation withdrawals are permissible. New developments must demonstrate to ADWR that an "assured water supply" exists to satisfy the needs of the development for at least 100 years.

The ADWR Director has discretion to prescribe management goals and practices for an AMA. The ADWR Director also has the discretion to establish regulations that recognize the unique characteristics of the watershed for which the AMA was created, i.e., to preserve riparian habitat and wildlife.

Similarly, the ADWR director has discretion to designate an INA. In areas designated as an INA, new irrigation is prohibited. Irrigation can continue if the farmer can demonstrate continuous historic use for a period five years prior to formation of the INA.

ADWR has been vested with significant authority to manage Arizona's surface and groundwater rights. The Commission for Environmental Cooperation (CEC) Expert Study Team observed:



“...The Groundwater Management Code, as one of its central features, vested authority in DWR for coordinated management of surface water rights and groundwater rights. The Act delegated to DWR wide-ranging authority to manage Arizona’s water. To this end, the legislature placed centralized control of administration of the state’s ground-water resources in DWR in order to “[f]ocus the responsibility for water management and administration of water related programs” and to “[s]tabilize the use of water resources....” (A.R.S. § 45-102.) The director was endowed with considerable power to manage the state’s water resources effectively. The legislature delegated to the Director “general control and supervision of surface water, its appropriation and distribution, and of ground-water, to the extent provided for by [the Act].” [A.R.S. § 45-103(B).] The director’s extensive authority was intentionally crafted to allow considerable discretion in anticipating and dealing with problems raised by managing Arizona’s water resources.

(“Sustaining and Enhancing Riparian Migratory Bird Habitation on the Upper San Pedro River,” Final Draft, March 1999, Prepared for The Secretariat of The Commission for Environmental Cooperation, By the San Pedro Expert Study Team, Dr. Hector Arias Rojo – Watershed Management, Dr. John Bredehoeft – Hydrology, Dr. Ronald Lacewell – Natural Resource Economics, Dr. Jeff Price – Ornithology, Dr. Julie Stromberg – Plant Ecology, Gregory A. Thomas, J.D. – Law & Public Policy and Study Coordinator, 1999, Commission for Environmental Cooperation)

Arizona water law is not based on reality. Arizona water law refuses to acknowledge the direct connection between groundwater and surface water.

This issue has been addressed directly by Robert Glennon, University of Arizona (UA) Professor of Law and Dr. Thomas Maddock, III, UA Professor of Hydrology and Water Resources:

“...Many people look at washes and arroyos, dry except during rainstorms or snow melt, and do not understand that, despite the lack of surface flow, water is not far below the surface. The presence of sub-surface water--a high water table--sustains the remaining desert vegetation which has deep tap roots. Unfortunately, unrestricted groundwater pumping of water hydrologically-connected to surface flows will inexorably hasten the demise of the remaining free flowing streams and associated riparian habitats, and interfere with the vested property rights of surface water rights holders. On July 27, 1993, the Arizona Supreme Court sanctioned these consequences in re the General Adjudication of All Rights to Use Water in the Gila River System and Source, [FN2] Interlocutory Review, Issue No. 2. (hereinafter Issue No. 2). The Court reaffirmed a 1931 ruling that rested on hydrologic concepts contained in a legal treatise published in 1912 and, in the process, further obfuscated the legal interpretation of the 1931 ruling...

...Arizona has suffered its own form of desertification, a term that may seem

inapt as applied to a State already perceived by most people as a barren desert. Yet, Arizona's natural pre-development environment included thousands of miles of rivers, streams, and creeks ranging from the Colorado River through the Grand Canyon to unnamed trickles that meandered through alpine meadows. Most low desert free-flowing water courses are now only memories. Unregulated groundwater pumping poses a serious jeopardy to those that remain.

The Issue No. 2 Court...By refusing to take into account modern principles of hydrogeology and by ignoring technological developments like high capacity turbine pumps, the Issue No. 2 Court failed to ground its opinion in reality."

("In Search of Subflow: Arizona's Futile Effort to Separate Groundwater from Surface Water," Robert Jerome Glennon and Thomas Maddock, III, 36 Ariz. L. Rev. 567)

Legal delusion similar to that utilized as the basis for Arizona water law has been rejected in Federal court cases in at least three Supreme Court cases. The first case is *Kansas v. Colorado*, 115 S. Ct. 1995. In this case, the Supreme Court curtailed Colorado groundwater pumpers who were pulling water from the aquifer in the Arkansas River Valley in Colorado upstream of the border with Kansas.

The second case is *Nebraska v. Wyoming*, 115 S. Ct. 1033, 1997 (1995). In this case, the Supreme Court addressed groundwater pumping in Wyoming that had been depleting flows in the North Platte River.

The third case is *Cappaert v. United States* (426 U.S. 128 (1976)). In this case the Supreme Court stopped the groundwater pumping of Nevada farmers that was depleting water necessary for the survival of the Devil's Hole Pupfish.

These cases have been reviewed recently in "The Concept of Capture: The Hydrology and Law of Stream/Aquifer Interactions," by Robert Jerome Glennon and Thomas Maddock, III, in a 1997, publication from the Rocky Mountain Mineral Law Institute:

"...The Arkansas River Compact offers a recent, important illustration of a compact that protects a downstream state from the diminution of surface flows caused by capture of surface water in an upstream state...The Compact grandfathered-in existing uses of the Arkansas River Basin as of 1949 and permitted future development as long as the development would not diminish the usable flows in the River Basin as of 1949 and permitted future development as long as the development would not diminish the usable flows in the river in either state. (See *id.* [63 Stat. 145-52 (1950).] at 147.) After 1948, prompted by new turbine pump technology and the absence of controls on new wells in Colorado, approximately 1,500 irrigation wells came on line. These wells were located in the shallow alluvial aquifers (Alluvial aquifers are generally aquifers near a stream formed from recent sedimentary deposits.) in the Arkansas River Valley in Colorado upstream of the border with Kansas. (See Simpson, *supra* note 216 [For background on this conflict and on recent developments, see Hal D. Simpson, "Conjunctive Use of Surface and Groundwater in the Arkansas River Basin, Colorado," Address at ABA Water Law Conference (Feb. 1997),

and David L. Harrison, "A Response to Kansas v. Colorado: Sustainable Use of the Arkansas River," address at Natural Resources Law Center, U. of Colo. School of Law (June 1995).], at 2.)

In 1985, Kansas brought suit in the Supreme Court under the Court's original jurisdiction. Kansas alleged that Colorado had violated the Compact by permitting the development of post-Compact irrigation wells that reduced the flow of usable water in Kansas. In 1994, the special master appointed by the Court to try the dispute issued his final report...

...Although Colorado and Kansas skirmished on hydrologic modeling and burden of proof issues, the Supreme Court saw no need to resolve these questions because "regardless of which burden of proof applies, [the special master had] no difficulty in concluding that pumping in Colorado ha[d] caused material depletions of the usable Stateline flows of the Arkansas river..." (Kansas v. Colorado, 115 S. Ct. at 1745)...

...The U.S. Supreme Court's equitable apportionment doctrine offers another way in which federal law may regulate pumping of groundwater that captures surface flows...Wyoming, Nebraska, and Colorado have been squabbling over rights to use the North Platte River for over a half century...In the 1980's, Nebraska returned to the Court and filed an Amended Petition which alleged that Wyoming was depleting the natural flows of the North Platte by construction additional reservoirs and "permitting unlimited depletion of groundwater that is hydrologically connected to the North Platte River and its tributaries." [Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995)] Nebraska also alleged that groundwater development in Wyoming adjacent to the Laramie River, a tributary to the North Platte, threatened further to reduced flows in the North Platte River. (See *id.*)...

...the Supreme Court has made clear that pumping of hydrologically-connected groundwater may result in such a change of condition that the court might modify an earlier decree to prevent harm to a downstream state from an upstream state's groundwater pumping..."

"...Cappaert v. United States (426 U.S. 128 (1976), the U.S. Supreme Court considered federal reserved rights in Devil's Hole National Monument in Nevada which had been set aside by executive proclamation for the purpose of preserving a pool of water that contained the desert pupfish, an unusual species, and that had other scientific and educational interests. In 1968, local farmers began pumping groundwater from a well approximately two and on-half miles from Devil's Hole. The groundwater pumping captured water from the pool, thus lowering the water level I the pool land exposing a rock shelf which decreased the desert pupfish's spawning area and increased the likelihood of its extinction. The farmers had a permit from the state engineer under Nevada law for their wells. In 1971, the United States filed suit. Both sides conceded that the water pumped by the farmers was hydrologically connected to the water in the pool in Devil's Hole. The farmers claimed that the reserved rights doctrine required federal courts to balance competing interests, a claim rejected by the U.S.

Supreme Court. (426 U.S. 138.) The court decided that the government intended to reserve unappropriated water in order to maintain the level of the pool. (See *id.* At 147.) The court approved an injunction that reserved the amount of water that would be necessary to preserve the water level in the pool in order to implement the original objectives of reserving the land. "[T]he United States can protect its [reserved] water from subsequent diversion, whether the diversion is of surface or ground water." (*Id.* at 143.) Nor did the federal government need to perfect its reserved water rights according to state law. "Federal water rights are not dependent upon state law or state procedures..." (*Id.* at 145.)

We may draw several lessons from Cappaert. First, the priority date of federal reserved rights is the date of the federal reservation. Second, the purpose of the reservation will determine the scope of the federal reserved rights. Third the amount of water reserved in that which is "necessary" to accomplish the federal purposes. Fourth, the federal reserved rights doctrine will protect against harm to these purposes from subsequent groundwater pumping that captures surface water..."

[Robert Jerome Glennon and Thomas Maddock, III, The Concept of Capture: The Hydrology and Law of Stream/Aquifer Interactions, 43 Rocky Mtn. Min. Law Inst. 22-1 (1997)]

Cappaert v. United States (426 U.S. 128 (1976)) has also been reviewed in another article by Professor Glennon. In "In Search of Subflow," Professor Glennon states:

"...In Cappaert v. United States [426 U.S. 128 (1976)], the United States Supreme Court rejected the state claim that the reserved rights doctrine required a balancing of competing interests. When the Federal Government sets aside land for a particular federal purpose, its purpose is not balanced against competing state interests. A combination of Commerce Clause (U.S. Const. Art. I, § 8, cl. 3.), the Property Clause (U.S. Const. Art. IV, § 3, cl. 2.), and the Supremacy Clause (U.S. Const. Art. VI, cl. 2.) means that when there is a dispute the federal interests prevail..."

"...the Court held that "the United States can protect its [reserved] water from subsequent diversion, whether the diversion is of surface or groundwater." (426 U.S. at 143)"

"...Federal water rights are not dependent upon state law or state procedures..." (426 U.S. at 145)"

"...Several implications flow from the Cappaert ruling. First, the reserved rights doctrine will apply to the San Pedro Riparian National Conservation Area. Second, the reserved rights adhere as of the date of the federal reservation. Third, the purpose of the reservation determines the scope of federal water rights. Fourth, the Federal Government obtains rights to the quantity of water that is "necessary" to accomplish its purpose. Fifth, the reserved rights doctrine will protect against harm from subsequent groundwater pumping of

hydrologically-connected water..."

("In Search of Subflow: Arizona's Futile Effort to Separate Groundwater from Surface Water," Robert Jerome Glennon and Thomas Maddock, III, 36 Ariz. L. Rev. 567)

The connection between groundwater and surface water has also been examined by Professors Glennon and Maddock in a situation similar to that concerning dewatering of the San Pedro River. Groundwater pumping from the City of San Antonio threatens species dependent on natural springs in the area:

"...In Texas, the City of San Antonio relies almost entirely on groundwater pumped from the Edwards Aquifer. Such pumping has adversely affected natural springs in the area and, in the early 1990s, led the Sierra club to sue the Secretary of the Interior for failing to challenge withdrawals of water from the Edwards Aquifer that threatened various endangered species. [Sierra Club v. Lujan, 36 Env'tl. Rep. Cas. (BNA) 1533 (W.D. Tex. 1993).]..."

...In its suit against the Secretary of the Interior, the Sierra club claimed that pumping captured some of the flow in those springs and thereby constituted a "taking" of habitat of threatened and endangered species in violation of the Endangered Species Act. [(Sierra Club v. Lujan, 36 Env'tl. Rep. Cas. (BNA) 1533 (W.D. Tex. 1993), *dismissed on other grounds sub nom.* Sierra Club V. Babbitt, 995 F.2d 571 (5<sup>th</sup> Cir. 1993).] The district court held that: (1) The Fish and Wildlife Service (FWS) had a nondiscretionary duty under the ESA to develop a recovery plan for the endangered species, and (2) the FWS had violated the ESA by failing to define minimum spring flow requirements to protect the species. [Id. On further review, the Fifth Circuit dismissed the case as moot after FWS published a revised recovery plan. See Sierra Club v. City of San Antonio, 112 F.3d 789 (5<sup>th</sup> Cir. 1997).]..."

[Robert Jerome Glennon and Thomas Maddock, III, The Concept of Capture: The Hydrology and Law of Stream/Aquifer Interactions, 43 Rocky Mtn. Min. Law Inst. 22-1 (1997)]

Ultimately, this litigation forced the Texas State Legislature to produce and pass the Edwards Aquifer Act. The Edwards Aquifer Act established a conservation district named the Edwards Aquifer Authority. The Edwards Aquifer Authority has the power to regulate groundwater withdrawals and to impose aquifer-wide restriction on water withdrawals by non-exempt wells. Owing to several years with above average rainfall, it is not yet certain whether or not the Edwards Aquifer Authority will be effective.

The SPRNCA was formed with passage of the Arizona-Idaho Conservation Act (AICA), Public Law 100-696 [S. 2840]. AICA became law on November 18, 1989. The SPRNCA was established:

"In order to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River in Cochise County, Arizona..."

The water rights for the SPRNCA emanate from the AICA. In the AICA, Congress reserved "a quantity of water sufficient to fulfill the purposes of the [SPRNCA]." [16 U.S.C. § 460xx(a)] The amount of water reserved by Congress for the SPRNCA was also addressed in the Senate report upon which the SPRNCA section of the AICA was based:

"...That quantity which will maintain flows, including periodic bank full discharge and periodic overbank discharge through the riparian zone, as well as support fish and fish reproduction, birds and wildlife, and maintain the aesthetic and recreational value of the Riparian Conservation Area."

(U.S. Senate Committee on Energy and Natural Resources, San Pedro Riparian National Conservation Area Report, No. 100-525, 100<sup>th</sup> Cong., 2d sess., Sep. 7, 1988, at 4.)

Water rights for the SPRNCA date from enactment of the AICA. While there may be some debate concerning provision of water for the SPRNCA by senior water users, there is no debate that water users denying water from the SPRNCA after November 18, 1989, violate not only AICA, but also the water rights of the SPRNCA.

#### Violations of Sections 2, 7, and 9 of the ESA

The State of Arizona now has a law restricting counties from controlling the density of development within their jurisdiction, even in areas like the Upper San Pedro Basin where increasing groundwater development is causing historic and illegal harm. By impeding control of excessive groundwater development in the Upper San Pedro Basin, the State of Arizona is in violation of Section 9 of the ESA.

The State of Arizona and ADWR have the authority to create an INE or an AMA in the Upper San Pedro Basin to control excessive local deficit groundwater pumping harming the San Pedro River. The State of Arizona and ADWR refuse to do so. By refusing to control groundwater pumping that increasingly depletes San Pedro River base flows, the State of Arizona and ADWR are in violation of Section 9 the ESA.

The Cochise County Board of Supervisors and the cities of Sierra Vista, Huachuca City and Benson refuse to control the excessive groundwater-dependent development within their respective jurisdictions. By refusing to control groundwater dependent development within their respective jurisdictions, the Cochise County Board of Supervisors, and the cities of Sierra Vista, Huachuca City, and Benson are in violation of Section 9 of the ESA.

The fact that the BLM and the Service refuse to act definitively to utilize available avenues of remedy to curtail these violations of Section 9 of the ESA by the State of Arizona and ADWR finds both agencies also in violation of Section 9 of the ESA, as well as Sections 2 and 7.

BLM and the Service refuse to utilize available legal means to stop groundwater pumping occurring since November 18, 1989, particularly, but not limited to new agricultural groundwater pumping in the Hereford/Palominas area. Failure to do so violates Sections 2, 7, and 9 of the ESA.

BLM and the Service need immediately undertake three actions to correct

violations of Sections 2, 7 and 9 of the ESA. The first action is to seek injunction in Arizona General Stream Adjudication Court against groundwater pumping initiated since November 18, 1989. The second is to seek injunction in Federal court against ADWR, the State of Arizona, the Cochise County Board of Supervisors, and the cities of Sierra Vista, Huachuca City and Benson to end violations of Section 9. Both these actions are necessary. Both of these actions are overdue.

In addition, BLM and the Service need to enter formal Section 7, consultation addressing BLM failure to (1) defend the reserved Federal water rights of the SPRNCA, and (2) failure to manage the SPRNCA to protect the federally protected species and Critical Habitat. Section 7 consultation is required where a Federal action, or in this case, non-action, affects federally protected species or Critical Habitat in an adverse way.

In correspondence to the BLM, dated March 26, 1999, Professor Robert Glennon of the University of Arizona (UA) College of Law and Professors Thomas Maddock and Robert MacNish of the UA Department of Hydrology and Water Resources, advised BLM to "take immediate steps to obtain an injunction from the Arizona General Stream Adjudication Court that would halt recently initiated large-scale groundwater pumping for agricultural irrigation." The Professors state:

"...In June 1998, the San Pedro Expert Study Team, set up by the Secretariat of the Commission for Environmental Cooperation (CEC), issued its Draft Report that confirmed that extensive groundwater pumping by farmers, the City of Sierra Vista, private water companies, and Fort Huachuca is diminishing surface flows in the San Pedro River. The Report also concluded that "there is not substantial divergence among hydrologists about the nature of the hydrological problem nor the measures that would solve it." The San Pedro Expert Study Team, Sustaining and Enhancing Riparian Migratory bird Habitat on the Upper San Pedro River, 99 (15 June 1998)...

...Agriculture continues to be the largest single water user in the San Pedro River Valley...Most irrigation water comes from groundwater pumping of the regional and floodplain aquifer within two miles of the River. This pumping is capturing water that would otherwise reach the River directly or serve as baseflows to sustain surface flows in the River. See Robert Jerome Glennon and Thomas Maddock, III, The Concept of Capture: The Hydrology and Law of Stream/Aquifer Interactions, 43 rocky Mtn. Min. Law Inst. 22-1 (1997)...Since 1998, ADWR has permitted at least four new irrigation wells in the Palominas area bordering the SPRWCA.

Pumping from these new wells conflicts with BLM's federal reserved rights for the SPRNCA. Congress created the SPRNCA in 1988 in order to protect this fragile and unique habitat...Congress expressly reserved "a quantity of water sufficient to fulfill the purposes of the [SPRNCA]." 16 U.S.C. § 460xx(a). A Report of the U.S. Senate Committee on Energy and Natural Resources specified the quantity of water to be reserved by the legislation: "That quantity which will maintain flows, including periodic bank full discharge and periodic overbank discharge through the riparian zone, as well as support fish and fish reproduction, birds and wildlife, and maintain the aesthetic and recreational value of the Riparian Conservation Area." U.S. Senate Committee on Energy and Natural Resources, San Pedro Riparian National Conservation Area Report,

No. 100-525, 100<sup>th</sup> Cong., 2d sess., Sep. 7, 1988, at 4. Congress clearly intended to reserve sufficient water to assure perennial flows through the SPRNCA in order to protect fish, fish reproduction and the aquatic habitat...

...Under federal law, federal reserved rights enjoy a priority date as of the date when the federal reservation is made, or 1988, in the case of the SPRNCA. Under federal law, any subsequent groundwater pumping that interferes with the senior federal reserved right may be enjoined. See *Cappaert V. United States*, 426 U.S. 128 (1976)...

...In 1991, lawyers representing BLM filed claims for federal reserved rights for the SPRNCA in the Arizona General Stream Adjudication Court. In the subsequent years, those claims have not been adjudicated... In the foreseeable future, the situation will not change... However, the court has jurisdiction and power to issue temporary restraining orders and injunctions. See *Trimble v. Chattman*, Contested Case No. W1-102, In re General Adjudication of Gila River, Special Master's Report, Oct. 29, 1998. These remedies are ideally suited to prevent changes to the status quo, such as new large-scale agricultural irrigation.

We urge the BLM, as steward of the SPRNCA charged by Congress with responsibility for protecting this irreplaceable resource, to act to protect the federal reserved right expressly created by Congress by seeking injunctive relief from the Arizona General Stream Adjudication Court against recently initiated agricultural pumping..."

(Correspondence, Robert J. Glennon, Esq., Morris K. Udall Professor of Law and Public Policy, Thomas Maddock, III, Ph.D., Professor of Hydrology and Water Resources, and Robert MacNish, Ph.D., Adjunct Professor of Hydrology & Water Resources, University of Arizona, to Mr. Mike Ferguson, Deputy State Director, Resources, US Bureau of Land Management, Phoenix, March 26, 1999.)

On May 6, 1999, BLM replied:

"...In the January meeting and in your letter, you made clear that you regard judicial intervention as a necessary part of the Upper San Pedro Basin strategy. We have never ruled out that alternative, particularly as it would apply to large new agricultural uses. However, such action has not seemed opportune to this point. Demonstrating a clear impact on our Federal Reserved instream flow water right would require data that has simply not existed or that we do not presently have the means to collect... Gathering sufficient and reliable data is one of the highest priorities among the projects for which we are seeking funding through the Departments of Defense and the Interior and with other agencies and landowners in the Upper San Pedro Partnership (Partnership). We would be interested in meeting with you again to consider monitoring needs and to clarify in greater detail some of the data you mentioned in your letter... In the meantime, we are continuing to pursue a more diverse, collaborative approach



with the Upper Basin land managers and agencies in the Partnership, which has objectives very similar to the list in your letter..."

(Correspondence, Mr. Mike Ferguson, BLM Deputy State Director, Resources Division, Phoenix, to Dr. Robert J. Glennon, UA School of Law, and Drs. Thomas Maddock and Robert MacNish, UA Department of Hydrology and Water Resources, Tucson, May 6, 1999.)

The BLM response to Professors Glennon, Maddock and MacNish highlights some of the reasons necessitating this Notice of Intent to Sue. It also illustrates some of the reasons that judicial intervention will ultimately be necessary to save the San Pedro River.

BLM rationale for not defending SPRNCA water rights may be divided into two primary fallacies: (1) "Demonstration of clear impact does not exist," and (2) "The Upper San Pedro Partnership collaborative approach will solve the problem." Each is discussed separately:

**BLM fallacy #1: Demonstration of clear impact does not exist.**

**BLM writes:**

"...Demonstrating a clear impact on Federal Reserved instream water right has simply not existed...Gathering sufficient and reliable data is one of the highest priorities among the projects for which we are seeking funding...We would be interested in meeting with you again to consider monitoring needs and to clarify in greater detail some of the data you mentioned in your letter..."

Consensus concerning the demonstration of clear impact has already been reached within the expert hydrological community. Hydrological models from ADWR, UA, and USGS all demonstrate direct connectivity between the local groundwater pumping and decreasing San Pedro base flows. Recently, the CEC Expert Study Team concluded:

"...Substantial consensus exists as to the nature of the hydrologic problem. Solutions in the basin are inhibited not so much by conflicts over hydrology as concerns over the allocation of the costs and benefits of the remedies..."

("Sustaining and Enhancing Riparian Migratory Bird Habitation on the Upper San Pedro River," Final Draft, March 1999, Prepared for The Secretariat of The Commission for Environmental Cooperation, By the San Pedro Expert Study Team, Dr. Hector Arias Rojo – Watershed Management, Dr. John Bredehoeft – Hydrology, Dr. Ronald Lacewell – Natural Resource Economics, Dr. Jeff Price – Ornithology, Dr. Julie Stromberg – Plant Ecology, Gregory A. Thomas, J.D. – Law & Public Policy and Study Coordinator, 1999, Commission for Environmental Cooperation)

BLM's calling for more data is nothing more than blatant application of the classical do nothing via the "stall by more studying" approach. More data has already been accumulated concerning San Pedro River hydrology than has been used in deciding the

past Supreme Court cases cited earlier. BLM's claiming that "[g]athering sufficient and reliable data is one of the highest priorities" laughable. More than ten years ago, ADWR hydrologists advised BLM to institute the same program:

"...Recommendations...The Bureau of Land Management should institute a program to monitor groundwater levels in the floodplain aquifer of the San Pedro River and the underlying regional aquifer..."

(Putman, Frank, Kim Mitchell, Greg Bushner, "Water Resources of the Upper San Pedro Basin, Arizona," Hydrology Division, Arizona Department of Water Resources, Phoenix, Arizona, July 1988, p. 148)

After ten years of "managing" the SPRNCA, the BLM still doesn't have its "highest priority" hydrological monitoring project in place. It is no wonder that BLM has earned its nickname "Bureau of Lethargic Mediocrity".

Like the San Pedro, the Santa Cruz River once flowed northwards out of Mexico to also join the Gila River. Santa Cruz River Basin officials demonstrated comparable managerial aptitude:

"...According to Dr. G.E.P. Smith, irrigation engineer at the University of Arizona, agriculturalists in the Santa Cruz valley near Tucson have used rare judgment in not overtaxing the ground reservoir supply, up to the present, assuring Tucson and the Santa Cruz valley of a continuing water supply...Had the ground water supply been developed in some great boom time, it probably would have been over-developed as has occurred in many sections of the southwest..."

("Valley Around City Includes Three Benches, Groundwater Supplies in Santa Cruz Basin Are Extremely Important," Arizona Daily Star, February 23, 1940)

By about 1960, excessive groundwater pumping to accommodate the growth of Nogales and Tucson, and for irrigated agriculture had killed the Santa Cruz River. Nogales had already suffered a period of shortage. Press coverage of the Santa Cruz' death continued into the middle sixties:

"The ground water level in the Santa Cruz River basin generally dropped...up to 42 feet at Nogales...from 1962 to 1963, the annual report of the U.S. Geological Survey shows.

At Nogales, which suffered a water shortage early this summer, the water level in the wells at the pumping plant was 44 feet below the well sump, the lowest in 25 years...

Agricultural uses accounted for nearly one half of total water pumped out of the ground in the basin while the City of Tucson pumped slightly more than one-quarter: 44,700 acre-feet or nearly 15 billion gallons.

Most of the city's wells are located between the confluence of the Rillito Creek with the Santa Cruz River and the San Xavier Mission; they pumped a total of 32,300 acre-feet with the water table dropping from two to eight feet.

Some wells along the Rillito Creek reported drops of 12 feet, the report said..."

"Santa Cruz Water Level Takes Drop, 42-Foot Decrease Noted At Nogales," Arizona Daily Star, September 23, 1963

On September 22, 1964, the Star reported:

"...The letter [Bureau of Reclamation to the Pima County Board of Supervisors] explained that the basin "has some of the most highly-developed agricultural, municipal and industrial areas in Arizona, primarily dependent on ground-water pumping for water supply. Competition for ground-water supplies is keenest in the Tucson area. Flow in the mainstream is basically confined to flash flows, which often cause substantial flood damage."

"Santa Cruz Basin Study Is Planned, Resources Will Be Surveyed," Arizona Daily Star, September 22, 1964

Unless BLM, and other Federal entities, take assertive actions soon, the San Pedro River will suffer similar fate as the Santa Cruz.

BLM fallacy #2: The Upper San Pedro Partnership collaborative approach will solve the problem.

BLM writes:

"...In the meantime, we are continuing to pursue a more diverse, collaborative approach with the Upper Basin land managers and agencies in the Partnership [the Upper San Pedro Partnership], which has objectives very similar to the list in your letter..."

The Upper San Pedro Partnership consists primarily of BLM, ADWR, Cochise County, the City of Sierra Vista, and Ft. Huachuca. This Partnership cannot not save the San Pedro. In fact, aside from BLM lethargy and lack of advocacy on behalf of the San Pedro River, the leadership of each other partner has consistently and energetically endeavored to impede San Pedro River preservation efforts.

ADWR answers directly to the Governor of the State of Arizona. On September 29, 1993, in order to promote the uncontrolled development of housing subdivisions in the Upper San Pedro River Basin, ADWR Deputy Director C. Laurence Linser removed the requirement to warn housing buyers of potential future water problems:

"...Current groundwater modeling studies indicate that with continued pumping at the current rate of withdrawal for 100 years, the cone of depression in the groundwater aquifer will not directly or appreciably affect the San Pedro River..."

(Correspondence, Mr. C. Laurence, Deputy Director, ADWR, to William P. Sullivan, Martinez & Curtis, P.C. [Attorneys for Dan Cracchiolo, Bella Vista Land and Water Co.] September 29, 1993.)

Mr. Linser's conclusion was pure prevarication. The fact that there existed no objective basis for Mr. Linser's conclusion was subsequently proven in ADWR's Public Records Law response to Southwest Center for Biological (SWCBD) inquiry for data upon which his decision was based. No such data existed.

BLM lawyers did respond to ADWR's removal of developers' warnings against water inadequacy:

"...There is no doubt that pumping in the Sierra Vista already has a significant indirect impact on the flow of the San Pedro, and as we understand it your own hydrologists agree with this conclusion. Even though the cumulative cone of depression has not intercepted the stream, the cumulative cone of depression in that area is intercepting underground recharge which historically augmented and supported the stream. The new uses to be allowed under your revised policy will only exacerbate this problem and accelerate the time when there is a direct and catastrophic effect on the San Pedro River..."

"...your letter reflects, in our view, an insensitivity as to the significant tension which presently exists in that area of Arizona, and a disrespect for the property rights of the United States...we sincerely believe that your decision is misguided and will likely lead to confrontations which could have been avoided..."

(Fritz L. Goreham, Field Solicitor, Office of the Solicitor, US Department of the Interior, Phoenix Field Office to Larry Linser, Deputy Director, Arizona Department of Water Resources, dated November 17, 1993)

Predictably, however, BLM, and the Department of Interior, never followed up on their concerns.

Since Mr. Linser was directly accountable to then Governor Fife Symington, his actions were not unexpected. After all, Governor Symington, not only demonstrated an inability to understand basic wildlife biology, he publicly encouraged violation of environmental protection laws. Governor Symington even offered to personally kill federally protected Mexican Spotted Owls:

"The topic of the endangered spotted owl came up while Symington addressed a group Thursday (June 3, 1993) in Williams. Symington kidded the audience: "I like the kind that you stuff and put on your desk.""

(Political Insider, Phoenix Gazette, June 4, 1993)

"The Mexican spotted owl shouldn't get broad federal protection because the bird is smart enough to survive human disruption of its habitat, Gov. Fife Symington said yesterday.

Even if that weren't the case, he said, "There isn't one spotted owl on this Earth that's worth losing a job over in the American economy."

(The Arizona Daily Star, "Spotted owl hardy, smart, governor says," Howard Fischer, September 20, 1994)

"Quote of the week..."I'm there to help solve problems, whether I have to dredge a lake at Havasu, or shoot a spotted owl somewhere, or build a bridge across a creek that the BLM and the Forest Service don't want us to build - whatever the issue, call me, I'm there to help." Fife Symington, speaking to the County Supervisors Association of Arizona."

(Political Insider, Editor, Steve Knickmeyer, Arizona Republic/Phoenix Gazette, November 17, 1995)

With the current Governor of Arizona, Jane Dee Hull, the situation has changed little. On October 5, 1997, in Reno, Nevada, the Governor Hull told the 1997 Western States Republican Leadership Conference:

"...Republicans must unite to end the War on the West. Environmental laws, truly the most egregious of all regulations, must be controlled. I urge all Congressional delegations to consider themselves guardians of our history and our future. These federal laws, onerous and debilitating, must be eliminated. Thoughtful, reasonable laws can be created that are based on sound science, economic prosperity, and the preservation of the quality of life. Our Western industries and traditions must be preserved...The Endangered Species Act is another example. I check weekly to make sure my grandchild's dog Kelsey has not been placed on the list. For if he were, I would probably have to guarantee him a separate room from us humans with a special diet of imported food..."

(Western States Republican Leadership Conference, Reno, Nevada, October 5, 1997)

On September 10, 1998, at the Governor's Rural Development Conference in Sierra Vista, Governor Hull said:

"It may take some time but the U.S. government will eventually understand that jobs for Americans are more important than some species of birds and animals...Some day the federal government will realize jobs are more important than small animals..."

(Sierra Vista Herald, "Hull: Jobs before some types of birds, animals," Bill Hess, September 11, 1998)

Hostile environmental attitude of Governor Hull aside, the mission statement of ADWR reflects quite a different tone:

"To ensure a long-term sufficient and secure water supply for the state; to develop public policy which promotes efficient use and equitable distribution of water in an environmentally and economically sound manner..."

Unfortunately, ADWR's efforts in the Upper San Pedro Basin continue to ignore this mission statement. A recent Office of the Auditor General Performance Audit and the ADWR Director Pearson's response highlight ADWR's current "let the San Pedro die"

attitude:

"...The Office of Auditor General has conducted a performance audit and Sunset review of the Arizona Department Water Resources...(Department)...The purpose of this audit was to evaluate the Department's efforts to ensure a long-term water supply for the State..."

"...the adequate water supply provision, applicable to areas outside of the AMAs, requires only that the original purchaser of a new subdivision lot receive notification of the sufficiency of the water supply. The provision does not prohibit new subdivisions from being developed or sold in the absence of sufficient water, and does not require that subsequent purchasers receive notification regarding insufficient water...well spacing in the non-AMAs is not regulated..."

"...REGULATORY LIMITATIONS MAY CREATE WATER SUPPLY PROBLEMS AS THE POPULATION INCREASES...Since water in the State is a limited resource, shortages may develop or become more pervasive. For example, the Sierra Vista area is currently experiencing groundwater depletion..."

"...If the Department determines that the water supply is insufficient, the developer is required only to notify potential buyers by displaying the water supply information in promotional material and subdivision lot sales contracts. Additionally, it appears that only the original purchaser is entitled to notification regarding the water supply, as there is no requirement that the water supply information be disclosed to purchasers when the subdivision lot is resold...The lack of an assured water supply provision in areas outside of the AMAs allows the development and sale of new subdivisions that do not have sufficient water. Therefore, new residents may be using an insufficient water supply, and may deplete the water upon which existing residents rely...The Department has not sought legislative changes to better enable subsequent purchasers to know the sufficiency of the water supply or to require areas outside of AMAs to demonstrate an assured water supply before building new subdivisions, and to regulate well spacing..."

(State of Arizona Office of the Auditor General Performance Audit Arizona Department of Water Resources, Report to the Arizona Legislature by Douglas R. Norton, Auditor General, April 1999, Report No. 99-8)

Predictably, the ADWR Director's response reflects an attitude antithetical to the ADWR mission statement and mandate:

"...This letter is the Department's response to the performance audit of the Arizona Department of Water Resources by the Office of the Auditor General...The recommendations of the audit will require significant study to determine the economic cost benefit of amending A.R.S. § 45-576 to extend the assured water supply requirements to areas outside of the AMAs and to amend

A.R.S. § 45-598 to provide the Department with limited authority to establish well spacing requirements in areas of the State outside of the AMAs..."

(Correspondence, Rita P. Pearson, Director, Arizona Department of Water Resources, to Douglas R. Norton, Auditor General, April 19, 1999.)

With Governor Hull in control, obviously ADWR attitudes have changed little since the 1993, Symington/Linser removal of required water inadequacy warnings for prospective Upper San Pedro River Basin subdivision buyers.

The City of Sierra Vista and Cochise County are lead by the likes of Casey Jones and Harold Vangilder, and Les Thompson, respectively. Mr. Jones has personally attempted to incite public violence against leaders of the environmental community. Mr. Thompson's efforts to destroy the San Pedro River by promoting development within the riparian corridor itself are used nationally as examples of a public official faithfully and successfully servicing his developer clients. Mr. Jones and Mr. Vangilder even led the City of Sierra Vista in formally declaring war against environmentalists trying to save the San Pedro River:

"City officials declare war on enviro 'enemy'...At a hastily called news conference Friday, officials from Sierra Vista and Cochise County said they have sat silently on the sidelines for too long and vowed to take on environmentalists hoping to stop growth in the area..."

"...We've been silent too long. Them days are gone." Sierra Vista Mayor Pro Tem Harold Vangilder said at the beginning of the city's news conference..."

("City officials declare war on enviro 'enemy'", Colleen Chandler, Sierra Vista Herald, September 23, 1995)

"...On Friday, Sept 23, the Sierra Vista City Council took a courageous action...they declared they would fight any attack on the viability of their economy by fighting the listing as endangered species two noxious weeds and a member of the fish-bait community. I'm talking about the water umbel, the ladies tresses and the tiger salamander...It is incomprehensible that laws passed by Congress, the regulation and policies of federal agencies and the rulings of federal judges would declare the needs of owls, squirrels, noxious weeds and fish bait have more value than the future we seek to build for our children. It is a sad thing to note that the environmental community can apparently lay down on the graves of our children and cry for the owls..."

("Greater Arizona Journal," by Harold Vangilder, The Weekly Bulletin, October 4, 1995.)

"Report is minimized by Sierra Vista councilman...A Sierra Vista official is minimizing the importance of a state document which asserts that declining groundwater levels in the Sierra Vista area are reducing the flow in the San Pedro River.

"It has the import of the tag on your mattress," said Sierra Vista City

Councilman Harold Vangilder of the document which local homeowners have signed..."

("Report is minimized by Sierra Vista councilman," Diane Dolak, Sierra Vista Herald/Review, March 27, 1994)

"A conversation with the Sierra Vista Mayor Pro Tem...There is not anything in, on or around the San Pedro River that is worth a single job of a single citizen in Sierra Vista. A government or a law that doesn't put people first is perverted and the city of Sierra Vista, at least this mayor pro tem, intends to put people first."

("A conversation with the Sierra Vista Mayor Pro Tem", Mountain View News, October 11, 1995)

"...In Sierra Vista today, there are those such as Harold Vangilder who have grand plans for the little municipality, and he'll be damned if he'll tolerate saving water for bugs and trees if it means creating hardships for his fellow *Homo sapiens*...All right, there may be five hundred species of wildlife found along the San Pedro. My response is, so what?...he says..."

"...There are some people who want to save the damn river for the coyotes and the minnows...If I had to choose between the minnows in the river and the aspiration of humans, the minnows are dead. Nature has been selecting for species for a long time. It's called evolution, and part of the process is survival of the fittest. We're the ones who rule supreme, and if a plant or animal can't adapt to our needs, then it's too bad."

(Science Under Siege, The Politicians' War on Nature and Truth, by Todd Wilkinson, Johnson Printing, 1988)

"...Sierra Vista City Council members Casey Jones and Harold Vangilder on Monday urged the Industrial Development Authority to become more aggressively involved with the city's growth and development..."It's got to be a labor of love," Vangilder said. "You've got to be aggressive about it"..."

("Council Members Urge IDA [Sierra Vista Industrial Development Authority] to Boost Growth," Sierra Vista Herald, Amy Fredette, July 9, 1998)

"...I am concerned about water," Thompson said. "Everybody in Arizona better be concerned about water but at the cost of stopping development? You'll never get this supervisor to stop development for water..."

("RV park plan approved; city annexation bid next," John Graber, Sierra Vista Herald, February 3, 1998)

"Supervisors OK for development, Split vote clears way for homes, golf course...Thompson (Cochise County Board of Supervisor Les Thompson) also



said the riparian area should be a reason to promote development in the area, not prevent it."

("Supervisors OK for development, Split vote clears way for homes, golf course" John Graber, Sierra Vista Herald, August 4, 1998)

In the last several years, while base flows in the San Pedro River continue to decline, local officials have been focused on their "labor of love," (Councilmen Jones' and Vangilder's July 7, 1998, appeal "to become more aggressively involved with...growth and development..."). More than 13,000 housing units have been approved or are in the process of being approved:

"Cochise County Planning & Zoning Commission Minutes, November 23, 1996...Docket MPD-90-03A: An application to amend the Bella Vista Ranches Master Development Plan approved by the Board of Supervisors on June 8, 1992 which established a comprehensive and logical framework to guide future development on the lands as described below. This amendment generally proposes a reduction of residential units from 6360 to 5186 and a sixty (60) acre reduction in commercial acreage...Ms. Gignac [Bella Vista Ranches and Water Company CEO] stated that one of the reasons that Bella Vista has not been able to develop Charleston Village is that it needs to be put on City of Sierra Vista sewer...She added that they had recently had a master sewer plan done in which it shows that the northern tier of the MDP [master development plan] cannot be sewered thus leading to the request for lower density so that they can use septic tanks in that area...There was further discussion followed by Mr. Brofer moving that the Commissioners recommend to the Board of Supervisors that they approve Docket MDP-90-03A...it was passed unanimously..."

(Cochise County Planning & Zoning Commission minutes, November 13, 1996)

"...Under the previously approved Tenneco general plan, more than 7,000 single family housing units could have been built on the almost 2,055 acres and under the proposed amendment 1000 less houses would be constructed, said Bill Keaton, director operations for Castle & Cooke Arizona Inc. The Tenneco plan is also part of Vista 2010, Sierra Vista's general development plan, he said..."

"...As for future single family housing units, the Martin & McIntosh [Castle & Cooke's California-based engineering firm], document stated nearly 234 acres would be 6,000 square-foot lots, about 1,034 acres would be 8,000 square-foot lots and about 478 acres would be 18,000 square-foot lots. That could lead to 6,140 single family homes being constructed..."

("Castle & Cooke plan may create 6,140 homes sites, Rezoning proposal targets 2,055 acres east of Highway 92," Sierra Vista Herald, Bill Hess, May 23, 1999)

"...During the work session, Hibbs [Bob Hibbs, vice president of Castle & Cooke Arizona Inc., owner of the property] and Castle & Cooke engineering consultant Roger McIntosh talked about the proposed site plan and expansion of sewer lines in the area.

A proposed sewer agreement calls for the city to enter into a 20-year financing agreement with Castle & Cooke. Hibbs said the city will use a bond issue to finance the sewer project, with Castle & Cook repaying the city, with interest. There is no cost estimate for the project.

McIntosh said Castle & Cooke is proposing 5,656 single-family homes plus 1,800 multi-family units, for a total of 7,456 housing units..."

("Proposal may take 25 years to build," Sierra Vista Herald, Diane Saunders, June 3, 1999)

The local area's population is growing so rapidly that the City of Sierra Vista is out of wastewater treatment capacity. Instead of reexamining its excessive and non-sustainable rate of groundwater dependent growth, Sierra Vista, together with the Bureau of Reclamation (Reclamation), designed a scheme to solve the city's wastewater treatment bottleneck while pretending to protect the San Pedro River. Former Sierra Vista mayor Richard Archer lied publicly about the proposals efficacy:

"...The City of Sierra Vista has embarked on a Wastewater Recharge project. This recharge project, by refreshing the aquifer between Sierra Vista And the San Pedro River, will protect the San Pedro River until the total population of Sierra Vista/Fort Huachuca reaches 107,000 people..."

(Correspondence, Sierra Vista Mayor Richard Archer to General William W. Hartzog, US Army Training and Doctrine Command, Ft. Monroe, VA, April 5, 1996.)

This same claim is still made in the City of Sierra Vista's current promotional brochure, "A Walk Along the San Pedro":

"...A study, completed in the mid80's, indicated that the combined Sierra Vista/Fort Huachuca pumping was creating a deepening cone of depression, which could eventually impact the flows of the San Pedro River. The city began looking at ways that it could clean up the water at the treatment facility to augment the water supply. It was concluded that the water could be cleaned further and recharged between the city and the river. This process would, in effect, create an underground mound of water that would protect the river base flows from the effects of the cone of depression under the city...The whole purpose of these projects is to protect the San Pedro River from any adverse effects of groundwater pumping in the Sierra Vista/Fort Huachuca area. The current plan is projected to mitigate any impact to the river over the next 20 years..."

(City of Sierra Vista Brochure, "A Walk Along the San Pedro," 1998.)

The Sierra Vista/Ft. Huachuca population center currently pumps at least 7000 acre feet of groundwater per year in excess of replenishment. With only a cursory examination of the proposed wastewater recharge project, it is obvious that the net effect on the aquifer from the WWTP expansion further increases the deficit. SWCBD addressed this exact point in our comments, dated January 29, 1999, regarding Reclamation's "Draft Environmental Assessment for the City of Sierra Vista Water Reclamation Facility Effluent Recharge Project." (DEA):

"...The current estimate of Sierra Vista's ability to recharge the water the city pumps from the ground is approximately 30 percent, or 2,000 acre feet annually. This means that Sierra Vista is currently pumping groundwater totaling approximately 6,666 acre feet annually (Upper San Pedro Initiative: Southwest Center for Biological Diversity (SWCBD) comments on the San Pedro Expert Study Team's draft report, "Sustaining and Enhancing Riparian Migratory Bird Habitat on the Upper San Pedro River.").

If Sierra Vista can continue to recharge at the rate of 30% of their pumping, as their total groundwater pumping reaches 10,000 acre feet annually, the total amount of water recharged will be approximately 3,000 acre feet annually. The net effect on the aquifer is an increasing deficit of 2,334 acre feet annually (total groundwater pumped minus the amount recharged). In other words, as Sierra Vista's groundwater pumping increases from 6,666 to 10,000 acre feet annually, the aquifer will experience an increasing deficit of 2,334 acre feet annually or will experience an increasing deficit of approximately 50%. (This assumes, of course, that the proposed wastewater treatment plant will be able to increase its recharge from 2,000 to 3,000 acre feet annually.) In other words, increasing the recharge by 33% results from increasing the groundwater pumping deficit by approximately 50%.

The DEA states that Sierra Vista's Wastewater Treatment Plant "must be expanded to treat 4 mgd, or 4,480 acre-feet per year, to meet projected future demands. The DEA also predicts 10% loss of the water from evaporation prior to recharge. This means that a maximum capacity, the city will have increased its recharge to approximately 4000 acre feet annually but will have increased its groundwater pumping to 13,333 acre feet annually. In other words, at full capacity, the Project will increase recharge by 50% while increasing the city's groundwater pumping by 200%. The DEA is not clear about current Sierra Vista/Ft. Huachuca pumping and is not clear about future pumping rates. Failure to present these numbers adds to the aura of deceit that dominates the DEA..."

The recharge plan might protect a short section of the River temporarily. Sooner or later, however, the cone of depression under the city will capture both the recharge site and the River. Nothing will be left.

The current Cochise County Plan reflects similar accommodation of groundwater dependent growth no matter what the consequence:

"... GOALS AND POLICIES...Overall Plan Goal...The overall goal of the Cochise County Comprehensive Plan is to promote the future growth of Cochise County in an orderly, harmonious, environmentally and economically responsible manner. Free enterprise market dynamics

shall be allowed to determine land use activity patterns to the maximum extent feasible within the public's legitimate interests of health, safety, welfare, conservation and convenience..."

"...This policy does not preclude any specific types of land use due to level and type of water use. Instead it allows the developer the flexibility to address water conservation, rainwater detention, erosion control and the conservation and enhancement of natural recharge areas using their choice of best management practices..."

(COCHISE COUNTY COMPREHENSIVE PLAN -- AMENDED 1996 -- RESOLUTION NO. 84-72, AMENDED ORDINANCE NO. 06-02 & RESOLUTION NO. 96-34.)

Last year, to continue showing solidarity with local officials in the Upper San Pedro Basin, Governor Hull helped pass legislation to further curtail potential protective county zoning options even further.

Local state representative Gail Griffin introduced the legislation. With this new law, the State of Arizona has successfully added another obstacle against controlling groundwater dependent development along the San Pedro.:

"Hull signs into law ban on zoning to cut land values, Measure addresses complaints from Pima, Cochise landowners...Counties are going to lose their power to "down-zone" property.

Gov. Jane Hull on Wednesday signed legislation barring counties from enacting any changes in zoning or development regulations to reduce the value of a person's property without owner consent...The legislation not only bars direct down-zoning but also prohibits a county from making any change in its zoning code that would have the effect of restricting development..."

("Hull signs into law ban on zoning to cut land values, Measure addresses complaints from Pima, Cochise landowners," Arizona Daily Star, Howard Fischer, May 8, 1998)

"...Cochise County Board of Supervisors Chairman Lee Thompson supports legislation signed by Gov. Jane Hull restricting counties' ability to rezone.

"I have been very supportive of this," Thompson said. "My personal feeling is the rights of the private citizens come before the counties' authority..."

("County supports downzoning ban," Sierra Vista Herald, John Graber, May 8, 1998)

Ft. Huachuca is also a primary member of the San Pedro Partnership. The Base's efforts to evade environmental law have been extensive and prolonged. Most of Ft. Huachuca's efforts concern their refusal to accept comprehensive responsibility for their activities.

Ft. Huachuca is responsible for the local presence of more than 30,000 troops, dependents, and associated personnel. In addition, Ft. Huachuca's increasing local

economic expenditures are the primary substrate for the excessive local groundwater-dependent growth.

According to the Base's own economic documents ("Impact Statement Fiscal Year 1991", Ft. Huachuca, Arizona and "Impact Statement Fiscal Year 1997", Ft. Huachuca, Arizona), Ft. Huachuca's direct economic impacts within Cochise County have increased by 39%, from \$467.7 million in 1991 to \$649.7 million in 1997.

Ft. Huachuca's public relations position features a redundant mantra of "downsizing" and "decreased water usage on post" implies benefits to the San Pedro. Taking into account the dramatically increasing money spent on local contracts, however, the net effect of Ft. Huachuca's "downsizing" and "water conservation on post" is an increase in local groundwater pumping directly stemming from the increasing local contracting activities.

Ft. Huachuca's violations of Sections 7 and 9 of the ESA, as well as their refusal to obey the National Environmental Policy Act are currently being addressed in Federal court.

#### Violations of Sections 2 and 4 of the ESA

The specifics of Sections 2 and 4 of the ESA have already presented. The Southwestern Willow Flycatcher was listed as endangered on February 17, 1995. Huachuca Water Umbel was listed on January 6, 1997. The listings of both required multiple litigation efforts to overcome habitual violations of law by the Service.

A fundamental tenant of biological and legal protection requires a management plan to guide protective actions. These plans are called Recovery Plans. Sections 2 and 4 of the ESA require them. The Service has not produced Recovery Plans for the Southwestern Willow Flycatcher or for Huachuca Water Umbel.

#### Conclusion

The San Pedro River is dying. Cruel, calculated intransigence by the State of Arizona, ADWR, the Cochise County Board of Supervisors, the cities of Sierra Vista, Benson, and Huachuca City, the BLM, and the Service is the primary cause. In spite of more than a decade of irrefutable evidence that excessive local groundwater pumping is killing the San Pedro River, these entities still refuse to undertake any meaningful preservation efforts. After more than ten years of meetings, decision-delaying studies, fanfare, and the like, the principle entities responsible for protecting the River have yet to generate a single significant action resulting in decreasing or controlling local groundwater pumping.

San Pedro River base flows continue diminishing. As base flows continue diminishing, developers and farmers, serviced by faithful local officials, and counting on continuing Federal impotence and State complicity, flaunt laws designed specifically to prevent loss of places like the San Pedro River. Nothing changes the basic fact that increasing local groundwater pumping continues increasingly sucking the San Pedro dry.

In 60 days, on August 30, 1999, if the US Bureau of Land Management, the US Fish and Wildlife Service, the State of Arizona, Arizona Department of Water Resources, the Cochise County Board of Supervisors, and the cities of Sierra Vista, Benson, and

Huachuca City do not remedy their violations of the Endangered Species Act and other laws, SWCBD will seek judicial relief. If you have further questions, please contact Robin Silver, M.D., Conservation Chair, SWCBD, P.O. Box 39629, Phoenix, AZ 85069-9629, by mail; by phone: 602 246 4170, or by Email: [rsilver@sw-center.org](mailto:rsilver@sw-center.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Robin Silver, M.D.", written in a cursive style.

Robin Silver, M.D.  
Conservation Chair

cc: Earthlaw