ARIZONA DEPARTMENT OF WATER RESOURCES
NOTICE OF APPEAL OF AGENCY ACTION

1. Party filing this notice of appeal:

   Name: ROBIN SILVER
   Address: PO BOX 1178
   Phone No: (602) 799 3275 Email address: ROBINSILVER2008@gmail.com

2. The following action of the Department of Water Resources is being appealed:
   (Please attach a copy of the letter which advised you of the action.)

   ATTACHED

3. The following is a concise statement of the reason(s) for the appeal:
   (If you need additional space, please attach a separate page. Note: Pursuant to A.R.S. § 41-1092.03(B), the grounds for appeal by a party who will be adversely affected by an agency action and who exercised a right provided by law to comment on the action is limited to the issues raised in the party's comments.)

   SEE ATTACHED

4. Pursuant to A.R.S. § 41-1092.06, the appealing party may request an informal settlement conference. Such a request must be made no later than 20 days before the hearing. If an informal settlement conference is requested, the conference will be held within 15 days after the request is received by the agency.

   The person filing this notice of appeal requests an informal settlement conference at this time (check one):

   Yes _____ No X

   Note: A person who participates in an informal settlement conference waives the right to object to the participation of the Department's representative in the final administrative decision. A.R.S. § 41-1092.06(B).

5. [signature] Date: 8/23/12
   Signature of filing party

   ROBIN SILVER MD
   Print or type name Include title if applicable

FILING OF FORM: A party who desires to file a notice of appeal must complete this form and file it with the Docket Supervisor, Arizona Department of Water Resources, 3550 North Central Avenue, Phoenix, Arizona 85012 within thirty (30) days after the date the party received notice of the appealable agency action.

Rev. 12/16/10

Robin D. Silver, MD
PO Box 1178, Flagstaff, AZ 86002
Telephone: (602) 799-3275
FAX: (928) 222-0077
Email: robinsilver2008@gmail.com

August 23, 2012

Arizona Department of Water Resources DOCKET SUPERVISOR
FAX: 602 771 8686

Mr. Thomas Buschatzke
Assistant Director for Water Planning
Arizona Department of Water Resources

Andrew J. Craddock, Manager
Office of Assured and Adequate Water Supply
FAX: +1 (602) 771-8681
Email: **ajcraddock@azwater.gov**

Subject: APPEAL of issuance of a Designation of Adequate Water Supply for Castle and Cook's Pueblo del Sol Water Company (File No. 40-700705).

I own property on the Upper San Pedro River in Cochise County. I have done so since 1993. This correspondence is my objection to the two aforementioned Arizona Department of Water Resources (ADWR) activities.

Applicant Castle and Cook seeks total annual demand of 4,150.81 acre-feet per year by 2025.[1] It seeks water for for about 6,959 dwelling units, plus commercial and open space, on approximately 2,000 acres.[2]

Castle and Cook's consultant reports fail to analyze their developments effect on the San Pedro River.[3] **Water for these activities is not legally available.**[4] **Water for these activities is not physically available without loss of San Pedro River base flow.**[5]

Two documents are attached for incorporation into these projects' records. These documents address the specific reasons for which water is not legally available.

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[1] Demand Estimate of Application, April 28, 2011, Part B.

[2] Sierra Vista Herald 2006a, 2006b, 2006c.

[3] Brown and Caldwell 2011; Fluid Solutions 2011.

[4] Cappaert v. United States 426 U.S. 128 [1976]; Glennon and Maddock 1994; Glennon and Maddock 1997; *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, No. W-1, W-2, W-3, W-4 (Consolidated) (Ariz. Super. Ct. Maricopa County); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 2011; Maddock 1993; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995).

[5] Lacher 2011, USGS 1999, 2007 **

They also address ADWR's responsibility pursuant to the Arizona's Consumer Fraud Act.[6]

Federal law and federal legal rulings confirm (1) the scientific reality that groundwater and surface water are connected and, (2) the priority of congressionally established federal water rights.[7] These facts have been clearly established since 1976.

In 1976, the U.S. Supreme Court decided a landmark case, *Cappaert v. United States*. Groundwater pumping intercepting and denying water *necessary* to satisfy Federal reserved water rights was unequivocally no longer legal, even if protected by State law.[8] In *Cappaert v. United States*, the U.S. Supreme Court stopped the groundwater pumping of Nevada farmers that was intercepting and depleting surface water belonging to the federal government and that was necessary for the survival of the endangered Devil's Hole Pupfish.[9]

The U.S. Supreme Court has re-confirmed the findings of *Cappaert v. U.S.* two times since 1976.[10] In *Kansas v. Colorado*, 115 S. Ct. 1995, the U.S. Supreme Court curtailed Colorado groundwater pumpers from pulling water from the aquifer in the Arkansas River Valley in Colorado upstream of the border with Kansas.[11]

In the second case confirming *Cappaert v. U.S.*, *Nebraska v. Wyoming*, 115 S. Ct. 1033, 1937 (1995), the U.S. Supreme Court addressed groundwater pumping in Wyoming that had been intercepting and depleting flows in the North Platte River.[12]

Prior to September 29, 1993, consistent with federal law and scientific reality, ADWR recognized the fact that a 100-year supply of water does not exist in the Upper San Pedro Watershed Sierra Vista Sub-basin.[13] On September 29, 1993, however, Governor Fife Symington abruptly changed ADWR's course and ADWR no longer recognized the inadequacy of the Sierra Vista Sub-basin water supply.[14] ADWR continues this practice today.[15]

No new legal ruling or court order occurred to trigger the abrupt, September 29, 1993, Symington/ADWR policy change.[16] No new hydrological facts were discovered. None were presented.[17] The only difference between September 28, 1993 and September 29, 1993, was the blatant implementation of Governor Symington's

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[6] A.R.S. 44-1524, 441530; Arizona Attorney General 2001.

[7] Cappaert v. United States 426 U.S. 128 [1976].

[8] Ibid.

[9] Ibid.

[10] Glennon and Maddock 1994. Glennon and Maddock 1997. Kansas v. Colorado, 115 S. Ct. 1995. Maddock 1993. Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995).

[11] Kansas v. Colorado, 115 S. Ct. 1995. Glennon and Maddock 1997.

[12] Glennon and Maddock 1997. Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995).

[13] ADWR 1984, 1989, 1990, 1992, 1993c, 1993d, 1993e, 1994a, 2012.

[14] Ibid.

[15] ADWR 1993a, 1993b, 1994c, 2012; CBD 2002, 2003, 2004.

[16] ADWR 1994a; Maricopa Audubon 1993, 1994.

[17] Ibid.

antipathy for consumer safeguards and for protection of environmental treasures like the San Pedro River.[18]

Since September 29, 1983, ADWR has perpetuated Governor Symington's philosophy and direction.[19] Recently, however, Arizona's own courts have created a new State of Arizona precedent similar to those established in federal law.[20] On August 28, 2006, Maricopa County Superior Court Judge Eddward Ballinger issued a historic Order. He ruled,

> "…that SRP [Salt River Project] entitled to a preliminary injunction against the Shield Ranch to restrain the ranch from irrigating 22 acres of farmland in the Verde Valley for which the ranch had "no colorable claim" of a water right…It was the first time in over thirty years that a water right has actually been enforced in the state."[21]

The precedent prevents unlawful water users in the Verde Valley from stealing water that does not belong to them. This precedent is applicable to the San Pedro situation.[22]

ADWR's attempt to inappropriately grant adequacy certification to these two proposed Castle and Cooke projects is particularly insensitive at this time. Excessive unmitigated local groundwater pumping is already harming the San Pedro River.[23] The entity charged with controlling the watershed's water deficit, the Upper San Pedro Partnership, has failed to keep its promise to balance the local water budget by 2011.[24] Water supplied to these projects will further harm the River.[25]

The San Pedro River is truly one of Arizona's, the Nation's, and the World's environmental crown jewels.[26] The U.S. Congress officially recognized its uniqueness and value in 1988 with creation of the San Pedro Riparian National Conservation Area (SPRNCA).[27] Congress created the SPRNCA "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."[28]

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[18] ADWR 1994a; Arizona Republic 1996; Maricopa Audubon 1993, 1994; Phoenix Gazette 1993; Phoenix NewTimes 1997, 2001

[19] ADWR 2012.

[20] *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, No. W-1, W-2, W-3, W-4 (Consolidated) (Ariz. Super. Ct. Maricopa County).

[21] Feller 2007. "The Adjudication That Ate Arizona Water Law," Joseph M. Feller, Arizona Law Review, Volume 49: 405 2007.

[22] Ibid.

[23] ACOE 1970, 1974, 2005; ADWR 1996; BLM 2006, 2010; CEC 1999b; CBD v DoD 2002, 2011; Lacher 2011, 2012; Leenhouts et al 2006; SWCBD v DoD 1995; USFWS 1999, 2002, 2007; USGS 1999, 2006, 2012.

[24] Sierra Vista Herald 2003; Upper San Pedro Partnership 2010, 2011

[25] ACOE 1970, 1974, 2005; CEC 1999b; CBD v DoD 2002, 2011; Lacher 2011, 2012; Leenhouts et al 2006; SWCBD v DoD 1995; USFWS 1999, 2002, 2007.

[26] AGFD 1993, American Birding Association 1995; Arizona Commission on the Environment 1990; Arizona Daily Star 2002, 2003; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002, 2003a, 2003b; BLM 1987; CEC 1999a, 1999b; Life Magazine 1993; National Geographic 2000; New York Times 1999; Sierra Vista Herald 2000; SWCBD 1996; TNC 2002; US Congress 1988; USFWS 1978

[27] US Congress 1988

[28] Ibid.

With creation of the SPRNCA, the Upper San Pedro River became federal property.[29] Congress reserved "a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area."[30] Congress reserved "[t]hat 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."[31]

The U.S. Bureau of Land Management (BLM) became responsible for the management of the SPRNCA.[32] In 1991, BLM determined the amount of water necessary to fulfill the mandated congressional purpose of the SPRNCA.[33] BLM applied at that time to ADWR to perfect its SPRNCA water rights.[34] On April 3, 1992, ADWR granted surface water rights for the SPRNCA for monthly median of mean daily flows at the Palominas for 3,666 acre/feet per year and at the Charleston gage for 11,028 acre/feet per year.[35]

The date of the priority for BLM's San Pedro River water rights is August 12, 1985.[36] Huachuca Audubon, Chiricahua Sierra Club and Defenders of Wildlife applied for the permit "to Appropriate the Public Waters of the San Pedro River for Instream Flows for Wildlife Habitat Protection" on August 12, 1985.[37] ADWR transferred this application to BLM and perfected the water rights for BLM and the Federal government on April 3, 1992.[38] ADWR recognizes the priority date for BLM and the SPRNCA as August 12, 1985.[39]

In 1993, Life Magazine recognized the San Pedro River as one of "America's Last Great Places."[40]

The San Pedro River is jeopardized by excessive unmitigated local groundwater pumping.[41] The excessive local groundwater pumping intercepts water that otherwise flows to the River providing its base flow.[42] Base flow is the surface water in a river that comes from the underground aquifer and seeps through the river banks providing stream flow during the driest times of the year. San Pedro River base flow continues to decline.[43]

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[29] Ibid.
[30] Ibid.
[31] US Senate 1988.
[32] US Congress 1988.
[33] BLM 1991.
[34] Ibid.
[35] ADWR 1992.
[36] ADWR 1992; Huachuca Audubon, et al. 1985.
[37] Huachuca Audubon, et al. 1985.
[38] ADWR 1992.
[39] Ibid.
[40] Life Magazine 1993.
[41] ACOE 1970, 1974, 2005; CEC 1999b; CBD v DoD 2002, 2011; Lacher 2011, 2012; Leenhouts et al 2006; SWCBD v DoD 1995; USFWS 1999, 2002, 2007.
[42] ACOE 1970, 1974, 2005; ADWR 1994b, 1996; ASL 1994; BLM 2012; CBD v DoD 2002, 2011; Fort Huachuca 1994; Lacher 2011; USGS 1999, 2007.
[43] ADWR 1996; BLM 2010; CEC 1999b; Lacher 2011; USGS 1999, 2006, 2012.

The last official, published accounting of the local groundwater pumping deficit is from 2008. It was minus 4,400 acre-feet/year.[44] This 2008 deficit number has recently, though unofficially, been revised to minus 5,240 acre-feet/year in the pending draft USGS congressional report for 2009.[45] The pending draft USGS congressional report for 2009 documents the groundwater pumping deficit for 2009 as minus 6,100 acre-feet/year.[46] The pumping deficit has not improved.

New hydrological modeling definitively defines and confirms the San Pedro's future demise unless new mitigation is implemented.[47] In 2007, USGS published a new state of the art modeling template to map and predict groundwater pumping impact on the San Pedro River [48] but never ran their own model. Since then, noted hydrologist, Dr. Laurel Lacher has completed running the USGS model.[49] Her new study is titled, "Simulated Groundwater and Surface Water Conditions in the Upper San Pedro River Basin 1902-2105, Preliminary Baseline Results." Dr. Lacher's new modeling confirms the San Pedro's demise unless new mitigation is implemented:

> "In general, the new modeling predicts that much of the San Pedro and Babocomari rivers will cease to have perennial baseflow over the next century as a result of increased groundwater pumping. Of the three long-term USGS stream-gaging station sites on the Upper San Pedro River within the model area (near Palominas, Charleston, and Tombstone), only the Charleston site is predicted to maintain any summer baseflow by the end of the 21st Century." [p. 4]
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> "…Consistent with findings in Figure 23 and Table 2 for total baseflow decline, the simulation predicts that the bulk of future baseflow capture will occur on the lower Babocomari River and the San Pedro River north of Sierra Vista, both of which would diminish flows at the Tombstone gaging station location. At the Palominas gaging station site, simulated baseflow capture decreases from 0.93 to 0.83 cu-ft/s (about 28 to 26% of total baseflow decline) throughout the 21st Century because little or no baseflow is available for capture. Simulated baseflow capture from 2000 to 2050 decreases slightly (by less than 0.1 cuft/s) at Palominas, remains constant at Charleston, and increases by 0.9 cu-ft/s at Tombstone. In the period from 2050 to 2100, simulated baseflow capture is 0.0, 0.6, and 1.1 cu-ft/s for the Palominas, Charleston, and Tombstone gaging station locations, respectively (see column 9 in Table 3). By October 2100, simulated baseflow capture at the Tombstone gaging station is 3.6 cu-ft/s, or 36% of the total baseflow decline at that location (see column 8 in Table 3). Simulated capture at the Charleston gaging station location increases from 0.3 to 0.9 cu-ft/s over the 21st Century and constitutes 18% of the total decline in baseflow at that location by October 2100. Comparing these values with columns 6 and 9 of Table 2 confirms that

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44 Upper San Pedro Partnership 2010.
45 Upper San Pedro Partnership 2011.
46 Ibid.
47 Lacher 2011
48 USGS 2007
49 Lacher 2011

human development is responsible for all simulated baseflow declines between 2000 and 2100." [p. 43]

"SUMMARY AND CONCLUSIONS…This study updated and used the published USGS model of the USPB by Pool and Dickinson (2007) to simulate groundwater and baseflow conditions in the basin from 1902 to 2105 with no adjustments for climate change, but including the best available pumping and recharge data to date… [p. 50]

"Simulated baseflow capture on the Babocomari River between 2000 and 2100 comprises 90 to 93% of total baseflow decline and equates to 53 to 93% of total historic baseflow over that century. For the simulation period 1902 to 2100, capture is predicted to account for 18 to 36% of total simulated baseflow declines (including those caused by ET) near the Charleston and Tombstone gaging station locations, respectively, with pumping alone accounting for all simulated baseflow declines in the model area from 2000 to 2100. This finding incorporates the assumption that ET peaks in or near the year 2000. Simulated baseflow capture of 0.9 cu-ft/s (28% of total simulated baseflow decline) occurs in a small section of the San Pedro River near Palominas by October 2000, with little change over the next lOO-year simulation period. In general, the simulations predict that, in the absence of any major water use changes in the basin, much of the San Pedro and Babocomari rivers will cease to have perennial baseflow over the next century due to the widespread impacts of projected groundwater pumping." [p. 51] [50]

In summary, water for Castle and Cooke's proposed activities (1) is not legally available, period, and (2) is not physically available without loss of San Pedro River base flow. ADWR certification of Castle and Cooke's proposed activities will devalue my San Pedro River property value. ADWR certification of Castle and Cooke's proposed activities will devalue federal property, the SPRNCA, that belongs to all of us.

Please notify me of your decision. My mailing address is PO Box 1178, Flagstaff, AZ 86002.

Sincerely,

Robin Silver, MD

[50] Lacher 2011

References:

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ADWR 1993a. Memorandum to Lori Faeth, Policy Advisor to the Governor, Natural Resources and Environment; from Herb Guenther, Director of Department of Water Resources; RE: Sierra Vista Sub-Basin, Adequacy Determinations; April 9, 2003.

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ADWR 1993d. Correspondence, C. Laurence Linser, Deputy Director, ADWR, to William P. Sullivan, Martinez & Curtis, P.C., Attorneys for Bella Vista Land and Water Co., September 29, 1993.

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ADWR 1994a. Public Records Law response, T.C. Richmond, Chief Counsel, ADWR, to Robin Silver, M.D., Conservation Committee, Maricopa Audubon Society, March 28, 1994.

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CBD 2003. Public Records request by CBD to ADWR for "1. All documents, data and information to substantiate the information presented on the above referenced map (Cochise County Water Adequacy Reports [1980 to 2002] Map) from an April 9, 2003 memo from Herb Guenther to Lori Faeth. This documentation should include but not be limited to summary information about every project or development indicated on the map," and "2. All documents, data and information regarding Cochise County Water Adequacy Reports since the above referenced map was produced."; September 12, 2003.

CBD 2004. Public Records request by CBD to ADWR for specific files relating to the Cochise County Water Adequacy Reports (1980 to 2002) Map included in an April 9, 2003 memo from Herb Guenther to Lori Faeth, November 12, 2003. Analysis of ADWR documents regarding certification of “inadequacy” and “adequacy” for development in the Sierra Vista Sub-basin, from 1988 to June 30, 2004; CBD, June 30, 2004.

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Lacher 2011. Simulated Groundwater and Surface Water Conditions in the Upper San Pedro River Basin 1902-2105, Preliminary Baseline Results, Task 1 Report for December 2010 Contract Prepared for Friends of the San Pedro River and The Walton Family Foundation; Laurel J. Lacher, PhD, RG, Lacher Hydrological Consulting, Tucson, Arizona, June 2011.

Lacher 2012. Simulated Near-Stream Recharge at Three Sites in the Sierra Vista Subbasin, Arizona, Laurel J. Lacher, PhD., RG, Lacher Hydrological Consulting, Tucson, AZ., January 2012.

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Maricopa Audubon 1993. Public Records Request, Robin Silver, M.D., Conservation Committee, Phoenix, to Mr. C. Laurence Linser, Deputy Director, ADWR, requesting, “any and/or all ‘current groundwater modeling studies’ and/or the data that form the basis for your statement, dated September 29, 1993… ’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…’" November 29, 1993.

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JANICE K. BREWER
Governor

SANDRA A. FABRITZ-WHITNEY
Director

ARIZONA DEPARTMENT OF WATER RESOURCES

3550 North Central Avenue, Second Floor
PHOENIX, ARIZONA 85012-2105

(602) 771-8500

July 23, 2012

VIA CERTIFIED MAIL

Addressees on the Attached List

RE: Decision of the Director to Grant Pueblo Del Sol Water Company's Application for Designation as Having an Adequate Water Supply (No. 40-700705.0000)

On June 23, 2011, Pueblo Del Sol Water Company (Pueblo Del Sol) submitted an application for a designation as having an adequate water supply. During the public notice period, the Department received multiple objections.

After considering the application, the objections, the response of Pueblo Del Sol, and further analysis by Department staff, the Department determined that the application satisfies all of the requirements for a designation as having an adequate water supply. See A.R.S. § 45-108; A.A.C. R12-15-701, *et seq*. This letter is the Decision of the Director of the Department of Water Resources (Department) to grant the application as shown in the enclosed Draft Decision and Order.

The Department's decision on the objections is explained below. Objections raised are numbered for ease of reference.

1. Objection: Groundwater pumping to meet Pueblo Del Sol's estimated water demand will adversely impact the streamflow of the San Pedro River.

Numerous objectors claim that the proposed groundwater pumping to meet the estimated water demand in Pueblo Del Sol's application will adversely impact the streamflow of the San Pedro River. Consequently, the objectors claim that Pueblo Del Sol's application should be denied. For the reasons stated below, the Department disagrees.

Under the adequate water supply statutes and rules, the Department must determine whether an applicant for an adequate water supply determination has sufficient water supplies that are physically, legally and continuously available to satisfy the proposed water demand and whether the applicant has the financial capability to construct the facilities necessary to make the water available for the proposed use. *See* A.R.S. § 45-108(I) and A.A.C. R12-15-701, *et seq*. The

Department does not have authority to consider potential impacts on a river or stream from proposed pumping of groundwater by the applicant. Accordingly, whether or not Pueblo Del Sol's proposed groundwater pumping will have adverse impacts on the San Pedro River is not an issue that the Department may consider as part of its review of the Pueblo Del Sol application.

2. Objection: Pueblo Del Sol's proposed groundwater pumping will interfere with the federal reserved rights claimed by the United States Bureau of Land Management for the San Pedro Riparian National Conservation Area.

Many objectors assert that Pueblo Del Sol's proposed groundwater pumping will interfere with the federal reserved rights that the United States Bureau of Land Management (BLM) is claiming for the San Pedro Riparian National Conservation Area (SPRNCA) in the Gila River Adjudication, and therefore the groundwater is not legally available. Some objectors argue that the Department should deny Pueblo Del Sol's application for this reason and others argue that the Department should not issue a decision on Pueblo Del Sol's application until the Gila River Adjudication is completed. The Department disagrees with the objectors' arguments.

The objectors cite to *Cappaert v. United States*, 426 U.S. 128 (1976) for the proposition that federal reserved rights are entitled to greater protection than state water rights, including protection from both surface water diversions and groundwater pumping. In *Cappaert*, the United States sought an injunction to limit groundwater pumping near Devil's Hole, a part of Death Valley National Monument, because the pumping was lowering the water level and threatening a unique species of fish. 426 U.S. at 135. The U.S. Supreme Court held "that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 143. In upholding the injunction on groundwater pumping, the Court noted that the District Court did not curtail all pumping, but had narrowly tailored the injunction "to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole." *Id.* at 141.

Unlike the *Cappaert* case, the extent of any federal reserved right for SPRNCA is unknown, as is the impact the proposed pumping may have on such a right. Until the federal reserved right claims associated with SPRNCA have been finally adjudicated, it would be impossible to determine whether the proposed pumping would need to be curtailed to preserve SPRNCA, and if so, to what extent. The Supreme Court in *Cappaert* clearly stated that any limitations on pumping must be narrowly tailored to the minimal need of the reservation. Such a determination is impossible in the absence of an adjudication of the reservation itself.

Moreover, the Department's review of the Pueblo Del Sol application is an administrative process to determine whether the application satisfies the criteria for a designation of adequate water supply under the applicable statutes and rules, and does not involve a determination of water rights such as those claimed for SPRNCA. The existence and priority of water rights are determined through a general stream adjudication, which is a separate process in superior court. The importance of the distinction between the Department's administrative process and water rights determinations in the general stream adjudications was recognized by the Arizona Court of Appeals in *Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 506, ¶¶ 34-35, 260 P.3d 299, 306 (App. 2011). In that case, the Arizona Court of Appeals held that "[w]hen the general

adjudication of water rights is already pending, and a party has been noticed as a claimant in the action, that general adjudication is the exclusive forum in which the noticed party may adjudicate the water rights at issue in the action." 227 Ariz. at 509, ¶49, 206 P.3d at 309. Consistent with that holding, the federal reserved water rights claimed for SPRNCA must be determined as part of the Gila River Adjudication and not as part of the Department's review of Pueblo Del Sol's application. The Department lacks statutory authority and subject matter jurisdiction to determine the federal reserved water rights claims for SPRNCA. *See* 227 Ariz. at 509, ¶51, 260 P.3d at 309.

The United States has requested that the Department withhold any decision on Pueblo Del Sol's Application pending the completion of the Gila River Adjudication. The Department has no authority to do so under the adequate water supply statutes and rules, which set forth specific criteria that the Department must consider in making its determination.

3. Objection: Pueblo Del Sol has failed to demonstrate physical availability of groundwater.

Some objectors argue that Pueblo Del Sol has failed to demonstrate physical availability[1] of groundwater due to existing groundwater mining in the area. The Department disagrees.

Adequate water supply applicants are required to demonstrate that a water supply will be physically, continuously and legally available for 100 years to meet the demands of the proposed use, and that the applicant has financial capability to make the water available for the proposed use. A.R.S. § 45-108(I). Under the criteria for physical availability of groundwater set forth in A.A.C. R12-15-716(B), the applicant must demonstrate that after 100 years of pumping, taking into account all existing and approved demands and the proposed demand, the depth-to-static water level will not exceed 1200 feet below land surface. Pueblo Del Sol has demonstrated that after 100 years, the depth-to-static water level will not exceed 650 feet below land surface. Pueblo Del Sol has therefore demonstrated that groundwater will be physically available for 100 years to meet the demand of the proposed use.

Appealable Agency Action

This Decision of the Director to grant Pueblo Del Sol's Application for a Designation as Having an Adequate Water Supply (No.40-700705.0000), as shown in the enclosed Draft Decision and Order, is an appealable agency action. The Addressees on the attached list are entitled to appeal this decision. In order to appeal this action, a written appeal must be filed within thirty (30) days from receipt of this letter. Enclosed is a summary of the appeal process and an appeal form. Pursuant to A.R.S. § 41-1092.03(B), the grounds for filing a notice of appeal by an objector are "limited to issues raised in that party's comments."

Please direct any questions concerning the appeal process to Nicole Klobas, Deputy Counsel, at 602-771-8472.

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[1] One objector suggests that Pueblo Del Sol has failed to demonstrate physical availability and continuous availability of the groundwater supply. Because the substance of that objection only discusses physical availability, the Department is treating the objection as an objection on the grounds of physical availability.

Sincerely,

Thomas Buschatzke
Assistant Director

Enc. Draft Decision and Order
Notice of Right to Appeal Agency Action
Notice of Appeal of Agency Action Form

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September 7, 2004

Hon. Terry Goddard
Arizona Attorney General
1275 West Washington Street
Phoenix, AZ 85007
Phone: (602) 542-5025

Hon. Paul Charlton
U.S. Attorney for Arizona
Two Renaissance Square, 40 North Central Ave., Suite 1200
Phoenix 85004-4408
Phone: (602) 514-7500

Mr. Pete Zegarac
Acting Officer in Charge, U.S. Postal Inspection Service, Phoenix Division
P.O. Box 20666
Phoenix, AZ 85036-0666
Telephone: (602) 223-3660

Dear Attorney General Goddard, U.S. Attorney Charlton, and Mr. Zegarac,

RE: 1. Arizona Department of Water Resources (ADWR) falsely represents the adequacy of the Sierra Vista area's water supply to consumers and lenders.[1]

2. Assistant Arizona Attorney General Mary Mangotich Grier believes that concern regarding dishonest certification of water adequacy by ADWR for Sierra Vista area developers is "a consumer disclosure issue."[2]

[1] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[2] CBD v. ADWR 2003b

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3. ADWR's false statements to consumers violate Arizona's consumer fraud statutes.[3]

4. Since these false statements to consumers affect Federal property and transit via U.S. mail, they also violate Federal criminal statutes regarding "Fraud and False Statements" and "Mail Fraud."[4]

5. Request for action by the Arizona Attorney General, the U.S. Attorney General for Arizona, and the U.S. Postal Inspection Service Phoenix Division Officer in Charge to protect consumers and lenders in the Sierra Vista area by stopping these violations of law.[5]

Executive Summary

Arizona Department of Water Resources (ADWR) falsely represents the adequacy of future water supply to real estate consumers and lenders in the Sierra Vista area.[6] ADWR certifies the "adequacy" of the area's water supply for Sierra Vista developers when, in fact, it does not exist.[7] ADWR Director Herb Guenther is the official responsible for ADWR's misrepresentation.

Arizona State law mandates that ADWR evaluates the availability of an adequate 100-year supply of water for Sierra Vista area developers and their subdivisions.[8] The resulting certifications advise consumers and lenders of the adequacy of water supply for the real estate under consideration.[9] The process is designed to protect consumers against fraud.[10]

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[3] A.R.S. 44-1521, 44-1522

[4] 18 U.S.C. 1001, 18 U.S.C. 1341

[5] A.R.S. 44-1521, 44-1522; 18 U.S.C. 1001, 18 U.S.C. 1341

[6] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992,1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[7] ACOE 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004b, 2004c; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2002, 2003a, 2003b, 2003c, 2003d, 2004b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[8] ADWR 1984, 1989, 1990, 1992b, 1993a, 1993b, 1993c, 1994a, 2003a, 2003b, 2003c, 2004b, 2004c; A.R.S. 32-2181F, A.R.S. 44-1521, A.R.S. 45-1522, A.R.S. 45-108; CBD 2002, 2003c, 2003d, 2004b

[9] Ibid.

[10] ADWR 2004b

A 100-year supply of water does not physically exist in the Sierra Vista area without loss of San Pedro River base flow.[11] Base flow is the water in the stream during the driest times of the year.[12]

Three circumstances protect the San Pedro River legally against loss of its base flow:

1. The Upper San Pedro River is Federal property deriving its base surface flow directly from the Sierra Vista Sub-basin's groundwater aquifer source.[13]

2. The Upper San Pedro River is essential for the survival of Federally protected endangered plants and animals.[14]

3. The Upper San Pedro River is a Public Trust treasure.[15]

The protective applicability of each of these facts to situations identical to that of the San Pedro River has been resolved in the Federal Courts on multiple occasions.[16] Consequently, just as a 100-year supply of water does not physically exist in the Sierra Vista area without loss of San Pedro River base flow,[17] a 100-year supply of water does not exist legally either.[18] All groundwater pumping in the Sierra Vista area beginning at least after November 18, 1988 (the date of Congress' creation of the San Pedro Riparian National Conservation Area) will ultimately need be reduced or terminated as necessary to preserve Federal water rights and the San Pedro River.[19]

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[11] ACOE 2002, 2003; ADWR 1988, 1991, 1994b, 1996; BLM 1987; CBD 2001, 2003a, 2003b; CBD v. ADWR 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Steinitz, et al. 2000; U.S. Army 2003; USFWS 1999b, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992

[12] ADWR 1994b

[13] ACOE 1970, 1974; ADWR 1991, 1994b, 1998; ASL 1994, CEC 1999b; CEQ 1981; U.S. Congress 1988; USGS 1999; USFWS 1999b, 2002

[14] AGFD 2000; Amundson 2000; Arizona Republic 1993, 1995; Birds of North America 1999; Bureau of Reclamation 2002; CBD 2004a; CBD v. DoD 1999; Endangered Species Act 1973; Laymon 2000; National Audubon 2002; SWCBD 1991,1992, 1999; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2002

[15] AGFD 1993, American Birding Association 1995; Arizona Commission on the Environment 1990; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002b, 2003a, 2003b; BLM 1987; CEC 1999a, 1999b; Life Magazine 1993; National Geographic 2000; New York Times 1999; Sierra Vista Herald 2000b; SWCBD 1996; TNC 2002; U.S. Congress 1988; USFWS 1978

[16] Arizona Center for Law in the Public Interest 2004, Cappaert v. United States 426 U.S. 128 (1976), CBD v. DoD 1999, Glennon and Maddock 1994, 1997; Greer v. Connecticut, 161 U.S. 519 (1896). Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); Maddock 1993; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995), Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 U.S. (2002). ; Ward v. Race Horse, 163 U.S. 504 (1896)

[17] ACOE 2002, 2003; ADWR 1988, 1991, 1994b, 1996; BLM 1987; CBD 2001, 2003a, 2003b; CBD v. ADWR 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Steinitz, et al. 2000; U.S. Army 2003; USFWS 1999b, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992

[18] ACOE 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004b, 2004c; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2002, 2003a, 2003b, 2003c, 2003d, 2004b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[19] ACOE 1970, 1974, 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 1998, 2003a, 2003b, 2003c, 2004b, 2004c; AGFD 1993, 2000; American Birding Association 1995; Amundson 2000; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 1993, 1995, 2002b, 2003a, 2003b; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; ASL 1994; Birds of North America 1999; BLM 1987, 1991; Bureau of Reclamation 2002; Cappaert v. United States 426 U.S. 128 (1976); CBD 2001, 2002, 2003a, 2003b, 2003c, 2003d, 2004a, 2004b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999a, 1999b; CEQ 1981;

ADWR ignores these facts by issuing "adequacy" certifications in the Sierra Vista area.[20] These certifications are deceptive and untruthful.[21] They misrepresent the situation to consumers and lenders.[22]

In the 1960s and 1970s land fraud schemes were rampant in Arizona.[23] During those times, Arizona law did not protect consumers.[24] The likes of Ned Warren and Howard Woodall misrepresented and sold waterless desert land as perpetually lush, green real estate to unwary, unprotected consumers.[25]

In response to countless tragedies, former Representative Udall and others pressured the Arizona State Legislature into passing the Consumer Fraud Act.[26] The act or use of deceit, dishonesty or deception in connection with the sale of real estate in Arizona became illegal.[27] The Arizona Attorney General enforces the new Consumer Fraud Act.[28]

Based on the clear language and intent of the Consumer Fraud Act, ADWR assures Arizona consumers that ADWR protects them from unscrupulous developers. This assurance is found in ADWR's Water Adequacy Program Summary:

> "In 1973, the Arizona Legislature enacted a statewide water adequacy statute as a consumer protection measure in response to the marketing of lots without available water supplies. The Water Adequacy Program, described in A.R.S. § 45-108, requires subdivision developers to obtain a determination from the State regarding the availability of water supplies prior to marketing lots. Developers are required to disclose any 'inadequacy' of the supply to potential buyers…"[29]

Department of Interior 1994; Endangered Species Act 1973; Glennon 2002; Glennon and Maddock 1994, 1997; Greer v. Connecticut, 161 U.S. 519 (1896); Huachuca Audubon et al. 1985; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Laymon 2000; Life Magazine 1993; Maddock 1993; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); National Audubon 2002; National Geographic 2000; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995); New York Times 1999; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); Sierra Vista Herald 2000b; Special Master 2003; State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991, 1996, 1999; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 U.S. (2002); TNC 2002; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1978, 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 (1896); Winters v. United States [1908]

[20] ADWR 1993, 1994a, 2003a, 2003b, 2003c; CBD 2002, 2003c, 2003d, 2004b; CBD v. ADWR 2003a

[21] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[22] Ibid.

[23] Arizona Project 1977, Cochise County 2004, Romley 1994, Udall 1972

[24] Udall 1972

[25] Arizona Project 1977, Arizona Republic 2002c, Cochise County 2004, Romley 1994, Udall 1972

[26] A.R.S. 44-1521 through 1534

[27] A.R.S. 44-1521, 44-1522

[28] A.R.S. 44-1524, 441530; Arizona Attorney General 2001

[29] ADWR 2004b

There is nothing nebulous in ADWR's assurance to consumers. This assurance is consistent with the Arizona Legislature's "Declaration of policy" for groundwater management:

> "The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens…"
>
> "…It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state."[30]

Good faith fulfillment of the Legislature's direction by ADWR demands consumer protection and comprehensive management.[31] The Legislature also requires that "[s]tatutes shall be liberally construed to effect their objects and to promote justice."[32] In the Sierra Vista area, ADWR deceives this trust.[33]

ADWR's assurance to consumers is problematic because former Governor Fife Symington created a scheme to allow Sierra Vista developers to misrepresent the adequacy of the local water supply to prospective consumers and lenders.[34] Governor Symington summarily discarded consumer protection and comprehensive water assessment in the Sierra Vista area.[35] Governor Symington's misrepresentation scheme still survives to this day.[36]

On January 21, 2004, Assistant Arizona Attorney General Mary Mangotich Grier expressed her opinion that concern regarding dishonest certification of water adequacy by ADWR for Sierra Vista area developers is "a consumer disclosure issue."[37] Ms. Mangotich Grier expressed her opinion to Superior Court Judge Thomas Dunevant in a Hearing regarding our challenge to the accuracy of ADWR's issuance of water adequacy to Sierra Vista area developers.[38] While we disagree with the Attorney General's vigorous defense of ADWR's dishonest water adequacy certifications for Sierra Vista area developers,[39] Arizona's consumer fraud statutes are indeed clear.[40] The act or use of deceit, dishonesty or deception

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[30] A.R.S. 45-401
[31] A.R.S. 44-1521 through 1534; A.R.S. 45-401
[32] A.R.S. 1-211
[33] ADWR 1993, 1994a, 2003a, 2003b, 2003c; CBD 2002, 2003c, 2003d, 2004b; CBD v. ADWR 2003a
[34] ADWR 1993, 2003b
[35] Ibid.
[36] ADWR 2003b, 2003c, 2004c; CBD 2002, 2003c, 2003d, 2004b
[37] CBD v. ADWR 2003b
[38] CBD v. ADWR 2003a
[39] Ibid. ADWR and the Arizona Attorney General based their defense purely on technical legal issues (standing, justiciability, entitlement to injunctive relief or mandamus, and statute of limitations). They did not challenge the validity of the fact that ADWR misrepresents the adequacy of water supply in the Sierra Vista area.
[40] A.R.S. 44-1521 through 34

in connection with the sale of real estate is illegal.[41] ADWR's issuance of dishonest certifications for Sierra Vista area developers violates these consumer fraud statutes.[42]

Federal criminal statutes regarding "Fraud and False Statements" and "Mail Fraud" are also clear.[43] ADWR's issuance of fraudulent Sierra Vista-area "adequacy" certifications violate these statutes since they (1) affect Federal property, and (2) transit via mail. The U.S. Attorney may commence a civil action in any Federal court to stop such violations.[44]

Background

The San Pedro River is the last free flowing, un-dammed desert river in the Southwest.[45] Millions of songbirds migrate through the Southwest every year to and from their wintering grounds in Central America and Mexico and their summer breeding grounds in Canada and the northern United States.[46] For tens of thousands of years, they have traveled along the few north-south river corridors for shelter, food, and water during their transit. In the past, the rivers Rio Grande, San Pedro, Santa Cruz, and Colorado formed these corridors. Today, only the San Pedro survives.[47]

Nearly 45% of the 900 total species of birds in North America utilize the San Pedro at some point in their lives.[48] More birds than ever before now use the San Pedro owing to the degradation of past migratory corridors.[49] In 1995, the American Bird Conservancy recognized the San Pedro as its first "Globally Important Bird Area" in the United States.[50] The American Bird Conservancy recognized the San Pedro because "it is considered the largest and best example of riparian woodland remaining in the southwestern U.S."[51]

The San Pedro is also renowned for its biodiversity beyond birds. It supports the highest variety of mammal species in the United States and the second richest on Earth.[52] Only the montane cloud forests of Costa Rica hold more.[53] In addition, 47 species of reptiles and amphibians are also found there.[54]

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[41] A.R.S. 44-1521, 44-1522

[42] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[43] 18 U.S.C. 1001, 18 U.S.C. 1341

[44] 18 U.S.C. 1345

[45] AGFD 1993, American Birding Association 1995, CEC 1999a, CEQ 1981, National Geographic 2000; New York Times 1999

[46] CEC 1999a, 1999b; New York Times 1999

[47] AGFD 1993, American Birding Association 1995, Arizona Highways 1989, CEC 1999a, CEQ 1981, National Geographic 2000; New York Times 1999

[48] CEC 1999b, National Geographic 1999, 2000

[49] Arizona Highways 1996, CEC 1999a; New York Times 1999

[50] American Birding Association 1995

[51] Ibid.

[52] USFWS 1978

[53] Ibid.

[54] BLM 1987, Arizona Highways 1989

The San Pedro River is truly one of Arizona's, the Nation's, and the World's environmental crown jewels.[55] The U.S. Congress officially recognized its uniqueness and value in 1988 with creation of the San Pedro Riparian National Conservation Area (SPRNCA).[56] Congress created the SPRNCA "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."[57] In 1993, Life Magazine recognized the San Pedro River as one of "America's Last Great Places."[58]

With creation of the SPRNCA on November 18, 1988, the upper San Pedro River became Federal property.[59] Congress reserved "a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area."[60] Congress reserved "[t]hat 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."[61]

The U.S. Bureau of Land Management (BLM) became responsible for the management of the SPRNCA.[62] In 1991, BLM determined the amount of water necessary to fulfill the mandated congressional purpose of the SPRNCA.[63] BLM applied at that time to ADWR to perfect its SPRNCA water rights.[64] On April 3, 1992, ADWR granted surface water rights for the SPRNCA for monthly median of mean daily flows at the Palominas for 3,666 acre/feet per year and at the Charleston gage for 11,028 acre/feet per year.[65]

The date of the priority for BLM's San Pedro River water rights is August 12, 1985.[66] Huachuca Audubon, Chiricahua Sierra Club and Defenders of Wildlife applied for the permit "to Appropriate the Public Waters of the San Pedro River for Instream Flows for Wildlife Habitat Protection" on August 12, 1985.[67] ADWR transferred this application to BLM and perfected the water rights for BLM and the Federal government on April 3, 1992.[68] ADWR recognizes the priority date for BLM and the SPRNCA as August 12, 1985.[69]

Excessive, unmitigated and increasing, local groundwater pumping threatens the San Pedro River.[70] The pumping deprives the San Pedro River of surface flow due to the existence of a direct hydrological connection between the water in the area's underground aquifer and the surface water, or actual stream flow, in the River.[71] During the driest time of the year, most of the surface or stream flow in the San Pedro River comes from this

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[55] AGFD 1993, American Birding Association 1995; Arizona Commission on the Environment 1990; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002b, 2003a, 2003b; BLM 1987; CEC 1999a, 1999b; Life Magazine 1993; National Geographic 2000; New York Times 1999; Sierra Vista Herald 2000b; SWCBD 1996; TNC 2002; U.S. Congress 1988; USFWS 1978
[56] U.S. Congress 1988
[57] Ibid.
[58] Life Magazine 1993
[59] U.S. Congress 1988
[60] Ibid.
[61] U.S. Senate 1988
[62] U.S. Congress 1988
[63] BLM 1991
[64] Ibid.
[65] ADWR 1992a
[66] ADWR 1992a; Huachuca Audubon, et al. 1985
[67] Huachuca Audubon, et al. 1985
[68] ADWR 1992a
[69] Ibid.
[70] CEC 1999b, CBD v. DoD 1999, USFWS 1999b, USFWS 2002
[71] ACOE 1970, ACOE 1974, ADWR 1994b, ASL 1994, USGS 1999

groundwater seeping into the River.[72] This flow is called base flow. It represents SPRNCA's Federal water rights.[73]

The fact that the connection between groundwater and surface water exists in Federal law, as well as in reality, has been clearly established since 1976.[74] At that time, the U.S. Supreme Court decided a landmark case, *Cappaert v. United States*. Groundwater pumping intercepting and denying water *necessary* to satisfy Federal reserved water rights was unequivocally no longer legal, even if protected by State law.[75] In *Cappaert v. United States*, the U.S. Supreme Court stopped the groundwater pumping of Nevada farmers that was intercepting and depleting surface water belonging to the Federal government and necessary for the survival of the endangered Devil's Hole Pupfish.[76]

University of Arizona (UA) Law Professor Robert Glennon and UA Hydrology Professor Thomas Maddock from the University of Arizona summarize the details involved in the *Cappaert v. United States* case:

> "… In *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 one-half miles from Devil's Hole. The groundwater pumping captured water from the pool, thus lowering the water level in the pool and 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 is that which is 'necessary' to accomplish the federal purposes. Fourth, the federal reserved rights doctrine will protect against harm to

[72] ADWR 1998, 1991, 1994b; CEC 1999b, CEQ 1981, USGS 1999, USFWS 1999b, 2002
[73] ADWR 1992a; Huachuca Audubon, et al. 1985; BLM 1991; U.S. Congress 1988
[74] Cappaert v. United States 426 U.S. 128 [1976]
[75] Ibid.
[76] Ibid.

these purposes from subsequent groundwater pumping that captures surface water…"[77]

Professors Glennon and Maddock also review *Cappaert v. United States*, as it applies to the San Pedro, in another published article. In their Law Review article, "In Search of Subflow," they write:

> "…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…"[78]

The U.S. Supreme Court has re-confirmed the findings of *Cappaert v. U.S.* two times since 1976.[79] In *Kansas v. Colorado*, 115 S. Ct. 1995, the U.S. Supreme Court curtailed Colorado groundwater pumpers from pulling water from the aquifer in the Arkansas River Valley in Colorado upstream of the border with Kansas.[80]

Professors Glennon and Maddock summarize the details:

> "…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*:

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[77] Glennon and Maddock 1997

[78] Glennon and Maddock 1994

[79] Glennon and Maddock 1994, 1997; Kansas v. Colorado, 115 S. Ct. 1995; Maddock 1993; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995)

[80] Kansas v. Colorado, 115 S. Ct. 1995; Glennon and Maddock 1997

Sustainable Use of the Arkansas River,' address at the 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)…"[81]

In the second case confirming *Cappaert v. U.S.*, *Nebraska v. Wyoming*, 115 S. Ct. 1033, 1937 (1995), the U.S. Supreme Court addressed groundwater pumping in Wyoming that had been intercepting and depleting flows in the North Platte River.[82] Professor Glennon and Professor Maddock summarize the details:

"…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 constructing 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…"[83]

Since Federal water rights were unequivocally established on November 18, 1988 with creation of the SPRNCA, any subsequent pumping, interception or diversion of water resulting in the reduction of SPRNCA base flow violates Federal water rights.[84] In addition, since the San Pedro River is essential for the survival of federally protected endangered species, reduction of the River's base flow also violates the Endangered Species Act.[85]

The purpose of the Endangered Species Act (ESA) is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be

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[81] Glennon and Maddock 1997

[82] Glennon and Maddock 1997, Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995)

[83] Glennon and Maddock 1997

[84] ACOE 1987; 2003; ADWR 1988, 1991, 1992a, 1994a, 1996; Arizona Supreme Court 1988, 1992, 1999; ASL 1994, 1998; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD v. DoD 1999; CEC 1999b; CEQ 1981; Department of Interior 1993; Glennon and Maddock 1994, 1997; Kansas v. Colorado, 115 S. Ct. 1995; Maddock 1993; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995); U.S. Congress 1988; U.S. Constitution; USFWS 1999b, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992

[85] CBD 2004a; CBD v. DoD 1999; Endangered Species Act 1973; SWCBD 1991, 1992, 1999; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2002

conserved, to provide a program for the conservation of such endangered species and threatened species…"[86]

The ESA mandates that all Federal agencies "conserve endangered species." Section 2(c)(1) of the ESA states:

> "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…"

Section 4(f)(1) of the ESA requires that the Secretary of the Interior "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…" Section 7(a)(2) of the ESA insures that "any action authorized, funded, or carried out by [any Federal] agency…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…to be critical…"

Section 9 of the ESA prevents adversely affecting a federally listed and protected endangered species by any entity, Federal, State or private. Such harmful action 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."[87] Section 9(a)(1) states that "…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."

Section 9(a)(2) states that "…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."

The Public Trust Doctrine also protects the San Pedro River and its dependent plants and animals.[88] The Public Trust Doctrine is the summary of legal rulings that provides for the preservation of submerged and submersible lands for public use in navigation, fishing and recreation in perpetuity.[89] Under the Public Trust Doctrine a State must administer its watercourse lands for the public benefit and in trust for the public.[90]

Ultimately, one or more of these three fundamental legal concepts (Federal water rights, the ESA, and the Public Trust Doctrine) will prevail in controlling the Sierra Vista area's excessive groundwater pumping.[91] The question now is whether or not the San Pedro can

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[86] ESA Section 2(b)

[87] Babbitt v. Sweet Home Chapter for a Great Oregon, 115 S. Ct. 2407 (1995)

[88] Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); CBD v. ADWR 2002; Greer v. Connecticut, 161 U.S. 519 (1896); Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Pollard v. Hagen, 44 U.S. (3 How) 212 (l845); State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. l976); Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; Ward v. Race Horse, 163 U.S.. 504 (1896); WJF. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998)

[89] Black's Law Dictionary 2004

[90] Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)

[91] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v.

survive long enough to be saved.

Base flow in the San Pedro River has already decreased dramatically.[92] Base flow in the River has now become intermittent at Palominas,[93] at Contention,[94] and at the confluence of the Babocomari River and the San Pedro.[95] These declines have been great enough to cause loss of obligate wetland plants and facultative wetland plants.[96] At Contention, groundwater elevation has declined so rapidly that Fremont cottonwood seedlings cannot survive.[97] "A clear trend" of declining water levels in the region's monitoring wells has been documented.[98]

Deficit groundwater pumping has resulted in the decreasing or intermittently absent base flow in the Palominas/Hereford area and in the Huachuca City area of the confluence of the Babocomari River and the San Pedro.[99] U.S. Army Corps of Engineers' (ACOE) data reveals that the groundwater-pumping center from the City of Sierra Vista and Fort Huachuca is now negatively affecting the flow gradient near the San Pedro.[100]

While groundwater pumping funded by Department of Defense and Fort Huachuca has decreased owing to litigation and an April 8, 2002, Court Order,[101] civilian sector groundwater consumption continues increasing dramatically.[102] Local efforts to control the increasing groundwater-pumping deficit have failed to significantly reduce the deficit.[103]

In January 1995, a local Water Issues Group (WIG) presented draft legislation to the Arizona State Legislature to create a Sierra Vista Water Management Area.[104] Cochise Community College President Walter Patton organized WIG.[105] At a public meeting on January 14, 1995 opponents shouted down proponents of the proposal. [106] WIG died there.[107]

In 1998, the Upper San Pedro Partnership (USPP) was created.[108] Its members consist of ADWR, Arizona Land Department, Bisbee, BLM, Cochise County, Fort Huachuca, Huachuca City, National Audubon, Nature Conservancy, and Sierra Vista. Since the formation of the USPP in 1998, with the exemption of Fort Huachuca related activities directly influenced by litigation or Court Order,[109] the major members of the USPP (ADWR, BLM,

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Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995]; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002); U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S.. 504 [1896]; Winters v. United States [1908]

[92] ADWR 1996; CEC 1999b; USGS 1999, 2004

[93] BLM 1987, USFWS 1999b, USFWS 2002

[94] ADWR 1994b; SAIC 1998; USFWS 1999b, USFWS 2002

[95] Schwartzman 1990; USFWS 1999b, 2002

[96] ADWR 1994b

[97] Ibid.

[98] ACOE 2002

[99] USFWS 1999b, 2002; USGS 1999

[100] ACOE 2003

[101] CBD v. DoD 1999

[102] Arizona Corporation Commission 1999, 2003; U.S. Army 2003; High Country News 2004

[103] Arizona Corporation Commission 1999, 2003; CEC 1999b; High Country News 2004; Sierra Vista Herald 1995; U.S. Army 2003;

[104] Sierra Vista Herald 1995

[105] Working Issues Group 1994

[106] CEC 1999b, Sierra Vista Herald 1995

[107] CEC 1999b

[108] Sierra Vista Herald 1998b

[109] CBD v. DoD 1999; SWCBD v. DoD 1994, 1995, 1996, 1999

Sierra Vista, and Cochise County) have provided no significant long-term reduction in the area's deficit groundwater pumping.[110]

Arizona Corporation Commission pumping records show that groundwater pumping in the civilian sector has increased by 19% since the formation of the Partnership in 1998.[111] ADWR estimates that the deficit has increased by 20% to 8,400 acre-feet annually since the formation of the USPP.[112]

The strategy of the developer dominated USPP has been blatantly modeled after earlier successful efforts by Nogales and Tucson area developers and farmers.[113] The Nogales and Tucson area developers and farmers successfully promoted endless studies of the Santa Cruz River while blocking all significant efforts to control the excessive groundwater pumping and diversions that ultimately killed it.[114] The San Pedro has become "the most studied river in the world" says UA Hydrology Professor Thomas Maddock.[115] "In essence, if you don't want to do anything on the river, you just keep studying it."[116]

The U.S. Army recognized these facts expressively in a May 12, 2003, summary "Information Paper."[117] The "Information Paper" is titled, "District Court Decision on Fort Huachuca's Biological Opinion." It was produced in response to the Court Order. Its "Facts" section reads:

> "…Development over the last decade has overburdened water resources. The region is now facing an escalating groundwater deficit, with the underlying aquifer being drained beyond its capacity for recharge. Declining water levels are adversely affecting critical habitat and several endangered species in the San Pedro Riparian Area. While Fort Huachuca has undertaken aggressive conservation measures, steadily reducing its water consumption since 1998, unrestrained growth in the civilian community has continued to aggravate the water deficit situation…"[118]

The amount of groundwater available for use above and beyond maintenance and preservation of San Pedro River base flow is limited.[119] If the groundwater level falls another three feet, half of the riparian forest will die.[120]

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[110] BLM 2003, USPP 2003

[111] Arizona Corporation Commission 1999, Arizona Corporation Commission 2003

[112] High Country News 2004

[113] Arizona Daily Star 1940, 1945, 1948, 1957a, 1957b, 1963, 1964a, 1964b, Sierra Vista Herald 1999a, 2000a, 2004a; USPP 2003

[114] Arizona Daily Star 1940, 1945, 1948, 1957a, 1957b, 1963, 1964a, 1964b

[115] High Country News 2004

[116] Ibid.

[117] U.S. Army 2003

[118] Ibid.

[119] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2003a; CBD v. DoD 1999; CEC 1999b; CEQ 1981; Department of Interior 1994; Endangered Species Act 1973; GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; SWCBD 1991; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001 and 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S.. 504 [1896]; Winters v. United States [1908])

[120] New York Times 1999

Only the most optimistic predictions extend catastrophic demise of the entire Upper San Pedro beyond the next several decades.[121] Consequently, the existing supply of groundwater for the future needs of the Upper San Pedro Basin is obviously threatened.[122]

In response to such a situation, the ADWR Director has the authority to designate an Active Management Area (AMA) when "[a]ctive management practices are necessary to preserve the existing supply of groundwater for future needs."[123] The Upper San Pedro Basin is not an AMA. It should be if groundwater is to be preserved for future needs.[124]

In areas outside of an AMA, the developer of a proposed subdivision must submit a report to the ADWR Director demonstrating the adequacy of the water supply for the development.[125] ADWR then evaluates the plans and issues a decision on the adequacy of the water supply.[126] The ADWR Director must forward a copy of their decision to the State Real Estate Commissioner.[127] If the ADWR Director reports an inadequate supply of water, the State Real Estate Commissioner requires that all promotional material and contracts for the sale of lots "adequately" display the ADWR Director's report or a Commissioner approved developer's summary of the report.[128] The evaluation and reporting of water supply adequacy reflects concern for consumer protection arising from the tragedies of the Ned Warren land fraud scandals.[129]

Prior to September 29, 1993, ADWR recognized the fact that a 100-year supply of water does not exist in the Sierra Vista Sub-basin.[130] On December 17, 1984, ADWR addressed the non-adequacy of water supply for the Corona del Sol Condominiums with Pueblo del Sol Water Company as the water provider:

> "Pursuant to A.R.S. § 45-108, G. G. Bender has provided the Department of Water Resources with information on the water supply for the referenced subdivision…
>
> Water for domestic use will be provided to each of the 9 units in the subdivision by Pueblo del Sol Water Company from wells within its franchised area.
>
> Adequacy of the water supply was reviewed by the Department considering quantity, quality, dependability and legal availability. The subdivision is located in the San Pedro Valley just southeast of the City of Sierra Vista…
>
> Existing hydrological studies and data suggest that there is a hydraulic connection between the San Pedro River and the aquifer underlying the water company's wells, and a connection between pumpage of groundwater in the Ft. Huachuca-Sierra Vista area and a reduction of flow in the San Pedro River. Additional groundwater pumpage in the Ft. Huachuca-Sierra Vista area could ultimately cause a further reduction of flow in the river. In addition, certain unresolved questions currently exist as to whether such pumpage of groundwater has violated or will violate the legal rights of other persons to the surface waters of

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[121] CEC 1999b, CBD v. DoD 1999, USFWS 1999b, Sierra Vista Herald 2004b, Steinitz, et al. 2000, USFWS 2002
[122] San Pedro Alliance 2000, Sierra Vista Herald 1999c
[123] A.R.S. 45-412
[124] San Pedro Alliance 2000; Sierra Vista Herald 1999c
[125] A.R.S. 45-108A
[126] Ibid.
[127] A.R.S. 45-108B
[128] A.R.S. 32-2181F
[129] A.R.S. 44-1521 through 1534, ADWR 2004b, Arizona Project 1977, Cochise County 2004, Romley 1994, Udall 1972
[130] ADWR 1984, 1989, 1990, 1992a, 1993a, 1993b, 1993c, 1994a

the San Pedro River, and whether persons pumping water from wells in the area are required by law to establish or acquire surface water rights. The resolution of these questions will require judicial action, which may not become final for many years. Hence, while hydrological studies suggest that an adequate water supply is physically available to this subdivision, the possibility exists it may not be legally available.

In view of these circumstances, the Department is not in a position at this time to conclude that an adequate water supply is legally available to provide the present and future requirements of this subdivision. We suggest the following language be included in the public report for the subdivision.

> 'Pueblo del Sol Condominiums is a residential subdivision to be sold with domestic water supply furnished by Pueblo del Sol Water Company. Depth to water in the water company wells presently ranges from about 300 to 450 feet below land surface and water levels have declined at a rate of about one foot per year. Existing wells in the area are capable of producing several hundred to more than 1,000 gallons per minute of acceptable quality water for domestic use. Thus, it appears that an adequate water supply is physically available to the subdivision. However, studies conducted to date suggest that there is a hydraulic connection between wells in the Ft. Huachuca-Sierra Vista area and the San Pedro River, and that past pumpage of groundwater in the area has resulted in reduced flow in the San Pedro River. Additional groundwater pumpage could ultimately cause a further reduction of flow in the San Pedro River. Pending resolution of the question whether such groundwater pumpage violates the legal rights of other persons to the waters of the San Pedro River, which will involve litigation and court decisions, the Department of Water Resources is not in a position at this time to conclusively determine whether an adequate water supply is legally available to satisfy the requirements of this subdivision.'

A.R.S. § 32-2181.F requires that the Department's report for dry lot subdivisions or those with an inadequate water supply be included in all promotional material and contracts for sale of lots in the subdivision. Since the Department is not in a position at this time to conclude whether an adequate supply is legally available to this subdivision, the developer must comply with this provision. The developer should include in all promotional material and contracts the above-quoted language or a summary of this language approved by the Commissioner. We suggest that any summary include the following statement:

> 'It appears that an adequate water supply is <u>physically</u> available to the subdivision. However the Department of Water Resources is not in a position to conclusively determine whether an adequate water supply is <u>legally</u> available to satisfy the requirements of the subdivision due to certain questions yet to be resolved in pending judicial proceedings.'…"[131]

[131] ADWR 1984

On March 9, 1989, ADWR addressed the non-adequacy of water supply for the Desert Mist Commerce Center with Bella Vista Water Company as the water provider:

> "Pursuant to A.R.S. § 45-108, Buck Lewis Engineers has provided the Department of Water Resources with information on the water supply for the referenced subdivision…
>
> Water for domestic use will be provided to each of the 52 units in the subdivision by Bella Vista Water Company from wells within its franchised area.
>
> Adequacy of the water supply was reviewed by the Department considering quantity, quality, dependability and legal availability. The subdivision is located in San Pedro Valley just east of the City of Sierra Vista. The property overlies a large alluvial aquifer. Information available to the Department indicates that the depth to water in the water company's wells ranges from about 350 to 450 feet below land surface. Water levels are presently declining at a rate of about one and one-half feet per year. Existing wells in the area are capable of producing several hundred to more than 1,000 gallons per minute of acceptable quality water for domestic use.
>
> Existing hydrological studies and data suggest that there is a hydraulic connection between the San Pedro River and the aquifer underlying the water company's wells, and a connection between pumpage of groundwater in the Ft. Huachuca-Sierra Vista area and a reduction of flow in the river. In addition, certain unresolved questions currently exist as to whether such pumpage of groundwater has violated or will violate the legal rights of other persons to the surface waters of the San Pedro River, and whether persons pumping water from wells in the area are required by law to establish or acquire surface water rights. The resolution of these questions will require judicial action, which may not become final for many years. Hence, while hydrological studies suggest that an adequate water supply is physically available to this subdivision, the possibility exists that it may not be legally available.
>
> In view of these circumstances, the Department is not in a position at this time to conclude that an adequate water supply is legally available to provide the present and future requirements of this subdivision. We suggest the following language be included in the public report for the subdivision:
>
>> 'Desert Mist Commerce Center is an industrial subdivision to be sold with domestic water supply furnished by Bella Vista Water Company. Depth to water in the water company wells presently ranges from about 350 to 450 feet below land surface and water levels have declined at a rate of about one and one-half feet per year. Existing wells in the area are capable of producing several hundred to more than 1,000 gallons per minute of acceptable quality water for domestic use. Thus, it appears that an adequate water supply is physically available to the subdivision. However, studies conducted to date suggest that there is a hydraulic connection between wells in the Ft. Huachuca-Sierra Vista area and the San Pedro River, and that past pumpage of groundwater in the area has resulted in reduced flow in the San Pedro River. Pending resolution of the question whether such groundwater pumpage violates the legal rights of other persons to the waters of the San Pedro River, which will involve litigation and court decisions, the Department

of Water Resources is not in a position at this time to conclusively determine whether an adequate water supply is legally available to satisfy the requirements of this subdivision.'

A.R.S. § 32-2181.F. requires a summary of the Department's report for dry lot subdivisions or those with an inadequate water supply be included in all promotional material and contracts for sale of lots in the subdivision. Since the Department is not in a position at this time to conclude whether an adequate supply is legally available to this subdivision, the developer must comply with this provision. The developer should include in all promotional material and contracts the above-quoted language or a summary of this language approved by the Commissioner. We suggest that any summary include the following statement:

'It appears that an adequate water supply is physically available to the subdivision. However, the Department of Water Resources is not in a position to conclusively determine whether an adequate water supply is legally available to satisfy the requirements of the subdivision due to certain questions yet to be resolved in pending judicial proceedings...'"[132]

On June 16, 1993, ADWR addressed the non-adequacy of water supply for Charleston Village with Bella Vista Water Company as the water provider:

"Pursuant to A.R.S. § 45-108, Bella Vista Ranches, LP has provided the Department of Water Resources with information on the water supply for the above referenced subdivision…

Water will be provided to each of the 185 lots in the subdivision by Bella Vista Water Co.

Adequacy of the water supply was reviewed by the Department considering quantity, quality, dependability and legal availability. The subdivision is located in the San Pedro Valley and overlies a large alluvial aquifer. Information available to the Department indicates that the depth to water in the water company's wells is from about 295 to 343 feet below land surface.

Existing hydrological studies and data suggest that there is a hydraulic connection between the San Pedro River and the underlying aquifer in the Ft. Huachuca-Sierra Vista area. In addition, certain unresolved questions currently exist as to whether such pumpage of groundwater has violated or will violate the legal rights of other persons to the surface water of the San Pedro River, and whether persons pumping water from wells in the area are required by law to establish or acquire surface water rights. The resolution of these questions will require judicial action, which may not become final for many years. Hence, while hydrological studies suggest that an adequate water supply is physically available to this subdivision, the possibility exists that it may not be legally available. Therefore, the Department must find the water supply to be *inadequate*. [Emphasis added]

Thus, the Department is not in a position at this time to conclude that an adequate water supply is legally available to provide the present and future

[132] ADWR 1989

requirements of this subdivision. We suggest the following language be included in the public report for the subdivision:

> 'Charleston Village is a subdivision to be sold with water furnished by Bella Vista Water Company. Depth to water in the water company's wells is presently from about 295 to 343 feet below land surface. It appears that an adequate water supply is physically available to the subdivision. However, pending resolution of the question whether such groundwater pumpage impacts the legal rights of other persons to the waters of the San Pedro River, which will involve litigation and court decisions, the Department of Water Resources is not in a position to conclusively determine whether an adequate water supply is legally available to satisfy the requirements of this subdivision and must find the water supply to be *inadequate*.' [Emphasis added]

A.R.S. § 32-2181.F. requires a summary of the Department's report for dry lot subdivisions or those with an inadequate water supply be included in all promotional material and contracts for sale of lots in the subdivision. The developer should include in all promotional material and contracts the above-quoted language or a summary of this language approved by the Commissioner. We suggest that any summary include the following statement:

> 'It appears that an adequate water supply is *physically* available to the subdivision. However, the Department of Water Resources is not in a position at this time to conclude whether an adequate supply is *legally* available to satisfy the requirements of the subdivision due to certain questions yet to be resolved in pending judicial proceedings…'"[133]

From November 13, 1984 until September 29, 1993, ADWR issued a "statement of inadequacy" for 26 subdivisions in the area.[134] The subdivisions represented a combined total of 4,268 lots, and with a total demand of 3,782.78 acre-feet per year.[135] This information comes from a table included in ADWR's Public Record Law response, dated March 28, 1994. The ADWR table is titled, "INADEQUACY STATEMENTS ISSUED IN SIERRA VISTA/Determinations based on river/aquifer hydraulic connection".[136]

CBD's own review of ADWR's records reveals similar results.[137] Between 1988 (the establishment date for Federal water rights) and September 29, 1993, 24 developments were issued statements of inadequacy. For this same period (1998 through September 29, 1993), only one development was given a statement of adequacy for 187 acre-feet.[138]

From at least 1984 through September 29, 1993, ADWR appropriately and accurately issued determinations of inadequacy based on a series of widely know facts:

1. The San Pedro River is an Arizona, a U.S., and a World treasure.[139]

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[133] ADWR 1993a
[134] ADWR 1994a
[135] Ibid.
[136] Ibid.
[137] ADWR 1984, 1989, 1990, 1992b, 2003a; CBD 2002, CBD 2003c, 2003d, 2004b
[138] Ibid.
[139] Arizona Commission on the Environment 1990; Arizona Highways 1989, BLM 1987, Life Magazine 1993, U.S. Congress 1988; USFWS 1978

2. As such a treasure, the Public Trust Doctrine protects the San Pedro River.[140]

3. Federally protected Endangered Species depend on the San Pedro River, and consequently the Endangered Species Act protects the River's base flow.[141]

4. Congress recognized the San Pedro's value by creating the SPRNCA on November 18, 1988.[142]

5. Congress created the SPRNCA, on November 18, 1988, with the expressly defined purpose "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…"[143]

6. Congress reserved federal water rights establishment of the SPRNCA, for "a quantity of water sufficient to fulfill the purposes of the [SPRNCA]."[144]

7. The federal reserved water rights for the SPRNCA date unequivocally from at least November 18, 1988.[145]

8. Congress quantified the amount of water necessary to fulfill the purpose for the SPRNCA is "[t]hat 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."[146]

9. The BLM further quantified the amount of water sufficient to fulfill the purposes of the SPRNCA.[147]

10. ADWR agreed with BLM's quantification and certified the water rights for the BLM as managers of the SPRNCA on April 3, 1992.[148]

11. The date of priority for BLM's San Pedro River water rights is August 12, 1985.[149]

12. The connection between groundwater and surface water in the Sierra Vista Sub-watershed of the Upper San Pedro Basin physically exists.[150]

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[140] Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Greer v. Connecticut, 161 U.S. 519 (1896); Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Ward v. Race Horse, 163 U.S.. 504 (1896)

[141] Arizona Republic 1993; Endangered Species Act 1973; SWCBD 1991, 1992; USFWS 1986a, 1986b, 1991, 1992, 1993

[142] U.S. Congress 1988

[143] Ibid.

[144] Ibid.

[145] ADWR 1992a; Huachuca Audubon et al. 1985; U.S. Congress 1988

[146] U.S. Senate 1988

[147] BLM 1991

[148] ADWR 1992a

[149] ADWR 1992a; BLM 1991; Huachuca Audubon, et al. 1985

[150] ACOE 1970, 1974,1987; ADWR 1988, 1991; USGS 1982

13. During the driest time of the year, most of the surface or stream flow in the San Pedro River comes from this groundwater seeping into the River.[151]

14. The U.S. Supreme Court established, in 1976, that the physical connection between groundwater and surface water exists legally for Federal interests no matter any State law to the contrary.[152]

15. Federal law has supremacy over state law.[153]

16. The physical availability of a 100-year supply of water does not exist without the loss of San Pedro River base flow given projected increases in groundwater pumping.[154]

17. The Arizona Supreme Court ruled, on September 9, 1988, that groundwater is subject to adjudication if the water source is for a claim based on Federal law.[155]

18. The Federal reserved rights doctrine protects Federal reservations in Arizona from harm by pumping of groundwater that is hydrologically connected to surface flows.[156]

19. The Arizona Supreme Court ruled, on March 19, 1992, that property owners "absent…a claim based on federal law" are not assured water rights that reserve future use.[157]

20. Ultimately, one or more fundamental legal concept (Federal water rights protection, the ESA, or the Public Trust Doctrine) will prevail in controlling the Sierra Vista area's excessive groundwater pumping.[158]

Governor Bruce Babbitt and Governor Rose Mofford respected these facts, as well as the Arizona Legislature's desire for direction for consumer protection, comprehensive management, and promotion of justice.[159] Governor Fife Symington chose to ignore them.[160]

Governors Babbitt and Mofford were not deterred in spite of attacks by developers:

> "[Hugh] Holub a lawyer for numerous real estate and farming interests…charged the state is "covering its ass" legally by withholding adequacy findings.

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[151] ADWR 1988, 1991; BLM 1987

[152] Cappaert v. United States 426 U.S. 128 [1976]

[153] U.S. Constitution

[154] ADWR 1988, ADWR 1991, BLM 1987, CEQ 1981, USGS 1982, Vionnet and Maddock 1992

[155] Arizona Supreme Court 1988, Lacher 1994

[156] Arizona v. California [1963], Cappaert v. United States 426 U.S. 128 [1976], Winters v. United States [1908]

[157] Arizona Supreme Court 1992

[158] ADWR 1988, 1991, 1992a, 1994a; A.R.S. 1-211; A.R.S. 44-1521 through 1534; A.R.S. 45-401; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Supreme Court 1988, 1992; Arizona v. California [1963]; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CEQ 1981, Endangered Species Act 1973: Greer v. Connecticut, 161 U.S. 519 (1896); Huachuca Audubon, et al. 1985; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); SWCBD 1991; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993; USGS 1982; Vionnet and Maddock 1992; Ward v. Race Horse, 163 U.S.. 504 [1896]; Winters v. United States [1908]

[159] Arizona Daily Star 1984; ADWR 1984, 1989

[160] ADWR 1992b, 1993b, 1993c

'Of course not," shot back State Department of Water Resources chief Wesley Steiner. 'We have a responsibility…"[161]

Governors Babbitt and Mofford were not developers. Governor Symington was. As of September 29, 1993, Governor Symington and his ADWR no longer recognized the inadequacy of the Sierra Vista Sub-basin water supply.[162] ADWR continues this practice today.[163]

No new legal ruling or court order occurred to trigger ADWR's September 29, 1993, abrupt policy change.[164] No new hydrological facts were uncovered or presented.[165]

The only difference between September 28, 1993 and September 29, 1993, was the blatant implementation of former Governor Symington's philosophical antipathy for consumer safeguards and protection of environmental treasures like the San Pedro River.[166] The action reflects his consistent disrespect for consumers, lenders, endangered wildlife, Federal property and law.[167]

Governor Symington and his ADWR changed the practice of accurately issuing inadequacy statements in the Sierra Vista area based on two faulty premises:

1. "…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…" and

2. "…we currently believe that groundwater pumped in the Sierra Vista/Ft. Huachuca area is not appropriable surface water…There still remains uncertainty related to the adjudication of groundwater uses that may impact federal reserved rights…Until the Court [Arizona Supreme Court] decides this issue, a decision that there is an inadequate supply of groundwater available for subdivisions because of the impact of federal reserved rights would be speculation…"[168]

Even in 1993, premise #1 (no effect from local groundwater pumping on the San Pedro for 100 years) was not based on fact.[169] As of September 29, 1993, the most optimistic estimate of groundwater directly capturing San Pedro River surface water reached only to approximately 2030 before excessive groundwater pumping sucks dry the San Pedro base flow.[170]

Professor Maddock challenged ADWR's September 29, 1993, conclusion:

> "…I am somewhat disturbed by the first sentence in paragraph five on the first page of the letter—'Current groundwater modeling studies indicated that with continued pumping at the current rate of withdrawal for 100 years, the cone of depression will not directly or appreciably affect the San Pedro River.'"

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[161] Ibid.
[162] Ibid.
[163] ADWR 2003b, 2003c, 2004c; CBD 2002, 2003c, 2003d, 2004b
[164] ADWR 1994a; Maricopa Audubon 1993, 1994;
[165] Ibid.
[166] ADWR 1994a; Arizona Republic 1996; Maricopa Audubon 1993, 1994; Phoenix Gazette 1993; Phoenix NewTimes 1997b, 2001
[167] Arizona Republic 1996; Phoenix Gazette 1993; Phoenix NewTimes 1997b, 2001
[168] ADWR 1993b
[169] ADWR 1994a, Maddock 1993, Maricopa Audubon 1993, Maricopa Audubon 1994
[170] ADWR 1991

> "…As this is inconsistent with all the models we are presently aware of, I am curious as to which current model you refer…All of the models [ADWR 1988, Vionnet and Maddock 1992] mentioned above predict appreciable effects on the river, and on the riparian system in general, by Sierra Vista/Ft. Huachuca pumping—even when the agricultural pumping is discontinued... let alone 100 years into the future…"[171]

Former U.S. Interior Department Solicitor Fritz Goreham summarized Governor Symington's and his ADWR's deceit concisely:

> "…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…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..."[172]

Premise #2 (Federal rights to the groundwater are speculative), like premise #1, is also nonsense. Governor Symington's ADWR based its misrepresentation on the use and implication of the words "uncertainty'' and "speculation." They say, "(t)here still remains uncertainty related to the adjudication of groundwater uses that may impact federal reserved rights…Until the Court [Arizona Supreme Court] decides this issue, a decision that there is an inadequate supply of groundwater available for subdivisions because of the impact of federal reserved rights would be speculation…"[173]

Denial or misrepresentation of reality is the hallmark of Governor Symington's philosophy.[174] He chose to ignore the fact that the U.S. Supreme Court has already settled any question as to the superiority of Federal water rights.[175] He chose to ignore the fact that the U.S. Supreme Court has also settled the issue of legal reflection of hydrological reality for Federal water rights.[176] The fact that San Pedro River base flow originates from the aquifer was not disputable in 1993.[177] Nor was the fact that Federal water rights are represented by San Pedro River base flow.[178] No State court will be reversing these facts.[179]

In response to Governor Symington's ADWR September 29, 1993 misrepresentation, Department of Interior Solicitor Goreham protests:

> "…The bottom line is that 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 be avoided…"[180]

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[171] Maddock 1993
[172] Department of Interior 1993
[173] ADWR 1993b
[174] Phoenix NewTimes 1997b, 2001
[175] Cappaert v. United States 426 U.S. 128 [1976]
[176] Ibid.
[177] ACOE 1970, 1974,1987; ADWR 1988, 1991; BLM 1987; USGS 1982
[178] ADWR 1992a, BLM 1991, U.S. Congress 1988, U.S. Senate 1988
[179] U.S. Constitution
[180] Department of the Interior 1993

Professors Glennon and Maddock summarize the legal situation:

> "…The court decided that the government intended to reserve unappropriated water in order to maintain the level of the pool. (See id. [426 U.S. 138] 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…"[181]

Even though this summary was published in 1997, all the legal rulings and Congressional actions occurred prior to September 29, 1993.[182] But legal rulings, facts, and Congressional actions were not to stop Governor Symington from bringing his business philosophy to his government.[183] He did not abandon his penchant for the use of deception and/or misrepresentation to secure investments.[184]

Governor Symington's ADWR refused to stop the misrepresentation deception in spite of multiple appeals.[185] Immediately after the September 29, 1993, ADWR policy change, at least one project received a "statement of adequacy" and at least two projects secured reversal from their earlier "statement of inadequacy" to a "statement of adequacy."[186]

Since the 1993 (between September 29, 1993 and September 17, 2003) policy change date, 52 developments have been given statements of adequacy for a total allocation of approximately 2,306 acre-feet per year.[187] Only 3 developments have received statements of inadequacy since the 1993 policy change (and these were either immediately bordering the River or failed to complete the application process).[188] Four of the 24 inadequacies given between 88 and 93 have been reversed.[189]

On June 13, 1996, Governor Symington's philosophy caught up with him.[190] He was indicted for similarly misrepresenting his financial situation to lenders and their consumers, investors, and retirees.[191] On September 3, 1997, Governor Symington was convicted and left office.[192]

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[181] Glennon and Maddock 1997
[182] Ibid.
[183] ADWR 1993b, 1994a; Department of Interior 1993; Maddock 1993; Maricopa Audubon 1993; Maricopa Audubon 1994; Phoenix NewTimes 1997b, 2001
[184] Ibid.
[185] Maddock 1993, Department of Interior 1993, 1994; GGBP 1994
[186] ADWR 1994a
[187] ADWR 2003a; CBD 2002, 2003c, 2003c, 2004b
[188] Ibid.
[189] Ibid.
[190] Phoenix NewTimes 1996, 1997b, 2001
[191] Ibid.
[192] Arizona Republic 2002a; Phoenix NewTimes 1997a, 1997b, 2001

Unfortunately, Governor Symington's legacy of misrepresentation at ADWR did not end with his departure. Governor Jane Hull succeeded Governor Symington. Governor Hull's attitude towards the environment was no different than that of Governor Symington.[193] Governor Hull chose to perpetuate Governor Symington's decision to misrepresent water adequacy in the Sierra Vista area.[194] Specific requests to correct the deceit and misrepresentation were ignored.[195]

Governor Janet Napolitano succeeded Governor Hull. Governor Napolitano must now decide whether or not to permit perpetuation of Governor Symington's decision to misrepresent water adequacy in the Sierra Vista area.[196]

On April 9, 2003, ADWR Director Herb Guenther forwarded a memo to Governor Napolitano's Environmental Aide Lori Faeth justifying ADWR's decision to continue Governor Symington's Sierra Vista area water adequacy misrepresentation.[197] Governor Symington's 1993 decision to misrepresent the water situation for the benefit of his developer friends has now become a "reexamination" of ADWR's position:

> "In 1993, the Department reexamined its position, and ceased issuing determinations of inadequacy based on lack of legal availability. The legal availability then, as now, is based on the current legal right to use the water, and not on an adjudication determination that has yet to be made. Even though the adjudication court may determine in the future that a well is pumping surface water rather than groundwater, the court may nonetheless fashion a remedy to protect the preexisting groundwater right…
>
> …The Department will not change its position regarding the legal availability of those water supplies, which may or may not be impacted in the future by the Gila River adjudication. In addition, previously issued Water Adequacy Reports will not be changed…"[198]

There were no new hydrological facts or legal rulings to be "reexamined" to trigger Governor Symington's original, 1993 decision to misrepresent the water adequacy situation in the Sierra Vista area.[199] Director Guenther ignores the obvious. The outcome of the Gila River Adjudication is completely predictable and inevitable: Federal water rights will be confirmed.[200] The U.S. Government has always "reserve[d] the right to argue whether jurisdiction is proper" in the Arizona State court's Adjudication proceedings.[201] The U.S. Government cannot give up its SPRNCA water rights without violating its Public Trust responsibilities.[202] And, as the Arizona Supreme Court acknowledged in 1992,

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[193] Arizona Republic 1997, Sierra Vista Herald 1998a

[194] ADWR 2003a; CBD 2002, 2004b

[195] CBD 2001; CBD v. ADWR 2002; Maddock 1993, Department of Interior 1993, 1994; GGBP 1994

[196] ADWR 2003b, 2003c; CBD 2003a

[197] ADWR 2003b

[198] Ibid.

[199] Maricopa Audubon 1993, 1994; ADWR 1994a

[200] ACOE 1970, 1974,1987, 2002, 2003; ADWR 1988, 1991, 1992a, 1994a, 1994b, 1996; Arizona Corporation Commission 1999, 2003; Arizona Supreme Court 1988, 1992, 1999; Arizona v. California [1963]; BLM 1987 BLM 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2003a; CBD v. DoD 1999; CEC 1999b; Department of Interior 1994; GGBP 1994; Glennon and Maddock 1994, 1997; Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995]; Steinitz, et al. 2000; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1999b, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; Winters v. United States [1908]

[201] Special Master 2003

[202] AGFD 1993, American Birding Association 1995; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002b, 2003a, 2003b; BLM 1987; CBD v. ADWR 2002; CEC 1999a,

> "…Appropriative water rights are based on current beneficial use, not reservation for future uses. See A.R.S. § 45-141(B) ('Beneficial use shall be the basis, measure and limit to the use of water.'). Consequently, real property owners claiming a right to use underground water at some future time would -- absent present beneficial use or a claim based on federal law -- have no appropriative claims to assert in the adjudication."[203]

All groundwater pumping in the Sierra Vista Sub-basin beginning at least after November 18, 1988 (the date of Congress' creation of the SPRNCA) will ultimately need be reduced or terminated as necessary to preserve Federal water rights and the San Pedro River.[204]

Federal water rights were legally inviolate prior to Governor Symington's September 29, 1993, decision to misrepresent the water adequacy situation in the Sierra Vista area.[205] Nothing happened on September 29, 1993 to change this fact.[206] Nothing has happened subsequently except to strengthen the legality of Federal water rights.[207] In fact, since September 29, 1993, even more data has confirmed the San Pedro's (and Federal water right's) peril resulting from the area's excessive, and increasing groundwater pumping.[208]

The Gila River Adjudication has been ongoing for 30 years.[209] It may go on for at least several more decades.[210] No matter when the proceedings conclude however, the outcome will be the same. It is ironic that Director Guenther is willing to look out 100 years for physical

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1999b; Greer v. Connecticut, 161 U.S. 519 (1896); Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Life Magazine 1993; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); National Geographic 2000; New York Times 1999; Pollard v. Hagen, 44 U.S. (3 How) 212 (l845); Sierra Vista Herald 2000b; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. l976); SWCBD 1996; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002); TNC 2002; U.S. Congress 1988; USFWS 1978; Ward v. Race Horse, 163 U.S.. 504 (1896); WJF. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998)

[203] Arizona Supreme Court 1992 (830 P.2d at 451)

[204] ACOE 1970, 1974, 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 1998, 2003a, 2003b, 2003c, 2004b, 2004c; AGFD 1993, 2000; American Birding Association 1995; Amundson 2000; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 1993, 1995, 2002b, 2003a, 2003b; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; ASL 1994; Birds of North America 1999; BLM 1987, 1991; Bureau of Reclamation 2002; Cappaert v. United States 426 U.S. 128 (1976); CBD 2001, 2002, 2003a, 2003b, 2003c, 2003d, 2004a, 2004b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999a, 1999b; CEQ 1981; Department of Interior 1994; Endangered Species Act 1973; Glennon 2002; Glennon and Maddock 1994, 1997; Greer v. Connecticut, 161 U.S. 519 (1896); Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Laymon 2000; Life Magazine 1993; Maddock 1993; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); National Audubon 2002; National Geographic 2000; New York Times 1999; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995); Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); Sierra Vista Herald 2000b; Special Master 2003; State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991, 1996, 1999; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 U.S. (2002); TNC 2002; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1978, 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 (1896); Winters v. United States [1908]

[205] ACOE 1970, 1974,1987; ADWR 1988, 1991, 1992a; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; Lacher 1994; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USGS 1982; Vionnet and Maddock 1992; Winters v. United States [1908]

[206] ADWR 1993b, 1994a; Department of Interior 1993; Maddock 1993; Maricopa Audubon 1993; Maricopa Audubon 1994

[207] ADWR 1994a; Arizona Supreme Court 1999, CBD 2001, 2003a; CBD v. ADWR 2003a; CEC 1999b; Department of Interior 1994; GGBP 1994; Glennon and Maddock 1994, 1997; Kansas v. Colorado, 115 S. Ct. 1995; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995]

[208] ACOE 2002, 2003; ADWR 1994b, 1996; Arizona Corporation Commission 1999, 2003; CBD 2001, 2003a, 2003b; CBD v. ADWR 2003a; CBD v. DoD 1999; CEC 1999b; High County News 2004; Steinitz, et al. 2000; USFWS 1999b, 2002; USGS 1999, 2004; USFWS 1999b, 2002; U.S. Army 2003

[209] Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 557-59, 103 S.Ct. 3201, 3209-10, 77 L.Ed.2d 837 (1983)(subsection entitled "The Arizona Cases"); United States v. Superior Court, 144 Ariz. 265, 270-71, 697 P.2d 658, 663-64 (1985)(subsection entitled "The Controversy"); Gila River I, 171 Ariz. 230, 830 P.2d 442, 444 (1992)

[210] ADWR 2002

water availability (ignoring the San Pedro), while seeking to narrow the legal arena to the shortest-term possible. Only the number of negatively affected consumers will grow if misrepresentation of the area's water adequacy continues.

Since September 29, 1993, the San Pedro's value as a Public Trust treasure has been even more widely recognized.[211] And the applicability of the Public Trust Doctrine has been more thoroughly litigated.[212]

Since September 29, 1993, the San Pedro's value for Endangered Species has also been more thoroughly recognized and documented.[213] Most of the Huachuca Water Umbel on Earth survives on the San Pedro River within the SPRNCA.[214] Its Critical Habitat consists primarily of the SPRNCA.[215] The Southwestern Willow Flycatcher was listed as Endangered in 1995.[216] Critical Habitat for the Southwestern Willow Flycatcher was subsequently designated along the San Pedro River from the Hereford Bridge to the Interstate 10 Bridge at Benson.[217]

At least 25% of Arizona's Yellow-billed Cuckoo population nests on the Upper San Pedro River.[218] This is the largest population of Cuckoos in the western United States.[219]

Except for the Bush Administration's antipathy towards wildlife protection, the Yellow-billed Cuckoo would have already been listed and protected as endangered, and Critical Habitat, including the SPRNCA, would have already been designated.[220] It is just a matter of time until it receives the appropriate Federal protection as Endangered with Critical Habitat.[221]

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.[222] It has been designated Critical Habitat for Loach Minnow and Spikedace reflecting this fact.[223]

On April 22, 2003, ADWR Director Guenther forwarded another memo to Governor Napolitano's Environmental Aide.[224] In the memo, Director Guenther offers two more novel ideas, and an additional attempt at obfuscation to continue support for Governor Symington's San Pedro misrepresentation:

> "…In 1999, the Arizona Supreme Court held that federal reserved water rights may include groundwater to the extent that surface water supplies are not sufficient to serve the purpose of the reservation. In re the General Adjudication of all Rights to Use Water in the Gila River System and Source, 195 Ariz. 411, 989 P.2d 739

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[211] American Birding Association 1995; Arizona Daily Star 2002, 2003b; Arizona Highways 1996, 1998; Arizona Republic 2002b, 2003a, 2003b; CEC 1999a, 1999b; Life Magazine 1993; National Geographic 2000; New York Times 1999; Sierra Vista Herald 2000b, SWCBD 1996, TNC 2002

[212] Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002); Ward v. Race Horse, 163 U.S.. 504 (1896); W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998)

[213] AGFD 2000; Arizona Republic 1995; Bureau of Reclamation 2002; USFWS 1994, 1995, 1997a, 1997b, 1999a, 1999c, 2000, 2001

[214] USFWS 1997a, 1999a

[215] USFWS 1999a

[216] Arizona Republic 1995, USFWS 1995

[217] USFWS 1997b

[218] AGFD 2000, Bureau of Reclamation 2002

[219] Bureau of Reclamation 2002

[220] CBD 2004a, 2004c; Land Letter 2003; USFWS 2001

[221] Amundson 2000, CBD 2004a, Laymon 2000, USFWS 2001

[222] USFWS 1991, 1994

[223] USFWS 1999c, 2000

[224] ADWR 2003c

(1999) (Gila III). In that case, the issue was only decided in the abstract, and was not a determination that a particular federal reservation does in fact have a reserved right to groundwater. The Court stated:

> We decide this issue in the abstract at this time as a necessary step in determining the scope of interest to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian, or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

195 Ariz. At 420, 989 P.2d at 748…

The Gila River adjudication court has not yet undertaken the fact-intensive inquiry necessary to determine the purpose of SPRNCA or the quantity of water necessary to accomplish that purpose. Absent this inquiry, any federal reserved right to groundwater for SPRNCA is theoretical, and is not taken into consideration by the Department in its Water Adequacy Reports…"[225]

Director Guenther's selective quotation and interpretation of the Arizona Supreme Court case is a lie by omission. Federal water rights are not "theoretical" to the Arizona Supreme Court as implied by Director Guenther. To the contrary, the Arizona Supreme Court explicitly recognizes Federal water rights in this very ruling misquoted by Director Guenther. In the immediately proceeding sentence of the same ruling of Director Guenther's excerpted "theoretical" quotation, the Arizona Supreme Court says:

> "…FOR THE FOREGOING REASONS, WE HOLD THAT THE TRIAL COURT CORRECTLY DETERMINED THAT THE FEDERAL RESERVED WATER RIGHTS DOCTRINE APPLIES NOT ONLY TO SURFACE WATER BUT TO GROUNDWATER…"[226]

The "foregoing reasons" illustrate the depth of deceit involved here with respect to consumer protection and to recognition of the ultimate, completely predictable and inevitable conclusion of the Gila River Adjudication:

> "The state law parties argue, however that even if the reserved rights doctrine applies equally in principle to groundwater as surface water, we should decline to extend the doctrine to groundwater out of deference to state water law. Where federal rights are at issue, a state court may adopt state law as the rule of decision IF TO DO SO WOULD NOT FRUSTRATE OR IMPAIR A FEDERAL PURPOSE. See *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 728-29, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). SUCH IS NOT THE CASE HERE. TO THE CONTRARY, THE SUPREME COURT HAS DENIED THE RESERVED RIGHTS DOCTRINE AS AN EXCEPTION TO CONGRESS'S DEFERENCE TO STATE WATER LAW. See

[225] ADWR 2003c
[226] Arizona Supreme Court 1999 [989 P.2d at 748 (emphasis added).]

United States v. New Mexico, 438 U.S. 696, 714, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978); accord *Cappaert*, 426 U.S. at 145, 96 S.Ct. 2062…"[227]

"IT IS APPARENT FROM THE [FEDERAL] CASE LAW THAT WE MAY NOT WITHHOLD APPLICATION OF THE RESERVED RIGHTS DOCTRINE PURELY OUT OF DEFERENCE TO STATE LAW. RATHER, WE MAY NOT DEFER TO STATE LAW WHERE TO DO SO WOULD DEFEAT FEDERAL WATER RIGHTS."[228]

"The state law parties next argue, however, that deference to state law in this case would not defeat federal water rights. Specifically, they maintain that there has never been a need to reserve groundwater in a state that provides all overlying landowners an equal right to pump as much groundwater as they can put to reasonable use upon their land.... This argument, however, overlooks that federal reserved water rights are by nature a preserve intended to 'continue[ ] through the years.' See *Winters* [*v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed.2d 340 (1908)] 207 U.S. at 577, 28 S.Ct. 207. In *Arizona v. California*, THE SUPREME COURT AFFIRMED THAT AN IMPLIED RESERVATION INCLUDES SUFFICIENT WATERS 'TO SATISFY THE FUTURE AS WELL THE PRESENT NEEDS OF INDIAN RESERVATIONS.' *Arizona v. California*, 373 U.S. at 600, 83 S.Ct. 1468 [1963]. THE COURT ADDED THAT THE RESERVATION OF WATERS APPLIES TO THE 'FUTURE REQUIREMENTS' OF OTHER TYPES OF FEDERAL RESERVATIONS AS WELL. Id. at 601, 83 S.Ct. 1468. A THEORETICALLY EQUAL RIGHT TO PUMP GROUNDWATER, IN CONTRAST TO A RESERVED RIGHT, WOULD NOT PROTECT A FEDERAL RESERVATION FROM A TOTAL FUTURE DEPLETION OF ITS UNDERLYING AQUIFER BY OFF-RESERVATION PUMPERS. Cf. *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 676 n.22, 99 S.Ct. 305, 61 L.Ed.2d 823 (1979).... WE THEREFORE CANNOT CONCLUDE THAT DEFERENCE TO ARIZONA'S LAW -- AND TO THE OPPORTUNITY IT EXTENDS TO ALL LANDOWNERS TO PUMP AS MUCH GROUNDWATER AS THEY CAN REASONABLY USE -- WOULD ADEQUATELY SERVE TO PROTECT FEDERAL RIGHTS.[229]

"The Department of Water Resources presented evidence to the trial court in this case of streams in transition from perennial to intermittent within the San Pedro and Upper San Pedro watersheds, of others nearing ephemeral character, and of others in geographical 'retreat.' See Arizona Dep't Water Resources, Gila River System Groundwater-Surface Water Interaction Study 31-32 (1987).... WE THEREFORE CANNOT CONCLUDE THAT DEFERENCE TO ARIZONA'S LAW -- AND TO THE OPPORTUNITY IT EXTENDS TO ALL LANDHOLDERS TO PUMP AS MUCH GROUNDWATER AS THEY CAN REASONABLY USE – WOULD ADEQUATELY SERVE TO PROTECT FEDERAL RIGHTS. [230]

"We recognize that our determination that reserved water rights may encompass groundwater threatens to disrupt the assumptions that underlie state law uses.... We are no less cognizant now than when we decided Gila River II that Arizona's

[227] Arizona Supreme Court 1999 [989 P.2d at 747 (emphasis added).]
[228] Arizona Supreme Court 1999 [989 P.2d at 747 (emphasis added).]
[229] Arizona Supreme Court 1999 [989 P.2d at 747-48 (emphasis added).]
[230] Arizona Supreme Court 1999 [989 P.2d at 748 (emphasis added).]

> agricultural, industrial, mining, and urban interests have accommodated themselves to the framework of *Southwest Cotton*.... YET THERE HAS LONG LOOMED THE NEED -- SOMETIMES NOTED, SOMETIMES WISHED AWAY -- FOR THOSE SAME INTERESTS ALSO TO ACCOMMODATE THEMSELVES TO THE WATER CLAIMS OF THE VAST FEDERAL LAND HOLDINGS THAT SURROUND THEM.... For state law purposes in *Gila River II*, we found reason to retain a bifurcated framework DESPITE THE HYDROLOGICAL MISCONCEPTIONS UPON WHICH IT RESTED. BUT FEDERAL LAW DOES NOT PERMIT US THAT OPTION IN DECIDING THE EXTENT OF FEDERAL RESERVED RIGHTS. As Leshy and Belanger wrote in summary of *Cappaert* [*v. U.S.*, 426 U.S. 128 (1976)], 'FOR FEDERAL LAW, THE QUESTION IS ONE OF HYDROLOGY, NOT LEGAL COMPARTMENTALIZATION.' 20 Ariz.St.L.J. at 734."[231]
>
> HOLDERS OF FEDERAL RESERVED RIGHTS ENJOY GREATER PROTECTION FROM GROUNDWATER PUMPING THAN DO HOLDERS OF STATE LAW RIGHTS TO THE EXTENT THAT GREATER PROTECTION MAY BE NECESSARY TO MAINTAIN SUFFICIENT WATER TO ACCOMPLISH THE PURPOSE OF A RESERVATION."[232]

In addition, Director Guenther ignores several other important facts:

1. Congress already defined the purpose of the SPRNCA,[233]
2. BLM already studied and tallied the amount of water necessary to fulfill the Congressionally defined purpose,[234] and
3. ADWR already agreed with BLM's study, conclusion, and application in granting SPRNC water rights in 1992.[235]

In his April 22, 2003, memo to Governor Napolitano's Environmental Aide, Director Guenther continues:

> "…Under the Department's administrative rules, the Department's analysis determines whether the water supplies are physically, continuously, and legally available to satisfy demands for 100 years, and whether the water supplies are of suitable water quality. A.A.C. R12-15-715 et seq. Water supplies may include groundwater, surface water, effluent, and Central Arizona Project water. For groundwater supplies, the Department's determinations of physical availability is based upon a 100-year depth-to-static water level, which must remain less than 400 feet to 1200 feet below land surface depending upon whether the subdivision will be served by a municipal provider. A.A.C. R12-15717.B.1.c. Continuous availability of groundwater is based on evidence of adequate delivery, storage and treatment works together with wells of sufficient capacity to satisfy demands. A.A.C. R12-15-717.C.1. Legal availability of groundwater is based on "notice of intent to serve" agreements from municipal providers. A.A.C. R12-15-717.D. None of these

[231] Arizona Supreme Court 1999 [989 P.2d at 750 (emphasis added).]
[232] Arizona Supreme Court 1999 [989 P.2d at 751 (emphasis added).]
[233] U.S. Congress 1988
[234] BLM 1991
[235] ADWR 1992a

> inquiries require the Department to consider the impacts of groundwater pumping that is tributary of surface water…"[236]

This interpretation of the Arizona Administrative Code, is not only another lie by omission, it attempts to create a new shell game to further perpetuate Governor Symington's misrepresentation scheme. Director Guenther now claims that Governor Symington innocently based his misrepresentation scheme on the Arizona Administrative Code.[237] This line of reasoning did not exist previously.[238] It cannot be found in any of ADWR's "adequacy" program files.[239] It is another post-hoc attempt to cover-up and perpetuate Governor Symington's deceptive and fraudulent scheme.

Director Guenther's new line of reasoning omits the fact that not all of the subdivisions granted "adequacy" certification fulfill even his own new hyper-narrow legal re-interpretation. Director Guenther's reasoning relies upon receipt of "notice of intent to serve" agreements from municipal (or public utility) providers. At least five subdivisions do not have these agreements.[240] Without a "notice of intent to serve" agreement, an "adequate" certification for any of these subdivisions is improper and out of compliance even under Director Guenther's new and inappropriately hyper-narrow re-interpretation of Arizona law.[241]

Director Guenther's lie by omission goes even further. In AMAs, municipal providers, and other water companies, must themselves undergo examination for 100-year adequacy for water supply. They must demonstrate consistency with the management goal of the AMA.[242]

Outside of an AMA, water providers are not restricted except to report their yearly pumping to the Arizona Corporation Commission. There are essentially no limitations on the amount of groundwater pumped.[243] In other words, Director Guenther presents a scheme implying oversight, but in reality, the scheme offers no limitation and no control. And to make matters worse, ADWR cynically assures perpetuation of this lack of any limitation and control by stalling designation of an AMA in the Upper San Pedro Basin.[244]

Ironically, the Arizona Auditor General had earlier identified the vulnerability of consumers in the Sierra Vista area, as well, as the lack of ADWR efforts to remedy the situation:

> "The Office of Auditor General has conducted a performance audit and Sunset review of the Arizona Department Water Resources…The purpose of this audit was to evaluate the Department's efforts to ensure a long-term water supply for the State…
>
> …Groundwater Depletion Is Likely to Continue…Regulatory Limitations May Create Water Supply Problems As the Population Increases…The populations outside of the AMAs [Active Management Area's] is projected to grow by an additional 500,000 persons by 2025. However, limited consumer protections outside AMAs provide current and future residents with less assurance about future water supply

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[236] ADWR 2003c
[237] Ibid.
[238] ADWR 1984, 1989, 1993a, 1994a, 2003a; CBD 2002, 2004b; Maricopa Audubon 1993, 1994
[239] ADWR 1994a, 2003a; CBD 2002, 2004b; Maricopa Audubon 1993, 1994
[240] Ibid.
[241] A.A.C. R12-15-717.D.
[242] A.A.C. R12-15-705, ADWR 2001
[243] A.R.S. 45-453
[244] ADWR 2000, San Pedro Alliance 2000, Sierra Vista Herald 2003b

than their counterparts in the AMAs. Specifically, 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…."[245]

Director Guenther's new hyper-narrow legal interpretation did not exist prior to April 22, 2003.[246] Consequently, the Arizona Auditor General could not, at that time, identify any other consumer vulnerability with respect to the reporting of inadequate water supplies outside of AMAs. Governor Symington's misrepresentation scheme aside, only the Statute's failure to require continuity of inadequate water supply notice upon resale was problematic in 1999.[247]

The Arizona Auditor General does remind ADWR that Arizona State Law requires that the ADWR Director include in their yearly report "suggestions as to amending existing laws or enacting new legislation as the director and the Arizona water resources advisory board deem necessary and such other information, suggestions and recommendations as the director considers of value to the public."[248] ADWR has done nothing of the sort.[249]

Director Guenther's new hyper-narrow legal interpretation anchors the foundation for his new shell game. The granting of developers' "adequacy" certification based on the "notice to serve" agreements is the heart of this new scheme. Under this scheme, developers relying on well water accessed at least after November 18, 1988 will continue to be granted "adequacy" certifications because ADWR interprets the water as still legally available. But since the non-AMA water companies and municipal providers do not have

[245] Arizona Auditor General 1999
[246] ADWR 1994a, 2003a, 2003c; CBD 2002, 2004b; Maricopa Audubon 1993, 1994
[247] A.R.S. 45-108; ADWR 1994a, 2003a, 2003c; Arizona Auditor General 1999; CBD 2002, 2004b; Maricopa Audubon 1993, 1994
[248] A.R.S. 45-111, Arizona Auditor General 1999
[249] A.R.S. 45-111; ADWR 2002; Arizona Auditor General 1999; CBD 2001, 2003a, 2004b; CBD v. ADWR 2002; CBD v. ADWR 2003; Maddock 1993, Department of Interior 1993, 1994; GGBP 1994;

rights to the groundwater they pump, no summary accounting ever takes place. Consequently, the shell game avoids any common sense analysis of the cumulative effects of accommodating so many groundwater dependent subdivisions and developers.

Director Guenther's new shell game perpetuates the Governor Symington's undermining of ADWR's mission "to secure long-term water supplies for Arizona's communities."[250] It similarly insults the clear reassurance against fraud found in the ADWR Water Adequacy Program Summary.[251]

In 1995, a U.S. District Court examined USFWS' similar ruse in that agency's attempt to weaken habitat protection for the Mexican Spotted Owl.[252] In that case, we established the fact that an evaluation claiming zero effects across a landscape does not accurately reflect the programmatic net effect.[253]

In the past, ADWR has been supportive of such a fundamental principle of system analysis.[254] In 1994, ADWR had told the Arizona Legislature so:

> "…groundwater and surface water form an interconnected hydrologic system in which quantities of water are exchanged between the stream and the aquifer based on changing hydrological conditions. It is critical to have an accurate conceptualization of the interconnected surface water and groundwater system in order to quantify any impacts."[255]

The U.S. District Court case and this fundamental system analysis principle are applicable to the situation in the Sierra Vista area.[256] The principle did apply prior to September 29, 1993.[257] After Governor Symington's September 29, 2003 decision, it did not.[258]

Between September 29, 1993 and December 31, 2000, more than 13,000 new subdivision homes have been approved.[259] This trend continues.[260]

This development translates into a forecasted 50% increase in population by the year 2025.[261] Census forecasts show the City of Sierra Vista growing to a population of nearly 100,000 by 2030.[262]

Even if there were enough water for each subdivision individually, this is not the case cumulatively. When considering the programmatic net effect of 50+ subdivisions,[263] the area's other groundwater pumping and the predictable increase in demand,[264] a 100-year supply of water does not exist.[265]

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[250] ADWR 2004a
[251] ADWR 2004b
[252] Silver v. Thomas 1995
[253] Ibid.
[254] ADWR 1984, 1989, 1993a, 1994b
[255] Ibid.
[256] ADWR 1984, 1989, 1993a; CBD v. DoD 1999; Silver v. Thomas 1995; SWCBD v. DoD 1995
[257] ADWR 1984, 1989, 1990, 1992a, 1993a, 1993b, 1993c, 1994a
[258] ADWR 1992b, 1993b, 1993c, 2003b, 2003c, 2004c; CBD 2002, 2003c, 2003d, 2004b
[259] Fort Huachuca 1998, Sierra Vista Herald 1999b, Sierra Vista Herald 2000c
[260] Sierra Vista Herald 2002a, Sierra Vista Herald 2002b
[261] Fort Huachuca 1998
[262] Sierra Vista Herald 2003a
[263] ADWR 1984, 1989, 1990, 1992b, 1994a, 2003a; CBD 2002, 2003c, 2003d, 2004b
[264] Fort Huachuca 1998; Sierra Vista Herald 2002a, 2002b, 2003a
[265] San Pedro Alliance 2000

In the April 22, 2003, memo, Director Guenther does magnanimously recognize the existence of "an interrelationship between groundwater and surface water in the Sierra Vista Sub-Basin":

> "…The Department recognizes that there is an interrelationship between groundwater and surface water in the Sierra Vista Sub-Basin. However, that relationship is hydrologically complex and is affected by not only groundwater pumping, but also by other factors including climate, season, aquifer conditions, and the existence of riparian vegetation…"[266]

Unfortunately, however, Director Guenther then attempts to assign nebulous complexity to the Sub-basin's characteristics to justify decisional delay. San Pedro River base flows are indisputably affected by climate, season, aquifer conditions, and riparian vegetation. The status of none of these elements changes the fact that maintenance of the San Pedro's riparian habitat is fundamental to fulfilling Congress' designated SPRNCA purpose.[267] The rarity of SPRNCA's riparian habitat makes its recovery and survival more important than ever.[268]

Prior ADWR statements concerning drought and the importance of groundwater discharge to the maintenance of riparian ecosystem are not nebulous:

> "…During periods of no precipitation, the discharge of perennial and intermittent streams is supported entirely by groundwater discharge to the stream (baseflow). As groundwater is drained from the aquifer by pumping or as baseflow, the gradient of the water table is lowered, the rate at which groundwater drains to the stream is reduced, and baseflow in turn is reduced. Base flow maintains streamflow during periods of negligible runoff and is critical for maintaining riparian ecosystems."[269]

The current drought and the consensus predictions for extended drought exacerbate the effects of the area's excessive deficit groundwater pumping. [270]

None of these elements (climate, season, aquifer conditions, and riparian vegetation) change the fact that excessive groundwater pumping in the Sierra Vista Sub-basin deprives the San Pedro River of surface flow.[271] None of these elements changes the hydrological or legal conclusion that a 100-year supply of water does not exist locally.[272] They only highlight the urgency for action in response to this crisis.

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[266] ADWR 2003c

[267] U.S. Congress 1988

[268] AGFD 1993, American Birding Association 1995; Arizona Commission on the Environment 1990; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002b, 2003a, 2003b; BLM 1987; CEC 1999a, 1999b; Life Magazine 1993; National Geographic 2000; New York Times 1999; Sierra Vista Herald 2000b; SWCBD 1996; TNC 2002; U.S. Congress 1988; USFWS 1978

[269] ADWR 1994b

[270] Arizona Republic 2003c, 2003d

[271] ADWR 1996; CEC 1999b; USGS 1999, 2004

[272] ACOE 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004b, 2004c; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2002, 2003a, 2003b, 2003c, 2003d, 2004b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S.

ADWR has chosen to perpetuate Governor Symington's misrepresentation.[273] Governor Napolitano has not responded to multiple written requests and a challenging lawsuit to the contrary.[274] ADWR now completely ignores the fact that a 100-year supply of water does not exist in the Sierra Vista Sub-basin without loss of the San Pedro.[275]

Summary

Two questions remain to be answered:

1. Can the San Pedro River survive long enough to be saved?
2. How many more consumers and lenders will be deceived now, only to ultimately see their investments devalued later?

Federal water rights, the ESA, and the Public Trust Doctrine are intended to protect against the vulnerable environmental treasures such as the San Pedro.[276] Ultimately, these statutes will prevail in controlling the Sierra Vista area's excessive groundwater pumping threatening the survival of the Southwest's last free flowing, un-dammed desert river.[277] All groundwater pumping in the Sierra Vista area beginning at least after November 18, 1988 (the date of Congress' creation of the SPRNCA) will ultimately need be reduced or terminated as necessary to preserve Federal water rights and the San Pedro River.[278]

Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[273] ADWR 2003a; CBD 2002, 2004b; CBD v. ADWR 2003

[274] CBD 2003a, 2003b, CBD v. ADWR 2003

[275] ADWR 1993b, 2003b, 2003c; CBD v. ADWR 2003

[276] ACOE 1970, 1974; AGFD 1993, 2000; ADWR 1991, 1994b, 1998; American Birding Association 1995; Arizona Commission on the Environment 1990; Amundson 2000; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 1993, 1995, 2002b, 2003a, 2003b; ASL 1994; Birds of North America 1999; BLM 1987; Bureau of Reclamation 2002; CBD 2004a; CBD v. DoD 1999; CEC 1999a, 1999b; CEQ 1981; Endangered Species Act 1973; Laymon 2000; Life Magazine 1993; National Audubon 2002; National Geographic 2000; New York Times 1999; Sierra Vista Herald 2000b; SWCBD 1991,1992, 1996, 1999; TNC 2002; U.S. Congress 1988; USGS 1999; USFWS 1978, 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2002

[277] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[278] ACOE 1970, 1974, 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 1998, 2003a, 2003b, 2003c, 2004b, 2004c; AGFD 1993, 2000; American Birding Association 1995; Amundson 2000; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona Daily Star 2002, 2003b; Arizona Highways 1989, 1996, 1998; Arizona Republic 1993, 1995, 2002b, 2003a, 2003b; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; ASL 1994; Birds of North America 1999; BLM 1987, 1991; Bureau of Reclamation 2002; Cappaert v. United States 426 U.S. 128 (1976); CBD 2001, 2002, 2003a, 2003b, 2003c, 2003d, 2004a, 2004b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999a, 1999b; CEQ 1981; Department of Interior 1994; Endangered Species Act 1973; Glennon 2002; Glennon and Maddock 1994, 1997; Greer v. Connecticut, 161 U.S. 519 (1896); Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Laymon 2000; Life Magazine 1993; Maddock 1993; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); National Audubon 2002; National Geographic 2000; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995); New York Times 1999; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); Sierra Vista Herald 2000b; Special Master 2003; State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central

Consumer fraud, Federal anti-fraud, and mail fraud statutes are intended to protect vulnerable consumers and lenders.[279] In the Sierra Vista area, these statutes are being ignored.[280] This is particularly concerning given the focused local sales efforts directed at attracting realty investments by seniors and fixed income retirees, especially military retirees.[281] This group is the least prepared and the least able to recover from the inevitable reduction in property values as water becomes less available and more expensive.

Sierra Vista area lenders have also not enjoyed the protection intended by the Arizona's consumer fraud protection statutes.[282] Governor Symington's continuing ADWR misrepresentation scheme increasingly affects lenders as more new homeowners without adequate future water supply seek loans. Making false statements to a lender is a felony.[283] Ironically, Governor Symington was convicted of making false statements to a lender on September 27, 1997.[284]

Lenders have been expressive concerning their hesitancy in issuing loans for properties with an inadequate water supply.[285] The Arizona Daily Star reports:

> "ADWR refuses to certify 100 year water 'adequacy' for areas largest developer
>
> Tenneco Realty, a subsidiary of the Houston-based, multinational oil-gas-shipbuilding-chemical company Tenneco Inc., is the fountainhead of this area's future. This and countless other signs promote its Sierra Vista Project, which in 30 years could almost double the metropolitan area's current population of 42,000.
>
> But the future of the project, and perhaps of Sierra Vista itself, could be hung up by this city's intricate - and hotly disputed - link to the San Pedro River, about 10 miles to the east.
>
> The State Department of Water Resources says ground water pumping for the project would dry up parts of the river in the next 100 years...The state concluded Tenneco's pumping – even though many miles from the river – will reduce the ground water level there by about 50 feet in 100 years. In areas where the river's flow is sustained by high ground water recharge…the pumping will cause the river

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Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991, 1996, 1999; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 U.S. (2002); TNC 2002; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1978, 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 (1896); Winters v. United States [1908]

[279] A.R.S. 44-1521, 44-1522;

[280] ACOE 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004b, 2004c; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2002, 2003a, 2003b, 2003c, 2003d, 2004b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[281] Fort Huachuca 2003, Retired Officer 2000

[282] A.R.S. 44-1521 – 44-1534

[283] 18 U.S.C. 1014

[284] 18 U.S.C. 1014; Arizona Republic 2002a; Phoenix NewTimes 1997a, 1997b, 2001

[285] Arizona Daily Star 1984

to dry much sooner than 100 years…As a result, the state water agency has refused to certify that Tenneco has an adequate water supply...

This, by itself, will not stop the project. Cochise County, unlike Pima County, is not in a state water Active Management Area where developers must prove an assured 100-year water supply to build. Here, the state only requires that developments with inadequate water supplies let customers know in sales contracts.

But it will keep the U.S. Department of Housing and Urban Development and Veteran Administration from insuring Federal Housing Administration and VA mortgage loans for housing customers, for Tenneco or for any other project.

'We certainly don't want anyone buying homes without adequate water,' said Adele Kauth, manager of HUD's Tucson office. 'If they could be subjected to cutting off of water someday, it (the development) could be a wasteland.'

Veterans Administration official Loring Myer said that his Phoenix-based office also will turn down loans if made aware of an inadequate water situation..."[286]

A moratorium was even temporarily undertaken by the U.S. Department of Housing and Urban Development (HUD) on Federal Housing Authority-approved mortgages to protect lenders.[287] A "hailstorm of developer protests" halted the moratorium, however, as HUD sacrificed consumer and lender protection for political expediency.[288]

The intent of consumer fraud statutes is clear. Deception in connection with the sale of real estate in Arizona is illegal.[289] ADWR assures consumers of protection for the water supply adequacy for their real estate investments:

"In 1973, the Arizona Legislature enacted a statewide water adequacy statute as a consumer protection measure in response to the marketing of lots without available water supplies. The Water Adequacy Program, described in A.R.S. § 45-108, requires subdivision developers to obtain a determination from the State regarding the availability of water supplies prior to marketing lots. Developers are required to disclose any 'inadequacy' of the supply to potential buyers…"[290]

For the Sierra Vista area, ADWR's assurance is a lie.[291] In spite of this assurance to consumers, ADWR certifies an adequate 100-year water supply in the Sierra Vista area when

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[286] Ibid.

[287] High Country News 2004

[288] Ibid.

[289] A.R.S. 44-1521, 44-1522

[290] ADWR 2004b

[291] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

it does not exist.[292] The certifications are disingenuous.[293] They are fraudulent.[294] The certifications violate Arizona's consumer fraud statutes.[295]

The Arizona Legislature has been clear in its desire for comprehensive management of the State's groundwater.[296] The Arizona Legislature vests broad powers in the Governor and the ADWR Director to "formulate plans and develop programs," "investigate works, plans or proposals pertaining to surface water and groundwater," to "collect and investigate information," and to "prepare and devise means and plans for the development, conservation and utilization of all waterways, watersheds, surface water, groundwater and groundwater basins."[297]

In the Groundwater Code, the Arizona Legislature maintains this comprehensive management theme.[298] The Legislature declares a public policy "to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state."[299]

ADWR Director Guenther's new hyper-narrow re-interpretation of Arizona law in support of the continuation of Governor Symington's misrepresentation of the adequacy of the Sierra Vista area water supply insults the Legislature's desire for comprehensive management of the State's water resources.[300] Good faith and justice has been abandoned, as the comprehensive oversight envisioned by the Legislature remains illusive in the Sierra Vista area.[301]

Former Governor Symington endeavored to disregard consumer protection, and comprehensive water management oversight, and public trust for future generations in the Sierra Vista area.[302] ADWR today, still chooses to continue Governor Symington's deception and misrepresentation.[303]

The Arizona Attorney General is charged with enforcement of Arizona consumer fraud statutes.[304] Assistant Arizona Attorney General Mangotich Grier has expressed her opinion that concern regarding dishonest certification of water adequacy by ADWR for Sierra Vista

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[292] Ibid.

[293] Ibid.

[294] Ibid.

[295] A.R.S. 44-1521, 44-1522; ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[296] A.R.S. 45-401

[297] A.R.S. 45-105

[298] A.R.S. 45-401

[299] A.R.S. 45-401(B)

[300] A.R.S. 45-105, A.R.S. 45-401; ADWR 2003a; CBD 2002, 2004b; CBD v. ADWR 2003;

[301] A.R.S. 1-211, A.R.S. 44-1521-1534, A.R.S. 45-105, A.R.S. 45-401; ADWR 1993b, 2003a, 2003b; CBD 2002, 2004b; CBD v. ADWR 2003

[302] ADWR 1992b, 1993b, 1993c

[303] ADWR 2003b, 2003c, 2004c; CBD 2002, 2003c, 2003d, 2004b

[304] A.R.S. 44-1524, 44-1530; Arizona Attorney General 2001

area developers is "a consumer disclosure issue."[305] We agree. ADWR violates these statutes by misrepresenting the water adequacy to consumers and lenders in the Sierra Vista area.[306] We call on the Arizona Attorney General to follow through by respecting law and mandate and stopping this fraud.

The SPRNCA is Federal property.[307] It is already showing signs of destruction owing to excessive local groundwater pumping.[308] Since ADWR's actions perpetuate a scheme that promotes and accommodates the destruction of Federal property, Federal anti-fraud statutes are being violated.[309] The time has now come for the U.S. Attorney and the Department of Justice to also become involved.[310]

ADWR transmits its summary correspondence misrepresenting the Sierra Vista water supply adequacy by U.S. Mail.[311] Consequently, mail fraud statutes against using the U.S. Mail "to further a scheme" are also being violated.[312] It is now time for the U.S. Postal Inspection Service, the law enforcement branch of the U.S. Postal Service, to stop ADWR's use of the U.S. Mail to transmit its fraudulent documents.

Please contact us if we may provide any more information. We may be contacted via mail: CBD, P.O. Box 39629, Phoenix, AZ 85069-9629, by phone: 602 246 4170, or by Email: rsilver@biologicaldiversity.org. Thank you very much.

Sincerely,

Robin Silver, M.D.
Board Chair

CC: Governor Janet Napolitano
Phone: (602) 542-4331

ADWR Director Herb Guenther
Phone: (602) 417-2410

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[305] CBD v. ADWR 2003b

[306] A.R.S. 44-1521, 44-1522; ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001, 2003a, 2003b; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999a, 1999b, 1999c, 2000, 2001, 2002; USGS 1982, 1999, 2004; Vionnet and Maddock 1992; WJF. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[307] U.S. Congress 1988

[308] ACOE 2002, 2003; ADWR 1994b, 1996; BLM 1987; CEC 1999b; SAIC 1998; Schwartzman 1990; USFWS 1999b, 2002; USGS 1999, 2004

[309] 18 U.S.C. 1001; ACOE 2002, 2003; ADWR 1994b, 1996; BLM 1987; CEC 1999b; SAIC 1998; Schwartzman 1990; USFWS 1999b, 2002; USGS 1999, 2004

[310] 18 U.S.C. 1345

[311] ADWR 1984, 1989, 1990, 1992b, 2003a; CBD 2002, CBD 2003c, 2003d, 2004b

[312] USPS 2004, 18 U.S.C. 1341

Attachments:

Correspondence, from CBD, to Ms. Rita Pearson, ADWR Director, RE: 1. Request for revocation of every "statement of adequacy" of 100-year adequacy of the water supply in the Sierra Vista Sub-basin of the Upper San Pedro Basin", issued since September 29, 1993; 2. Immediate suspension of the issuance of any new "statement of adequacy" for the Sierra Vista Sub-basin.; February 26, 2001.

Correspondence, from CBD to Governor Janet Napolitano, RE: Request for meeting to discuss your changing of a residual Symington/Hull ADWR policy that is jeopardizing the San Pedro River." February 27, 2003.

Correspondence, from CBD to Governor Janet Napolitano, RE: Proposed meeting between the Governor of the State of Arizona and the Arizona conservation community to discuss the Governor's calling for Ft. Huachuca to "accept the functions of bases that will close in the upcoming [BRAC] round." (Arizona Daily Star 2003a) Such expansion of Ft. Huachuca will further imperil the San Pedro River without extensive mitigation.; April 18, 2003.

References:

18 U.S.C. 1001. U.S. Code TITLE 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 47 - FRAUD AND FALSE STATEMENTS; Section 1001. Statements or entries generally: (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry… shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. 1014. U.S. Code TITLE 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 47 - FRAUD AND FALSE STATEMENTS; Section 1014. - Loan and credit applications generally; renewals and discounts; crop insurance: Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662), or the Small Business Administration in connection with any provision of that Act, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) [1] of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefore, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union"

includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

18 U.S.C. 1341. U.S. Code TITLE 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 63 - MAIL FRAUD; Section 1341. Frauds And Swindles; Section 1341. Frauds and swindles…Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1345. U.S. Code Title 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 63 - MAIL FRAUD; Section 1345. Injunctions against fraud…(a)(1) If a person is - (A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title; (B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title)…the Attorney General may commence a civil action in any Federal court to enjoin such violation.

A.A.C. R12-15-705. Assured Water Supply Requirement - Consistency with Management Goal

A.A.C. R12-15-717. Adequate Water Supply Requirement-Physical Availability…D. The director shall determine that an applicant will have sufficient supplies of water which will be legally available to the applicant to satisfy the applicant's 100-year projected water demand, if the applicant is an adequacy water report applicant, or will exceed the applicant's current and committed demands for 100 years, if the applicant is a designation of ADWS applicant, in accordance with the following…5. If the applicant will obtain the proposed source of water through a written contract other than a water exchange agreement, a contract between an adequacy water report applicant and the municipal provider proposed to serve the applicant, a contract with the United States Secretary of the Interior for Colorado River water, or a subcontract with a multi-county water conservation district, the director shall determine whether the proposed source of water is legally available to the applicant, the term of years for which the source is legally available, and the volume of water which is legally available as follows: a. The director shall determine that the proposed source of water is legally available to the applicant only if: i. The person providing the water under the contract has a legal right to the water in accordance with the terms of this subsection.; ii. The director determines that the terms of the contract will ensure that the proposed source of water will be delivered to the applicant.; b. The director shall determine the term of years for which the proposed source of water is legally available based on the term of years remaining in the contract.; c. The director shall determine the quantity of water legally available to the applicant based on the volume established in the contract.; 6. If the applicant is an adequacy water report applicant, the applicant has submitted evidence indicating that the applicant has entered into a notice of intent to serve agreement signed by both the applicant and the municipal provider proposed to serve the applicant, which contains a statement of the municipal provider's intent to serve all of the proposed lots and uses that are subject to this determination of an adequate water supply.; 7. If the applicant is an adequacy water report applicant, and the municipal provider proposed to serve the applicant is a city or town, the applicant has submitted evidence indicating that the

applicant is located within the incorporated limits of the city or town or the applicant has submitted evidence of the legal right of the city or town to serve water to the applicant outside the city or town's incorporated limits.; 8. If the applicant is an adequacy water report applicant, and the municipal provider proposed to serve the applicant is a private water company, the applicant has submitted evidence:; a. Of the private water company's certificate of convenience and necessity approved by the Arizona Corporation Commission. The director shall only determine that the water provided by the private water company is legally available if the certificate of convenience and necessity is free of conditions which would likely result in the revocation of the certificate of convenience and necessity; and; b. That the applicant is located within the certificated area or within any other area in which the Arizona Corporation Commission authorizes the private water company to serve water.; 9. If the applicant is a private water company applying for a designation of adequate water supply, evidence that the applicant has a certificate of convenience and necessity approved by the Arizona Corporation Commission authorizing the proposed water use.

A.R.S. 1-211. 1-211. Rules of construction and definitions…B. Statutes shall be liberally construed to effect their objects and to promote justice.

A.R.S. 32-2181F. "In areas outside of groundwater active management areas established pursuant to title 45, chapter 2, article 2, if the director of water resources, pursuant to section 45-108, reports an inadequate on-site supply of water to meet the needs projected by the developer or if no water is available, the state real estate commissioner shall require that all promotional material and contracts for the sale of lots in subdivisions approved by the commissioner adequately display the director of water resources' report or the developer's brief summary of the report as approved by the commissioner on the proposed water supply for the subdivision."

A.R.S. 44-1521. 44-1521. Definitions…5. "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate, or services.

A.R.S. 44-1522. 44-1522. Unlawful practices; intended interpretation of provisions…A. The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

A.R.S. 44-1524. Powers of attorney general…A. If the attorney general has reasonable cause to believe that a person has engaged in, is engaging in or is about to engage in any practice or transaction which is in violation of this article or order or assurance of discontinuance entered under this article, he may: 1. Require such person to file on such forms as he prescribes a statement or report in writing, under oath, as to all the facts and circumstances concerning the sale or advertisement of merchandise by such person, and such other data and information as he may deem necessary.; 2. Examine under oath any person in connection with the sale or advertisement of any merchandise.; 3. Examine any merchandise or sample thereof, or any record, book, document, account or paper as he may deem necessary.; 4. Pursuant to an order of the superior court, impound any record, book, document, account, paper, or sample or merchandise material to such practice and retain the same in his possession until the completion of all proceedings undertaken under this article or in the courts.; B. This section does not prohibit the attorney general from investigation of violations of this article including requesting a person to respond to a complaint filed against him. A person cannot be compelled to comply with a request to respond to a complaint except in accordance with section 44-1527.

A.R.S. 44-1530. Assurance of discontinuance of unlawful practice…In the enforcement of the provisions of this article, the attorney general may accept an assurance of discontinuance of any act or practice deemed in violation of the provisions of this article from any person engaging in, or who has engaged in, such act or practice. Such assurance may include a stipulation for the payment by such person of reasonable expenses incurred by the attorney general or as restitution to aggrieved persons, or both. Any such assurance shall be in writing and shall be filed with and subject to the approval of the superior court of the county in which the alleged violator resides or has its principal place of business or in Maricopa County. A violation of such assurance within six years of the filing thereof shall constitute prima facie proof of a violation of the provisions of this article. Such assurance of discontinuance shall not be considered an admission of a violation for any purpose.

A.R.S. 45-105. 45-105. Powers and duties of director…A. The director may: 1. Formulate plans and develop programs for the practical and economical development, management, conservation and use of surface water, groundwater and the watersheds in this state, including the management of water quantity and quality.; 2. Investigate works, plans or proposals pertaining to surface water and groundwater, including management of watersheds, and acquire, preserve, publish and disseminate related information which the director deems advisable.; 3. Collect and investigate information upon and prepare and devise means and plans for the development, conservation and utilization of all waterways, watersheds, surface water, groundwater and groundwater basins in this state and of all related matters and subjects...B. The director shall: 1. Exercise and perform all powers and duties vested in or imposed upon the department and adopt and issue rules necessary to carry out the purposes of this title.; 2. Administer all laws relating to groundwater, as provided in this title…8. Investigate and take appropriate action upon any complaints alleging withdrawals, diversions, impoundments or uses of surface water or groundwater that may violate this title or the rules adopted pursuant to this title.; 14. In the year following each regular general election, present information to the committees with jurisdiction over water issues in the house of representatives and the senate. A written report is not required but the presentation shall include information concerning the following: (a) The current status of the water supply in this state and any likely changes in that status.; (b) Issues of regional and local drought effects, short-term and long-term drought management efforts and the adequacy of drought preparation throughout the state.; (c) The status of current water conservation programs in this state…(f) The status of any pending or likely litigation regarding surface water adjudications or other water related litigation and the potential impacts on this state's water supplies… (h) Other matters related to the reliability of this state's water supplies, the responsibilities of the department and the adequacy of the department's and other entities' resources to meet this state's water management needs.

A.R.S. 45-108. 45-108 Evaluation of subdivision water supply…A. In areas outside of active management areas…the developer of a proposed subdivision including dry lot subdivisions, regardless of subdivided lot size, prior to recordation of the plat, shall submit plans of the water supply for the subdivision and demonstrate the adequacy of the water supply to meet the needs projected by the developer to the director. The director shall evaluate the plans and issue a report on the plans…B. The director shall evaluate the proposed source of water for the subdivision to determine its ability to meet proposed uses for a period of years commensurate with normal practices in other areas of the sate and shall forward a copy of such evaluation to the state real estate commissioner…F. The director may revoke a designation made pursuant to this section when the director finds that the water supply may become inadequate.

A.R.S. 45-111. 45-111. Annual report by director…On or before July 1 each year the director shall render to the governor and the legislature a full and true report of the department's operations under this title. The report shall include suggestions as to amending existing laws or enacting new legislation as the director and the Arizona water resources advisory board deem necessary and such other information, suggestions and recommendations as the director considers of value to the public. The report shall be published and made available to the public.

A.R.S. 45-141. 45-141. Public nature of waters of the state; beneficial use; reversion to state; actions not constituting abandonment or forfeiture…A. The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.; B. Beneficial use shall be the basis, measure and limit to the use of water. An appropriator of water is entitled to beneficially use all of the water appropriated on less than all of the land to which the water right is appurtenant, and this beneficial use of the water appropriated does not result in the abandonment or forfeiture of all or any portion of the right…"

A.R.S. 45-401. Chapter 2 GROUNDWATER CODE…45-401. Declaration of policy…A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective…B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

A.R.S. 45-453. Chapter 2 GROUNDWATER… 45-453. Groundwater rights and uses in areas outside active management areas; amounts; transportation; irrigation non-expansion areas…In areas outside of active management areas, a person may: 1. Withdraw and use groundwater for reasonable and beneficial use, except as provided in article 8.1 of this chapter [Withdrawals of Groundwater for Transportation to Active Management Area]…"

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ADWR 1993a. Correspondence from Greg Wallace, Chief Hydrologist, ADWR, to Mr. Roy Tanney, Chief of Subdivisions, Department of Real Estate, Phoenix, Re: Charleston Village, Cochise County, June 16, 1993.

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CENTER FOR BIOLOGICAL DIVERSITY

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

May 20, 2005

Hon. Terry Goddard
Arizona Attorney General
1275 West Washington Street
Phoenix, AZ 85007
Phone: (602) 542-5025

Director Herb Guenther
Arizona Department of Water Resources
500 North Third Street
Phoenix, AZ 85004
Phone: (602) 417-4720

Dear Attorney General Goddard and Director Guenther,

RE: 1. Addendum to the Center for Biological Diversity's September 7, 2004, Consumer Fraud Complaint (CIC04-23832) and Answer to the Arizona Attorney General's December 22, 2004, response; regarding, (a) Arizona Department of Water Resources' false representation of the adequacy of the Fort Huachuca/Sierra Vista area's water supply to consumers and lenders, and (b) Assistant Arizona Attorney General Mary Mangotich Grier's belief that concern regarding dishonest certification of water adequacy by Arizona Department of Water Resources for Fort Huachuca DWR for Sierra Vista area developers is "a consumer disclosure issue."[1]

2. Notice of Claim compliant with A.R.S. 12-821.01 to pursue citizen Tort Action against the Arizona Department of Water Resources (ADWR) if the Arizona Attorney General continues to abrogate enforcement responsibility to stop ADWR Consumer Fraud Act violations.

Background

On September 7, 2004, the Center for Biological Diversity (CBD) presented to the Arizona Attorney General extensive evidence of Consumer Fraud Act violation by ADWR.[2] (Complaint) Our Complaint also presents irrefutable evidence of the inadequacy of water in the Sierra Vista Sub-basin. New information since our September 7, 2004, Complaint reveals even more evidence of the inadequacy of water.[3]

[1] CBD v. ADWR 2003b
[2] CBD 2004e
[3] ADWR 1992a; Department of Interior 2004; Fort Huachuca 2002; U.S. Congress 1988; USGS 2004b

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ADWR misrepresents the adequacy of water in the Fort Huachuca/Sierra Vista area (1) by denying the existence of Federal reserved water rights, and (2) by denying the connection between surface base flow of the San Pedro River and groundwater from which it originates.[4] An adequate supply of water does not exist in the Fort Huachuca area to provide for Federal reserved water rights, San Pedro River survival, and the area's excessive, increasing groundwater-dependent growth.[5] ADWR continues to misrepresent the adequacy of water in the Fort Huachuca area by denying these facts.[6]

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[4] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996, 2005a, 2005b; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001a, 2003a, 2003b, 2004e, 2005; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CBD v. HUD et al. 2005; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003b; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1998a, 1998b, 1998c, 1998d, 1999a, 1999b, 1999c, 2000, 2001, 2002a; USGS 1982, 1999a, 2004a; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); W.J.F. Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[5] ACOE 1970, 1974, 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004a, 2004b, 2004c; AGFD 1993, 2005; American Birding Association 1995; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2001, 2002, 2003, 2004; Arizona Daily Star 1984, 2002, 2003a, 2004b; Arizona Daily Sun 2004; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002, 2003a, 2003b, 2003c, 2003d, 2004a, 2004b, 2004c, 2004d, 2004e; Arizona Supreme Court 1988, 1992, 1999; Arizona v. California [1963]; ASL 1994; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001a, 2001b, 2002, 2003a, 2003b, 2003c, 2003d, 2004c, 2004e, 2004f, 2005; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999, 2003; CEC 1999a, 1999b; CEQ 1981; CNN 2004, 2005; Cook et al. 2004; Department of Defense 2005; Department of Interior 1994, 2004; EEC 2001, 2005a, 2005b; Endangered Species Act; Fort Huachuca 2002a; GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896); Haas and Frye 1997; High Country News 2004, 2005; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Life Magazine 1993; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); National Geographic 2000, 2004; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995); New York Times 1999; NOAA 2005; Observer/UK 2004; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); Sierra Vista Herald 2000b, 2003a, 2003e, 2004e; State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991, 1996, 1999a, 1999b; SWRAG 2000; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002); TNC 2002; Tucson Citizen 2004; U.S. Army 2003b, 2003d, 2003e; U.S. Congress 1988; U.S. Constitution Articles I, IV; U.S. Senate 1988; USFWS 1978, 1986a, 1986b, 1990, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1998a, 1998b, 1998c, 1998d, 1999b, 1999c, 1999d, 1999f, 2000, 2001, 2002a, 2003; USGS 1982, 1999a, USGS 1999b, 2004a, 2004b; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); W.J.F. Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Washington Post 2005; Winters v. United States [1908]

[6] A.R.S. 44-1521, 44-1522; ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004a, 2004b, 2004c, 2005a, 2005b; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992,1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001a, 2003a, 2003b, 2004c, 2004f; CBD v. ADWR 2002, 2003; CBD v. DoD 1999; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act; GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003b; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999b, 1999c, 1999d, 1999f, 2000, 2001, 2002a; USGS 1982, 1999a, 2004a; Vionnet and Maddock 1992; W.J.F. Realty Corp. v.

Groundwater in the Sierra Vista Sub-watershed is hydrologically connected to surface flow of the San Pedro River.[7] Most of the surface flow in the San Pedro during the driest time of the year comes from groundwater seeping from the aquifer through the riverbanks.[8] The surface flow during the driest time of the year is called base flow. Extensive local groundwater pumping intercepts water that would otherwise seep from the aquifer to provide base flow for the San Pedro River.[9] Not surprisingly, San Pedro River base flow, or the water in the stream during the driest times of the year, continues decreasing dramatically.[10] The Palominas/Hereford groundwater-pumping center, near the Mexican border, has been acknowledged to be negatively affecting San Pedro River base flows since 1987.[11] The Fort Huachuca/Sierra Vista groundwater-pumping center is now also negatively affecting the flow gradient near the San Pedro.[12]

San Pedro River base flow represents Bureau of Land Management (BLM) Federal reserved water rights.[13] Federal reserved water rights inarguably exist for the BLM and the San Pedro River.[14] The fact that the connection between groundwater and surface water exists in Federal law, as well as in reality, has been clearly established since 1976.[15] At that time, the U.S. Supreme Court decided a landmark case, *Cappaert v. United States*. With *Cappaert v. United States*, groundwater pumping that intercepts and denies Federal reserved water rights is unequivocally illegal, no matter any State law to the contrary.[16] The U.S. Supreme Court has re-confirmed the findings of *Cappaert v. United States* two times since 1976.[17] All groundwater pumping in the Sierra Vista Sub-basin beginning at least after August 12, 1985 will ultimately need be reduced or terminated as necessary to preserve Federal water rights and the San Pedro River.[18] The Arizona Supreme Court agrees.[19]

Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); WJF Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[7] ACOE 1970, ACOE 1974, ADWR 1994b, ASL 1994, USGS 1999a

[8] ADWR 1988, 1991, 1994b; CEC 1999b, CEQ 1981, USGS 1999a, USFWS 1999b, 2002a

[9] ACOE 1970, 1974; ADWR 1988, 1991, 1994b, 1998; ASL 1994, CEC 1999b; CEQ 1981; Department of Interior 1993; Glennon and Mattock 1997; U.S. Congress 1988; USGS 1999a; USFWS 1999b, 2002

[10] ADWR 1996; CEC 1999b; USGS 1999a, 2004a

[11] BLM 1987; USFWS 1999e, 2002a, p. 92; USGS 1999a

[12] ACOE 2003

[13] ADWR 1992a; Huachuca Audubon, et al. 1985; BLM 1991, 1995; U.S. Congress 1988

[14] ADWR 1992a; BLM 1991; U.S. Congress 1988

[15] Cappaert v. United States 426 U.S. 128 [1976]

[16] Cappaert v. United States 426 U.S. 128 [1976]

[17] Glennon and Maddock 1994, 1997; Kansas v. Colorado, 115 S. Ct. 1995; Maddock 1993; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995)

[18] ACOE 1970, 1974, 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004a, 2004b, 2004c; AGFD 1993, 2005; American Birding Association 1995; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2001, 2002, 2003, 2004; Arizona Daily Star 1984, 2002, 2003a, 2004b; Arizona Daily Sun 2004; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002, 2003a, 2003b, 2003c, 2003d, 2004a, 2004b, 2004c, 2004d, 2004e; Arizona Supreme Court 1988, 1992, 1999; Arizona v. California [1963]; ASL 1994; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001a, 2001b, 2002, 2003a, 2003b, 2003c, 2003d, 2004c, 2004e, 2004f, 2005; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999, 2003; CEC 1999a, 1999b; CEQ 1981; CNN 2004, 2005; Cook et al. 2004; Department of Defense 2005; Department of Interior 1994, 2004; EEC 2001, 2005a, 2005b; Endangered Species Act; Fort Huachuca 2002a; GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896); Haas and Frye 1997; High Country News 2004, 2005; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Life Magazine 1993; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); National Geographic 2000, 2004; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995); New York Times 1999; NOAA 2005; Observer/UK 2004; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); Sierra Vista Herald 2000b, 2003a, 2003e, 2004e; State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991, 1996, 1999a, 1999b; SWRAG 2000; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002); TNC 2002; Tucson Citizen 2004; U.S. Army 2003b, 2003d, 2003e; U.S. Congress 1988; U.S. Constitution Articles I, IV; U.S. Senate 1988; USFWS 1978, 1986a, 1986b, 1990, 1991, 1992, 1993,

Water in the Fort Huachuca area is already over-allocated.[20] Since our September 7, 2004, Complaint, we now document that total Federal reserved water rights account for between 103% and 130% of the area's entire annual natural recharge.[21] BLM's San Pedro River Federal reserved water rights total 11,028 acre-feet/year at the Charleston gage.[22] Fort Huachuca's Federal reserved water rights total 7,549 acre-feet/year.[23] The most current estimate of total recharge in the Sub-watershed equals 18,000 acre-feet per year.[24]

Since our September 7, 2004, Complaint we now document that the San Pedro River, representing BLM Federal reserved water rights, has not received its share of water for 69% (122/178) of all months on record (November 1988 through September 2003) at the Charleston gage as of December 2, 2004.[25] This shortfall represents an accumulating deficit to date of 34,819 acre-feet based on USGS stream flow data.[26]

Excessive, local groundwater-dependent growth in the Fort Huachuca/Sierra Vista area threatens the San Pedro River.[27] The area's excessive, increasing groundwater-dependent growth is supported in good part by Federal lending, loan guarantee, and underwriting programs.[28] From October 1, 1992 (start FY 1993) through September 30, 2004 (end FY 2004), the Veterans Administration (VA) has guaranteed and insured 5,179 home loans for $177,053,463 in Cochise County.[29] Since September 30, 2001, the Federal Housing Administration (FHA) has guaranteed or insured 459 loans for $43.8 million in the Fort Huachuca area.[30] The Small Business Administration (SBA) has loaned $8.5 million creating 272 jobs,[31] and the VA has guaranteed 548 loans totaling $81.1 million during this same period.[32] FHA proposes to guarantee or insure another 800 new loans for approximately $69.9 million.[33]

In the past, both the VA and FHA had moratoriums on their lending, loan guarantee, and underwriting programs in the Fort Huachuca area when ADWR did not falsely represent the adequacy of future water supply.[34] The Federal lenders recognized that property without adequate water would not retain its value.[35] The Arizona Daily Star reports:

> "ADWR refuses to certify 100 year water 'adequacy' for areas largest developer

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1994, 1995, 1997a, 1997b, 1998a, 1998b, 1998c, 1998d, 1999b, 1999c, 1999d, 1999f, 2000, 2001, 2002a, 2003; USGS 1982, 1999a, USGS 1999b, 2004a, 2004b; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); W.J.F. Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Washington Post 2005; Winters v. United States [1908]

[19] Arizona Supreme Court 1999 [989 P.2d at 747, 747-48, 750, 751]

[20] ADWR 1992a; BLM 1991; Department of the Interior 2004: ADWR 2004: Appendix C – Sierra Vista Subwatershed Ground-Water Budget, Table C2. Summarization of development ground-water budgets for the Sierra Vista Subwatershed; and Appendix D – ADWR Ground-Water Budget for the Sierra Vista Subwatershed for 2002; Department of Defense 2005; Fort Huachuca 2002a; U.S. Congress 1988; USGS 2004a, 2004b

[21] ADWR 1992a, 2004; Fort Huachuca 2002

[22] ADWR 1992a

[23] Fort Huachuca 2002

[24] Department of Interior 2004

[25] ADWR 1992a; U.S. Congress 1988; USGS 2004b

[26] Ibid.

[27] ACOE 2003; BLM 1987; CEC 1999b; CBD v. DoD 1999, SWCBD v. DoD 1994; USFWS 1999e, 2002a; USGS 1999a

[28] FHA 2004; SBA 2005; VA 2004a, 2004b;

[29] VA 2004b

[30] FHA 2004

[31] SBA 2005

[32] VA 2004b

[33] FHA 2004

[34] Arizona Daily Star 1984; High Country News 2004

[35] Arizona Daily Star 1984

Tenneco Realty, a subsidiary of the Houston-based, multinational oil-gas-shipbuilding-chemical company Tenneco Inc., is the fountainhead of this area's future. This and countless other signs promote its Sierra Vista Project, which in 30 years could almost double the metropolitan area's current population of 42,000.

But the future of the project, and perhaps of Sierra Vista itself, could be hung up by this city's intricate - and hotly disputed - link to the San Pedro River, about 10 miles to the east.

The State Department of Water Resources says ground water pumping for the project would dry up parts of the river in the next 100 years...The state concluded Tenneco's pumping – even though many miles from the river – will reduce the ground water level there by about 50 feet in 100 years. In areas where the river's flow is sustained by high ground water recharge…the pumping will cause the river to dry much sooner than 100 years…As a result, the state water agency has refused to certify that Tenneco has an adequate water supply...

This, by itself, will not stop the project. Cochise County, unlike Pima County, is not in a state water Active Management Area where developers must prove an assured 100-year water supply to build. Here, the state only requires that developments with inadequate water supplies let customers know in sales contracts.

But it will keep the U.S. Department of Housing and Urban Development and Veteran Administration from insuring Federal Housing Administration and VA mortgage loans for housing customers, for Tenneco or for any other project.

'We certainly don't want anyone buying homes without adequate water,' said Adele Kauth, manager of HUD's Tucson office. 'If they could be subjected to cutting off of water someday, it (the development) could be a wasteland.'

Veterans Administration official Loring Myer said that his Phoenix-based office also will turn down loans if made aware of an inadequate water situation..."[36]

Even though ADWR acknowledged the fact that an adequate 100-year supply of water does not exist in the Fort Huachuca vicinity until September 29, 1993,[37] the VA and FHA moratorium did not last.[38] It ended in a "hailstorm of developer protests."[39] Undoubtedly, the moratorium was reversed following a scenario consistent with Senator Dennis DeConcini's "Keating Five" treatment of Federal Savings and Loan regulators.[40] Efforts at uncovering a paper trail concerning lifting of the moratorium continues.[41] Lifting of the moratorium itself is being actively challenged, as an adequate supply of water still does not exist in the area.[42]

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[36] Ibid.
[37] ADWR 1984, 1989, 1990, 1992b, 1993a, 1993b, 1993c, 1994a
[38] High Country News 2004
[39] High Country News 2004
[40] Arizona Republic 1999
[41] CBD 2004g, 2004h, 2004i; FHA 2004; HUD 2004; VA 2004a, 2004b;
[42] ACOE 1970, 1974, 2002, 2003; ADWR 1984, 1988, 1989, 1990, 1991, 1992a, 1992b, 1993a, 1993b, 1994a, 1994b, 1996, 2003a, 2003b, 2003c, 2004a, 2004b, 2004c; AGFD 1993, 2005; American Birding Association 1995; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2001, 2002, 2003, 2004; Arizona Daily Star 1984, 2002, 2003a, 2004b; Arizona Daily Sun 2004; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002, 2003a, 2003b, 2003c, 2003d, 2004a, 2004b, 2004c, 2004d, 2004e; Arizona Supreme Court 1988, 1992, 1999; Arizona v. California [1963]; ASL 1994; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001a, 2001b, 2002, 2003a, 2003b, 2003c, 2003d, 2004c, 2004e, 2004f, 2005; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999, 2003; CBD v. HUD, et al. 2005; CEC 1999a, 1999b; CEQ 1981; CNN 2004, 2005; Cook et al. 2004; Department of Defense 2005; Department of Interior 1994, 2004; EEC 2001, 2005a, 2005b; Endangered Species Act; Fort Huachuca 2002a; GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896); Haas and Frye 1997; High Country News 2004, 2005;

ADWR's false statements to consumers violate Arizona's consumer fraud statutes.[43] The act or use of deceit, dishonesty or deception in connection with the sale of real estate is illegal.[44] ADWR's false representation substantially promotes and facilitates the Fort Huachuca/Sierra Vista area's groundwater-dependent growth, while obscuring the increasing risk of the inevitable reduction in property values as water becomes less available and more expensive.

ADWR falsely represents the adequacy of water in the Fort Huachuca/Sierra Vista area with the understanding and intent that sham "water adequacy" will be used in marketing and advertising materials to induce consumers to purchase real property and to induce lenders and underwriters to facilitate the purchases. ADWR engages in a deceptive act or practice, misrepresentation or omission of a material (that there is not sufficient water) with the intent that others rely on this misrepresentation in connection with the sale/purchase of real property, in violation of the Consumer Fraud Act (A.R.S. 44-1521 *et seq.*). ADWR Director Herb Guenther is the official responsible for ADWR's misrepresentation.

On December 22, 2004, the Arizona Attorney General responded to our September 7, 2004, Complaint.[45] On December 22, 2004, the Attorney General advised CBD that the Attorney General "will not be taking any action" as "a conflict of interest is created" because "this office represents the Department of Water Resources."[46] The Attorney General's citing of "a conflict of interest" as rationale for not investigating and stopping consumer fraud by ADWR ignores mandate and legal precedent.

<u>The Arizona Attorney General's refusal to pursue Consumer Fraud Act violation by ADWR and the ADWR Director owing to "conflict of interest" ignores mandate and legal precedent.</u>

The Arizona Attorney General is the "chief legal officer of the State." [A.R.S. § 41-192(A)] The Arizona Attorney General's Agency Handbook confirms the Attorney General's charge to enforce the Consumer Fraud Act:

> "The Attorney General enforces the Consumer Fraud Act, A.R.S. §§ 44-1521 to -1534. This Act makes it unlawful to engage in fraudulent or deceptive practices in the advertisement or sale of any merchandise or service. A.R.S. § 44-1522(A). The Attorney General may obtain injunctive relief, restitution, and civil penalties against any person found to be in violation of the Act."[47]

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Life Magazine 1993; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); National Geographic 2000, 2004; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 (1995); New York Times 1999; NOAA 2005; Observer/UK 2004; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); Sierra Vista Herald 2000b, 2003a, 2003e, 2004e; State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991, 1996, 1999a, 1999b; SWRAG 2000; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002); TNC 2002; Tucson Citizen 2004; U.S. Army 2003b, 2003d, 2003e; U.S. Congress 1988; U.S. Constitution Articles I, IV; U.S. Senate 1988; USFWS 1978, 1986a, 1986b, 1990, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1998a, 1998b, 1998c, 1998d, 1999b, 1999c, 1999d, 1999f, 2000, 2001, 2002a, 2003; USGS 1982, 1999a, USGS 1999b, 2004a, 2004b; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); W.J.F. Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Washington Post 2005; Winters v. United States [1908]

[43] A.R.S. 44-1521, 44-1522; CBD 2004e

[44] A.R.S. 44-1521, 44-1522

[45] Arizona Attorney General 2004

[46] Ibid.

[47] Arizona Attorney General 2001; "1.3.12 Power to Enforce the Consumer Fraud Act"

While it is true that the Attorney General may provide legal representation to state agencies, the Attorney General is also obligated to assure that the laws governing state agencies and employees are obeyed:

> "…the Attorney General, as a constitutional officer and elected official, is also entrusted with the duty to protect the public interest and defend the state constitution.
>
> …Because the Attorney General is elected by the people of this State, he or she has, in addition to his or her obligation to provide legal representation to state agencies, an obligation to the people of the State to ensure that the laws governing state agencies are carried out in a manner that is consistent with the legislature's intent. The Attorney General is responsible for ensuring that the laws the legislature has enacted are enforced. The Attorney General's resources are not available to help any agency avoid duties, obligations, and laws…"[48]

The Attorney General is obligated to investigate and prosecute public corruption and other illegal activities that may involve public officers or employees:

> "The Attorney General is charged with investigating public corruption and other illegal activities that may involve public officers or employees. Consequently, the Attorney General will not represent officers or employees accused of these activities and will vigorously investigate and prosecute any public officer or employee engaged in illegal activity.[49]

No "conflict of interest" abrogates the Attorney General from enforcing criminal laws against State officials:

> "Representatives of the Attorney General's Office owe a fiduciary duty to the State of Arizona as the client and not to an individual official or employee. ER 1.13. There is, therefore, no inherent conflict of interest for the Attorney General to enforce civil or criminal laws against State officials. *See generally United States v. Troutman*, 814 F.2d 1428, 1438-39 (10th Cir. 1987). Instead, the Attorney General has a duty on behalf of the State to investigate and take appropriate action if there is any claim of illegal acts by state officers or employees. *See*, *e.g.*, *Block*, 189 Ariz. at 273-75, 942 P.2d at 432-34 (Attorney General authorized to take action on behalf of State pursuant to A.R.S. § 35-212 to challenge any action involving the illegal expenditure of funds in state government and by A.R.S. § 12-2041 to challenge the legality of any individual's exercise of authority as a public officer).
>
> The Attorney General may investigate and civilly or criminally prosecute any State official or employee who has committed or intends to commit an improper or illegal act."[50]

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[48] Ibid., "1.4 Role of the Attorney General in Representing and Advising State Administrative Agencies, Public Officers, and Employees…1.4.1 Administrative Agencies."
[49] Ibid., "1.4.2 Public Officers and Employees."
[50] Ibid., "1.9.2.5 Illegal Activity or Other Action Requiring Enforcement Actions Against State Officials."

Notice of Intent to Pursue Citizen Tort Action if the Arizona Attorney General continues to abrogate enforcement responsibility of Consumer Fraud Act violation by ADWR

The San Pedro River is the last surviving river in the desert Southwest.[51] The San Pedro River is truly one of Arizona's, the Nation's, and the World's environmental crown jewels.[52] Millions of songbirds migrate through the Southwest every year to and from their wintering grounds in Central America and Mexico and their summer breeding grounds in Canada and the northern United States.[53] For tens of thousands of years, these songbirds have traveled along the few north-south river corridors for shelter, food, and water during their transit. In the past, the Rivers Rio Grande, San Pedro, Santa Cruz, and Colorado formed these corridors. Today, only the San Pedro survives.[54]

Nearly 45% of the 900 total species of birds in North America utilize the San Pedro at some point in their lives.[55] More birds than ever before now use the San Pedro owing to the degradation of past migratory corridors.[56] In 1995, the American Bird Conservancy recognized the San Pedro as its first "Globally Important Bird Area" in the United States.[57] The American Bird Conservancy recognized the San Pedro because "it is considered the largest and best example of riparian woodland remaining in the southwestern U.S."[58] Arizona Senator John McCain observes, "people worldwide see the river as an important wildlife corridor."[59] Arizona Governor Janet Napolitano calls the San Pedro "one of the richest and most critical bird migration corridors on the planet."[60]

The San Pedro is also renowned for its biodiversity beyond birds. It supports the highest variety of mammal species in the United States and the second richest on Earth.[61] Only the montane cloud forests of Costa Rica hold more.[62] In addition, 47 species of reptiles and amphibians are also found on the San Pedro.[63]

CBD's 13,000 members are dedicated to protecting endangered species and wild places through science, policy, education, and environmental law. CBD staff, volunteers and members research, study, observe, publicize, and seek protection for the San Pedro River and its dependent plants, and animals. CBD's staff, volunteers and members use, benefit from, and enjoy the San Pedro River, which is affected by the decreasing water levels of the San Pedro River. We use the ecosystems, plants, and animals in the Upper San Pedro River Basin for wildlife observation, research, educational trips, photography, aesthetic enjoyment, and other recreational, scientific, and educational activities. CBD's focused involvement in the

[51] AGFD 1993; American Birding Association 1995; Arizona Highways 1989; CBD v. DoD 1999; CEC 1999a; CEQ 1981; National Geographic 2000; New York Times 1999
[52] AGFD 1993; American Birding Association 1995; Arizona Commission on the Environment 1990; Arizona Daily Star 2002, 2003a; Arizona Highways 1989, 1996, 1998; Arizona Republic 2002, 2003a, 2003b; BLM 1987; CEC 1999a, 1999b; Life Magazine 1993; National Geographic 2000; New York Times 1999; Sierra Vista Herald 2000b, 2003e, 2004f; SWCBD 1996; TNC 2002; U.S. Congress 1988; USFWS 1978
[53] CEC 1999a, 1999b; New York Times 1999
[54] AGFD 1993; American Birding Association 1995; Arizona Highways 1989; CEC 1999a; CEQ 1981; National Geographic 2000; New York Times 1999
[55] CEC 1999b; National Geographic 1999, 2000
[56] Arizona Highways 1996; CEC 1999a; New York Times 1999
[57] American Birding Association 1995
[58] Ibid.
[59] Sierra Vista Herald 2003e
[60] Sierra Vista Herald 2004f
[61] USFWS 1978
[62] Ibid.
[63] BLM 1987; Arizona Highways 1989

protection of the San Pedro has been extensive and heroic.[64] This includes nearly two decades of activism and 11 years of public interest litigation.[65]

In 1993, Life Magazine recognized the San Pedro River as one of "America's Last Great Places."[66] Because or the rarity of surviving desert river habitat, it is not surprising that the San Pedro River is essential for the survival and recovery of rare species.[67]

Most of the Huachuca Water Umbel on Earth survives on the Upper San Pedro River.[68] CBD petitioned for protection of Huachuca Water Umbel under the Endangered Species Act (ESA) on May 31, 1993.[69] The U.S. Fish and Wildlife Service (USFWS) supported CBD's efforts on behalf of the Water Umbel and the San Pedro River with listing of the Water Umbel and designation of its primary Upper San Pedro River Critical Habitat.[70]

The Upper San Pedro River is essential for the recovery of the endangered Southwestern Willow Flycatcher.[71] CBD petitioned for protection of the Southwestern Willow Flycatcher and its habitat on January 25, 1992.[72] USFWS concurred in 1995.[73]

The Upper San Pedro River provides breeding habitat for approximately 15 percent of the world's known population of Western Yellow-billed cuckoo (*Coccyzus americanus occidentalis*).[74] The population of this bird has been drastically reduced with the loss of riparian habitats in the western United States.[75] At least 25% of Arizona's Yellow-billed Cuckoo population nests on the Upper San Pedro River.[76] This is the largest surviving population of Western Cuckoos in the United States.[77] CBD petitioned the Federal government for protection with listing as "Endangered" under the Endangered Species Act on February 2, 1998.[78]

Assignment of a monetary damage value upon loss of a priceless treasure such as the San Pedro River is difficult. It is, however, possible to recognize the tragedy, pain and suffering that will arise from the loss of the last surviving river in the desert Southwest.[79] The amount of lost local revenue resulting from loss of San Pedro-dependent eco-tourism is determinable. It is also possible to assess the potential loss in property value resulting from the death of the San Pedro and the inevitable restriction of water use for those properties coming on line beginning after August 12, 1985.

The past and ongoing facilitating influence on the deadly San Pedro River-destroying, groundwater-dependent growth by ADWR's false representation of water adequacy is substantial. If ADWR were to stop falsely representing the adequacy of future water supply to

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[64] CBD 2001a, 2002, 2003a, 2003b, 2003c, 2003d, 2004a, 2004b, 2004f, 2004g, 2005; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CBD v. HUD et al. 2005; SWCBD 1991, 1992, 1993, 1996, 1998, 1999; SWCBD v. DoD 1994, 1995, 1996, 1999
[65] Ibid.
[66] Life Magazine 1993
[67] AGFD 2000; Amundson 2000; Arizona Republic 1993, 1995; Bureau of Reclamation 2002; CBD 2004a; CBD v. DoD 1999; Endangered Species Act; Laymon 2000; National Audubon 2002; National Geographic 1999; SWCBD 1991,1992, 1999b; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1999d, 1999e, 1999f, 2000, 2002a, 2002b
[68] USFWS 1997a, 1999d
[69] SWCBD 1993. Petition to list Canelo Hills Ladies' Tresses (Spiranthes delitescens), Huachuca Water Umbel (Lilaeopsis schaffneriana ssp. Recurva), and Huachuca Tiger Salamander (Ambystoma tigrinum stebbinsi), Southwest Center for Biological Diversity, May 31, 1993.
[70] USFWS 1999d
[71] SWCBD 1992, USFWS 1993, 1995, 1997b, 2002b
[72] SWCBD 1992
[73] Arizona Republic 1995, USFWS 1995
[74] CEC 1999b
[75] CEC 1999b; SWCBD 1998; USFWS 2001b
[76] AGFD 2000, Bureau of Reclamation 2002
[77] Bureau of Reclamation 2002
[78] SWCBD 1998
[79] AGFD 1993; American Birding Association 1995; Arizona Highways 1989; CBD v. DoD 1999; CEC 1999a; CEQ 1981; National Geographic 2000; New York Times 1999

real estate consumers and lenders in the Fort Huachuca area, Federal lending, loan guarantee, and underwriting programs would stop.[80] From October 1, 1992 (start FY 1993) through September 30, 2004 (end FY 2004), the Veterans Administration (VA) has guaranteed and insured 5,179 home loans for $177,053,463 in Cochise County.[81] Since September 30, 2001, the Federal Housing Administration (FHA) has guaranteed or insured 459 loans for $43.8 million in the Fort Huachuca area.[82] The Small Business Administration (SBA) has loaned $8.5 million creating 272 jobs,[83] and the VA has guaranteed 548 loans totaling $81.1 million during this same period.[84] None of these loans would have secured Federal guarantee or insurance but for the suspect reversal of Federal agency moratorium and ADWR's false representation of the adequacy of water in the Fort Huachuca area.[85]

FHA proposes to guarantee or insure another 800 new loans for approximately $69.9 million.[86] None of these new loans should be guaranteed or insured as the inadequacy of water in the Fort Huachuca area is acknowledged.[87] No suspect reversal of Federal agency loan moratorium will happen again as before. The "Keating Five" affair significantly educated the public to more vigilance and less tolerance of corrupt public officials. CBD was not in existence when the moratorium was "lifted." CBD now exists to advocate for the San Pedro River and the consumers and lenders of the Fort Huachuca area.

If the fraud continues and the San Pedro River dies, millions of dollars per year in local eco-tourism revenue will be lost.[88] Cochise County assigns $28 million in annual eco-tourism to the San Pedro River:

> "Estimates of the local economic impact of eco-tourism related to the San Pedro range as high as $28 million annually and are increasing."[89]

According to Arizona Governor Janet Napolitano:

> "'Bird watching is a $28 million tourism industry in Cochise County,' she [Arizona Governor Janet Napolitano] said. "That's because the San Pedro corridor is one of the richest and most critical bird migration corridors on the planet.'"[90]

Damages to individual property owners will also be substantial if ADWR fails to stop falsely representing the adequacy of future water supply in the Fort Huachuca area. If the fraud is not stopped, Federal infrastructure loans, underwriting and loan guarantees will continue, water restriction will become necessary and the San Pedro River will undoubtedly die. Property will be devalued as watered property loses its water, and riverfront property loses its River.

An example of near certain property devaluation is the property of CBD Board Chair Dr. Robin Silver. He owns property on the San Pedro River. Adjoining property recently appraised and sold for $4,452 per acre in March 2004. With loss of the San Pedro, at least

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[80] Arizona Daily Star 1984; CBD v. HUD et al. 2005; High Country News 2004
[81] VA 2004b
[82] FHA 2004
[83] SBA 2005
[84] VA 2004b
[85] Arizona Daily Star 1984; CBD v. HUD et al. 2005; High Country News 2004
[86] FHA 2004
[87] CBD v. HUD et al. 2005
[88] Cochise County 2005; Sierra Vista Herald 2004f
[89] Cochise County 2005
[90] Sierra Vista Herald 2004f

90% of the property value will be lost. All property owners in the Sierra Vista Sub-watershed face similar peril.

Summary

ADWR continues to violate the Arizona Consumer Fraud Act by falsely representing the adequacy of the Fort Huachuca/Sierra Vista area's water supply to consumers and lenders.[91] In spite of mandate, due process, legal precedent and the public interest, the Arizona Attorney General refuses to stop this fraud.[92]

A.R.S. 12-821.01 requires a Notice of Claim prior to pursuit of citizen legal action against ADWR if the Arizona Attorney General continues to abrogate enforcement responsibility to stop ADWR's Consumer Fraud Act violations. As this fraud is ongoing, we file this Notice within the necessary 180 days of the December 22, 2004, refusal by the Arizona Attorney General to intervene and stop the fraud. With this Notice please be advised of our intention to pursue citizen legal action in Superior Court if the Arizona Attorney General continues refusing to investigate and halt ADWR's ongoing violations of the Consumer Fraud Act.

If we can provide any further information, please contact us via mail: Robin D. Silver, M.D., Board Chair, CBD, P.O. 39629, Phoenix, AZ 85069-9629; via Phone: 602.246.4170; FAX: 602.249.2576; or Email: rsilver@biologicaldiversity.org.

Sincerely,

Robin D. Silver, M.D.
Board Chair

CC: Howard Shanker, Esq.

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[91] ACOE 2002, 2003; ADWR 1988, 1991, 1992a, 1992b, 1994a, 1994b, 1996, 2005a, 2005b; Arizona Center for Law in the Public Interest 2004; Arizona Center for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P. 2d 158 (App. 1991); Arizona Commission on the Environment 1990; Arizona Corporation Commission 1999, 2003; Arizona v. California [1963]; Arizona Supreme Court 1988, 1992, 1999; BLM 1987, 1991; Cappaert v. United States 426 U.S. 128 [1976]; CBD 2001a, 2003a, 2003b, 2004e, 2005; CBD v. ADWR 2002, 2003a; CBD v. DoD 1999; CBD v. HUD et al. 2005; CEC 1999b, CEQ 1981, Department of Interior 1994; Endangered Species Act 1973: GGBP 1994; Glennon 2002; Glennon and Maddock 1994,1997; Greer v. Connecticut, 161 U.S. 519 (1896).; Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Kansas v. Colorado, 115 S. Ct. 1995; Lacher 1994; Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).; Nebraska v. Wyoming, 115 S. Ct. 1033, 1937 [1995}; Pollard v. Hagen, 44 U.S. (3 How) 212 (1845); State of Arizona 1991; State v. Fertterer, 841 P.2d 467 (Mont. 1992); State v. New Jersey Central Power & Light, 125 N.J. 103, 308 A.2d 671 (1973), aff'd. 336 A.2d 750 (N.J. Super. Ct. Div. 1975), rev'd., 351 A.2d 337 (N.J. 1976); Steinitz, et al. 2000; SWCBD 1991; Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 U.S. (2002). ; U.S. Army 2003b; U.S. Congress 1988; U.S. Constitution; U.S. Senate 1988; USFWS 1986a, 1986b, 1991, 1992, 1993, 1994, 1995, 1997a, 1997b, 1998a, 1998b, 1998c, 1998d, 1999a, 1999b, 1999c, 2000, 2001, 2002a; USGS 1982, 1999a, 2004a; Vionnet and Maddock 1992; W.J.F. Realty Corp. v. Town of Southampton, 240 A.D.2d 657, 659 N.Y.S.2d 81 (1997); W.J.F. Realty Corp. v. State of New York, 1998 WL 249100 (N.Y.Sup. April 22, 1998); Ward v. Race Horse, 163 U.S. 504 [1896]; Winters v. United States [1908]

[92] Arizona Attorney General 2004

References:

18 U.S.C. 1001. U.S. Code TITLE 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 47 - FRAUD AND FALSE STATEMENTS; Section 1001. Statements or entries generally: (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry… shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. 1014. U.S. Code TITLE 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 47 - FRAUD AND FALSE STATEMENTS; Section 1014. - Loan and credit applications generally; renewals and discounts; crop insurance: Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662), or the Small Business Administration in connection with any provision of that Act, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) [1] of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefore, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

18 U.S.C. 1341. U.S. Code TITLE 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 63 - MAIL FRAUD; Section 1341. Frauds And Swindles; Section 1341. Frauds and swindles…Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1345. U.S. Code Title 18 - CRIMES AND CRIMINAL PROCEDURE; PART I – CRIMES; CHAPTER 63 - MAIL FRAUD; Section 1345. Injunctions against fraud…(a)(1) If a person is - (A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title; (B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title)…the Attorney General may commence a civil action in any Federal court to enjoin such violation.

A.A.C. R12-15-705. Assured Water Supply Requirement - Consistency with Management Goal

A.A.C. R12-15-717. Adequate Water Supply Requirement-Physical Availability…D. The director shall determine that an applicant will have sufficient supplies of water which will be legally available to the applicant to satisfy the applicant's 100-year projected water demand, if the applicant is an adequacy water report applicant, or will exceed the applicant's current and committed demands for 100 years, if the applicant is a designation of ADWS applicant, in accordance with the following…5. If the applicant will obtain the proposed source of water through a written contract other than a water exchange agreement, a contract between an adequacy water report applicant and the municipal provider proposed to serve the applicant, a contract with the United States Secretary of the Interior for Colorado River water, or a subcontract with a multi-county water conservation district, the director shall determine whether the proposed source of water is legally available to the applicant, the term of years for which the source is legally available, and the volume of water which is legally available as follows: a. The director shall determine that the proposed source of water is legally available to the applicant only if: i. The person providing the water under the contract has a legal right to the water in accordance with the terms of this subsection.; ii. The director determines that the terms of the contract will ensure that the proposed source of water will be delivered to the applicant.; b. The director shall determine the term of years for which the proposed source of water is legally available based on the term of years remaining in the contract.; c. The director shall determine the quantity of water legally available to the applicant based on the volume established in the contract.; 6. If the applicant is an adequacy water report applicant, the applicant has submitted evidence indicating that the applicant has entered into a notice of intent to serve agreement signed by both the applicant and the municipal provider proposed to serve the applicant, which contains a statement of the municipal provider's intent to serve all of the proposed lots and uses that are subject to this determination of an adequate water supply.; 7. If the applicant is an adequacy water report applicant, and the municipal provider proposed to serve the applicant is a city or town, the applicant has submitted evidence indicating that the applicant is located within the incorporated limits of the city or town or the applicant has submitted evidence of the legal right of the city or town to serve water to the applicant outside the city or town's incorporated limits.; 8. If the applicant is an adequacy water report applicant, and the municipal provider proposed to serve the applicant is a private water company, the applicant has submitted evidence:; a. Of the private water company's certificate of convenience and necessity approved by the Arizona Corporation Commission. The director shall only determine that the water provided by the private water company is legally available if the certificate of convenience and necessity is free of conditions which would likely result in the revocation of the certificate of convenience and necessity; and; b. That the applicant is located within the certificated area or within any other area in which the Arizona Corporation Commission authorizes the private water company to serve water.; 9. If the applicant is a private water company applying for a designation of adequate water supply, evidence that the applicant has a certificate of convenience and necessity approved by the Arizona Corporation Commission authorizing the proposed water use.

A.R.S. 1-211. 1-211. Rules of construction and definitions…B. Statutes shall be liberally construed to effect their objects and to promote justice.

A.R.S. 12-821.01. Authorization of claim against public entity or public employee…A. Persons who have claims against a public entity or a public employee shall file claims with the person or persons

authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon…B. For purposes of this section, a cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage…C. Notwithstanding subsection A, any claim which must be submitted to a binding or nonbinding dispute resolution process or an administrative claims process or review process pursuant to a statute, ordinance, resolution, administrative or governmental rule or regulation, or contractual term shall not accrue for the purposes of this section until all such procedures, processes or remedies have been exhausted. The time in which to give notice of a potential claim and to sue on the claim shall run from the date on which a final decision or notice of disposition is issued in an alternative dispute resolution procedure, administrative claim or review process. This provision shall not be construed to prevent the parties to any contract from agreeing to extend the time for filing such notice of claim. D. Notwithstanding subsection A, a minor or an insane or incompetent person may file a claim within one hundred eighty days after the disability ceases…E. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days…F. This section shall apply to all causes of action which accrue on or after the effective date of this section.

A.R.S. 32-2181F. “In areas outside of groundwater active management areas established pursuant to title 45, chapter 2, article 2, if the director of water resources, pursuant to section 45-108, reports an inadequate on-site supply of water to meet the needs projected by the developer or if no water is available, the state real estate commissioner shall require that all promotional material and contracts for the sale of lots in subdivisions approved by the commissioner adequately display the director of water resources' report or the developer's brief summary of the report as approved by the commissioner on the proposed water supply for the subdivision.”

A.R.S. 44-1521. 44-1521. Definitions…5. "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate, or services.

A.R.S. 44-1522. 44-1522. Unlawful practices; intended interpretation of provisions…A. The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

A.R.S. 44-1524. <u>Powers of attorney general</u>…A. If the attorney general has reasonable cause to believe that a person has engaged in, is engaging in or is about to engage in any practice or transaction which is in violation of this article or order or assurance of discontinuance entered under this article, he may: 1. Require such person to file on such forms as he prescribes a statement or report in writing, under oath, as to all the facts and circumstances concerning the sale or advertisement of merchandise by such person, and such other data and information as he may deem necessary.; 2. Examine under oath any person in connection with the sale or advertisement of any merchandise.; 3. Examine any merchandise or sample thereof, or any record, book, document, account or paper as he may deem necessary.; 4. Pursuant to an order of the superior court, impound any record, book, document, account, paper, or sample or merchandise material to such practice and retain the same in his possession until the completion of all proceedings undertaken under this article or in the courts.; B. This section does not prohibit the attorney general from investigation of violations of this article

including requesting a person to respond to a complaint filed against him. A person cannot be compelled to comply with a request to respond to a complaint except in accordance with section 44-1527.

A.R.S. 44-1530. Assurance of discontinuance of unlawful practice…In the enforcement of the provisions of this article, the attorney general may accept an assurance of discontinuance of any act or practice deemed in violation of the provisions of this article from any person engaging in, or who has engaged in, such act or practice. Such assurance may include a stipulation for the payment by such person of reasonable expenses incurred by the attorney general or as restitution to aggrieved persons, or both. Any such assurance shall be in writing and shall be filed with and subject to the approval of the superior court of the county in which the alleged violator resides or has its principal place of business or in Maricopa County. A violation of such assurance within six years of the filing thereof shall constitute prima facie proof of a violation of the provisions of this article. Such assurance of discontinuance shall not be considered an admission of a violation for any purpose.

A.R.S. 45-105. 45-105. Powers and duties of director…A. The director may: 1. Formulate plans and develop programs for the practical and economical development, management, conservation and use of surface water, groundwater and the watersheds in this state, including the management of water quantity and quality.; 2. Investigate works, plans or proposals pertaining to surface water and groundwater, including management of watersheds, and acquire, preserve, publish and disseminate related information which the director deems advisable.; 3. Collect and investigate information upon and prepare and devise means and plans for the development, conservation and utilization of all waterways, watersheds, surface water, groundwater and groundwater basins in this state and of all related matters and subjects...B. The director shall: 1. Exercise and perform all powers and duties vested in or imposed upon the department and adopt and issue rules necessary to carry out the purposes of this title.; 2. Administer all laws relating to groundwater, as provided in this title…8. Investigate and take appropriate action upon any complaints alleging withdrawals, diversions, impoundments or uses of surface water or groundwater that may violate this title or the rules adopted pursuant to this title.; 14. In the year following each regular general election, present information to the committees with jurisdiction over water issues in the house of representatives and the senate. A written report is not required but the presentation shall include information concerning the following: (a) The current status of the water supply in this state and any likely changes in that status.; (b) Issues of regional and local drought effects, short-term and long-term drought management efforts and the adequacy of drought preparation throughout the state.; (c) The status of current water conservation programs in this state…(f) The status of any pending or likely litigation regarding surface water adjudications or other water related litigation and the potential impacts on this state's water supplies… (h) Other matters related to the reliability of this state's water supplies, the responsibilities of the department and the adequacy of the department's and other entities' resources to meet this state's water management needs.

A.R.S. 45-108. 45-108 Evaluation of subdivision water supply…A. In areas outside of active management areas…the developer of a proposed subdivision including dry lot subdivisions, regardless of subdivided lot size, prior to recordation of the plat, shall submit plans of the water supply for the subdivision and demonstrate the adequacy of the water supply to meet the needs projected by the developer to the director. The director shall evaluate the plans and issue a report on the plans…B. The director shall evaluate the proposed source of water for the subdivision to determine its ability to meet proposed uses for a period of years commensurate with normal practices in other areas of the sate and shall forward a copy of such evaluation to the state real estate commissioner…F. The director may revoke a designation made pursuant to this section when the director finds that the water supply may become inadequate.

A.R.S. 45-111. 45-111. Annual report by director…On or before July 1 each year the director shall render to the governor and the legislature a full and true report of the department's operations under

this title. The report shall include suggestions as to amending existing laws or enacting new legislation as the director and the Arizona water resources advisory board deem necessary and such other information, suggestions and recommendations as the director considers of value to the public. The report shall be published and made available to the public.

A.R.S. 45-141. 45-141. Public nature of waters of the state; beneficial use; reversion to state; actions not constituting abandonment or forfeiture…A. The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.; B. Beneficial use shall be the basis, measure and limit to the use of water. An appropriator of water is entitled to beneficially use all of the water appropriated on less than all of the land to which the water right is appurtenant, and this beneficial use of the water appropriated does not result in the abandonment or forfeiture of all or any portion of the right…"

A.R.S. 45-401. Chapter 2 GROUNDWATER CODE…45-401. Declaration of policy…A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective…B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

A.R.S. 45-453. Chapter 2 GROUNDWATER… 45-453. Groundwater rights and uses in areas outside active management areas; amounts; transportation; irrigation non-expansion areas…In areas outside of active management areas, a person may: 1. Withdraw and use groundwater for reasonable and beneficial use, except as provided in article 8.1 of this chapter [Withdrawals of Groundwater for Transportation to Active Management Area]…"

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CBD 2001b. Correspondence, from CBD, to Mr. David Harlow, Arizona Field Office Supervisor, U.S. Fish and Wildlife Service, Phoenix; Ms. Nancy Kaufman, U.S. Fish and Wildlife Service Regional Director, Albuquerque; Director, U.S. Fish and Wildlife Service, Washington, DC; Ms. Gail Norton, U.S. Department of the Interior, Secretary, Washington, DC; Brig. Gen. James A. Marks, Ft. Huachuca Commander, Ft. Huachuca; Mr. Donald Rumsfeld, U.S. Department of Defense Secretary, Washington, DC; RE: Notice of Intent to Sue, Ft. Huachuca, the U.S. Department of Defense, and the U.S. Fish and Wildlife Service, to remedy violations of Sections 2, 7, and 9 of the Endangered Species Act; November 21, 2001

CBD 2002. Public Records request, from Michelle Harrington, CBD Phoenix Area Coordinator, to ADWR Director, for "1. All letters, correspondence, and/or certification from ADWR of 'inadequacy for 100 year water supply' for development in the San Pedro Basin since May 21, 2001. Please include a list of all supporting documents that ADWR has used to rationalize issuance of these letters and/or certificates of 'inadequacy,' and 2. All letters, correspondence, and/or certification from ADWR of 'adequacy for 100 year water supply' for development in the San Pedro Basin since May 21, 2001. Please include a list of all supporting documents that ADWR has used to rationalize issuance of these letters and/or certificates of 'adequacy.'" December 3, 2002.

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CBD 2003b. Correspondence, from Dr. Robin Silver, Conservation Chair, CBD, to Governor Janet Napolitano; RE: Proposed meeting between the Governor of the State of Arizona and the Arizona conservation community to discuss the Governor's calling for Ft. Huachuca to "accept the functions of bases that will close in the upcoming [BRAC] round." (Arizona Daily Star 2003a) Such expansion of Ft. Huachuca will further imperil the San Pedro River without extensive mitigation; April 18, 2003.

CBD 2003c. Public Records request by CBD to ADWR for "1. All documents, data and information to substantiate the information presented on the above referenced map (Cochise County Water Adequacy Reports [1980 to 2002] Map) from an April 9, 2003 memo from Herb Guenther to Lori Faeth. This documentation should include but not be limited to summary information about every project or development indicated on the map," and "2. All documents, data and information regarding Cochise

County Water Adequacy Reports since the above referenced map was produced." September 12, 2003.

CBD 2003d. Public Records request by CBD to ADWR for specific files relating to the Cochise County Water Adequacy Reports (1980 to 2002) Map included in an April 9, 2003 memo from Herb Guenther to Lori Faeth, November 12, 2003.

CBD 2004a. 60-Day Notice of Intent to Sue Over The Warranted But Precluded Status of the Western Yellow-Billed Cuckoo; Correspondence from CBD to Secretary of the Interior Gail Norton and USFWS Director Steven Williams, June 14, 2004.

CBD 2004b. Analysis of ADWR documents regarding certification of "inadequacy" and "adequacy" for development in the Sierra Vista Sub-basin, from 1988 to June 30, 2004; CBD, June 30, 2004.

CBD 2004c. "The Bush Administration Listing Record," Center for Biological Diversity, August 2004.

CBD 2004e. Correspondence from CBD to Arizona Attorney General Terry Goddard, U.S. Attorney for Arizona Paul Charlton, U.S. Postal Inspection Service Phoenix Division Acting Officer in Charge Pete Zegarac; RE: 1. Arizona Department of Water Resources (ADWR) falsely represents the adequacy of the Sierra Vista area's water supply to consumers and lenders.; 2. Assistant Arizona Attorney General Mary Mangotich Grier believes that concern regarding dishonest certification of water adequacy by ADWR for Sierra Vista area developers is "a consumer disclosure issue."; 3. ADWR's false statements to consumers violate Arizona's consumer fraud statutes.; 4. Since these false statements to consumers affect Federal property and transit via U.S. mail, they also violate Federal criminal statutes regarding "Fraud and False Statements" and "Mail Fraud."; 5. Request for action by the Arizona Attorney General, the U.S. Attorney General for Arizona, and the U.S. Postal Inspection Service Phoenix Division Officer in Charge to protect consumers and lenders in the Sierra Vista area by stopping these violations of law.; September 7, 2004.

CBD 2004f. Correspondence from CBD to Mr. Robert J. Blaney, District Director, Arizona District Office, U.S. Small Business Administration, Phoenix; RE: Freedom of Information Act request for, 1. A list of every loan, arranged, granted, facilitated, guaranteed, and/or underwritten by the U.S. Small Business Administration (SBA) for use in the Upper San Pedro Basin from August 8, 2001 to present. The Upper San Pedro Basin is defined as the area in Cochise County in the San Pedro River watershed roughly Benson south to the International Border. This includes but is not limited to the communities of Benson, St. David, Fairbank, Tombstone, Bisbee, Naco, Palominas, Hereford, Sierra Vista, and Huachuca City, and their surrounding areas. This list should include location of business, the number of employees, the amount of the loan, and/or the prospective amount of company growth to be enhanced with the loan. We do not need the names of the individual recipient(s) of the loans. If no list is available, please substitute copies of the documents that provide this information.; 2. A list of every prospective loan, in the process of being arranged, granted, facilitated, guaranteed, and/or underwritten by the SBA for use of the Upper San Pedro Basin from August 8, 2001 to present. We do not need the name(s) of the individual recipient(s) of the loans. If no list is available, please substitute copies of the documents that provide this information.; 3. Copies of all documentation establishing compliance with the National Environmental Policy Act, and/or the Endangered Species Act for every one of these SBA loans for use in the Upper San Pedro Basin from August 8, 2001 to present.; 4. Copies of all documentation that refers to the inadequate supply of water in the Upper San Pedro Basin from November 18, 1988 to present.; September 16, 2004.

CBD 2004g. Correspondence from CBD to Department of Veterans Affairs FOIA Officer, Phoenix; RE: Freedom of Information Act request for, 1. From January 1, 1984 to present, a list of all current, planned and proposed projects and/or housing developments underwritten and/or financed by the Department of Veterans Affairs (VA) in the Sierra Vista Sub-basin of the Upper San Pedro Basin of

Cochise County.; 2. From January 1, 1984 to present, the total financial totals for each of the current, planned and proposed projects and/or housing developments underwritten and/or financed by the VA in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 3. From January 1, 1984 to present, copies of all National Environmental Policy Act documentation regarding all current, planned and proposed projects and/or housing developments underwritten and/or financed by the VA in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 4. From January 1, 1984 to present, copies of all correspondence from the VA to the U.S. Fish and Wildlife Service regarding programmatic consultation for VA and/or VA supported activities in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 5. From January 1, 1984 to present, copies of all documents providing proof of National Environmental Policy Act and/or Endangered Species Act compliance by the VA for all current, planned and proposed projects and/or housing developments underwritten and/or financed by the VA in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 6. From January 1, 1984 to present, copies of all documentation that refers to the inadequate supply of water in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 7. Copies of all documentation regarding the implementation and lifting of the1984 moratorium on VA insuring new VA-approved mortgage loans in the Sierra Vista area.; October 21, 2004.

CBD 2004h. Correspondence from CBD, to Ricardo Gerakos-FOIA Liaison, Arizona State Office, U.S. Department of Housing and Urban Development, Phoenix; Re: Freedom of Information Act Request, for 1. From July 19, 2000 to present, a list of all current, planned and proposed projects and/or housing developments underwritten and/or financed by the U.S. Department of Housing and Urban Development (HUD) in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 2. From July 19, 2000 to present, the total financial totals for each of the current, planned and proposed projects and/or housing developments underwritten and/or financed by HUD in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 3. From July 19, 2000 to present, copies of all National Environmental Policy Act documentation regarding all current, planned and proposed projects and/or housing developments underwritten and/or financed by HUD in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 4. From July 19, 2000 to present, copies of all correspondence from HUD to the U.S. Fish and Wildlife Service regarding programmatic consultation for HUD and/or HUD supported activities in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 5. From July 19, 2000 to present, copies of all documents providing proof of National Environmental Policy Act and/or Endangered Species Act compliance by the State of Arizona, including but not limited to the Department of Commerce, for funding supplied by HUD for Arizona programs in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County, including but not limited to "HUD home funds and tax credits."; 6. From January 1, 1984 to present, copies of all documentation that refers to the inadequate supply of water in the Sierra Vista Sub-basin of the Upper San Pedro Basin of Cochise County.; 7. Copies of all documentation regarding the implementation and lifting of the1984 moratorium on HUD insuring new Federal Housing Administration-approved mortgage loans in the Sierra Vista area.; October 21, 2004.

CBD 2004i. Correspondence from CBD, to Department of Veterans Affairs FOIA Officer, Phoenix; RE: Freedom of Information Act request for, Copies of the Veterans Administration (VA) Report, *"County Analysis – Guaranteed and Insured Home Loans, All Veterans and Servicemen"* for Cochise County for each year end that includes the years 1999, 2000, 2001, 2002, 2003 and 2004 (as soon as it is released). Please do not hold up the FOIA response for the 2004 report if it has not yet been completed.; December 1, 2004.

CBD 2005. Correspondence from CBD, to Maj. Gen. Barbara Fast, Fort Huachuca Commanding General; Dr. Francis J. Harvey, Secretary of the Army; Dr. Donald Rumsfeld, U.S. Department of Defense Secretary; Mr. Steve Spangle, U.S. Fish and Wildlife Service Arizona Field Office Supervisor; Mr. Dale Hall, U.S. Fish and Wildlife Service Regional Director; Mr. Steve Williams, U.S. Fish and Wildlife Service Director; Ms. Gale Norton, U.S. Department of the Interior Secretary; RE: Notice of Intent to Sue Fort Huachuca, U.S. Department of Defense and U.S. Fish and Wildlife Service for failing

(1) to reinitiate formal consultation under the Endangered Species Act, and (2) for jeopardizing the San Pedro River and its dependent endangered species.; March 17, 2005.

CBD v. ADWR 2002. CBD v. ADWR, CV2002-000171. This case was dismissed on a legal technicality (ripeness). The Court never examined the challenge to the fact that ADWR ignores Public Trust in issuing certificates of adequacy in the Sierra Vista area. Navigability as yet to be defined by Arizona statute became the issue. The ultimate outcome is not disputable; however, as Federal standards applicable to the San Pedro have already been extensively litigated.

CBD v. ADWR 2003a. CBD v. ADWR, CV2003-011945.

CBD v. ADWR 2003b. Transcript, CBD v. Herb Guenther, ADWR, CV2003-011945, Hearing before Hon. Thomas Dunevant III, January 21, 2004: "Assistant Arizona Attorney General Mary Mangotich Grier…Instead of doing that, they've chosen to come to this court and have asked you to interpret the DWR statute and regulations pertaining to adequacy reports, which are basically a consumer disclosure issue…"

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Washington, DC; Ms. Nancy Kaufman, Regional Director, US Fish and Wildlife Service, Albuquerque, NM; Ms. Jamie Clark, Director, US Fish and Wildlife Service, Washington, DC; Mr. Bruce Babbitt, Secretary, US Department of the Interior; Washington, DC; RE: Notice of Intent to Sue the Bureau of

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