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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


² CBD v. ADWR 2003b
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
⁷ A.R.S. 44-1521, 44-1522
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. Base flow is the water in the stream during the driest times of the year.

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.
2. The Upper San Pedro River is essential for the survival of Federally protected endangered plants and animals.
3. The Upper San Pedro River is a Public Trust treasure.

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. 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, a 100-year supply of water does not exist legally either. 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.
ADWR ignores these facts by issuing “adequacy” certifications in the Sierra Vista area. These certifications are deceptive and untruthful. They misrepresent the situation to consumers and lenders.

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

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

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…”
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.”

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

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. Governor Symington summarily discarded consumer protection and comprehensive water assessment in the Sierra Vista area. Governor Symington’s misrepresentation scheme still survives to this day.

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.” 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. While we disagree with the Attorney General’s vigorous defense of ADWR’s dishonest water adequacy certifications for Sierra Vista area developers, Arizona’s consumer fraud statutes are indeed clear. The act or use of deceit, dishonesty or deception

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
34 ADWR 1993, 2003b
35 Ibid.
37 CBD v. ADWR 2003b
38 CBD v. ADWR 2003b
39 CBD v. ADWR 2003a
40 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.
41 A.R.S. 44-1521 through 34
in connection with the sale of real estate is illegal. ADWR’s issuance of dishonest certifications for Sierra Vista area developers violates these consumer fraud statutes.

Federal criminal statutes regarding “Fraud and False Statements” and “Mail Fraud” are also clear. 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.

Background

The San Pedro River is the last free flowing, un-dammed desert river in the Southwest. 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. 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.

Nearly 45% of the 900 total species of birds in North America utilize the San Pedro at some point in their lives. More birds than ever before now use the San Pedro owing to the degradation of past migratory corridors. In 1995, the American Bird Conservancy recognized the San Pedro as its first “Globally Important Bird Area” in the United States. 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.”

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. Only the montane cloud forests of Costa Rica hold more. In addition, 47 species of reptiles and amphibians are also found there.
The San Pedro River is truly one of Arizona’s, the Nation’s, and the World’s environmental crown jewels.\textsuperscript{55} The U.S. Congress officially recognized its uniqueness and value in 1988 with creation of the San Pedro Riparian National Conservation Area (SPRNCA).\textsuperscript{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.”\textsuperscript{57} In 1993, Life Magazine recognized the San Pedro River as one of “America’s Last Great Places.”\textsuperscript{58}

With creation of the SPRNCA on November 18, 1988, the upper San Pedro River became Federal property.\textsuperscript{59} Congress reserved “a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area.”\textsuperscript{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.”\textsuperscript{61}

The U.S. Bureau of Land Management (BLM) became responsible for the management of the SPRNCA.\textsuperscript{62} In 1991, BLM determined the amount of water necessary to fulfill the mandated congressional purpose of the SPRNCA.\textsuperscript{63} BLM applied at that time to ADWR to perfect its SPRNCA water rights.\textsuperscript{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.\textsuperscript{65}

The date of the priority for BLM’s San Pedro River water rights is August 12, 1985.\textsuperscript{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.\textsuperscript{67} ADWR transferred this application to BLM and perfected the water rights for BLM and the Federal government on April 3, 1992.\textsuperscript{68} ADWR recognizes the priority date for BLM and the SPRNCA as August 12, 1985.\textsuperscript{69}

Excessive, unmitigated and increasing, local groundwater pumping threatens the San Pedro River.\textsuperscript{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.\textsuperscript{71} During the driest time of the year, most of the surface or stream flow in the San Pedro River comes from this

\textsuperscript{56} U.S. Congress 1988
\textsuperscript{57} Ibid.
\textsuperscript{58} Life Magazine 1993
\textsuperscript{59} U.S. Congress 1988
\textsuperscript{60} Ibid.
\textsuperscript{61} U.S. Senate 1988
\textsuperscript{62} U.S. Congress 1988
\textsuperscript{63} BLM 1991
\textsuperscript{64} Ibid.
\textsuperscript{65} ADWR 1992a
\textsuperscript{66} ADWR 1992a; Huachuca Audubon, et al. 1985
\textsuperscript{67} Huachuca Audubon, et al. 1985
\textsuperscript{68} ADWR 1992a
\textsuperscript{69} Ibid.
\textsuperscript{70} CEC 1999b, CBD v. DoD 1999, USFWS 1999b, USFWS 2002
groundwater seeping into the River. This flow is called base flow. It represents SPRNCA’s Federal water rights.

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. 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. 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.

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

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74 Cappaert v. United States 426 U.S. 128 [1976]
75 Ibid.
76 Ibid.
these purposes from subsequent groundwater pumping that captures surface water.”

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…”

The U.S. Supreme Court has re-confirmed the findings of *Cappaert v. U.S.* two times since 1976. 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. 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
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)...”

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…”

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
83 Glennon and Maddock 1997
conserved, to provide a program for the conservation of such endangered species and threatened species….”

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.” 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. 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. Under the Public Trust Doctrine a State must administer its watercourse lands for the public benefit and in trust for the public.

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. The question now is whether or not the San Pedro can

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86 ESA Section 2(b)
89 Black’s Law Dictionary 2004
90 Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)
survive long enough to be saved.

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

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. 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.

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

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. Cochise Community College President Walter Patton organized WIG. At a public meeting on January 14, 1995 opponents shouted down proponents of the proposal. WIG died there.

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

110 BLM 2003, USPP 2003
112 High Country News 2004
115 High Country News 2004
116 Ibid.
117 U.S. Army 2003
118 Ibid.
120 New York Times 1999
Only the most optimistic predictions extend catastrophic demise of the entire Upper San Pedro beyond the next several decades. Consequently, the existing supply of groundwater for the future needs of the Upper San Pedro Basin is obviously threatened. 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.” The Upper San Pedro Basin is not an AMA. It should be if groundwater is to be preserved for future needs.

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. ADWR then evaluates the plans and issues a decision on the adequacy of the water supply. The ADWR Director must forward a copy of their decision to the State Real Estate Commissioner. 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. The evaluation and reporting of water supply adequacy reflects concern for consumer protection arising from the tragedies of the Ned Warren land fraud scandals.

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. 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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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
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 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.’”

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...’

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 known facts:

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

\133 ADWR 1993a
\134 ADWR 1994a
\135 Ibid.
\136 Ibid.
\137 Ibid.
\138 Ibid.
2. As such a treasure, the Public Trust Doctrine protects the San Pedro River.\textsuperscript{140}

3. Federally protected Endangered Species depend on the San Pedro River, and consequently the Endangered Species Act protects the River’s base flow.\textsuperscript{141}

4. Congress recognized the San Pedro’s value by creating the SPRNCA on November 18, 1988.\textsuperscript{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…”\textsuperscript{143}

6. Congress reserved federal water rights establishment of the SPRNCA, for “a quantity of water sufficient to fulfill the purposes of the [SPRNCA].”\textsuperscript{144}

7. The federal reserved water rights for the SPRNCA date unequivocally from at least November 18, 1988.\textsuperscript{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.”\textsuperscript{146}

9. The BLM further quantified the amount of water sufficient to fulfill the purposes of the SPRNCA.\textsuperscript{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.\textsuperscript{148}

11. The date of priority for BLM’s San Pedro River water rights is August 12, 1985.\textsuperscript{149}

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


\textsuperscript{142} U.S. Congress 1988

\textsuperscript{143} Ibid.

\textsuperscript{144} Ibid.

\textsuperscript{145} ADWR 1992a; Huachuca Audubon et al. 1985; U.S. Congress 1988

\textsuperscript{146} U.S. Senate 1988

\textsuperscript{147} BLM 1991

\textsuperscript{148} ADWR 1992a

\textsuperscript{149} ADWR 1992a; BLM 1991; Huachuca Audubon, et al. 1985

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 Sierravista 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.

\(^{151}\) ADWR 1988, 1991; BLM 1987

\(^{152}\) Cappaert v. United States 426 U.S. 128 [1976]

\(^{153}\) U.S. Constitution


\(^{155}\) 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


\(^{159}\) Arizona Daily Star 1984; ADWR 1984, 1989

‘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.’”

161 Ibid.
162 Ibid.
164 ADWR 1994a; Maricopa Audubon 1993, 1994;
165 Ibid.
168 ADWR 1993b
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.  
\(^{179}\) 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.’ (ld. 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…’ (ld. 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…”

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

Governor Symington’s ADWR refused to stop the misrepresentation deception in spite of multiple appeals. 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.”

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. 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). Four of the 24 inadequacies given between 88 and 93 have been reversed.

On June 13, 1996, Governor Symington’s philosophy caught up with him. He was indicted for similarly misrepresenting his financial situation to lenders and their consumers, investors, and retirees. On September 3, 1997, Governor Symington was convicted and left office.
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. Governor Hull chose to perpetuate Governor Symington’s decision to misrepresent water adequacy in the Sierra Vista area. Specific requests to correct the deceit and misrepresentation were ignored.

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.

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. 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…”

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. Director Guenther ignores the obvious. The outcome of the Gila River Adjudication is completely predictable and inevitable: Federal water rights will be confirmed. The U.S. Government has always "reserve[d] the right to argue whether jurisdiction is proper" in the Arizona State court’s Adjudication proceedings. The U.S. Government cannot give up its SPRNCA water rights without violating its Public Trust responsibilities. And, as the Arizona Supreme Court acknowledged in 1992,
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 iniolate 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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203 Arizona Supreme Court 1992 (830 P.2d at 451)
205 Arizona Supreme Court 1992 (830 P.2d at 451)
207 Arizona Supreme Court 1992 (830 P.2d at 451)
209 Arizona Supreme Court 1992 (830 P.2d at 451)
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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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
222 USFWS 1991, 1994
223 USFWS 1999c, 2000
224 ADWR 2003c
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…”

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…”

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).]
"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."  

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
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.  

"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.  

"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. 

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. 

In addition, Director Guenther ignores several other important facts:

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

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

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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

236 ADWR 2003c
237 Ibid.
240 Ibid.
241 A.A.C. R12-15-717.D.
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
248 A.R.S. 45-111, Arizona Auditor General 1999
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.” It similarly insults the clear reassurance against fraud found in the ADWR Water Adequacy Program Summary.

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. In that case, we established the fact that an evaluation claiming zero effects across a landscape does not accurately reflect the programmatic net effect.

In the past, ADWR has been supportive of such a fundamental principle of system analysis. 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.”

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

Between September 29, 1993 and December 31, 2000, more than 13,000 new subdivision homes have been approved. This trend continues. This development translates into a forecasted 50% increase in population by the year 2025. Census forecasts show the City of Sierra Vista growing to a population of nearly 100,000 by 2030.

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, the area’s other groundwater pumping and the predictable increase in demand, a 100-year supply of water does not exist.

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250 ADWR 2004a
251 ADWR 2004b
252 Silver v. Thomas 1995
253 Ibid.
255 Ibid.
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
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..."  

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. The rarity of SPRNCA's riparian habitat makes its recovery and survival more important than ever.

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."  

The current drought and the consensus predictions for extended drought exacerbate the effects of the area's excessive deficit groundwater pumping. 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. None of these elements changes the hydrological or legal conclusion that a 100-year supply of water does not exist locally. They only highlight the urgency for action in response to this crisis.
ADWR has chosen to perpetuate Governor Symington’s misrepresentation. Governor Napolitano has not responded to multiple written requests and a challenging lawsuit to the contrary. 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.

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. 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. 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.

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ADWR 2003a; CBD 2002, 2004b; CBD v. ADWR 2003

CBD 2003a, 2003b, CBD v. ADWR 2003

ADWR 1993b, 2003b, 2003c; CBD v. ADWR 2003

Consumer fraud, Federal anti-fraud, and mail fraud statutes are intended to protect vulnerable consumers and lenders.\textsuperscript{279} In the Sierra Vista area, these statutes are being ignored.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{283} Ironically, Governor Symington was convicted of making false statements to a lender on September 27, 1997.\textsuperscript{284}

Lenders have been expressive concerning their hesitancy in issuing loans for properties with an inadequate water supply.\textsuperscript{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...
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...

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. A “hailstorm of developer protests” halted the moratorium, however, as HUD sacrificed consumer and lender protection for political expediency.

The intent of consumer fraud statutes is clear. Deception in connection with the sale of real estate in Arizona is illegal. 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…”

For the Sierra Vista area, ADWR’s assurance is a lie. In spite of this assurance to consumers, ADWR certifies an adequate 100-year water supply in the Sierra Vista area when...
it does not exist.\textsuperscript{292} The certifications are disingenuous.\textsuperscript{293} They are fraudulent.\textsuperscript{294} The certifications violate Arizona’s consumer fraud statutes.\textsuperscript{295}

The Arizona Legislature has been clear in its desire for comprehensive management of the State’s groundwater.\textsuperscript{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.”\textsuperscript{297}

In the Groundwater Code, the Arizona Legislature maintains this comprehensive management theme.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{300} Good faith and justice has been abandoned, as the comprehensive oversight envisioned by the Legislature remains illusive in the Sierra Vista area.\textsuperscript{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.\textsuperscript{302} ADWR today, still chooses to continue Governor Symington’s deception and misrepresentation.\textsuperscript{303}

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

\textsuperscript{292} Ibid.
\textsuperscript{293} Ibid.
\textsuperscript{294} Ibid.
\textsuperscript{295} Ibid.
\textsuperscript{296} A.R.S. 45-401
\textsuperscript{297} A.R.S. 45-105
\textsuperscript{298} A.R.S. 45-401
\textsuperscript{299} A.R.S. 45-401(B)
\textsuperscript{300} A.R.S. 45-105, A.R.S. 45-401; ADWR 2003a; CBD 2002, 2004b; CBD v. ADWR 2003
\textsuperscript{301} A.R.S. 45-105, A.R.S. 45-401; ADWR 2003a; CBD 2002, 2004b; CBD v. ADWR 2003
\textsuperscript{302} ADWR 1992b, 1993b, 1993c
\textsuperscript{304} A.R.S. 44-1524, 44-1530; Arizona Attorney General 2001
area developers is “a consumer disclosure issue.” We agree. ADWR violates these statutes by misrepresenting the water adequacy to consumers and lenders in the Sierra Vista area. We call on the Arizona Attorney General to follow through by respecting law and mandate and stopping this fraud.

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

ADWR transmits its summary correspondence misrepresenting the Sierra Vista water supply adequacy by U.S. Mail. Consequently, mail fraud statutes against using the U.S. Mail “to further a scheme” are also being violated. 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

307 U.S. Congress 1988


310 18 U.S.C. 1345


312 USPS 2004, 18 U.S.C. 1341
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. R12-15-717. 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 inadequacy 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. 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. 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 state 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. 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]…"


ADWR 1984. Correspondence from Michael R. Long, Chief Hydrologist, ADWR, to Mr. Roy Tanney, Chief of Subdivisions, Department of Real Estate, Phoenix, Re: Pueblo del Sol Condominiums, Cochise County, December 17, 1984.

ADWR 1989. Correspondence from Greg Wallace, Chief Hydrologist, ADWR, to Mr. Roy Tanney, Chief of Subdivisions, Department of Real Estate, Phoenix, Re: Desert Mist Commerce Center, Cochise County, March 9, 1989.

ADWR 1990. Correspondence from Greg Wallace, Chief Hydrologist, ADWR, to Mr. Roy Tanney, Chief of Subdivisions, Department of Real Estate, Phoenix, Re: Crossroads Commerce Center, Cochise County, November 20, 1990.


ADWR 1992b. Correspondence from Greg Wallace, Chief Hydrologist, ADWR, to Mr. Roy Tanney, Chief of Subdivisions, Department of Real Estate, Phoenix, Re: Ranchos Carmella Phases III & IV, Cochise County, June 30, 1992.

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.


ADWR 1993c. Correspondence from Greg Wallace, Chief Hydrologist, ADWR, to Mr. Roy Tanney, Chief of Subdivisions, Department of Real Estate, Phoenix, Re: Ranchos Carmella Phases III & IV, Cochise County, November 3, 1993.


ADWR 2000. Correspondence from Ms. Rita Pearson, ADWR Director, to the San Pedro Alliance, RE: Request to designate the Upper San Pedro Basin as an Active Management Area, December 8, 2000.


ADWR 2003b. 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.


AGFD 1993. Arizona Riparian Inventory and Mapping Project, Arizona Game and Fish Department, Phoenix, December 1, 1993.


Arizona Republic 1996. “Symington moves to right seeking votes,” Michael Murphy, Arizona Republic, May 5, 1996; quoting Governor Symington, “I’m here to help solve problems, whether I have to dredge a lake at Havasu, or shoot a spotted owl somewhere, or build a bridge across a creek that the BLM and the Forest Service don’t want us to build.”

Arizona Republic 1997. “Environmental laws need to be reshaped, not repealed,” Joel Nilsson, Arizona Republic, October 18, 1997; quoting Governor Jane Hull, at the Western States Republican Leadership Conference in Reno, Nevada, on October 5, 1997, “Republicans must unite to end the war on the West. Environmental laws, truly the most egregious of all regulations, must be controlled…Our western industries and traditions must be preserved.”


BLM 2003. Correspondence, from Ms. Shela A. McFarlin, Field Manager, Bureau of Land Management, Tucson Field Office, Tucson, Arizona, to Dr. Robin Silver, Conservation Chair, CBD, in response to CBD’s request for “All documentation of any action to date providing significant long-term reduction in the net deficit groundwater budget in the Upper San Pedro Basin not provided by Ft. Huachuca or the Department of Defense. (Please note that a Federal judge has recognized that the City of Sierra Vista Wastewater Treatment Plant provides only short-term protection at best. [CBD v. DoD 1999]),” September 30, 2003.


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.
CBD 2003a. Correspondence, from Dr. Robin Silver, Conservation Chair, 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.

CBD 2003b. Correspondence, from Dr. Robin Silver, Conservation Chair, CBD, to Governor Janet Napolitano, RE: 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 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 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 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…”


CEC 1999a. “Ribbon of Life, An Agenda for Preserving Transboundary Migratory Bird Habitat On the Upper San Pedro River, Commission For Environmental Cooperation, 1999


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.

Maricopa Audubon 1994. Public Records Request, Ms. Rita Pearson, Esq., Director, ADWR, requesting all letters of “adequacy for 100 year water supply” from ADWR “for development in the San Pedro Basin since September 29, 1993. Please include all supporting documents that ADWR has used to rationalize issuance of the letters of ‘adequacy.’”; March 2, 1994.


Sierra Vista Herald 1998a. “Hull: Jobs before some types of birds, animals,” Bill Hess, Sierra Vista Herald, September 11, 1998; quoting Governor Jane Hull, “Someday the federal government will realize jobs are more important than small animals.”


Sierra Vista Herald 2000b. “If National Geographic can see the San Pedro as a jewel, can’t those of us living here?” Editorial, Sierra Vista Herald, April 25, 2000.


Sierra Vista Herald 2003a. “State reviews need for water management area,” Bill Hess, Sierra Vista Herald, August 14, 2003


SWCBD 1996. A Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation submitted to the Secretariat of the Commission for Environmental Cooperation, submitted by Earthlaw, on behalf of the Southwest Center for Biological Diversity and Dr. Robin Silver, November 14, 1996.
Correspondence from Dr. Robin Silver, Conservation Chair, CBD to Mr. Bill Childress Program Manager, BLM, Sierra Vista, Mr. Gary Bauer, Acting Arizona State Director, BLM, Phoenix, Mr. Tom Fry, Director, BLM, Washington, DC, Mr. David Harlow, Arizona Field Office Supervisor, USFWS, Phoenix, Ms. Nancy Kaufman, Regional Director, USFWS, Albuquerque, Ms. Jamie Clark, Director, USFWS, Washington, DC, Mr. Bruce Babbitt, Secretary, US Department of the Interior, Washington, DC, Ms. Jane Dee Hull, Governor, State of Arizona, Phoenix, Ms. Rita Pearson, Director, ADWR, Phoenix, Mr. Les Thompson, Chairman, Cochise County Board of Supervisors, Bisbee, Mr. Tom Hessler, Mayor, City of Sierra Vista, Mr. James Crawford, Mayor, City of Benson, Ms. Carole Vaughn, Mayor, Huachuca City; RE: Notice of Intent to Sue for (1) the Bureau of Land Management (BLM) and the US Fish and Wildlife Service (Service), to remedy violations of Sections 2, 4, 7, and 9 of the Endangered Species Act (ESA), and (2) Notice of Intent to Sue the State of Arizona, Arizona Department of Water Resources (ADWR), the Cochise County Board of Supervisors, and the cities of Sierra Vista, Huachuca City, and Benson, to remedy violations of Section 9 of the ESA, June 30, 1999.; These violations concern Huachuca Water Umbel, Southwestern Willow Flycatcher, Southwestern Willow Flycatcher Critical Habitat, and proposed Huachuca Water Umbel Critical Habitat. These violations primarily involve failure to control the increasing local groundwater pumping that is killing the San Pedro River.


U.S. Constitution. Article I, Section 8, Clause 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”); Article IV, Section 3, Clause 2 (The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.); Article VI, Clause 2 (This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme
Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.)


USFWS 1999b. U.S. Fish and Wildlife Service, Biological Opinion concerning activities, authorized, carried out, or funded by the Department of the Army at and near Fort Huachuca, Arizona, for the next 10 years, #AESO/ES 2-21-98-F-266, October 27, 1999.


USFWS 2002. U.S. Fish and Wildlife Service, Biological Opinion concerning impacts that may result from activities authorized, carried out, or funded by the Department of the Army at and near Fort Huachuca, Arizona. #AESO/ES 2-21-02- F-229 August 23, 2002.


