

The BLM fights for the Southwest's last free-flowing river

by Tony Davis

SIERRA VISTA, ARIZONA

"For sale: Prime Office/Retail," proclaims the sign on a mesquite flat on the outskirts of this affluent city of 47,000 people, about an hour south of Tucson near the Huachuca Mountains.

It's announcing a 2,000-acre project known as Tribute, proposed by California developer Castle and Cooke and approved by city leaders six years ago. Plans call for nearly 7,000 homes and apartments, plus offices, shopping, parks and schools. The real estate bust has temporarily derailed it, but eventually up to 250 homes a year could be built.

Six miles east lies the San Pedro River, the Southwest's last free-flowing major desert river. It boasts the region's healthiest remaining riparian habitat and is home to about 80 different mammals, including coatimundi and badgers, and 350 to 400 bird species. Four million people a year visit the San Pedro, which is so closely observed by hydrologists and riparian ecologists that it's called the most studied river in the world.

For the last two decades, housing developments have been rising at a steady clip around Sierra Vista and the San Pedro watershed; the city's population has increased more than 15 percent in the last decade. In Cochise County, which includes this area, and certain other arid counties, state law requires proposed developments to prove that they have 100 years' worth of water. But since the 1970s, the state water agency has repeatedly concluded that there's plenty of water for developments here -- a least 17,000 acre feet to serve 27,000 new homes, even though rainfall alone would not provide enough water for that many homes. Last July, the state determined that Tribute, which will use 2,400 acre-feet of that groundwater a year, also meets the 100-year requirement.

The federal Bureau of Land Management, which manages the 40-mile-long San Pedro Riparian National Conservation Area northeast of the city, has long sat silent as the state made its approvals, effectively endorsing the concept that pumping groundwater affects neither surface water nor the river, despite evidence to the contrary. Starting last spring, however, the agency abruptly switched course, arguing that its rights to the river's water, approved by Congress when the conservation area was created in 1988, supersede those of any local entity. The BLM is now challenging the state's decision on Tribute. The BLM's action delighted environmentalists, who had grown weary of waiting for it to protect the San Pedro's instream flow. But it also angered some locals, who complained that the federal agency is "stealing" the state's water. The dispute, which pits the future of Sierra Vista against one of the Southwest's most beloved and fought-over rivers, could become the first real opportunity for Arizona to acknowledge that water availability should limit growth. It could also set a precedent for the touchy question of federal versus state control over water rights.

Other southern Arizona rivers -- the Santa Cruz, the Gila, the Salt -- have been dried up by more than a century of diversions and pumping by farms and cities. Pumping creates a "cone of depression" that depletes the water table, and many hydrologists and environmentalists believe that excessive groundwater withdrawals could eventually empty much of the San Pedro, including in the national conservation area. Many studies since the 1980s predict that the water table could drop so far that it would no longer support a year-round flow, killing cottonwood and willow trees and harming riparian habitat. A 2011 study found that groundwater pumping already has reduced the river's flow somewhat.

But despite the clear connection between groundwater pumping and river depletion, Arizona law treats surface water and groundwater as separate entities. Since 1990, more than 3,600 unmetered groundwater wells have been drilled in the Sierra Vista area. When it approved Tribute, the Arizona Department of Water Resources said that it lacked the power to limit water pumping to protect the river.

Further complicating the matter is the fact that Indian tribes, farmers, developers and various local, state and federal government entities have long held conflicting water-rights claims to the San Pedro. Those claims, along with others in the larger Gila River watershed, are being hashed out in the Gila River Adjudication, which has dragged on for nearly 40 years in state courts with no end in sight.

The state water agency made an effort to acknowledge the hydrology during the early 1980s, under then-Gov. Bruce Babbitt, a Democrat who pushed for groundbreaking water law reforms. Back then, the state agency ruled that no new development in the Sierra Vista area had a legally adequate water supply. But in 1993, under Republican Gov. Fife Symington, a former developer, the state reversed its opinion, informing a Sierra Vista developer that adequate groundwater supplies were available. Pumping at the existing rate for 100 years, it said, wouldn't "directly or appreciably" hurt the river.

At the time, the BLM and the Interior Department Solicitor's office threatened possible lawsuits to protect the federally reserved water right. Instead of fighting, though, in 1998, the BLM -- now under Interior Secretary Babbitt -- allied with state, local and federal agencies, activists and developers to form the Upper San Pedro Partnership, which sought to eliminate the groundwater-pumping deficit by September 2011 without having to limit growth.

By 2008, the partnership managed to cut the deficit from about 12,000 acre-feet per year to 4,500 per year by buying and retiring farmland, recharging treated sewage effluent into the ground and encouraging water conservation. The deficit has since crept back to 6,000 acre-feet, partly due to drought. County officials say they can regain most of that loss by building stormwater basins and upgrading the city's sewage-treatment plant. They also argue that the impact of rural wells has been overestimated.

But the Tribute project has pushed things to a tipping point. Last spring, while the state was considering the subdivision's application, the BLM began sticking up for its San Pedro water rights, much to the surprise of many observers. And that push came from the top of the agency. "The key concern we have is continuing consumption of groundwater affecting riparian areas, affecting the San Pedro," says Robert Abbey, the agency's since-retired, conservation-oriented chief. "One project may not have a long-term effect on the conservation area, but the cumulative effect of many projects over time does have some consequences."

Abbey ordered BLM's Arizona office to write the state water agency, pointing out that federal senior water rights are entitled to broader protection than state-granted rights. Under a 1976 U.S. Supreme Court decision, a senior water-rights holder can stop a junior water-rights holder from pumping water if it would hurt the senior party's rights. The letter concluded that Arizona shouldn't award Tribute an "adequate" water ruling until the Gila River adjudication was complete and the water-rights question settled.

Then, in late August, the BLM joined the Center for Biological Diversity and the Huachuca Audubon Society in filing appeals of the state's approval of Tribute. "This is a very positive sign," says University of Arizona law professor Robert Glennon. "BLM is no longer willing to be passive in waiting for progress in the Gila River Adjudication to protect its water rights in the San Pedro."

The BLM and other federal agencies have taken on Western ranchers, loggers and state agencies over water rights many times in the past, but current and former BLM officials agree that it's making a harder push than before -- inspired by former Director Abbey's leadership as well as the pressures on the region's watersheds caused by drought and climate change.

Elsewhere in Arizona, for instance, the BLM recently installed a handful of stream gauges on the Agua

Fria river northwest of Phoenix, to kickstart the process of asserting its water rights there. In the past year, it has also asked the state water agency so far unsuccessfully -- to get moving on longstanding applications for three instream-flow designations in western Arizona, which would strengthen the BLM's legal standing to fight proposed diversions from those rivers. The agency is also trying to secure instream-flow rights for the Upper Missouri Breaks National Monument in Montana.

Some environmentalists privately expect the Tribute appeals to fail because the final decision, due early in 2013, lies with the state water agency, which has rarely challenged development. Then, they hope, the BLM will go to federal court to seek a more sympathetic ruling on the scope of its water rights. The attorney for the developer's water company, Pueblo Del Sol, meanwhile, has challenged BLM's view of the Gila River adjudication, arguing that the state has no right to say Tribute's water supply is inadequate until the Gila River adjudication is finished and the water-rights argument is resolved. If the federal agency does prevail, some local well users fear they'll lose the right to pump. The BLM has said that it could sue owners of wells drilled since 1988 to stop or limit their pumping. But city and Cochise County officials believe new studies will show that these wells' water use has been significantly exaggerated.

Other critics have been quick to accuse the BLM of overreaching. The Goldwater Institute, a Phoenix-based conservative think tank, called the agency's action -- along with the Forest Service's refusal to allow the nearby city of Tombstone to quickly replace water infrastructure damaged in a 2011 wildfire -- a federal assault on state sovereignty. The actions "throw a noose around Arizona's neck, for which water is life," wrote Nick Dranias, chair of the institute's Center for Constitutional Government. Republican State Sen. Gail Griffin denounced the BLM's approach as a blatant attempt to steal Arizona's water.

But conservationist Ted Mouras, a retired U.S. Army officer living in Sierra Vista, thinks it's absurd to accuse the BLM of waging war on the community. "The BLM has an obligation to accomplish the goals set before it, and one of them is to protect the conservation area," says Mouras. "They are drawing a line in the sand. If you build Tribute, you will only increase the threat to the river."

The BLM has indeed flung down a legal gauntlet, one that will affect the state, Tribute's developer and Sierra Vista's future. The question is an old one: Can or should anyone in Arizona limit growth to protect the San Pedro? After decades in which authorities have said "no," the BLM is seeking a new answer.