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December 19, 1990

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WATER RESOURCES

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DEPARTMENT OF WATER RESOURCES
COLORADO RIVER MANAGEMENT

Mr. Carl Frieders
Mayor, City of Sierra Vista
2400 East Tocoma Street
Sierra Vista, AZ 85635

RE: BLM Application for Instream Flow Water Right on the San Pedro River

Dear Mayor Frieders:

Our office represents the Bureau of Land Management (BLM) and other agencies in the U.S. Department of the Interior in regard to legal matters. This letter concerns the pending BLM application for a state law water right on the San Pedro River.

Representatives from the BLM have provided me with information concerning the meeting held on October 9th between the BLM and representatives from Cochise County and your City in regard to this matter. The purpose of that meeting was to discuss the possibility of having the City's protest against the BLM application withdrawn. As I understand it, the City has agreed to consider that request, but it has not yet decided to withdraw the protest. Apparently the City and the County have raised several areas of concern which include the relationship of the Gila River adjudication to this matter. The purpose of this letter is to attempt to address those concerns.

1. Amendment of the Application - first, it is important to point out that the application has been amended to separate the flushing flow provision into a separate application to be filed later. The Department of Water Resources (DWR) had expressed difficulty with this aspect of the application and BLM eventually determined that the provision was not necessary to the application. The elimination of that provision should be important to the City since the amended application clearly poses no conflict with any claim the City has to surface water sources. This is particularly germain to your letter of protest wherein you referenced several pending surface water applications on a tributary. As amended, the BLM application poses no conflict on that tributary since the tributary is not a perennial flow stream and the BLM's application is for base flow in the San Pedro River. Furthermore, I presume that the City's pending applications pre-

dated the BLM application (as originally filed by the Sierra Club), thus giving you a position of priority if there were a conflict.

For these reasons, I suggest to you that the City's protest may not be effective in that it does not allege valid grounds for a protest. First, the protest does not raise issues in regard to public safety or public interest (ARS 45-153). Second, the protest does not demonstrate any conflict with vested water rights. Accordingly, the City's protest is really not effective as a protest and may therefore be disregarded by DWR in this process.

2. Connection to Indian Reserved Water Rights - representatives of the City and County at the October 9th meeting apparently expressed concern that the federal government may claim additional amounts of water from the San Pedro in two ways: 1) as part of BLM's federal reserved water right (yet to be quantified by the court), and 2) as part of the water rights for the downstream Gila River Indian Reservation (also yet to be quantified by the court). I will address these arguments separately.

In regard to the BLM reserved right, the BLM is in the process right now of quantifying its full claim to water under the reserved water right created pursuant to federal law. In large part, this claim will parallel what has been requested under state law. In fact, the original claim filed by BLM for the federal preserve used the same numbers as set forth in the state application. However, amendments are now being considered and will be filed shortly by BLM. I recommend that you review this matter with BLM officials in order to determine the magnitude of the difference.

If there is a difference, I suggest that this is an insignificant issue since the two matters are on different tracks in different forums. It should be noted, however, that the BLM's decision to proceed on the state application is in part an effort to allow the state authorities to quantify the instream flow entitlement prior to the court's engagement of that issue. I believe that the DWR officials welcome this opportunity, and I would think that the City and County would welcome it as well. Since the purposes covered under the federal law are broader than the purposes covered under state law, it is not unreasonable to conclude that the federal claim may in some respects be larger in quantity (for administrative uses, domestic uses, etc.), but the base instream flow needs should be largely the same if not identical.

In regard to what will be done by the Bureau of Indian Affairs (BIA) and the downstream Indian tribe, the most that can be said is that BLM has no control over that matter. Given the government's trust responsibility to the Tribe, the Department cannot compromise an Indian water rights claim simply to advance a BLM application under state law. Furthermore, at this time it is not

clear what the nature and scope of the BIA-Indian claim to the San Pedro will be. That will be decided as the government gets closer to the adjudication of the Gila River Reservation HSR. In other words, there is no way to clarify or identify what will or will not be done by the BIA within the context of the BLM state law application. To the extent that you seek some assurance in this area, or some form of commitment from the Department, that simply cannot be provided. I'm sure that John McKinnon, the County's attorney, can explain this to you since he has in the past represented the Navajo Tribe in regard to water matters.

However, I suggest that you should not overlook the advantage which may come from having the flow right quantified by state authorities. As you know, there is at this time significant energy behind a settlement of the Gila River Tribe's water rights claims. As I have told people from your area before, in my judgment there will not be a settlement of that reservation's water right without a San Pedro component. In my view, the quantification of the base flow right for the BLM preserve would be helpful as an important benchmark from which a settlement on that tributary could be crafted. Of course, it is too early to discuss details, but common sense dictates that the BLM and the Tribe are after the same basic goal -- they want to see the river flow down to the confluence with the Gila River in as much the same condition as it has historically. In addition, both entities will want to protect that flow from future depletions resulting from diversions by junior appropriators. Finally, both entities will want to protect against large diversions via new dams, but, as you know, such diversions are not proposed or planned, and the watershed does not really facilitate that kind of development.

In summary, while I can appreciate your concern over the potential BIA-Indian claims, I suggest that the City and the County need to consider the following points: 1) BLM cannot affect what the BIA and the Tribe will do in the adjudication; 2) the BLM state application is really a separate matter, and your concern over the adjudication process does not amount to a valid protest of the BLM state application; 3) if your concern is not a valid protest, DWR will either ignore your protest or determine it to be invalid at a hearing; and 4) your position may not reflect the benefit you may obtain by having state authorities quantify the instream flow needs in advance of the court deciding that matter as part of the federal water right.

3. <u>Likely result of a hearing</u> - it should be obvious that BLM seeks to have your protest withdrawn so as to avoid a DWR hearing if possible. However, if you will not withdraw your protest, we will request DWR to schedule a hearing as soon as possible. If that happens, we feel confident that your protest will not hold up since you have not articulated any interference with prior vested rights. In this context, your protest then becomes a statement to BLM and the public that you are not supportive of

BLM's efforts to protect the flow of the river and the associated riparian area. I assume that is not the message you desire to convey.

4. What is in the best interest of the river - I suppose the most important point is what the City truly wants to do in order to help protect the resource value of the San Pedro. As I understand it, you have always said that the City does not want to see the river dried up or otherwise impaired. If that is the case, then the City should be wholly supportive of BLM's application, particularly since it is under the umbrella of state law. Even if the City may eventually resist BIA or tribal claims which exceed the BLM state water right, the City may nevertheless desire to support the BLM base flow entitlement which guarantees protection of the riparian resources. In my view you can do both without compromising your position in any way whatsoever. But by supporting the BLM application, or at least not protesting it, you will be making a clear statement that the City wants to see the resource protected and preserved. By maintaining your protest, it seems to me that you convey the opposite message.

In conclusion, I hope that these points will assist you in arriving at a decision in regard to your protest. Since we would like to make progress on this application as soon as possible, it would be helpful to have your decision on this matter by mid-January. If you conclude that you cannot withdraw the protest, we will ask DWR to schedule the matter for hearing.

If I can answer any questions in regard to this letter, or otherwise provide you with information, please give me a call at (602) 379-4756. Thank you for your attention to this important matter.

Sincerely,

Fritz L. Goreham
Field Solicitor

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For the Field Solicitor

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