Written Testimony of

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Before the United States House of Representatives
Transportation and Infrastructure Committee
Regarding "The Clean Water Restoration Act of 2007"

April 16, 2008
Rayburn House Office Building
Washington D.C.

Mr. Chairman and members of the Committee, thank you for the opportunity to testify today regarding H.R. 2421, the Clean Water Restoration Act of 2007. The Arizona Department of Environmental Quality implements a number of water quality protection programs in our state, including the Federal Water Pollution Control Act and amendments, known as the Clean Water Act. Arizona's Governor, Governor Janet Napolitano, issued a letter of support for the legislation and we thank you, Chairman Oberstar, for introducing this legislation, and the co-sponsors, and this Committee for your leadership in this matter of importance to our state. We also thank Senator Feingold in the Senate for introducing S. 1870 in the Senate.

The Arizona Department of Environmental Quality has very serious concerns about the potential impact of the 2006 United States Supreme Court plurality decision in the *Rapanos* and *Carabell* cases, 165 L. Ed. 2d 159 (2006), hereinafter, the Decision, on Clean Water Act programs in Arizona. The Decision could minimize, if not devastate surface water quality protections that have been implemented in Arizona at least since the 1972 Amendments. While the Decision alone is of grave concern, the implementation guidance jointly issued by the Environmental Protection Agency and the Army Corps of Engineers, 72 Fed. Reg. 31824 (June 8, 2007), hereinafter, Guidance, further puts Arizona's waters at great risk.

The *Rapanos* Decision arises out of cases involving jurisdiction over construction activities on or around "four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditionally navigable waters . . . ." 165 L. Ed. 2d at 164. It is, therefore, from our perspective, highly unfortunate that the Decision and Guidance are expected to have such an enormous impact on the quality of Arizona's arid environment and the health of its citizens. We believe that a different set of facts presented to the Court, for example facts involving a large discharge of pollutants to an ephemeral stream, necessarily would have led to a different conclusion that would have been more protective of the environment.

As Governor Napolitano stated in her September 26, 2007 letter of support: "The implementation of the Clean Water Act in Arizona long has protected Arizona's

wetlands, streams, canals, and lakes for drinking, wildlife, recreation, tourism and irrigation, to name a few important uses of our water resources. Arizona and the federal government combined properly have spent millions since the enactment of the Federal Water Pollution Control Act to assess water quality throughout our state and to protect those uses through point source permitting, Total Maximum Daily Load studies and monitoring, Section 319 nonpoint source grants, and other Clean Water Act programs. The Clean Water Restoration Act of 2007 offers a recognition and ratification of these critical efforts to protect the scarce and precious water resources in our arid state."

Like other states, Arizona devotes significant resources to Clean Water Act programs. Since the late 1970s, Arizona has developed and implemented surface water quality standards, performed Total Maximum Daily Load studies, and monitored, assessed and reported surface water quality under Sections 303 and 305 of the Clean Water Act; since 2000 Arizona has approved over $11 million in non-point source water quality improvement grants. Since 1973, Arizona has participated in the issuance of point source permits under Section 402 of the Clean Water Act and since 2003 has issued and enforced Section 402 point source permits under a delegation from the EPA. If as a result of the *Rapanos* Guidance ephemeral and intermittent waters are deemed non-jurisdictional, all Clean Water Act protections for these water bodies may be lost. Such a result would seriously impede my agency's ability to achieve its mission to protect and enhance the quality of Arizona's environment.

Our specific concern for Arizona stemming from the *Rapanos* Decision and Guidance is the potential elimination of Clean Water Act protections, particularly Section 402 point source permitting protections, for ephemeral and intermittent, or non-perennial, waters. Ephemeral waters are those streams that contain surface flow only in response to precipitation and intermittent waters are those streams that contain continuous surface flow only part of the year, for example, from a seasonal spring or in response to snow melt. Arizona's landscape includes a vast network of these non-perennial streams. In cooperation with the United States Geological Survey, we recently have quantified this network and determined that approximately 96% of the stream miles in Arizona are non-perennial. See attached Arizona Streams map, November 27, 2007.

Arizona's largest water body--second in size only to the perennially flowing Colorado River, which forms the western border we share with Nevada and California--is the Gila River. The Gila River, an interstate stream originating in our neighboring state of New Mexico, drains two thirds of the land area in Arizona to the Colorado River a few miles north of the Mexican Border and the Colorado River Delta of the Gulf of California. The Gila flows intermittently in wetter years, but in times of long-term drought, such as we presently are experiencing, this massive water body is largely dry and any flow is highly disconnected. The Gila's main tributaries include the Salt, Santa Cruz, and Hassayampa Rivers, which are very large and mainly ephemeral streams. See attached Important Rivers, Streams and Washes of Arizona.

Arizona's largest and fastest growing counties, Maricopa, Pima and Pinal Counties, are located in the heart of the mostly ephemeral Gila River drainage. Subdivisions require

sewage treatment facilities and many of these facilities construct outfalls and discharge to ephemeral arroyos in these neighborhoods. These facilities currently hold Clean Water Act point source permits for discharges of wastewater that are protective of aquatic life, agricultural irrigation and livestock watering, and body contact uses. Without Clean Water Act protections, the Arizona Department of Environmental Quality will be unable to require permits that are protective of these uses. Arizona law prohibits the Arizona Department of Environmental Quality from being more stringent than the federal Clean Water Act. We will be unable to assure the public and water users that these discharges of wastewater in the desert are not harmful to the environment.

Arizona's non-perennial stream water quality has benefited from Clean Water Act protections since the early 1970s when Section 402 point source permits were issued for several facilities discharging wastewater to ephemeral streams, including permits for major publicly owned treatment works (POTWs) serving the cities of Tucson and Phoenix and discharging large amounts of effluent to the Salt and Santa Cruz Rivers, which are tributaries to the Gila River, as described above. Combined, these facilities treat over 200 million gallons per day of municipal and industrial sewage and still discharge to these large ephemeral waters under Section 402 point source permits. The Rapanos Decision and Guidance have presented the opportunity for these large POTWs and other dischargers to argue that their discharges do not require Clean Water Act pollution limits, known as effluent limits.

Further, in 1975, the United States District Court for the District of Arizona ensured Clean Water Act protection for small ephemeral streams, or arroyos. The Court held that: "[A] legal definition of 'navigable waters' or 'waters of the United States' within the scope of the Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States." *United States v. Phelps Dodge Corp.*, 391 F.Supp. 1181, 1187 (1975). This Arizona District Court decision long ago set the stage for the standard that dischargers to desert waters must obtain Clean Water Act Section 402 permits to be in compliance with the law.

As this Committee well knows, the Clean Water Act provides for the development and implementation by the states of water quality standards for the nation's surface waters that are protective of the water bodies' uses as designated by the states. Since 1980 Arizona has included express protections for ephemeral water bodies in Clean Water Act standards promulgated in rule under Arizona law and approved by EPA. This has been necessary to protect the large ephemeral streams, like the Salt and Santa Cruz Rivers, receiving discharges from large POTWs, but also is necessary to protect ephemeral arroyos from pollution caused by smaller municipal dischargers and industrial dischargers, such as uranium and hard rock mines.

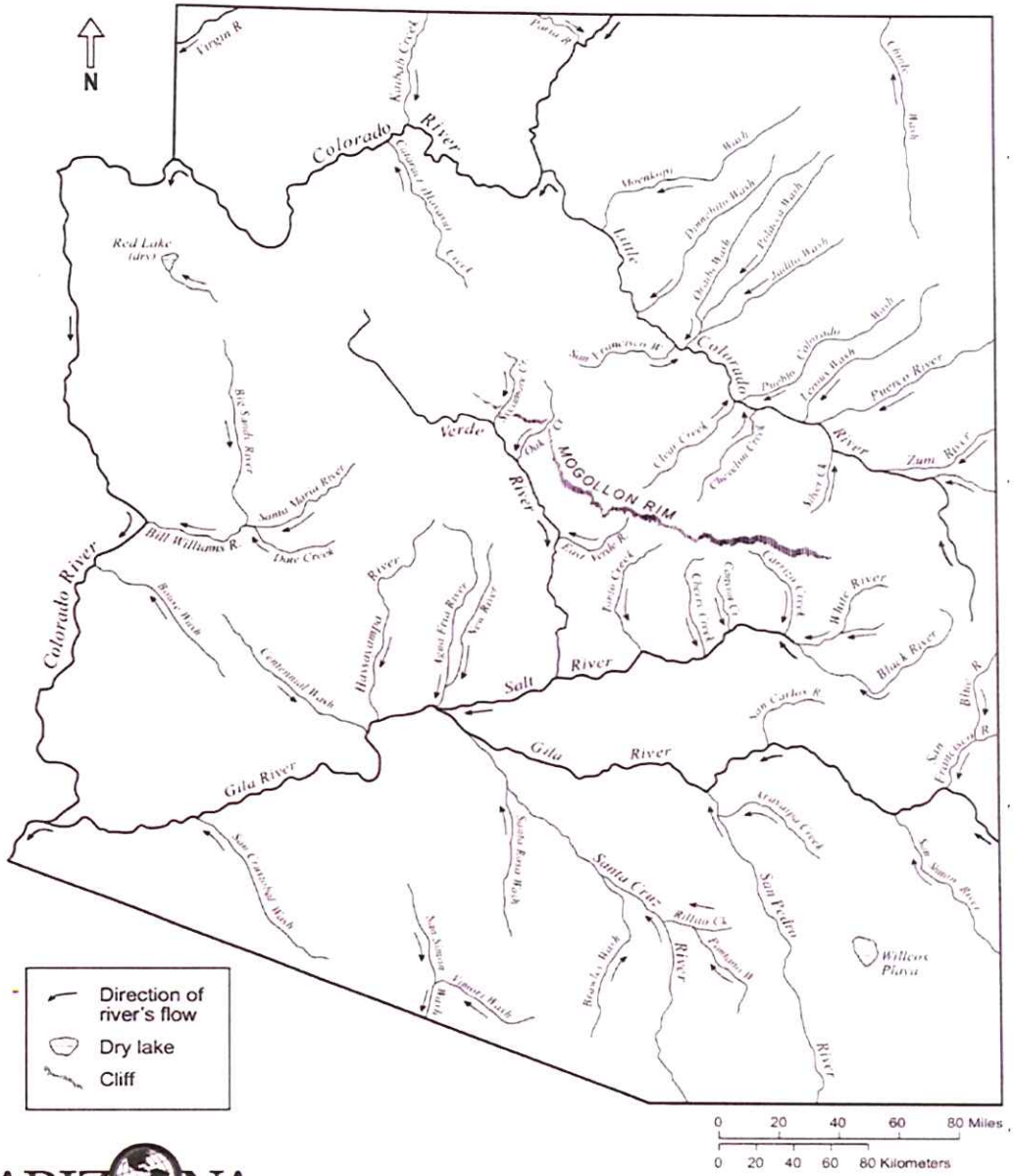
The Clean Water Act also has provided a valuable tool to protect tribal resources in Arizona. Central Arizona tribes, such as the Gila River Indian Community, the Ak-Chin Indian Community and the Tohono O'Oodham Nation, inhabit Reservations with

ephemeral stream networks also tributary to the Gila River. These Communities have been severely impacted by growth surrounding their Reservations. The Clean Water Act point source permitting process and permit conditions have assured these Communities that point source discharges that may reach their Reservations have sufficient water quality protections. Moreover, we have worked with the Ak-Chin Indian Community to stop a proposal for effluent discharges to three arroyos upstream of the Community. The Community's elders and elected leaders objected to the proposal because the Tribe values highly, for cultural reasons, the ephemeral nature of the washes. Arizona will propose in its update of Clean Water Act water quality standards a prohibition on discharges into these special arroyos. Without the Clean Water Act's applicability to ephemeral streams, these protections are not possible.

Though the amount of surface water in Arizona, in dry and normal years, is well below the amount of surface water in many parts of the United States, the rate of pollutant loading to Arizona streams is not significantly different. Arizona's non-perennial streams require at least the same protections from pollution as do perennial streams in order to protect the overall quality of our environment, aquatic life and the people who use those streams.

In sum, the impacts of the *Rapanos* Decision and Guidance in Arizona may be widespread, impacting surface water quality standards for nearly all of our surface streams and nearly all of our 160 Section 402 permits for wastewater and stormwater discharges to waters other than the Colorado River. Without these federal Clean Water Act protections, which have been in place for 35 years, my agency may not be able protect Arizona streams for aquatic life uses, including Endangered Species Act listed species like Arizona's native Gila and Apache Trout; we may not be able to protect surface streams for agricultural irrigation use or livestock watering, and we may not be able to prohibit wastewater discharges to our most pristine, high quality streams, like Sabino Creek and the Little Colorado River. See attached photographs. Our Governor and the Arizona Department of Environmental Quality support the Clean Water Restoration Act of 2007 because it ensures the longstanding, pre-*Rapanos*, Clean Water Act programs and protections remain in place to protect the surface water resources in our state. In the Governor's words, in times of explosive growth, long term drought and the impacts of climate change, these water resources are "far too precious to waste."

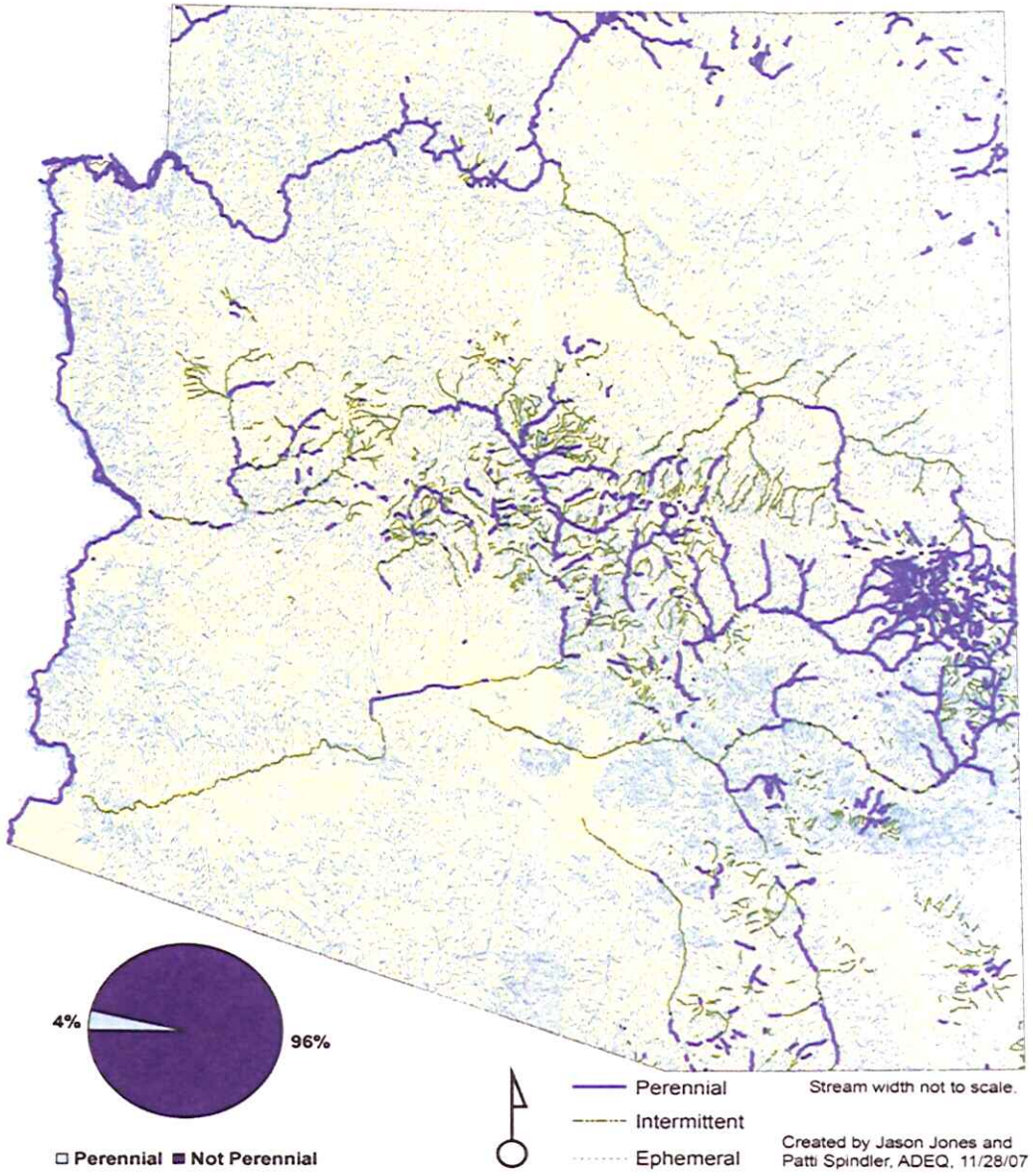
Important Rivers, Streams and Washes of Arizona



ARIZONA GEOGRAPHIC ALLIANCE

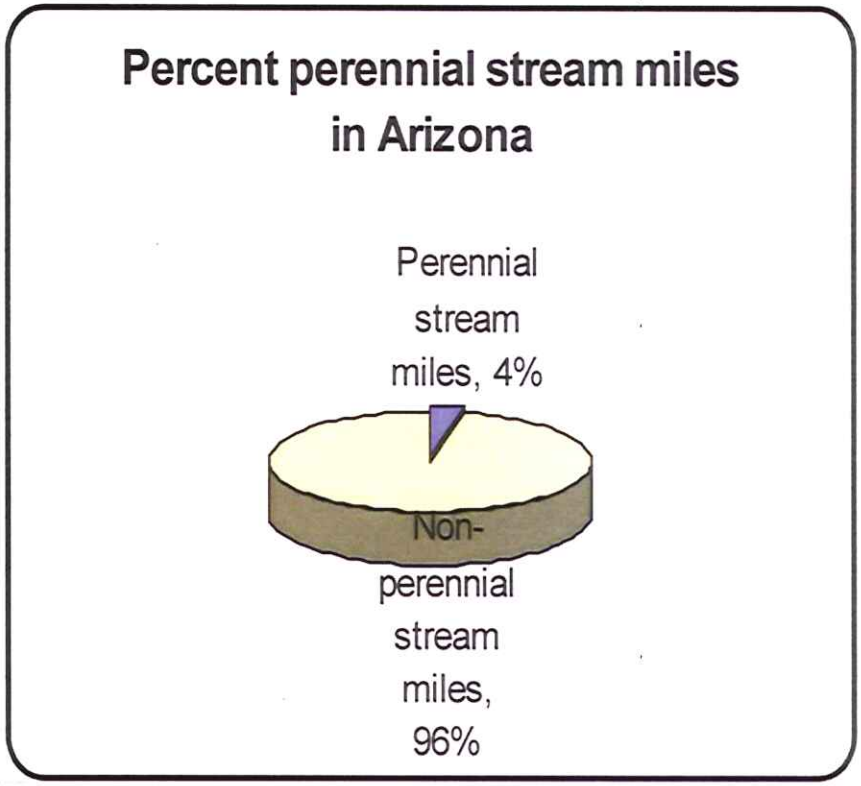
Courtesy: Arizona Geographic Alliance
Department of Geography, Arizona State University
Barbara Trapido-Lurie

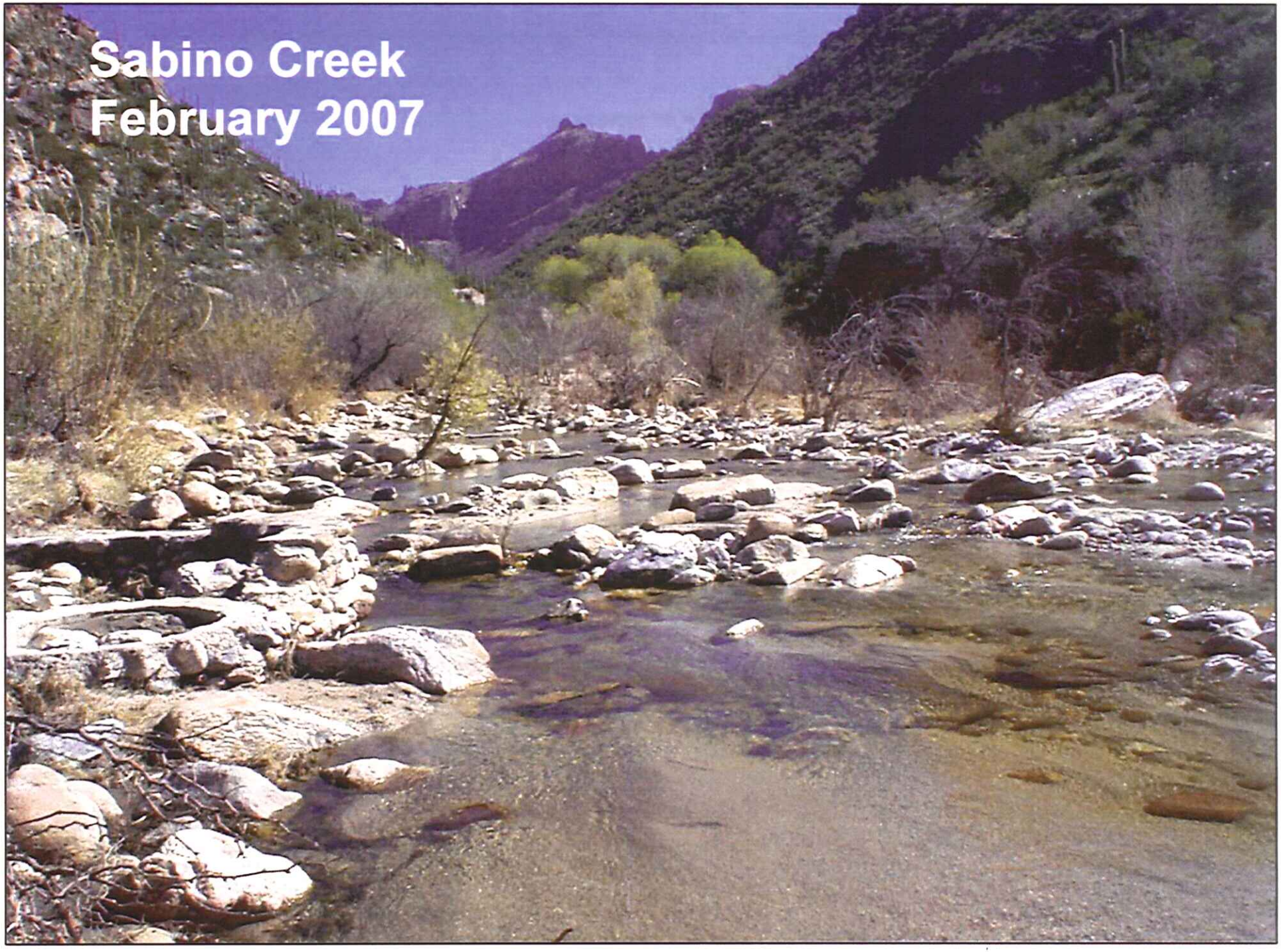
Arizona Streams



Stream type	Stream miles, statewide (%)	Stream miles, Non-Indian
Predicted perennial 2007	5592 (3.7%)	4778 (5.3%)
Non-perennial 2007	144322 (96.3%)	85597 (94.7%)
Total stream miles	149914	90375

5592
144322




Sabino Creek
February 2007

Little Colorado River
June 2007

Upper Hassayampa River June 2007

Corps 'not involved' with sand removal
Doug Balcomb, The Wickenburg Sun
March 13, 2008

[The], PE, Chief of the Arizona Section Regulatory Branch of the U.S. Army Corps of Engineers recently clarified the role of the Corps in the decision-making process of the bypass through downtown Wickenburg, which is under construction. In a talk to the Wickenburg Rotary Club on Tuesday, March 4, [the Chief] stated that the Corps was not involved in decisions regarding the removal of sand from the Hassayampa River bed or the proposed borrow pit on the east side of the river needed for the bypass construction. . . . She stated that a 2006 decision by the U.S. Supreme Court overturned Section 404 of the Clean Water Act. Previously, the Corps had exercised jurisdiction over nearly all riverbeds, even those that are dry most of the year, but this is no longer the case.

Lee Pearson and Alan Hall
www.wickenburg-az.com

Outfall
Siphon Draw
May 2006

Siphon Draw
May 2006