Case No. 12-16172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF TOMBSTONE;
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity); TOM TIDWELL (in his official capacity); CORBIN NEWMAN (in his official capacity);
Defendants-Appellees.

APPELLANT'S BRIEF
(PRELIMINARY INJUNCTION INTERLOCUTORY APPEAL)

Appeal from the United States District Court for the State of Arizona
Case No. 4:11-CV-00845-FRZ, Hon. Frank Zapata, presiding

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CORPORATE DISCLOSURE STATEMENT

The City of Tombstone is a municipal corporation chartered under the Constitution of the State of Arizona, which incorporated the relevant laws of the Territory of Arizona. Goldwater Institute is a nonpartisan, tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. Neither the City of Tombstone nor the Goldwater Institute has any parent corporation. Neither has issued any stock. Both certify that they have no parents, trusts, subsidiaries and/or affiliates that have issued shares or debt securities to the public.

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JURISDICTION

On May 14, 2012, the district court denied Tombstone's second preliminary injunction motion, whereupon Tombstone's Notice of Preliminary Injunction Appeal was immediately filed. ER1-16. This Court has jurisdiction over the instant appeal because it arises from an interlocutory order that refused a preliminary injunction. The basis of this Court's appellate jurisdiction is 28 U.S.C. § 1292(a)(1), as implemented by 9th Cir. Rule 3-3, which authorizes an appeal as of right from the refusal of a preliminary injunction. The basis of the district court's subject matter jurisdiction is 28 U.S.C. §§ 1331, 1361, 1367, 2201 and 2202.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

The central issue is whether the lower court committed reversible error in denying Tombstone's second preliminary injunction motion. This issue involves the following sub-issues:

1) Whether the lower court abused its discretion by erroneously ruling as a matter of law that the Sovereign Immunity of the United States bars Tombstone's request for prospective preliminary injunctive relief against individual Defendants who are sued in their official capacity for unconstitutional conduct.

2) Whether the lower court abused its discretion in rendering a conclusory decision on the issues of irreparable harm and the balance of public interests, harms, and equities that prevents meaningful appellate review.

3) Whether the lower court abused its discretion in erroneously ruling as a matter of law that Tombstone did not have a likelihood of success of showing the Tenth Amendment bars Defendants from commandeering municipal property that is essential to Tombstone's existence and to protecting public health and safety.

APPLICABLE LAW

Verbose copies of all constitutional provisions, statutes, regulations and regulatory guidelines are included in the addendum to this Brief.

STATEMENT OF THE CASE

Water is life to the historic desert town of Tombstone, Arizona, and its 1,562 residents. It is also life to Southeastern Arizona during wildfire season. And yet, Defendants are refusing to allow Tombstone to freely and fully restore its Huachuca Mountain municipal water system: (a) six years after arsenic contamination left just one of Tombstone's wells producing safe potable water, (b) sixteen months after a fire at Six Gun City nearly burned Tombstone's historic downtown to the ground, (c) nine months after the Monument Fire's denuding of forests caused monsoon flooding to destroy the water system, (d) three weeks after wildfires have returned to the Huachuca Mountains, (e) in the midst of peak seasonal demand for potable water, and (f) just one month before monsoon season returns.

Even though Tombstone's water system rests upon 130 year old rights of

way across federal land that were recognized as valid property rights by the Forest Service in 1916 (ER1157), Defendants claim limitless power under the Property Clause to commandeer Tombstone's essential water system and threaten its very existence as a political subdivision of the State of Arizona.

In claiming such limitless power under the Property Clause, the federal government is defying the Supreme Court's very clear ruling in *Alden v. Maine*, 527 U.S. 706, 713-14 (1999), that the Constitution assumes the "continued existence" of the States as a limitation on every power delegated to the federal government. Defendants are also refusing to yield to the Supreme Court's recent *unanimous* ruling that "[i]mpermissible interference with state sovereignty is not within the National Government's enumerated powers." *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). Finally, by misapplying federal law to commandeer municipal property that is essential to protecting public health and safety, Defendants are violating the first principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *New York v. United States*, 505 U.S. 144 (1992)).

In short, despite the plain language and clear implications of more than twenty years of federalism jurisprudence, the federal government will not concede that there is *no such thing as limitless federal power* under any provision of the

Constitution, especially when the principle of state sovereignty is at stake.

As a result of the federal government's intransigence, Tombstone has desperately and repeatedly sought emergency injunctive relief. On March 1, 2012, the district court denied Tombstone's first motion for preliminary injunction without prejudice, allowing the City to file an amended complaint and a second preliminary injunction motion by March 30, 2012. ER1244-50. On March 30, 2012, Tombstone filed a First Amended Complaint and a second preliminary injunction motion seeking to stop Defendants' interference with its emergency repair efforts to restore its municipal water system. ER633-50, 912-86. On May 14, 2012, the court denied Tombstone's second preliminary injunction motion, whereupon Tombstone's interlocutory appeal was immediately filed. ER1-16. On May 21, 2012, Tombstone then filed an emergency motion for injunction pending appeal with the Ninth Circuit Court of Appeals. After a full briefing, on May 30, 2012, two judges of the Ninth Circuit's three judge motions panel denied the motion. Dkt. 15.

Time is growing increasingly short for "The Town Too Tough to Die." With monsoon season approaching, Tombstone's water system is again at imminent risk of devastation. Before it is too late, this Honorable Court should reverse the lower court's refusal to grant Tombstone a preliminary injunction under the Tenth Amendment. Oral argument is requested.

STATEMENT OF FACTS

This emergency began between May and July 2011, when the Monument Fire engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone's water supply infrastructure is located. ER776(¶12), 915(¶1), 1185-86, 1199-1200. In July 2011, the monsoon rains were record-breaking. With no vegetation to absorb the runoff, huge mudslides forced boulders—some the size of Volkswagens—to tumble down mountainsides crushing Tombstone's waterlines and destroying reservoirs; thus, shutting off Tombstone's main source of water. *Id.*; ER1437:12-20. In response, both Tombstone and Governor Jan Brewer declared a State of Emergency. ER842-43.

Nevertheless, for over nine months, Defendants have refused to allow Tombstone to freely and fully repair and restore its 130 year old water infrastructure in the Huachuca Mountains—a municipal water system built on federal land that dates back to the days of Wyatt Earp and Doc Holliday. ER788, 791, 916(¶2), 957(¶¶61-72), 1388:15-17. It is now peak season for water consumption in Tombstone and there is not enough water flowing from the Huachuca Mountain water system to support both adequate safe drinking water and fire suppression. ER800(¶¶10, 12).

The City is relying on a single well water source that Tombstone's Water Operator Jack Wright has warned is at the risk of arsenic poisoning. ER800(¶11).

With the City's alternative well water sources already poisoned by arsenic, ER798(¶¶5-7), 799(¶¶8-9), this last, potentially unstable well water source, which itself is contaminated by near intolerable levels of arsenic, barely provides enough water to handle peak consumption demand. ER799(¶8), 800(¶11). Without more water flowing from the Huachuca Mountain water system, Tombstone's Water Operator Jack Wright has further warned that the City's public health and safety is at risk because of the possibility of that one remaining well failing, which would force the City to rely on a five day reserve of water for both drinking water and fire suppression. ER800(¶¶11, 12), 801(¶¶13-14). Moreover, the threat of a catastrophic fire is very real for Tombstone; in December of 2010 the town nearly lost its historic downtown during the Six Gun City fire. ER832(¶6), 833(¶7). Without all of the water that can be produced by the Huachuca Mountain system, Tombstone simply cannot justify upgrading its water distribution system to provide adequate fire suppression capacity. ER750-51(¶73), 833(¶¶8-9). According to Tombstone's Fire Chief Jesse Grassman, the town is a "disaster waiting to happen." ER833(¶9).

Despite the manifest emergency facing the desert-parched City of Tombstone, Defendants have continuously refused to allow Tombstone to take necessary emergency action to repair its Huachuca Mountain water infrastructure. ER776(¶11), 1218, 1444:5-13. Initially, Defendants allowed Tombstone's choice

of mechanized vehicles and equipment to repair one of Tombstone's twenty-five spring catchments, namely Miller Spring No. 1 (also known as "Main Spring No. 1"). ER1193, 1197, 1233-37. But then Defendants took nearly a month to consider requested repairs to Gardner Spring No. 24 and the remaining water infrastructure. *Compare* ER1219 *with* 1239. When they granted permission in late December 2011, they limited Tombstone to temporary repairs at Gardner Spring No. 24 using underpowered mechanized equipment and hand tools. ER1292:17-21, 1294:2-14, 1345:3-7, 1390:14-17, 1392:4-23. Because of the ongoing State of Emergency and the threat of further delay preventing the town from addressing ongoing water and fire hazards, Tombstone filed suit seeking an injunction to allow it to fully and freely repair its Huachuca Mountain water system.

Since March 1, 2012, Defendants have refused to allow Tombstone to use anything other than hand tools to restore *any* part of its water system. ER776(¶11), 959(¶¶67, 68). But hand tools cannot do the job that needs to be done to avert the ongoing emergency adequately or in a reasonable period of time. ER665(¶39), 775-76(¶10), 1270:22-25, 1271:1-2. First, as a result of the Monument Fire disaster, the terrain throughout the Huachuca Mountains has huge boulders, giant felled trees, and huge piles of gravel and sand that must be moved and rearranged. ER775(¶¶9-10); 1344:4-8, 1442:24-25, 1443:1-15. Additionally, a diversionary flume is needed as an essential safety and protective measure to defect future water

flows and prevent them from injuring workers in the area. ER664(¶38), 775(¶¶9, 12). The flume would also prevent destruction of the spring catchments and access to the springs themselves. *Id.* The City's water structures simply cannot be safely rebuilt or fully utilized in the future without these protective flumes in place. *Id.* Second, full repair and burial of the auxiliary water lines from the City's springs to its main is needed to protect them from future weather events. ER775(¶10). Otherwise, the town's water structures will be periodically destroyed by weather and flow events, depriving the City of a continuous water supply. ER775-76(¶9-12). Accordingly, safe and complete repair of Tombstone's water infrastructure, which is essential to providing safe drinking water and adequate fire suppression, requires heavy equipment and vehicles. ER745-46(¶¶58-60), 775-76(¶¶8-10).

Furthermore, even when using hand tools, Tombstone has been subject to harassment by Defendants consisting of deliberate approval delays and interference with repair efforts. ER1222-25, 1340:1-22, 1397:6-11. Defendants, for example, even attempted to bar Tombstone from using a wheelbarrow to conduct its emergency repairs. ER777(¶13). As a result, only three springs are currently feeding Tombstone's municipal water system. ER961(¶70). Given that repairs and reconstruction could have been completed with heavy equipment and vehicles in a month or less, Defendants have prevented Tombstone from enjoying the beneficial use of water from twenty-two of the twenty-five springs. ER665(¶39), 775-

76(¶10), 961(¶¶71-72). Moreover, the temporary repairs allowed to Gardner Springs No. 24 are at imminent risk of being washed away in the impending monsoons. ER775(¶9), 786, 961(¶72), 1346:16-21.

In the meantime, Defendants are questioning Tombstone's legal entitlement to restore the remaining twenty-two springs. ER1438:18-23. This is despite the fact that, in 1916, Tombstone's predecessor in interest to its municipal water system, the Huachuca Water Company, wrote a letter to Defendants asking for confirmation of its vested rights. ER1156. In response, the Forest Service did not impede access to ancient spring heads, pipelines and related rights of way. It did not demand a permit (although it freely granted them). Instead, the Forest Service admitted that the Huachuca Water Company already had full right and title to the Huachuca Mountain water infrastructure under federal law. ER1157.

What was abundantly obvious to Defendants in 1916 is now being completely disregarded. But it is not because Tombstone is differently situated than the Huachuca Water Company. Tombstone was transferred all of the Huachuca Water Company's property rights and permit privileges in 1947. ER1159-63. Defendants investigated the transfer of permits and subsequently approved it in 1948 and 1949. ER690(¶¶81-82).

The different treatment accorded Tombstone by Defendants is also not explained by some newfound defect in the City's chain of title—somehow

discovered by Forest Service officials nearly a century distant from the facts on the ground in 1916. In fact, the chain of title to Tombstone's water rights, infrastructure and rights of way in the Huachuca Mountains is clear. Tombstone actually holds both long established and *previously adjudicated* water rights and appurtenant possessory, pipeline and access rights of way. ER847-48(¶9). The following chart illustrates how Tombstone's water system rights are thoroughly documented and evidenced.

1866 Mining Act Rights	**Pre-1976 Deed**	**Pre-1976 Notice of Approp**	**Pre-1976 Survey/ Map**	**Pre-1976 Ownrshp Adjudictd**	**Pre-1976 Development /Continuous Maintenance**	**Pre-1976 Permit**
26 Mile Pipeline	Yes: ER990, 1014, 1159-63.	N/A	Yes: ER1137, 1142-46.	Yes: ER1147-48.	Yes: ER884, 888-89, 893, 904-05, 1017-20, 1156-58.	Yes: ER1145, 1164-81.
Access Roadways	Yes: ER990, 994, 1014, 1159-63.	N/A	Yes: ER1137.	TBD	Yes: ER884, 888, 893, 904-05, 990, 994, 1014, 1137.	TBD
Miller Spring a/k/a Main Spring (No. 1)	Yes: ER988-89, 996, 1004-05, 1007-08, 1012-13,	Yes: ER1038-41.	Yes: ER1042, 1137, 1171.	TBD	Yes: ER884, 888-89, 893, 898, 1025-29, 1038-41, 1156-58.	Yes: ER1164-81.

	1159-63.					
McCoy Springs Group (Nos. 2, 3, 4)	Yes: ER988-89, 996, 1004-05, 1007-08, 1012-13, 1159-63.	Yes: ER1043-46, 1048-51.	Yes: ER1047-1137.	Yes: ER1147-49.	Yes: ER884, 888-89, 893, 904, 1025-29, 1043-46, 1048-51, 1156-58.	Yes: ER1164-81.
Marshall Spring (No. 5)	Yes: ER 1159-63.	Yes: ER1052-55.	Yes: ER1056, 1137.	TBD	Yes: ER1025-29, 1052-55, 1156-58.	Yes: ER1164-81.
Bench Spring (No. 6)	Yes: ER 1159-63.	Yes: ER1057-60.	Yes: ER1061, 1137.	TBD	Yes: ER1025-29, 1057-60, 1156-58.	Yes: ER1164-81.
Maple Springs Group (Nos. 7, 8, 9)	Yes: ER 1159-63.	Yes: ER1062-65.	Yes: ER1066, 1137.	TBD	Yes: ER898, 1025-29, 1062-65, 1156-58.	Yes: ER1164-81.
Gird Reservoir (No. 9 ½)	Yes: ER 1000, 1159-63.	TBD	TBD	TBD	Yes: ER1156-58.	Yes: ER 1164-81.
Lower Spring (No. 10)	Yes: ER 1159-63.	Yes: ER1067-70.	Yes: ER1071, 1137.	TBD	Yes: ER1025-29, 1067-70, 1156-58.	Yes: ER 1164-81.

Clark Spring (No. 11)	Yes: ER 1159-63.	Yes: ER1072-75, 1077-80.	Yes: ER1076, 1137, 1170.	Yes: ER1151-55.	Yes: ER888-89, 898, 1025-29, 1072-75, 1077-80, 1156-58.	Yes: ER1164-81.
Brearley Spring (No. 12)	Yes: ER1159-63.	Yes: ER1072-75, 1077-80.	Yes: ER1076, 1137.	TBD	Yes: ER888-89, 1025-29, 1077-80, 1156-58.	Yes: ER1164-81.
Carr Spring (a/k/a Head Spring) (No. 13)	Yes: ER988-89, 996, 999, 1012-13, 1159-63.	Yes: ER1081-85, 1092-95.	Yes: ER1086, 1137, 1169.	TBD	Yes: ER884, 888-89, 1025-29, 1081-85, 1092-95, 1156-58.	Yes: ER1164-81.
Cabin Spring (No. 14)	Yes: ER988-89, 996, 999, 1012-13, 1159-63.	Yes: ER1087-90.	Yes: ER1091, 1137.	TBD	Yes: ER884, 888-89, 1025-29, 1087-1090, 1092-95, 1156-58.	Yes: ER1164-81.
Cabin Auxiliary (No. 15)	Yes: ER988-89, 996, 999, 1012-13, 1159-63.	Yes: ER1087-90, 1092-95.	Yes: ER1091, 1137.	TBD	Yes: ER884, 888-89, 1025-29, 1087-1090, 1156-58.	Yes: ER1164-81.
Rock Spring (No. 16)	Yes: ER988-89, 996, 999,	Yes: ER1096-1100, 1102-	Yes: ER1101, 1137, 1168.	TBD	Yes: ER884, 888-89, 904, 1025-29, 1096-1100, 1102-06,	Yes: ER1164-81.

	1012-13, 1159-63.	06.			1156-58.	
Rock Auxiliary (No. 17)	Yes: ER988-89, 996, 999, 1012-13, 1159-63.	Yes: ER 1096-1100, 1102-06.	Yes: ER1101, 1137, 1168.	TBD	Yes: ER884, 888-89, 904, 1025-29, 1096-1100, 1102-06, 1156-58.	Yes: ER1164-81.
Smith Spring (No. 18)	Yes: ER988-89, 996, 999, 1012-13, 1159-63.	Yes: ER1107-10.	Yes: ER1111, 1137.	TBD	Yes: ER884, 888-89, 904, 1025-29, 1107-10, 1156-58.	Yes: ER1164-81.
Porter Spring (No. 19)	Yes: ER988-89, 996, 999, 1012-13, 1159-63.	Yes: ER1112-15.	Yes: ER1116, 1137.	TBD	Yes: ER884, 888-89, 1025-29, 1156-58.	Yes: ER1164-81.
O'Brien Spring (No. 20)	Yes: ER988-89, 996, 999, 1012-13, 1159-63.	Yes: ER1117-20.	Yes: ER1121, 1137.	TBD	Yes: ER884, 888-89, 1025-29, 1117-20, 1156-58.	Yes: ER1164-81.
Storrs Spring (No. 21)	Yes: ER988-89, 996,	Yes: ER1122-25.	Yes: ER1126, 1137.	TBD	Yes: ER884, 888-89, 1025-29, 1122-25,	Yes: ER1164-81.

	999, 1012-13, 1159-63.				1156-58.	
Quartz Spring (No. 22)	Yes: ER988-89, 996, 999, 1004-05, 1012-13, 1159-63.	Yes: ER1127-30.	Yes: ER1131.	TBD	Yes: ER1025-29, 1156-58.	Yes: ER1164-81.
Hoagland Spring (No. 23)	Yes: ER 1159-63.	Yes: ER1132-36.	TBD	TBD	Yes: ER1156-58.	Yes: ER1164-81.
Gardner Spring (No. 24)	Yes: ER988-89, 996, 999, 1004-05, 1012-13, 1159-63.	Yes: ER1138-41.	Yes: ER1172.	TBD	Yes: ER884, 888-89, 893, 898, 1156-58, 1172.	Yes: ER1164-81.

Moreover, the different treatment accorded Tombstone today is not explained by any change in the exercise of its vested rights in the Huachuca Mountains. Motorized and mechanized vehicles and equipment, both heavy and light, have *always* been utilized by Tombstone to access, repair, maintain and construct water structures, both before and after the passage of the Arizona

Wilderness Act of 1984. ER752(¶79), 884(¶¶3-6), 888(¶¶4-7), 889(¶¶8-9), 893(¶¶3-6), 898(¶¶4-7), 899-900(¶¶14-15), 904-06(¶¶3-7). Tombstone has *always* constructed and reconstructed permanent water structures destroyed by periodic flood and fire events. *Id*. Substantial ground displacement within the scope of its land use and right of way easements is and *always has been* absolutely necessary simply as a matter of ordinary maintenance. *Id*. Indeed, Tombstone's water system rights expressly grant the City the right to excavate, make cuts in the land, and to construct and maintain flumes, ditches, pipelines, canals, reservoirs and dams. ER847-75(¶¶9-41).

SUMMARY OF ARGUMENT

The lower court abused its discretion because it committed error as a matter of law in applying the doctrine of sovereign immunity to bar Tombstone's preliminary injunctive relief under the Quiet Title Act. Simply put, the doctrine of sovereign immunity does not apply to prospective injunctive relief against federal officers for unconstitutional conduct. Correspondingly, Tombstone's timely-filed preliminary injunction motion against the individual Defendants is not barred by any sovereign immunity enjoyed by the United States under the Quiet Title Act.

The lower court abused its discretion because it violated Fed. R. Civ. P. 52(b) in issuing a conclusory ruling that is incapable of meaningful judicial review on the elements of irreparable harm and the balance of public interests, harms and

equities. Moreover, the elements of irreparable harm and the balance of public interests, harms, and equities weigh overwhelmingly in favor of Tombstone's requested relief. Tombstone has shown irreparable harm because Defendants have impaired its sovereign interests, threatened public health and safety, and impaired its property interests. Tombstone's requested injunctive relief is favored by the balance of public interests, harms, and equities because there is no competent evidence of any environmental harm from its proposed work that could outweigh the City's "paramount" public health and safety interest. Likewise, the public interests actually served by federal law favor Tombstone's police power exercise of its 1866 Mining Act rights.

Finally, the lower court abused its discretion as a matter of law in ruling Tombstone's Tenth Amendment claim did not raise serious questions going to the merits. U.S. Const. amend. X. The court was mistaken to rule the Property Clause gives the federal government limitless power to violate the principle of state sovereignty. U.S. Const. art. IV, Sec. 3, Cl. 2. The court was wrong to regard the Tenth Amendment as a meaningless tautology. Instead, the lower court should have recognized that Defendants' conduct violates the Tenth Amendment because it threatens Tombstone's continued existence as a political subdivision of the state, commandeers Tombstone's essential municipal property, and regulates Tombstone as a political subdivision of the State of Arizona in such a way as to violate the

principle of state sovereignty.

ARGUMENT

Defendants are commandeering Tombstone's municipal water system simply to make the town knuckle under. In the process, they are risking human life, property, and Tombstone's continued existence as a viable political subdivision of the State. The Tenth Amendment protects Tombstone from such abuse. U.S. Const. amend. X. For this reason, the lower court's denial of Tombstone's preliminary injunction motion should be reversed. Moreover, an injunction should be issued to bar the individual Defendants from interfering with the town's efforts to freely and fully restore its Huachuca Mountain water system.

I. Standard of Review

The refusal to issue a preliminary injunction should be reversed on appeal when the lower court abuses its discretion. *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 501-504 (9th Cir. 1980). A lower court abuses its discretion in refusing an injunction when its decision is premised on errors of law. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 405 (1990); *Sports Form, Inc. v. United Press Int'l, Inc*., 686 F.2d 750, 752-53 (9th Cir.1982). A lower court also abuses its discretion when it renders a conclusory decision that is incapable of meaningful appellate review. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997); *Norris v. City & County of San Francisco*, 900 F.2d 1326, 1329-32 (9th Cir. 1990); *Irish*

v. United States, 225 F.2d 3, 8 (9th Cir. 1955); *see also N.L.R.B. v. United Paperworkers Int'l Union*, AFL-CIO, CLC, 965 F.2d 1401, 1410 (6th Cir. 1992); *Barnes v. Gulf Oil Corp*., 824 F.2d 300, 306 (4th Cir. 1987).

As discussed below, the lower court abused its discretion in both of these respects when it refused to grant Tombstone's second preliminary injunction motion. All essential findings and conclusions underpinning the lower court's decision are overbroad, conclusory, clearly erroneous as a matter of fact and law, and simply incapable of meaningful judicial review. These errors reflect the fact that the lower court structured proceedings on Tombstone's second preliminary injunction motion to virtually guarantee the court would be misled by Defendants' mistaken arguments.

Despite the fact that Tombstone's second preliminary injunction motion was limited to new matters, which had not been previously briefed or argued, the lower court barred Tombstone from filing a supporting reply brief or advancing oral argument. ER1248:11-15, 25; 1249:1-2. Despite initially requesting proposed findings and conclusions of law from both parties, the district court then vacated its request and proceeded to rely exclusively upon this truncated briefing schedule. ER17-18. The lower court thus prevented the adversarial process from clarifying the law and the facts, predictably resulting in an abundance of reversible error.

Although remand would ordinarily be the appropriate remedy for the lower

court's abuse of discretion, Tombstone nevertheless requests that this Court issue the preliminary injunction sought in the lower court in lieu of remand.[1] Preliminary injunctions should be granted upon the weighing of four factors: (1) whether the

[1] Tombstone's Tenth Amendment claim is ripe for preliminary injunctive relief for at least four reasons. First of all, Defendants' actions are sufficiently final for judicial review because they have triggered the Quiet Title Act's statute of limitations thereby presently causing "legal consequences" to "flow" that prejudice Tombstone. *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1371-72 (2012). Second, requiring Tombstone to exhaust *any* administrative regulatory process imposed by Defendants under the Wilderness Act and its associated regulations is futile because Tombstone's Tenth Amendment challenge ripened the moment Defendants presumed to impede its rightful repair work during a declared State of Emergency. *State v. Bowsher*, 734 F. Supp. 525, 539 (D.D.C. 1990) *aff'd sub nom. State of Ariz. v. Bowsher*, 935 F.2d 332 (D.C. Cir. 1991). Third, the exhaustion of the administrative process enforced by Defendants is futile because the associated delay renders it inadequate to prevent irreparable harm. *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773 (1947); *Twp. of S. Fayette v. Allegheny County Hous. Auth*., 27 F. Supp. 2d 582, 594-95 (W.D. Pa. 1998) (citing *Bethlehem Steel Corp. v. E.P.A.*, 669 F.2d 903, 908) *aff'd sub nom. Twp. of S. Fayette v. Allegheny County Hous*., 185 F.3d 863 (3d Cir. 1999); *Am. Horse Prot. Ass'n, Inc. v. Frizzell*, 403 F. Supp. 1206, 1215 (D. Nev. 1975). Fourth, the exhaustion of the administrative process enforced by Defendants is futile because Defendants have predetermined that they will not allow Tombstone to freely and fully restore its Huachuca Mountain municipal water system. *Porter v. Board of Trustees of Manhattan Beach Unified School Dist.*, 307 F. 3d 1064, 1073-75 (9th Cir. 2002); *El Rescate Legal Serv. v. EOIR*, 959 F.2d 742, 747 (9th Cir.1992); *Wright v. Inman*, 923 F. Supp. 1295, 1299 (D. Nev. 1996). In particular, in view of the Forest Service's 1916 recognition that Tombstone's municipal water system rests upon water rights and pipeline rights of way protected by 1866 Mining Act (ER1157), Defendants are clearly predetermining the outcome of their administrative proceedings by claiming ignorance about the town's legal authority to restore its municipal water system. Finally, Defendants capriciously claim that administrative delay has been necessary for mandatory interagency consultations even though no such consultations are necessary if they simply yielded to Tombstone exercising its rights under the 1866 Mining Act. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1111 (9th Cir. 2005).

plaintiff is likely to succeed on the merits, (2) whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in his favor, and (4) whether an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a modified "sliding scale" approach to preliminary injunctions in which "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). As discussed below, there is no doubt each of the governing elements favor Tombstone's request for preliminary injunctive relief. Injunctive relief is warranted on appeal because the delay associated with remand will only increase the irreparable harm the town is currently suffering.

II. The Sovereign Immunity of the United States under the Quiet Title Act does not bar Tombstone's request for prospective preliminary injunctive relief against individual Defendants who are sued in their official capacity for unconstitutional conduct.

The clearest example of the lower court's abuse of discretion is its erroneously overbroad ruling that the doctrine of sovereign immunity entirely barred Tombstone's second preliminary injunction motion under the Quiet Title Act. ER6-9. Led astray by Defendants' mistaken arguments, the lower court disregarded the fact that Tombstone's motion encompassed prospective equitable

relief against the *individual Defendants* for *violating the Tenth Amendment*.

It is well-established that unconstitutional actions by federal officials are not those of the sovereign and, therefore, they are not protected by sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 692, 696-97, 702 (1949). Because there is no such sovereign immunity, allowing timely temporary injunctive relief against federal officers for *unconstitutional conduct* does not have the practical effect of evading any sovereign immunity enjoyed by the United States under the Quiet Title Act or otherwise.

The principal case cited by the lower court for the contrary proposition, namely, *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, only bars officer suits under the Quiet Title Act where allowing the suit to proceed would have the substantive effect of clouding United States' title after the statute of limitations specified in the Act has expired. 461 U.S. 273, 285 (1983). This narrow judicially-created expansion of sovereign immunity was designed to prevent parties from evading the Quiet Title Act's *statute of limitations* through late-filed officer suits. 28 U.S.C. § 2409a (2006). *Block* and its progeny have no applicability here because a *timely* request for *temporary* injunctive relief against federal officers cannot have the substantive effect of clouding United States' title *after the statute of limitations specified in the Quiet Title Act has expired.*

No case cited by the lower court (or Defendants) holds otherwise. Moreover,

this Court and others have been careful to emphasize that the Quiet Title Act does not provide the sole vehicle for equitably remedying independent wrongs by federal officers even when the scope of the remedy may affect federal property. *See, e.g.*, *Robinson v. United States*, 586 F.3d 683, 688 (9th Cir. 2009) (Quiet Title Act not invoked by wrongful conduct involving use of land where federal government only "vaguely" disputes title); *Donnelly v. United States*, 850 F.2d 1313, 1317-18 (9th Cir. 1988); *Lee v. United States*, 809 F.2d 1406, 1409 n.2 (9th Cir. 1987); *Patchak v. Salazar*, 632 F.3d 702, 711 (D.C. Cir. 2011); *Kansas v. United States*, 249 F.3d 1213, 1225 (10th Cir. 2001). Taken together, there is no legal basis for applying the doctrine of sovereign immunity under the Quiet Title Act to bar Tombstone's preliminary injunction motion as to the individual Defendants for unconstitutional conduct. 28 U.S.C. § 2409a (2006). Accordingly, the lower court abused its discretion in entirely refusing Tombstone's requested injunctive relief on the basis of this clear legal error. *Cooter & Gell*, 496 U.S. at 405; *Sports Form*, Inc., 686 F.2d at 752-53.

III. The lower court abused its discretion in rendering a conclusory decision on the issues of irreparable harm and the balance of public interests, harms and equities that prevents meaningful appellate review.

Fed. R. Civ. P. 52(b) required the lower court to "find the facts specially and state its conclusions of law separately" in refusing Tombstone's request for preliminary injunctive relief. Nevertheless, the lower court offered only a series of

unsupported conclusions in support of its ruling that Tombstone failed to demonstrate irreparable harm or a favorable balance of public interests, harms and equities. ER15:12-28. As a result, there is no way to know what evidence or law, if any, underpins the lower court's decision—much less why the lower court rejected the evidence and legal argument advanced by Tombstone on those issues. This is despite the fact that the lower court had the benefit of both parties' detailed Statements of Fact and initially ordered the parties to draft proposed findings of fact and conclusions of law, later vacating that order. ER17-18. The lower court appears to have deliberately disregarded Rule 52(b).

The lower court's conclusory determination of three out of the four legal elements governing Tombstone's requested injunctive relief is an abuse of discretion because it violates Rule 52(b) and thereby prevents meaningful appellate review. *Monterey Mech. Co.*, 125 F.3d at 715; *Norris*, 900 F.2d at 1329-32; *Irish*, 225 F.2d at 8; *see also United Paperworkers Int'l Union*, 965 F.2d at 1410; *Barnes*, 824 F.2d at 306. This abuse of discretion warrants reversal of the lower court's decision because it taints the determination of weightiest elements of the test for issuing preliminary injunctive relief; moreover, as discussed below, there is no question each of those elements favor Tombstone.

A. Tombstone is suffering irreparable harm because Defendants have impaired Tombstone's sovereign interests as a political subdivision of the State of Arizona.

The lower court's decision completely ignored the rule of law that irreparable injury includes impairment of sovereign interests without notice or opportunity to be heard. *Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001). It is well-established that states and their political subdivisions have concurrent police power jurisdiction over federal lands within their boundaries. *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976). Moreover, both Tombstone and Arizona Governor Jan Brewer clothed the repair and restoration of the town's Huachuca Mountain water system in more than state and federal property law. Both declared a State of Emergency to authorize the repairs. ER842-43. By declaring a State of Emergency with specific regard to Tombstone, Governor Brewer exercised "all police power vested in the state by the constitution and laws of this state" to alleviate the peril facing Tombstone from the loss of its municipal water supply. Ariz. Rev. Stat. §§ 26-301(15), 26-303(E). In other words, all police powers of the State of Arizona, including those wielded by Tombstone, were marshaled to reestablish the Town's Huachuca Mountain water system within the scope of their concurrent police power jurisdiction over the affected lands.

In response, Defendants impeded and undermined this effort by effectively suspending or revoking the Forest Service's express 1916 recognition of Tombstone's water system rights and concurrent determination that permitting was unnecessary to use and enjoy those rights. ER1157-58. Moreover, they have done

so without making appropriate administrative findings or giving Tombstone a hearing as required by 36 CFR 251.60(a) and (f) (citing 36 CFR 251.54(g)(3)(ii)). Defendants' interference with Tombstone's police power mandate to repair its water system has also forced the Town to rely primarily on groundwater sources, in contravention of the public policy set out in Ariz. Rev. Stat. §§ 45-401, *et seq*. ER800(¶¶10-12). Taken together, Defendants have unquestionably caused irreparable harm by impairing the sovereign interests of the State of Arizona and Tombstone as a political subdivision of the State without the notice and opportunity to be heard required by their own administrative procedures. *Kansas*, 249 F.3d at 1228. By erroneously ignoring this point of law in rejecting Tombstone's claim of irreparable harm from Defendants' conduct, the lower court abused its discretion. *Cooter & Gell*, 496 U.S. at 405; *Sports Form*, Inc., 686 F.2d at 752-53; *cf. Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) ("[a]n alleged constitutional infringement will often alone constitute irreparable harm").

B. Tombstone is suffering irreparable harm because Defendants are threatening public health and safety.

The lower court did not dispute the rule of law that irreparable harm includes threats to public health and safety. *See, e.g.*, *Taverns for Tots, Inc. v. City of Toledo*, 307 F. Supp. 2d 933, 945 (N.D. Ohio 2004); *United States v. Midway Heights County Water Dist.*, 695 F. Supp. 1072, 1075 (E.D. Cal. 1988). Instead,

the lower court simply rejected Tombstone's claim that Defendants' commandeering of its Huachuca Mountain water system threatened irreparable harm as "overstated and speculative." ER15:21. It is impossible to know the precise evidentiary basis of this declaration because no special findings of fact support it. The lower court's declaration is accompanied only by conclusory assertions that (a)Tombstone did not establish the "location" or "flow" of its 25 springs and related infrastructure at the "time of the Monument fire," (b) "water from the Huachuca Mountains has been substantially restored," and (c) Tombstone has "access to sufficient and safe water between its wells and the Huachuca water." ER15:13-21. All of these assertions are overstated, clearly erroneous, and non-dispositive, revealing the lower court's decision as an abuse of discretion.

First of all, looking no further than the lower court's own decision, there is no question that Tombstone established the location of at least *six* out of twenty-five springs and their associated infrastructure. This is because the springs and related infrastructure Tombstone owns *includes* the six springs and infrastructure surveyed in connection with its 1962 special use permit, which the lower court referenced in its own decision. *Compare* ER10:24, 1165-81 *with* ER848-50, 854, 861-64, 867-68, 875 (¶¶11-12, 20, 27, 29, 32, 33, 41). Moreover, regardless of whether Tombstone's springs and related infrastructure could be located on the ground "at the time of the Monument fire," there is abundant evidence of the water

system's location in the legal descriptions contained in numerous surveys, maps, court orders and notices of appropriation. ER848-80(¶¶11-51). The lower court's overstated determination that Tombstone had not established the location of its Huachuca Mountain water system is thus clearly erroneous.

Secondly, although Tombstone has not individually metered the water flow generated by each of its twenty-five spring sites, the lack of such evidence is not dispositive. Both parties agree that historical records show the system has seasonably delivered up to 400 gallons per minute. ER266-67(¶15), 297, 750(¶72:16-19), 801(¶14). The system is now only delivering approximately 100 gallons per minute drawing upon only *three* of the twenty-five springs Tombstone owns. ER800(¶11). Even without spring-specific flow data "at the time of the Monument fire," it defies commonsense to rule that Tombstone's Huachuca Mountain water supply has been "substantially restored" when Defendants have indisputably limited Tombstone to drawing water from only *12 percent* of its available Huachuca Mountain water sources and the resulting water flow is only *twenty-five percent* of its maximum historical flow.

But even if restoring Tombstone's entire 25 spring water system somehow produced no more water than is currently produced by its three functioning springs, Tombstone is and has been facing exactly the same water shortage that Defendants *themselves* described as a threat to public health and safety in their pre-litigation

administrative findings. This is because the temporary repairs to one of the three currently functioning springs, namely Gardner Spring No. 24, will soon be washed away in the impending monsoons. ER956(¶58), 958(¶64), 775(¶9), 786, 961(¶72), 1346:16-21. This event will place Tombstone in exactly the same position it was in December 2011, when Defendants authorized temporary repairs to that spring. At that time, Defendants rendered the following administrative finding:

> Water from the springs is needed for safe drinking water for residents as well as visitors to this tourism based economy, as well as for emergency fire suppression . . . . Health and safety risks exist to the City of Tombstone if repairs are not completed expeditiously.

ER1215, 1270:13-21; *see also* ER1192, 1196-97, 1233.

Even if there were no other evidence in the record, this undisputed administrative finding establishes that the threat to public health and safety faced by Tombstone is real and substantial—not "overstated and speculative," as asserted by the lower court. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1102 (9th Cir. 2011); *Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 393-95 (9th Cir. 1994). There is no question that Tombstone is at imminent risk of a dangerous water shortage due to Defendants' refusal to allow the town to freely and fully restore its water system. The lower court's finding that Tombstone's Huachuca water supply has been "substantially restored" is thus clearly erroneous.

Likewise, there is no factual basis for the lower court's conclusion that Tombstone has "access to sufficient and safe water between its wells and the

Huachuca water." ER15:18-20. Tombstone does *not* have access to "sufficient and safe water" from "wells." All three of Tombstone's wells are contaminated with arsenic. ER798(¶¶5-7), 799(¶8-9), 800. The water from two out of Tombstone's three wells is poisoned with unsafe levels of arsenic. *Id*. Only *one* well is currently producing drinkable water, which is still contaminated with arsenic, but at levels deemed safe enough to drink. ER799(¶8). But all available safe well water is entirely consumed during peak demand, leaving the town dependent upon a five day water reserve and its partially restored Huachuca Mountain water system for fire suppression. ER800(¶10), 800-01(¶12).

Under these circumstances, according to Tombstone's Water Operator Jack Wright, public health and safety is threatened because the town's one remaining well could fail or become arsenic poisoned at any time. ER800(¶¶11-12), 801(¶¶13-14). If that well fails, there will not be enough water flow from the Huachuca Mountain water system to cover peak consumption demand, much less fire suppression. *Id*. Correspondingly, Tombstone's Fire Chief Jesse Grassman states that Tombstone is a "disaster waiting to happen" because there is not enough water to fight a major fire in the city's historic downtown even if a modern water distribution system were installed and all sources of well water were combined with the current amount of water flowing from the Huachuca Mountain water system. ER833-34(¶¶8-9).

Taken together, Defendants' commandeering of Tombstone's water system indisputably poses a greater and more certain threat to public health and safety than secondhand smoke in a bar. *See Taverns for Tots, Inc.*, 307 F. Supp. 2d at 945. A reasonable level of public health and safety is being denied every day that Defendants force the town to rely upon only *three* mountain spring water catchments—one of which is soon to be washed away—when Tombstone is entitled to *twenty-five*. Tombstone obviously needs to permanently restore every water source it owns as soon as possible for adequate fire suppression capacity and potable water. Doing anything less presents a greater risk "than a reasonable man would incur." 5 J. Pomeroy, *A Treatise on Equity Jurisprudence and Equitable Remedies*, § 1937 (§ 523), p. 4398 (2d ed.1919). For this reason, the lower court abused its discretion in failing to find that preliminary injunctive relief was necessary to prevent irreparable harm. *Id.*

C. Tombstone is suffering irreparable harm because Defendants are impairing and threatening the loss of rights or interests in the town's Huachuca Mountain water system.

In reaching its ruling against Tombstone on the element of irreparable harm, the lower court sweepingly declared that "Plaintiff failed to properly establish where the numerous springs were located and the associated infrastructure that was in place at the time of the Monument fire." ER15:13-15. It is unclear whether this conclusory determination was meant to address the rule of law that irreparable

harm includes impairment or threatened loss of rights or interests in real property. *Park Vill. Apt. Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1119 (9th Cir. 2011). But if so, it is not dispositive of Tombstone's claim of irreparable harm.

Tombstone's ownership interest in its municipal water system is not legally contingent on establishing where that system was located "at the time of the Monument fire." Tombstone owns water rights and rights of way relating to 25 springs, related infrastructure improvements, and pipelines that were established *long ago* pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 ("1866 Mining Act"). More specifically, Tombstone owns pipeline rights of way for two main pipeline branches and also for smaller pipeline offshoots to each of its 25 springs. ER875-78(¶¶42-45), 1142-48, 1157. Additionally, as was customary in the Arizona Territory, Tombstone has the right to possess parcels surrounding each of its 25 springs to construct and maintain small dams called "catchments," reservoirs, diversionary berms called "flumes," and other similar structures.[2] ER847-80(¶¶9-51).

As shown in the chart above, Tombstone's water system rights are

[2] Possession of parcels is customarily appurtenant to Tombstone's water rights because the water sources change their locations from time to time within a certain range. ER1293:3-10. The 1866 Mining Act protects these possessory easements and rights of way because the scope and measure of rights appurtenant to water rights are determined by local custom or law. *California v. United States*, 438 U.S. 645, 656-57 (1978); *Hage v. United States*, 51 Fed. Cl. 570, 580-84 (Fed. Cl. 2002); *Store Safe Redlands Assocs. v. United States*, 35 Fed. Cl. 726, 737 (Fed. Cl. 1996).

abundantly evidenced by title documents, notices of appropriation, surveys, sworn testimony, and even state court judgments. ER847-80(¶¶9-51). Unrebutted expert testimony from Tombstone's historian and archivist establishes that they were claimed and perfected in accordance with local custom during the 1880s; and also in full compliance with territorial law between 1893 and 1913, which allowed for the acquisition of water rights on federal lands by "locating" a water source through posting a notice of appropriation at the point of diversion, recordation of the notice, and subsequent development and beneficial use. *Compare id. with* Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86 (April 13, 1893); Ariz. Terr. Rev. Stat. §§ 73-4168 through 4170, 73-4175 (1901).

In fact, sworn answers to written interrogatories from 1906 specifically describe the location, development and use of 21 of the 25 springs by Tombstone's predecessor in interest. ER1025-28. Later, in 1915, an Arizona state court adjudicated the entire water system right of way in Miller Canyon "extending from the spring and tap, highest up said canyon, to the lowest tap and opening into the main pipe line" in favor of Tombstone's predecessor in interest, along with the right to make beneficial use of "all" of the water from McCoy Group Spring Nos. 2, 3 and 4. ER1147-48. Another state court judgment in 1917, arising from a jury trial, enforced similar rights with respect to Clark Spring No. 11. ER1154-55. Because all of its water rights were similarly claimed and perfected, these court

decisions confirm the unrebutted expert testimony of Tombstone's archivist and historian that its water system rights were established in accordance with local law and custom. ER851-53(¶¶17-19), 877(¶44).

Taken together, the record evidence unequivocally shows that both Tombstone and Tombstone's predecessor in interest appropriated the beneficial use of water from twenty-five springs, as well as maintained and continuously used catchments, flumes, dams, reservoirs and pipelines to those springs across federal lands in Miller and Carr Canyons in accordance with local custom and law. Nothing more is required for Tombstone's resulting possessory and infrastructure rights of way under local custom and law to be protected under the 1866 Mining Act.[3] *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917); *Jennison v. Kirk*, 98 U.S. 453, 456, 460 (1878). There is no question that

[3] The lower court irrelevantly emphasized the lack of filed statements of claim for some of Tombstone's 1866 Mining Act water rights under Arizona's state water laws; further suggesting that Tombstone's rights might fall within the scope of the water adjudication process authorized by 43 U.S.C. § 666, or pending state water adjudication proceedings. ER13:18-24, 14, 15:1-9. However, as shown above, Tombstone's water rights under the 1866 Mining Act vested and some were confirmed by court order long before Arizona's state water laws were enacted. Accordingly, they are either exempt from or protected from retroactive divestment under those laws. *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195 (Ariz. Sup. Ct. 1999); *see also* Ariz. Rev. Stat. § 45-171; Ariz. Rev. Stat. § 45-182(B)(3). Furthermore, the purpose of any water adjudication proceeding is to determine "relative rights" to the beneficial use of water, not to determine the nature, measure and scope of appurtenant possessory easements and rights of way. *Store Safe Redlands Assocs*., 35 Fed. Cl. at 733-34. Accordingly, the possessory interests appurtenant to Tombstone's water rights are not within the scope of any pending or potential water adjudication proceeding under Arizona's water laws. *Id*.

Tombstone's water system rights are protected interests in real property under state and federal law.[4] *California v. United States*, 438 U.S. 645, 656-57, 657 n.11 (1978); *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406 (Ct. App. 2008).

Not surprisingly, Defendants have never squarely denied the vesting of Tombstone's water system rights. They cannot in good faith. In 1916, the Forest Service wrote a letter to Tombstone's predecessor in interest stating unequivocally: "the Forest Service has recognized the existence of a right of way for your reservoir and pipelines across the Forest under sections 2339 and 2340 U.S. Revised Statutes [the 1866 Mining Act]." ER1157. In 1947, the Forest Service itself reviewed and approved the quit claim deed transfer of those rights to Tombstone, even issuing a corresponding special use permit in 1948.[5] ER187-88,

[4] Although the 1866 Mining Act was repealed in 1976 by the Federal Land Policy and Management Act, rights previously established thereunder were expressly guaranteed by 43 U.S.C. § 1761(c)(2)(A). Moreover, prior to the enactment of FLPMA, the Supreme Court held that the permitting processes and regulations established by federal laws enacted after 1866 did not impliedly repeal or otherwise cloud rights guaranteed by the Mining Act. *Utah Power & Light Co.*, 243 U.S. 389.

[5] Contrary to the lower court's determinations, the 1962 special use permit did not restrict Tombstone's water system to a pipeline serving only six springs and five parcels. The 1962 special use permit was issued solely to authorize the construction of permanent fencing and other structures that were not covered by Tombstone's 1866 Mining Act rights around the identified springs and parcels. The 1962 special use permit did not restrict, address or encompass any other spring sites except to place dimensions on the servicing pipeline right of way and generally recognize Tombstone's right to maintain its municipal water supply. As recognized by the Forest Service in 1916, permitting is entirely superfluous to the enjoyment of Tombstone's 1866 Mining Act rights. ER1158.

690(¶¶81-82). And as recently as November and December 2011, Defendants admitted in their on administrative paperwork that Tombstone's water system was in place since the 1880s. ER1187, 1202.

Rather than squarely denying the vesting of Tombstone's water system rights, Defendants, like the lower court, have merely objected to them on the grounds that the related springs and associated infrastructure cannot be "located" on the ground. When springs, infrastructure and rights of way are buried by boulders the size of Volkswagons and twelve feet of mud, they may have a point; perhaps the only way to locate the springs is to allow Tombstone to use the heavy equipment it needs to restore its water system. But nothing in the record establishes that Tombstone lost its water system rights through abandonment or otherwise. ER1432:23-25, 1435:1-13. In fact, unrebutted testimony—and Defendants' own administrative findings—confirm Tombstone's continued use and maintenance of all of the foregoing springs, pipelines, catchments and flumes prior to the 1976 repeal of the 1866 Mining Act. ER 884(¶¶3-6), 888 (¶¶4-8), 1187-88, 1199, 1202-03.

Nevertheless, because of Defendants' actions in questioning Tombstone's 1866 Mining Act rights while commandeering the town's water system, the statute of limitations for Tombstone's quiet title cause of action has begun to tick. 28 U.S.C. § 2409a*; Michel v. United States, Dep't of the Interior*, 65 F.3d 130, 132

(9th Cir.1995). Moreover, Defendants are purporting to regulate the use of Tombstone's easements in such a way as to frustrate the purpose for which the easement was granted. *United States v. Estate of Hage*, 2011 U.S. Dist. LEXIS 53019 * 28 (D. Nev. 2011) (citing *St. James Vill., Inc. v. Cunningham*, 210 P.3d 190, 192, 194 (Nev. 2009); *City of Baker City v. United States*, 2011 U.S. Dist. LEXIS 105915 * 15 (D. Or. Sept. 19, 2011). Consequently, Defendants' undisputed refusal to allow Tombstone to freely and fully restore its Huachuca Mountain water system is causing irreparable harm by impairing or threatening the loss of rights or interests in real property. *Park Vill. Apt. Tenants Ass'n*, 636 F.3d at 1119. Any conclusion to the contrary by the lower court (if any) is erroneous as a matter of law and should be reversed as an abuse of discretion. *Cooter & Gell*, 496 U.S. at 405; *Sports Form*, Inc., 686 F.2d at 752-53.

D. The balance of public interests, harms and equities favors Tombstone's requested relief because of the undisputed national policy favoring deference to state sovereignty in matters related to water development and ownership on federal lands.

With respect to the balance of public interests, harms, and equities, the lower court did not dispute the rule of law that public health and safety is a "paramount public interest." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981). In fact, the lower court did not address any relevant legal contention raised by Tombstone. Nor did it expressly consider or balance any public interest, harm or equity. Instead, the lower court simply decreed as follows: "Plaintiff

cutting a path through a federally protected wilderness area with excavators and other construction equipment would have a significant impact; the public interest and equities weigh in favor of Defendants who are attempting to conserve and protect important wilderness areas." ER15:24-28. But this conclusory ruling is clearly erroneous because Tombstone is not seeking to "cut a path" through a Wilderness Area. Tombstone is proposing to restore its 130 year old water system *to its original specifications* using methods that will have a minimal environmental footprint because the impending monsoons will wash any footprint away. ER768-69(¶4), 776(¶12), 909-11, 1443:16-25, 1444:1-4.

More specifically, Tombstone is seeking to fully repair and restore: (1) the pipelines depicted in the surveyed rights of way shown at ER548, 1137, 1142-46; and (2) the water structures depicted in the surveyed parcels and rights of way shown at ER1042, 1047, 1056, 1061, 1066, 1071, 1076, 1086, 1091, 1101, 1111, 1116, 1121, 1126, 1131, 1177-81 (with coordinates and dimensions plainly set out in the notices of appropriation shown at ER1040,1045-46, 1050-51, 1054-59, 1064, 1069-70, 1074-75, 1079-80, 1084-85, 1089-90, 1094-95, 1099, 1105-06, 1109-10, 1114, 1119, 1124, 1129, 1135, 1140-41). The work involves ground displacement by equipment powerful enough to move huge boulders and deep mud; i.e., probing the ground for buried springs, building simple dam-like structures called "catchments" at the springs, building up mounds of dirt around the springs called

"flumes" to keep workers safe from flash floods in the coming monsoons (with the incidental benefit of protecting the completed repair work), and burying pipes to those catchments.

There is no competent record evidence of any significant environmental harm from Tombstone's proposed work—much less any harm to the environment that could possibly outweigh Tombstone's "paramount" public health and safety interest. In fact, completing repairs to Tombstone's municipal water system requires replicating at similarly situated locations what Defendants *already approved* during November 2011 with respect to one of Tombstone's water sources, namely Miller Spring No. 1. *Compare* ER775-76(¶¶8-10), 788-90 *with* 1193, 1197, 1332:9-23. Because the work is essentially the same as what Defendants previously approved, presumably Defendants should agree it will not entail significant environmental harm. For this reason, the lower court's failure to expressly weigh the public interests, harms, and equities at issue in this case is a clear abuse of discretion warranting reversal. *Monterey Mech. Co.*, 125 F.3d at 715; *Aleknagik Natives Ltd*., 648 F.2d at 502-04.

Furthermore, the lower court's conclusory ruling begs the question of whether the public interests served by the federal laws at issue in this case actually favor protecting environmental interests over Tombstone's police power exercise of its 1866 Mining Act rights during a declared State of Emergency. Although this

Court has ruled that environmental harms are entitled to great weight when considering injunctive relief that implicates the use of federal lands, no decision in this circuit has ever grappled with the relative weight of environmental harm in a context where public health and safety, state sovereignty, and water rights and development interests are held in the balance. Unlike the usual dispute between private parties and the federal government over environmental and development interests, there is an undisputed national policy requiring deference to state sovereignty with respect to water ownership and development. *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978). Moreover, all of the federal laws at issue in this case contain savings clauses carving Tombstone's previously established water system and related rights out of the regulatory regimes they create. Act of Nov. 6, 1906 (1906) (Proclamation of President Theodore Roosevelt); Wilderness Act of 1964, 16 U.S.C. §§ 1131(c), 1134(a), (b); Federal Land and Management Policy Act of 1976, 43 U.S.C. § 1761(c)(2)(A); Arizona Wilderness Act of 1984, 98 Stat. 1485, Pub. L. No. 98-406, §101(a)(14)(b). Even the Forest Service's own guidelines yield to Tombstone's customary use and enjoyment of its water system. 2300 Forest Service Manual, Ch. 20, § 2323.43d, available at http://www.fs.fed.us/im/directives/fsm/2300/2320.doc.

In view of the foregoing national policy and savings clauses protecting Tombstone's water system, the federal laws at issue in this case must be construed

to accommodate, rather than somehow to conflict with and impliedly preempt, Tombstone's police power exercise of its 1866 Mining Act rights as a subdivision of the State of Arizona. In *Chamber of Commerce of the United States v. Whiting*, for example, the Supreme Court ruled that state licensing laws were not impliedly preempted by the federal government's occupation of the field of immigration law where a savings clause specifically preserved the state's sovereign power to enact such laws. 131 S.Ct. 1968, 1987 (2011). In so ruling, the Court observed that the presence of the savings clause stood against the claim that there was a conflict between the purposes of federal immigration law and the state licensing regime. Similarly, the consistent presence of savings clauses in every federal law or guideline at issue here, which serve to protect Tombstone's 1866 Mining Act rights, shows that federal law must not be construed as intended to override and displace the police power exercise of such rights. This conclusion is further buttressed by the holding of *Wyeth v. Levine*, in which the Court ruled that when federal law trenches upon the state's police power, federalism interests prohibit construing federal law to preempt state law unless Congress' intent is clear and unequivocal. 555 U.S. 555, 565 (2009).

Whiting and *Wyeth* thus stand against construing federal law to override the police power exercise of Tombstone's 1866 Mining Act rights during a State of Emergency. Rather, federal law must be construed to accommodate such exercise.

Correspondingly, the public interests actually served by federal law must be construed to favor such exercise, rather than to favor conflicting environmental interests. In other words, as a corollary of *Whiting* and *Wyeth*'s non-preemption doctrine, the public interests *actually* served by the federal laws at issue in this case favor Tombstone's police power exercise of its 1866 Mining Act rights, not any conflicting environmental interest. For this reason, the balance of public interests, harms and equities favors granting preliminary injunctive relief; and the lower court's contrary decision is a clear abuse of discretion as a matter of law. *Cooter & Gell*, 496 U.S. at 405; *Sports Form*, Inc., 686 F.2d at 752-53; *see also Dreyfus*, 663 F.3d at 1102; *Native Vill. of Quinhagak*, 35 F.3d at 393-95.

IV. The lower court abused its discretion in erroneously ruling as a matter of law that Tombstone did not have a likelihood of success of showing the Tenth Amendment bars Defendants from commandeering municipal property that is essential to Tombstone's existence and to protecting public health and safety.

The lower court rejected Tombstone's Tenth Amendment claim on the basis that the federal government's regulatory power over federal lands under Property Clause is "without limitation," as expressed in *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997). ER13:8-11. The court also refused to depart from *Garcia*'s rejection of the three prong "traditional government functions" test of *National League of Cities*. ER13n.4. In essence, following *Garcia*, the lower court reasoned that limitless power was delegated to the federal government under the

Property Clause and therefore the Tenth Amendment reserves nothing to the states to limit that power. But more recent Supreme Court precedent stands against reducing the Tenth Amendment to such a meaningless tautology and has further rendered *Garcia* a "dead letter." Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 Harv. J.L. & Pub. Pol'y 947, 954 (2008); *see also* Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1283, 1299 (June 2000). For this reason, the lower court's ruling is an abuse of discretion because it is erroneous as a matter of law. *Cooter & Gell*, 496 U.S. at 405; *Sports Form*, Inc., 686 F.2d at 752-53. As discussed below, Tombstone's Tenth Amendment claim raises serious questions going to the merits.

A. Defendants' conduct violates the Tenth Amendment because it threatens Tombstone's continued existence as a political subdivision of the State of Arizona in violation of the principles articulated in *Bond* and *Alden*.

In *Bond v. United States*, the Supreme Court unanimously ruled: "[i]mpermissible interference with state sovereignty is not within the National Government's enumerated powers." 131 S. Ct. 2355, 2366 (2011). Given that the federal government only has enumerated powers, this ruling necessarily implies that even the Property Clause is limited by the principle of state sovereignty. Likewise, *Alden v. Maine*, 527 U.S. 706, 713-14 (1999), very clearly ruled that the background principles of the Constitution preclude construing any delegated

federal power as entailing the power to threaten the "States' continued existence."

Following *Bond* and *Alden*, the federal government's power under the Property Clause is not so vast as to authorize Defendants to threaten Tombstone's continued existence. Nevertheless, Defendants' commandeering of the town's water system does just that. Because Tombstone is a fire prone desert town with a history of close calls with disaster, Defendants are threatening Tombstone's existence as a viable political subdivision of the State of Arizona and the State's sovereign right to maintain the existence of its political subdivision. This threat undermines the Constitution's assumption of the "States' continued existence" and violates the principle of state sovereignty. *Alden*, 527 U.S. at 713-14. Defendants' conduct also violates the constitutional principles enforced in *Printz*, *New York*, and *National League of Cities*.

B. Defendants conduct violates the Tenth Amendment because it commandeers Tombstone's essential municipal property in violation of the first principle enforced in *New York* and *Printz*.

One of the clearest examples of impermissible interference with state sovereignty is federal commandeering of the organs or officials of state government. *New York*, 505 U.S. at 166. This ban on commandeering, however, is not a constitutional axiom. Rather, it is an implication of the first principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz*, 521 U.S. at 920 (quoting *New*

York). The district court should have applied this first principle tautologically to stop Defendants from interfering with Tombstone's water system restoration efforts.

By overriding a gubernatorial emergency proclamation and commandeering Tombstone's municipal water system, Defendants are literally regulating the State of Arizona through its political subdivision. They are not regulating individuals. Defendants' conduct is no different in principle than demanding Tombstone secure a federal permit to drive a fire truck or a squad car during a firestorm or a riot. From the perspective of state autonomy, there are no material differences between commandeering municipal officials and commandeering sovereign property without which the municipality cannot fulfill its traditional function of protecting public health and safety. Defendants are depriving the State of its structural autonomy and *its reason for being* just as assuredly as if they had directly commanded Tombstone's Mayor to use hand tools to repair the town's water infrastructure himself. For this reason, Defendants' regulatory commandeering of Tombstone's municipal water system violates the principle of state sovereignty enforced in *Printz*, 521 U.S.at 920, and *New York*. This conclusion is reinforced by application of the three prong "traditional government functions" test of *National League of Cities*, which the lower court should have applied notwithstanding *Garcia*.

C. Defendants' conduct violates the Tenth Amendment because it regulates Tombstone as a political subdivision of the State of Arizona in such a way as to violate the principle of state sovereignty under the three prong "traditional government functions" test of *National League of Cities*.

Echoing the holding of *National League of Cities*, the Supreme Court has clearly embraced the principle that the federal judiciary properly patrols the traditional boundaries between state sovereignty and federal power without deferring to Congress. *Brzonkala v. Virginia Polytechnic Inst. & State Univ*., 169 F.3d 820, 844-47 (4th Cir. 1999), *aff'd, Morrison*, 529 U.S. 598. As explained in *Alden*, the Supreme Court is now committed to enforcing the principle of state sovereignty that "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" 527 U.S. 706, 714 (1999) (citations omitted). This ruling and others indisputably echo the methodology, rationale and holding of *National League of Cities*, 505 U.S. at 852-54. *See e.g.*, *United States v. Lopez*, 514 U.S. 549, 552 (1995); *United States v. Morrison*, 529 U.S. 598, 611, 617-18 (2000). Such fully-engaged judicial review of federal incursions into the province of state sovereignty has been further buttressed by cases that have repeatedly applied heightened scrutiny to federal actions that have invoked the 14th Amendment's Enforcement Clause to override state sovereignty (where, if anything, the principle of state sovereignty is less secure

than here). *See, e.g.*, *Horne v. Flores*, 129 S.Ct. 2579, 2595-96 (2009); *City of Boerne v. Flores*, 521 U.S. 507, 527-36 (1997).

Taken together, the Supreme Court's modern federalism jurisprudence is utterly inconsistent with *Garcia*'s core holding that the defense of state sovereignty must be mounted from within the political process at the federal level—in Congress—not within the court system. 469 U.S. at 554. Consequently, it appears that the Court has by inescapable logical implication overruled *Garcia*, and thereby reinstated the three prong "traditional government functions" test of *National League of Cities* through *New York*'s citation to *Hodel*. *New York v. United States*, 505 U.S. 144, 160, 166 (1992) (citing *Hodel*, 452 U.S. at 288).

Of course, jurists have hotly debated whether lower courts should assume that the Supreme Court has overturned *Garcia sub silencio*. *See, e.g.*, *Petersburg Cellular P'ship v. Bd. Of Sup'rs of Nottoway County*, 205 F. 3d 688, 711, 717-19 (4th Cir. 2000). Still, jurists *do* recognize and refrain from applying implicitly obsolete precedent. *See, e.g.*, *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 127 (D.C. Cir. 1986). While caution is warranted, when an irreconcilable conflict arises between past and present Supreme Court precedent, as here, lower courts have no other choice but to follow the more recent case. The existence of just such an irreconcilable conflict between *Garcia* and all Supreme Court federalism jurisprudence since 1989 is confirmed by *Bond*, which for the first time confirmed

citizen standing to enforce the Tenth Amendment in court—something utterly inconceivable under *Garcia*.

In fact, despite *Garcia*, numerous courts continue to apply *National League of Cities*' three prong "traditional governmental functions" test. *See, e.g.*, *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996); *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011); *Delawder v. Platinum Fin. Servs. Corp*., 443 F. Supp. 2d 942, 951 (S.D. Ohio 2005); *Z.B. v. Ammonoosuc Cmty. Health Servs*., 2004 U.S. Dist. LEXIS 13058, 14-15 (D. Me. July 13, 2004); *Qwest Broadband Servs. v. City of Boulder*, 151 F. Supp. 2d 1236, 1245 (D. Colo. 2001). The lower court should have done the same because only the three prong test of *National League of Cities* harmonizes all of the Supreme Court's federalism jurisprudence since 1989. *Massachusetts v. Sebelius*, 698 F.Supp.2d 234, 252 n.154 (E.D. Mass. 2010) ("'the traditional government functions' analysis [is]. . . appropriate in light of more recent Supreme Court cases").

Applying the three prong test of *National League of Cities* leaves no doubt that Defendants' refusal to allow Tombstone to freely and fully repair its municipal water system violates the principle of state sovereignty. This is because such conduct: (1) regulates "states as states," (2) concerns attributes of state sovereignty,

and (3) impairs the state's ability to structure integral operations in areas of traditional governmental functions. *National League of Cities*, 426 U.S. at 852-54.

First of all, contrary to any claim that Defendants are only regulating federal lands, the Forest Service recognized that the federal government did not own Tombstone's water system or the underlying rights of way in 1916. ER1157. Secondly, in seeking to restore its water system, Tombstone is exercising the State's concurrent police power jurisdiction over federal lands under a declared State of Emergency. ER842-43. Thirdly, Tombstone's maintenance of a municipal water system to provide adequate potable water and fire suppression capability is at the core of the sovereign powers and traditional government functions reserved to a political subdivision of the State. *Brush v. Commissioner*, 300 U.S. 352, 370-73 (1937).

Defendants' conduct thus regulates Tombstone when it is acting in a purely sovereign capacity with respect to sovereign property that is essential to performing a traditional governmental function, and also within the scope of the town's concurrent sovereign jurisdiction. If words mean anything, such conduct (a) regulates "states as states," (b) concerns essential attributes of state sovereignty, and (c) impairs governmental functions traditionally assigned to the States; thus easily passing *National League of Cities*' test of unconstitutionality under the Tenth Amendment. U.S. Const. amend. X. For this reason, the lower court's

refusal to find a likelihood of success on the merits of Tombstone's Tenth Amendment claim is erroneous as a matter of law and should be reversed as an abuse of discretion.[6]

CONCLUSION

In *Bond*, 131 S. Ct. at 2366, the Supreme Court unanimously reiterated the Constitution's assumption that all federal powers are limited by the principle of state sovereignty. Indeed, the rule of law that the principle of state sovereignty limits even plenary powers is underscored by the fact that the federal government's treaty power was at issue in *Bond*. The lower court's contrary ruling that federal power under the Property Clause is "without limitation," if taken literally, is clearly mistaken as a matter of law under current Supreme Court precedent.

Indeed, as illustrated by Tombstone's plight, limitless federal power over federal land is an existential threat to state and local governments in States where more than forty percent of their jurisdiction consists of federal lands and essential

[6] Contrary to Defendants' claims below, *Reno v. Condon*, 528 U.S. 141 (2000), does not in any way preclude Tombstone's Tenth Amendment claim. *Reno* does not embrace *Garcia*'s core holding that the political process affords states their sole remedy for violations of the Tenth Amendment. *Reno* ruled that a federal law does not facially violate the Tenth Amendment when it applies to both private and public entities "acting purely as commercial sellers" and "suppliers to the market for motor vehicle information." *Reno*, 528 U.S. at 150 n.3, 151. This ruling has nothing to do with Tombstone's Tenth Amendment claim. Rather than mounting a facial attack on federal law, Tombstone is challenging Defendants' sustained misapplication of federal law as a violation of the Tenth Amendment because it undermines the town's ability to exist as a viable and autonomous political subdivision of the State of Arizona.

infrastructure unavoidably exists on those lands. It is respectfully submitted that state sovereignty would be illusory in most western states if Defendants were allowed to claim unlimited regulatory authority over federal lands to prevent state and local governments from quickly responding to natural disasters to protect public health and safety and preserve their own existence.

For this fundamental reason, Tombstone asks this Court to reverse the lower court's denial of its second preliminary injunction motion as an abuse of discretion. However, rather than remanding the case for further proceedings, because all of the elements applicable to considering such relief weigh overwhelmingly in favor of preliminary injunctive relief, it is respectfully requested that this Court preliminarily enjoin Defendants, TOM VILSAK, TOM TIDWELL, and CORBIN NEWMAN, and anyone acting at their direction, from in any way interfering with the Tombstone's use of the heavy equipment and vehicles identified at ER909-11 to repair and restore: (a) the pipelines depicted in the surveyed rights of way shown at ER548, 1137, 1142-46; and (b) the water structures depicted in the surveyed parcels and rights of way shown at ER1042, 1047, 1056, 1061, 1066, 1071, 1076, 1086, 1091, 1101, 1111, 1116, 1121, 1126, 1131, 1177-81 (with coordinates and dimensions plainly set out in the notices of appropriation shown at ER1040,1045-46, 1050-51, 1054-59, 1064, 1069-70, 1074-75, 1079-80, 1084-85, 1089-90, 1094-95, 1099, 1105-06, 1109-10, 1114, 1119, 1124, 1129, 1135, 1140-41); by (c)

probing the ground for buried springs; (d) building simple dam-like structures called "catchments" at the springs once located; (e) building up mounds of dirt around the springs called "flumes" to keep workers safe from flash floods in the coming Monsoons; and (f) burying pipes to those catchments. Alternatively, the Court should grant such relief as is just and equitable, including remand.

Respectfully Submitted,

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STATEMENT OF RELATED CASES

The above attorney certifies that he is not aware of any related cases as defined in 9th Cir. R. 28-2.6.

CERTIFICATE OF SERVICE

THE ATTACHED FILING HAS BEEN ELECTRONICALLY FILED AND SERVED BY ECF upon the person identified in the below Service List. Additionally, four copies of the Six Volumes of the Excerpts of Record, have been placed with the U.S. Postal Service, sufficient postage prepaid, for filing with the Clerk of the Ninth Circuit Court of Appeals. Finally, one copy of the foregoing Six

Volumes of the Excerpts of Record has been served upon the person identified in the below Service List via U.S. Mail, sufficient postage prepaid, on the 11th day of June, 2012, at or before 5:00 p.m.

s/Nicholas C. Dranias

SERVICE LIST
Attorney for Defendants, UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity as the Chief Forester of the USDA Forest Service); TOM TIDWELL (in his official capacity as Regional Forester for the Southwestern Region of the U.S. Forest Service); and CORBIN NEWMAN (in his official capacity as Regional Forester for the Southwestern Region of the U.S. Forest Service) David C. Shilton Appellate Section, Environment & Natural Resources Division, U.S. Dept. of Justice, P.O. Box 7415 Washington, D.C. 20044 Phone: (202) 514-5580 David.Shilton@usdoj.gov

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Attorney for Plaintiff

Date 6/11/2012

ADDENDUM

CHAP. CCLIII.—*An Act to grade East Capitol Street and establish Lincoln Square.* July 25, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the commissioner of public buildings be, and he hereby is, authorized and directed, in such manner as he may deem most proper, to cause East Capitol Street to be graded from Third Street east to Eleventh Street east, and to cause the square at the intersection of said street with Massachusetts, North Carolina, Tennessee, and Kentucky avenues, between Eleventh and Thirteenth streets east, to be enclosed with a wooden fence, and the same shall be known as Lincoln Square. And the sum of fifteen thousand dollars is hereby appropriated out of any money in the treasury not otherwise appropriated, to enable the said improvement to be made.

East Capitol Street to be graded and Lincoln Square enclosed.

Appropriation.

APPROVED, July 25, 1866.

CHAP. CCLIV.—*An Act in Relation to the unlawful Tapping of Government Water Pipes.* July 25, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the unlawful tapping of any water pipe laid down in the District of Columbia by authority of the United States is hereby declared to be a misdemeanor and an indictable offence; and any person who may be indicted for and convicted of such offence in the criminal court of the District of Columbia shall be subject to such fine as the court may think proper to impose, not exceeding five hundred dollars, or to imprisonment for a term not exceeding one year. And it is hereby made the special duty of the commissioner of public buildings to bring to the notice of the attorney of the United States for the District of Columbia, or to the grand jury, any infraction of this law.

Unlawful tapping of government water pipes punishable by fine or imprisonment.

Commissioner of public buildings to prosecute.

APPROVED, July 25, 1866.

CHAP. CCLV.—*An Act to authorize the Entry and Clearance of Vessels at the Port of Calais, Maine.* July 25, 1866.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, from and after the passage of this act, the Secretary of the Treasury may authorize, under such regulations as he shall deem necessary, the deputy collector of customs at the port of Calais, in the State of Maine, to enter and clear vessels, and to perform such other official acts as the said Secretary shall think advisable.

Deputy collector of customs at Calais, Me., may enter and clear vessels, &c.

APPROVED, July 25, 1866.

CHAP. CCLXII.—*An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes.* July 26, 1866

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

Mineral lands declared open to occupation to all citizens, &c. subject to regulations, &c.

SEC. 2. *And be it further enacted*, That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dol-

Persons, &c claiming, without opposition, any vein of quartz-bearing gold, &c. having occupied and made expenditures on the

same, and filing diagram, may enter the tract and receive a patent therefor.

lars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

Patent to grant what.

After filing diagram of tract claimed, what proceedings to be had before patent issues.

Notice to be published.

SEC. 3. *And be it further enacted*, That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

Survey of plat of premises.

Payment of five dollars per acre, and costs of survey, &c.

Survey, plat, &c. to cover only one vein, to be named in patent.

Proceedings when the location and entry of mine are upon unsurveyed lands.

SEC. 4. *And be it further enacted*, That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid, and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: *Provided*, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

Location not to exceed 200 feet along vein, with additional claim for discoverer, and right to follow vein to any depth, &c.

Limit to number and extent of locations.

Further condition of sale, and to be expressed in patent.

SEC. 5. *And be it further enacted*, That as a further condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Where adverse claimants appear, proceedings stayed until right is settled.

Patent then to issue.

SEC. 6. *And be it further enacted*, That whenever any adverse claimants to any mine located and claimed as aforesaid shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases.

President may establish additional land districts, &c for purposes of this act

SEC. 7. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to establish additional land districts and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

See *Post*, p. 470.

Right of way for highways.

SEC. 8. *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Owners of vested rights to use of water for mining, &c. to be protected, and right of way for canals and ditches granted.

SEC. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Damages.

Owners of homesteads made upon lands designated as mineral, in which no valuable mines of gold, &c. have been found, &c. may pre-empt the same, &c.;

SEC. 10. *And be it further enacted*, That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or said parties may avail themselves of the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

or may take them as homesteads. 1862, ch. 75. Vol. XII. p. 392.

Upon survey, lands clearly agricultural may be set apart and made subject to pre-emption and sale.

SEC. 11. *And be it further enacted*, That upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

APPROVED, July 26, 1866.

CHAP. CCLXIII. — *An Act to authorize "The Chesapeake Bay and Potomac River Tidewater Canal Company" to enter the District of Columbia, and extend their Canal to the Anacostia River at any Point above Benning's Bridge.* July 26, 1866.

The Chesapeake Bay, &c. Canal Company may extend its canal to Anacostia River,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "The Chesapeake Bay and Potomac River Tide-water Canal Company," incorporated by the general assembly of the State of Maryland, at the January session thereof, eighteen hundred and sixty-six, by an act entitled "An act to incorporate the Chesapeake Bay and Potomac River Tide-water Canal Company," be, and the same are hereby, authorized to extend their canal from the point where it strikes the boundary line of the District of Columbia, thence in and through the said District to the Anacostia River at any point thereon above Benning's bridge.

may take and hold property necessary for proper construction of extension, &c.

SEC. 2. *And be it further enacted*, That the said company are hereby authorized and empowered to take, purchase, and hold, for the purpose[s] of this act, so much real estate and other property as shall be necessarily required for the proper construction of the extension aforesaid, and for the construction of all proper and convenient basins, locks, reservoirs, docks, and wharves, to be connected with said extension. And where the said company shall not be able to procure such real estate by purchase

Proceedings where land can-

not be purchased, or the owner is under disability.

from the owner thereof, or the owner thereof shall be a femme covert, infant, non compos mentis, imprisoned, or resident beyond the District of Columbia, then application may be made by the president of said company to the chief justice of the supreme court of the District of Columbia, for the appointment of three persons, who shall be freeholders in said District,

Commission of inquest of damages.

as a commission of inquest of damages, and who shall go upon and inspect any property proposed to be taken by said company for the purposes contemplated by this act; and before any person so appointed as such commissioner shall proceed to act, he shall take an oath or affirmation that he will fairly and truly value the damages sustained by the owner or owners of any property by the use and occupation of any such real estate, water

Report to be made.

rights, or other property, by said company; and said commission shall reduce their inquisition or finding to writing, and sign and seal the same, and it shall then be returned to the said chief justice, who shall file the same in the office of the register of deeds of the city of Washington. But

Notice.

no such inquisition shall be had until after ten days' notice thereof has been served on the owner of the real estate so to be taken, when he resides in the District of Columbia, or by publication of notice in one or more of the daily newspapers published in the city of Washington, for twenty days where such owner resides beyond said District. When the owner is a femme covert, the notice shall be to her and her husband; when he is a minor, to his guardian; and when he is non compos mentis, to his committee, or the person having charge of his estate. The said

Report to be confirmed.

report shall be confirmed by the supreme court of the District of Columbia at its next term after the return of said report, unless for cause

Inquest may be set aside.

shown to the contrary. And where good cause is thus shown, the said chief justice shall set aside said inquest, and appoint another similar commission, who shall qualify in the same manner, and whose inquisition shall be taken, returned, filed, and confirmed, or set aside for good cause shown, in the same manner as the first inquisition was taken, returned, filed, and

New commission and inquisition from time to time

confirmed, or set aside. And such commission and inquisition shall be renewed as often as may be necessary, until the inquisition made shall be confirmed. Such inquisition shall describe the property taken by metes

Property taken to be described, and valuation paid.

and bounds, and the valuation thereof shall be paid or tendered within ten days after the confirmation of such inquisition by said district court; and when such valuation or damages are so paid or tendered, said com-

Company to pay expenses of inquisition.

pany shall have a full and perfect right to enter upon, use, occupy, and enjoy any property so valued during its corporate existence, and all expenses incurred by such inquisition shall be paid by said company.

Tolls and rents.

SEC. 3. *And be it further enacted*, That it shall be lawful for said company to levy, demand, and receive such even tolls and rents for the use of the wharves and docks of said company on said extension, or for freight transported by said company, or for the passage through said extension of boats, rafts, or any other water craft, as a majority of the directors at any regular meeting shall assess therefor: *Provided*, That the Congress of the United States shall at all times have power to increase or reduce such tolls or rents.

Canal extension to be a public highway.

SEC. 4. *And be it further enacted*, That the said canal extension, when completed, shall forever thereafter be esteemed and taken to be a public highway for the transportation of all goods, commodities, or produce of every kind and description, and for all canal boats, rafts, or other water crafts of every kind whatever, upon the payment of such tolls or rents as are authorized to be imposed by this act.

Public property of the United States to go through free of tolls

SEC. 5. *And be it further enacted*, That the said company shall permit all public property belonging to the United States to pass through said canal extension free of all charge or toll; and the said company shall,

Company when required to give Congress an account of receipts and expenditures, &c.

from time to time, as may be required, lay before Congress a just and true account of their receipts and expenditures on said extension, with a statement of the clear profits thereof.

Provisions of charter to apply to extension, subject, &c.

SEC. 6. *And be it further enacted*, That, subject to the aforesaid provisions of this act, all and singular the provisions of the aforesaid act of the general assembly of the State of Maryland, entitled "An act to incorporate the Chesapeake Bay and Potomac River Tide-water Canal Company," relating to the powers, liabilities, and authority of said company, in operating and using their canal, shall take effect and apply to the extension aforesaid in the District of Columbia.

Act to be a public act, and when to take effect.

SEC. 7. *And be it further enacted*, That this act shall be deemed a public act, and shall take effect and be in force from and after its passage, and shall be subject to alteration or repeal by Congress.

APPROVED, July 26, 1866.

CHAP. CCLXIV. — *An Act authorizing the Secretary of the Treasury to issue Certificates of Registry, or Enrolment and License, to certain Vessels.* July 26, 1866.

Certificate of registry, or enrolment and license, may issue to the Diana; M. C. Rowe; Mary; Jessee Conger; N. C. Ford; Sweet Home; Alma; Marco Polo; Three Bells; J. S. Austin; Dolphin.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized to issue certificates of registry, or enrolment and license, to the steamer "Diana," of Victoria, Vancouver Island; the schooners "M. C. Rowe," of Gloucester, Massachusetts; "Mary," of Dexter, New York; "Jessee Conger," of Oswego, New York; "N. C. Ford," of Buffalo, New York; "Sweet Home," of Rochester, New York; "Alma," of Sodus, New York; "Marco Polo," of Erie, Pennsylvania; brig "Three Bells," of Rochester, New York; barque "J. S. Austin," of Buffalo, New York; and the sloop "Dolphin," of Alexandria Bay, New York: *Provided*, That there shall be paid on each of such vessels that are foreign built a tax equal to the internal revenue tax upon the materials and construction of similar vessels of American build.

APPROVED, July 26, 1866.

CHAP. CCLXV. — *An Act to authorize the Issue of certain Bonds in Denominations greater than One Thousand Dollars.* July 26, 1866.

Bonds issued in favor of certain railroad companies may be of larger denominations than $1000. Proviso 1862, ch. 120. Vol. xii. p. 489. 1864, ch. 216, Vol. xiii. p. 356. 1865, ch. 86. Vol. xiii. p. 504.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter the bonds of the United States authorized by the act of July first, eighteen hundred and sixty-two, "To aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean," and by all acts amendatory thereof, may be issued in denominations greater than one thousand dollars, at the discretion of the Secretary of the Treasury: *Provided, however*, That it shall at all times be optional with any railroad company whether they will receive bonds of a larger denomination than one thousand dollars.

APPROVED, July 26, 1866.

CHAP. CCLXVI. — *An Act making Appropriations for the Current and Contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes for the Year ending thirtieth June, eighteen hundred and sixty-seven, and for other Purposes.* July 26, 1866.

Appropriation for expenses of the Indian department and treaty stipulations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby appropriated, out of any money in the treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian department and fulfilling treaty stipulations with the various Indian tribes:—

For the current and contingent expenses of the Indian department, namely:

Superintendents, agents, sub-agents, clerks, &c.

For the pay of superintendents of Indian affairs and of Indian agents, one hundred and ten thousand and fifty dollars.

For pay of sub-agents, six thousand dollars.

For pay of clerk to superintendent at Saint Louis, Missouri, one thousand two hundred dollars.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

November 6, 1906.

A PROCLAMATION

Huachuca Forest Reserve, Ariz. Preamble.

WHEREAS, the public lands in the Territory of Arizona, which are hereinafter indicated, are in part covered with timber, and it appears that the public good would be promoted by setting apart said lands as a public reservation;

Vol. 26, p. 1103.

And whereas, it is provided by section twenty-four of the Act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An act to repeal timber-culture laws, and for other purposes," "That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof";

Forest reserve, Arizona.

Now, therefore, I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by section twenty-four of the aforesaid act of Congress, do proclaim that there are hereby reserved from entry or settlement and set apart as a Public Reservation, for the use and benefit of the people, all the tracts of land, in the Territory of Arizona, shown as the Huachuca Forest Reserve on the diagram forming a part hereof.

Lands excepted.

This proclamation will not take effect upon any lands withdrawn or reserved, at this date, from settlement, entry, or other appropriation, for any purpose other than forest uses, or which may be covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists.

Reserved from settlement.

Warning is hereby given to all persons not to make settlement upon the lands reserved by this proclamation.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixt.

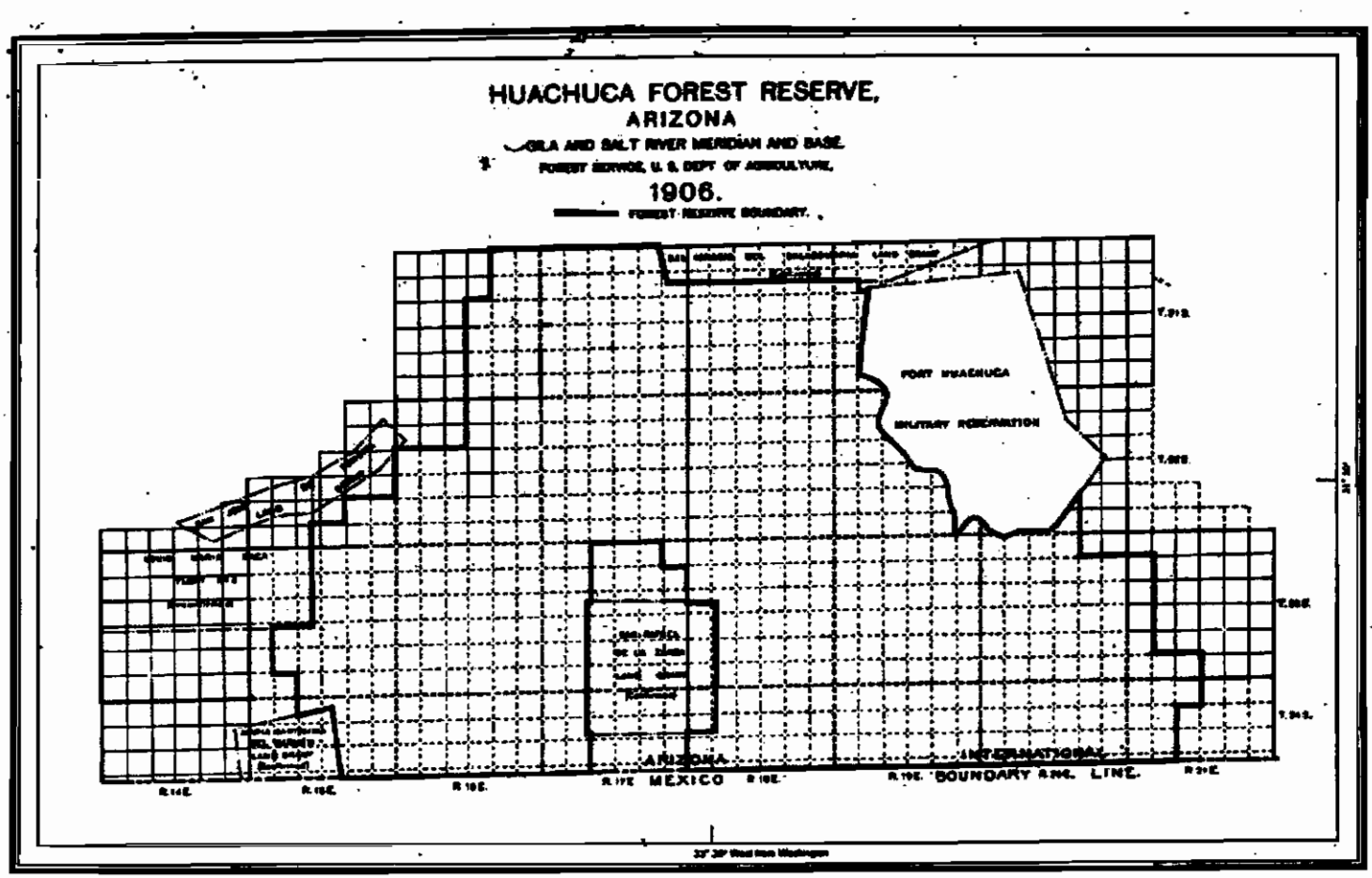
Done at the City of Washington this 6th day of November, in the year of our Lord one thousand nine hundred and six, and [SEAL.] of the Independence of the United States the one hundred and thirty-first.

THEODORE ROOSEVELT

By the President:

ROBERT BACON

Acting Secretary of State.


HUACHUCA FOREST RESERVE,
ARIZONA
GILA AND SALT RIVER MERIDIAN AND BASE.
FOREST SERVICE, U. S. DEPT OF AGRICULTURE.
1906.
FOREST RESERVE BOUNDARY.
FORT HUACHUCA
MILITARY RESERVATION
T. 21 S.
T. 22 S.
T. 23 S.
T. 24 S.
R. 14 E.
R. 15 E.
R. 16 E.
R. 17 E.
R. 18 E.
R. 19 E.
R. 20 E.
ARIZONA
MEXICO
INTERNATIONAL
BOUNDARY LINE.

or corporation is located for the transaction of business; *provided*, however, that the shares of stock of all banks, including national banks, shall not be taxed at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of the Territory, and that the shares of stock of any banking association, owned by non-residents of the Territory, shall be taxed in the county where the bank is located, and not elsewhere.

SEC. 2. Bank stock shall be entered in the names of the holders of the several shares thereof respectively, and the capital stock of every person, association or corporation (other than banks) engaged in the business of banking, buying and selling exchange and receiving deposits, shall be entered in the names of the several owners thereof respectively.

SEC. 3. Upon the demand of the Assessor, the President, Cashier or other officer in charge of any incorporated bank association, person or persons, shall make out and deliver to such assessor, before the first day of May, a statement showing the name and residence of each stockholder therein, on the first day of January preceding, and the amount of stock held by him on that day. The person making such statement shall, before delivering the same to the Assessor, make and subscribe an oath to be administered and certified by the Assessor or his deputy and annexed to such statement, substantially in the following form, to wit:

Territory of Arizona,.....County of.....SS.

I,....., do solemnly swear that I am.....of the (here name the bank); that the annexed is a true statement of the same of all the stockholders in said bank on the first day of May, and the amount of stock then held and owned by each of them.

(Signed by affiant).....

Subscribed and sworn to before me, this..... ..... day of....., 18.....

....., Assessor.

Every president, cashier, managing agent, officer, or person in charge of any association, corporation or person [other than banks] engaged in the business of banking, buying and selling exchange receiving deposits, shall on like demand, deliver to the assessor a statement showing the name and residence of every person owning any part of the capital stock of such person, association or corporation, so engaged, and take and subscribe and annex thereto a like oath, adapting the words thereof to such a case. If any such person, officer or agent shall refuse to make out and deliver such statement, when so required, he shall be personally liable to the county for the whole amount of taxes which should be paid upon such stock; and it shall be the duty of the Assessor or Tax Collector, as the case may be, to collect the same as other county and Territorial taxes are collected.

SEC. 4. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed

SEC. 5. This Act shall take effect and be in force from and after its passage.

Approved April 13, 1893.

No. 86. AN ACT

Relating to the Appropriation of Water and the Construction and Maintenence of Reservoirs, Dams and Canals.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That any person or persons, company or corporation shall have the right to appropriate any of the unappropriated waters or the surplus or flood waters in this Territory for delivery to consumers, rental, milling, irrigation, mechanical, domestic, stock or any other beneficial purpose, and such person or persons, company or corporation for the purpose of making such appropriation of waters as herein specified, shall have the right to construct and maintain reservoirs, dams, canals, ditches, flumes and any and all other necessary water ways. And the person or persons, company or corporation first appropriating water for the purposes herein mentioned shall always have the better right to the same.

SEC. 2. Every person or persons, company or corporation, who shall desire to appropriate any of the waters of this Territory for the uses and purposes mentioned in Section 1 of this Act shall first post at the place of diversion on the stream or streams as the case may be, a notice of his, their or its appropriation of the amount of water by it or them appropriated, and that they intend to build and maintain a dam at a certain place, in said notice to be designated, and in case of storage of water by reservoir that they intend to construct and maintain a reservoir at a place to be in said notice stated, and that they intend to construct and maintain a canal or canals, as the case may be, from the point of diversion of said water to some terminal point to be mentioned in said notice, a copy of which shall be filed

and recorded in the office of the County Recorder in which said dam, reservoir and canal is contemplated to be constructed, and if said canal runs through more than one County, then such notices shall be filed and recorded in each County through which said canal is to be constructed, and a copy of said notice shall also be filed and recorded in the office of the Secretary of the Territory. That said person or persons, company or corporation after posting and filing their notice as herein provided, shall within a *reasonable time* thereafter construct their dam or dams, reservoir or reservoirs, canal or canals, as the case may be, and shall after such construction use reasonable diligence to maintain the same for the purposes in such notices specified, and on failure to within a reasonable time after posting and filing of such notice or notices as herein provided to construct such reservoir, dam or canal as in such notice specified or to use reasonable diligence after such construction to maintain the same, shall be held to work a forfeiture of such right to the water or waters attempted to be appropriated.

SEC. 3. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

SEC. 4. This Act shall take effect and be in force from and after its passage.

Approved April 13, 1893.

No. 87. AN ACT

To Regulate the Fees and Salaries of Certain County Officers.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. Clerks of the District Court shall receive the following fees in civil cases:

For copy of complaint with or without certificate and seal, each one hundred words	$ .15
Each writ of summons	1.00
Docketing each cause, to be charged but once	.25
Docketing each rule or motion	.25
Filing each paper	.10
Entering appearance of each party to a suit, to be charged but once	.25
Each continuance	.25
Swearing each witness	.20
Administering an oath or affirmation with certificate and seal	.50

Each subpœna issued	.25
Each additional name inserted in subpœna	.10
Approving bond, except bond for costs	.50
Swearing and empaneling a jury	.50
Receiving and recording verdict of jury	.50
Assessing damages in each case not tried by jury	.25
Each commission to take deposition	1.00
Taking deposition, each one hundred words	.25
Each order	.25
Each judgment or decree	1.00
When the judgment or decree exceeds two hundred words, the additional fee for each one hundred words in excess of two hundred words shall be	.15
Each execution or order of sale, writ of possession, restitution or other writ not otherwise provided for	1.00
Recording return of any writ, when such return is required by law to be recorded	1.00
Each certificate to any fact contained in the record of his office	.25
Making out and transmitting the record and proceedings in a cause to an inferior Court, for each one hundred words	.15
Making and transmitting the mandate or judgment of the District Court upon an appeal from the Probate Court	1.00
Filing a record in a cause appealed to the District Court	.25
Transcribing, comparing and verifying record books of his office, payable out of the County Treasury upon warrants issued, under an order of the Board of Supervisors, each one hundred words	.15
Making transcript of the record and papers in any cause upon appeal for writ of error, with certificate and seal, each one hundred words	.15
Making copy of records of judgment or papers on file in his office, for any party applying for the same, with or without certificate and seal, per one hundred words	.15
Issuing a writ of *scire facias* and making copy of same	1.00
Taxing the bill of costs in each case with copy of same	.25
Issuing a license to an attorney and recording proceedings therein	3.00
Filing and recording declarations of intention to become a citizens of the United States	3.00
Issuing a certificate of naturalization	3.00

it is plainly inconsistent therewith.

Duplicate receipts.

4165. (Sec. 13.) A warehouse proprietor must subscribe and deliver to the bailor, on demand, any reasonable number of warehouse receipts, not exceeding three (one original and the others marked "Duplicate," and the original to state the number of duplicates issued) of the same tenor, expressing truly the original contract for storage, and if he refuses to do so, the bailor may take the produce or commodity from him, and recover from him besides all damages thereby occasioned.

Proprietor exonerated from liability.

4166. (Sec. 14.) A warehouse proprietor is exonerated from liability for produce or commodity by delivery thereof, in good faith, to any holder of an original warehouse receipt thereof, properly endorsed or made in favor of the bearer.

Surrender of receipt.

4167. (Sec. 15.) When a warehouse proprietor has given a warehouse receipt, or other instrument, substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the produce or commodity.

(Took effect Sept. 1, 1901.)

TITLE LXXIII.

WATERS AND WATER RIGHTS.

CHAPTER I.

RIPARIAN RIGHTS.

Common law doctrine not to apply.

4168. (Sec. 1.) The common-law doctrine of riparian water rights, shall not obtain or be of any force or effect in this territory.

Right to appropriate.

4169. (Sec. 2.) Any person or persons, company or corporation shall have the right to appropriate any of the unappropriated waters or the surplus or flood waters in this territory for delivery to consumers, rental, milling, irrigation, mechanical, domestic, stock or any other beneficial purpose, and such person or persons, company or corporation for the purpose of making such appropriation of waters as herein specified, shall have the right to construct and maintain reservoirs, dams, canals, ditches, flumes and any and all other necessary water ways. And the person or persons, company or corporation first appropriating

water for the purposes herein mentioned shall always have the better right to the same.

Manner of appropriation.

4170. (Sec. 3.) Every person or persons, company or corporation, who shall desire to appropriate any of the waters of this territory for the uses and purposes mentioned in section 2 of this act shall first post at the place of diversion on the stream or streams as the case may be, a notice of his, their or its appropriation of the amount of water by it or them appropriated, and that they intend to build and maintain a dam at a certain place, in said notice to be designated, and in case of storage of water by reservoir that they intend to construct and maintain a reservoir at a place to be in said notice stated, and that they intend to construct and maintain a canal or canals, as the case may be, from the point of diversion of said water to some terminal point to be mentioned in said notice, a copy of which shall be filed and recorded in the office of the county recorder in which said dam, reservoir and canal is contemplated to be constructed, and if said canal runs through more than one county, then such notices shall be filed and recorded in each county through which said canal is to be constructed, and a copy of said notice shall also be filed and recorded in the office of the secretary of the territory. That said person or persons, company or corporation after posting and filing their notice as herein provided, shall within a reasonable time thereafter construct their dam or dams, reservoir or reservoirs, canal or canals, as the case may be, and shall after such construction use reasonable diligence to maintain the same, for the purposes in such notices specified, and on failure to within a reasonable time after posting and filing of such notice or notices as herein provided to construct such reservoir, dam or canal as in such notice specified or to use reasonable diligence after such construction to maintain the same, shall be held to work a forfeiture of such right to the water or waters attempted to be appropriated.

Canal owners shall not contract more water than canal will supply.

4171. (Sec. 4.) All corporations, associations, or individuals, owning, managing or controlling any canals, irrigating ditches, flumes, pipe lines or other means for conveying water from any public stream in this territory, on or to the lands of occupants, for the purpose of selling, hiring or letting the same to such occupants for pay or hire, shall not sell, hire or let, or contract to sell, hire or let more water than the said canals, ditches, flumes or pipe lines may be estimated to carry at any one time, whether such contract be made for measured, time, or acreage quantity.

Canals and ditches to be kept in good repair.

4172. (Sec. 5.) Such persons, associations or corporations as provided for in the preceding section, shall at all times keep their ditches, canals, flumes or pipe lines in good repair and condition, so as to carry

the full amount of water that such persons, association or corporation have contracted to carry and deliver to the persons contracted with, during the time specified in such contract, and a failure to deliver the quantity of water contracted for (when there be sufficient in the stream or head) shall make such persons, corporations or associations liable for all damages that may arise or be sustained by the parties buying, hiring or renting water from said carriers.

Users of water may clean and repair canals, etc., if owners refuse.

4173. (Sec. 6.) When any corporation, association or individual owning or controlling any canal, water ditch, flume or pipe line, as in this act provided, shall permit their respective ways for carrying water, or their dam headgates or other appliances for securing the water at the head to get out of repair or reduced in capacity by filling up or otherwise, so that the same will not carry the amount of water so contracted to be delivered to the users thereof, and shall not within a reasonable time repair, cleanse or restore the same, then it shall be lawful for such persons who have contracted and paid for such water to enter in and upon said canal, ditch, flume or line and make repairs, clean and restore said premises at their own proper cost and charge and the reasonable cost of such repairs, cleansing and restoration shall be a lien on such canal, ditch, flume, or line, which lien may be foreclosed as other liens upon real estate in any court of competent jurisdiction, and the premises sold and proceeds applied in payment of said claim and lien, the surplus, if any, to be paid to the owner thereof: *Provided.* That written notices of the specific repairs, cleansing and restoration to be done and the maximum cost thereof shall be served on such corporation or others owning or controlling such premises at least six days before entering upon such premises for the purpose of such repairs, cleansing and restoration; and if within said six days the corporation or others owning or controlling such canal, ditch, flume or line shall commence and with reasonable diligence, prosecute such repairs, cleansing and restoration, no such right of entry shall exist: *Provided, further,* That such repairs, cleansing and restoration, shall be reasonable in extent, method and cost, and so made as to be of the most permanent benefit to the property; and *provided, further,* that within thirty days after the completion of said work of repairs, cleansing and restoration, a notice under oath of the lien claimed under this act, stating the amount of the expenditure actually made in the work aforesaid, containing an itemized statement of the sums so expended and the purpose for which each was expended, and a statement of the facts upon which said lien is claimed, shall be filed in the office of the recorder of the county in which such work was done, and recorded in a book kept by him for that purpose; and *Provided, further,* That such owners or

managers of such water ways shall not be held liable under this act for any deficiency in the supply of water, which may be caused by any act of omission or commission over which they have no control, or that may be caused by flood, storms or drouth.

CHAPTER II.

IRRIGATING CANALS AND ACEQUIAS.

Public waters.

4174. (Sec. 7.) All rivers, creeks and streams of running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided.

Prior rights not disturbed.

4175. (Sec. 8.) All rights in acequias, or irrigating canals, heretofore established shall not be disturbed, nor shall the course of such acequias be changed without the consent of the proprietors of such established rights.

Public and private acequias.

4176. (Sec. 9.) All the inhabitants of this territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek or stream of running water.

Damages to private land.

4177. (Sec. 10.) Whenever such public or private acequias shall necessarily run through the lands of any private individuals not benefited by said acequias, the damages resulting to such private individuals, on the application of the party interested, shall be assessed by the probate judge of the proper county in a summary manner.

Agricultural canals have prior right.

4178. (Sec. 11.) No inhabitant of this territory shall have the right to erect any dam, or build a mill, or place any machinery, or open any sluice, or make any dyke, except such as are used for mining purposes or the reduction of metals, as provided for in sections six and seven of this chapter, that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferable to all others; and the justices of the peace of the respective precincts shall hear and determine the question relative to all such obstructions in a summary manner, and cause the removal of the same by order directed to the constable of the precinct or sheriff of the county, who shall proceed to execute the same without delay.

Remuneration to owners of agricultural lands.

4179. (Sec. 12.) Where reduction works or other mining apparatus shall be placed upon lands previously held for agricultural purposes, the person or persons so holding such lands shall be entitled to remunera-

PL 98–406, AUGUST 28, 1984, 98 Stat 1485

UNITED STATES PUBLIC LAWS
98th Congress - Seeond Session
Convening January 23, 1984

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)
Additions and Deletions are not identified in this document.

PL 98–406 (HR 4707)
AUGUST 28, 1984

An Act to designate certain national forest lands in the State of Arizona as wilderness, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Arizona Wilderness Act of 1984'.

TITLE I

SEC. 101. (a) In furtherance of the purposes of the Wilderness Act (16 U.S.C. 1131–1136), the following lands in the State of Arizona are hereby designated as wilderness and therefore as components of the National Wilderness Preservation System:

(1) "16 USC 1132' certain lands in the Prescott National Forest, which comprise approximately five thousand four hundred and twenty acres, as generally depicted on a map entitled "Apache Creek Wilderness — Proposed', dated February 1984, and which shall be known as the Apache Creek Wilderness;

(2) "16 USC 1132' certain lands in the Prescott National Forest, which comprise approximately fourteen thousand nine hundred and fifty acres, as generally depicted on a map entitled "Cedar Bench Wilderness — Proposed', dated August 1984, and which shall be known as the Cedar Bench Wilderness;

(3) "16 USC 1132' certain lands in the Apache–Sitgreaves National Forest, which comprise approximately eleven thousand and eighty acres, as generally depicted on a map entitled "Bear Wallow Wilderness — Proposed', dated March 1984, and which shall be known as the Bear Wallow Wilderness;

(4) "16 USC 1132' certain lands in the Prescott National Forest, which comprise approximately twenty-six thousand and thirty acres, as generally depicted on a map entitled "Castle Creek Wilderness — Proposed', dated August 1984, and which shall be known as the Castle Creek Wilderness;

(5) certain lands in the Coronado National Forest, which comprise approximately sixty-nine thousand seven hundred acres, as generally depicted on a map entitled "Chiricahua Wilderness — Proposed', dated March 1984, and which are hereby incorporated in and shall be deemed part of the Chiricahua Wilderness, as designated by Public Law 88–577 "16 USC 1131';

(6) "16 USC 1132' certain lands in the Coconino National Forest, which comprise approximately eleven thousand five hundred and fifty acres, as generally depicted on a map entitled "Fossil Springs Wilderness — Proposed', dated April 1984, and which shall be known as the Fossil Springs Wilderness;

(7) "16 USC 1132' certain lands in the Tonto National Forest, which comprise approximately fifty-three thousand five hundred acres, as generally depicted on a map entitled "Four Peaks Wilderness — Proposed', dated April 1984, and which shall be known as the Four Peaks Wilderness;

(8) certain lands in the Coronado National Forest, which comprise approximately twenty-three thousand six hundred acres, as generally depictcd on a map entitlcd "Galiuro Wildernccss Additions — Proposed', dated April 1984, and which are hereby incorporated in and shall bc deemed a part of the Galiuro Wilderness as designated by Public Law 88–577; "16 USC 1131'

(9) "16 USC 1132' certain lands in thc Prescott National Forcst, which comprise approximately nine thousand eight hundred acres, as generally depicted on a map entitlcd "Granite Mountain Wildernccss — Proposcd', dated April 1984, and which shall be known as Granite Mountain Wilderness;

(10) "16 USC 1132' certain lands in the Tonto National Forest, which comprise approxiinately thirty-six thousand seven hundred and eighty acres, as generally depicted on a map entitled "Hellsgate Wilderness — Proposed', dated August 1984, and which shall be known as the Hellsgate Wilderness;

(11) "16 USC 1132' certain lands in the Prescott National Forest which comprise approximately seven thousand six hundred acres, as generally depicted on a map entitled "Juniper Mesa Wilderness — Proposed', dated February 1984, and which shall be known as the Juniper Mesa Wilderness;

(12) "16 USC 1132' certain lands in the Kalbab and Coconino National Forests, which comprise approximately six thousand five hundred and ten acres, as generally depicted on a map entitled "Kendrick Mountain Wilderness — Proposed', dated February 1984, and which shall be known as Kendrick Mountain Wilderness;

(13) "16 USC 1131' certain lands in the Tonto National Forest, which comprise approximately forty-six thousand six hundred and seventy acres, as generally depicted on a map entitled "Mazatzal Wilderness Additions — Proposed', dated August 1984, and which are hereby incorporated and shall be deemed a part of the Mazatzal Wilderness as designated by Publie Law 88–577: Provided, That within the lands added to the Mazatzal Wilderness by this Aet, the provisions of the Wilderness Aet shall not be eonstrued to prevent the installation and maintenanee of hydrologie, meteorologie, or teleeommunieations faeilities, or any eombination of the foregoing, or limited motorized aeeess to such faeilities when nonmotorized aeeess means are not reasonably available or when time is of the essenee, subjeet to sueh eonditions as the Seeretary deems desirable, where sueh faeilities or aceess are essential to flood warning, flood eontrol, and water reservoir operation purposes;

(14) "16 USC 1132' eertain lands in the Coronado National Forest, which eomprise approximately twenty thousand one hundred and ninety aeres, as generally depieted on a map entitled "Miller Peak Wilderness — Proposed', dated February 1984, and whieh shall be known as the Miller Peak Wilderness;

(15) "16 USC 1132' certain lands in the Coronado National Forest, whieh eomprise approximately twenty-five thousand two hundred and sixty acres, as generally depieted on a map entitled "Mt. Wrightson Wilderness — Proposed', dated February 1984, and whieh shall be known as the Mt. Wrightson Wilderness;

(16) "16 USC 1132' eertain lands in the Coconino National Forest, whieh eomprise approximately eighteen thousand one hundred and fifty aeres, as generally depieted on a map entitled "Munds Mountain Wilderness — Proposed', dated August 1984, and whieh shall be known as the Munds Mountain Wilderness;

(17) "16 USC 1132' certain lands in the Coronado National Forest, which comprise approximately seven thousand four hundred and twenty acres, as generally depicted on a map entitled "Pajarita Wilderness — Proposed', dated March 1984, and which shall be known as the Pajarita Wilderness;

(18) "16 USC 1132' certain lands in the Coconino National Forest, which comprise approximately forty-three thousand nine hundred and fifty acres, as generally depicted on a map entitled "Red Rock–Secret Mountain Wilderness — Proposed', dated April 1984, and which shall be known as the Red Rock–Secret Mountain Wilderness;

(19) "16 USC 1132' certain lands in the Coronado National Forest, which comprise approximately thirty-eight thousand five hundred and ninety acres, as generally depieted on a map entitled "Rincon Mountain Wilderness — Proposed'; dated February 1984, and which shall be known as the Rineon Mountain Wilderness;

(20) "16 USC 1132' certain lands in the Tonto National Forest, whieh comprise approximately eighteen thousand nine hundred and fifty acres, as generally depicted on a map entitled "Salome Wilderness — Proposed', dated August 1984, and whieh shall be known as the Salome Wilderness;

(21) "16 USC 1132' certain lands in the Tonto National Forest, which comprise approximately thirty-two thousand eight hundred acres, as generally depicted on a map entitled "Salt River Canyon Wilderness — Proposed', dated April 1984, and which shall be known as the Salt River Canyon Wilderness;

(22) "16 USC 1132' certain lands in the Coconino National Forest, which comprise approximately eighteen thousand two hundred acres, as generally depicted on a map entitled "Kachina Peaks Wilderness — Proposed', dated August 1984, and which shall be known as the Kachina Peaks Wilderness;

(23) "16 USC 1132' certain lands in the Coronado National Forest, which comprise approximately twenty-six thousand seven hundred and eighty acres, as generally depicted on a map entitled "Santa Teresa Wilderness — Proposed', dated February 1984, and which shall be known as the Santa Teresa Wilderness; the governmental agency having jurisdictional authority may authorize limited access to the area, for private and administrative purposes, from U.S. Route 70 along Black Rock Wash to the vicinity of Black Rock;

(24) eertain lands in the Tonto National Forest, whieh eomprise approximately thirty-five thousand six hundred and forty aeres, as generally depieted on a map entitled "Superstition Wilderness Additions — Proposed', dated August 1984, and whieh are hereby ineorporated in and shall be deemed to be a part of the Superstition Wilderness as designated by Publie Law 88–577;

(25) "16 USC 1131' eertain lands in the Coeonino National Forest and Preseott National Forest, whieh comprise approximately eight thousand one hundred and eighty aeres, as generally depieted on a map entitled "Syeamore Canyon Wilderness Additions — Proposed', dated April 1984, and whieh are hereby ineorporated in and shall be deemed a part of the Syeamore Canyon Wilderness as designated by Publie Law 92–241;

(26) "16 USC 1132' eertain lands in the Coeonino National Forest, whieh eomprise approximately thirteen thousand six hundred aeres, as generally depieted on a map entitled "West Clear Creek Wilderness — Proposed', dated April 1984, and whieh shall be known as the West Clear Creek Wilderness;

(27) "16 USC 1132' eertain lands in the Coeonino National Forest, which comprise approximately six thousand seven hundred acres, as generally depicted on a map entitled "Wet Beaver Wilderness — Proposed', dated February 1984, and which shall be known as the Wet Beaver Wilderness;

(28) "16 USC 1132' certain lands in the Prescott National Forest, whieh eomprise approximately five thousand six hundred aeres, as generally depieted on a map entitled "Woodehute Wilderness — Proposed', dated August 1984, and whieh shall be known as the Woodehute Wilderness;

(29) "16 USC 1132' certain lands in the Coconino National Forest, whieh compromise approximately ten thousand one hundred and forty acres, as generally depieted on a map entitled "Strawberry Crater Wilderness — Proposed', dated April 1984, and which shall be known as Strawberry Crater Wilderness;

(30) "16 USC 1132' eertain lands in the Apache–Sitgreaves National Forest, whieh eomprise approximately five thousand two hundred aeres, as generally depieted on a map entitled "Escudilla — Proposed Wilderness', dated April 1984, and whieh shall be known as Escudilla Wilderness.

(b) Subject to valid existing rights, the wilderness areas designated under this section shall be administered by the Secretary of Agrieulture (hereinafter in this title referred to as the "Seeretary') in aeeordance with the provisions of the Wilderness Act governing areas designated by that Aet as wilderness, exeept that any referenee in such provisions to the effeetive date of the Wilderness Act (or any similar referenee) shall be deemed to be a reference to the date of enaetment of this Aet.

(e) "16 USC 1131' As soon as praetieable after enaetment of this Aet, the Seeretary shall file a map and a legal deseription of eaeh wilderness area designated under this seetion with the Committee on Interior and Insular Affairs of the United States House of Representatives and with the Committee on Energy and Natural Resources of the United States Senate. Such map and deseription shall have the same foree and effect as if ineluded in this Aet, except that correction of elerical and typographical errors in such legal description and map may be made. Such map and legal deseription shall be on file and available for public inspection in the Office of the Chief of the Forest Service, United States Department of Agriculture.

(d) The Congress does not intend that designation of wilderness areas in the State of Arizona lead to the creation of protective perimeters or buffer zones around each wilderness area. The fact that nonwilderness activities or uses can be seen or heard from areas within a wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.

(e)(1) "16 USC 1133' As provided in paragraph (6) of seetion 4(d) of the Wilderness Act, nothing in this Act or in the Wilderness Act shall eonstitute an express or implied claim or denial on the part of the Federal Government as to exemption from Arizona State water laws.

(2) "16 USC 1131' As provided in paragraph (7) of section 4(d) of the Wilderness Act, nothing in this Act or in the Wilderness Aet shall be construed as affecting the jurisdiction or responsibilities of the State of Arizona with respect to wildlife and fish in the national forests located in that State.

(f)(1) Grazing of livestock in wilderness areas established by this title, where established prior to the date of the enactment of this Aet, shall be administered in aeeordance with section 4(d)(4) of the Wilderness Act and seetion 108 of Public Law 96–560.

(2) "16 USC 1133' The Secretary is directed to review all policies, practices, and regulations of the Department of Agriculture regarding livestock grazing in national forest wilderness areas in Arizona in order to insure that such policies, practices, and regulations fully conform with and implement the intent of Congress regarding grazing in such areas, as such intent is expressed in this Act.

(3) Not later than one year after the date of the enactment of this Act, and at least every five years thereafter, the Secretary of Agriculture shall submit to the Committee on Interior and Insular Affairs of the United States House of Representatives and

to the Committee on Energy and Natural Resourees of the United States Senate a report detailing the progress made by the Forest Serviee in earrying out the provisions of paragraphs (1) and (2) of this section.

SEC. 102. (a) In furtheranee of the purposes of the Wilderness Aet, the Seeretary of Agrieulture shall review the following as to their suitability or nonsuitability for preservation as wilderness and shall submit his reeommendations to the President:

(1) eertain lands in the Coronado National Forest, which eomprise approximately eight hundred fifty aeres, as generally depieted on a map entitled "Bunk Robinson Wilderness Study Area Additions — Proposed', dated February 1984, and whieh are hereby ineorporated in the Bunk Robinson Wilderness Study Area as designated by Publie Law 96–550;

(2) "94 Stat. 3223 eertain lands in the Coronado National Forest, whieh eomprise approximately five thousand and eighty aeres, as generally depieted on a map entitled "Whitmire Canyon Study Area Additions — Proposed', dated February 1984, and whieh are hereby ineorporated in the Whitmire Canyon Wilderness Study Area as designated by Publie Law 96–550; and

(3) eertain lands in the Coronado National Forest, whieh eomprise approximately sixty-two thousand aeres, as generally depieted on a map entitled "Mount Graham Wilderness Study Area', dated August 1984, and which shall be known as the Mount Graham Wilderness Study Area.

With respeet to the areas named in paragraphs (1) and (2), the President shall submit his reeommendations to the United States House of Representatives and the United States Senate no later than January 1, 1986.

(b) Subjeet to valid existing rights, the wilderness study areas designated by this seetion shall, until Congress determines otherwise, be administered by the Seeretary so as to maintain their presently existing wilderness eharaeter and potential for inclusion in the National Wilderness Preservation System.

SEC. 103. (a) The Congress finds that —

(1) the Department of Agrieulture has completed the seeond roadless area review and evaluation program (RARE II);

(2) the Congress has made its own review and examination of national forest system roadless areas in Arizona and of the environmental impacts associated with alternative allocations of sueh areas.

(b) On the basis of sueh review, the Congress hereby determines and direets that —

(1) "16 USC 1600' without passing on the question of the legal and faetual suffieiency of the RARE II final environmental statement (dated January 1979) with respeet to national forest system lands in States other than Arizona, such statement shall not be subjeet to judieial review with respeet to national forest system lands in the State of Arizona;

(2) with respect to the national forest system lands in the State of Arizona whieh were reviewed by the Department of Agriculture in the second roadless area review and evaluation (RARE II) and those lands referred to in subseetion (d), except those lands designated for wilderness study upon enactment of this Act, that review and evaluation or reference shall be deemed for the purposes of the initial land management plans required for such lands by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, to be an adequate consideration of the suitability of such lands for inclusion in the National Wilderness Preservation System and the Department of Agriculture shall not be required to review the wilderness option prior to the revisions of the plans, but shall review the wilderness option when the plans are revised, which revisions will ordinarily oceur on a ten-year cycle, or at least every fifteen years, unless, prior to such time the Seeretary of Agriculture finds that conditions in a unit have significantly changed;

(3) areas in the State of Arizona reviewed in such final environmental statement or referred to in subseetion (d) and not designated wilderness or wilderness study upon enactment of this Act shall be managed for multiple use in aecordance with land management plans pursuant to section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976: Provided, That such areas need not be managed for the purpose of protecting their suitability for wilderness designation prior to or during revision of the initial land management plans;

(4) "16 USC 1604' in the event that revised land management plans in the State of Arizona are implemented pursuant to section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, and other applicable law, areas not recommended for wilderness designation need not be managed for the purpose of protecting their suitability for wilderness designation prior to or during revision of such plans, and areas recommended for wilderness designation shall be managed for the purpose of protecting their suitability for wilderness designation as may

be required by the Forest and Rangeland Renewable Resourees Planning Aet of 1974, as amended by the National Forest Management Aet of 1976, and other applieable law; and

(5) "16 USC 1600' unless expressly authorized by Congress, the Department of Agrieulture shall not eonduet any further statewide roadless area review and evaluation of national forest system lands in the State of Arizona for the purpose of determining their suitability for inelusion in the National Wilderness Preservation System.

(e) "16 USC 1604' As used in this seetion, and as provided in seetion 6 of the Forest and Rangeland Renewable Resourees Planning Aet of 1974, as amended by the National Forest Management Aet of 1976, the term "revision' shall not include an "amendment' to a plan.

(d) The provisions of this seetion shall also apply to national forest system roadless lands in the State of Arizona whieh are less than five thousand aeres in size.

SEC. 104. Seetion 3(a) of the Wild and Scenie Rivers Act (16 U.S.C. 1274) is amended by inserting the following after paragraph (50):

"(51) VERDE, ARIZONA. — The segment from the boundary between national forest and private land in seetions 26 and 27, township 13 north, range 5 east, Gila Salt River meridian, downstream to the eonfluence with Red Creek, as generally depieted on a map entitled "Verde River — Wild and Scenic River' dated Mareh 1984, whieh is on file and available for publie inspection in the Offiee of the Chief, Forest Service, United States Department of Agriculture; to be administered by the Secretary of Agrieulture. This designation shall not prevent watcr users reeeiving Central Arizona Project water alloeations from diverting that water through an exehange agreement with downstream watcr users in accordance with Arizona water law. After eonsultation with State and loeal governments and the interested public and within two years after the date of enaetment of this paragraph, the Secretary shall take sueh action as is requircd under subsection (b) of this seetion.'.

SEC. 105. There are added to the Chiricahua National Monument, in the State of Arizona, established by Proelamation Numbered 1692 of April 18, 1924 (43 Stat. 1946) certain lands in the Coronado National Forest which comprise approximately eight hundred and fifty aeres as generally depieted on the map entitled "Bonita Creek Watershed', dated May 1984, retained by the United States Park Serviee, Washington, D.C. The area added by this paragraph shall be administered by the National Park Serviee as wilderness.

TITLE II

SEC. 201. The Congress finds that —

(1) the Aravaipa Canyon, situated in the Galiuro Mountains in the Sonoran desert region of southern Arizona, is a primitive place of great natural beauty that, due to the rare presence of a perennial stream, supports an extraordinary abundance and diversity of native plant, fish, and wildlife, making it a resouree of national significance; and

(2) the Aravaipa Canyon should, together with certain adjoining public lands, be incorporated within the National Wilderness Preservation System in order to provide for the preservation and protection of this relatively undisturbed but fragile complex of desert, riparian and aquatic ecosystems, and the native plant, fish, and wildlife eommunities dependent on it, as well as to proteet and preserve the area's great scenic, geologic, and historical values, to a greater degree than would be possible in the absence of wilderness designation.

SEC. 202. "16 USC 1132' In furtherance of the purposes of the Wilderness Act of 1964 (78 Stat. 890, 16 U.S.C. 1131 et seq.) and consistent with the policies and provisions of the Federal Land Policy and Management Act of 1976 (90 Stat. 2743; 43 U.S.C. 1701 et seq.), certain public lands in Graham and Pinal Counties, Arizona, which comprise approximately six thousand six hundred and seventy acres, as generally depicted on a map entitled "Aravaipa Canyon Wilderness — Proposed' and dated May 1980, are hereby designated as the Aravaipa Canyon Wilderness and, therefore, as a component of the National Wilderness Preservation System.

SEC. 203. "16 USC 1131' Subject to valid existing rights, the Aravaipa Canyon Wilderness shall be administered by the Secretary of the Interior in accordance with the provisions of the Wilderness Act governing areas designated by that Act as

wilderness. For purposes of this title, any references in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the cffectivc date of this Act and any reference to the Secretary of Agriculture with rcgard to administration of such areas shall be deemed to be a reference to the Secretary of the Interior, and any reference to wilderness areas designated by the Wilderness Act or designated national forest wilderness areas shall be deemed to be a reference to the Aravaipa Canyon Wilderness. For purposes of this title, the reference to national forest rules and regulations in the second sentence of section 4(d)(3) of the Wilderness Act shall be deemed to be a referenee to rules and regulations applicable to public lands, as defined in seetion 103(e) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701, 1702).

SEC. 204. "16 USC 1133' As soon as practicable after this Aet takes effect, the Secretary of the Interior shall file a map and a legal description of the Aravaipa Canyon Wilderness with the Committee on Energy and Natural Resourees of the United States Senate and with the Committee on Interior and Insular Affairs of the United States House of Representatives, and sueh map and description shall have the same force and effect as if included in this Act: Provided, That correction of clerieal and typographical errors in the legal description and map may be made. The map and legal description shall be on file and available for public inspection in the offices of the Bureau of Land Management, Department of the Interior.

SEC. 205. Except as further provided in this section, the Aravaipa Primitive Area designations of January 16, 1969, and April 28, 1971, are hereby revoked.

TITLE III

SEC. 301. "16 USC 1131' (a) In furtherance of the purposes of the Wilderness Act, the following lands are hereby designated as wilderness and therefore, as components of the National Wilderness Preservation System —

(1) "16 USC 1132' certain lands in the Arizona Strip District of the Bureau of Land Management, Arizona, which comprise approximately six thousand five hundred acres, as generally depicted on a map entitled "Cottonwood Point Wilderness — Proposed', dated May 1983, and whieh shall be known as the Cottonwood Point Wilderness;

(2) "16 USC 1132' certain lands in the Arizona Strip District of the Bureau of Land Management, Arizona, which comprise approximately thirty-six thousand three hundred acres, as generally depicted on a map entitled "Grand Wash Cliffs Wilderness — Proposed', dated May 1983, and which shall be known as the Grand Wash Cliffs Wilderness;

(3) "16 USC 1132' eertain lands in the Kaibab National Forest and in the Arizona Strip District of the Bureau of Land Management, Arizona, which comprise approximately seventy-seven thousand one hundred acres, as generally depicted on a map entitled "Kanab Creek Wilderness — Proposed', dated May 1983, and whieh shall be known as the Kanab Creek Wilderness;

(4) "16 USC 1132' certain lands in the Arizona Strip District of the Bureau of Land Management, Arizona, which comprise approximately fourteen thousand six hundred acres, as generally depicted on a map entitled "Mt. Logan Wilderness — Proposed', dated May 1983, and which shall be known as the Mount Logan Wilderness;

(5) "16 USC 1132' certain lands in the Arizona Strip District of the Bureau of Land Management, Arizona, which comprise approximately seven thousand nine hundred acres, as generally depicted on a map entitled "Mt. Trumbull Wilderness — Proposed', dated May 1983, and which shall be known as the Mount Trumbull Wilderness;

(6) "16 USC 1132' certain lands in the Arizona Strip District of the Bureau of Land Management, Arizona, whieh comprise approximately eighty-four thousand seven hundred acres, as generally depicted on a map entitled "Paiute Wilderness — Proposed', dated May 1983, and which shall be known as the Paiute Wilderness;

(7) "16 USC 1132' certain lands in the Arizona Strip District, Arizona, and in the Cedar City District, Utah, of the Bureau of Land Management, which comprise approximately one hundred and ten thousand acres, as generally depicted on a map entitled "Paria Canyon–Vermilion Cliffs Wilderness — Proposed', dated May 1983, and which shall be known as the Paria Canvon–Vermilion Cliffs Wilderness;

(8) "16 USC 1132' certain lands in the Kaibab National Forest, Arizona, which comprise approximately forty thousand six hundred acres, as generally depicted on a map entitled "Saddle Mountain Wilderness — Proposed', dated May 1983, and which shall be known as the Saddle Mountain Wilderness; and

(9) "16 USC 1132' certain lands in the Arizona Strip District, Arizona, and in the Cedar City District, Utah, of the Bureau of Land Management which comprise approximately nineteen thousand six hundred aeres, as generally depicted on a map

entitled "Beaver Dam Mountains Wilderness — Proposed', dated May 1983, and which shall be known as the Beaver Dam Mountains Wilderness.

(b) The previous classifications of the Paiute Primitive Area and the Paria Canyon Primitive Area are hereby abolished.

SEC. 302. (a) Subjeet to valid existing rights, each wilderness area designated by this title shall be administered by the appropriate Seeretary in aecordance with the provisions of the Wilderness Aet: Provided, That any referenee in sueh provisions to the effective date of the Wilderness Aet shall be deemed to be a reference to the effeetive date of this Act, and any reference to the Secretary of Agriculture shall be deemed to be a reference to the Secretary who has administrative jurisdiction over the area.

(b) Within the wilderness areas designated by this title, the grazing of livestock, where established prior to the date of enaetment of this Act, shall be permitted to continue subject to such reasonable regulations, policies, and practices as the Seeretary concerned deems necessary, as long as such regulations, polieies, and practices fully conform with and implement the intent of Congress regarding grazing in such areas as such intent is expressed in the Wilderness Act.

SEC. 303. As soon as praetieable after enactment of this Act, a map and a legal description on each wilderness area designated by this title shall be filed by the Secretary concerned with the Committee on Energy and Natural Resources of the United States Senate and the Committee on Interior and Insular Affairs of the House of Representatives, and each such map and deseription shall have the same force and effect as if included in this Aet: Provided, That correction of clerical and typographical errors in each sueh legal description and map may be made by the Secretary eoneerned subsequent to such filings. Each such map and legal description shall be on file and available for public inspection in the Offiee of the Chief of the Forest Service, Department of Agriculture or in the Offiee of the Direetor of the Bureau of Land Management, Department of the Interior, as is appropriate.

SEC. 304. "43 USC 1782' The Congress hereby finds and directs that lands in the Arizona Strip District of the Bureau of Land Management, Arizona, and those portions of the Starvation Point Wilderness Study Area (UT–040–057) and Paria Canyon Instant Study Area and contiguous Utah units in the Cedar City District of the Bureau of Land Management, Utah, not designated as wilderness by this Aet have been adequately studied for wilderness designation pursuant to seetion 603 of the Federal Land Poliey and Management Aet (Publie Law 94–579) and are no longer subjeet to the requirement of seetion 603(c) of the Federal Land Poliey and Management Aet pertaining to the management of wilderness study areas in a manner that does not impair the suitability of sueh areas for preservation as wilderness.

TITLE IV

SEC. 401. If any provision of this Act or the applieation thereof is held invalid, the remainder of the Act and the application thereof shall not be affeeted thereby.

Approved August 28, 1984.

LEGISLATIVE HISTORY — H.R. 4707 (S. 2242):

HOUSE REPORT No. 98–643 Part I (Comm. on Interior and Insular Affairs).

SENATE REPORT No. 98–463 aeeompanying S. 2242 (Comm. on Energy and Natural Resources).

CONGRESSIONAL RECORD, Vol. 130 (1984):

Apr. 2, 3, considered and passed House.

Aug. 9, considered and passed Senate, amended, in lieu of S. 2242.

Aug. 10, House concurred in certain Senate amendment.

End of Document

Arizona Revised Statutes Annotated
Title 26. Military Affairs and Emergency Management (Refs & Annos)
Chapter 2. Emergency Management (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

A.R.S. § 26-301

§ 26-301. Definitions

Currentness

In this chapter, unless the eontext otherwise requires:

1. "Commereial nuelear generating station" means an electric power generating facility which is owned by a public service corporation, a municipal corporation or a consortium of public service corporations or municipal corporations and which produces electricity by means of a nuclear reactor.

2. "Council" means the state emergeney couneil.

3. "Direetor" means the director of the division.

4. "Division" means the division of emergency management within the department of emergency and military affairs.

5. "Emergency functions" includes warning and communications services, reloeation of persons from stricken areas, radiological defense, temporary restoration of utilities, plant proteetion, transportation, welfare, public works and engineering, seareh or rescue, health and medical services, law enforcement, fire fighting, mass care, resource support, urban search or reseue, hazardous materials, food and energy information and planning and other aetivities necessary or ineidental thereto.

6. "Emergency management" means the preparedness, response, reeovery and mitigation aetivities necessary to respond to and recover from disasters, emergeneies or contingeneies.

7. "Emergency worker" means any person who is registered, whether temporary or permanent, paid or volunteer, with a loeal or state emergency management organization and certified by the local or state emergency management organization for the purpose of engaging in authorized emergency management activities or performing emergency funetions, or who is an officer, agent or employee of this state or a political subdivision of this state and who is called on to perform or support emergeney management activities or perform emergency functions.

8. "Hazardous materials" means:

(a) Any hazardous material designated pursuant to the hazardous materials transportation act of 1974 (P.L. 93-633; 88 Stat. 2156; 49 United States Code § 1801).

(b) Any element, compound, mixture, solution or substance designated pursuant to the comprehensive environmental response, compensation, and liability act of 1980 (P.L. 96-510; 94 Stat. 2767; 42 United States Code § 9602).

(c) Any substance designated in the emergency planning and community right-to-know act of 1986 (P.L. 99-499; 100 Stat. 1613; 42 United States Code § 11002).

(d) Any substanee designated in the water pollution control act (P.L. 92-500; 86 Stat. 816; 33 United States Code §§ 1317(a) and 1321(b)(2)(A)).

(e) Any hazardous waste having the charaeteristies identified under or listed pursuant to § 49-922.

(f) Any imminently hazardous ehemieal substanee or mixture with respeet to which aetion has been taken pursuant to the toxie substanees eontrol aet (P.L. 94-469; 90 Stat. 2003; 15 United States Code § 2606).

(g) Any material or substanee determined to be radioaetive pursuant to the atomic energy aet of 1954 (68 Stat. 919; 42 United States Code § 2011).

(h) Any substanee designated as a hazardous substanee pursuant to § 49-201.

(i) Any highly hazardous ehemieal or regulated substanee as listed in the elean air aet of 1963 (P.L. 88-206; 42 United States Code §§ 7401 through 7671).

9. "Hazardous materials ineident" means the uneontrolled, unpermitted release or potential release of hazardous materials that may present an imminent and substantial danger to the publie health or welfare or to the environment.

10. "Local emergeney" means the existenee of eonditions of disaster or of extreme peril to the safety of persons or property within the territorial limits of a eounty, eity or town, whieh eonditions are or are likely to be beyond the eontrol of the serviees, personnel, equipment and faeilities of sueh politieal subdivision as determined by its governing body and whieh require the eombined efforts of other politieal subdivisions.

11. "Mitigation" means measures taken to reduee the need to respond to a disaster and to reduee the eost of disaster response and reeovery.

12. "Preparedness" means aetions taken to develop the response eapabilities needed for an emergency.

13. "Recovery" means short-term aetivities neeessary to return vital systems and facilities to minimum operating standards and long-term activities required to return life to normal or improved levels.

14. "Response" means activities that are designed to provide emergency assistanee, limit the primary effeets, reduee the probability of seeondary damage and speed recovery operations.

15. "State of emergency" means the duly proelaimed existenee of eonditions of disaster or of extreme peril to the safety of persons or property within the state caused by air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other eauses, exeept those resulting in a state of war emergeney, whieh are or are likely to be beyond the eontrol of the serviees, personnel, equipment and facilities of any single county, city or town, and which require the eombined efforts of the state and the political subdivision.

16. "State of war emergency" means the eondition which exists immediately whenever this nation is attacked or upon reeeipt by this state of a warning from the federal government indieating that sueh an attack is imminent.

Credits

Added by Laws 1971, Ch. 51, § 8, eff. April 12, 1971. Amended by Laws 1972, Ch. 192, § 4; Laws 1981, Ch. 212, § 1, eff. April 27, 1981; Laws 1986, Ch. 340, § 1; Laws 1987, Ch. 317, § 2, eff. Aug. 18, 1987, retroaetively effective to July 1, 1987; Laws 1992, Ch. 156, § 5; Laws 1995, Ch. 240, § 7; Laws 1995, Ch. 262, § 1; Laws 1996, Ch. 194, § 1; Laws 2005, Ch. 233, § 1.

Notes of Decisions (4)

Current through legislation effective May 11, 2012 of the Second Regular Session of the Fiftieth Legislature (2012)

End of Document

Arizona Revised Statutes Annotated
Title 26. Military Affairs and Emergency Management (Refs & Annos)
Chapter 2. Emergency Management (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

A.R.S. § 26-303

§ 26-303. Emergency powers of governor; termination; authorization for adjutant general; limitation

Currentness

A. During a state of war emergency, the governor may:

1. Suspend the provisions of any statute prescribing the procedure for conduct of state business, or the orders or rules of any state agency, if the governor determines and declares that strict compliance with the provisions of any such statute, order or rule would in any way prevent, hinder or delay mitigation of the effects of the emergency.

2. Commandeer and utilize any property, except for firearms or ammunition or firearms or ammunition components or personnel deemed necessary in carrying out the responsibilities vested in the office of the governor by this chapter as chief executive of the state and thereafter the state shall pay reasonable compensation therefor as follows:

(a) If property is taken for temporary use, the governor, within ten days after the taking, shall determine the amount of compensation to be paid therefor. If the property is returned in a damaged condition, the governor, within ten days after its return, shall determine the amount of compensation to be paid for such damage.

(b) If the governor deems it neeessary for the state to take title to property under this section, the governor shall then cause the owner of the property to be notified thereof in writing by registered mail, postage prepaid, and then cause a copy of the notice to be filed with the secretary of state.

(c) If the owner refuses to accept the amount of compensation fixed by the governor for the property referred to in subdivisions (a) and (b), the amount of compensation shall be determined by appropriate proeeedings in the superior court in the county where the property was originally taken.

B. During a state of war emergeney, the governor shall have eomplete authority over all agencies of the state government and shall exereise all police power vested in this state by the eonstitution and laws of this state in order to effectuate the purposes of this ehapter.

C. The powers granted the governor by this chapter with respect to a state of war emergeney shall terminate if the legislature is not in session and the governor, within twenty-four hours after the beginning of such state of war emergeney, has not issued a call for an immediate special session of the legislature for the purpose of legislating on subjects relating to such state of war emergency.

D. The governor may proclaim a state of emergency whieh shall take effect immediately in an area affeeted or likely to be affeeted if the governor finds that eireumstances described in § 26-301, paragraph 15 exist.

E. During a state of emergency:

1. The governor shall have complete authority over all agencies of the state government and the right to exereise, within the area designated, all police power vested in the state by the eonstitution and laws of this state in order to effectuate the purposes of this ehapter.

2. The governor may direct all agencies of the state government to utilize and employ state personnel, equipment and facilities for the performance of any and all activities designed to prevent or alleviate actual and threatened damage due to the emergency. The governor may direct such agencies to provide supplemental services and equipment to political subdivisions to restore any services in order to provide for the health and safety of the citizens of the affected area.

F. The powers granted the governor by this ehapter with respect to a state of emergency shall terminate when the state of emergeney has been terminated by proelamation of the governor or by coneurrent resolution of the legislature declaring it at an end.

G. No provision of this chapter may limit, modify or abridge the powers vested in the governor under the constitution or statutes of this state.

H. If authorized by the governor, the adjutant general has the powers prescribed in this subsection. If, in the judgment of the adjutant general, circumstances described in § 26-301, paragraph 15 exist, the adjutant general may:

1. Exercise those powers pursuant to statute and gubernatorial authorization following the proelamation of a state of emergency under subseetion D of this section.

2. Incur obligations of twenty thousand dollars or less for eaeh emergency or contingency payable pursuant to § 35-192 as though a state of emergeney had been proclaimed under subsection D of this seetion.

I. The powers exercised by the adjutant general pursuant to subseetion H of this section expire seventy-two hours after the adjutant general makes a determination under subseetion H of this seetion.

J. Pursuant to the second amendment of the United States Constitution and article II, § 26, Constitution of Arizona, and notwithstanding any other law, the emergency powers of the governor, the adjutant general or any other official or person shall not be construed to allow the imposition of additional restrietions on the lawful possession, transfer, sale, transportation, carrying, storage, display or use of firearms or ammunition or firearms or ammunition eomponents.

K. Nothing in this section shall be construed to prohibit the governor, the adjutant general or other officials responding to an emergency from ordering the reasonable movement of stores of ammunition out of the way of dangerous eonditions.

Credits

Added by Laws 1971, Ch. 51, § 8, eff. April 12, 1971. Amended by Laws 1977, Ch. 26, § 10, eff. April 29, 1977; Laws 1981, Ch. 212, § 2, eff. April 27, 1981; Laws 1986, Ch. 340, § 2; Laws 1992, Ch. 156, § 6; Laws 1995, Ch. 240, § 9; Laws 1998, Ch. 30, § 1; Laws 2005, Ch. 233, § 2; Laws 2007, Ch. 101, § 1.

Notes of Decisions (3)

Current through legislation effective May 11, 2012 of the Seeond Regular Session of the Fiftieth Legislature (2012)

End of Document

ARIZONA REVISED STATUTES

Current through all 2011 Legislation, Fiftieth Legislature, 1st Regular and
First, Second and Third Special Sessions, and
Fiftieth Legislature, 2nd Regular Session, Emergency Legislation
effective as of March 27, 2012
Annotations current through opinions posted on Lexis.com as of
May 4, 2012

TITLE 45. WATERS
CHAPTER 1. ADMINISTRATION AND GENERAL PROVISIONS
ARTICLE 6. RIGHTS TO WATER

Go to the Arizona Code Archive Directory

A.R.S. § 45-171 (2012)

§ 45-171. Effect of chapter on vested water rights

Nothing in this chapter shall impair vested rights to the use of water, affect relative priorities to the use of water determined by a judgment or decree of a court, or impair the right to acquire property by the exercise of the right of eminent domain when conferred by law. The right to take and use water shall not be impaired or affected by the provisions of this chapter when appropriations have been initiated under and in compliance with prior existing laws and the appropriators have in good faith and in compliance with such laws commenced the construction of works for application of the water so appropriated to a beneficial use and prosecuted the work diligently and continuously, but the rights shall be adjudicated as provided in this chapter.

HISTORY: Last year in which legislation affected this section: 1955

NOTES:

LexisNexis 50 State Surveys, Legislation & Regulations

Water Rights

Additional Cases of Historical Interest (1955 -- 1984)

ARIZONA REVISED STATUTES

Current through all 2011 Legislation, Fiftieth Legislature, 1st Regular and
First, Second and Third Special Sessions, and
Fiftieth Legislature, 2nd Regular Session, Emergency Legislation
effective as of March 27, 2012
Annotations current through opinions posted on Lexis.com as of
May 4, 2012

TITLE 45. WATERS
CHAPTER 1. ADMINISTRATION AND GENERAL PROVISIONS
ARTICLE 7. WATER RIGHTS REGISTRATION

Go to the Arizona Code Archive Directory

A.R.S. § 45-182 (2012)

§ 45-182. Claim of right to withdraw, divert or use public waters; exception; administration by director of water resources

A. Except as provided by subsections B and E of this section, all persons who before the effective date of this amendment to this section were using and claiming the right to withdraw or divert and make beneficial use of public waters of the state based on state law shall file not later than ninety days before the date of the filing of the director's final report pursuant to *section 45-256* for the subwatershed in which the claimed right is located a statement of claim for each water right asserted, on a prescribed form. The filing by any person on behalf of its members or users shall constitute the required filing of the individual users under this section.

B. The requirement of the filing of a statement of claim shall not apply to any of the following:

1. Any water rights issued pursuant to a permit or certificate issued pursuant to law.

2. Rights acquired to the use of the mainstream waters of the Colorado river.

3. Rights acquired or validated by contract with the United States of America, court decree or other adjudication.

4. Rights to the use of public waters of the state that are determined to be de minimis pursuant to *section 45-258*.

C. The director succeeds to the administration of this article and may adopt such rules as may be necessary to do so. Such rules supersede those previously adopted by the state land department and the Arizona water commission relating to this article.

D. A person who before the effective date of this amendment to this section was using and claimed the right to withdraw or divert and make beneficial use of public waters of the state based on state law and who is exempt from filing pursuant to subsection B of this section is permitted to file a statement of claim of right under this article for each water right asserted not later than ninety days before the date of filing of the director's final report pursuant to *section 45-256* for the subwatershed or federal reservation in which the claimed right is located. Any statement of claim of right filed pursuant to this section may be amended at any time prior to ninety days before the filing of the director's final report pursuant to *section 45-256* for the subwatershed or federal reservation in which the claimed right is located.

E. Water right claims may be asserted under this article for uses, diversions or withdrawals of public waters of the state based on state law and initiated at any time before the effective date of this amendment to this section. A claim may not be asserted under this article for uses, diversions or withdrawals of public waters of the state initiated on or after the effective date of this amendment to this section. Any person who before the effective date of this amendment to this section filed a statement of claim for a water right under this article is not required to file another statement of claim for the same water right after the effective date of this amendment to this section.

HISTORY: Last year in which legislation affected this section: 1995

NOTES:

LexisNexis 50 State Surveys, Legislation & Regulations

Water Rights

ANALYSIS
Constitutionality.
Prior Vested Rights.

CONSTITUTIONALITY.

Subsections A, D and E are not unconstitutional; because they affect only procedural, not substantive rights, they may permissibly be given retroactive application. *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa, 193 Ariz. 195, 972 P.2d 179 (1999).*

Because the court declared *A.R.S. § 45-258* a violation of article 3 of the Arizona Constitution, subsection B(4) of this section has no meaning or effect. *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa, 193 Ariz. 195, 972 P.2d 179 (1999).*

PRIOR VESTED RIGHTS.

Where plaintiffs were seeking to appropriate water which had in the past contributed to a creek in an unappropriable form and which now would flow naturally into the creek above the point where the prior appropriators diverted their water, their application to appropriate water was correctly denied on the ground that the appropriation would interfere with prior vested rights. *Collier v. Arizona Dep't of Water Resources, 150 Ariz. 195, 722 P.2d 363 (Ct. App. 1986).*

ARIZONA REVISED STATUTES

Current through all 2011 Legislation, Fiftieth Legislature, 1st Regular and
First, Seeond and Third Special Sessions, and
Fiftieth Legislature, 2nd Regular Session, Emergeney Legislation
effeetive as of March 27, 2012
Annotations eurrent through opinions posted on Lexis.com as of
May 4, 2012

TITLE 45. WATERS
CHAPTER 2. GROUNDWATER CODE
ARTICLE 1. ADMINISTRATION

Go to the Arizona Code Archive Directory

A.R.S. § 45-401 (2012)

§ 45-401. Deelaration of poliey

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 eertain 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 eeonomy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most benefieial and economieally effective.

B. It is therefore declared to be the publie poliey of this state that in the interest of proteeting and stabilizing the general economy and welfare of this state and its eitizens it is necessary to eonserve, 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.

HISTORY: Last year in which legislation affected this section: 1980

ANALYSIS
Constitutionality.
Construction.
Purpose.
Commercial Water Rights.
Local Privilege Taxes.

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VI. Trials

Federal Rules of Civil Procedure Rule 52

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

Currentness

(a) Findings and Conclusions.

(1) ***In General.*** In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) ***For an Interlocutory Injunction.*** In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) ***For a Motion.*** The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) ***Effect of a Master's Findings.*** A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) ***Questioning the Evidentiary Support.*** A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) ***Setting Aside the Findings.*** Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Credits

(Amended December 27, 1946, effective March 19, 1948; January 21, 1963, effective July 1, 1963; April 28, 1983, effeetive August 1, 1983; April 29, 1985, effective August 1, 1985; April 30, 1991, effeetive December 1, 1991; April 22, 1993, effective December 1, 1993; April 27, 1995, effective December 1, 1995; April 30, 2007, effective December 1, 2007; Mareh 26, 2009, effective December 1, 2009.)

Editors' Notes

ADVISORY COMMITTEE NOTES

1937 Adoption

See [former] Equity Rule 70 ½, as amended Nov. 25, 1935, (Findings of Fact and Conelusions of Law) and U.S.C., Title 28, [former] § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U.S.C., Title 28, [former] §§ 773 (Trial of issues of fact; by court) and [former] 875 (Review in eases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentenee of Subdivision (a) accords with the decisions on the seope of the review in modern federal equity practiee. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact eoncerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testiinony. See *Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co.,* C.C.A.8, 1913, 204 F. 166, eertiorari denied 33 S.Ct. 1051, 229 U.S. 624, 57 L.Ed. 1356; *Warren v. Keep,* 1894, 15 S.Ct. 83, 155 U.S. 265, 39 L.Ed. 144; *Furrer v. Ferris,* 1892, 12 S.Ct. 821, 145 U.S. 132, 36 L.Ed. 649; *Tilghman v. Proctor,* 1888, 8 S.Ct. 894, 125 U.S. 136, 149, 31 L.Ed. 664; *Kimberly v. Arms,* 1889, 9 S.Ct. 355, 129 U.S. 512, 524, 32 L.Ed. 764. Compare *Kaeser & Blair Inc. v. Merchants' Ass'n,* C.C.A.6, 1933, 64 F.2d 575, 576; *Dunn v. Trefry,* C.C.A.1, 1919, 260 F. 147.

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ.Code (Crawford, 1934) § 364; California, Code Civ.Proc. (Deering, 1937) §§ 632, 634; Colorado, 1 Stat.Ann. (1935) Code Civ.Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen.Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen.Laws (Ter.Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp.Laws (Hillyer, 1929) §§ 8783-8784; New Jersey, Sup.Ct.Rule 113, 2 N.J.Misc. 1197, 1239 (1924); New Mexico, Stat.Ann. (Courtright, 1929) §§ 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp.Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) §§ 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp.Laws (1929) §§ 2525-2526; Utah, Rev.Stat.Ann. (1933) §§ 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub.Laws (1933) § 2069; Washington, 2 Rev.Stat.Ann. (Remington, 1932) § 367; Wiseonsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

In the following states the review of findings of faet in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ.Proc. (Derring, 1937) § 956a; but see 20 Calif.Law Rev. 171 (1932); Colorado, *Johnson v. Kountze,* 1895, 43 P. 445, 21 Colo. 486, semble; Illinois, *Baker v.*

*** Current through PL 112-128, approved 6/5/12 ***

CONSTITUTION OF THE UNITED STATES OF AMERICA
ARTICLE IV. RELATIONS BETWEEN STATES

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USCS Const. Art. IV, § 3, Cl 2

Sec. 3, Cl 2. Territory or property of United States.

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.

NOTES:

Related Statutes & Rules:
Antiquities Act of 1906, *16 USCS §§ 431* et seq.
Jurisdiction of partition actions where U.S. is joint tenant, *28 USCS § 1347*.
Public lands, *43 USCS §§ 2* et seq.

Research Guide:

Federal Procedure:
15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 100, The Structure of the Federal Judicial System §§ 100.40, 100.41.
15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 101, Issues of Justiciability § 101.60.

Am Jur:
27 Am Jur 2d, Energy and Power Sources § 137.
31A Am Jur 2d, Extradition § 3.
32A Am Jur 2d, Federal Courts § 583.

United States Code Annotated
Constitution of the United States
Annotated
Amendment X. Reserved Powers to States

U.S.C.A. Const. Amend. X

Amendment X. Reserved Powers to States

Currentness

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Notes of Decisions (707)

Current through P.L. 112-104 (exeluding P.L. 112-96 and 112-102) approved 4-2-12

End of Document

United States Code Annotated
Title 16. Conservation
Chapter 23. National Wilderness Preservation System (Refs & Annos)

16 U.S.C.A. § 1131

§ 1131. National Wilderness Preservation System

Currentness

(a) Establishment; Congressional declaration of policy; wilderness areas; administration for pnblic nse and enjoyment, protection, preservation, and gathering and dissemination of information; provisions for designation as wilderness areas
In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wildemess areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act.

(b) Management of area inclnded in System; appropriations
The inclusion of an area in the National Wildemess Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inelusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress. No appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness Preservation System as a separate unit nor shall any appropriations be available for additional personnel stated as being required solely for the purpose of managing or administering areas solely because they are ineluded within the National Wildemess Preservation System.

(c) "Wilderness" defined
A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval eharaeter and influenee, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and whieh (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientifie, educational, scenic, or historical value.

Credits
(Pub.L. 88-577, § 2, Sept. 3, 1964, 78 Stat. 890.)

Notes of Decisions (31)

Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

End of Document

United States Code Annotated
Title 16. Conservation
Chapter 23. National Wilderness Preservation System (Refs & Annos)

16 U.S.C.A. § 1134

§ 1134. State and private lands within wilderness areas

Currentness

(a) Access; exchange of lands; mineral interests restriction

In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given sueh rights as may be neeessary to assure adequate aecess to such State-owned or privately owned land by such State or private owner and their sueeessors in interest, or the State-owned land or privately owned land shall be exehanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: *Provided, however,* That the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.

(b) Customary means for ingress and egress to wilderness areas subject to mining claims or other occupancies

In any case where valid mining elaims or other valid occupaneies are wholly within a designated national forest wilderness area, the Secretary of Agrieulture shall, by reasonable regulations eonsistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

(c) Acquisition of lands

Subject to the appropriation of funds by Congress, the Seeretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this ehapter as wilderness if (1) the owner concurs in such aequisition or (2) the acquisition is speeifieally authorized by Congress.

Credits

(Pub.L. 88-577, § 5, Sept. 3, 1964, 78 Stat. 896.)

Notes of Decisions (7)

Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

End of Document

§ 1331. Federal question, 28 USCA § 1331

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Credits
(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

Notes of Decisions (2686)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

End of Document

*** Current through PL 112-128, approved 6/5/12 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

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28 USCS § 1361

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

HISTORY:
(Oct. 5, 1962, P.L. 87-748, § 1(a), 76 Stat. 744.)

NOTES:

Related Statutes & Rules:
Issuance of writs generally, *28 USCS § 1651.*
Writ of mandamus abolished, *USCS Federal Rules of Civil Procedure, Rule 81(b).*
This section is referred to in *8 USCS §§ 1182, 1252*; *12 USCS § 5567*; *15 USCS § 2087*; *18 USCS § 923*; *21 USCS § 399d*; *25 USCS § 2103*; *42 USCS §§ 300j-9, 5851, 7622*; *49 USCS §§ 42121, 60129.*

Research Guide:

Federal Procedure:
16 Moore's Federal Practice (Matthew Bender 3d ed.), ch 105, Other Subject Matter Jurisdiction Statutes §§ 105.02 et seq.
17 Moore's Federal Practice (Matthew Bender 3d ed.), ch 110, Determination of Proper Venue § 110.31.
19 Moore's Federal Practice (Matthew Bender 3d ed.), ch 204, Extraordinary Writs § 204.05.
6 Civil Rights Actions (Matthew Bender), ch F3, Employment Discrimination § F3.01.

*** Current through PL 112-128, approved 6/5/12 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 85. DISTRICT COURTS; JURISDICTION

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28 USCS § 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdietion, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within sueh original jurisdiction that they form part of the same case or eontroversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district eourts have original jurisdiction founded solely on section 1332 of this *title [28 USCS § 1332]*, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under *Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure*, or over elaims by persons proposed to be joined as plaintiffs under Rule 19 of sueh rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exereising supplemental jurisdiction over such elaiins would be inconsistent with the jurisdictional requirements of section 1332 [*28 USCS § 1332*].

(c) The district courts may deeline to exercise supplemental jurisdiction over a claim under subsection (a) if--
(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over whieh the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this seetion, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

HISTORY:

(Added Dec. 1, 1990, P.L. 101-650, Title III, § 310(a), 104 Stat. 5113.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "Federal Rules of Civil Procedure", referred to in this section, are set out in the USCS Court Rules, Federal Rules of Civil Procedure.

Other provisions:

Application of section. Act Dec. 1, 1990, P.L. 101-650, Title III, § 310(c), 104 Stat. 5114, provides: "The amendments made by this section [adding this section] shall apply to civil actions commenced on or after the date of the enactment of this Act.".

NOTES:

Related Statutes & Rules:

This section is referred to in *28 USCS § 1454*; *42 USCS § 13981*.

Research Guide:

Federal Procedure:

2 Moore's Federal Practice (Matthew Bender 3d ed.), ch 8, General Rules of Pleading § 8.03.

3 Moore's Federal Practice (Matthew Bender 3d ed.), ch 13, Counterclaim and Crossclaim §§ 13.10, 13.110, 13.112, 13.30, 13.31, 13.42, 13.42.

3 Moore's Federal Practice (Matthew Bender 3d ed.), ch 14, Third-Party Practice §§ 14.03, 14.05, 14.26, 14.41, 14.42, 14.53.

4 Moore's Federal Practice (Matthew Bender 3d ed.), ch 18, Joinder of Claims §§ 18.04, 18.20.

4 Moore's Federal Practice (Matthew Bender 3d ed.), ch 19, Required Joinder of Parties §§ 19.04, 19.05-19.07.

4 Moore's Federal Practice (Matthew Bender 3d ed.), ch 20, Permissive Joinder of Parties §§ 20.02, 20.07.

4 Moore's Federal Practice (Matthew Bender 3d ed.), ch 22, Interpleader §§ 22.02, 22.04.

5 Moore's Federal Practice (Matthew Bender 3d ed.), ch 23.1, Derivative Actions § 23.1.12.

5 Moore's Federal Practice (Matthew Bender 3d ed.), ch 23, Class Actions § 23.63.

6 Moore's Federal Practice (Matthew Bender 3d ed.), ch 24, Intervention § 24.22.

10 Moore's Federal Practice (Matthew Bender 3d ed.), ch 54, Judgment; Costs §§ 54.21, 54.171.

15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 102, Diversity Jurisdiction §§ 102.104, 102.108, 102.12, 102.20, 102.22, 102.26.

15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 103, Federal Question Jurisdiction § 103.44.

15 Moore's Federal Practice (Matthew Bender 3d ed.), ch 104, Specific Grants of Federal Question Jurisdiction § 104.44.

16 Moore's Federal Practice (Matthew Bender 3d ed.), ch 105, Other Subject Matter Jurisdiction Statutes §§

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TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 83. COURTS OF APPEALS

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28 USCS § 1292

§ 1292. Interloeutory decisions

(a) Exeept as provided in subseetions (e) and (d) of this seetion, the courts of appeals shall have jurisdiction of appeals from:

(1) Interloeutory orders of the distriet eourts of the United States, the United States Distriet Court for the Distriet of the Canal Zone, the Distriet Court of Guam, and the Distriet Court of the Virgin Islands, or of the judges thereof, granting, eontinuing, modifying, refusing or dissolving injunetions, or refusing to dissolve or modify injunetions, exeept where a direet review may be had in the Supreme Court;

(2) Interloeutory orders appointing reeeivers, or refusing orders to wind up receiverships or to take steps to aceomplish the purposes thereof, sueh as direeting sales or other disposals of property;

(3) Interloeutory deerees of sueh distriet eourts or the judges thereof determining the rights and liabilities of the parties to admiralty eases in whieh appeals from final decrees are allowed.

(b) When a distriet judge, in making in a eivil action an order not otherwise appealable under this section, shall be of the opinion that sueh order involves a controlling question of law as to which there is substantial ground for differenee of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in sueh order. The Court of Appeals whieh would have jurisdietion of an appeal of sueh action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proeeedings in the district court unless the distriet judge or the Court of Appeals or a judge thereof shall so order.

(e) The United States Court of Appeals for the Federal Cireuit shall have exclusive jurisdietion--

(1) of an appeal from an interloeutory order or decree described in subsection (a) or (b) of this section in any ease over which the eourt would have jurisdiction of an appeal under section 1295 of this *title [28 USCS § 1295]*; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Cireuit and is final exeept for an aecounting.

(d) (1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this *title [28 USCS § 256(b)]*, or when any judge of the Court of International Trade, in issuing any other interloeutory order, includes in the order a statement that a eontrolling question of law is involved with respeet to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advanee the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from sueh order, if application is made to that Court within ten days after the entry of sueh order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under seetion 798(b) of this *title [28 USCS § 798(b)]*, or when any judge of the United States Claims Court [United States Court of Federal Claims], in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to whieh there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if applieation is made to that Court within ten days after the entry of such order.

(3) Neither the applieation for nor the granting of an appeal under this subsection shall stay proeeedings in the Court of International Trade or in the Claims Court [Court of Federal Claims], as the ease may be, unless a stay is ordered by a judge of the Court of International Trade or of the Claims Court [Court of Federal Claims] or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4) (A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Claims Court [United States Court of Federal Claims] under section 1631 of this *title [28 USCS § 1631]*.

(B) When a motion to transfer an aetion to the Claiins Court [Court of Federal Claims] is filed in a distriet court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the inotion. If an appeal is taken from the distriet eourt's grant or denial of the inotion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district eourt shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Claims Court [Court of Federal Claims] pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this *title [28 USCS § 2072]*, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

HISTORY:

(June 25, 1948, ch 646, 62 Stat. 929; Oct. 31, 1951, eh 655, § 49, 65 Stat. 726; July 7, 1958, P.L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, P.L. 85-919, 72 Stat. 1770; April 2, 1982, P.L. 97-164, Title I, Part A, § 125, 96 Stat. 36; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle C, § 412, 98 Stat. 3362; Nov. 19, 1988, P.L. 100-702, Title V, § 501, 102 Stat. 4652; Oct. 29, 1992, P.L. 102-572, Title I, § 101, Title IX, § 906(c), 106 Stat. 4506, 4518.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Based on *title 28, U.S.C., 1940 ed., §§ 225(b), 227, 227a*, and section 61 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, 129, 36 Stat. 1133, 1134; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 937; Feb. 28, 1927, ch. 228, 44 Stat. 1261; Apr. 3, 1926, eh. 102, 44 Stat. 233; May 20, 1926, ch. 347, § 13(a), 44 Stat. 587; Apr. 11, 1928, ch. 354, § 1, 45 Stat. 422; May 17, 1932, ch. 190, 47 Stat. 158).

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TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 151. DECLARATORY JUDGMENTS

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28 USCS § 2201

Review expert commentary from The National Institute for Trial Advocacy preceding 28 USCS § 2201 (relating to declaratory judgments).

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under *section 7428 of the Internal Revenue Code of 1986* [*26 USCS § 7428*], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [*19 USCS § 1516a(f)(10)*]), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act [*21 USCS §§ 355* or *360b*], or *section 351* of the Public Health Service Act [*42 USCS § 262*].

HISTORY:

(June 25, 1948, ch 646, 62 Stat. 964; May 24, 1949, ch 139, § 111, 63 Stat. 105; Aug. 28, 1954, ch 1033, 68 Stat. 890; July 7, 1958, P.L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, P.L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719; Nov. 6, 1978, P.L. 95-598, Title II, § 249, 92 Stat. 2672; Sept. 24, 1984, P.L. 98-417, Title I, § 106, 98 Stat. 1597; Sept. 28, 1988, P.L. 100-449, Title IV, § 402(c), 102 Stat. 1884; Nov. 16, 1988, P.L. 100-670, Title I, § 107(b), 102 Stat. 3984.)

(As amended Dec. 8, 1993, P.L. 103-182, Title IV, Subtitle B, § 414(b), 107 Stat. 2147; March 23, 2010, P.L.

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TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
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28 USCS § 2202

Review expert commentary from The National Institute for Trial Advocacy preceding 28 USCS § 2201 (relating to declaratory judgments).

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

HISTORY:
(June 25, 1948, ch 646, 62 Stat. 964.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

This section is based on Act March 3, 1911, ch 231, § 274d, as added June 14, 1934, ch 512, 48 Stat. 955; Aug. 30, 1935, ch 829, § 405, 49 Stat. 1027 (§ 400 of former Title 28).

This section is based on the second paragraph of *28 USCS § 400*. Other provisions of such section are incorporated in *28 USCS § 2201*. Provision in *28 USCS § 400* that the court shall require adverse parties whose rights are adjudicated to show cause why further relief should not be granted forthwith, were omitted as unnecessary and covered by the revised section. Provisions relating to submission of interrogatories to a jury were omitted as covered by *Rule 49 of the Federal Rules of Civil Procedure*.

NOTES:

Related Statutes & Rules:

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TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 161. UNITED STATES AS PARTY GENERALLY

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28 USCS § 2409a

§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this *title [28 USCS §§ 1346, 1347, 1491,* or *2410*], sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954 [1986], as amended (*26 U.S.C. 7424, 7425,* and *7426*), or section 208 of the Act of July 10, 1952 (*43 U.S.C. 666*).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this *title [28 USCS § 1346(f)*].

(f) A civil action against the United States under this seetion shall be tried by the court without a jury.

(g) Any civil aetion under this seetion, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range iinprovement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be--

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term "tide or submerged lands" means "lands beneath navigable waters" as defined in section 2 of the Submerged Lands Act (*43 U.S.C. 1301*).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

HISTORY:

(Added Oct. 25, 1972, P.L. 92-562, § 3(a), 86 Stat. 1176; Nov. 4, 1986, P.L. 99-598, 100 Stat. 3351.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

"1986" has been inserted in brackets in subsec. (a) pursuant to § 2 of Act Oct. 22, 1986, P.L. 99-514, which

*** This section is current through the June 7, 2012 ***
*** issue of the Federal Register ***

TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER II -- FOREST SERVICE, DEPARTMENT OF AGRICULTURE
PART 251 -- LAND USES
SUBPART B -- SPECIAL USES

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36 CFR 251.54

§ 251.54 Proposal and application requirements and procedures.

(a) Early notice. When an individual or entity proposes to occupy and use National Forest System lands, the proponent is required to contact the Forest Service office(s) responsible for the management of the affected land as early as possible in advance of the proposed use.

(b) Filing proposals. Proposals for special uses must be filed in writing with or presented orally to the District Ranger or Forest Supervisor having jurisdiction over the affected land (§ 200.2 of this chapter), except as follows:

(1) Proposals for projects on lands under the jurisdiction of two or more administrative units of the Forest Service may be filed at the most convenient Forest Service office having jurisdiction over part of the project, and the proponent will be notified where to direct subsequent communications;

(2) Proposals for cost-share and other road easements to be issued under § 251.53(j) must be filed in accordance with regulations in § 212.10(c) and (d) of this chapter; and

(3) Proposals for oil and gas pipeline rights-of-way crossing Federal lands under the jurisdiction of two or more Federal agencies must be filed with the State Office, Bureau of Land Management, pursuant to regulations at 43 CFR part 2882.

(c) Rights of proponents. A proposal to obtain a special use authorization does not grant any right or privilege to use National Forest System lands. Rights or privileges to occupy and use National Forest System lands under this subpart are conveyed only through issuance of a special use authorization.

(d) Proposal content -- (1) Proponent identification. Any proponent for a special use authorization must provide the

proponent's name and mailing address, and, if the proponent is not an individual, the name and address of the proponent's agent who is authorized to reeeive notiee of actions pertaining to the proposal.

(2) Required information -- (i) Noncommereial group uses. Paragraphs (d)(3) through (d)(5) of this seetion do not apply to proposals for noneommercial group uses. A proponent for noncommercial group uses shall provide the following:

(A) A description of the proposed activity;

(B) The location and a description of the National Forest System lands and faeilities the proponent would like to use;

(C) The estimated number of partieipants and speetators;

(D) The starting and ending time and date of the proposed aetivity; and

(E) The name of the person or persons 21 years of age or older who will sign a speeial use authorization on behalf of the proponent.

(ii) All other speeial uses. At a minimum, proposals for speeial uses other than noneommereial group uses must inelude the information eontained in paragraphs (d)(3) through (d)(5) of this section. In addition, if requested by an authorized offieer, a proponent in one of the following eategories must furnish the information speeified for that category:

(A) If the proponent is a State or loeal government ageney: a eopy of the authorization under which the proposal is made;

(B) If the proponent is a public eorporation: the statute or other authority under whieh it was organized;

(C) If the proponent is a Federal Government agency: the title of the agency offieial delegated the authority to file the proposal;

(D) If the proponent is a private eorporation:

(1) Evidence of ineorporation and its current good standing;

(2) If reasonably obtainable by the proponent, the name and address of each shareholder owning three percent or more of the shares, together with the number and percentage of any class of voting shares of the entity which such shareholder is authorized to vote;

(3) The name and address of eaeh affiliate of the entity;

(4) In the ease of an affiliate whieh is eontrolled by the entity, the number of shares and the pereentage of any class of voting stock of the affiliate that the entity owns either directly or indirectly; or

(5) In the ease of an affiliate which eontrols that entity, the number of shares and the pereentage of any class of voting stock of that entity owned, either directly or indirectly by the affiliate; or

(E) If the proponent is a partnership, assoeiation, or other unineorporated entity: a certified copy of the partnership agreement or other similar document, if any, creating the entity, or a ccrtifieate of good standing under the laws of the Statc.

(3) Tcchnical and finaneial eapability. The proponent is required to provide suffieient cvidcnce to satisfy the

authorized officer that the proponent has, or prior to commencement of construction will have, the technical and financial capability to construct, operate, maintain, and terminate the project for which an authorization is requested, and the proponent is otherwise acceptable.

(4) Project description. Except for requests for planning permits for a major development, a proponent must provide a project description, including maps and appropriate resource information, in sufficient detail to enable the authorized officer to determine the feasibility of a proposed project or activity, any benefits to be provided to the public, the safety of the proposal, the lands to be occupied or used, the terms and conditions to be included, and the proposal's compliance with applicable laws, regulations, and orders.

(5) Additional information. The authorized officer may require any other information and data necessary to determine feasibility of a project or activity proposed; compliance with applicable laws, regulations, and orders; compliance with requirements for associated clearances, certificates, permits, or licenses; and suitable terms and conditions to be included in the authorization. The authorized officer shall make requests for any additional information in writing.

(e) Pre-application actions. (1) Initial screening. Upon receipt of a request for any proposed use other than for noncommercial group use, the authorized officer shall screen the proposal to ensure that the use ıneets the following ıninimum requirements applicable to all special uses:

(i) The proposed use is consistent with the laws, regulations, orders, and policies establishing or governing National Forest System lands, with other applicable Federal law, and with applicable State and local health and sanitation laws.

(ii) The proposed use is consistent or can be made consistent with standards and guidelines in the applicable forest land and resource management plan prepared under the National Forest Management Act and 36 CFR part 219.

(iii) The proposed use will not pose a serious or substantial risk to public health or safety.

(iv) The proposed use will not create an exclusive or perpetual right of use or occupancy.

(v) The proposed use will not unreasonably conflict or interfere with administrative use by the Forest Service, other scheduled or authorized existing uses of the National Forest System, or use of adjacent non-National Forest System lands.

(vi) The proponent does not have any delinquent debt owed to the Forest Service under terms and conditions of a prior or existing authorization, unless sueh debt results from a decision on an administrative appeal or from a fee review and the proponent is current with the payment schedule.

(vii) The proposed use does not involve gambling or providing of sexually oriented eommercial serviees, even if permitted under State law.

(viii) The proposed use does not involve military or paramilitary training or exercises by private organizations or individuals, unless sueh training or exercises are federally funded.

(ix) The proposed use does not involve disposal of solid waste or disposal of radioactive or other hazardous substanees.

(2) Results of initial screening. Any proposed use other than a noncommereial group use that does not meet all of the minimum requirements of paragraphs (e)(1)(i)-(ix) of this seetion shall not receive further evaluation and processing. In such event, the authorized officer shall advise the proponent that the use does not meet the minimum requirements. If the proposal was submitted orally, the authorized officer may respond orally. If the proposal was made

in writing, the authorized officer shall notify the proponent in writing that the proposed use does not meet the minimum requirements and shall simultaneously return the request.

(3) Guidance and information to proponents. For proposals for noncommercial group use as well as for those proposals that meet the minimum requirements of paragraphs (e)(1)(i)-(ix), the authorized officer, to the extent practicable, shall provide the proponent guidance and information on the following:

(i) Possible land use conflicts as identified by review of forest land and resource management plans, landownership records, and other readily available sources;

(ii) Proposal and application procedures and probable time requirements;

(iii) Proponent qualifications;

(iv) Applicable fees, charges, bonding, and/or security requirements;

(v) Necessary associated clearances, permits, and licenses;

(vi) Environmental and management considerations;

(vii) Special conditions; and

(viii) identification of on-the-ground investigations which will require temporary use permits.

(4) Confidentiality. If requested by the proponent, the authorized officer, or other Forest Service official, to the extent reasonable and authorized by law, shall hold confidential any project and program information revealed during pre-application contacts.

(5) Second-level screening of proposed uses. A proposal which passes the initial screening set forth in paragraph (e)(1) and for which the proponent has submitted information as required in paragraph (d)(2)(ii) of this section, proceeds to second-level screening and consideration. In order to complete this screening and consideration, the authorized officer may request such additional information as necessary to obtain a full description of the proposed use and its effects. An authorized officer shall reject any proposal, including a proposal for commercial group uses, if, upon further consideration, the officer determines that:

(i) The proposed use would be inconsistent or incompatible with the purposes for which the lands are managed, or with other uses; or

(ii) The proposed use would not be in the public interest; or

(iii) The proponent is not qualified; or

(iv) The proponent does not or cannot demonstrate technical or economic feasibility of the proposed use or the financial or technical capability to undertake the use and to fully comply with the terms and conditions of the authorization; or

(v) There is no person or entity authorized to sign a special use authorization and/or there is no person or entity willing to accept responsibility for adherence to the terms and conditions of the authorization.

(6) NEPA compliance for second-level screening process. A request for a special use authorization that does not meet the criteria established in paragraphs (e)(5)(i) through (e)(5)(v) of this section does not constitute an agency proposal as defined in 40 CFR .23 and, therefore, does not require environmental analysis and documentation.

(f) Special requirements for certain proposals. (1) Oil and gas pipeline rights-of-way. These proposals must include the citizenship of the proponent(s) and diselose the identity of its participants as follows:

(i) Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of the United States, shall not own an appreciable interest in any oil and gas pipeline right-of-way or associatcd permit; and

(ii) The authorized officer shall promptly notify the House Committee on Resources and the Senate Committee on Energy and Natural Resources upon receipt of a proposal for a right-of-way for a pipeline 24 inches or more in diameter, and no right-of-way for that pipeline shall be granted until notiee of intention to grant the right-of-way, together with the authorized officer's detailed findings as to the term and conditions the authorized officer proposes to impose, have been submitted to the committees.

(2) Major development. Proponents of a major development may submit a request for a planning permit of up to 10 years in duration. Requests for a planning permit must inelude the information contained in paragraphs (d)(1) through (d)(3) of this seetion. Upon eompletion of a master development plan developed under a planning permit, proponents may then submit a request for a long-term authorization to eonstruct and operate the development. At a minimum, a request for a long-term permit for a major development must include the information contained in paragraphs (d)(1) and (d)(2)(ii) through (d)(5) of this section. Issuance of a planning permit does not prejudice approval or denial of a subsequent request for a speeial use permit for the development.

(g) Application processing and response. (1) Acceptanee of applications. Exccpt for proposals for noncommercial group uses, if a request does not meet the criteria of both screening processes or is subsequently denied, the proponent must be notified with a written explanation of the rejection or denial and any written proposal returned to the proponent. If a request for a proposed use meets the eriteria of both the initial and second-level screening processes as described in paragraph (e) of this section, the authorized officer shall notify the proponent that the agency is prepared to aceept a written formal application for a special use authorization and shall, as appropriate or necessary, provide the proponent guidance and information of the type described in paragraphs (e)(3)(i) through (e)(3)(viii) of this section.

(2) Processing applications. (i) Upon aeceptance of an application for a special use authorization other than a planning permit, the authorized officer shall evaluate the proposed use for the requested site, ineluding effects on the environment. The authorized officer may request such additional information as necessary to obtain a full description of the proposed use and its effects.

(ii) Federal, State, and local government agencies and the public shall receive adequate notiee and an opportunity to eomment upon a special use proposal accepted as a formal application in accordance with Forest Service NEPA procedures.

(iii) The authorized officer shall give due deference to the findings of another agency such as a Public Utility Commission, the Federal Regulatory Energy Commission, or the Interstate Commerce Commission in lieu of another detailed finding. If this information is already on file with the Forest Service, it need not be refiled, if reference is made to the previous filing date, plaee, and ease number.

(iv) Applications for noncommercial group uses must be received at least 72 hours in advance of the proposed activity. Applications for noneommercial group uses shall be processed in order of receipt, and the use of a particular area shall be allocated in order of receipt of fully executed applications, subject to any relevant limitations set forth in this section.

(v) For applieations for planning permits, including those issued for a major development as described in paragraph (f)(3) of this section, the authorized officer shall assess only the applicant's financial and technical qualifications and determine compliance with other applicable laws, regulations, and orders. Planning permits may be categorically excluded from documentation in an environmental assessment or environmental impact statement pursuant

to Forest Service Handbook 1909.15 (*36 CFR 200.4*).

(3) Response to applications for noncommercial group uses. (i) All applications for noncommercial group uses shall be deemed granted and an authorization shall be issued for those uses pursuant to the determination as set forth below, unless applications are denied within 48 hours of receipt. Where an application for a noncommercial group use has been granted or is deemed to have been granted and an authorization has been issued under this paragraph, an authorized officer may revoke that authorization only as provided under § 251.60(a)(1)(i).

(ii) An authorized officer shall grant an application for a special use authorization for a noncommercial group use upon a determination that:

(A) Authorization of the proposed activity is not prohibited by the rules at 36 CFR part 261, subpart B, or by Federal, State, or local law unrelated to the content of expressive activity;

(B) Authorization of the proposed activity is consistent or can be made consistent with the standards and guidelines in the applicable forest land and resource management plan required under the National Forest Management Act and 36 CFR part 219;

(C) The proposed activity does not materially impact the characteristics or functions of the environmentally sensitive resources or lands identified in Forest Service Handbook 1909.15, chapter 30;

(D) The proposed activity will not delay, halt, or prevent administrative use of an area by the Forest Service or other scheduled or existing uses or activities on National Forest System lands, including but not limited to uses and activities authorized under parts 222, 223, 228, and 251 of this chapter;

(E) The proposed activity does not violate State and local public health laws and regulations as applied to the proposed site. Issues addressed by State and local public health laws and regulations as applied to the proposed site include but are not limited to:

(1) The sufficiency of sanitation facilities;

(2) The sufficiency of waste-disposal facilities;

(3) The availability of sufficient potable drinking water;

(4) The risk of disease from the physical characteristics of the proposed site or natural conditions associated with the proposed site; and

(5) The risk of contamination of the water supply;

(F) The proposed activity will not pose a substantial danger to public safety. Considerations of public safety must not include concerns about possible reaction to the users' identity or beliefs from non-members of the group that is seeking an authorization and shall be limited to the following:

(1) The potential for physical injury to other forest users from the proposed activity;

(2) The potential for physical injury to users from the physical characteristics of the proposed site or natural conditions associated with the proposed site;

(3) The potential for physical injury to users from scheduled or existing uses or activities on National Forest System lands; and

(4) The adequacy of ingress and egress in case of an emergency;

(G) The proposed aetivity does not involve military or paramilitary training or exercises by private organizations or individuals, unless such training or exercises are federally funded; and

(H) A person or persons 21 years of age or older have been designated to sign and do sign a special use authorization on behalf of the applicant.

(iii) If an authorized officer denies an applieation because it does not meet the eriteria in paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this seetion, the authorized officer shall notify the applieant in writing of the reasons for the denial. If an alternative time, place, or manner will allow the applicant to meet the eight evaluation eriteria, an authorized officer shall offer that alternative. If an application is denied solely under paragraph (g)(3)(ii)(C) of this section and all alternatives suggested are unacceptable to the applicant, the authorized officer shall offer to have eompleted the requisite environmental and other analyses for the requested site. A deeision to grant or deny the applieation for which an environmental assessment or an environmental impact statement is prepared is subject to the notice and appeal procedures at 36 CFR part 215 and shall be made within 48 hours after the deeision beeomes final under that appeal process. A denial of an applieation under paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section eonstitutes final ageney action and is immediately subjeet to judicial review.

(4) Response to all other applieations. Based on evaluation of the information provided by the applicant and other relevant information such as enviromnental findings, the authorized officer shall decide whether to approve the proposed use, approve the proposed use with modifications, or deny the proposed use. A group of applieations for similar uses having minor environmental iinpacts may be evaluated with one analysis and approved in one decision.

(5) Authorization of a speeial use. Upon a deeision to approve a special use or a group of similar special uses, the authorized offieer may issue one or more special use authorizations as defined in § 251.51 of this subpart.

HISTORY: *[45 FR 38327,* June 6, 1980; *45 FR 43167,* June 26, 1980, as amended at *48 FR 29122,* June 24, 1983; *49 FR 46895,* Nov. 29, 1984; *53 FR 16550,* May 10, 1988; *60 FR 45258, 45293,* Aug. 30, 1995; *63 FR 65950, 65964,* Nov. 30, 1998; *74 FR 68379, 68381,* Dec. 24, 2009]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:
16 U.S.C. 472, 479b, 551, 1134, 3210, 6201-13; *30 U.S.C. 1740,* 1761-1771.

NOTES: [EFFECTIVE DATE NOTE: *74 FR 68379, 68381,* Dec. 24, 2009, amended paragraph (f), effective Dec. 24, 2009.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Bureau of Land Management, Department of the Interior: See 43 CFR 2567.8; Group 2500. Other regulations relating to agrieulture appear in Title 7; title 9; title 17, chapter I; title 48, chapter 4.
ABBREVIATIONS: The following abbreviations are used in this chapter: A.O. = Administrative order P.L.O. = Publie Land order.

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register eitations concerning Part 251 Issuanee of Final Directives, see: *71 FR 16622,* Apr. 3, 2006.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Robertson v Methow Valley Citizens Council (1989) 490 US 332, 104 L Ed 2d 351, 109 S Ct 1835

*** This section is current through the June 7, 2012 ***
*** issue of the Federal Register ***

TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY
CHAPTER II -- FOREST SERVICE, DEPARTMENT OF AGRICULTURE
PART 251 -- LAND USES
SUBPART B -- SPECIAL USES

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36 CFR 251.60

§ 251.60 Termination, revocation, and suspension.

(a) Grounds for termination, revocation, and suspension. (1) Noncommercial group uscs.

(i) Revocation or suspension. An authorized officer may revoke or suspend a spccial usc authorization for a noncommereial group use only under one of the following eireumstanees:

(A) Under the criteria for which an applieation for a speeial use authorization may be denied under § 251.54(g)(3)(ii);

(B) For noneompliance with applicable statutes or regulations or the terms and conditions of the authorization;

(C) For failure of the holder to exercise the rights or privileges granted; or

(D) With the consent of the holder.

(ii) Administrative or judicial review. Revocation or suspension of a special use authorization under this paragraph constitutes final agency action and is immediately subject to judicial review.

(iii) Termination. A special use authorization for a noncommercial group use terminates when it expires by its own terms. Termination of a special use authorization under this paragraph does not involve agency action and is not subject to administrative or judicial review.

(2) All other special uses -- (i) Revocation or suspension. An authorized officer may revoke or suspend a special use authorization for all other special uses, except a permit or an easement issued pursuant to § 251.53(e) or an easement issued under § 251.53(l) of this subpart:

(A) For noneomplianee with applieable statutes, regulations, or the terms and conditions of the authorization;

(B) For failure of the holder to exereise the rights or privileges granted;

(C) With the consent of the holder; or

(D) At the diseretion of the authorized officer for specific and eompelling reasons in the public interest.

(ii) Administrative review. Except for revocation or suspension of a permit or an easement issued pursuant to § 251.53(e) or an easement issued under § 251.53(l) of this subpart, suspension or revocation of a special use authorization under this paragraph is subject to administrative appeal in accordance with 36 CFR part 251, subpart C, of this chapter.

(iii) Termination. For all special uses except noncommercial group uses, a special use authorization terminates when, by its terms, a fixed or agreed-upon condition, event, or time occurs. Termination of a special use authorization under this paragraph does not involve agency action and is not subject to administrative or judicial review.

(b) For purposes of this section, the authorized officer is that person who issues the authorization or that officer's successor.

(c) A right-of-way authorization granted to another Federal agency will be limited, suspended, revoked, or terminated only with that agency's concurrence.

(d) A right-of-way authorization serving another Federal agency will be limited, suspended, revoked, or terminated only after advance notice to, and consultation with, that agency.

(e) Except when immediate suspension pursuant to paragraph (f) of this section is indicated, the authorized officer shall give the holder written notice of the grounds for suspension or revocation under paragraph (a) of this section and reasonable time to cure any noncompliance, prior to suspension or revocation pursuant to paragraph (a) of this section,

(f) Immediate suspension of a special use authorization, in whole or in part, may be required when the authorized officer deems it necessary to protect the public health or safety or the environment. In any such case, within 48 hours of a request of the holder, the superior of the authorized officer shall arrange for an on-site review of the adverse conditions with the holder. Following this review, the superior officer shall take prompt action to affirm, modify, or cancel the suspension.

(g) The authorized officer may suspend or revoke permits or easements issued under § 251.53(e) or easements issued under § 251.53(l) of this subpart under the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings instituted by the Secretary under *7 CFR 1.130* through *1.151*.

(h)(1) The Chief may revoke any easement granted under the provisions of the Act of October 13, 1964, *78 Stat. 1089, 16 U.S.C. 534:*

(i) By consent of the owner of the easement;

(ii) By condemnation; or

(iii) Upon abandonment after a 5-year period of nonuse by the owner of the easement.

(2) Before any such easement is revoked for nonuse or abandonment, the owner of the easement shall be given notice and, upon the owner's request made within 60 days after receipt of the notice, an opportunity to present relevant information in accordance with the provisions of 36 CFR part 251, subpart C, of this chapter.

(i) Upon revoeation or termination of a speeial use authorization, the holder must remove within a reasonable time the struetures and improvements and shall restore the site to a eondition satisfaetory to the authorized offieer, unless the requirement to remove structures or improvements is otherwise waived in writing or in the authorization. If the holder fails to remove the structures or improvements within a reasonable period, as determined by the authorized offieer, they shall beeome the property of the United States, but holder shall remain liable for the eosts of removal and site restoration.

HISTORY: *[45 FR 38327,* June 6, 1980; *45 FR 43167,* June 26, 1980, as amended at *48 FR 28639,* June 23, 1983; *60 FR 45258, 45295,* Aug. 30, 1995; *63 FR 65950, 65968,* Nov. 30, 1998; *74 FR 68379, 68381,* Dee. 24, 2009; *75 FR 14495,* Mar. 26, 2010; *75 FR 24801, 24802,* May 6, 2010]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE SUBPART:
16 U.S.C. 472, 479b, 551, 1134, 3210, 6201-13; *30 U.S.C. 1740,* 1761-1771.

NOTES: [EFFECTIVE DATE NOTE: *74 FR 68379, 68381,* Dec. 24, 2009, amended paragraph (a) and revised paragraph (g), effective Dec. 24, 2009; *75 FR 14495,* Mar. 26, 2010, revised paragraphs (a)(2)(i), (a)(2)(ii), and (g), effective Mar. 26, 2010; *75 FR 24801, 24802,* May 6, 2010, revised paragraph (a)(2)(i), effective May 6, 2010]

NOTES APPLICABLE TO ENTIRE CHAPTER:
CROSS REFERENCES: Bureau of Land Management, Department of the Interior: See 43 CFR 2567.8; Group 2500. Other regulations relating to agriculture appear in Title 7; title 9; title 17, chapter I; title 48, chapter 4.
ABBREVIATIONS: The following abbreviations are used in this chapter: A.O. = Administrative order P.L.O. = Public Land order.

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 251 Issuance of Final Directives, see: *71 FR 16622,* Apr. 3, 2006.]

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Black v Arthur (1998, DC Or) 18 F Supp 2d 1127, affd (2000, CA9 Or) *201 F3d 1120, 2000 CDOS 1051, 2000 Daily Journal DAR 1555, 30 ELR 20338*

LexisNexis (R) Notes:

CASE NOTES

CASE NOTES Applicable to entire Part:Part Note

Sweetwater, A Wilderness Lodge Llc v. United States, 72 Fed. Cl. 208, 2006 U.S. Claims LEXIS 253 (Aug. 25, 2006).
Overview: *One of two well-recognized situations where the government will be held to take without any formal*

*** Current through PL 112-128, approved 6/5/12 ***

TITLE 43. PUBLIC LANDS
CHAPTER 15. APPROPRIATION OF WATERS; RESERVOIR SITES

Go to the United States Code Service Archive Directory

43 USCS § 666

§ 666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs. Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other souree, or (2) for the administration of sueh rights, where it appears that the United States is the owner of or is in the proeess of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to sueh suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplieable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the eourt having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) Service of summons. Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Joinder in suits involving use of interstate streams by State. Nothing in this Act shall be construed as authorizing the joinder of thc United States in any suit or controversy in thc Supreme Court of the United States involving the right of Statcs to the use of thc watcr of any interstatc strcam.

HISTORY:
(July 10, 1952, ch 651, Title II, § 208(a)-(c), 66 Stat. 560.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
"This Act", referred to in this section, is Act July 10, 1952, ch 651, 66 Stat. 549, popularly known as the Departments of State, Justice, Commerce, and the Judiciary Appropriation Act of 1953. For full classification of this Act, consult

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 35. Federal Land Policy and Management (Refs & Annos)
Subchapter V. Rights-Of-Way (Refs & Annos)

43 U.S.C.A. § 1761

§ 1761. Grant, issue, or renewal of rights-of-way

Currentness

(a) Authorized purposes

The Secretary, with respect to the publie lands (including public lands, as defined in seetion 1702(e) of this title, which are reserved from entry pursuant to section 24 of the Federal Power Aet (16 U.S.C. 818)) and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each ease land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for--

(1) reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water;

(2) pipelines and other systems for the transportation or distribution of liquids and gases, other than water and other than oil, natural gas, synthetic liquid or gaseous fuels, or any refined produet produced therefrom, and for storage and terminal facilities in conneetion therewith;

(3) pipelines, slurry and emulsion systems, and conveyor belts for transportation and distribution of solid materials, and faeilities for the storage of such materials in eonnection therewith;

(4) systems for generation, transmission, and distribution of electric energy, except that the applicant shall also comply with all applicable requirements of the Federal Energy Regulatory Commission under the Federal Power Act, including part 1 [1] thereof (41 Stat. 1063, 16 U.S.C. 791a-825r).; [2]

(5) systems for transmission or reception of radio, television, telephone, telegraph, and other electronic signals, and other means of eommunication;

(6) roads, trails, highways, railroads, eanals, tunnels, tramways, airways, livestock driveways, or other means of transportation except where such facilities are construeted and maintained in conneetion with commercial recreation facilities on lands in the National Forest System; or

(7) such other necessary transportation or other systems or facilities which are in the public interest and whieh require rights-of-way over, upon, under, or through such lands.

(b) Procedures applicable; administration

(1) The Secretary concerned shall require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit and disclose those plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition, which he deems necessary to a determination, in accordanee with the provisions of this Aet, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

(2) If the applicant is a partnership, corporation, association, or other business entity, the Secretary concerned, prior to granting a right-to-way [3] pursuant to this subchapter, shall require the applicant to diselose the identity of the participants in the entity, when he deems it neeessary to a determination, in accordanee with the provisions of this subchapter, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions whieh should be ineluded in the right-of-way. Sueh diselosures shall inelude, where applieable: (A) the name and address of eaeh partner; (B) the name and address of eaeh shareholder owning 3 per eentum or more of the shares, together with the number and pereentage of any elass of voting shares of the entity whieh sueh shareholder is authorized to vote; and (C) the name and address of eaeh affiliate of the entity together with, in the ease of an affiliate controlled by the entity, the number of shares and the percentage of any class of voting stock of that affiliate owned, direetly or indirectly, by that entity, and, in the case of an affiliate which controls that entity, the number of shares and the percentage of any class of voting stock of that entity owned, directly or indireetly, by the affiliate.

(3) The Secretary of Agrieulture shall have the authority to administer all rights-of-way granted or issued under authority of previous Aets with respect to lands under the jurisdiction of the Seeretary of Agrieulture, ineluding rights-of-way granted or issued pursuant to authority given to the Seeretary of the Interior by sueh previous Aets.

(c) Permanent easement for water systems; issuance, preconditions, etc.

(1) Upon reeeipt of a written applieation pursuant to paragraph (2) of this subseetion from an applieant meeting the requirements of this subseetion, the Seeretary of Agriculture shall issue a permanent easement, without a requirement for reimbursement, for a water system as described in subsection (a)(1) of this section, traversing Federal lands within the National Forest System ("National Forest Lands"), constructed and in operation or placed into operation prior to October 21, 1976, if--

(A) the traversed National Forest lands are in a State where the appropriation doctrine governs the ownership of water rights;

(B) at the time of submission of the application the water system is used solely for agricultural irrigation or livestock watering purposes;

(C) the use served by the water system is not located solely on Federal lands;

(D) the originally constructed facilities comprising such system have been in substantially continuous operation without abandonment;

(E) the applicant has a valid existing right, established under applicable State law, for water to be conveyed by the water system;

(F) a recordable survey and other information concerning the location and characteristics of the system as necessary for proper management of National Forest lands is provided to the Secretary of Agriculture by the applicant for the easement; and

(G) the applicant submits such application on or before December 31, 1996.

(2)(A) Nothing in this subsection shall be construed as affecting any grants made by any previous Act. To the extent any such previous grant of right-of-way is a valid existing right, it shall remain in full force and effect unless an owner thereof notifies the Secretary of Agriculture that such owner elects to have a water system on such right-of-way governed by the provisions of this subsection and submits a written application for issuance of an easement pursuant to this subsection, in which case upon the issuance of an easement pursuant to this subsection such previous grant shall be deemed to have been relinquished and shall terminate.

(B) Easements issued under the authority of this subsection shall be fully transferable with all existing conditions and without the imposition of fees or new conditions or stipulations at the time of transfer. The holder shall notify the Secretary of Agriculture within sixty days of any address change of the holder or change in ownership of the facilities.

(C) Easements issued under the authority of this subsection shall include all changes or modifications to the original facilities in existence as of October 21, 1976, the date of enactment of this Act.

(D) Any future extension or enlargement of facilities after October 21, 1976, shall require the issuance of a separate authorization, not authorized under this subsection.

(3)(A) Except as otherwise provided in this subsection, the Secretary of Agriculture may terminate or suspend an easement issued pursuant to this subsection in accordance with the procedural and other provisions of section 1766 of this title. An easement issued pursuant to this subsection shall terminate if the water system for which such easement was issued is used for any purpose other than agricultural irrigation or livestock watering use. For purposes of subparagraph (D) of paragraph (1) of this subsection, non-use of a water system for agricultural irrigation or livestock watering purposes for any continuous five-year period shall constitute a rebuttable presumption of abandonment of the facilities comprising such system.

(B) Nothing in this subsection shall be deemed to be an assertion by the United States of any right or claim with regard to the reservation, acquisition, or use of water. Nothing in this subsection shall be deemed to confer on the Secretary of Agriculture any power or authority to regulate or control in any manner the appropriation, diversion, or use of water for any purpose (nor to diminish any such power or authority of such Secretary under applicable law) or to require the conveyance or transfer to the United States of any right or claim to the appropriation, diversion, or use of water.

(C) Except as otherwise provided in this subsection, all rights-of-way issued pursuant to this subsection are subject to all conditions and requirements of this Act.

(D) In the event a right-of-way issued pursuant to this subsection is allowed to deteriorate to the point of threatening persons or property and the holder of the right-of-way, after consultation with the Secretary of Agriculture, refuses to perform the repair and maintenance necessary to remove the threat to persons or property, the Secretary shall have the right to undertake such repair and maintenance on the right-of-way and to assess the holder for the costs of such repair and maintenance, regardless of whether the Secretary had required the holder to furnish a bond or other security pursuant to subsection (i) of this section.

(d) Rights-of-way on certain Federal lands

With respect to any project or portion thereof that was licensed pursuant to, or granted an exemption from, part I of the Federal Power Act [16 U.S.C.A. §§ 791a et seq.] which is located on lands subject to a reservation under section 24 of the Federal Power Act [16 U.S.C.A. § 818] and which did not receive a permit, right-of-way or other approval under this section prior to October 24, 1992, no such permit, right-of-way, or other approval shall be required for continued operation, including continued operation pursuant to section 15 of the Federal Power Act [16 U.S.C.A. § 808], of such project unless the Commission determines that such project involves the use of any additional public lands or National Forest lands not subject to such reservation.

Credits

(Pub.L. 94-579, Title V, § 501, Oct. 21, 1976, 90 Stat. 2776; Pub.L. 99-545, § 1(b), (c), Oct. 27, 1986, 100 Stat. 3047, 3048; Pub.L. 102-486, Title XXIV, § 2401, Oct. 24, 1992, 106 Stat. 3096.)

Notes of Decisions (7)

Current through P.L. 112-104 (excluding P.L. 112-96 and 112-102) approved 4-2-12

Footnotes

1 So in original. Probably should be "part I".

2 So in original. The period preceding the semicolon probably should not appear.

3 So in original. Probably should be "right-of-way".

End of Document

*** Current through changes received June 4, 2012 ***

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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USCS Ct App 9th Cir, Circuit R 3-3

Review Court Orders which may amend this Rule.

Circuit Rule 3-3. Preliminary Injunction Appeals

(a) Every notice of appeal from an interlocutory order (i) granting, continuing, modifying, refusing or dissolving a preliminary injunction or (ii) refusing to dissolve or modify a preliminary injunction shall bear the caption "PRELIMINARY INJUNCTION APPEAL." Immediately upon filing, the notice of appeal must be transmitted by the district court clerk's office to the Court of Appeals clerk's office.

(b) Within 7 days of filing a notice of appeal from an order specified in subparagraph (a), the parties shall arrange for expedited preparation by the district court reporter of all portions of the official transcript of oral proceedings in the district court which the parties desire to be included in the record on appeal. Within 28 days of the docketing in the district court of a notice of appeal from an order specified in subparagraph (a), the appellant shall file an opening brief and excerpts of record. Appellee's brief and any supplemental excerpts of record shall be filed within 28 days of service of appellant's opening brief. Appellant may file a brief in reply to appellee's brief within 14 days of service of appellee's brief.

(c) If a party files a motion to expedite the appeal or a motion to grant or stay the injunction pending appeal, the court, in resolving those motions, may order a schedule for briefing that differs from that described above.

Cross References: FRAP 8, Stay or Injunction Pending Appeal, and Circuit Rules 27-2, 27-3; *FRAP 10*, The Record on Appeal, and Circuit Rules 10-2, 10-3, 30-1; *FRAP 34*, Excerpts of Record, and Circuit Rule 34-3.

HISTORY:
(Amended Dec. 1, 2002; July 1, 2006; Dec. 1, 2009.)

2323.43c - New Water Development Structures

Only the President (FSM 2323.04) can approve new water development structures, including water-regulating structures, power installations, transmission conduits, water conservation works, related improvements, and proposals to increase the storage capacity of a reservoir or to replace a reservoir that was not under a valid permit or other authority at the time the unit became wilderness. Range and wildlife waters are not included here. Use provisions in section 2323.2 and section 2323.3 to guide these projects.

Evaluate and recommend actions on proposals for new structures through the National Environmental Policy Act process (FSM 1950). Recommendations for approval must clearly show that public values to be gained exceed those values lost and that the need cannot be met outside wilderness.

2323.43d - Existing Water Development Structures

If needed and in the public interest, or a part of a valid existing right, permit maintenance or reconstruction of existing structures that does not change the location, size, or type, or which would not increase the storage capacity of a reservoir. Structures include reservoirs, ditches, and related facilities for the control or use of water that were under valid special-use permit or other authority when the area involved was incorporated under the Wilderness Act. For approval, see FSM 2323.04.

Do not permit the use of motorized equipment and mechanized transportation for maintenance of water-development structures except where practiced before the area was designated wilderness. See section 2326 for motorized and mechanical use approval responsibilities.

Evaluate each improvement in the forest plan to determine if continued use of the improvement is compatible with the wilderness resource. If the improvement is to remain, describe maintenance needs and methods of accomplishing the work in the wilderness implementation schedule. If not, allow the improvement to deteriorate naturally. In the case of high hazard dams or other large structures where downstream values are jeopardized by imminent failure or loss, breach or remove the structure in a manner that does not have an adverse effect on the downstream values (FSM 2324.3).

2323.44 - Gathering Water Resource Information

Line Officers may permit gathering information about water resources except actual prospecting (drilling and digging) for water. Ensure that these efforts are compatible with the preservation of the wilderness environment and meet the conditions in section 4(c) of the Wilderness Act. Ensure that the applicant understands that the approval to gather water resource information does not imply a precommitment by the Forest Service to approve any development proposals that may result from such studies. For approvals, see FSM 2323.04.