UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-16172

CITY OF TOMBSTONE
Appellant

v.
UNITED STATES OF AMERICA, *et al.*
Appellee

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On Appeal from the United States District Court for the
District of Arizona
Case No. 4:11-CV-00845-FRZ
The Honorable Frank Zapata, District Judge

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# BRIEF *AMICUS CURIAE* OF COALITION OF COUNTIES IN SUPPORT OF APPELLANT CITY OF TOMBSTONE

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Karen Budd-Falen
Budd-Falen Law Offices, LLC
300 E. 18th Street/Post Office Box 346
Cheyenne, WY 82003
(307) 632-5105
(307) 637-3891 (Facsimile)
karen@buddfalen.com
Attorney for Amicus Curiae
Coalition of Counties

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(A), Proposed Amicus Curiae, the Coalition of Arizona/New Mexico Counties for Stable Economic Growth ("COC") is a non-profit corporation. This corporation is comprised of county governments, businesses, organizations and individuals in 13 counties in Eastern Arizona and Western New Mexico. Its mission includes protecting rural economies of Arizona and New Mexico, maintaining and increasing the economic base which results from federal lands, establishing and protecting private property rights of individuals and industries which are dependent on federal lands, and the introduction of new regulations which impact management of federal lands and private property. The COC is not a publicly-owned corporation, nor is it owned by any parent corporations.

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## I. STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to its motion to participate in this matter as an *amicus curiae*, the Coalition of Arizona/New Mexico Counties for Stable Economic Growth ("COC") hereby submits its brief in support of the Appellant and respectfully requests that this Court reverse the ruling of the Federal District Court for the District of Arizona in the above-captioned action. As set forth in the motion to file this brief, the COC is a nonprofit corporation made up of county governments, businesses, organizations and individuals in Eastern Arizona and Western New Mexico. Approximately 65% of the land that makes up the 13 member counties of the COC is federal land. Therefore, the members of the COC are directly impacted in the determination of rights of way across federal land with respect to roads, trails, ditches, water lines for distribution and water rights.

Many of the member counties of the COC have existed since before the creation of the United States and have retained the original name given to each by the King of Spain. Additionally, many member counties established rights of way and water rights that were recognized by the King of Spain, Mexico and the Treaty of Guadalupe-Hidalgo. Many of the member counties' water rights and rights of way that were recognized by the King of Spain are now located on federal land.

The member counties of the COC have continually been forced to litigate against the United States Forest Service ("USFS") in order to retain and continue use of their vested water rights and rights of way. The member counties have been very successful in litigating their vested interests; however, that litigation has been very costly and has created ongoing fiscal problems within the counties. Despite the member counties' best efforts, a concrete resolution on rights of way and water rights of the counties has yet to be reached with the USFS. Because the Court's ultimate decision in this case determines the retention and use of water rights and rights of way across federal land within a city and county of Arizona, the COC seeks to ensure that its members' position in this matter is brought to the Court's attention for consideration.

## II. SOURCE OF AUTHORITY TO FILE AMICUS BRIEF

Filed on even date herewith, this brief is accompanied by a motion seeking permission to file this brief, as authorized by Rule 29(a) and (b) of the Federal Rules of Appellate Procedure.

## III. SUMMARY OF ARGUMENT

*Amicus Curiae* urges the reversal of the decision of the District Court for the District of Arizona. Plaintiff is a holder of rights-of-way granted pursuant to the Act of July 26, 1866 and, as a holder, is entitled to maintain that right-of-way

without regulation by, or permission from, the federal Defendants. The Property Clause of the United States Constitution nor subsequent laws enacted by the United States of America do not supersede Plaintiff's rights-of-way across the Coronado National Forest and do not allow for blatant disregard of vested rights-of-way by the federal Defendants. The actions that Plaintiff seeks to take are consistent with the maintenance of the status quo, which has been recognized by at least one other circuit as being an activity over which the federal Defendants do not have regulatory authority.

## IV. ARGUMENT

### A. Rights of Way Established Pursuant to the Act of 1866 Are Not Superceded by the Property Clause, and Include the Right to Maintain those Rights of Way

At the trial court level, the district court denied the Plaintiff's requested injunctive relief, holding that the federal Defendants properly regulated the Plaintiff's attempted restoration of their water pipeline from the Huachuca Mountains, and that, because the path of the pipeline was through federally-protected wilderness, that the public interest and equities weighed in favor of the federal Defendants. However, the district court's holdings are in error, as the Plaintiff has vested rights of way across the Coronado National Forest pursuant to the Act of July 27, 1866 "Act of 1866"), which allows the maintenance of those

rights of way without notification to, and regulation by, the federal Defendants. Rights-of-way such as those claimed by the Plaintiff are not superseded by the Property Clause, nor by other subsequent laws enacted by the United States. In fact, courts have held that holders of these rights of way are entitled to maintain them without regulation by, or permission from, the federal government.

Under the Act of 1866,

> 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 the 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 herein specified is acknowledged and confirmed.

See 43 U.S.C.A. § 661. Accordingly, for a right of way to vest under the Act of 1866, the prospective grantee must possess valid water rights under the state law, and the water facilities must have been constructed on unoccupied and unreserved lands. See Bear Lake & River Waterworks & Irrigation Co. v. Garland, 164 U.S. 1, 12 (1896). In the present case, Plaintiff has alleged that both of these requirements were met: that it has valid water rights pursuant to state law and that the water facilities were constructed on unoccupied and unreserved lands.

Similarly, the Act of March 3, 1891, 26 Stat. 1095, codified in pertinent part at 43 U.S.C. § 946 (repealed Oct. 21, 1976) ("the 1891 Act"), provided for a vested federal right-of-way for irrigation upon approval of a map by the Secretary of the Interior. See Utah Power & Light Co. v. United States, 243 U.S. 389, 406-07, 37 S.Ct. 387, 61 L.Ed. 791 (1917). Like the Act of 1866 rights-of-way, rights vested under the 1891 Act are perpetual unless the use changes. See Kern River Co. v. United States, 257 U.S. 147, 151-152, 42 S.Ct. 60, 66 L.Ed. 175 (1921) ("The approval, once given, could not be recalled…[unless by] a suit in equity…in the event the grantee ceased to use or retain the land for the purpose indicated in the act.") (citations omitted).

The 1891 Act also authorized the President to reserve forest lands from the public domain. See 1891 Act, ch. 561, § 24, 26 Stat. 1103, repealed by FLPMA, title VII, § 704(a), 90 Stat. 2792. On February 22, 1897, pursuant to this authorization in the 1891 Act, President Cleveland issued proclamations placing approximately 20,000,000 acres of public lands into forest reserves. See United States v. Jenks, 22 F.3d 1531, 1515 (10th Cir. 1994) [hereinafter "Jenks I"]. These Presidential proclamations prevented additional settlement on reserved lands and raised concerns regarding access for existing property holders. Following the issuance of the Presidential proclamations, Congress sought to protect the access

rights of homesteaders and others holding property interests surrounded by the newly created forest reserves by enacting the Forest Service Organic Administration Act, ch. 2, 30 Stat. 34 (1897) (codified at 16 U.S.C.A. § 473-551) [hereinafter "Organic Act"]. Section 478 of the Organic Act "protect [ed] whatever rights and licenses with regard to the public domain existed prior to the reservation." See Montana Wilderness Ass'n v. United States, 496 F.Supp. 880, 888 (D. Mont. 1980) (construing 16 U.S.C.A. § 478), aff'd on other grounds, 655 F.2d 951 (9th Cir. 1981).

In 1976, Congress changed the statutory regime regarding rights-of-way by enacting the Federal Land Policy Management Act (FLPMA), 43 U.S.C. §§ 1701-1784 (1976). Effective October 21, 1976, the FLPMA replaced a "tangled array of laws granting rights-of-way across federal lands," with a single method for establishing a right-of-way over public lands. See United States v. Jenks, 22 F.3d 1513, 1515(10th Cir.1994). Most important for present purposes, however, Congress specifically chose to preserve vested rights such as those under the 1866 and 1891 Acts. Section 509(a) of the FLPMA provides:

> Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use hereto-fore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter.

See 43 U.S.C. § 1769(a); see also 43 U.S.C. § 1701 historical note (a) ("[Section 701 of the FLPMA] provided that Nothing in this Act..., or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act...") and (h)("All actions by the Secretary concerned under this Act shall be subject to valid existing rights."). Therefore, all rights previously held under the 1866 and 1891 Acts survived the passage of FLPMA.

Rights held under the 1866 Act are extremely important for the continuation and recognition of water rights in the western United States. These water rights are relied upon by many local, county, and state governments, as well as individuals throughout the West. However, the district court held that the Property Clause of the United States Constitution was controlling of the outcome of the issues present in this litigation, and that the Defendants had engaged in appropriate regulation relating to federal land by denying Plaintiff access to its rights-of-way, water rights, and water structures located in the Coronado National Forest. This precedent could be devastating to other governmental entities which hold, and rely upon, similar types of rights-of-way.

Under the Property Clause of the United States Constitution,

> 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 Constitutional shall be so construed as to prejudice any claims of the United States, or of any particular State.

See U.S. CONST. Art. IV § 3, cl. 2. The Supreme Court has held that securing water rights and rights of way requires no federal approval because the Act of 1866 automatically protects those rights recognized under local custom or law. See Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917). Further, in Jennison v. Kirk, 98 U.S. 453, 460-461 (1878) the Supreme Court recognized that the general purpose of the 1866 Act was to give the sanction of the government to vested water rights acquired by owners and possessors of those rights that were recognized by local custom, laws, and decisions of the courts. See 98 U.S. 453, 460-461 (1878).

The rights-of-way incident to such water rights were recognized in the same manner as the vested water rights, i.e. by local customs, laws and decisions of the courts. See id. This has long been recognized by courts in Arizona. See Bristor v. Cheatham, 255 P.2d 173, 241 (Ariz. 1953); see also Clough v. Wing, 17 P. 453, 455 (Ariz. 1888); Boquillas Land & Cattle Co. v. Curtis, 89 P. 504 (Ariz. 1907). The Ninth Circuit has also recognized that the 1866 Act protected water rights and rights-of-way for diversion of the water in accordance with local and customary law and usage. See Hunter v. United States, 388 F.2d 148 (9th Cir.1967) (a case arising

in California); see also Western Watersheds Project v. Matejko, 456 F.3d 922 (9th Cir.2006) (a case arising in Idaho).

The question regarding to what extent the USFS may impose regulation upon access to and maintenance of an easement granted pursuant to the 1866 Act, insofar as access and maintenance occur on federal lands, is clear. Looking at similar rights-of-way granted pursuant to the 1866 Act, courts have determined that the scope of such a right of way is limited by the established usage of the route as of the date of repeal of the statute (i.e. as of October 21, 1976 with the passage of FLPMA). See Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 745-46 (10th Cir. 2005). That did not mean, however, that the right-of-way had to be maintained in precisely the same condition it was in on October 21, 1976; rather, it could be improved "as necessary to meet the exigencies of increased travel," so long as this was done "in the light of traditional uses to which the right-of-way was put" as of repeal of the statute in 1976. See id.

Although courts have held that *changes* in rights-of-way across federal lands are subject to regulation by the relevant federal land management agencies, see id., those same courts have also recognized that routine maintenance of that right-of-way does not require consultation with the agency. Id. The Tenth Circuit has addressed in depth what constitutes "routine maintenance," which does not require

consultation with the federal land management agency, and "construction of improvements," which would require such consultation. See id. at 749. There, the Court held that:

> Defined in terms of the nature of the work, "construction" . . . . includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the road (*e.g.,* going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any "improvement," "betterment," or any other change in the nature of the road that may significantly impact [federal] lands, resources, or values. "Maintenance" preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage [, and] keeping drainage features open and operable– essentially preserving the status quo.

See id., citing United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000) (footnote omitted).[1] The Tenth Circuit determined that, under that definition, grading or blading a road for the first time would constitute "construction" and would require advance consultation, though grading or blading a road to preserve the character of the road in accordance with prior practice would not. See id.

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[1] Although this definition was drawn as an interpretation of 36 C.F.R. 5.7, which applies within national parks, the Tenth Circuit determined that this definition was "applicable to distinguishing between routine maintenance and actual improvements of [rights of way pursuant to the Act of 1866] across federal lands more generally." See Southern Utah Wilderness Alliance, 425 F.3d at 749.

Importantly, this definition of "maintenance" fits the situation at issue in the present case. As noted by the Tenth Circuit, "maintenance" preserves the existing [right-of-way], including the physical upkeep or repair of wear or damage *whether from natural* or other cases." See id. In the present case, Plaintiff seeks to maintain its right-of-way to repair damage which occurred as a result of natural causes.

Importantly, in Southern Utah Wilderness Alliance, the Tenth Circuit determined that drawing the line between maintenance and construction based on "preserving the status quo" promoted the congressional policy of "freezing" rights of way as of the uses established as of October 21, 1976. See id. at 749. There, the court held that such a definition "protects existing uses without interfering unduly with federal land management and protection. As long as the Counties act within the existing scope of their rights of way, performing maintenance and repair that preserves the existing state of the [right-of-way], they have no legal obligation to consult with the [federal land management agency] . . .." Id.[2] Performing

[2] A temporary taking simply occurs when what would otherwise be a permanent taking is temporarily cut short, and the essential element of a temporary taking is a finite start and end to the taking. See American Pelagic Fishing Co., L.P. v. U.S., 379 F.3d 1363, 1372 (App. 2004). Water rights are real property interests under Arizona law. See Strawberry Water Co. v. Paulsen, 220 Ariz. 401, 406 (App. 2008). If the USFS continues to regulate the rights of way and water rights of the City of Tombstone to the extent that the City's rights are no longer viable, it is like that the USFS will have effectuated a temporary taking under the 5th Amendment to the Constitution.

maintenance to preserve the existing right-of-way – maintaining the status quo – is exactly the situation in the case before this Court. Plaintiff has requested injunctive relief to allow it to repair its existing right-of-way, to allow the provision of water to the City of Tombstone, maintaining the status quo.

In the present case, Plaintiff alleges that the Huachuca Water Company secured water rights and rights of way through prior appropriation in the Miller and Carr Canyons before Arizona received statehood and that those rights were subsequently recognized under the Act of 1866. In 1881 the Huachuca Water Company began supplying the City of Tombstone with water from its water rights within the Miller and Carr Canyons. Huachuca Water Company's valid transfer of its rights to the City of Tombstone by quitclaim deed did not terminate or alter the rights and rights of way established by the company before Arizona's statehood and recognized by the Act of 1866. See A.R.S. § 45-172. These water rights were secured prior to the 1906 reservation of the Huachuca Forest Reserve, now the Coronado National Forest. Plaintiff alleges that these water rights, and rights-of-way, have been acknowledged by the United States Department of Interior and the Supreme Court of Arizona.

Nothing in the Property Clause allows for blatant disregard of perfected rights-of-way across federal land recognized under the Act of 1866. The USFS has

blatantly disregarded clearly established rights-of-way by not allowing the Plaintiff access to those rights-of-way in order maintain its pipeline and to supply its citizens with water. The refusal by the USFS to allow any use of mechanized equipment, including a wheel barrel, on the rights-of-way substantially impairs the Plaintiff's ability to maintain that right of way.

## IV. CONCLUSION

Plaintiff, as a holder of rights-of-way granted pursuant to the Act of 1866, is entitled to maintain that right-of-way without regulation by, or permission from, the federal Defendants. The actions that Plaintiff seeks to take are consistent with the maintenance of the status quo, which has been recognized by at least one other circuit as being an activity over which the federal Defendants do not have regulatory authority. Accordingly, the Coalition of Counties respectfully requests that this Court reverse the judgment of the district court.

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RESPECTFULLY SUBMITTED this 18th day of June, 2012.

/s/Karen Budd-Falen
Karen Budd-Falen
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, WY 82003-0346
307/632-5105 Telephone
307/637-3891 Telefax
karen@buddfalen.com
Attorney for Amicus Curiae
Coalition of Counties

## CERTIFICATE OF COMPLIANCE

**Section 1. Word count**

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 3,087 words.

☒ I relied on my word processor to obtain the count and it is Corel Word Perfect X3.

☐ I counted five characters per word, counting all characters including citations and numerals.

**Section 2. Line count**

My brief was prepared in a monospaced typeface and contains 262 lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/Karen Budd-Falen
Karen Budd-Falen
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, WY 82003-0346
307/632-5105 Telephone
307/637-3891 Telefax
karen@buddfalen.com
Attorney for Amicus Curiae
Coalition of Counties

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 18th day of June, 2012. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following:

Nicholas Constantine Dranias
Christina Sandefur
Scharf-Norton Center for Constitutional Litigation
Goldwater Intstitute
500 E. Coronado Rd.
Phoenix, AZ 85004
ndranias@goldwaterinstitute.org
csandefur@goldwaterinstitute.org

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

Mark R. Haag (Via U.S. Mail only)
U.S. Department of Justice
Environment & Natural Resources Division
Post Office Box 7415
Washington, D.C. 20044

/s/ Karen Budd-Falen
Karen Budd-Falen

## CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions, if any, have been made and, with the exception of those redactions, every document submitted in Digital Form is an exact copy of the written document filed with the Clerk.

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

/s/Karen Budd-Falen
Karen Budd-Falen
BUDD-FALEN LAW OFFICES, LLC
300 East 18th Street
Post Office Box 346
Cheyenne, WY 82003-0346
307/632-5105 Telephone
307/637-3891 Telefax
karen@buddfalen.com
Attorney for Amicus Curiae
Coalition of Counties