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 REPLY 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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INTRODUCTION

Defendants disregard the context of this emergency appeal. This appeal does not involve a dispute over commercial activity on federal lands that could be more fully and fairly determined at a leisurely administrative pace. It does not stem from a lawsuit "of choice." Tombstone's very existence as a viable political subdivision of the State of Arizona is at stake. Tombstone never had the option to stand down. But the Forest Service has always had that option—and still does.

Tombstone used to have three safe well water sources to supplement its Huachuca Mountain municipal water system. However, since 2006, all of those well water sources have been arsenic contaminated and only one is safe enough to be used for potable water. ER798-800. Additionally, in December 2010, a major fire originating from the business known as Six Gun City nearly destroyed Tombstone's historic downtown because of the tinderbox conditions of its 19th century wooden structures. ER832-33. Fewer than seven months later, the Monument Fire erupted in the Huachuca Mountains, leading to monsoon floods that utterly destroyed Tombstone's Huachuca Mountain municipal water system.

Throughout the ensuing emergency, the Forest Service has had clear legal authority to allow Tombstone to freely exercise its 1866 Mining Act rights to restore its municipal water system without further regulation or consultations with other agencies. If the Forest Service simply yielded to this rule of law, the town's

entire municipal water system could have been restored long ago. Instead, the Forest Service has decided to feign ignorance about the nature of Tombstone's rights, conduct needless consultations, and play a cat and mouse game of regulatory interference.

In this context, the lower court's decision to refuse preliminary injunctive relief is as bewildering as Defendants' conduct is terrifying. Each passing day in which Defendants are able to obstruct the full restoration of Tombstone's municipal water supply presents the town with the risk that monsoons could wash away the pipeline to its three remaining Huachuca Mountain springs, leaving the town to rely upon its one remaining potable well water source. Defendants are forcing the town's residents and visitors to live with the threat of drinking arsenic-poisoned water. They are also forcing Tombstone to live with the grave threat of another Six Gun City fire burning its historic downtown to the ground.

These risks are not speculative. Essentially the same risks prompted the declaration of a State of Emergency by Arizona Governor Jan Brewer after the Monument Fire. ER842. Even the Forest Service's own pre-litigation administrative findings repeatedly admitted they were real and substantial. ER1192, 1196-97, 1215, 1233, 1270:13-21. Tombstone undoubtedly faces irreparable harm consisting of impairment of its sovereign interests in protecting public health and safety and in preserving its own continued existence, which is

guaranteed by the Tenth Amendment. For this reason and others discussed below, the lower court's clearly erroneous decision should be vacated and the requested preliminary injunction should be issued.

REBUTTAL TO DEFENDANTS' "STATEMENT OF THE CASE"

The gravamen of Defendants' "Statement of the Case" is one of supposed cooperation with Tombstone punctuated by allegedly unmet requests for information about the town's proposed restoration work. That story lacks even surface credibility because Tombstone already has a special use permit encompassing *six* spring sites, yet Defendants refuse to allow Tombstone to restore more than *three*. ER961(¶70), 963(¶76). Defendants' tale of cooperation is also premised on misleading declarations,[1] to which the lower court allowed no reply. ER1248: 25, 1249:1-2. Fortunately, the undisputed facts suffice for this appeal. Defendants' continued pretense that they lack sufficient information to render a final decision on Tombstone's proposed restoration work only proves they have predetermined its denial.

Undisputed evidence establishes *both* the finality of Defendants' refusal to allow the restoration work sought here *and* the futility of pursuing further administrative remedies. Appellant's Brief, p. 19 n.1. Defendants admit that, no later than December 5, 2011, Tombstone requested the Forest Service to allow it to

[1] Tombstone's motion for injunction pending appeal rebutted these declarations. *See* 9th Cir. Dkt. 8-5(45:4-25, 54-56:1-14, 60, 62, 68).

restore *all* of the spring sites in its Huachuca Mountain municipal water system. Appellee Brief, p. 16 (ER1219). Defendants have refused to do so. Instead, Tombstone has been forced through an interminable process of seeking authorization for necessary repairs on a spring-by-spring basis, by which the town has been prevented from restoring its municipal water system using mechanized and motorized equipment.

For example, it took nearly *four months*, from July 22 until November 7, 2011, before Defendants allowed Tombstone to restore just one of its 25 springs—Miller Spring No. 1—using mechanized and motorized equipment. ER1374:11-17. As late as *October 20, 2011*, the Forest Service was still insisting that Tombstone use hand tools to repair its water line. ER1285:9-19. This was during what even the Forest Service admits was a serious public health and safety emergency created by the town's dire water shortage. ER1378:21-25, 1379:1-7. Even after approving permanent restoration work at Miller Spring, it took almost two *more* months, until December 22, 2011, before Defendants approved temporary repairs at Gardner Spring No. 24. ER1239, 1366:5-11.

Unlike at Miller Spring, Tombstone was not permitted to use mechanized equipment at Gardner Spring. ER1280:5-15. Tombstone was told not to use mechanized equipment in the creek bed. ER1310:12-16. Tombstone's request to use construction vehicles like those at Miller Spring in restoring Gardner Spring

was refused. ER1315:4-8. Tombstone was blocked from installing 2,200 feet of pipe. ER1388:15-17. And Tombstone was prohibited from trenching pipelines to Gardner Spring. ER1390:14-22. These restrictions were final determinations because Defendants deemed the limited authorization for restoration work at Gardner Spring a final, non-appealable administrative decision. ER1243.

Similar restrictions apply to Tombstone's remaining spring sites because the Forest Service has taken the position that any "ground disturbance activity" requires similar regulatory authorization. ER1385:13-17. In fact, Tombstone was told that any trenching of pipeline would require preauthorization even if within its pipeline right-of-way. ER1400:18-25. And the Forest Service delivered an ultimatum to Tombstone stating that if the town did not agree to its terms, then it would not authorize the town to restore its municipal water supply. ER1397:6-11. Since at least March 1, 2012, Defendants have chosen to grind Tombstone's restoration work to a halt by forcing the town to use only hand tools. ER776(¶11), 959(¶¶67, 68). With little more than pickaxes and shovels, Tombstone has been forced to slog through boulders, giant felled trees, and huge piles of gravel and sand. ER775(¶¶9-10); 1344:4-8, 1442:24-25, 1443:1-15.

Such conduct shows that Defendants will not again allow Tombstone to use mechanized or motorized equipment to restore its remaining spring sites. This conclusion is buttressed by Defendants' litigation conduct, which belies their claim

that they would cooperate if only Tombstone furnished site-specific information about the proposed work.[2]

In his February 2, 2012 testimony before the lower court, Forest Supervisor Jim Upchurch stated that Defendants would need the following information to reach a decision on allowing Tombstone to fully restore its water system: (1) an identification of the location with "coordinates and/or legals;" (2) specificity about the "work the City proposes to do;" (3) "[h]ow the work would be accomplished;" and (4) "why the work must be done." ER 1404:11-24, 1405: 1-12. Subsequently, Tombstone furnished Defendants with all of this information.

Specifically, relative to the location of the work to be performed, Defendants were given: (1) ancient deeds and notices of appropriation establishing Tombstone's water rights and rights of way long before the designation of the Coronado National Forest and the Miller Peak Wilderness; and (2) maps, permits and surveys depicting the full extent of the servicing pipeline. ER987-1146. Relative to the proposed work and how it would be accomplished, Defendants were given: (1) a proposed order stating the specific nature of the work to be performed; (2) a declaration furnishing a detailed description of the work to be performed and list of what equipment would be used at each spring site; and (3)

[2] An agency's litigation position can evidence that it has predetermined an issue such that administrative exhaustion is futile. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).

surveys depicting the dimensions of the original structures to be restored at each spring site. *Id.*, ER772-94, 908-11. Relative to "why the work must be done," Defendants were given declarations from Tombstone's Water Operator and Fire Chief detailing the public health and safety emergency justifying restoration of all of Tombstone's spring sites. ER795-43.

As further evidence of Tombstone's right to perform the foregoing work, the town furnished:

- A 1891 legal opinion letter on behalf of Tombstone's predecessor in interest attesting to their validity (ER1017-21);
- Ancient sworn testimony describing the location and development of 21 out of the 25 spring sites in question (ER1024-37);
- Court judgments from the 1910s showing the adjudication of the entire pipeline in Miller Canyon, as well as water rights of way to four springs, in favor of Tombstone's immediate predecessor in interest (ER1147-55);
- The Forest Service's *own* 1916 letter recognizing the Huachuca Mountain water system rights as protected by the 1866 Mining Act (ER1156-58);
- A 1947 quit claim deed transferring all of these rights to Tombstone (ER1159-64); and
- A series of declarations from former Tombstone employees and contractors showing continuous and customary maintenance of the pipelines and spring sites servicing Tombstone's Huachuca Mountain water system using heavy mechanized equipment and motorized vehicles from 1969 through 2004 without interference by the Forest Service (ER882-907).

These facts show that Defendants have long had sufficient information to decide on Tombstone's proposal to fully restore its entire municipal water system in a manner similar to what was previously authorized at Miller Spring. Contrary to Defendants' misleading assertion that "Tombstone produced no evidence that the springs not mentioned in Tombstone's special use permit were ever used as a part of the City's water system" (Appellee Brief, p. 38), even at this preliminary stage of litigation, there is overwhelming record evidence that Tombstone's 25-spring municipal water system served the town for over one hundred years. Appellant Brief, pp. 10-14. Construction Manager Kevin Rudd's March 28, 2012 declaration attests to the condition of 24 spring sites, demonstrating that it is possible to locate them based on the legal descriptions contained in the notices of appropriation, surveys, and maps furnished to Defendants.[3] ER774(¶7), 788-91. There is no evidence that any of Tombstone's extensively documented legal rights have been abandoned or otherwise lost. ER1432:23-25, 1435:1-13.

Defendants certainly have as much—if not far more—site specific information as when they approved the restoration work at Miller Spring. Because Defendants still bar Tombstone from performing the same sort of work that was

[3] Although trumpeted by Defendants as an admission (Appellee Brief, p. 39), Construction Manager Kevin Rudd's January 26, 2012 testimony that he could not locate 18 of the town's springs only attests to the "massive devastation" that destroyed the system after the post-Monument Fire flooding. ER1436:24-25, 1437:1-20.

already approved at Miller Spring *even at sites over which there is no location dispute*,[4] it is apparent that their purported willingness to cooperate with Tombstone administratively—if only the town gave them still more information about the location of its springs—is a mere pretense.

Defendants' continued insistence on the need to consult with other agencies about Tombstone's proposal proves Defendants are affirmatively choosing to create more delay when they have the option of standing down. This is because: (1) they previously admitted in a final administrative decision that the kind of work proposed at Miller Spring "would have no effect on Federally listed threatened or endangered species or designated critical habitat" (Appellee Brief, p. 13 (ER1237)); and (2) this Court has repeatedly ruled interagency consultations are unnecessary if a federal agency simply refrains from taking affirmative action and allows the exercise of vested rights. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012); *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1111 (9th Cir. 2005). Finally, Defendants blocked Tombstone from using a wheelbarrow to perform what little hand work they will allow. ER777(¶13). Given that time is of the essence, the fact that Defendants later reversed this arbitrary decision is little comfort. Such conduct is part of the

[4] There is no dispute over the location of some of the remaining unrestored spring sites—five of them are included among the six spring sites surveyed in the Forest Service's own 1962 special use permit. Defendants obviously know where those springs are located.

foregoing pattern of deliberate delay, which also includes an unexplained 13 day delay between the Forest Service's December 9, 2011 internal approval of temporary repairs to Gardner Spring and the December 22, 2011 communication of that approval to Tombstone. ER1217, 1239, 1340:1-22.

In reality, Defendants have predetermined that they will refuse to allow Tombstone to restore its Huachuca Mountain municipal water system using the same motorized and mechanized methods they previously approved for Miller Spring. At a time of dire need, Defendants have effectively prohibited the town from enjoying the beneficial use of 22 of its 25 springs—88 percent of its Huachuca Mountain water system. Further administrative proceedings are futile and will only compound the irreparable harm Tombstone faces. Defendants must not be allowed to evade appellate review of this predetermined lawless policy.

ARGUMENT

Compliance with Fed. R. Civ. 52(a)[5] requires findings of fact to be rendered with reference to specific evidence. *Norris v. City & County of San Francisco*, 900 F.2d 1326, 1329 (9th Cir. 1990). Specific conclusions of law are required to be rendered by applying specific legal principles. *Id.* It is undisputed that the lower court did not do so in weighing the harms, equities and public interests implicated by Tombstone's requested injunctive relief. Despite Defendants' effort to backfill

[5] Defendants are correct that references to Rule 52(b) in Appellant's opening brief were inadvertent errors. The undersigned counsel apologizes for any confusion.

the lower court's decision, the court clearly abused its discretion in denying the requested preliminary injunction.

I. Tombstone is Suffering Irreparable Harm from Being Forced to Live on the Edge of Disaster.

Defendants do not dispute that a threat to public health and safety constitutes irreparable harm to a governmental body. *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, like the lower court, they contend that the danger facing Tombstone is speculative. But this Court has held that irreparable harm is shown if plaintiff demonstrates a substantial risk of injury that it is entitled to avoid. *M.R. v. Dreyfus*, 663 F.3d 1100, 1102 (9th Cir. 2011).

In *Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 393 (9th Cir. 1994), this Court rejected arguments that the threat of irreparable harm from a "lack of access to traditional food sources" was speculative. It observed that the tribe in question was entitled to rely on its traditional food source; consequently, "rather than focusing on whether anybody currently is starving, the [lower] court should have focused on the evidence of the *threatened loss* of an important subsistence food source and destruction of their culture and way of life." *Id*. at 394 n. 5 (emphasis added). Thus, imposing a risk of injury "greater than a reasonable

man would incur" constitutes irreparable harm. 5 J. Pomeroy, A Treatise on Equity Jurisprudence and Equitable Remedies, § 1937 (§ 523), p. 4398 (2d ed.1919).

Here, unless injunctive relief is granted, Tombstone faces a greater risk to public health and safety than a reasonable government would incur. Only three of its 25 springs are currently furnishing water to its municipal water system. ER961(¶70). Before these three springs were (partially) restored, Defendants admitted in numerous administrative findings that Tombstone faced grave public health and safety risks relating to the inadequacy of its water supply. ER1192, 1196-97, 1233. Even after Miller and Head (also known as Carr) Springs Nos. 1 and 13 were restored, Defendants rendered similar findings to justify authorizing temporary restoration work at Gardner Spring. ER1215, 1270:13-21. These administrative findings were completely ignored by the lower court's conclusory determination that Tombstone's public health and safety interest was "overstated and speculative." ER15:21.

Defendants urge this Court to follow the lower court's lead based on the contention that the current water flow generated by Tombstone's three (partially) restored springs renders the foregoing administrative findings irrelevant. Appellee Brief, p. 41 n.17. But only 100 gallons per minute (gpm) is the difference between the amount of water available to Tombstone today and the amount of water previously deemed by Defendants to be so inadequate as to present a threat to

public health and safety. *Compare* ER800(¶11) *with* ER1192, 1196-97, 1215, 1233, 1270:13-21 . There are at least two reasons why this does not provide a sufficient margin of safety to render Defendants' previous administrative findings irrelevant.

First, it remains undisputed that Tombstone's temporary repairs are at risk of being washed away in monsoon flooding. ER775(¶9), 786, 956(¶58), 958(¶64), 961(¶72), 1346:16-21. Defendants will not allow Tombstone to protect Gardner Spring by building a permanent diversionary flume, which is essential to deflect future water flows and prevent them from injuring workers in the area. ER664(¶38), 775(¶¶9, 12), 786, 961(¶72), 1222-25; 1346:16-21. Defendants are also preventing the town from trenching and burying its pipelines to protect them from destruction by future floods. ER775-76(¶9-12). That risk is now imminent because the monsoons have arrived. Tombstone therefore faces *precisely* the same public health and safety risk described in Defendants' own administrative findings to authorize repair work to Gardner Spring.

Second, neither Defendants nor the lower court have ever explained how an additional 100 gpm would materially diminish the magnitude of the public health and safety risk spotlighted by Defendants' administrative findings. It simply cannot be done. The only conceivable basis of those administrative findings was the implicit determination that Tombstone's well water supply was threatened with

failure due to arsenic contamination or mechanical problems. In the event of such a well failure, a mere 100 gpm cannot possibly replace the water that would be needed for domestic consumption or fire suppression. As explained by Tombstone Water Operator Jack Wright and Fire Chief Jesse Grassman, an additional 400 gpm is needed to protect public health and safety because of peak domestic consumption demand, the risk of well failure, and the water supply needed for a distribution system that could furnish truly adequate fire suppression. ER800(¶¶11-12), 801(¶¶13-14); ER833-34(¶¶8-9). Therefore, Defendants' administrative findings *still* constitute real and substantial evidence that the public health and safety threat faced by Tombstone is "greater than a reasonable man would incur."

No reasonable government, which is obligated to protect public health and safety in a desert-parched, disaster-prone tinderbox town, would incur the risk of relying exclusively upon arsenic-contaminated wells and 100 gpm from three partially restored springs, which could be swept away at any moment, when it has the option of permanently restoring as much as *400 gpm* from *25 springs*. ER266-67(¶15), 297, 750(¶72:16-19), 801(¶14). Whatever historical variability may exist in the water produced by Tombstone's mountain springs, the town faces the certain *inability* to adequately protect public health and safety every day that Defendants obstruct Tombstone's proposed restoration work.

Forcing Tombstone to live on the edge of disaster when the town has the right and the opportunity to greatly minimize or entirely avoid such risk *is* irreparable harm. Just as the tribe in *Native Vill. of Quinhagak* did not have to starve to death in order to demonstrate irreparable harm from fishing regulations, neither should Tombstone be required to burn to the ground to prove irreparable harm from Defendants' conduct. 35 F.3d at 393, 394 n.5. The lower court thus committed clear reversible error in failing to recognize that the element of irreparable harm weighs sharply in favor of the requested injunction.

II. Tombstone is Suffering Irreparable Harm Because Defendants Have Impaired its Sovereign Interests.

Like the lower court, Defendants ignore *Kansas v. United States*, 249 F.3d 1213, 1228 (10th Cir. 2001), which held that irreparable harm is shown by the impairment of a state's sovereign interests. Instead, they argue the State of Emergency declared by Arizona Governor Jan Brewer has no sovereign significance or Tombstone lacks standing to claim the impairment of any sovereign interest entailed by that declaration. But by declaring a State of Emergency, the Governor determined "state assistance is needed to supplement . . . political subdivisions' efforts and capabilities to save lives, protect property and public health and safety, or to lessen or avert the threat of a disaster in Arizona." Ariz. Admin. Code R8-2-301(8). The Governor thereby confirmed that Tombstone's restoration work represented the "combined efforts of the state and the political

subdivision." Ariz. Rev. State. § 26-301(15). Governor Brewer's declared State of Emergency therefore clothed Tombstone's restoration work with "all police power vested in the state." Ariz. Rev. Stat. § 26-303(B), (E)(1).

Defendants' interference with Tombstone's restoration work is thus a direct impairment of the State's sovereign interests. As a direct, intended beneficiary of Governor Brewer's Emergency Declaration—and joint actor under its police power authority—Tombstone has corresponding standing to claim irreparable injury. *See, e.g.*, *Middlesex County Utilities Auth. v. Borough of Sayreville*, 690 F.2d 358, 362 (3rd Cir. 1982); *Friends of Earth v. Carey*, 552 F.2d 25, 33-34 (2nd Cir. 1977). Such impairment constitutes irreparable harm because, without notice or an opportunity to be heard, Defendants have reversed the Forest Service's 1916 letter determination that: (1) Tombstone's municipal water system was protected by the 1866 Mining Act; and (2) special use permitting is optional. ER1156-58. The lower court thus abused its discretion as a matter of law in failing to find that Tombstone demonstrated irreparable harm.

III. The Balance of Equities and the Public Interest Weigh in Favor of Preliminary Injunctive Relief.

Without reference to any specific evidence or law, the lower court balanced the equities and public interest by declaring: "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. This determination is essentially the same as the one reversed as conclusory in *Barnes v. Gulf Oil Corp*., 824 F.2d 300, 306 (4th Cir. 1987) (criticizing finding "there is no greater hardship on Mrs. Barnes. . . . Indeed, I am inclined to think that the Andersons are undergoing a greater hardship").

Contrary to Defendants' suggestions, the lower court's decision on the balance of equities and public interest is certainly not "comprehensive" when considered in light of the entire record. The lower court's decision neither considered nor adjudicated Tombstone's central argument that the public interest *actually* served by the federal laws at issue here favors the requested injunction. Its decision completely ignored the Supreme Court's ruling in *United States v. New Mexico*, 438 U.S. 696 (1978), that the national forest system codifies a principled deference to state water law. It also did not address the implications of *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1987 (2011), or *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), in light of the numerous savings clauses contained in the federal laws at issue in this case. These seminal cases should not have been ignored because they are controlling.

Leaving aside the consultation provisions of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), the federal laws invoked by Defendants in this case are subsidiary to the establishment and maintenance of the national forest system. *See*,

e.g., 16 U.S.C. § 551 (authorizing regulation for the "[p]rotection of national forests"); 16 U.S.C. § 1133(a)(1) ("[n]othing in this Act shall be deemed to be in interference with the purpose for which national forests are established"). Therefore, assessing whether the requested preliminary injunction would advance the public interest requires a determination of the principal purpose of the national forest system.

When the Supreme Court considered the legislative text and history of the national forest system in *United States v. New Mexico*, it concluded that Congress was committed to "principled deference to state water law." *Id.* at 718 (citing 16 U.S.C. § 481). The Court also ruled that "Congress authorized the national forest system *principally* as a means of enhancing the quantity of water that would be available to the settlers of the arid West." *Id.* at 713 (emphasis added). It further rejected the contention that "Congress intended to partially defeat this goal" for "aesthetic, environmental, recreational and 'fish' purposes." *Id.* at 705, 713, 716-17.

There is no doubt the requested preliminary injunction would advance the purpose of the national forest system as articulated in *New Mexico*, 438 U.S. at 713-18. Allowing the proposed restoration work is fully consistent with Congress' "principled deference to state water law" because Tombstone's appurtenant possessory rights and rights of way indisputably arise under territorial and state

water law and are guaranteed by the 1866 Mining Act. Appellant Brief, pp. 10-14, 30-36. Likewise, allowing Tombstone to fully restore its 130 year old municipal water system would directly actualize the principal purpose of the national forest system of "enhancing the quantity of water" available to the "settlers of the arid West." In short, the "principal" public interest *actually* served by the national forest system clearly favors the requested relief. This conclusion is underscored by a consideration of the text of the federal laws at issue in this case in light of the federalism principles enforced in *Whiting*, 131 S.Ct. at 1987, and *Wyeth*, 555 U.S. at 565.

Neither Defendants nor the lower court have grappled with the fact that all of the substantive federal laws at issue in this case contain savings clauses protecting Tombstone's 1866 Mining Act rights. *See, e.g.*, Act of Nov. 6, 1906 (1906) (Proclamation of President Theodore Roosevelt) (stating "[t]his proclamation will not take effect upon any lands . . . which may be covered by any prior valid claim"); Wilderness Act of 1964, 16 U.S.C. §§ 1133(c) (stating the ban on motorized and mechanized equipment is subject to exceptions "as specifically provided for in this Act and . . . existing private rights"), 1133(d)(6) (providing "[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws"), 1134(a) (providing that in "any case where State-owned or privately owned land is

completely surrounded by national forest lands within areas designated by this Act as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest"); Arizona Wilderness Act of 1984, 98 Stat. 1485, § 302(a) (stating its regulatory provisions are "[s]ubject to valid existing rights"). 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 the savings clause of 43 U.S.C. § 1761(c)(2)(A).

Even if Tombstone's Mining Act rights were subject to regulation under the general provisions of the foregoing laws, which is disputed,[6] these savings clauses clearly indicate that the public interest requires Defendants to respect previously vested rights. The savings clauses may not protect previously vested rights from *all*

[6] The express exclusion of lands "which may be covered by any prior valid claim" from the 1906 Presidential Proclamation justifies the natural interpretation that the lands covered by Tombstone's 1866 Mining Act rights were never actually brought within the national forest system; that they are, in fact, outside of the Coronado National Forest; and, by extension, they are not subject to the regulatory provisions of the Arizona Wilderness Act of 1984 or the Wilderness Act of 1964. This, in turn, justifies the straightforward conclusion that Tombstone's Mining Act rights are not subject to regulation under the foregoing laws (albeit possibly subject to regulation under other federal laws), and that the public interest cannot possibly be served by Defendants' effort to regulate them as if they were.

federal regulation,[7] but they do protect them from those that would effectively abrogate pre-existing rights. *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). In other words, the cited savings clauses compel the conclusion that the public interest advanced by the foregoing federal laws is *undermined* by regulation that effectively prohibits rightful activities under the 1866 Mining Act, such as routine maintenance. *See, e.g.*, *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005).

Given the periodic wildfire and flood disasters that afflict the Huachuca Mountains, Tombstone's proposed work is simply the routine maintenance that has been taking place for decades without interference by the Forest Service. ER883-906; 954-56(¶¶52-57). There is just no other way to keep the system operating. By standing in the way of Tombstone's proposed restoration work for nearly a year *for the first time ever*, Defendants are effectively prohibiting Tombstone from exercising its previously vested rights. This is contrary to the public interest served by the cited savings clauses. Thus, by requiring Defendants to stop such

[7] This Court has ruled that private 1866 Mining Act water rights and rights of way can be subject to reasonable federal regulation, but nevertheless underscored that reasonable regulation cannot prohibit rightful activity. *Adams v. United States*, 3 F.3d 1254, 1256-60 (9th Cir. 1993).

interference, the public interest is advanced by the requested relief. This analysis is confirmed by applying principles of federalism to the construction of the foregoing savings clauses in light of *New Mexico*, 438 U.S. at 713-18.

The cited savings clauses preclude the claim that federal law expresses a clear and unequivocal intent to override Tombstone's police power exercise of its previously vested rights—especially in view of the purpose of the national forest system. Arizona and its political subdivisions enjoy concurrent police power jurisdiction over federal lands. *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976). Conflicts between state police powers and federal regulations are subject to standard preemption analysis, which requires sensitivity to the principle that federal law must not be construed as authorizing the preemption of state or municipal police powers unless such intention is clearly and unequivocally expressed. *Wyeth*, 555 U.S. at 565. If anything, just as the savings clause in *Whiting*, 131 S.Ct. at 1987, was held to warrant construing federal immigration law to accommodate state licensing laws, the cited savings clauses should be construed as indicating that Congress meant for federal law to *accommodate* Tombstone's police power exercise of its previously existing rights. For this reason, Tombstone's requested injunction advances the public interests *actually* served by the federal laws at issue in this case.

Defendants' asserted environmental interests do not outweigh the foregoing public interest in favor of allowing the restoration of Tombstone's municipal water system for at least four reasons.

First, Defendants notably do not defend the lower court's clearly erroneous statement that Tombstone was seeking to "cut a path through a federally protected wilderness area with excavators and other construction equipment," which is the only factual predicate to its ruling on the balance of harms. ER15:24-28. As Defendants know, Tombstone is proposing no such thing. It seeks only to restore its municipal water system to original specifications as set out in ancient maps, surveys and notices of appropriation. Appellant Brief, pp. 37-38, 50-51. The record shows that the contemplated work would cause no lasting adverse impacts on the environment. ER768-69(¶4), 776(¶12), 909-11, 1443:16-25, 1444:1-4. Given that the *only* expressed factual predicate of the lower court's ruling against Tombstone on the balance of harms is clearly erroneous, the balance of hardships favors Tombstone's requested relief. *Native Vill. of Quinhagak*, 35 F.3d at 393 (balance of hardships favored plaintiff because defendants presented "no evidence that the issuance of a preliminary injunction will injure them during the pendency of this litigation"); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 504-05 (9th Cir. 1980) (balance of hardships favors plaintiff where only a conclusory statement and no evidence supports hardship claimed by defendant).

Second, the District Biologist found no possibility of adverse effects from Tombstone's previously approved work on any endangered species. Appellee Brief, pp. 13-14 (ER1237, 1240). Thus, the environmental concern that animates the consultation procedures of the Endangered Species Act, 16 U.S.C. § 1536(a)(2), is not applicable. Moreover, Defendants have always had the option of simply yielding to Tombstone exercising its 1866 Mining Act rights. *Karuk Tribe of California*, 681 F.3d at 1021 ("Where private activity is proceeding pursuant to a vested right or to a previously issued license, an agency has no duty to consult under Section 7 if it takes no further affirmative action regarding the activity"); *Western Watersheds Project*, 468 F.3d at 1111. Because federal law does not mandate consultations under the Endangered Species Act under the facts of this case, the abstract environmental interest associated with mandatory consultations has no weight here.

Third, even if there were competent record evidence of an environmental threat from Tombstone's requested relief, that interest would be outweighed by the more fundamental goal of the national forest system, which is aimed "principally" at "enhancing the quantity of water that would be available to the settlers of the arid West." *New* Mexico, 438 U.S. at 713.

The lower court's decision to give greater weight to environmental interests is not supported by *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 647 (9th

Cir. 2004), because that case only addressed the relative weight of environmental interests under the Wilderness Act *vis a vis* the *private* interest entailed by specially permitted "commercial packstock operations," not the *public interest* advanced by the rightful restoration of an essential municipal water system under the 1866 Mining Act in furtherance of police power action during a State of Emergency. *Clouser v. Espy*, 42 F.3d 1522, 1529 (9th Cir. 1994), is similarly distinguishable because it dealt with road access to ensure the "commercial viability" of a mining claim in a National Park, which neither implicates the goal of the national forest system of "enhancing the quantity of water that would be available to the settlers of the arid West" (*New* Mexico, 438 U.S. at 713), nor the federalism principles that require Defendants to accommodate Tombstone's police power exercise of its 1866 Mining Act rights (*Whiting*, 131 S.Ct. at 1987; *Wyeth*, 555 U.S. at 565).

Fourth, and finally, it should not be forgotten that the public interest served by the requested preliminary injunction is not merely water development and consumption for its own sake; it is the protection of public health and safety. Neither the lower court nor Defendants dispute that the protection of public health and safety is a "paramount public interest." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981). Tombstone's public health and safety interest is real and substantial—not "overstated and speculative," as asserted

by the lower court in lieu of any special findings of fact. ER15:21. Tombstone's "paramount" public health and safety interest outweighs any other interest.

Taken together, the balance of the hardships, equities and public interests sharply favors Tombstone because Defendants claim no injury from the requested injunction other than the violation of their supposed regulatory prerogatives, which carry no weight. The lower court's conclusory decision to the contrary is thus clearly erroneous and should be reversed.

IV. Tombstone's Tenth Amendment Claim Raises Serious Questions Going to the Merits.[8]

The serious questions raised by Tombstone's Tenth Amendment claim are not deflected by *Reno v. Condon*, 528 U.S. 141 (2000), or any other case Defendants cite. *Reno* ruled that a generally applicable federal law does not violate the Tenth Amendment when it regulates both private and public entities "acting

[8] Tombstone agrees with Defendants' invitation to reach its Tenth Amendment claim notwithstanding the lower court's denial of injunctive relief on grounds of sovereign immunity. Nevertheless, it must be emphasized that the vague reference in *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 285 (1983), to enforcing the QTA's "other restrictions" cannot sustain the lower court's decision. The reference is *obiter dictum* because only the statute of limitations was at issue in *Block*, not "other restrictions." While Congress can impose *statutes of limitations*, by definition "sovereign" immunity does not apply to actions against officers for their unconstitutional conduct. Furthermore, the QTA cannot bar the requested relief because, as in *Robinson v. United States*, 586 F.3d 683, 688 (9th Cir. 2009), Tombstone's Tenth Amendment claim is in the nature of a property-based tort claim, to which Defendants have only vaguely contested title—emphasizing that their actions are justified "whatever" the town's asserted property rights. Appellee Brief, pp. 23, 32.

purely as commercial sellers" and "suppliers to the market for motor vehicle information." *Reno*, 528 U.S. at 150 n.3, 151. The other cases cited by Defendants likewise either deal with a facial attack on generally applicable federal law or the regulation of commercial activity. Appellee Brief, pp. 24-28.

Tombstone, however, is not attacking any generally applicable federal law; nor is it seeking to engage in a purely commercial activity outside of the traditional functions of state and local government. As discussed above, every federal law at issue in this case either should not be applied to Tombstone's property or is actually furthered by the requested relief.[9] Rather than advancing a facial attack on a generally applicable law, this appeal thus raises an *as-applied* challenge to lawless executive action that purports to regulate a core governmental function traditionally assigned to the states. *Reno* and every other case Defendants cite to defend the lower court's decision are thus inapposite.[10]

As held in *Brush v. Commissioner*:

> [T]he acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental

[9] Neither the lower court nor Defendants have explained how Tombstone's claim could be characterized as challenging the Wilderness Act, which only applies to a specific area of the Coronado National Forest, when the town's spring sites supposedly cannot be located. The lack of specific legal conclusions and special findings of fact indisputably confound appellate review of this issue.

[10] Even if Defendants' interference stems from Endangered Species Act consultation requirements, Tombstone's claim remains an as-applied challenge because such consultations would not have been required if Defendants had allowed the town to exercise its vested rights.

> functions, and this conclusion is fortified by a consideration of the public uses to which the water is put. Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths, could not exist. And this is equivalent, *in a very real sense, to saying that the city itself would then disappear*.

300 U.S. 352, 370-71 (1937) (emphasis added). Following *Block*, Defendants' commandeering of the town's water system threatens both Tombstone's very existence as a political subdivision of the State of Arizona and the State's sovereign right to maintain the existence of its political subdivisions. This existential threat undermines the Constitution's assumption of the "States' continued existence." *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). The lower court, therefore, erred as a matter of law in rejecting Tombstone's Tenth Amendment claim. Appellant's Brief, pp. 41-49.[11] Because the equities weigh sharply in favor of the requested relief, this Court should reverse the lower court's ruling as legally erroneous, and hold that Tombstone raises serious questions on the merits of its Tenth Amendment claim. *Dreyfus*, 663 F.3d at 1102.

[11] Defendants and the lower court are clearly wrong in claiming that *Printz v. United States*, 521 U.S. 898, 920 (1997), and *New York v. United States*, 505 U.S. 144 (1992), stand only for barring direct commandeering of state officials. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 183 L. Ed. 2d 450, 492 (2012) (observing a conditional exercise of the Spending Power is unconstitutional based on *New York* and *Printz* if it "indirectly coerces a State to adopt a federal regulatory system as its own").

CONCLUSION

For all of the foregoing reasons, including those previously advanced, Tombstone respectfully requests the reversal of the lower court's May 14, 2012 preliminary injunction order as set out in its opening brief.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing Brief is proportionately spaced, has a typeface of 14 points, and contains 6,738 words.

s/Nicholas C. Dranias

CERTIFICATE OF SERVICE

THE ATTACHED FILING HAS BEEN ELECTRONICALLY FILED AND SERVED BY ECF upon the person identified in the below Service List on the 23rd day of July, 2012.

s/Nicholas C. Dranias

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