No. _____

In The
Supreme Court of the United States

CITY OF TOMBSTONE,

Petitioner,

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),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Most fundamentally, this petition asks whether a state has any right to exist under the Tenth Amendment. Under the authority of a State of Emergency declared by the Governor of Arizona, the historic City of Tombstone sought to freely restore its municipal water supply infrastructure inholdings, located within Arizona's Coronado National Forest, after they were destroyed by a natural disaster. Even though the City faced a serious public health and safety emergency consisting of the loss of adequate water for public consumption and fire suppression, the Forest Service refused to allow the City to restore its essential infrastructure without first obtaining special use authorizations. The specific questions presented for review are:

1.

Whether the City of Tombstone is likely to succeed on the merits of the claim that the Forest Service violated the Tenth Amendment by directly regulating the City in such a way as to impede restoration of essential municipal infrastructure during a State of Emergency, and thereby threaten the continued existence of a political subdivision of the State of Arizona.

QUESTIONS PRESENTED FOR REVIEW
– Continued

2.

Whether the City of Tombstone is likely to succeed on the merits of the claim that this Court has implicitly overturned *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and that, under the traditional governmental functions test applied in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the U.S. Forest Service violated the Tenth Amendment by preventing the City from freely restoring its essential municipal infrastructure during a State of Emergency.

3.

Whether the City of Tombstone is likely to succeed on the merits of the claim that the Forest Service violated the Tenth Amendment by preventing the City from freely restoring its essential municipal infrastructure during a State of Emergency because the Property Clause, like all other delegated powers of the federal government, is limited by the principle of state sovereignty.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Plaintiff-Appellant and Petitioner: City of Tombstone, an Arizona municipality.

Defendants-Appellees and Respondents: United States of America; United States Department of Agriculture; Tom Vilsack (in his official capacity as Secretary of Agriculture); Tom Tidwell (in his official capacity as Chief Forester of the United States Department of Agriculture Forest Service); and Corbin Newman (in his official capacity as Regional Forester for the Southwestern Region of the United States Department of Agriculture Forest Service) (hereinafter collectively "Forest Service").

This petition has not been filed by or on behalf of a nongovernmental corporation. The City of Tombstone is a municipal corporation chartered by the Territory of Arizona and by the Constitution of the State of Arizona, which ratified existing territorial charter cities. 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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PETITION FOR WRIT OF CERTIORARI

The City of Tombstone respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit entered on December 21, 2012, to grant the preliminary injunction requested below during the pendency of this appeal pursuant to 28 U.S.C. § 1651(a) under *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980), to reverse the lower courts' decisions and remand with instructions to grant the preliminary injunction requested below until the underlying case is litigated to a final judgment, and/or to furnish such other relief as is just and equitable.

OPINIONS BELOW

The decision of the court of appeals affirming the decision of the U.S. District Court for the District of Arizona is not officially reported, but is available at 2012 WL 6758045 and is reproduced at App. 1-3. The decision of the U.S. District Court for the District of Arizona is not officially reported, nor is it available from an electronic service such as Westlaw, but it is reproduced at App. 4-24.

JURISDICTION

The decision of the court of appeals affirming the denial of Plaintiff's second motion for preliminary injunction was entered on December 21, 2012. App. 1.

This petition has been filed within 90 days of that date. Accordingly, the Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Court has jurisdiction over the instant appeal because it arises from an order that refused a preliminary injunction. The basis of the Ninth Circuit's appellate jurisdiction was 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 was 5 U.S.C. §§ 702, 706, 28 U.S.C. §§ 1331, 1361, 1367, 2201 and 2202.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case principally involves the Property Clause and the Tenth Amendment to the United States Constitution, as well as U.S. Rev. Stat. §§ 2339 and 2340, and the Presidential Proclamation of November 6, 1906 declaring the establishment of the Huachuca Forest Reserve.

The Property Clause provides: "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." U.S. Const. Art. IV, Sec. 3, Cl. 2.

The Tenth Amendment provides: "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." Id., Amend. X.

U.S. Rev. Stat. §§ 2339 and 2340 provide:

[Vested rights to use of water for mining, etc; right of way for canals. 26 July, 1866, c 262, s5, v.14, p. 252, 253.]

Sec. 2339. 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 herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages 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 damage.

[Patents, preemptions, and homesteads subject to vested and accrued water-rights.]

Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

Huachuca Forest Reserve, Proclamation No. 682 (November 6, 1906) provides:

By the President of the
United States of America

[November 6, 1906]

A Proclamation

[Huachuca Forest Reserve]

Preamble

[Vol. 26, p. 1108]

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;

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 Huachuca Forest Reserve on the diagram forming a part hereof.

[Lands Exempted]

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

Theodore Roosevelt

By the President:

Robert Bacon

Acting Secretary of State

The table of authorities lists all other relevant statutes and regulations. The Appendix contains their verbatim text.

STATEMENT OF THE CASE

Water is life to the historic desert town of Tombstone, Arizona, and its 1,562 residents. And yet, for nearly two years, the U.S. Forest Service has refused to allow Tombstone to freely and fully repair and restore its devastated municipal water supply infrastructure in the Huachuca Mountains – a municipal water system that dates back to the days of Wyatt Earp and Doc Holliday.

I. Essential Facts.

Between May and July 2011, the Monument Fire engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone's water supply infrastructure had been located. App. 96, 100(¶48). In July 2011, the monsoon rains were record-breaking. *Id.* With no vegetation to absorb the runoff, huge mudslides forced boulders – some the

size of Volkswagens – to tumble down mountainsides crushing and burying Tombstone's springheads, waterlines and reservoirs; thus, shutting off the City's main source of water. *Id.*

In view of the devastation wrought by the Monument Fire and ensuing monsoons, both the City of Tombstone and Arizona Governor Jan Brewer declared a State of Emergency on July 26, 2011 and August 17, 2011, respectively. App. 100(¶¶49, 50), 136-40. Under the authority of these emergency declarations, the City of Tombstone immediately began its restoration work using mechanized equipment and vehicles paid for with a grant from the State.

Shortly thereafter, the U.S. Forest Service intervened and ordered Tombstone to cease its work. App. 148-49. The Forest Service demanded that Tombstone separately apply for special use authorizations to restore its water supply infrastructure. App. 103-06. This was despite the City's existing 1962 special use permit to maintain a municipal water supply consisting of five special service areas and six water sources in the Huachuca Mountains *and* the City's century-old system of reservoirs and pipeline rights of way for twenty-five water sources under U.S. Rev. Stat. §§ 2339 and 2340. App. 125(¶9), 149-51, 161.

Between September and December 22, 2011, utilizing a complex special use authorization decision memorandum process involving various consultations with numerous federal offices and agencies, the Forest Service eventually approved temporary restoration

work to infrastructure serving just two of Tombstone's water sources. App. 106(¶69), 141-66. By interposing this special use authorization process as a precondition of Tombstone's emergency restoration work, the Forest Service ignored decades of custom and practice in which the City freely utilized motorized vehicles to repair and restore damaged infrastructure in the Huachuca Mountains. App. 101-02(¶56), 149, 161; App. Ct. 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). It also effectively reversed a letter determination issued to Tombstone's predecessor on April 4, 1916 that "recognized the existence of a right of way for your reservoir and pipelines across the Forest" under U.S. Rev. Stat. §§ 2339 and 2340. App. 134. That letter specifically determined special use permitting was unnecessary except to furnish "the specification of a definite width" for the related rights of way at the option of the permittee. App. 134-35. Rather than yielding to Tombstone's work during a State of Emergency, the Forest Service essentially imposed on the City an entirely new time-consuming special use authorization process.

In the course of processing and granting the foregoing two special use authorizations to restore infrastructure to two water sources, the Forest Service itself repeatedly rendered final administrative findings that the destruction of the City's infrastructure threatened public health and safety. The Forest Service's own findings include:

Overall, the damage to the City's water system has impaired its ability to provide customers with a safe and reliable source of potable water. App. 142.

[T]aking no action would threaten the water supply for the citizens of Tombstone. Therefore, emergency actions are warranted to protect life and property values outside of wilderness. . . . The loss of the water resources from the wilderness could be devastating to the City of Tombstone. The basis to take action is the threat to life, property, and other resource values outside of wilderness. App. 151-52, 162.

The cost to Tombstone to supply sufficient and safe drinking water to it's [sic] citizens as well as loss of income to businesses of Tombstone that are dependent on a water and water facilities to conduct business. App. 153.

The action is necessary for the health and safety of human life for the community of Tombstone in the form of providing a sufficient water supply. App. 154.

Debris from flooding has damaged the pipelines, catch basins, and collection structures, resulting in a decrease in the potable water supply for the citizens of Tombstone. App. 156.

Because of the emergency public health issue related to the availability of potable water to citizens of the COT, I decided that public

> involvement in this NEPA review would be limited . . . App. 159.
>
> The action is necessary for the health and safety of human life for the community of Tombstone. 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. App. 164-65.
>
> Health and safety risks exist to the City of Tombstone if repairs are not completed expeditiously. Water is needed to supplement well water in order to meet drinking water standards and provide water for fire suppression. Mechanized equipment will significantly hasten project completion. App. 165.

Today, including the two sources repaired with the Forest Service's permission, only three of the City's mountain water sources are currently flowing. App. 106(¶70). Those three sources could be swept away by monsoons at any time due to the Forest Service's refusal to allow the completion of permanent repairs. App. 107(¶73). This would leave the City entirely dependent upon a single well water source for potable water, which could fail at any time due to mechanical problems and arsenic contamination. App. 117-19(¶¶5-14).

The loss of water from the Huachuca Mountains also threatens the City's ability to furnish water for fire suppression – both locally and regionally to fight wildfires. App. 114(¶9), 122-23(¶¶12-16). The threat

of a catastrophic urban fire is very real. In December of 2010 the town nearly lost its historic downtown during the Six Gun City fire. App. 113(¶6). According to former Fire Chief Jesse Grassman, "Tombstone is a disaster waiting to happen." App. 114(¶9).

Nevertheless, the Forest Service has taken a firm stand in litigation that, whatever the nature of Tombstone's property rights or the underlying exigency, it will never allow the City to restore any portion of its remaining water infrastructure using anything other than horses and hand tools unless the City first seeks additional regulatory approval. In other words, the Forest Service will not yield to public health and safety, a declared State of Emergency, Tombstone's existing 1962 special use permit, or Tombstone's U.S. Rev. Stat. §§ 2339 and 2340 rights of way as a sufficient legal basis, separately or collectively, for the City to freely and fully restore its water supply infrastructure.

II. The Proceedings Below.

After dealing with months of obstruction on the ground in the wake of Governor Brewer's declared State of Emergency, Tombstone decided to bring the matter to a head on December 5, 2011. That day, the City of Tombstone wrote a letter to the Forest Service specifically requesting blanket, unhindered authorization to complete repairs to all of its municipal water supply in the Huachuca Mountains. App. 103(¶63); App. Ct. ER120. Nearly three weeks later,

on December 22, 2011, the Forest Service responded by ignoring the letter's specific request and instead authorizing repairs to infrastructure serving a second *single* springhead. App. 156-57; App. Ct. ER145. No administrative appeal was available to Tombstone because the related decision memorandum stated, "This decision is not subject to administrative review and appeal." App. 160. Shortly thereafter, on December 28, 2011, Tombstone filed the underlying lawsuit.

To complete repairs to its municipal water supply, Tombstone desperately and repeatedly sought emergency injunctive relief in the lower courts. On March 1, 2012, the district court denied Tombstone's first motion for preliminary injunction without prejudice, allowing the City to file a second preliminary injunction motion addressing Tenth Amendment issues by March 30, 2012. Dist. Ct. Dkt. 44. A month and a half later, on May 14, 2012, the court denied Tombstone's second preliminary injunction motion. App. 4. Without addressing the Forest Service's own administrative findings or rendering any specific factual findings of its own, the district court dismissed Tombstone's public health and safety concerns as overwrought. Tombstone immediately appealed the decision.

A week later, on May 21, 2012, Tombstone 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 without explanation. Subsequent emergency applications for an injunction under the All Writs Act were

served and renewed before individual justices of this Court, and were denied on June 1 and 5, 2012. Ultimately, on December 21, 2012, the Ninth Circuit Court of Appeals affirmed the lower court's denial of preliminary injunctive relief solely on the basis that Tombstone did not raise serious questions going to the merits of its Tenth Amendment theory. App. 1-3.

The district court principally denied Tombstone's second preliminary injunction motion on jurisdictional grounds – ruling that sovereign immunity under the Quiet Title Act, 28 U.S.C. § 2409a, barred preliminary injunctive relief and that the City's claims were otherwise not ripe. App. 11-18. The district court ruled alternatively that Tombstone failed to raise serious questions going to the merits of its Tenth Amendment claim. App. 18-20.

Reasoning tautologically that the Tenth Amendment only reserved power that was not delegated to the federal government, the district court determined that the Tenth Amendment reserved no power to Tombstone in relation to its inholdings because the Forest Service's power to regulate the City's infrastructure was "without limitations" under the Property Clause and the Arizona Wilderness Act (which the district court applied to Tombstone's infrastructure without specific findings as to the boundaries of the Wilderness area or the location of the City's infrastructure). App. 19. The district court also ruled that the Forest Service did not commandeer Tombstone's municipal property under *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505

U.S. 144, 156 (1992); and further refused to apply the traditional government functions test of *National League of Cities v. Usery*, 426 U.S. 833 (1976), ruling that it was bound by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). App. 20 n.4.

Significantly, the district court did not address Tombstone's argument that no federal law actually preempted the police power authority of the City of Tombstone to restore its municipal water supply during a declared State of Emergency. Nor did the district court address Tombstone's argument that the Forest Service's lawless administrative intervention violated the Tenth Amendment because its actions threatened the City's continued existence in violation of the principles enforced in *Alden v. Maine*, 527 U.S. 706, 713-14 (1999).

Without reaching any issue other than the merits of Tombstone's Tenth Amendment claim, the Ninth Circuit's decision adopted the district court's alternative rationale for rejecting preliminary injunctive relief. App. 1-3. It thereby implicitly overruled the jurisdictional bases of the district court's decision.[1]

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[1] Tombstone's appeal advanced a Tenth Amendment claim seeking preliminary injunctive relief against federal officers as well as agencies for unconstitutional conduct, which did not incorporate by reference any Quiet Title Act claim. Accordingly, neither sovereign immunity nor the Quiet Title Act could bar the requested preliminary injunctive relief; such relief could be

(Continued on following page)

REASONS FOR GRANTING THE PETITION

The Forest Service has denied the historic and culturally significant City of Tombstone the ability to freely restore its municipal water supply during a declared State of Emergency. In *Brush v. Commissioner*, this Court observed:

> The acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental 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). What was true for New York City in 1937 is just as true today for a fire prone, desert town like Tombstone,

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entertained on the basis of the court's own inherent equitable authority and statutes other than the Quiet Title Act, such as 5 U.S.C. § 706(2)(B) and 28 U.S.C. § 1331. *See*, *e.g.*, *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 689-90 (1949) (observing it is a general rule that sovereign immunity does not apply to the unconstitutional or lawless actions of federal officers because they are not those of the sovereign); *Presbyterian Church v. United States*, 870 F.2d 518, 525-26 (9th Cir. 1989) (same); *Lee v. United States*, 809 F.2d 1406, 1409 n.2 (9th Cir. 1987).

which would not exist but for its Huachuca Mountain water supply.

Following the reasoning of *Brush*, Tombstone "in a very real sense" could disappear because of the delay engendered by the Forest Service's regulatory interference. Because a State only exists through its agencies, political instrumentalities and subdivisions, this existential threat undermines the Constitution's structural assumption of the "States' continued existence" – at least as much as the threat of forcing a State to litigate in its own courts. *Alden*, 527 U.S. at 713-14.[2]

Wearing the hat of a proprietor under the Property Clause should change nothing in this analysis. A first year law student knows that a rule of necessity always conditions property rights. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910). Ordinary citizens have a privilege to invade the property of another to save life and limb during an emergency. A sovereign should be entitled to the same

[2] It should not matter if, given enough time and enough interagency consultations, the Forest Service might someday bestow an administrative blessing upon all or part of Tombstone's proposed restoration work. The Forest Service simply has no legal or constitutional authority to stand in the way of emergency police power action needed to preserve a State's existence. Tombstone's Tenth Amendment challenge ripened the moment Defendants presumed to impede its restoration work during a declared State of Emergency because such impediment is precisely what Tombstone is challenging as unconstitutional.

privilege from another sovereign with respect to lands over which *both have concurrent jurisdiction*. To the very extent the Forest Service might be acting as a proprietor, the agency should have yielded to Tombstone's water supply restoration work – even if Tombstone somehow were acting as a trespasser (which it is *not*[3]). Human life is too precious and the viability of our system of dual sovereignty is too important to be held hostage to even a single day of wrangling over red tape during a State of Emergency.

Accordingly, as discussed below, the Court should grant this petition for three reasons: 1) this case presents issues of great nationwide importance because States must be free to exercise their police power authority when public health and safety and their very existence is threatened by disasters; 2) the Ninth Circuit's decision evidences a pattern and practice of

[3] Although the parties dispute the precise nature and scope of Tombstone's inholdings in the Huachuca Mountains, the resolution of that dispute is immaterial to this petition. From any reasonable perspective, the City of Tombstone is not a mere trespasser on federal lands. The Forest Service's own administrative findings recognized special use permitting for Tombstone's water supply long before the enactment of the Arizona Wilderness Act, and further admit that Tombstone's municipal water system was established in the 1880s, predating President Roosevelt's November 6, 1906 proclamation reserving forest lands in the Huachuca Mountains. App. 149, 161. The Forest Service has never directly addressed, much less refuted with specific evidence, the expert opinion of City Archivist Nancy Sosa that Tombstone's inholdings are lawful under the 1866 Mining Act, more commonly referenced as U.S. Rev. Stat. §§ 2339 and 2340. App. 125(¶9).

disregard for this Court's federalism canon of construction, which warrants supervisory intervention before the next disaster strikes; and 3) the Ninth Circuit's decision manifestly illustrates the conflict and confusion between and among the circuits and district courts over whether and how federal power is limited by the principle of state sovereignty, the resolution of which requires guidance by this Court.

I. THIS CASE PRESENTS ISSUES OF GREAT NATIONWIDE IMPORTANCE BECAUSE STATES MUST BE FREE TO EXERCISE THEIR POLICE POWER AUTHORITY WHEN PUBLIC HEALTH AND SAFETY AND THEIR VERY EXISTENCE ARE THREATENED BY DISASTERS.

The preservation of harmonious internal relations between and among the states and the federal government is an issue of great nationwide importance, which warrants granting certiorari. *Wyeth v. Levine*, 555 U.S. 555, 563 (2009). Such harmony is undermined where, as here, a federal agency claims the authority to threaten the continued existence of a State. Indeed, the importance of this case is only heightened by a consideration of the set of facts from which it arises in light of the extent of federal land holdings in the western states and the threat posed by natural and manmade disasters.

An essential attribute of a state's sovereignty is jurisdiction over the lands within its boundaries. *Green v. Biddle*, 21 U.S. 1, 12 (1823). And yet, the

thirteen western states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming are subject to federal surface and subsurface land holdings over much of their total land area. App. 167. In fact, the percentage of federal land ownership as a percentage of surface land area ranges from a low of 19.4% in Hawaii to a high of 84.5% in Nevada. App. 168. Nearly *half* of Arizona's surface land area is owned by the federal government – not including tribal lands. *Id.* Clearly, state sovereignty would quickly become illusory in the western states if federal officials and agencies could freely claim unlimited regulatory authority to stop rapid local responses to disasters occurring on federal lands.

In view of the proportion of federal land holdings within their boundaries, the viability of the western states as sovereign governments hinges on their ability to exercise police power jurisdiction over federal lands. As Tombstone's plight reveals, a federal agency's mistaken belief in its own limitless power can easily become an existential threat to a State when essential infrastructure inholdings are surrounded by federal lands. Moreover, given the number and magnitude of natural and manmade disasters across the nation in recent years – from annual wildfires and flooding to Katrina to the BP oil spill to Sandy – every state has a keen interest in questioning whether any federal agency holds such potentially destructive unlimited power; or whether federal executive action and the Property Clause, like all

other provisions of the Constitution, must yield to the principle of state sovereignty. These crucial issues of great national importance are plainly raised by the questions presented for review and, as such, they warrant a grant of certiorari. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) ("The obvious importance of the case prompted our grant of certiorari.").

II. THE NINTH CIRCUIT'S DECISION EVIDENCES A PATTERN AND PRACTICE OF DISREGARD FOR THIS COURT'S FEDERALISM CANON OF CONSTRUCTION, WHICH WARRANTS SUPERVISORY INTERVENTION BEFORE THE NEXT DISASTER STRIKES.

The district court sustained the Forest Service's obstruction of the City's restoration work on the basis that the federal government's regulatory power over federal lands under the Property Clause is "without limitations," as expressed in *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997). App. 19. But this issue should only have been reached if the Forest Service's preemption of Tombstone's police power authority were based on a legitimate construction of federal law rendered with appropriate sensitivity to the federalism interests at stake. Neither the Ninth Circuit nor the district court ever rendered any specific legal conclusion to support this threshold preemption determination. Nor could they have.

As discussed below, the Ninth Circuit's decision is the latest iteration of a growing pattern and practice of disregarding the "federalism canon of construction"

in the course of sustaining the constitutionality of agency action. That pattern is becoming dangerous now that it is encroaching on perhaps the most weighty of federalism interests in the field most traditionally occupied by the States – the protection of public health and safety after a natural disaster. Before the next disaster strikes, certiorari is warranted as a basic matter of this Court's supervisory authority. *Cf. New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570-71 (1979). Indeed, the Ninth Circuit's choice not to publish its decision is all the more reason to grant certiorari.[4] Former Justice John Paul Stevens often voted to grant certiorari on unpublished decisions because he was concerned they could be used to hide questionable judgment. J. Cole & E. Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, 32 Litigation 8, 67 (Spring 2006). Such wisdom is instructive here.

Where preemption of state action would impose significant federalism costs, as here, this Court has repeatedly enforced a presumption against preemption, commonly known as the "federalism canon of construction." *Gila River Indian Community v. United States*, 697 F.3d 886, 906-07 (9th Cir. 2012) (Smith, J., dissenting) (citing *Gonzales v. Oregon*, 546 U.S. 243,

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[4] The Court has granted certiorari with regard to many unpublished decisions. *See*, *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 687 (2004); *Buckhannon Bd. v. West Virginia D.H.H.R.*, 532 U.S. 598, 602 (2001); *Transamerican Freight Lines v. Brada Miller Freight Sys.*, 423 U.S. 28, 34 (1975).

295-300 (2006); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); *United States v. Bass*, 404 U.S. 336, 349 (1971)). The Court has explained the federalism canon as follows:

> In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . [the Court] 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*.'

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (emphasis added). A federal court applying this canon must not just defer to "agency proclamations of pre-emption" but should "perform[ ] its own conflict determination" based on the "substance of state and federal law." *Id.* at 576. This precludes deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Gila River Indian Community*, 697 F.3d at 906-07 (Smith, J., dissenting).

Consequently, courts must not defer to a federal agency's assessment of its own authority under federal law when that assessment would impose federalism costs. Instead, federal law should be construed consistently with state law unless preemption is "clear and manifest." *Wyeth*, 555 U.S. at 565. Because the states and the federal government share concurrent jurisdiction over federal lands within their respective boundaries (*see generally Kleppe v. New*

Mexico, 426 U.S. 529, 543-44 (1976)), any conflict between state and federal law concerning federal lands should be subject to this standard preemption analysis.

It is impossible to reconcile the foregoing federalism canon with the outcome below. Tombstone was not acting in a proprietary or even a purely local governmental capacity when it sought to repair and restore its Huachuca Mountain water supply. Tombstone was deputized by Governor Jan Brewer under a declared State of Emergency and given $50,000 in state assistance to wield all of the police powers of the State in service of fully restoring its municipal water system after a devastating natural disaster. Ariz. Rev. Stat. § 26-301(15) ("combined efforts of the state and the political subdivision"); Ariz. Rev. Stat. § 26-303(B), (E)(1) ("all police power vested in the state"); Ariz. Admin. Code R8-2-301(8) ("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"). No federal law arguably giving the Forest Service jurisdiction over a national forest has the "clear and manifest" purpose of requiring the Forest Service to block such restoration work. To the contrary, with an application of sensitivity to the federalism interests at stake, the federal laws at issue could easily have been construed to yield to Tombstone's restoration work.

After all, the Forest Service's regulatory jurisdiction is presumably founded on the purpose of the laws

establishing 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 chapter shall be deemed to be in interference with the purpose for which national forests are established"). When the Supreme Court considered the legislative text and history of the national forest system in *United States v. New Mexico*, 438 U.S. 696, 718 (1978), it concluded that Congress was committed to "principled deference to state water law." 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. It further rejected the contention that "Congress intended to partially defeat this goal" for "aesthetic, environmental, recreational and 'fish' purposes." *Id.* at 704-05, 713, 716-17. These purposes are fully consistent with Tombstone's proposed restoration work – which is obviously intended to exercise rights under state water law and to enhance the quantity of water that would be available to the current settlers of the arid West.

Furthermore, like the legal framework in *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968, 1987 (2011), all of the substantive federal laws at issue in this case contain savings clauses that clearly authorize the Forest Service to yield to Tombstone's police power authority to restore its municipal water supply under a declared State of Emergency. *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 chapter and . . . existing private rights"), 1133(d)(6) (providing "[n]othing in this chapter 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 chapter 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").

Accordingly, applying this Court's federalism rule of construction, there was no lawful basis for the Forest Service to construe federal law as authorizing, much less compelling, interference with the Tombstone's emergency restoration work. And yet, that is precisely what the Forest Service did – with the subsequent acquiescence of the Ninth Circuit.

The outcome below is not an isolated occurrence. The Ninth Circuit is increasingly giving preemptive effect to the interpretative position of federal agencies

without regard to the federalism canon of construction. For example, as argued by the State in the pending case of *Arizona v. The Intertribal Council of Arizona*, No. 12-71, for which certiorari was granted on October 15, 2012, the Ninth Circuit has refused to apply preemption doctrine with sensitivity for federalism interests to the administrative determinations of the Electoral Assistance Commission. Likewise, the dissent of Ninth Circuit Judge Smith details the complete failure of the majority to apply the federalism canon in the recent case of *Gila River Indian Community*, 697 F.3d at 906-07. A third such decision *in fewer than six months* evidences a clear pattern and practice. This Court should grant certiorari in this case as an exercise of supervisory authority before the Ninth Circuit completely decouples from the doctrine of vertical *stare decisis* – and the next disaster strikes.

III. THE NINTH CIRCUIT'S DECISION MANIFESTLY ILLUSTRATES CONFLICT AND CONFUSION BETWEEN AND AMONG THE CIRCUITS AND LOWER COURTS OVER *WHETHER* AND *HOW* FEDERAL POWER IS LIMITED BY THE PRINCIPLE OF STATE SOVEREIGNTY, THE RESOLUTION OF WHICH REQUIRES GUIDANCE BY THIS COURT.

Certiorari should be granted to resolve conflicts between and among the decisions of courts of appeals and district courts that evidence widespread confusion over important issues of federal law. *Heffron v.*

International Society for Krishna Consciousness, 452 U.S. 640, 646 n.9 (1981); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.10 (1981); *Massachusetts v. United States*, 435 U.S. 444, 453 (1978); *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964); *United States v. Constantine*, 296 U.S. 287, 290 (1935). As evidenced by the Ninth Circuit's decision, there is no question that such confusion exists over the crucial questions of whether and how federal power is limited by the principle of state sovereignty – especially when it comes to the federal government's regulatory power under the Property Clause. Granting certiorari on the questions presented by this petition would give this Court a convenient vehicle for resolving this confusion and conflict.

Succinctly stated, the Ninth Circuit's adoption of *Garcia* and its refusal to apply the "traditional governmental function" test of *National League of Cities* conflicts with numerous decisions reached by other circuits and district courts – as well as the inescapable logic of this Court's current federalism jurisprudence. In particular, despite *Garcia*, the First and Tenth Circuit Courts of Appeals and several lower courts elsewhere, have applied the three-prong "traditional governmental function" test of *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), which originates from *National League of Cities*. *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. June 13, 2004); *Qwest Broadband Servs. v. City of Boulder*, 151 F. Supp. 2d 1236, 1245 (D. Colo. 2001). Members of the Fourth Circuit Court of Appeals have even engaged each other in heated debate over the continued viability of *Garcia* versus *National League of Cities*. *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).

This conflict and confusion exists because the logic of the Court's post-*Garcia* approach to federalism issues has naturally led many courts and jurists to conclude that *Garcia* is no longer good law and that they should look to the "traditional governmental function" test. Like it did in *National League of Cities*, the 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*, *United States v. Morrison*, 529 U.S. 598 (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*, 557 U.S. 433, 450-51 (2009); *City of Boerne v. Flores*, 521 U.S. 507, 527-36 (1997).

As explained in *Alden*, the 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. at 713-14 (citations omitted). In particular, the Court in *Alden* 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." More recently, in *Bond v. United States*, the 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*, an inescapable logical extension of *Bond* is the recognition that the principle of state sovereignty limits *all* enumerated powers – contrary to the literal meaning of the claim that the Property Clause is "without limitations."

This recognition was confirmed most recently by seven justices of this Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2601-03 (2012), which extended the anti-commandeering holdings of *Printz*, 521 U.S. at 933, and *New York*, 505 U.S. at

174-75, to prohibit Congress from exercising its Spending Power in such a way as to "indirectly" coerce "a State to adopt a federal regulatory system as its own." *Sebelius* proves unequivocally that the Court's ban on commandeering was never meant to be an isolated ruling, which only applied mechanically to direct commandeering. Instead, *Sebelius* shows that the rule against commandeering 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*, 505 U.S. at 166).

Taken as a whole, these rulings indisputably echo the methodology, rationale and holding of *National League of Cities*, 426 U.S. at 852-54. Not surprisingly, constitutional scholars ranging across the political spectrum have joined jurists in declaring *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 Loy. L.A. L. Rev. 1283, 1299 (June 2000). The existence of an irreconcilable conflict between *Garcia* and this Court's current federalism jurisprudence is further confirmed by *Bond*, which for the first time confirmed citizen standing to enforce the Tenth Amendment in court. This ruling 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. And yet, as evidenced by the Ninth Circuit's decision, *Garcia lives*.

To create predictability in federalism jurisprudence across the nation, it is time to pronounce *Garcia* dead; and also to clarify that the Property Clause, like all other enumerated powers, is limited by the principle of state sovereignty. Resolving this debate once and for all is of nationwide importance because both state and federal officials need a clear unifying legal framework to guide them in assessing when federal law violates the principle of state sovereignty. As shown by the unanimous opinion in *Bond*, the importance of providing such guidance is keenly felt by all members of this Court.

Granting certiorari will give this Court a rare opportunity to articulate a unified test with which to apply the constitutional limitations imposed by the principle of state sovereignty.[5] In so doing, the Court

[5] Although an order affirming the denial of injunctive relief is interlocutory in nature, such decisions still qualify as a basis for certiorari. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22 (2004); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003); *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964). This petition should be granted because the Tenth Amendment claim it raises presents a clear-cut issue of law that is "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 (1947) (citing *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)). Clarifying that the claim is, indeed, meritorious, would be essential to allowing the record to be fully developed in the district court, and to preserve this Court's ultimate jurisdiction.

need not reinvent the wheel. As recognized in *Massachusetts v. Sebelius*, 698 F. Supp. 2d 234, 252 n.154 (D. Mass. 2010), the traditional governmental function test of *National League of Cities* harmonizes all of the Court's current federalism jurisprudence. *Garcia*'s claim that the test is judicially unworkable has been disproven by two decades of court rulings, which have explored and applied every facet of the test in all but name.[6]

[6] Applying the traditional governmental function test of *National League of Cities* will leave no doubt that the Forest Service's refusal to allow Tombstone to freely and fully repair its municipal water system violates the principle of state sovereignty – even if it were fully authorized by an otherwise valid federal law. This is because the Forest Service is clearly regulating Tombstone when it is acting in a purely sovereign capacity with respect to sovereign property that is essential to protecting public health and safety 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. 426 U.S. at 852-54.

CONCLUSION

The Forest Service has claimed limitless power under the Property Clause to commandeer Tombstone's essential water supply and threaten the City's very existence as a political subdivision of the State of Arizona. In claiming such limitless power, the Forest Service is defying the Court's very clear ruling in *Alden*, 527 U.S. at 713-14, 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*, 131 S.Ct. at 2366. Finally, by misapplying federal law to commandeer infrastructure 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*, 521 U.S. at 920 (1997) (quoting *New York*, 505 U.S. at 166). 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 such, this case clearly involves issues of nationwide importance. As instantiated by Tombstone's plight, limitless federal power over federal land is an

existential threat to States when a substantial portion of their jurisdiction consists of federal lands and essential infrastructure unavoidably exists on those lands. It is respectfully submitted that state sovereignty would be illusory in the western states – and throughout the country – if the Forest Service were allowed to stop state and local government from rapidly responding to disasters in order to protect public health and safety from disasters and preserve their own existence. Moreover, if questions surrounding the viability of *Garcia* and *National League of Cities* are not resolved, conflict and confusion will remain characteristic of federalism jurisprudence in the lower courts.

Accordingly, to ensure predictability in the law and to preserve the continued existence of the States, the Court should grant this petition, issue the preliminary injunction requested below during the pendency of this appeal pursuant to 28 U.S.C. § 1651(a),[7]

[7] The analysis set out in this petition satisfies the standard of review for granting an original injunction pending appeal because: 1) "there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction," 2) there is a "fair prospect that a majority of the Court will conclude that the decision below was erroneous," 3) there has been "a demonstration that irreparable harm is likely to result" without such relief, and 4) the balance of equities favors such relief. *Rostker*, 448 U.S. at 1308; *American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm").

reverse the lower courts' decisions and remand with instructions to grant the preliminary injunction requested below until the underlying case is litigated to a final judgment, and/or furnish such other relief as is just and equitable.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF TOMBSTONE, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSAK, Secretary of Agriculture; TOM TIDWELL, Chief Forester of the USDA Forest Service; CORBIN NEWMAN, Regional Forester for the Southwestern Region of the U.S., Defendants-Appellees.	No. 12-16172 D.C. No. 4:11-cv-00845-FRZ MEMORANDUM* (Filed Dec. 21, 2012)

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, Senior District Judge, Presiding

Argued and Submitted December 4, 2012
San Francisco, California

Before: O'SCANNLAIN, THOMAS, and CALLAHAN, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The City of Tombstone, Arizona, appeals from the district court's denial of its motion for a preliminary injunction seeking to use motorized vehicles and heavy equipment to repair and to restore its Huachuca Mountain water infrastructure without Forest Service authorization. Although Tombstone has alleged it has access rights to certain water springs on federal land by virtue of nineteenth-century vested property rights and a 1962 Special Use Permit, the contours of any such entitlements have yet to be adjudicated definitively. The underlying case remains pending in the district court.

On this record, we conclude that Tombstone failed to raise serious questions going to the merits of its Tenth Amendment challenge and we do not reach whether the City has satisfied the other requirements for a preliminary injunction. *See Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011). Assuming without deciding that the Tenth Amendment constrains the Forest Service's authority to regulate Tombstone's activities under the Property Clause, no unlawful commandeering has been shown. *See, e.g., Printz v. United States,* 521 U.S. 898, 925-26 (1997); *New York v. United States,* 505 U.S. 144, 175-76 (1992). There is no evidence that Tombstone was compelled "to enact any laws or regulations," or "to assist in the enforcement of federal statutes regulating private individuals." *Reno v. Condon,* 528 U.S. 141, 151 (2000).

It is the Supreme Court's prerogative alone to overrule its precedents. *Nunez-Reyes v. Holder,* 646

F.3d 684, 692 (9th Cir. 2011) (en banc). We therefore have no authority to apply the traditional or integral governmental functions test Tombstone has urged. *See Nat'l League of Cities v. Usery,* 426 U.S. 833, 852 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 556-57 (1985).

Coalition of Arizona/New Mexico Counties for Stable Economic Growth's motion for permission to participate as an amicus curiae is granted.

AFFIRMED.

App. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

City of Tombstone, Plaintiff, vs. United States of America, et al., Defendants.	No. CV 11-845-TUC-FRZ **ORDER** (Filed May 14, 2012)

Pending before the Court is Plaintiff's second motion for a preliminary injunction. For the reasons stated below, the motion is denied.[1]

STANDARD FOR A PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary and drastic remedy. *See Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997); FED.R.CIV.P. 65. To obtain a preliminary injunction, the moving party generally must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public

[1] The Court notes that it previously held two separate evidentiary hearings related to this dispute where the parties presented numerous witnesses who gave live testimony and were subject to cross examination.

interest." *Winter v. Nat'l Resources Def. Council, Inc.,* 129 S. Ct. 365, 374 (2008).

In the Ninth Circuit, "the 'serious questions' approach survives *Winter* when applied as part of the four-element *Winter* test. In other words, 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met . . . That is, '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." *See Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-32, 1135 (9th Cir. 2011).

BACKGROUND

The City of Tombstone (hereinafter, "Tombstone" or "Plaintiff") seeks to prevent the United States Forest Service (hereinafter, "USFS" or "Defendants") from interfering with its ability to adequately access various water sources that deliver water to Tombstone. The water system in question is within the Coronado National Forest in the Huachuca Mountain Wilderness Area. During the summer of 2011, there was a large fire in these mountains (the Monument Fire) that destroyed vegetation; after the fire, there was a large amount of rainfall that caused rocks and

debris to slide down the mountain that damaged the water system. Tombstone claims that it is facing a serious water shortage as the water system in the Huachuca Mountains is a significant source of its water. Tombstone claims that while it has three separate wells that it can and does use to supply water to the city, there have been problems with contamination that limit the full use of this well water.

Tombstone claims that since approximately September of 2011, it has been attempting to access areas in the Huachuca Mountains to repair its water system, but that officials from the USFS have hindered their efforts by insisting that they need authorization from the USFS to access the land and make the repairs. The USFS has been insisting that they specify what repairs they plan to do as to each damaged section of the water system, and specify what materials and equipment they will be using to make the repairs. Tombstone claims that it is not required to receive authorization from the USFS, and even if it was, that it has given the USFS enough information to authorize all of its requested actions in the Huachuca Mountains. Tombstone claims that it has been using the water system in the Huachuca Mountains since the 1800's, and that there are numerous property filings and documents exchanged with the federal government that reflect that it has ownership or a right-of-way on the federal National Forest land at issue to go on the land unhindered by the federal government to address the water system.

Defendants dispute Plaintiff's position, argues that its position is based on vague, informal, unsubstantiated documents, and that determining water rights and rights to land dating back to the 1800's is a fact intensive task that can not be decided at this very early stage of the litigation. In contrast to Tombstone's position, the USFS claims that it has devoted an immense amount of resources and done everything in its power to expeditiously authorize Tombstone's requests to address the water system in the Huachuca Mountains. However, the USFS argues that it is required by federal statutes and regulations (including the National Environmental Policy Act-"NEPA" and the Endangered Species Act-"ESA") to evaluate the impact Plaintiff's proposed actions will have on the National Forest areas in question. For example, when a party proposes to use mechanized equipment on National Forest land such as Plaintiff, the USFS evaluates that action and issues a Minimum Requirements Decision Guide ("MRDG") specifying the appropriate equipment and actions that can be taken on federal land such that damage is minimized to protected areas such as the National Forest. Plaintiff, for example, seeks to engage in ground-disturbing activities with heavy equipment (excavators, tractors, etc.) that have to cross in and out of federal land, disturb the land by digging and removing land, and removing damaged materials and inserting new materials into the land to address the water system. As the USFS is charged with the responsibility of preserving National Forest land for the enjoyment of all citizens, it argues that it required to evaluate and

authorize Tombstone's actions. To perform this task, the USFS argues that it has informed Tombstone on numerous occasions that it must submit site specific information informing it of the specific actions, materials, and equipment it plans to use at damaged sites. Despite numerous requests by USFS, it claims that Tombstone has largely failed to provide the specific information requested such that USFS can perform its mandated duties to evaluate Tombstone's actions. For example, the mayor of Tombstone requested a blanket permit to address all of its claimed springs in the Huachuca Mountains based on his position that Tombstone had a right to access the land in question to repair the water system without interference; this demand appears to be based on a hand-written 1901 sketch map that appears to show numerous springs in the Huachuca Mountains. However, as this 1901 map had no detailed information pertaining to the site specific activities, materials, and equipment that would be used, the USFS could not issue any authorization (blanket or otherwise). In addition, the USFS argues that it has had numerous meetings with Tombstone informing them of the information they need, and have had USFS engineers and other personnel work with Tombstone to give them recommendations on the type of materials, equipment, and action to take to receive authorization for work from the USFS.

To the extent Tombstone has submitted site specific information informing it of the specific actions, materials, and equipment it plans to use at

damaged areas, the USFS argues that it acted as quickly as possible to authorize the repairs, and that it has already expeditiously issued authorizations to Tombstone. The USFS argues that Tombstone has repeatedly failed to provide site specific information as to each location, and that Tombstone's failure to do so has resulted in an inefficient, piecemeal process that has resulted in unnecessary delays for Tombstone. In addition, Defendants argue that Tombstone has otherwise failed to provide sufficient information entitling it to unfettered access to the 25 water sources at issue, Plaintiff's water from the Huachuca mountains has been substantially restored, Plaintiff currently has access to sufficient and safe water between its wells and the Huachuca water, and that Plaintiff's claims of a drastic water emergency related to public consumption and fire needs are overstated and speculative.

The Court agrees with Defendants' position.

DISCUSSION

The Quiet Title Act

A review of Plaintiff's Amended Complaint reflects that Plaintiff alleges three Counts for relief pursuant to the Administrative Procedure Act ("APA"), one count for relief pursuant to the Tenth Amendment, and one count for relief pursuant to the Quiet Title Act ("QTA"). Pursuant to the motion for a preliminary injunction, Plaintiff only claims preliminary injunctive relief on the merits pursuant to the

APA and Tenth Amendment. However, as Defendants correctly argue, Plaintiff's appear to argue only the merits of the APA and Tenth Amendment claims as a basis for relief in the motion for a preliminary injunction as a means to make an end-run around the limitations of the QTA which prohibit preliminary injunctive relief. Plaintiff essentially argues that Defendants have no right to interfere with their ability to enter National Forest land and make the repairs at issue as it essentially owns, without limitation, a right-of-way to enter the land and make necessary repairs to its water system. As with all purported civil actions against the federal government, the Government can only be sued to the extent it has clearly and explicitly consented to be sued under a specific statute. The United States, as a sovereign entity, must waive its sovereign immunity against suits. *See McCarthy v. U.S.,* 850 F.2d 558, 560 (9th Cir. 1988). A waiver can only occur when Congress has unequivocally expressed its intention to do so. *See Lehman v. Nakshian,* 453 U.S. 156, 160 (1981). Whether immunity has been waived is a question of subject matter jurisdiction. *See McCarthy,* 850 F.2d at 560.

While Plaintiff does not explicitly state it in the motion for a preliminary injunction, Plaintiff appears to primarily bring this case under the QTA arguing that it has a right to operate and maintain the rights-of-way on the federal land at issue. While the QTA (28 U.S.C. §2409a) does waive sovereign immunity to be sued over disputes over federal real property, the

Court has no jurisdiction to grant a preliminary injunction. See 28 U.S.C. §2409a(c) ("No preliminary injunction shall issue in any action brought under this section."); 28 U.S.C. §2409a(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 . . . "); *see also* 28 U.S.C. §2409(n) ("Nothing in this section shall be construed to permit suits against the United States based upon adverse possession [i.e., continuous, open use of certain federal land for many years as the sole basis for ownership].").

In light of these provisions, Plaintiff seeks to subvert the limitations in the QTA by basing preliminary injunctive relief on the APA and Tenth Amendment. However, the relief pertaining to the "vested rights" Plaintiff claims in this case arise under the QTA and preliminary injunctive relief is not available. *See, e.g., Block v. North Dakota,* 461 U.S. 273, 286 (1983) ("Only upon passage of the QTA did the United States waive its immunity with respect to suits involving title to land. Prior to 1972, States and all others asserting title to land claimed by the United States had only limited means of obtaining a resolution of the title dispute-they could attempt to induce the United States to file a quiet title action against them, or they could petition Congress or the Executive for discretionary relief. . . . We hold that Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge

the United States' title to real property . . . In light of [the QTA's] legislative history, we need not be detained long by North Dakota's contention that it can avoid the QTA's statute of limitations and other restrictions by the device of an officer's suit. If North Dakota's position were correct, all of the carefully-crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted. It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading."; rejecting claims pursuant to the APA and Tenth Amendment as a means to get around the limitations of the QTA); *State of Alaska v. Babbitt,* 38 F.3d 1068, 1073 (9th Cir. 1994) ("The Court in *Block* explicitly rejected the theory that one could avoid the limitations of the QTA by bringing an action under the APA . . . [W]hen the [U.S.] has an interest in the disputed property the waiver of sovereign immunity must be found, if at all, within the QTA."); *Friends of Panamint Valley v. Kempthorne,* 499 F.Supp. 2d 1165, 1178-79 (E.D. Cal. 2007) ("A claim that seeks a title determination against the [U.S.] can only be brought under the Quiet Title Act, not the Declaratory Judgment Act or any other law."); *Shawnee Trail Conservancy v. U.S.D.A,* 222 F.3d 383, 388 (7th Cir.2000), *cert. denied,* 531 U.S. 1074 (2001) ("[T]o allow claimants to avoid the QTA by characterizing their complaint as a challenge to the federal government's regulatory authority would be to allow parties to seek a legal determination of disputed title without being subject to the limitations placed on

such challenges by the Quiet Title Act"); *Kane County, Utah v. Kempthorne,* 495 F.Supp.2d 1143, 1159 (D. Utah 2007) ("The Counties' allegation that the Management Plan's restriction on the use of off-highway vehicles on roads within the Monument infringes on the Counties' right to regulate their own R.S. 2477 rights-of-way asserts an injury-in-fact to their legally protected interests in those rights-of-way. But the defendants correctly point out that the 'legally protected interests' in question are property rights ostensibly vested in the Counties by operation of the statute, and disputes concerning property rights on federal land must be brought into federal court pursuant to the Quiet Title Act . . . not the Administrative Procedure Act . . . This is no less true where a plaintiff alleges that the existence of an R.S. 2477 right-of-way invalidates an agency's decision to close or limit the use of a road . . . The Counties' allegations concerning injury-in-fact to their 'valid existing rights' resulting from the Management Plan's OHV restrictions necessarily implicate questions of title, viz., the existence and historical scope of the Counties' claimed R.S. 2477 rights-of-way within the Monument's boundaries. The Counties have not pleaded their existing OHV claims under the Quiet Title Act, and to that extent, they must be dismissed for want of jurisdiction.").

Based on the foregoing, the Court finds that Plaintiff's APA and Tenth Amendment claims arising out of its "vested rights" must fail at the preliminary injunction stage as any such claims must be brought

under the QTA which precludes the preliminary relief Plaintiff seeks in this case. Nevertheless, the Court shall address Plaintiff's remaining claims.

Serious Questions Going to the Merits

APA

Pursuant to the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702. Agency action is defined pursuant to 5 U.S.C. §551(13): "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act". *See also* 5 U.S.C. §706(2) (discussing a court's authority to address certain agency action). Typically, only "final agency action" is subject to judicial review, and as "a general matter, two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process . . . – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow". *Bennett v. Spear,* 520 U.S. 154, 178 (1997) (internal quotes and citations omitted).

Based on the Court's review of the record, there has been no final agency action that is properly subject to judicial review. First, there certainly has

been no consummation of the Defendants' decision making process. Rather, the record reflects that Defendants have consistently and continually worked with Plaintiff to attempt to resolve their water issues. There have been numerous communications between the parties where Defendants have attempted to accommodate Plaintiff's requests to repair water structures, have consistently encouraged Plaintiffs to submit site specific information with details as to the work that needs to be performed and the equipment needed such that Defendants could properly assess any impacts in the wilderness, and Defendants have been receptive to Plaintiff's requests and have changed certain requirements after considering Plaintiff's concerns. Rather, Tombstone failed to provide adequate information with details as to the work that needed to be performed and the equipment needed such that Defendants could properly assess any impacts in the wilderness. Tombstone has failed to provide Defendants with sufficient information to actually locate the majority of the 25 claimed springs on the ground, and Defendants independent search for the 25 claimed springs also has not revealed the location or existence of the majority of those springs other than the 6 springs originally identified and included in the 1962 Special Use Permit ("SUP" or "1962 SUP"). As such, there has been no "final agency action" for purposes of judicial review.

As to the "second [condition to establish final agency action subject to judicial review], the action must be one by which rights or obligations have been

determined, or from which legal consequences will flow"; the Court finds that this condition also has not been satisfied. *See id.* Plaintiff argues that the 1962 SUP was an open-ended permit that allowed it to do any maintenance and improvement in any manner it deemed appropriate; Plaintiff insists that Defendants' actions in disallowing Plaintiff to conduct its work and use equipment in the manner it thinks necessary demonstrates final agency action subject to judicial review. However, as discussed above, the first condition pertaining to final agency action has not been demonstrated based on the record before the Court. Furthermore, the 1962 SUP is not nearly as broad as argued by Plaintiff, and Defendants are enforcing the SUP within the parameters originally contemplated by the parties; the circumstances before the court do not reflect "action . . . [wherein] . . . rights or obligations have been determined, or from which legal consequences will flow." *Id.* Plaintiff's Exhibit 58 containing the 1962 SUP omits the three pages of detailed restrictions that shows that the SUP is not nearly as broad as represented. While Plaintiff argues that the SUP authorized Tombstone "to do improvement work at all of the spring impound areas and along all of the existing and future pipelines, when such improvements are deemed necessary" via approving Tombstone's application for a SUP, the 1962 SUP does not actually use that language. That language is only contained in Tombstone's application seeking the 1962 SUP, not in the 1962 SUP itself. Furthermore, the SUP only specifically incorporated the "maps" submitted in Tombstone's application as

part of the permit; it did not incorporate any additional statements that happened to be included along with the maps in Plaintiff's application. The 1962 SUP contains many limitations, including: the right to revoke or terminate the SUP; it only applies to 6 springs (and Tombstone only sought a SUP for 6 springs, as opposed to the 25 springs it now seeks access to); it does not allow Plaintiff to make improvements and use any equipment it sees fit without Defendants input and approval, and otherwise specifies that "construction or occupancy and use under this permit shall begin within 6 months and construction, if any, shall be completed within 14 months from the date of the permit . . . Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout and construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed." The record before the Court does not reflect final agency action.[2]

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[2] Plaintiff's [sic] cites to *Sackett* in support of its final agency action position; however, *Sackett* applied to a compliance order that compelled Plaintiff to take specific action; here, Defendants are simply enforcing the terms of the 1962 SUP in relation to Plaintiff's current requests; in addition, while the 1962 SUP was final agency action, a six year statute of limitations applies to such APA challenges. *See Sackett v. EPA,* 132 S. Ct. 1367 (2012); *Or. Nat. Desert Ass'n v. U.S. Forest Service,*

(Continued on following page)

The Court finds that Plaintiff has not demonstrated serious questions going to the merits (or a likelihood of success) on the APA claims in this case.[3]

Tenth Amendment

Plaintiff argues that the Tenth Amendment has been violated as Defendants' actions have essentially commandeered Plaintiff's property and Defendants have directly regulated the State through its political subdivision in violation of *Printz*. *See Printz v. U.S.,*

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465 F.3d 977, 990 (9th Cir. 2006); *Hells Canyon Pres. Council v. U.S. Forest Serv.,* 593 F.3d 923, 930 (9th Cir. 2010). In addition, to the extent Plaintiff has sought to engage in activities beyond that previously covered by the 1962 SUP, Defendants have clearly communicated the appropriate and reasonable process that must be followed such that compliance with applicable laws can be accomplished.

[3] To the extent Plaintiff alleges a claim based on agency guidelines, Plaintiff has no enforceable rights based on such guidelines. *See Schweiker v. Hansen,* 450 U.S. 785, 789 (1981). Likewise, to the extent that Plaintiff claims relief (related to the merits and irreparable harm) arising out of 36 C.F.R. §251.60(a) and (f), those regulations are of no moment under the circumstances at bar because they only apply to the termination, revocation, and suspension of permits which is inapplicable as this has not occurred in this case. Lastly, Plaintiff's argument relating to Defendants' frustrating the purpose of their easements is unpersuasive as any such easements have not been established, Plaintiff has not demonstrated what water infrastructure actually existed in the past and currently as to the 25 water sources (as opposed to the 6 covered by the SUP), Defendants have appropriately approved repairs for the 6 water sources covered by the SUP, and clearly conveyed the reasonable procedures as to sources not covered by the SUP.

521 U.S. 898 (1997) (finding that the Tenth Amendment was violated where Congress, through the Brady Handgun Violence Protection Act, compelled the chief law enforcement officer in each local jurisdiction to conduct background checks pertaining to purchasers of firearms in compliance with the Brady Act). The Court disagrees.

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. U.S.,* 505 U.S. 144, 156 (1992). The Property Clause of the Constitution provides: "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." Art. IV, §3, clause 2; *see also U.S. v. Gardner,* 107 F.3d 1314, 1318 (9th Cir. 1997) ("The Supreme Court has consistently recognized the expansiveness of this power [in the Property Clause], stating that the power over the public land thus entrusted to Congress is without limitations.") (internal quotes and citations omitted). The record before the Court reflects that Defendants have engaged in appropriate regulation relating to federal land, and

have not commandeered state property or improperly regulated the State.[4] The Court finds that Plaintiff has not demonstrated serious questions going to the merits (or a likelihood of success) on the Tenth Amendment claims in this case.

Irreparable Harm; Balance of Equities and Public Interest

To the extent Plaintiff asserts water rights (in contrast to the rights to the large swaths of land related to that water) as a basis for harm, the Court does not have proper jurisdiction over this issue. Pursuant to 43 U.S.C. §661: "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 herein specified is acknowledged and confirmed . . . " This statute does not explicitly waive the Government's sovereign immunity such that it can be sued pursuant to this

[4] Plaintiff cites the test in *Nat'l League of Cities v. Usery,* 426 U.S. 833 (1976) to support its position; however, *Nat'l League of Cities* was overruled and the test is nevertheless inapplicable in this case. *See Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985); *New York v. U.S.,* 505 U.S. at 160.

statute. The QTA recognizes that a suit for water rights against the United States can be brought under 43 U.S.C. §666 (often called the "McCarran Amendment"), as opposed to the QTA itself. The Court does not have jurisdiction to resolve a dispute under §666 because it is a very limited waiver of the Government's sovereign immunity. Section 666 only allows the U.S. to be joined as a defendant into a comprehensive litigation seeking to resolve the water rights of all parties that have any interest in a particular water source; thus, the statute permits the U.S. to be joined in a comprehensive state action resolving all waters rights of all interested parties. *See Gardner v. Stager,* 103 F.3d 886, 888 (9th Cir. 1996) ("The McCarran Amendment, 43 U.S.C. § 666, provides for a limited waiver of the sovereign immunity of the United States in certain circumstances where water rights are concerned. This waiver, however, is limited to comprehensive adjudications of all of the water rights of various users of a specific water system . . . The McCarran Amendment does not authorize private suits to adjudicate water rights between particular claimants and the United States . . . The waiver of sovereign immunity provided by the McCarran Amendment is therefore inapplicable to Gardners' private suit for water rights against the United States . . . Moreover, when there is a comprehensive litigation of the water rights of the users of a particular water system ongoing in a state tribunal, the federal court may dismiss a water rights suit brought by a private party."); *see also State ex rel. Arizona State Land Dept. V. Robinson Cattle, LLC,*

2011 WL 2695774, *3 (Ariz. Ct. App. 2011) ("No legal authority supports Robinson's position that it owns the parcel in fee simple, as there is no congressional authorization for the establishment of fee simple ownership in public lands based on historical use and local law and custom . . . The Act of 1866 plainly is limited to acknowledging water rights and associated ditch rights-of-way.").

The purpose of the McCarran Amendment was to avoid inefficient, costly, piecemeal litigation of separately filed lawsuits; thus, §666 does not waive the United States' sovereign immunity to be sued in a private lawsuit between one particular claimant and the United States. *See id.* This is exactly what Tombstone is attempting to do in this case, and the Court has no jurisdiction to hear such a water rights claim by Tombstone. Furthermore, as the Government points out, there is a comprehensive mass litigation in state court that has been ongoing since 1981 that covers the water sources that Tombstone is seeking to litigate in this case, and the United States has been a party in that case for many years. *See In re General Adjudication of All Rights to Use Water In Gila River System and Source,* 127 P.3d 882 (Ariz. 2006). As to that litigation, Plaintiff has only filed claims as to five water sources (as opposed to the 25 at issue in this case).

Plaintiff's arguments related to the 1962 SUP and its police power largely overlap with the issues considered in relation to the merits issues above

relating to the APA and Tenth Amendment; Plaintiff's arguments are rejected.

Based on the record before the Court, Defendants properly regulated and addressed the actions at issue. In addition, as referenced above, Plaintiff failed to properly establish where the numerous springs are located and the associated infrastructure that was in place at the time of the Monument fire, has not adequately shown the amount of water it was receiving from the 25 sources prior to the fire, and which of the 25 water sources were or were not producing water at the time of the fire. Further, it appears that Plaintiff's water from the Huachuca mountains has been substantially restored, Plaintiff currently has access to sufficient and safe water between its wells and the Huachuca water, and that Plaintiff's claims of a drastic water emergency related to public consumption and fire needs are overstated and speculative. Rather, it appears that Plaintiff is largely attempting to engage in activity resulting in new construction and action that was not covered by the 1962 SUP, as opposed to simply restoring existing water facilities. Upon review of the record, the Court finds that Plaintiff has not demonstrated irreparable harm. Likewise, the Court also finds that 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.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that Plaintiff's motion for a preliminary injunction is denied.

DATED this 14th day of May, 2012.

/s/ Frank R. Zapata
Frank R. Zapata
Senior United States District Judge

UNITED STATES CODE

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

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16 U.S.C. § 481. Use of waters

All waters on such reservations [national forests] may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations [national forests] are situated, or under the laws of the United States and the rules and regulations established thereunder.

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16 U.S.C. § 1131. National Wilderness Preservation System

(a) Establishment; Congressional declaration of policy; wilderness areas; administration for public use 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 "wilderness 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 included in System; appropriations

The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion 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 included within the National Wilderness 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 character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (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 scientific, educational, scenic, or historical value.

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16 U.S.C. § 1134. State and private lands within wilderness areas

(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

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, or the State-owned land or privately owned land shall be exchanged 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 claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent 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 Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area

designated by this chapter as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress.

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28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is

substantial ground for difference 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 such order. The Court of Appeals which would have jurisdiction of an appeal of such 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 proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction –

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court 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 Circuit and is final except for an accounting.

(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 interlocutory order, includes in the order a statement that a controlling question of

law is involved with respect to which 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 application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 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 which 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 application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Claims Court [Court of Federal Claims], as the case 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 action to the Claims Court [Court of Federal Claims] is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, 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 court 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).

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28 U.S.C. § 1331. Federal question

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

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28 U.S.C. § 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.

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28 U.S.C. § 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].

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28 U.S.C. § 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.

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28 U.S.C. § 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 section shall be tried by the court without a jury.

(g) Any civil action under this section, 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 improvement, 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.

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43 U.S.C. § 1761. Grant, issue, or renewal of rights-of-way

* * *

(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.

* * *

(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.

* * *

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

UNITED STATES PUBLIC LAWS
98th Congress – Second Session
Convening January 23, 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:

* * *

(14) "16 USC 1132' certain lands in the Coronado National Forest, which comprise approximately twenty thousand one hundred and ninety acres, as generally depicted on a map entitled "Miller Peak Wilderness – Proposed', dated February 1984, and which shall be known as the Miller Peak Wilderness;

* * *

(b) Subject to valid existing rights, the wilderness areas designated under this section shall be

administered by the Secretary of Agriculture (hereinafter in this title referred to as the "Secretary') in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness, except that any reference in such provisions to the effective date of the Wilderness Act (or any similar reference) shall be deemed to be a reference to the date of enactment of this Act.

(c) "16 USC 1131' As soon as practicable after enactment of this Act, the Secretary shall file a map and a legal description of each wilderness area designated under this section 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 description shall have the same force and effect as if included in this Act, except that correction of clerical and typographical errors in such legal description and map may be made. Such map and legal description 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 section 4(d) of the Wilderness Act, nothing in this Act or in the Wilderness Act shall constitute 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 Act 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 Act, shall be administered in accordance with section 4(d)(4) of the Wilderness Act and section 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 Resources of the United States Senate a report detailing the progress made by the Forest Service in carrying out the provisions of paragraphs (1) and (2) of this section.

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

(1) the Department of Agriculture has completed the second 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 such areas.

(b) On the basis of such review, the Congress hereby determines and directs that –

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

(2) with respect to the national forest system lands in the State of Arizona which were reviewed by the Department of Agriculture in the second roadless area review and evaluation (RARE II) and those lands referred to in subsection (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 occur on a ten-year cycle, or at least every fifteen years, unless, prior to such time the Secretary 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 subsection (d) and not designated wilderness or wilderness study upon enactment of this Act shall be managed for multiple use in accordance 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 Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, and other applicable law; and

(5) "16 USC 1600' unless expressly authorized by Congress, the Department of Agriculture shall not conduct 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 inclusion in the National Wilderness Preservation System.

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

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

* * *

TITLE III

SEC. 302. (a) Subject to valid existing rights, each wilderness area designated by this title shall be administered by the appropriate Secretary in accordance with the provisions of the Wilderness Act: Provided, That any reference in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the effective 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 enactment of this Act, shall be permitted to continue subject to such reasonable regulations, policies, and practices as the Secretary concerned deems necessary, as long as such regulations, policies, 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 practicable 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 description shall have the same force and effect as if included in this Act: Provided, That correction of clerical

and typographical errors in each such legal description and map may be made by the Secretary concerned subsequent to such filings. Each such map and legal description shall be on file and available for public inspection in the Office of the Chief of the Forest Service, Department of Agriculture or in the Office of the Director of the Bureau of Land Management, Department of the Interior, as is appropriate.

TITLE IV

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

CODE OF FEDERAL REGULATIONS

36 CFR § 215.12 Decisions and actions not subject to appeal.

The following decisions and actions are not subject to appeal under this part, except as noted:

(a) The amendment, revision, or adoption of a land and resource management plan that includes a project decision, except that the project portion of the decision is subject to this part. The amendment, revision, or adoption portion of a decision is subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (see 36 CFR parts 200 to 299, Revised as of July 1, 2000);

(b) Determination, with documentation, that a new decision is not needed following supplementation of an environmental impact statement (EIS) or revision of an environmental assessment (EA) pursuant to FSH 1909.15, Chapter 10, section 18.

(c) Preliminary findings made during planning and/or analysis processes on a project or activity. Such findings are appealable only upon issuance of a decision document.

(d) Subsequent implementing actions that result from the initial project decision that was subject to appeal.

(e) Projects or activities for which notice of the proposed action and opportunity to comment is published (§ 215.5) and

(1) No substantive comments expressing concerns or only supportive comments are received during the comment period for a proposed action analyzed and documented in an EA (§ 215.6); or

(2) No substantive comments expressing concerns or only supportive comments are received during the comment period for a draft EIS (40 CFR 1502.19), and the Responsible Official's decision does not modify the preferred alternative identified in the draft EIS.

(f) Decisions for actions that have been categorically excluded from documentation in an EA or EIS pursuant to FSH 1909.15, Chapter 30, section 31.

(g) An amendment, revision, or adoption of a land and resource management plan that is made independent of a project or activity (subject to either the objection process of § 219.32 or the administrative appeal and review procedures of part 217 in effect prior to November 9, 2000 (see 36 CFR parts 200 to 299, Revised as of July 1, 2000)).

(h) Concurrences and recommendations to other Federal agencies.

(i) Hazardous fuel reduction projects conducted under provisions of the HFRA, as set out at part 218, subpart A, of this title.

36 CFR § 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 receive notice of actions pertaining to the proposal.

(2) Required information – (i) Noncommercial group uses. Paragraphs (d)(3) through (d)(5) of this section do not apply to proposals for noncommercial 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 facilities the proponent would like to use;

(C) The estimated number of participants and spectators;

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

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

(ii) All other special uses. At a minimum, proposals for special uses other than noncommercial group uses must include the information contained in paragraphs (d)(3) through (d)(5) of this section. In addition, if requested by an authorized officer, a proponent in one of the following categories must furnish the information specified for that category:

(A) If the proponent is a State or local government agency: a copy of the authorization under which the proposal is made;

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

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

(D) If the proponent is a private corporation:

(1) Evidence of incorporation 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 each affiliate of the entity;

(4) In the case of an affiliate which is controlled by the entity, the number of shares and the percentage of any class of voting stock of the affiliate that the entity owns either directly or indirectly; or

(5) 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, either directly or indirectly by the affiliate; or

(E) If the proponent is a partnership, association, or other unincorporated entity: a certified copy of the partnership agreement or other similar document, if any, creating the entity, or a certificate of good standing under the laws of the State.

(3) Technical and financial capability. The proponent is required to provide sufficient evidence 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 meets the following minimum 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 such 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 commercial services, 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 such training or exercises are federally funded.

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

(2) Results of initial screening. Any proposed use other than a noncommercial group use that does not meet all of the minimum requirements of paragraphs (e)(1)(i)-(ix) of this section 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 disclose 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 associated 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 notice 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 include the information contained in paragraphs (d)(1) through (d)(3) of this section. Upon completion of a master development plan developed under a planning permit, proponents may then submit a request for a long-term authorization to construct 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 special use permit for the development.

(g) Application processing and response. (1) Acceptance of applications. Except 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 criteria 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 accept 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 acceptance 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, including 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 notice and an opportunity to comment 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, place, and case number.

(iv) Applications for noncommercial group uses must be received at least 72 hours in advance of the proposed activity. Applications for noncommercial 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 applications 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 nonmembers 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 activity 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 application because it does not meet the criteria in paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of this section, the authorized officer shall notify the applicant in writing of the reasons for the denial. If an alternative time, place, or manner will allow the applicant to meet the eight evaluation criteria, 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 completed the requisite environmental and other analyses for the requested site. A decision to grant or deny the application 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 decision becomes final under that appeal process. A denial of an application under paragraphs (g)(3)(ii)(A) through (g)(3)(ii)(H) of

this section constitutes final agency action and is immediately subject to judicial review.

(4) Response to all other applications. Based on evaluation of the information provided by the applicant and other relevant information such as enviromnental [sic] 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 applications for similar uses having minor environmental impacts may be evaluated with one analysis and approved in one decision.

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

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36 CFR § 251.60 Termination, revocation, and suspension.

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

(i) Revocation or suspension. An authorized officer may revoke or suspend a special use authorization for a noncommercial group use only under one of the following circumstances:

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

(B) For noncompliance 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 § 25153(1) of this subpart:

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

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

(C) With the consent of the holder; or

(D) At the discretion of the authorized officer for specific and compelling 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(1) 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(1) 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 revocation or termination of a special use authorization, the holder must remove within a reasonable time the structures and improvements and shall restore the site to a condition satisfactory to the authorized officer, 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 officer, they shall become the property of the United States, but holder shall remain liable for the costs of removal and site restoration.

ARIZONA REVISED STATUTES

A.R.S. § 26-301. Definitions

In this chapter, unless the context otherwise requires:

1. "Commercial nuclear 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 emergency council.

3. "Director" 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, relocation of persons from stricken areas, radiological defense, temporary restoration of utilities, plant protection, transportation, welfare, public works and engineering, search or rescue, health and medical services, law enforcement, fire fighting, mass care, resource support, urban search or rescue, hazardous materials, food and energy information and planning and other activities necessary or incidental thereto.

6. "Emergency management" means the preparedness, response, recovery and mitigation activities

necessary to respond to and recover from disasters, emergencies or contingencies.

7. "Emergency worker" means any person who is registered, whether temporary or permanent, paid or volunteer, with a local 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 functions, 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 emergency 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 section 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 section 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 section 11002).

(d) Any substance designated in the water pollution control act (P.L. 92-500; 86 Stat. 816; 33

United States Code sections 1317(a) and 1321(b)(2)(A)).

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

(f) Any imminently hazardous chemical substance or mixture with respect to which action has been taken pursuant to the toxic substances control act (P.L. 94-469; 90 Stat. 2003; 15 United States Code section 2606).

(g) Any material or substance determined to be radioactive pursuant to the atomic energy act of 1954 (68 Stat. 919; 42 United States Code section 2011).

(h) Any substance designated as a hazardous substance pursuant to section 49-201.

(i) Any highly hazardous chemical or regulated substance as listed in the clean air act of 1963 (P.L. 88-206; 42 United States Code sections 7401 through 7671).

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

10. "Local emergency" means the existence of conditions of disaster or of extreme peril to the safety of persons or property within the territorial limits of

a county, city or town, which conditions are or are likely to be beyond the control of the services, personnel, equipment and facilities of such political subdivision as determined by its governing body and which require the combined efforts of other political subdivisions.

11. "Mitigation" means measures taken to reduce the need to respond to a disaster and to reduce the cost of disaster response and recovery.

12. "Preparedness" means actions taken to develop the response capabilities needed for an emergency.

13. "Recovery" means short-term activities necessary 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 assistance, limit the primary effects, reduce the probability of secondary damage and speed recovery operations.

15. "State of emergency" means the duly proclaimed existence of conditions 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 causes, except those resulting in a state of war emergency, which are or are likely to be beyond the control of the services, personnel, equipment and facilities of

any single county, city or town, and which require the combined efforts of the state and the political subdivision.

16. "State of war emergency" means the condition which exists immediately whenever this nation is attacked or upon receipt by this state of a warning from the federal government indicating that such an attack is imminent.

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

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 necessary 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 proceedings in the superior court in the county where the property was originally taken.

B. During a state of war emergency, the governor shall have complete authority over all agencies of the state government and shall exercise all police power vested in this state by the constitution and laws of this state in order to effectuate the purposes of this chapter.

C. The powers granted the governor by this chapter with respect to a state of war emergency shall terminate if the legislature is not in session and the governor, within twenty-four hours after the

beginning of such state of war emergency, 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 which shall take effect immediately in an area affected or likely to be affected if the governor finds that circumstances described in section 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 exercise, within the area designated, all police power vested in the state by the constitution and laws of this state in order to effectuate the purposes of this chapter.

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 chapter with respect to a state of emergency shall terminate when the state of emergency has been

terminated by proclamation of the governor or by concurrent 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 section 26-301, paragraph 15 exist, the adjutant general may:

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

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

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

J. Pursuant to the second amendment of the United States Constitution and article II, section 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 restrictions on the lawful possession, transfer, sale, transportation, carrying, storage, display or use of firearms or ammunition or firearms or ammunition components.

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

* * *

A.R.S. § 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.

A.R.S. § 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.

A.R.S. § 45-401. Declaration of policy

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 certain 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 economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, 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.

ARIZ. ADMIN. CODE

A.A.C. § R8-2-301. Definitions

In addition to the definitions provided in A.R.S. § 26-301, *the* following definitions apply to this Article, unless specified otherwise:

1. "Applicant" means any state agency or political subdivision of the state that requests emergency assistance from the state.

2. "Applicant's authorized representative" means the person authorized by the governing body of a political subdivision to request funds, time extensions, and attend to other recovery matters related to a specific emergency proclamation.

3. "Application" means a written or verbal request by an applicant to the Director for emergency assistance.

4. "Contingency proclamation" means the document in which the governor authorizes the Director to pay expenses incurred by political subdivisions or state agencies that respond to frequently occurring emergencies that pose a significant and constant threat such as search or rescue, and hazardous materials spills.

5. "County" means the county or counties where an emergency is located.

6. "Department" means the Department of Emergency and Military Affairs provided in A.R.S. § 26-101.

7. "Eligible work" means actions taken and work performed by an applicant in response to an emergency that are consistent with the intent and purposes set forth in A.R.S. § 35-192 and these rules.

8. "Emergency" means any occasion or instance for which, in the determination of the Governor, state assistance is needed to supplement state agencies' and 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.

9. "Emergency resolution" means a document by which the governing body of a political subdivision declares an emergency.

10. "Fund" means the portion of the general fund used to pay incurred liabilities and expenses authorized as claims against the state to meet contingencies and emergencies when the Governor declares that a state of emergency exists.

11. "Incident period" means the time interval of an emergency during which damage occurs.

12. "Political subdivision" means any county, incorporated city or town, or school, community college, or other tax-levying public improvement district.

13. "Proclamation" means the document in which the Governor declares that a state of emergency exists pursuant to A.R.S. § 35-192(A) and authorizes an expenditure from the fund.

14. "State" means the state of Arizona.

15. "State agency" means any department, commission, board, agency, or division of the state, including the Department of Emergency and Military Affairs.

LAWS OF ARIZONA

AN ACT

[135] No. 86.

Relating to the Appropriation of Water and the Construction and Maintenance 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

TITLE LXXIII.

WATERS AND WATER RIGHTS.

CHAPTER I.

RIPARIAN RIGHTS.

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

4169. (Sec. 2.) Any person or persons, company or corporation shall have the right to appropriate any of the unappropriated water 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.

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.

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.

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.

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 [sic].

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

City of Tombstone, Plaintiff, vs. United States of America, et al., Defendants.	No. CV 11-845-TUC-FRZ **CITY OF TOMBSTONE'S VERIFIED FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. What is at stake in this case is the life or death of historic Tombstone, Arizona. Between May and July 2011, the "Monument Fire" engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone water infrastructure is located. 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 the mountain sides crushing Tombstone's waterlines and destroying reservoirs, thus, shutting off Tombstone's main source of water. In some areas, Tombstone's pipeline is under 12 feet of mud, rocks and other debris; while in other places, it is hanging in mid-air due to the ground being washed out from under it. In response, Arizona Governor Jan Brewer declared a state of emergency specifically for the City of Tombstone. The State of Arizona further appropriated emergency funds to

assist Tombstone in repairing its waterlines and reservoirs.

2. Despite the manifest emergency facing the desert-parched City of Tombstone, Defendants are refusing to allow Tombstone to take reasonable emergency action to repair its century-old Huachuca Mountain water infrastructure. Instead, they are enforcing fealty to an arbitrary, capricious and unlawful interpretation of federal law by requiring Tombstone to use hand tools and suggesting using horses to restore its water supply. This conduct violates Tombstone's sovereignty as a political subdivision of the State of Arizona because it deprives the City, its residents and visitors of essential municipal property, adequate fire suppression capabilities, and safe drinking water. But it is not too late to rescue "The Town Too Tough to Die." As discussed below, the Court should grant Tombstone declaratory and injunctive relief under the Administrative Procedure Act, the Quiet Title Act, and the Tenth Amendment to the U.S. Constitution.

* * *

4. Plaintiff, the City of Tombstone ("Tombstone"), is a duly incorporated municipality within Cochise County, Arizona which holds title to vested rights as herein alleged.

5. Defendant, UNITED STATES OF AMERICA, holds title or adversely possesses and claims to hold title to certain real property in conflict with the Plaintiff's vested rights as herein alleged.

6. Defendants, U.S. DEPARTMENT OF AGRICULTURE, TOM VILSAK in his official capacity as the Secretary of Agriculture, TOM TIDWELL, in his official capacity as the Chief Forester of the USDA Forest Service, CORBIN NEWMAN, in his official capacity as Regional Forester for the Southwestern Region of the U.S. Forest Service, are the administrators of the Miller Peak Wilderness Area within which Defendants claim a portion of Plaintiff's vested rights are located. Upon information and belief, CORBIN NEWMAN is the person authorized to grant emergency permits to access USFS property.

* * *

11. The doctrine of sovereign immunity is inapplicable to the individuals named as defendants acting in their official capacity because prospective equitable relief is being sought and they have acted without lawful authority as herein alleged.

12. As to Defendants UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE sovereign immunity has been expressly waived under 5 U.S. C. §§ 701, 702 and 704 (judicial review of administrative acts and omissions) and 28 U.S.C. § 2409a.

* * *

42. In 1977, a forest fire devastated much of the vegetation with much of the Huachuca Mountains. Mayor Marjorie Colvin declared a State of Emergency. The State of Arizona (via Governor Raul Castro) issued an emergency grant in the amount of $50,000

in emergency funding to repair the water line at Carr, Gardner and Miller reservoirs.

43. In 1978, the USFS District Ranger in Hereford met with representatives of Tombstone to discuss City of Tombstone rights in the Huachuca Mountains pertaining to the water line and acquiring permits to conduct repairs. Defendants allowed the repairs to be made.

44. In 1984, the Miller Peak Wilderness Area was established, encompassing the portion of Tombstone's vested rights in the Huachuca Mountains located in the E ½ of W ½ of the NE ¼ of the SE ¼ of Section 23, Township 23 S., Range 20 E. Gila & Salt River Basin Meridian, Cochise County, State of Arizona.

45. Nevertheless, as late as March 19, 1990, Defendants declared to Tombstone, "[t]he Coronado National Forest recognizes the prior uses of water from Miller Canyon by the City of Tombstone. We do not intend to conflict with prior water rights holders in Miller Canyon." Attached hereto as Exhibit 59 is a true and accurate copy of said letter (Tombston519).

* * *

47. In 1993, another devastating fire in the Huachuca Mountains damaged the Tombstone waterline. Upon information and belief, Defendants allowed substantial repairs to be made to the Gardner, Miller and Carr Spring sites, including repairs and regrading of hundreds of feet of roadway upon and

along the public highway right of way easements in Miller and Carr Canyons.

48. Between May 29, 2011 and July 26, 2011, the Monument Fire and subsequent landslides destroyed Tombstone's reservoirs and pipelines in Miller Canyon, destroyed the Clark, Brearley and Hoagland Spring areas in the "Divide", caused massive flooding in Carr Canyon disrupting nearly all springs in Carr Canyon and Head Springs Reservoir. Flooding completely obliterated Marshall Canyon, leaving only catch basin/reservoir at Maple Group Springs No. 7, 8 & 9 intact. Roads, pipelines, springs and spring sites throughout Tombstone's Huachuca Mountain municipal water system were buried under boulders, rocks, massive mudslides and other debris. Water flow from the Huachuca Mountain municipal water system was completely disrupted.

49. On July 26, 2011, Mayor Henderson declared a State of Emergency.

50. On August 17, 2011, pursuant to A.R.S. § 26-303(D), Arizona Governor Janice K. Brewer declared a State of Emergency pertaining to the water supply for the City of Tombstone and appropriated money for emergency repairs, directing that the "State of Arizona Emergency Response and Recovery Plan be used to direct and control state and other assets and authorize the Director of the Arizona Division of Emergency Management to coordinate state assets."

* * *

52. In light of the periodic disasters afflicting Tombstone's water structures in the Huachuca Mountains and other weather events preventing Tombstone from enjoying its vested rights, it is absolutely essential to the enjoyment and exercise of the City's vested rights that the City have sufficient autonomy to use heavy and light vehicles upon and along the road right of way easements in Carr and Miller Canyon, heavy and light mechanized equipment, as well as hand tools, to construct, rebuild and maintain water structures, flumes, dams, reservoirs, pipelines, and roadways within the scope of the City's vested rights.

53. Tombstone's vested rights explicitly include the right to engage in substantial ground displacement as well as to erect new permanent structures throughout its right of way easements, including the right to make cuts, excavations, ditches, flumes, dams, and reservoirs, all as appurtenant rights associated with the City's water rights.

* * *

56. In fact, prior to 1984 and as recently as October 2011, members of the public and employees of Tombstone customarily and regularly used heavy and light motorized vehicles upon and along the road right of way easements in Carr and Miller Canyon, which are included among the City's vested rights and referenced in the maps. Employees of Tombstone also customarily and regularly used heavy and light mechanized equipment, as well as hand tools, to construct, rebuild, repair and maintain water structures,

flumes, dams, reservoirs, pipelines, and roadways within the scope of the City's vested rights, often involving substantial ground displacement and the erection of new permanent structures.

* * *

58. Safe and complete repair of Tombstone's water infrastructure, which is essential to provide safe drinking water and adequate fire suppression, requires the use of a track operated John Deere JD200D excavator or equivalent throughout the land which is subject to Tombstone's vested rights. This is because the terrain has huge boulders, giant felled trees, huge piles of gravel and sand that must be moved and rearranged to rebuild a diversionary flume as a safety and protective measure to deflect future water flows from injuring workers in the area and destroying the spring catchments and access to the springs themselves. The City's water structures simply cannot be safely rebuilt or fully utilized in the future without these protective flumes in place. Otherwise, the City's water structures will be periodically destroyed by weather and flow events, depriving the City of a continuous water supply.

59. Safe and complete repair of Tombstone's water infrastructure, which is essential to provide safe drinking water and adequate fire suppression, also requires a mini excavator equal to John Deere JD60 gas cutoff saw, chain saw, 4x4 pickups and flatbed trucks, 48" ATV or UTV. a generator, and hand tools at Miller Spring No. 1, McCoy Group

Spring Nos. 2, 3, 4, Quartz Spring No. 22, Gardner Spring No. 24, Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21.

60. Finally, safe and complete repair of Tombstone's water infrastructure, which is essential to provide safe drinking water and adequate fire suppression, requires use of the X85 Vermeer Cable Plow at Marshall Spring No. 5, Bench Spring No. 6, Maple Group Spring Nos. 7, 8, and 9), Gird Reservoir No. 9 1/2, Lower Spring No. 10, Clark Spring No. 11, Brearley Spring No. 12, and Hoagland Spring No. 23. This is for full repair and burial of the auxiliary water lines from the City's springs to its main to protect them from future weather events.

* * *

63. Despite letter requests on December 5, 2011 by City Clerk/Manager George Barnes to Defendants' representative Jim Upchurch, the Defendants by and through Jim Upchurch in a letter written on December 7, 2011 are preventing Tombstone from conducting *any* repairs or construction at the spring heads located at McCoy Group Spring Nos. 2, 3, 4, Marshall Spring No. 5, Bench Spring No. 6, Maple Group Spring Nos. 7, 8, and 9, Gird Reservoir No. 9 1/2, Lower Spring No. 10, Clark Spring No. 11, Brearley Spring No. 12, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary

Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21; Quartz Spring No. 22, and Hoagland Spring No. 23. * * *

64. Despite requests by email from City Project Manager Kevin Rudd to Defendants' representatives Kathleen Nelson and Walter Keyes on November 29, 2011, Defendants by and through Walter Keyes in an email written to Kevin Rudd on December 2, 2011 have refused and are preventing Tombstone from building *any* above-grade protective flumes at the land use and right of way easements including and surrounding Gardner Spring No. 24.

65. Despite requests by email from City Project Manager Kevin Rudd to Defendants' representative Jim Upchurch on November 14, 2011, Defendants by and through Jim Upchurch in a letter written to City Clerk/Manager George Barnes on December 1, 2011 have refused and are preventing Tombstone from building *any* repairs or construction at the spring head locations of Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21. * * *

66. Despite requests by letter from George Barnes to Defendants' representative Jim Upchurch on January 13, 2012, Defendants by and through Jim Upchurch in a letter written to George Barnes on January 26, 2012 are refusing to allow any emergency

repairs at the locations of Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21, Maple Group Spring Nos. 7, 8, and 9, and Clark Spring No. 11. * * *

67. Defendants by and through email from its representative Kathleen Nelson to City Project Manager Kevin Rudd on February 28, 2012 are requiring only hand tools to be used in repairs at the land use and right of way easements including and surrounding the spring sites and pipelines servicing Mill Spring No. 1, McCoy Group Spring Nos. 2, 3, 4, Marshall Spring No. 5, Bench Spring No. 6, Maple Group Spring Nos. 7, 8, and 9, Gird Reservoir No. 9 1/2, Lower Spring No. 10, Clark Spring No. 11, Brearley Spring No. 12, Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21; Quartz Spring No. 22, Hoagland Spring No. 23, and Gardner Spring No. 24 as of March 01, 2012. * * *

68. As of March 1, 2012, Defendants will not allow the City of Tombstone free and unimpaired access to its municipal water system in the Huachuca Mountains to maintain their municipal water supply. As recently as March 25, 2012, Defendants' Forest Service employees even initially refused to allow Tombstone to use a wheelbarrow during its repair work. Defendants currently only allow non-mechanical

hand tools to perform rebuilding and repair work on the City's municipal water system in Carr and Miller Canyons. * * *

69. Defendants' aforesaid informal compliance orders enforce the restrictions contained in certain "special use authorization" decision memoranda issued in November and December 2011, which contain the specific statement that they are not subject to administrative review. * * * In view of these findings, it is futile for Tombstone to pursue administrative remedies because of the ongoing public health and safety emergency in which every minute of delay threatens irreparable harm, and the fact that there are little or no material differences between the vehicles and equipment needed for the work at Gardner Springs and the work that is currently necessary throughout the land that is subject to Tombstone's vested rights.

70. Because of Defendants' de facto prohibition on Tombstone enjoying and exercising substantially all of its vested rights, only Miller Spring No. 1, Gardner Spring No. 24 and Head Spring No. 13 are currently flowing, due to temporary repairs.

71. Because of Defendants' de facto prohibition on Tombstone enjoying and exercising its vested rights, and the seasonal nature of the water produced by the various springs, upon information and belief, Tombstone has lost and will continue to lose peak monthly water production from springs to which it has had vested rights for well over a century.

72. Because of Defendants' de facto prohibition on Tombstone enjoying and exercising substantially all of its vested rights, Tombstone is receiving less than a third of what water could otherwise be delivered based on historical records indicating a fully repaired municipal water system would regularly deliver 400 gallons per minute. The temporary repairs Defendants have allowed to Miller Spring No. 1 and Gardner Spring No. 24 are likely to be washed away during the first summer rainstorm, reducing the water flow by at least 80 gallons per minute. As Defendants have repeatedly admitted (*see* Exhibits 61 and 69), the lack of water from Tombstone's Huachuca Mountain sources threatens public health and safety.

73. The loss of Tombstone's Huachuca Mountain municipal water supply imminently threatens public health and safety because of the current lack of sufficient water supply for both consumption and fire suppression during peak demand. The imminence of the fire hazard facing Tombstone is readily apparent from the fact that in December 2010 a devastating fire broke out in Tombstone's downtown district. The entire business district could easily have been lost. The threat facing Tombstone is further heightened by the fact that, without the City's Huachuca Mountain water supply, the City cannot currently expand or modernize its water distribution system to address the imminent and ongoing fire hazard created by its all-wood construction historical district. This clear and present danger is compounded by the historically

increasing arsenic contamination of the city's well-water supply, which could deprive the city of safe potable well-water sources at any time.

* * *

98. * * * when the Governor of Arizona declares a state of emergency, as she has done here, she has exercised "all police power vested in the state by the constitution and laws of this state" in order to alleviate the underlying disaster or extreme peril. A.R.S. §§ 26-301(15), 26-303(E). This gubernatorial proclamation gives Tombstone concurrent police power jurisdiction to repair its water infrastructure in accordance with its vested rights.

99. Additionally, by denying Tombstone access to its Huachuca Mountain water supply, Defendants are forcing Tombstone to disregard the State of Arizona's declared public policy and laws against utilizing groundwater sources when reasonable alternatives are available, which is set out in A.R.S. § 45-401, *et seq*.

100. In preventing Tombstone from exercising power and jurisdiction to repair its water infrastructure in accordance with its vested rights, Defendants are acting as if Congress gave them the power to preempt the state's police powers with respect to a political subdivision's exercise of vested rights during a grave public health and safety emergency.

* * *

Count V – Tenth Amendment Claim

Defendants' Interference with Tombstone's Emergency Police Power Exercise of its Vested Rights Violates the Principle of State Sovereignty Guaranteed by the Tenth Amendment.

135. Plaintiff incorporates by reference paragraphs 1 to 73 and 98 to 100 supra.

136. The principle of state sovereignty limits the scope of federal power under the Tenth Amendment to the U.S. Constitution. *Bond v. United States,* 131 S. Ct. 2355 (2011) ("Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States").

137. The principle of state sovereignty guarantees sufficient autonomy to the states and political subdivisions of the states, including Plaintiff, from the federal government so that they can exercise traditionally reserved powers that are essential to their sovereign existence. *Printz v. U.S.,* 521 U.S. 898, 923-24, 932 (1997).

138. Tombstone's acquisition, maintenance, and enjoyment of water rights and appurtenant and independent property rights within the Coronado National Forest for the benefit of its residents is an exercise of traditionally reserved powers that is essential to its sovereign existence as a political

subdivision of the State of Arizona because public health and safety within Plaintiff's jurisdictional limits cannot otherwise be adequately protected and its own physical existence cannot otherwise be sustained.

139. Defendants' regulatory interference with Tombstone's emergency police power exercise of its vested rights violates the principle of state sovereignty as guaranteed by the Tenth Amendment to the U.S. Constitution and Tombstone has a clear right to judicial review of such conduct.

140. Tombstone has suffered or is likely to suffer irreparable harm from Defendants' unlawful conduct, has no adequate remedy at law, is likely to succeed on the merits, and the City's claim for preliminary and permanent injunctive relief is favored by the public interest and the balance of equities.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff City of Tombstone requests:

* * *

4. That this court preliminarily and/or permanently enjoin the Defendants, their agents, employees, successors, and all persons acting in concert or participating with them under their direction, from interfering with Tombstone's vested rights under Arizona law, the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and/or the Forest Right-of-Way Act of 1905, 16 U. S. C. § 524, to repair its Huachuca Mountain

Water Infrastructure and restore full rightful beneficial use of its water rights using necessary equipment and vehicles, * * *

RESPECTFULLY SUBMITTED on this 30th day of March, 2012 by:

s/Nicholas C. Dranias

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

City of Tombstone, Plaintiff, vs. United States of America, et al., Defendants.	)	No. CV 11-845-TUC-FRZ

DECLARATION OF JESSE GRASSMAN

* * *

2. I am the City of Tombstone's Fire Chief.

3. * * *

My opinions are offered to a reasonable degree of certainty in the fields of fire safety and fire suppression.

4. It is well known in the professional firefighting community throughout Cochise County, Arizona that Tombstone is a tinder box because of the all-wood structures located within its six block historical business district. The wood structures are especially flammable because of a shared attic that exists between them. In a fire, the shared attic would channel superheated air quickly from building to building, spreading any fire that

might develop. The only structure in the downtown historic district that has a sprinkler system is the Birdcage Theater I believe that is why Governor Brewer issued her emergency proclamation authorizing emergency repairs to Tombstone's water infrastructure in the Huachuca Mountains (a genuine copy of the foregoing proclamation is attached hereto as Exhibit 2).

* * *

6. My opinion about the danger currently faced by Tombstone is based on recent events. On December 8, 2010, I helped fight a fire at the premises of Six Gun City, which is located just to the south of the main street of the Tombstone historic business district. On that day, a fully-engulfed fire (a fire that completely engulfed the structures from the inside-out with flames reaching 200 feet) was reported to dispatch. We arrived within seven minutes of dispatch and discovered three structures on fire or catching fire. I observed glowing embers about the size of my hand picked up by the wind and blown three blocks away. If any of these embers landed on roofs in the historic district, those buildings could have easily caught fire. Even with the fires contained to the area around Six Gun City, and two fire engines on site to fight the blaze, it took 20 minutes to "knock down" (put out) the fire. It then took 5 hours to "mop up" (extinguish all potential risks of fire). Even with the use of compressed air foam in addition to water, approximately 65,000 gallons of water were used for knock down and mop up.

7. If the response time for the Six Gun City fire had been 15 minutes from dispatch, which is historically possible, a fire of the sort that was burning could have easily engulfed an entire block, with at least a 50% chance of blowing large embers to ignite other blocks in the historical district.

8. If a fire similar to the fire at Six Gun City spread to three blocks of the six block historical district during the late spring or summer months, I am reasonably certain the City would not have enough water flowing to maintain adequate water pressure and supplies to fight and suppress such a fire even with a modern distribution system.

* * *

9. The lack of adequate water flow from the Huachuca Mountains thus presents a monumental dilemma and fire safety hazard for the City of Tombstone. The city's current distribution system cannot furnish enough water to allow for the fire department to suppress a fire that would engulf more than a city block. But there is no way to justify modernizing the city's current distribution system to allow for the ability to deliver enough water to suppress a fire that could spread to multiple blocks in the historic district if the City is limited to less than 400 gallons per minute from the city's Huachuca Mountain sources. Tombstone is a disaster waiting to happen without that water.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Jesse Grassman
Jesse Grassman

Executed this 21st day of February, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

City of Tombstone, Plaintiff, vs. United States of America, et al., Defendants.	)	No. CV 11-845-TUC-FRZ

DECLARATION OF JACK WRIGHT

* * *

2. I am the City of Tombstone's Certified Water Operator. I have held this position since on or about May 1998. Since I was hired, my ordinary job obligations have involved sampling the city's water, monitoring the city's wells, monitoring the city's distribution systems, as well as making adjustments to the distribution, storage, and pumping systems. My monitoring involves the determination on a daily basis of how much water the city is using and will need; whereupon I adjust on a daily basis the flow to and from our water supplies and infrastructure accordingly. To test water safety, throughout my employment with the City of Tombstone, I have ordinarily performed and been responsible for accurately performing and reporting the results of monthly coliform sample testing, quarterly as well as annual arsenic sample testing, annual nitrate sample testing, as well as other forms of testing.

3. I hold certifications in Grade 2 Water Distribution and Grade 3 Water Treatment. My Grade 3 Water Treatment certification, in addition to my work experience and background in the field of water treatment and distribution services, gives me unusual knowledge in the field of water safety because I have had at least two hundred hours in training and education about water safety issues, including how to evaluate what constitutes safe and unsafe levels of arsenic in potable water based on state and national standards enforced by the Arizona Department of Environmental Quality.

* * *

5. Tombstone has historically had no more than four water sources, including sources that draw from the Huachuca mountain springs owned by Tombstone, that hold water that is either currently or was formerly used to supply drinking water to residents and visitors of Tombstone. These include Wells No. 1, 2, 3, and Point of Entry No. 4, which contains the water from the Huachuca Mountain springs and aqueduct (hereinafter "Huachuca Mountain spring water sources"). As discussed below, none of these water sources furnish safe potable water except for Well No. 2 and the Huachuca Mountain spring water sources.

* * *

8. Well No. 2 currently contains water that is safe for human consumption. However, there is an ongoing risk Well No. 2 could become unsafe due

to the natural process of the leaching and erosion of the natural arsenic deposits. Accordingly, Well No. 2 is tested for arsenic levels on an annual basis. The most recent reading of the water sources occurred on or about Jan. 30, 2012. In the past year, Well No. 2 has contained arsenic levels of 6 PPB.

* * *

11. It is possible that Well No. 2 could fail due to arsenic contamination equaling or exceeding the levels found in Well Nos. 1 or 3. If so, this would not be detected for another ten months due to our current monitoring program. In the meantime, it is my opinion to a reasonable degree of certainty in my field of expertise that the health and safety of citizens and residents in the City would be at risk because only approximately 100 gallons per minute are flowing out of the Huachuca Mountain spring water sources. This would not be an adequate flow to blend with Well No. 2 to ensure potable water is at or below safe levels of arsenic if Well No. 2's arsenic contamination equaled or exceeded that of Well Nos. 1 or 3.

12. Even if we discovered any contamination and stopped drawing water from Well No. 2 in time to avoid any health risk to the public, it is my opinion to a reasonable degree of certainty in my field of expertise that there would not be enough safe drinking water for Tombstone's residents and tourists given the current amount of water flowing from Huachuca Mountain spring water sources. At 100 gallons per minute flowing from the springs, during peak season, the City's

1,000,000 gallon reservoir, and 100,000 and 300,000 gallon storage tanks would be completely depleted in approximately five days.

13. I am also gravely concerned about the lack of adequate water for fire suppression needs. This is because Well No. 1 produces water through pumps that require electricity. Should the pump or electric power fail for any lengthy period of time, the source of water for fire suppression needs would be from the Huachuca Mountain spring water sources, the City's 1,000,000 gallon reservoir, and 100,000 and 300,000 gallon storage tanks, with Well No. 2 being run by an emergency natural gas powered engine. Even without water being diverted for fire suppression, these reserves could be depleted in fewer than four days by peak potable water consumption.

14. Given the history of arsenic contamination of Tombstone's wells, the need to be able to continuously replenish the City's water reserves, which are also used for fire suppression purposes, and the risks of our pumps or electricity failing, I believe it is essential to public health and safety in the City of Tombstone that the Huachuca Mountain spring water sources provide a regular flow of at least 400 gallons per minute. Due to the seasonal nature of the spring water flow, this is only possible if all twenty-four of the City of Tombstone's spring heads are restored and connected to the aqueduct serving the City.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Jack Wright
Jack Wright

Executed this 21st day of February, 2012

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF TOMBSTONE, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSAK, Secretary of Agriculture; TOM TIDWELL, Chief Forester of the USDA Forest Service; CORBIN NEWMAN, Regional Forester for the Southwestern Region of the U.S., Defendants-Appellees.	No. 12-16172 D.C. No. 4:11-cv-00845-FRZ

DECLARATION OF GEORGE BARNES IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING INTERLOCUTORY APPEAL

* * *

2. I am the City of Tombstone's City Clerk/Manager. I have held this position from November 2006 to November 2008, and from November 2010 to

* * *

4. The City of Tombstone maintains an agreement with the Arizona State Forester to provide emergency firefighting equipment, crew and water to

assist in wildland firefighting. The current contract has been in effect since April 1, 2012, and is effective through March 31, 2014.

* * *

6. Second, it must fight wildfires anywhere throughout the state, on demand of the State Forester.

* * *

11. Tombstone's fire department has a service area of a 270 square mile radius. This entire service area relies on Tombstone's water supply as its primary water source for fire suppression. Holiday Ranch Estates, which adjoins the city of Tombstone and is within Tombstone's service area, is now asking us to provide it with an emergency water supply, because their water company does not have an adequate water supply for drinking and fire suppression needs. Without the mountain springs, we do not have adequate water to sell to Holiday Ranch Estates, although we are obligated to respond to fires within that area because the Estates are within our service area. * * *

12. Because of the extra demand on resources imposed by the cooperative fire agreement, the lack of adequate water flow from the Huachuca Mountains to Tombstone puts the city in dire straits. Tombstone currently must stretch its limited water resources to meet two high risk fire suppression obligations: it must serve the needs of the city and meet its obligations under the cooperative fire agreement and mutual aid program.

* * *

15. Without the Huachuca Mountain sources, Tombstone cannot maintain adequate water flow and pressure to battle multiple fires. Additionally, the city risks losing water flow at the emergency tap at Nicksville and its ability to use its only uncontaminated well.

16. Should it be called upon pursuant to the contract to suppress a major wildfire, without an adequate water flow from the Huachuca Mountains, Tombstone would be utterly incapable of fighting and suppressing a fire within the city. As a result, the city and surrounding areas are at imminent risk of having a total loss of fire protection and potable drinking water.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ George Barnes
George Barnes

Executed this 21 day of May, 2012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

City of Tombstone, Plaintiff, vs. United States of America, et al., Defendants.	)	No. CV 11-845-TUC-FRZ

SUPPLEMENTAL DECLARATION OF NANCY SOSA

* * *

3. I am the City of Tombstone's Archivist and Historical Researcher. I have held the position of Archivist since December 2010 and also in 2008. As the City Archivist, I am responsible for maintaining the archive of city records accurately and in their original condition as the custodian of such records.

* * *

5. Since January 2011, I have been tasked with finding, preserving, organizing and indexing Tombstone's public documents dating back to 1880. These records include, but are not limited to, council minutes books from 1880 to 1982, tax assessment rolls, court records, dockets, deeds and hundreds of maps spanning over 130 years.

* * *

9. Based on my investigations, it is my opinion to a reasonable degree of certainty in the field of historical investigation that the City of Tombstone in Cochise County, Arizona ("Tombstone") holds: a) title to the beneficial use of water and appurtenant road, siting, water structure, canal, pipeline, flume, ditch, construction, maintenance, and excavation right of way easements relating to 25 springs in the Huachuca Mountains, which was obtained by Tombstone's predecessors in interest as early as May 20, 1880 and, except for Gardner Springs No. 24, no later than June 23, 1905 under the literal terms of the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661;

* * *

18. On April 13, 1890, prestigious territorial attorney Col. William Herring wrote an opinion letter to the Arizona Territorial Legislature describing the Huachuca Water Company's municipal water system and how the related property rights were obtained pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and supersede all conflicting land patents or homesteads. * * * This letter is significant because it confirms that, in the mind of a leading legal expert at the time, the rights claimed by the Huachuca Water Company in the Huachuca Mountains were acquired and being exercised fully in accord with local laws and customs. Its existence also shows that the Huachuca Water Company Huachuca Mountain pipeline and water system was fully operational and serving the City of Tombstone no later than 1890, and that the Huachuca Water Company was making

beneficial use of its water rights. This conclusion is further supported by the fact that a franchise ordinance enacted on September 9, 1881 granted the Huachuca Water Company a franchise with Tombstone to supply potable and fire suppression purposes.

19. In addition to the transfer and acquisition of rights evidenced by the foregoing quit claim deeds and the claimed the [sic] beneficial use of water evidenced by the foregoing letter and ordinance, testimony in the February 15, 1906 Deposition of William H. Brearley * * * further evidences the Company's continuous compliance with local customs and laws in regard to obtaining and maintaining its water rights and appurtenant easements. Between 1880 and 1909, it is apparent that local customs provided for the acquisition of water rights and appurtenant easements through "location" of a water source, which consisted of placing a monument and placing a notice of appropriation describing the water source in its vicinity, as well as recording a duplicate with the Office of the County Recorder of Deeds, and through subsequent "beneficial use," which required development of the source site to allow use of the water that it could generate. It is also apparent that local customs regarding the nature of the lands uses that were appurtenant to the beneficial use of water borrowed from mining practices and allowed the appropriator to claim five acre parcels around or adjacent to water sources and for siting water structures and to ensure continuous control over springs

that may shift their location over time. In addition to the right to build ditches, canals, pipelines and flumes (customarily involving the construction of above grade berms), local customs also included extensive rights of land development as appurtenant to water rights, including the right to excavate and cut into the land, erect dams and reservoirs. As discussed below, the documentary evidence indicates that, out of an abundance of caution, the Huachuca Water Company fully complied with these local customs, and with territorial laws that codified them between 1901 and 1908.

* * *

42. The validity of the foregoing customary and lawful methods of appropriating the beneficial use of water and appurtenant land use and right of way easements was recognized by the federal government as early as March 8, 1913, when the U.S. Department of the Interior accepted a surveyed map showing the Huachuca Water Company's water structures, pipelines and related easements as of 1908, as well as certain of the foregoing water sources, and issued a permit under the Act of February 15, 1901, 31 Stat. 790, to the Huachuca Water Company recognizing the Company's right to exercise its vested rights as based upon lawful perpetual right of way easements granted by Defendant United States pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 * * * The foregoing map was previously recorded by the Huachuca Water Company with the Cochise County Recorder of Deeds on August 1, 1908 at Book

000, page 676, and subsequently recorded on January 9, 1911 and again on February 8, 1965.

43. Additionally, on or about April 4, 1916, in response to a March 21, 1916, letter written by the Huachuca Water Company's President regarding the status of the right of way and water rights, the Acting District Forester wrote a letter to the Huachuca Water Company stating: "[I]t is our understanding that your plant has been in operation since before the creation of the Forest and 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 Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661]."

* * *

44. Perhaps the best evidence supporting my finding that the Huachuca Water Company appropriated its water rights and appurtenant land use and right of way easements in accordance with contemporaneous local custom and laws, and that the scope and nature of the rights claimed in the Company's notices of appropriation was fully in accord with local custom and law, is the fact that the Company's rights were contemporaneously challenged at least twice in court and in each occasion the Huachuca Water Company prevailed in enforcing its rights.

* * *

45. In the November 15, 1915 judgment, the Court "ordered, adjudged and decreed" that the Huachuca

Water Company is entitled to possession of: all those certain lands and premises . . . in that certain tract of land, described as follows, E 1/2 of W 1/2 of the NE 1/4 of the SE 1/4 of Section 23, Township 23 S., Range 20 E. Gila & Salt River Basin Meridian, in so far as it lies, and that said land and premises Tieing [sic] between the main pipe line of the said Plaintiff and the lowest bed of the canyon through which said pipeline runs, said lands and premises lying to the South and West of said pipe line and the right-of-way for said pipe line, and the land on which said pipe line is situated, said lands and premises extending from the spring and tap, highest up said canyon, to the lowest tap and opening into the main pipe line of the Plaintiff.

* * *

46. In the November 15, 1915 judgment, the Court also "ordered, adjudged and decreed" that the Huachuca Water Company is entitled to the "entire use and possession of those certain springs on said [sic] McCoy Reservoir site, numbered 2, 3 and 4, and situate[d] on the lands and premises described in the pleadings, and all of the water flowing from said springs numbered 2, 3, and 4, situate[d] on said McCoy Springs Reservoir site."

* * *

49. Based on the jury verdict, the Court entered a judgment finding: Plaintiff is entitled to the possession [of] . . . that certain spring known as Clark

Spring No. 11, situated on the divide between Miller and Carr Canyon, in the Huachuca Mountains, in the County of Cochise, State of Arizona, and also, the right of way for said pipeline leading from said Clark Spring No. 11 to the main pipe line of the plaintiff running to the City of Tombstone, and further for such lands surrounding said Clark Spring No. 11, as are necessary to the beneficial use of said springs, and it is further adjudged that plaintiff is entitled to, and do have, possession of those certain lands and premises, springs and water rights, and waters, as above described in the complaint, known as Clark Spring No. 11.

* * *

50. The validity of the Huachuca Water Company's property rights accrues to the benefit of Tombstone because all of the foregoing rights and privileges were incorporated by reference in the quit claim deed and bill of sale dated April 14, 1947, in which the Huachuca Water Company granted Tombstone all of its vested rights as well as all interests in outstanding permits.

* * *

51. Until the Monument Fire, the validity of the transfer of rights between the Huachuca Water Company and Tombstone was continuously recognized by the federal government.

* * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Nancy Sosa
Nancy Sosa

Executed this 30th day of March, 2012

(COPY)

HUACHUCA WATER COMPANY

PURE SPRING
WATER
FROM
HUACHUCA
MOUNTAINS

A. H. GARDNER
MANAGER

TOMBSTONE, ARIZONA, March 21/16

Mr R.J. Selkirk, Forest Supervisor,

Tucson, Arizona.

Dear Sir:-

Some weeks ago we entered a protest against patent issuing to J.E. Tomblinson on his homestead in the Coronado Forest Reserve in the Huachuca Mountains and in the correspondent issue that grew out of the matter the Department of Agriculture decided that we had no permit for our pipe line from their Department for our right of way thru the Reserve but they also stated that by such fact *TOMBLINSON GAINED NOTHING* and advised us to take the matter into the local courts – we did so and won our contention and a copy of the judgment (certified) is sent herewith, and we are also sending blue print of our survey and you will note that it carries the approval of the Department of the Interior with the certificate of the Receiver of the Land Office at Phoenix and approves our right of way and reservoir sites from source to terminal in Tombstone.

I wish to sya [sic] that this plant has been in operation continously [sic] since September 1881 supplying Tombstone and surrounding country with water and that our right of way and water rights and sites for reservoirs have not only been reconized [sic] by the Department of Interior but have been reconized [sic] many times and acknowledged by the Department of Agriculture and the Forest Service in particular and what we now want is to ask you to clear this matter up and see if you cant get the Department of Agriculture if in reviewing this case *NOW* thinks we should have more done, that they state what it is and we will proceed on our part or if with them they may do so – our right-of way, reservoir sites, springs and all rights should be reconized [sic] so that we may know just what they consider they are and we also think the width of right of way should be fixed definitely, kindly take the matter up for determination and oblige

Yours truly
HUACHUCA WATER COMPANY
per Secretary.
(Signed) A. H. Gardner,

Coronado Uses,
Huachuca Water Company,
Reservoir and Pipeline,
March 8, 1913.
(Interior) April 4, 1916.

Huachuca Water Company,

Tombstone, Arizona.

Gentlemen:

Your letter of March 21 to Supervisor Selkirk has been referred to this office for reply.

As stated in your letter it is our understanding that your plant has been in operation since before the creation of the Forest and 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.

It appears further that in 1913 you secured a permit from the Interior Department for your pipeline under the Act of February 15, 1901. This permit of course would only be applicable to the portions outside the National Forest since jurisdiction over lands within the Forest is within the Huachuca Water Co.

Department of Agriculture rather than the Interior Department. It is entirely true that you have no permit as such from this Department but since your rights are recognized it is doubted whether you would care to formally apply for an additional permit, the only advantage of which so far as it now appears

would be in the specification of a definite width for the right of way.

If you still desire a permit you should make application to the Forest Supervisor at Tucson, who will forward it here with his report for action by this office.

Very truly yours,

/s/ John Kerr

Enclosures

Acting District Forester.

DECLARATION OF EMERGENCY
**** TOMBSTONE WATERLINE FLOODING ****

WHEREAS, between June 12, 2011 and July 28, 2011, a series of seasonal monsoon rains passed over the Huachuca Mountains and areas that were severely burned by the Monument Fire; and

WHEREAS, the heavy rains resulted in significant flooding, erosion, and mud slides which caused significant damage to the primary source of water for the citizens of the City of Tombstone; and

WHEREAS, the debris and heavy sediment flow damaged several areas of the aqueduct and transmission system that conveys water from this source; and

WHEREAS, the damage has completely disrupted this critical water supply that provides between 50 and 80 percent of the City of Tombstone's ongoing water needs; and

WHEREAS, the City of Tombstone's Mayor and Common Council have declared a State of Emergency for their city for the flooding and subsequent damage to critical infrastructure; and

WHEREAS, the Governor is authorized to declare an emergency pursuant to A.R.S. § 26-303(D); and

WHEREAS, the Legislature has authorized the expenditure of funds in an event of an emergency pursuant to A.R.S. § 35-192.

NOW, THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, by virtue of the authority vested

in me by the Constitution and Laws of the State, do hereby determine that the flooding event in the Huachuca Mountains justifies a declaration of a State of Emergency, pursuant to A.R.S. § 26-303(D), and I do hereby;

a. Declare that a State of Emergency exists in the City of Tombstone due to flooding, effective June 12 through July 26, 2011; and

b. Direct that the sum of $50,000 from the General Fund be made available to the Director of the Arizona Division of Emergency Management to be expended in accordance with A.R.S. § 35-192, A.A.C. R8-2-301 to 321, and Executive Order 79-4; and

c. Direct that the State of Arizona Emergency Response and Recovery Plan be used to direct and control state and other assets and authorize the Director of the Arizona Division of Emergency Management to coordinate state assets.

IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona

/s/ Janice K. Brewer
GOVERNOR

DONE at the Capitol in Phoenix on this seventeenth day of August in the Year Two Thousand Eleven and of the Independence of the United States of

America the Two Hundred and Thirty-Sixth.

ATTEST:

Secretary of State

RESOLUTON [sic] # 14-2011

A RESOLUTION OF THE MAYOR AND COMMON COUNCIL OF THE CITY OF TOMBSTONE, COCHISE COUNTY, ARIZONA, DECLARING AN EMERGENCY RESULTING FROM THE MONUMENT FIRE

WHEREAS, The City of Tombstone has long relied upon spring water sources in the Huachuca Mountains, and

WHEREAS, these water sources have provided up to half of the total water demand for the City of Tombstone, and

WHEREAS, damage from the Monument Fire and subsequent monsoon rains causing erosion and mud slides have resulted in a complete interruption of this critical water supply, and

WHEREAS, the City of Tombstone does not have the physical or financial resources to fully enable the needed repairs and maintenance.

NOW THEREFORE, BE IT RESOLVED that the Mayor and the Common Council of the City of Tombstone, Arizona declare that an emergency exists and requests assistance from the Board of Supervisors of Cochise County and the Arizona Division of Emergency Management,

BE IT FURTHER RESOLVED that the Mayor is authorized to sign any documents required to secure this assistance.

PASSED AND ADOPTED by the Mayor and Common Council of the City of Tombstone, Arizona this 26th day of July, 2011.

/s/ Jack Henderson
Jack Henderson, Mayor

ATTEST:

/s/ George Barnes
George Barnes, City Clerk

File Code: 1950/2720/7420 **Date:** November 7, 2011
Route To:

Subject: DECISION MEMORANDUM: Special-use Authorization to Repair Municipal Waterline in Miller Canyon, City of Tombstone, Sierra Vista Ranger District

To: FILE

USDA Forest Service
Coronado National Forest
Sierra Vista Ranger District
Sections 10, 11, 13, 14, 15, 22, and 23,
Township 23 South, Ranges 20 East
Gila and Salt River Meridian
Cochise County, Arizona

BACKGROUND

The City of Tombstone, Arizona, (City) operates and maintains a municipal water system that provides customers with a mixture of well water and spring water, the latter of which originates on National Forest System (NFS) land on the Sierra Vista Ranger District.

* * *

Miller and Carr Springs and associated pipeline were damaged by flooding after the Monument Fire in 2011. The roads to Clark, Miller and Carr Springs were washed out after the 2011 flood.

The City's water supply and pipelines, four of which are located in the Miller Peak Wilderness, were

damaged by the Monument Fire and subsequent flooding and debris flow. Debris also damaged catch basins and collection structures; four catchment facilities near four springs are not functional. Two of these basins were destroyed in the 1977 floods after the Carr Fire. Overall, the damage to the City's water system has impaired its ability to provide customers with a safe and reliable source of potable water. The City has requested that the Forest approve its proposed interim plans to repair damaged springs, infrastructure and access roads in the Wilderness.

PROPOSED ACTION

The Forest proposes to approve the City's plan to repair the pipeline and infiltration basins at Miller Spring that were damaged by flooding to restore flow to the City's 7-inch pipeline. A 30-foot-diameter infiltration basin will be excavated, and then backfilled with drain rock and covered by a geotextile liner. Native stream material will then be used to bury the liner. A large diversion dike above the Miller Spring infiltration basins that has been partially constructed and studded with boulders will be extended an additional 100 feet to deflect debris flow from the basins.

* * *

Because of this, the Forest will require the City to follow all mitigation measures defined in a Minimum Requirements Decision Guide (MRDG) (Project Records, Item 1) to minimize and/or avoid potential adverse effects on Wilderness resources. The MRDG will

be incorporated as part of the terms and conditions in the Forest's special-use authorization that approves the temporary repairs.

* * *

DECISION AND RATIONALE

It is my decision to approve the City's request to repair its water system infrastructure on NFS land as described above.

* * *

CONSIDERATION OF EXTRAORDINARY CIRCUMSTANCES

Using the best available scientific and commercial information, Forest resource specialists confirmed for me that there are no extraordinary circumstances associated with the proposed activities that would result in individual or cumulative adverse effects to those resources identified in 36 CFR 220.6(b)(1)(i through vii). Their findings reported below confirm that the CE is valid for this proposed action and support my decision to approve the proposed repairs to the Tombstone municipal water system.

i. *Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species*

Determination: The District Biologist determined that the proposed action would have no effect on Federally listed threatened and endangered species and designated critical habitat; and

species and habitat proposed for Federal listing. The proposed activities would have no impact on Forest Service, Region 3, sensitive species (October 2007 list, Regional Forester); Forest management indicator species; and neo-tropical migratory bird species (Project Record, Item 2).

ii. *Floodplains, wetlands or municipal watersheds*

* * * Adverse effects to the municipal watershed are not anticipated, because the proposed actions would remediate damage caused by wildland fires and erosion and sedimentation caused by flooding. Based on observations of similar activities and two November 2011 field visit reports (Project Record, Items 4 and 5), effects on wetlands and floodplains would be negligible as long as the City implements Forest Service Best Management Practices and direction provided in the MRDG (Project Record, Item 1).

iii. *Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas*

iv. *Inventoried roadless areas, potential wilderness*

v. *Research natural areas*

Determination: * * * Authorization to use mechanical equipment and vehicles was granted by the Region 3 Regional Forester because of the emergency nature of the proposed repairs (Project Record, Item 1).

* * *

vii. *Archaeological sites, or historic properties or areas*

Determination: The Forest Archaeologist determined that no historic properties would be affected by the proposed temporary repairs (Project Record, Item 7).

* * *

Cultural-resource clearance for this emergency action is given, conditional upon (a) a resource advisor directs that impacts to rock-masonry features be avoided, and (b) actions be limited to recently functioning portions of the water system. Any efforts to improve portions of the water system that have been in disuse for decades should not be authorized at this time, and should be undertaken only after more complete evaluation of National Register eligibility and project effects has been made.

* * *

PUBLIC INVOLVEMENT

* * *

Because of the emergency nature of the proposal, I decided that public involvement in this NEPA review would be limited to the proposed action being listed on the Forest's public website in a Schedule of Proposed Actions and this DM being posted on the website after it is signed.

FINDINGS REQUIRED BY OTHER LAWS

* * *

Endangered Species Act

The District Biologist determined that the proposed action would have no effect on Federally listed threatened and endangered species and designated critical habitat; and species and habitat proposed for Federal listing (Project Record, Item 2).

* * *

ADMINISTRATIVE REVIEW AND APPEAL

This decision is not subject to an administrative review or appeal [36 CFR 215.4(a) and 215.12(f)].

* * *

/s/ *Jim Upchurch*

* * *

[SEALS] **ARTHUR CARHART NATIONAL WILDERNESS TRAINING CENTER**

MINIMUM REQUIREMENTS DECISION GUIDE

WORKSHEETS

* * *

Project Title: *Tombstone Water Emergency Watersystem Repair*.

Step 1: Determine if any administrative action is *necessary*.

Description: Briefly describe the situation that may prompt action.

During the Monument fire, which ignited on June 12 and was declared contained in late July, and the subsequent monsoon season; the City of Tombstone's water supply lines, four of which are located in the Miller Peak Wilderness, were damaged by the fire and subsequent flooding and debris flow. Debris from flooding has damaged the pipeline, catch basin, and collection structures. Continued erosion has also exposed the pipeline to various conditions which has resulted in a loss of water for citizens of Tombstone. The water supply for the city consists of mainly 2 wells and supplemental water from the Huachuca's Mountains. There are 4 catchment facilities in 4 springs that are not functioning as well as broken pipe. Two of these basins were destroyed in the 1977 floods after the Carr fire. The floods washed out the the [sic] pipe to the upper spring and many sections were wrapped around trees and boulders. In the late 80s, the City of

Tombstone approached the District about fixing the line from the upper spring to the lower spring in Miller Canyon. Since it was designated Wilderness, they wanted to use prison labor. Apparently, the project was dropped due to lack of funds.. Currently, the damage to the water system has resulted in a decreased flow of water into the Tombstone's water supply declaring it an emergency. The city states they currently are maintaining a 2 day supply of water and they run the risk of running out of water.

Tombstone first approached the Coronado National Forest concerning the broken water system in July of 2011. On August 18, 2011, Governor Brewer issued a state of emergency for the City of Tombstone. The declaration authorizes $50,000 to help cover engineering and repair costs for Tombstone's water system.

* * *

This money has a deadline for the repairs to be done by February 2012. On September 16, 2011, city officials from Tombstone requested information regarding the water facilities from the Lands Staff. On September 23, 2011 the City then requested motorized access into the wilderness to assess the condition of these structures. On October 24, 2011 the City of Tombstone submitted a proposal to Acting District Ranger Glen Fredrick to repair the water features in the Miller Peak Wilderness.

* * *

The first week of November the City of Tombstone went into the Wilderness with an excavator, chainsaw

dozer and pickup trucks to improve the trail to the dimensions of a road to access the lower Miller spring. This was done without approval from the Forest Service. Law Enforcement went into the Wilderness and requested that they bring the equipment back out until it was determined exactly what types of equipment was needed and what specific repairs would be done to get the line functioning to get water to Tombstone.

* * *

The Tombstone water system features currently in the Miller Peak Wilderness were first established in the late 1880s. For over 100 years the springs in Miller Canyon and Carr Canyon have provided water to a water company and later to Tombstone City. A special use permit was issued in 1948 and superseded by a special use permit in 1962, of which is still valid. The use of the water system features was established prior to the establishment of the Miller Peak Wilderness in 1984. The city has accessed these springs using the old road bed/system trail. They often used pick-up trucks to do minor repairs.

* * *

It has been noted in numerous news articles that well water used by the City of Tombstone has high levels of arsenic. The water from the Miller Peak Wilderness area is use [sic] to blend with the well water to meet Water Quality standards for the State of Arizona.

D. Describe Other Guidance

Is action necessary to conform to direction contained in agency policy, unit and wilderness management plans, species recovery plans, or agreements with tribal, state and local governments or other federal agencies?

Yes: ☒ **No:** ☒ **Not Applicable:** ☐

Explain: The special use permit for the water system features was issued prior to the Miller Peak Wilderness being established. There has been no indication that Tombstone owns fee simple property within the boundary of the Coronado NF. Until the dedication of the wilderness, the City of Tombstone used mechanized means to access and maintains [sic] the water system. However, the permit does not authorize or disallow motorized access or the use of mechanized means to maintain the water system features.

The Special Use permit states: "Tombstone, Arizona, hereinafter, to use subject to the conditions set out below, the following described lands:

> Five (5) parcels of land at five (5) acres each and strip of land 16,700 ft. long and 50 ft. wide (25 ft. On either side of the centerline) on National Forest Land in Sections 10, 12, 13, 15, 23, 24 and 26, T23S, F20D, and Sections 7 and 18, T23S, R21E, G&SRB&M, as shown on the map entitled City of Tombstone, Water Pipelines, Springs, and Spring Impound Areas, dated 2-1-62, and prepared by S. Taylor.

This permit covers 25.00 acres and 3.163 miles and is issued for the purpose of: Constructing, maintaining,

and using a municipal water supply with the right of fencing the 6 water sources. (5 parcels)" (see: Tombstone Special Use Permit)

In reference to the water features in the wilderness, the Wilderness Act states in Section 5(a): "(b) In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent 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."

* * *

Step 1 Decision: Is any administrative action *necessary* in wilderness?

Yes: ☒ **No:** ☒
More information needed: ☐

Explain: No action is necessary in the Miller Peak Wilderness to preserve the wilderness character. However, taking no action would threaten the water supply for the citizens of Tombstone.. Therefore, emergency actions are warranted to protect life and property values outside of wilderness.

The Forest Service is authorized to allow emergency treatments to prevent an unnatural loss of wilderness resources or to protect life, property, and other resource values outside of wilderness. The loss of the water resources from the wilderness could be

devastating to the City of Tombstone. The basis to take action is the threat to life, property, and other resource values outside wilderness.

* * *

Alternative # __B__.

Description: Access and repair tombstone water system features though [sic] mechanized means. This would involve use of motorized and mechanized equipment to locate, repair, and maintain water system features by City of Tombstone.

Effects:

* * *

Special Provisions; The Wilderness Act of 1964, Federal Policy, and the Forest Service Manual gives deciding officials authority to authorized access and/or privileges to occupants with existing rights that supersede the Wilderness Act, those functioning under a permit, and if it is in the public interest.

Economics and Timing Constraints: The City of Tombstone is limited in both time and money to accomplish the task of repairing the water system features affected by the fire and flooding events

* * *

Alternative # __D__.

Description: No Action

* * *

Special Provisions: The Wilderness Act of 1964, Federal Policy, and the Forest Service Manual gives deciding officials authority to authorized access and/or privileges to occupants with existing rights that supersede the Wilderness Act, those functioning under a permit, and if it is in the public interest. Doing nothing would conflict with the above special provisions.

Economic and Time Constraints: The long-term cost of the no action alternative are expected to be greater due to loss of water to the City of Tombstone and its citizens. The cost to the Tombstone to supply sufficient and safe drinking water to it's [sic] citizens as well as loss of income to businesses of Tombstone that are dependent on a water and water facilities to conduct business.

* * *

Safety Criterion

Occasionally, safety concerns can legitimately dictate choosing one alternative which degrades wilderness character (or other criteria) more than an otherwise preferable alternative. In that case, describe the benefits and adverse effects in terms of risks to the public and workers for each alternative here but avoid preselecting an alternative based on the safety criteria in this section.

Documentation: Administrative action is not necessary to maintain/promote wilderness character. The action is necessary for the health and safety of human life for the community of Tombstone in the form of providing a sufficient water supply

* * *

Step 2 Decision: What is the *Minimum* Activity?

* * *

Selected alternative:
Alternative B

* * *

Rationale* for selecting this alternative (including safety criterion, if appropriate): *Given the nature of the situation, restricted budget and limited time frame the use of mechanical means would be appropriate to insure the City of Tombstone has suffice [sic] water supply for citizens and patrons of the city.

* * *

Check any Wilderness Act Section 4(c) uses approved in this alternative:

☒ mechanical transport
☒ motorized equipment
☒ motor vehicles
☐ motorboats
☐ landing of aircraft
☒ temporary road
☐ structure or installation

* * *

Name	Position	Date
Peggy Wilson	Natural Resource Specialist/Recreation	11/4/11
Glen Fredrick	Sierra Vista Ranger District Acting District Ranger	11/4/11
Jim Upchurch	Coronado National Forest, Forest Supervisor	11/4/11

* * *

Name	Position	Date
Francisco Valenzuela	Director of Recreation, Heritage, & Wilderness	11/04/2011
Corbin Newman	Regional Forest	11/04/2011

File Code: 1950/2720 **Date:** December 22, 2011

* * *

Subject: DECISION MEMORANDUM: Special-use Authorization, Repairs to Gardner Spring and Waterline in Miller Canyon by Tombstone Water Company, Sierra Vista Ranger District

To: File

USDA Forest Service
Coronado National Forest
Sierra Vista Ranger District
Sections 23 and 26, Township 23 South, Range 20 East
Gila and Salt River Meridian
Cochise County, Arizona

BACKGROUND

The City of Tombstone (COT) has requested authorization by the Forest to allow it to continue to repair damages to its water system on National Forest System (NFS) lands. The COT has held a special use permit to operate and maintain the system since 1948. The system provides spring water that is blended with COT well water so that it meets potable drinking water standards. There are five springs and several miles of pipeline in the system. Debris from flooding has damaged the pipelines, catch basins, and collection structures, resulting in a decrease in the potable water supply for the citizens of Tombstone.

Repairs at Gardner Spring would include hand reconstruction of a 6-foot by 10-foot catchment basin and

installation of a 4-inch pipe, starting at the catchment basin and continuing approximately 3000 feet to the existing Miller Spring catchment. A mini-excavator would be used to bury about 3000 feet of pipe along the west side of the Miller Creek Trail. The total area of ground disturbance would be about 3 acres.

* * *

The MRDG will be incorporated in the terms and conditions of the Forest Service special-use authorization that authorizes the repairs.

PROPOSED ACTION

The Forest proposes to authorize the COT to repair the catchment basin at Gardner Spring and the associated water line that runs down canyon to Miller Spring.

* * *

DECISION AND RATIONALE

It is my decision to approve the spring and water line repair described above, contingent upon the COT'S adherence to the conditions of the MRDG mitigation measures as well as road and trail drainage and stabilization specifications.

This Decision Memorandum (DM) documents National Environmental Policy Act (NEPA) compliance for the project. Because the proposed action meets the criteria for categorical exclusion (CE) from further NEPA

review at 36 CFR 220.6(e)(3), *Approval, modification, or continuation of minor special uses of NFS lands, that require less than five contiguous acres of land*, preparation of an environmental assessment or environmental impact statement is not necessary.

CONSIDERATION OF EXTRAORDINARY CIRCUMSTANCES

Using the best available scientific and commercial information, Forest resource specialists confirmed for me that there are no extraordinary circumstances associated with the proposed activities that will individually or cumulatively result in adverse effects to those resources identified in 36 CFR 220.6(b)(I)(i through vii). Their findings are reported below.

i. *Federally listed threatened or endangered species or designated critical habitat, species proposed for Federal listing or proposed critical habitat, or Forest Service sensitive species*

Determination: The Sierra Vista District Biologist determined that the proposed action "may affect but is not likely to adversely affect" the Mexican spotted owl, ocelot, and Chiricahua leopard frog. He also found that the project would have "no effect" on all other listed species.

* * *

Based upon the above determinations, I conclude that there are no extraordinary circumstances that would result in adverse environmental effects and invalidate the applicability of the CE.

PUBLIC INVOLVEMENT

* * *

Because of the emergency public health issue related to the availability of potable water to citizens of the COT, I decided that public involvement in this NEPA review would be limited to the proposed action being listed on the Forest's public website in a Schedule of Proposed Actions and this DM being posted there after I sign it.

FINDINGS REQUIRED BY OTHER LAWS

* * *

Endangered Species Act

The Sierra Vista District Biologist determined that the proposed action "may affect but is not likely to adversely affect" the Mexican spotted owl, ocelot, and Chiricahua leopard frog. He also found that there the project will have "no effect" on all other listed species. Designated critical habitat of the Mexican spotted owl will not be adversely affected.

* * *

National Historic Preservation Act

The Forest Archaeologist determined that no historic properties would be affected by the proposed action. Based on the Forest Service Programmatic Agreement with the Arizona SHPO, this determination requires no further National Historic Preservation Act review and consultation (Project Record, Item 4).

ADMINISTRATIVE REVIEW AND APPEAL

This decision is not subject to administrative review and appeal [36 CFR 215.4(a) and 215.12(f)].

* * *

/s/ [Illegible] Acting for:
JIM UPCHURCH
Forest Supervisor

* * *

[SEAL] **MINIMUM REQUIREMENTS DECISION GUIDE**

WORKSHEETS

* * *

Project Title: ***Miller Peak Wilderness, City of Tombstone Emergency Water Facility Repair*.**

* * *

D. Describe Other Guidance
Is action necessary to conform to direction contained in agency policy, unit and wilderness management plans, species recovery plans, or agreements with tribal, state and local governments or other federal agencies?

* * *

Historical use: **Yes:** ☒ **No:** ☐
Not Applicable: ☐

Explain: The Tombstone water system features currently in the Miller Peak Wilderness were first established in the late 1880s. For over 100 years the springs in Miller Canyon have provided water to Tombstone City. A special use permit was issued in 1948 and superseded by a special use permit in 1962, which is still valid. The use of the water system features was established prior to the establishment of the Miller Peak Wilderness, as was the use of mechanized equipment to maintain said system.

* * *

Step 1 Decision: Is any administrative action *necessary* in wilderness?

Yes: ☒ **No:** ☒
More information needed: ☐

Explain: No action is necessary in the Miller Peak Wilderness to preserve the wilderness character. However, taking no action may threaten the water supply for the citizens of Tombstone. Therefore, actions are warranted to protect life and property values outside of wilderness.

The Forest Service is authorized to allow emergency treatments to prevent an unnatural loss of wilderness resources or to protect life, property, and other resource values outside of wilderness. The loss of the water resources from the wilderness could be devastating to the City of Tombstone. The basis to take action is the threat to life, property, and other resource values outside wilderness.

If action is *necessary*, proceed to Step 2 to determine the *minimum* activity.

Step 2: Determine the *minimum* activity.

* * *

Description of Alternatives

* * *

Alternative # __B__.

Description: Access and repair tombstone water system features through mechanized means. This

would involve use of motorized and mechanized equipment to locate, repair, and maintain water system features, including burying the pipeline along the existing trail

* * *

Effects:

Wilderness Character

* * *

"Undeveloped" The existence of the water system as well as maintaining and repairing the water system features adversely effects [sic] the undeveloped character of the Miller Peak Wilderness as outlined in the Wilderness act of 1964; however, burying the new pipeline and removing the damaged pipe would improve this element of wilderness character.

* * *

"Outstanding opportunities for solitude or a primitive and unconfined type of recreation" Maintaining and repairing the water system features with mechanized means will impact opportunities for solitude or a primitive and unconfined type of recreation in Miller Peak Wilderness to a greater degree than non-mechanized methods; however, conducting the repairs with mechanized means will take less time, so the impact will be of shorter duration.

Heritage and Cultural Resources: Negligible

* * *

Special Provisions; The Wilderness Act of 1964, Federal Policy, and the Forest Service Manual gives deciding officials authority to authorize access and/or privileges to occupants with existing rights that supersede the Wilderness Act, those functioning under a permit, and if it is in the public interest.

Economics and Timing Constraints: The City of Tombstone is limited in both time and money to accomplish the task of repairing the water system features affected by the fire and flooding. There is a need to complete the repairs as quickly as possible to restore water to the City of Tombstone, to minimize the length of time the repair work is occurring in the wilderness, and to complete the repairs prior to Mexican spotted owl nesting season.

Additional Wilderness-specific Comparison Criteria: Burying the pipe along the trail will help to reduce vandalism and visual impacts, as well as provide easier access for future repairs, resulting in a long term benefit to the wilderness resource compared to current conditions.

* * *

Safety Criterion

Documentation: Administrative action is not necessary to maintain or promote wilderness character. The action is necessary for the health and safety of human life for the community of Tombstone. 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. The water from the Miller Peak Wilderness area is used to blend with the well water to meet Water Quality standards for the State of Arizona.

Vandalism to the facilities has occurred periodically over the years. Burying the pipe will provide additional protection to the facilities, and reduce the need for future maintenance.

* * *

Step 2 Decision: What is the *Minimum* Activity?

* * *

Selected alternative:
Alternative B

* * *

***Rationale* for selecting this alternative (including safety criterion, if appropriate):**

- ***Health and safety risks exist to the City of Tombstone if repairs are not completed expeditiously. Water is needed to supplement well water in order to meet drinking water standards and provide water for fire suppression. Mechanized equipment will significantly hasten project completion.***

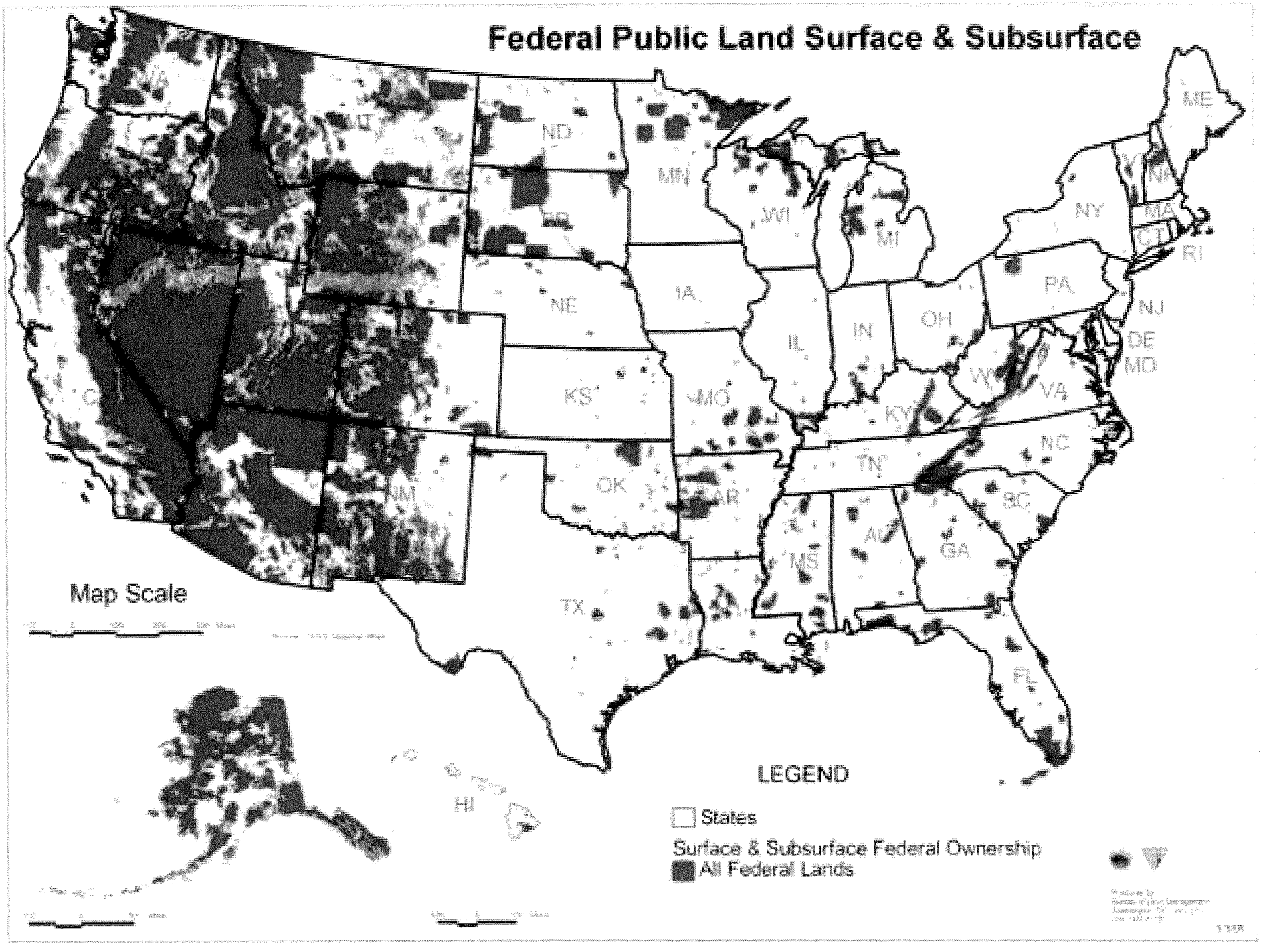
* * *

Check any Wilderness Act Section 4(c) uses approved in this alternative:

☒ mechanical transport
☒ motorized equipment
☒ motor vehicles
☐ motorboats
☐ landing of aircraft
☒ temporary road
☐ structure or installation

* * *

Name	Position	Date
Peggy Wilson	Natural Resource Specialist/Recreation	12/8/11
Kathleen Nelson	Sierra Vista Ranger District Acting District Ranger	12/8/11
Jim Upchurch	Coronado National Forest, Forest Supervisor	12/8/11
Francisco Valenzuela III	Director of Recreation, Heritage, & Wilderness	12/9/11
Corbin Newman	Regional Forest	12/9/2011


Federal Public Land Surface & Subsurface
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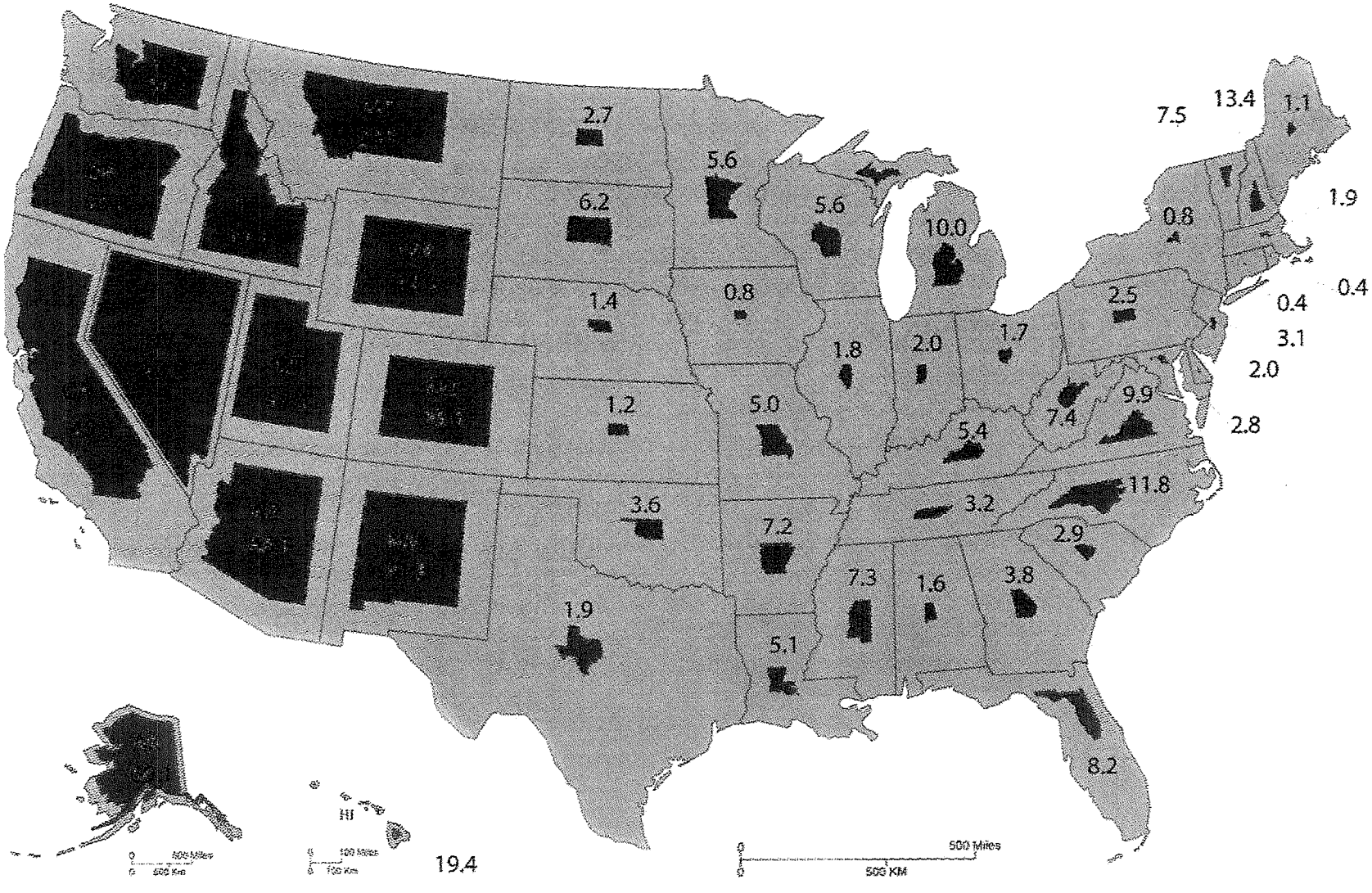
Map Scale
LEGEND
States
Surface & Subsurface Federal Ownership
All Federal Lands

WHO OWNS THE WEST?

Federal Land as a Percentage of Total State Land Area



Data source: U.S. General Services Administrataion, *Federal Real Property Profile 2004,* excludes trust properties.