

**GOLDWATER INSTITUTE
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION**

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

CITY OF TOMBSTONE;

Plaintiff,

v.

UNITED STATES OF AMERICA; U.S.

DEPARTMENT OF AGRICULTURE;

TOM VILSAK, in an official capacity;

TOM TIDWELL, in an official capacity;

and CAL JOYNER, in an official capacity;

Defendants.

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Civil Action No. 11-845-TUC-FRZ

Hon. Frank R. Zapata, presiding judge

CITY OF TOMBSTONE'S

VERIFIED SECOND 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

1 pipeline is under 12 feet of mud, rocks and other debris; while in other places, it is
 2 hanging in mid-air due to the ground being washed out from under it. In response,
 3 Arizona Governor Jan Brewer declared a state of emergency specifically for the City of
 4 Tombstone. The State of Arizona further appropriated emergency funds to assist
 5 Tombstone in repairing its waterlines and reservoirs.
 6

7 2. Despite the manifest emergency facing the desert-parched City of Tombstone,
 8 Defendants are refusing to allow Tombstone to take reasonable emergency action to
 9 fully repair its century-old Huachuca Mountain water infrastructure. Instead, they are
 10 enforcing fealty to an arbitrary, capricious and unlawful interpretation of federal law by
 11 requiring Tombstone to use hand tools and suggesting using horses to restore its water
 12 supply. This conduct violates Tombstone's sovereignty as a political subdivision of the
 13 State of Arizona. But it is not too late to rescue "The Town Too Tough to Die." As
 14 discussed below, the Court should grant Tombstone declaratory and injunctive relief
 15 under the Quiet Title Act, Administrative Procedure Act, and the Tenth Amendment to
 16 the U.S. Constitution.
 17
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 19

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LIST OF EXHIBITS TO SECOND AMENDED VERIFIED COMPLAINT

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Exhibit 2	September 2013 Gannett-Fleming Preliminary Engineering Report
Exhibit 3	Overview Survey of Carr Canyon Pipeline Right of Way and Reservoir Sites
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Exhibit 26	November 2011 Forest Service Decision Memorandum
Exhibit 27	December 5, 2011 Letter from Barnes Seeking Freedom to Fully Restore Water System
Exhibit 28	December 2011 Forest Service MRDG
Exhibit 29	December 2011 Forest Service Decision Memorandum

GENERAL ALLEGATIONS

3. This Court has jurisdiction and the instant district is the proper venue pursuant to 5 U.S.C. §§ 559, 701-706, and 28 U.S.C. §§ 1331, 1346(f), 1361, 1367, 1391(b)(2), 1391(e)(2), 2201, 2202, 2409a.

4. Plaintiff, CITY OF TOMBSTONE (“Tombstone”), is a duly chartered municipality within Cochise County, Arizona.

5. Defendant, UNITED STATES OF AMERICA, is the federal government.

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, CAL JOYNER, in his official capacity as Regional Forester for the Southwestern Region of the U.S. Forest

1 Service, are the administrators of the Coronado National Forest and the Miller Peak
2 Wilderness Area.

3
4 7. The Court is able to accord complete relief among existing parties without
5 impairing or impeding any non-party's interests or leaving any existing party subject to a
6 substantial risk of incurring double, multiple, or otherwise inconsistent obligations
7 because of the interest.

8
9 **OVERVIEW OF PROPERTY RIGHTS CLAIMS**

10 8. Essentially four kinds of property rights are discussed in this Complaint.

11 9. First, as more particularly alleged in paragraphs 29 through 65 below,
12 Tombstone enjoys and holds title to property rights to the beneficial use of water
13 appropriated from the spring sources of running surface watercourses, which are legally
14 described in Exhibit 1 (pp. 32-47), (hereinafter "water rights"). Under Arizona law, the
15 nature of an estate in the beneficial use of water is analogous to that of a fee simple
16 interest, to which the underlying land owner's interests are subordinated.
17

18
19 10. Tombstone's water rights vested and were perfected more than a century ago
20 under Arizona territorial and state law, and were further guaranteed by federal law under
21 U.S. Revised Statutes 2339 and 2340 (enacted under the Congressional Act of July 26,
22 1866, 14 Stat. 253, and the Congressional Act of July 9, 1870, 16 Stat. 218, codified at
23 43 U.S.C. § 661, sec. 9; hereinafter "RS2339 and RS2340"), which protected water
24 rights obtained under local laws, customs and court decisions, as well as by the Organic
25 Administration Act of 1897, 30 Stat. 36, 16 U. S. C. § 481, which allows for the
26 appropriation of water according to local law within reserved forest lands.
27
28

1 11. Second, as more particularly alleged in paragraphs 19 through 29 below, and
2 legally described in Exhibit 1 (pp. 1-31, 46-48), Tombstone enjoys and holds title to
3 various rights of way and parcels as appurtenant or incidental “sticks in the bundle”
4 expressly or impliedly associated with the foregoing water rights (hereinafter “secondary
5 rights”).
6

7 12. Specifically, based on territorial laws and local mining district customs
8 between 1880 and 1908, Tombstone’s secondary rights entail rights to construct,
9 exclusively possess, and maintain reservoirs, dams, canals, ditches, flumes, pipelines,
10 and any and all other necessary water structures and conveyances upon and along
11 surface lands for the conveyance of waters, as well as corresponding rights to possess
12 exclusively approximately 5 acre parcels of surface lands surrounding water diversions
13 for purposes of siting such water infrastructure and maintaining access to and control
14 over spring sources of running watercourses (commonly known as “reservoir sites”),
15 together with access and implied ways of necessity across other surrounding surface
16 lands (Exhibit 1, pp. 1-31, 46-48).
17
18

19 13. As appurtenances or incidents of water rights under territorial law and
20 custom, Tombstone’s foregoing “secondary rights” were confirmed and guaranteed by
21 federal law under RS2339 and RS2340.
22
23

24 14. Thirdly, as more particularly alleged in paragraphs 19 through 29 below,
25 Tombstone enjoys and holds title to property rights consisting of federal grants of right
26 of way for the siting and maintenance of ditches, reservoirs, canals, and pipelines under
27 RS2339 and RS2340, which are legally described in Exhibit 1 (pp. 1-31, 46-48), for
28

1 purposes of diverting and conveying water generated from various headspring sources
2 (hereinafter “federal water rights of way”).
3

4 15. Tombstone’s federal water rights of way are co-extensive with its secondary
5 rights, but they are nevertheless independent federal grants because an owner of federal
6 water rights of way need not be the owner of the water conveyed.

7 16. Tombstone’s federal water rights of way have the legal characteristics of
8 easements in that they entail access to and the use of surface lands for specific purposes
9 without the prerequisite of the grantee locating or recording a writing showing the
10 specific dimensions of such uses on the ground.
11

12 17. Tombstone’s federal water rights of way also have the legal characteristics of
13 limited fee interests in so far as they entail exclusive, permanent occupation and
14 possession of surface lands for improvements of a certain type, specifically, water
15 structures and conveyances. Moreover, like limited fee interests, Tombstone’s federal
16 water rights of way entitle the City to occupy and use surface lands without a connection
17 to a distinct dominant estate; and they are not personal to the initial grantee and can be
18 transferred by written instrument to third parties like any other form of real property.
19

20 18. Fourthly, as more particularly alleged in paragraphs 72 through 78 below, as
21 an adjacent land owner, Tombstone is entitled to access and use public highway rights of
22 way, legally described in Exhibit 1 (pp. 49-74), which were granted to Cochise County
23 under U.S. Revised Statutes 2477 (enacted under the Congressional Act of July 26,
24 1866, 14 Stat. 253, codified at 43 U.S.C. § 661). Like the federal water rights of way
25 granted by RS2339 and RS2340, these public highway rights of way granted by RS2477
26
27
28

1 overlap aspects of Tombstone's secondary rights and have legal characteristics of both
2 limited fee grants and easements.

3
4 **LAWS AND CUSTOMS GOVERNING THE LOCATION,**
5 **VESTING, PERFECTION, AND SCOPE OF**
6 **TOMBSTONE'S RS2339 AND RS2340 RIGHTS**

7 19. Between October 4, 1864 and April 13, 1893, no local statutory law existed in
8 the Arizona Territory governing the manner of vesting and perfection of water rights
9 apart from Ariz. Terr. Session Laws, 1st Legis. Assembly, Act No. 1, Chap. LV, §§ 1- 28
10 (October 4, 1864) (the "Howell Code").

11 20. Between October 4, 1864 and April 13, 1893, the Howell Code was
12 customarily interpreted in Cochise and Pima Counties, including mining districts located
13 therein, as allowing for the vesting and perfection of water rights through prior
14 appropriation and beneficial use alone, without any further notice requirement.

15 21. Between April 13, 1893 and 1912, to vest and perfect water rights, Ariz. Terr.
16 Session Laws, 15th Legis. Assembly, Act No. 86 (April 13, 1893) and Ariz. Terr. Rev.
17 Stat. §§ 73-4168 through 4170, 73-4175 (1901), required the posting of a notice of a
18 claimed water right and related right of way, with details provided in the notice on
19 existing or intended water infrastructure improvements, at the point of diversion and
20 recordation of such notice at the County Recorder of Deeds, together with development
21 of the water source as indicated by the notice within a reasonable period of time.

22 22. Between 1880 and 1916, local laws and customs in Pima and Cochise
23 Counties, and mining districts located therein, including the Hartford and Huachuca
24 Mining Districts, regarded water rights as including secondary rights.

1 23. Specifically, Ariz. Terr. Rev. Stat. § 73-4169 (1901), which codified the
2 acquisition of water rights by prior appropriation, explicitly provided that “for the
3 purpose of making such appropriation of waters as herein specified,” corporations and
4 individuals “shall have the right to construct and maintain reservoirs, dams, canals,
5 ditches, flumes and any and all other necessary water ways.”
6

7 24. Ariz. Terr. Rev. Stat. § 73-4173 (1901) regarded the secondary rights granted
8 by Ariz. Terr. Rev. Stat. § 73-4169 (1901), as interests in *real estate*, not merely
9 incorporeal interests associated with the beneficial use of water, as evidenced by
10 provisions indicating a “lien on such canal, ditch, flume, or line . . . may be foreclosed as
11 *other liens upon real estate* in any court of competent jurisdiction, and *the premises* sold
12 and proceeds applied in payment of said claim.” (emphasis added).
13
14

15 25. Further, in defining the boundaries of the premises encumbered by the
16 secondary right to construct and maintain water structures and conveyances for the
17 purposes of appropriating water under Ariz. Terr. Rev. Stat. § 73-4169 (1901), local
18 customs in Pima and Cochise Counties in the Arizona Territory between 1880 and 1916
19 borrowed from the 1872 Mining Act’s, 30 U.S.C. §§ 22-42, provisions relating to mill
20 sites, specifically U.S. Rev. Stat. § 2337(b), which allowed for staking a claim to parcels
21 of encompassing up to five acres.
22
23

24 26. Local customs in Pima and Cochise Counties, as well as in Hartford and
25 Huachuca Mining Districts, in the Arizona Territory between 1880 and 1916 allowed for
26 the conveyance of water rights and secondary rights by deed.
27
28

1 27. RS2339 and RS2340 established federal recognition of water rights existing
2 under local laws, customs and court decisions, including secondary rights implied
3 thereby, made an unequivocal federal grant of rights of way for ditches, reservoirs,
4 canals, aqueducts and pipeline rights of way in unreserved federal lands, further
5 subordinated land patents granted in such lands to such rights, and remained effective at
6 all relevant times until the Federal Land Policy and Management Act of 1976, 43 U.S.C.
7 § 1761(c)(2)(A), which grandfathered previously vested federal water rights of way
8 under RS2339 and RS2340.
9

11 28. Ariz. Rev. Stat. § 45-171 protects water rights appropriated under the
12 foregoing territorial laws and customs from impairment by water laws enacted since
13 1919 and Ariz. Rev. Stat. § 45-182(B)(3) specifically excludes water rights appropriated
14 under the foregoing territorial laws from the requirement of the filing of a statement of
15 claim under current water laws if those rights had been acquired or validated by court
16 decree or other adjudication.
17

18
19 **TOMBSTONE’S CHAIN OF TITLE**
20 **TO THE SUBJECT RS2339 AND RS2340 RIGHTS**

21 29. As alleged in paragraphs 37 through 65 below, legally described in Exhibit 1
22 (pp. 1-48), depicted in the September 2013 Gannett-Fleming engineering report entitled,
23 “Emergency Repair of Canyon Water Supply Facilities Preliminary Engineering Report”
24 (Figures III.1 and III.2, Appendix 1), a genuine copy of which is attached hereto as
25 Exhibit 2, and further located in the surveys marked Exhibits 3 through 14, which are
26 genuine copies of the originals to which they relate, Tombstone presently holds title
27
28

1 under RS2339 and RS2340 and Arizona law to: (a) rights to the beneficial use of water,
2 with respect to all water rising and flowing from at least 24 spring sources of running
3 surface watercourses (“headsprings”) in Miller and Carr Canyons and the adjacent
4 Marshall Canyon and “Divide” in the Huachuca Mountains; (b) secondary rights implied
5 by the foregoing water rights consisting of the right to exclusively possess up to five
6 acre reservoir sites surrounding the original location of said headsprings for purposes of
7 siting, constructing, accessing and maintaining ditches, reservoirs, canals and pipelines
8 for purposes of diverting and transporting water; and (c) corresponding unequivocal
9 federal water rights of way for the siting and maintenance of water structures and
10 conveyances, including ditches, catchments, reservoirs, canals, flumes, aqueducts, and
11 pipelines with respect to all of the foregoing appropriations of water. The foregoing
12 property rights are hereinafter collectively referenced as the “subject RS2339 and
13 RS2340 rights.”

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18 30. At all relevant times, as legally described in Exhibit 1 (pp. 1-48), depicted in
19 Exhibit 2 (Figures III.1, III.2, Appendix 1), and further located in the surveys marked
20 Exhibits 3 through 14, Tombstone’s federal water rights of way and secondary rights
21 have been located or are reasonably locatable on the ground sufficient for the purposes
22 of diverting water, as well as restoring water structures and conveyances under generally
23 accepted engineering principles.

24
25 31. Tombstone’s unbroken chain of title to the subject RS2339 and RS2340 rights
26 begins with the acquisition, diversion, development and beneficial use of all waters
27 rising and flowing in Miller and Carr Canyons between 1881 and 1888 through the
28

1 construction of dams, reservoirs, and a 26-30 mile long pipeline from Tombstone to the
2 Huachuca Mountains by the Huachuca Water Company, which was incorporated in the
3 State of Indiana in 1881 (hereafter referenced as the “1881 Indiana Huachuca Water
4 Company”), which was acting as an authorized agent of Tombstone under a duly
5 authorized franchise ordinance enacted by Tombstone to furnish the City and its
6 residents with water for public consumption and fire suppression.
7

8
9 32. Tombstone’s franchisee-agent and predecessor in interest, the 1881 Indiana
10 Huachuca Water Company, posted notices of appropriation regarding the diversion,
11 development and use of the beneficial use of 24 headsprings in Miller, Carr, Marshall
12 Canyons, and in the “Divide” between Miller and Carr Canyons, which feed the streams
13 and creeks located in the foregoing canyons, between 1901 and 1908.
14

15 33. On June 9, 1908, having jurisdiction over the subject matter and the parties,
16 the District Court of the Second Judicial District of the Territory of Arizona in and for
17 the County of Cochise entered a final judgment of foreclosure in favor of A.E. Davis and
18 against the 1881 Indiana Huachuca Water Company in case docket 5295, which had the
19 effect of imposing a judgment lien on the subject RS2339 and RS2340 rights barring
20 further transfer of the same except by foreclosure sale or redemption; and which
21 ultimately resulted in the judicially-confirmed foreclosure sale and transfer of the subject
22 RS2339 and RS2340 rights from the 1881 Indiana Huachuca Water Company to A.E.
23 Davis by the court-appointed Special Commissioner on May 14, 1909, which was duly
24 and concurrently recorded with the Cochise County Recorder, Arizona Territory.
25
26
27
28

1 34. On September 30, 1912, Tombstone's franchisee-agent and predecessor in
2 interest, A.E. Davis and his wife, then conveyed by deed and bill of sale the subject
3 RS2339 and RS2340 rights to a new Huachuca Water Company (an Arizona
4 Corporation incorporated on September 27, 1912, which is hereinafter referenced as the
5 "1912 Arizona Huachuca Water Company"). The deed and bill of sale was duly and
6 concurrently recorded with the Cochise County Recorder, Arizona Territory.
7

8 35. On January 10, 1938, Tombstone's franchisee-agent and predecessor in
9 interest, the 1912 Arizona Huachuca Water Company, in instruments which were duly
10 and concurrently recorded in Cochise County, Arizona, subsequently conveyed by deed
11 and bill of sale the subject RS2339 and RS2340 rights to its successor Huachuca Water
12 Company (an Arizona Corporation incorporated in 1937, which is hereinafter referenced
13 as the "1937 Arizona Huachuca Water Company"). The Arizona Corporation
14 Commission interposed no objection after being fully notified in contemporaneous
15 correspondence that the 1937 Huachuca Water Company was a mere continuation of the
16 1912 Arizona Huachuca Water Company created upon the expiration of the franchise
17 agreement with Tombstone.
18

19 36. Finally, on April 14, 1947, in instruments that were duly and concurrently
20 recorded in Cochise County, Arizona, the 1937 Arizona Huachuca Water Company
21 conveyed by deed and bill of sale the subject RS2339 and RS2340 rights to Tombstone.
22 The conveyance was previously approved by the final opinion and order of the Arizona
23 Corporation Commission on September 10, 1942 under Decision No. 13863, docket
24
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1 8758-E-885 and Tombstone's purchase of the subject RS2339 and RS2340 rights were
2 previously fully authorized and financed by appropriate city council action.
3

4 **OVERVIEW OF THE LOCATION, VESTING, PERFECTION, SCOPE, AND**
5 **CONTINUOUS USE OF TOMBSTONE'S RS2339 AND RS2340 RIGHTS**

6 37. Between 1881 and 1890, the 1881 Indiana Huachuca Water Company
7 appropriated, diverted, developed and delivered to the City and residents of Tombstone
8 all water rising and flowing in Miller and Carr Canyons, and their respective watersheds,
9 in the Huachuca Mountains, Arizona, which included running surface watercourses fed
10 by at least 24 springs located in Miller Canyon, Carr Canyon, in Marshall Canyon and
11 the "Divide" between Miller and Carr, utilizing numerous catchments, flumes (elongated
12 natural or artificial ditches similar to washes), dams, reservoirs and an approximately 26
13 to 30 mile pipeline, consisting of two main branches and numerous auxiliary branches,
14 all within the scope of the subject RS2339 and RS2340 rights.
15
16

17 38. Thereafter, subject to periodic natural disasters afflicting the Huachuca
18 Mountains and temporary periods of financial incapacity, Tombstone, its residents, and
19 all of its predecessors in interest, including the 1937 Arizona Huachuca Water Company,
20 the 1912 Arizona Huachuca Water Company, A.E. Davis, and the 1881 Indiana
21 Huachuca Water company continuously used and maintained all or substantially all of
22 the water, water structures and water conveyances encompassed by the subject RS2339
23 and RS2340 rights until the Monument Fire disaster of 2011 and thereafter, where
24 restoration has been allowed by the Forest Service, to this date.
25
26
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28

1 39. As more particularly alleged in paragraphs 47 through 65 below, Tombstone's
2 franchisee-agents and predecessors in interest acquired, located, vested, perfected and
3 exercised the subject RS2339 and RS2340 rights fully in accord with local laws and
4 customs existing between 1881 and 1916.
5

6 40. In particular, with respect to the subject RS2339 and RS2340 rights, between
7 1881 and 1890, the 1881 Indiana Huachuca Water Company complied with pre-1893
8 local customs, rooted in local laws, that provided for the acquisition, vesting and
9 perfection of water rights and appurtenant easements through "location" of the spring
10 headwaters of canyon watercourses and direct "beneficial use," which required diversion
11 and development through a dam, flume or catchment to allow use of the water.
12
13

14 41. Later, out of an abundance of caution, between 1901 and 1908, the 1881
15 Indiana Huachuca Water Company complied with Ariz. Terr. Session Laws, 15th Legis.
16 Assembly, Act No. 86 (April 13, 1893) and Ariz. Terr. Rev. Stat. §§ 73-4168 through
17 4170, 73-4175 (1901), which supplemented earlier local laws and customs by also
18 requiring the subject RS2339 and RS2340 rights to be vested and perfected by placing a
19 monument including a notice of appropriation describing the water source in its vicinity
20 and recording a duplicate with the Office of the County Recorder of Deeds.
21
22

23 42. The acquisition and vesting of the subject RS2339 and RS2340 rights were
24 recognized, decreed and adjudicated in favor of Tombstone's franchisee-agents and
25 predecessors in interest prior to 1919 by Arizona territorial and state courts having
26 jurisdiction over the subject matter and the parties. Accordingly, the water rights
27 associated with the subject RS2339 and RS2340 are considered "[r]ights acquired or
28

1 validated by . . . court decree or other adjudication” as contemplated by the statement of
2 claim filing requirement exemption set out in Ariz. Rev. Stat. § 45-182B.3, and also
3 within the scope of Ariz. Rev. Stat. § 45-171, which prevents current water law from
4 impairing “vested rights to the use of water” or affecting “relative priorities to the use of
5 water determined by a judgment or decree of a court.”
6

7 43. With respect to Miller Spring No. 1 through Storrs Spring No. 21, as
8 identified in the legal descriptions, engineering report and surveys attached as Exhibits 1
9 through 14, the corresponding portion of the subject RS2339 and RS2340 rights was
10 vested and duly perfected by Tombstone’s franchisee-agents and predecessors in interest
11 not later than June 23, 1905 (upon information and belief, between 1880 and 1890).
12

13 44. With respect to Quartz Spring No. 22 and Hoagland Spring No. 23, as
14 identified in the legal descriptions, engineering report and surveys attached as Exhibits
15 1, 2, 11, and 13, the corresponding portion of the subject RS2339 and RS2340 rights was
16 vested and duly perfected by Tombstone’s franchisee-agents and predecessors no later
17 than February 15, 1906.
18

19 45. With respect to Gardner Springs No. 24, as identified in the legal description,
20 engineering report and surveys attached as Exhibits 1, 2 and 13, the corresponding
21 portion of the subject RS2339 and RS2340 rights was vested and duly perfected by
22 Tombstone’s franchisee-agents and predecessors in interest no later than October 6,
23 1916 (upon information and belief between 1908 and 1909).
24

25 46. With respect to Miller Spring No. 1 through Gardner Spring No. 24, as
26 depicted in the legal descriptions, engineering report and surveys attached as Exhibits 1
27
28

1 through 14, the portion of the subject RS2339 and RS2340 rights evidenced by notices
2 of appropriation consistently asserted a concomitant secondary right to construct,
3 maintain, and occupy ground for reservoirs, dams, canals, ditches, flumes and any and
4 all other necessary water ways; and also to exclusively possess up to 5 acre reservoir
5 sites of surface lands surrounding each water diversion “as necessary ground for the use
6 and enjoyment of the water.”
7

8
9 **SPECIFIC FACTS CONCERNING THE LOCATION, VESTING,**
10 **PERFECTION, AND SCOPE OF**
11 **TOMBSTONE’S RS2339 AND RS2340 RIGHTS**

12 47. On July 22, 1881, James McCoy, one of the shareholders of the 1881 Indiana
13 Huachuca Water Company, granted the 1881 Indiana Huachuca Water Company rights
14 to all water “rising and flowing” in Miller and Carr Canyons, various five acre existing
15 mill sites in the foregoing canyons, “the road leading into and through said Miller Canon
16 [global: sic] and the right of way belonging to said road,” the “right of way belonging to
17 the line of water pipe, projected . . . from said Miller and Dublin [also known as Carr]
18 Canon [global: sic] to the City of Tombstone, Cochise County, Territory of Arizona,”
19 and “all appurtenances and privileges thereto incident” by a deed making reference to
20 previous deeds of real estate recorded in the Pima County Recorder of Deeds Office, in
21 book 7, pages 135-37, book 9, pages 795-97, book 10, pages 135-37, in the Cochise
22 County Recorder of Deeds Office, in book 1, pages 468 et seq., as well as to an
23 unrecorded deed from John W. Campbell dated July 8, 1881.
24

25
26 48. James McCoy, in turn, previously received:
27
28

1 (a) a deed on July 8, 1881 from John W. Campbell conveying a five acre mill site
2 as well as “all the water rising and flowing in Miller Canon” which Campbell acquired
3 “by purchase or actual possession” in addition to “all his right, title and interest to the
4 road leading into and through said canon and the right of way thereof”;

6 (b) two deeds on February 8, 1881 and June 28, 1881, respectively, from
7 Benjamin Rinehart and David C. Field for a mill site, “all water rising and flowing on
8 and through the Mill Site which was located . . . in Miller Canon” and all “right, title and
9 interest in or to any other water rising or flowing in said Miller Canon;
10

11 (c) a deed on February 25, 1881 from Richard Gird for all “right, title and interest
12 in and to “all the water flowing” in Dublin (also known as Carr) Canon; and
13

14 (d) a deed on February 9, 1881 from Levi J. Gird for “all of the right, title and
15 interest . . . to a certain spring of water [Gird Spring No. 9 1/2] . . . located by said L.J.
16 Gird on the 31st Day of December 1880” in “Miller Canon . . . for the purpose of
17 furnishing water to the town of Tombstone, and that said spring flows about 30,000
18 gallons per day.”
19

20 49. Subsequently, on September 9, 1881, a franchise ordinance promulgated by
21 the City of Tombstone granted the 1881 Indiana Huachuca Water Company a franchise
22 with Tombstone to supply water for potable and fire suppression purposes.
23

24 50. In consequence of said franchise ordinance and corresponding diversion of
25 water, both the City of Tombstone and the 1881 Indiana Huachuca Water Company
26 commenced their beneficial use of water originating from the headsprings encompassed
27 by the subject RS2339 and RS2340 rights, such use being sufficient to appropriate and
28

1 vest corresponding water rights in both Tombstone and the 1881 Indiana Huachuca
2 Water Company under local laws and customs in the Arizona Territory.

3
4 51. Then, on July 14, 1882, the 1881 Indiana Huachuca Water Company was
5 granted rights to water rising on a mining claim in Miller Canyon as well as rights to a
6 certain spring source of that water within the mining claim by a deed from E.H. Storrs.
7 E.H. Storrs previously was granted the foregoing rights by a deed from Jefferson
8 Lindsey on July 14, 1882.
9

10 52. On February 20, 1883, the 1881 Indiana Huachuca Water Company was
11 granted rights to all “right, title and interest in and to the water rising and flowing in
12 ‘Maple’ otherwise known or called ‘Miller Canon’” by a deed from James McCoy.
13

14 53. James McCoy, in turn, previously received:

15 (a) a deed on March 27, 1882 from Henry H. Hollenstein of “Maple Canon” (also
16 known as Miller Canyon) of “all his right, title and interest in the water rising and
17 flowing in Maple otherwise called Miller canon;” and
18

19 (b) a deed on September 6, 1881 from J. Lindsey and O. D. Merrill for a five acre
20 mill site and “all the water rising and flowing on said mill site” which were located on
21 the “twentieth day of May 1880” and recorded in the Office of the Recorder of Cochise
22 County in book 1 of records of mill sites, pages 94-95.
23

24 54. Thereafter, on August 3, 1886, the 1881 Indiana Huachuca Water Company
25 was granted rights to a mill site in Miller Canyon, in the Huachuca Mountains, with all
26 appurtenant water rights by a deed from H.H. Kimball.
27
28

1 55. Later, with respect to each of the following headsprings, the 1881 Indiana
2 Huachuca Water Company, both as an independent business enterprise and as franchisee
3 of Tombstone, through General Agent William H. Brearley, posted a notice of
4 appropriation at the place of diversion by placing a monument and leaving a duplicate
5 notice in a can in the monument, and contemporaneously recorded notice of the same in
6 the Cochise County Recorder's Office under Ariz. Terr. Session Laws, 15th Legis.
7 Assembly, Act No. 86 (April 13, 1893) or Ariz. Terr. Rev. Stat. §§ 73-4168 through
8 4170, 73-4175 (1901), as follows:
9
10

11 (a) with respect to McCoy Group Spring Nos. 2, 3 and 4, the notice attesting to
12 prior location of the site and appropriation of waters on 1883 and claiming the beneficial
13 use of all waters produced by said spring was posted on July 27, 1901 and recorded by
14 the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 416-
15 17;
16

17 (b) with respect to Marshall Spring No. 5, the notice attesting to prior location of
18 the site and appropriation of waters on 1888 and claiming the beneficial use of all waters
19 produced by said spring was posted on July 28, 1901 and recorded by the Cochise
20 County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 417-18;
21

22 (c) with respect to Bench Spring No. 6, the notice attesting to prior location of the
23 site and appropriation of waters on 1888 and claiming the beneficial use of all waters
24 produced by said spring was posted on July 28, 1901 and recorded by the Cochise
25 County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 419-20;
26
27
28

1 (d) with respect to Lower Auxiliary Spring No. 9, Middle Auxiliary Spring No. 8
2 and Upper Spring No. 7 of the Maple Group, the notice attesting to prior location of the
3 site and appropriation of waters on 1888 and claiming the beneficial use of all waters
4 produced by said springs was posted on July 28, 1901 and recorded by the Cochise
5 County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 420-22;
6

7 (e) with respect to Lower Spring No. 10, the notice attesting to prior location of
8 the site and appropriation of waters on 1890 and claiming the beneficial use of all waters
9 produced by said spring was posted on July 28, 1901 and recorded by the Cochise
10 County Recorder's Office on August 3, 1901 at Misc. Book 5, pages 422-23;
11

12 (f) with respect to Clark Spring No. 11 and Brearley (Auxiliary) Spring No. 12,
13 the notice attesting to prior location of the site and appropriation of waters on 1886 and
14 claiming the beneficial use of all waters produced by said springs was posted on July 27,
15 1901 and recorded by the Cochise County Recorder's Office on August 30, 1901 at
16 Misc. Book 5, pages 424-25;
17

18 (g) with respect to Head (Carr) Spring No. 13, the notice attesting to prior
19 location of the site and appropriation of waters on 1888 and claiming the beneficial use
20 of all waters produced by said spring was posted on July 29, 1901 and recorded by the
21 Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 425-27;
22

23 (h) with respect to Cabin Spring No. 14 and Cabin Auxiliary Spring No. 15, the
24 notice attesting to prior location of the site and appropriation of waters on 1888 and
25 claiming the beneficial use of all waters produced by said springs was posted on July 29,
26
27
28

1 1901 and recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc.
2 Book 5, pages 427-28;

3 (i) with respect to Rock Spring No. 16 and Rock Auxiliary Spring No. 17, the
4 notice attesting to prior location of the site and appropriation of waters on 1888 and
5 claiming the beneficial use of all waters produced by said springs was posted on July 29,
6 1901 and recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc.
7 Book 5, pages 428-30;

8 (j) with respect to Smith Spring No. 18, the notice attesting to prior location of
9 the site and appropriation of waters on 1888 and claiming the beneficial use of all waters
10 produced by said spring was posted on July 29, 1901 and recorded by the Cochise
11 County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 430-31;

12 (k) with respect to Porter Spring No. 19, the notice attesting to the diversion and
13 beneficial use of all waters produced by said spring was posted on July 29, 1901 and
14 recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5,
15 pages 431-32;

16 (l) with respect to O'Brien Spring No. 20, the notice attesting to prior location of
17 the site and appropriation of waters on 1888 and claiming the beneficial use of all waters
18 produced by said spring was posted on July 29, 1901 and recorded by the Cochise
19 County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 433-34;

20 (m) with respect to Storrs Spring No. 21, the notice attesting to prior location of
21 the site and appropriation of waters on 1888 and claiming the beneficial use of all waters
22
23
24
25
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1 produced by said spring was posted on July 29, 1901 and recorded by the Cochise
2 County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 434-35;

3 (n) with respect to Quartz Spring No. 22, the notice claiming the beneficial use of
4 all waters produced by said spring was posted on September 7, 1901 and recorded by the
5 Cochise County Recorder's Office on September 10, 1901 at Misc. Book 5, pages 463-
6 64; and
7

8 (o) with respect to Miller Spring No. 1 (also known as "Main Spring No. 1"), the
9 notice claiming the beneficial use of all waters produced by said spring was posted on
10 June 23, 1905 and recorded by the Cochise County Recorder's Office on June 24, 1905
11 at Misc. Book 11, pages 263-64.
12

13 56. The headsprings located at Miller Spring No. 1 through Storrs Spring No. 21,
14 together with specific reference to the reservoir at Gird Spring No. 9 ½, were further
15 located by the recordation of a hand drawn map of Miller, Marshall and Carr Canyons at
16 the Cochise County Recorder's Office on August 2, 1901 at Book 000, page 13.
17

18 57. Subsequently, on or about June 23, 1905, with respect to Hoagland Spring
19 No. 23 "situated in the divide between Marshall and Carr Canyon" on or about June 23,
20 1905, the 1881 Indiana Huachuca Water Company, as an independent business
21 enterprise and as franchisee of Tombstone, through General Agent A.H. Gardner posted
22 notice of appropriation at the place of diversion and contemporaneously recorded the
23 same in the Cochise County Recorder's Office under Ariz. Terr. Rev. Stat. §§ 73-4168
24 through 4170, 73-4175 (1901). The notice attested to the intended beneficial use of all
25
26
27
28

1 waters produced by said spring and was recorded by the Cochise County Recorder's
2 Office on June 24, 1905 at Misc. Book 11, pages 261-62.

3
4 58. As evidenced by the February 15, 1906 Deposition Transcript of William H.
5 Brearley filed before the District Court of the Second Judicial Circuit of the Territory of
6 Arizona in and for the County of Cochise, in City of Tombstone v. Huachuca Water
7 Company, all of the headsprings encompassed by the subject RS2339 and RS2340
8 rights, with the sole exceptions of any spring located at Gird Spring No. 9 ½ (upon
9 information and belief, solely a reservoir was located at Gird Spring No. 9 ½ as of 1906)
10 and Gardner Spring No. 24, were, in fact, diverted, developed and appropriated with the
11 posting of the requisite notices, all in accordance with then-governing local laws and
12 customs, between May 1, 1901 and June 23, 1905, with the water from these various
13 sources "used for the purpose of supplying the customers of the Company in the City of
14 Tombstone and at the various mines and ranches outside of that City and in the
15 neighborhood thereof."

16
17
18
19 59. Then, on or about April 27, 1908, the 1881 Indiana Huachuca Water
20 Company, as franchisee of Tombstone, through its President A.E. Davis posted notice of
21 appropriation at the place of diversion for Gardner Spring No. 24 in Miller Canyon and
22 recorded a duplicate of the same in the Cochise County Recorder's Office on April 29,
23 1908 at Misc. Book 16, pages 247-49. The notice attested to the intended appropriation
24 and beneficial use of all waters produced by said spring. Subsequent special use
25 permitting from the Forest Service issued on March 3, 1909, and a certified survey of
26 water structures and conveyances claimed by the 1912 Huachuca Water Company dated
27
28

1 October 6, 1916, show that contemplated diversions and pipeline rights of way servicing
2 Gardner Spring No. 24 were constructed as early as April 29, 1908 and no later than
3 October 6, 1916.
4

5 60. The adequacy of the foregoing actions by Tombstone's franchisee-agents and
6 predecessors-in-interest to allow for the lawful location, vesting and perfection of the
7 subject RS2339 and RS2340 rights on the ground under governing state and territorial
8 law is further evidenced by the fact that, on March 8, 1913, the U.S. Department of the
9 Interior accepted a surveyed map showing the Huachuca Water Company's main water
10 structures, pipelines and related rights of way, as well as certain of the foregoing water
11 sources, and issued a permit based on the same under the Act of February 15, 1901, 31
12 Stat. 790, to the 1912 Arizona Huachuca Water Company.
13
14

15 61. Correspondence dated December 11, 1912 from the U.S. Geological Survey
16 preceding the approval of the foregoing 1913 Department of Interior permit shows that
17 the U.S. Department of the Interior through the office of the U.S. Geological Survey
18 considered the foregoing actions by Tombstone's franchisee-agents and predecessors-in-
19 interest as adequate to establish the subject RS2339 and RS2340 rights, because the
20 indicated enclosures included evidence of the Huachuca Water Company's water rights
21 and the letter specifically reported, "The pipeline, which is seven inches in diameter, is
22 utilized to conduct the water collected from several springs located in a national forest to
23 the city of Tombstone where it is utilized for domestic purposes."
24
25

26 62. Further, the adequacy of the foregoing actions by Tombstone's franchisee-
27 agents and predecessors-in-interest to establish the subject RS2339 and RS2340 rights is
28

1 evidenced by the fact that on November 15, 1915, the Superior Court of the State of
2 Arizona in and for the County of Cochise, having jurisdiction over the parties and
3 subject matter, entered a final judgment in favor of the 1912 Arizona Huachuca Water
4 Company and against J.E. Tomblinson under case docket 1090.

6 63. In the aforesaid November 15, 1915 judgment, the Court “ordered, adjudged
7 and decreed” that the 1912 Arizona Huachuca Water Company was entitled to
8 possession of: “all those certain lands and premises . . . in that certain tract of land,
9 described as follows, E $\frac{1}{2}$ of W $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 23, Township 23
10 S., Range 20 E. Gila & Salt River Basin Meridian, in so far as it lies, and that said land
11 and premises lieing [sic] between the main pipe line of the said Plaintiff and the lowest
12 bed of the canyon through which said pipeline runs, said lands and premises lying to the
13 South and West of said pipe line and the right-of-way for said pipe line, and the land on
14 which said pipe line is situated, said lands and premises extending from the spring and
15 tap, highest up said canyon, to the lowest tap and opening into the main pipe line of the
16 Plaintiff [1912 Arizona Huachuca Water Company].”

20 64. In the November 15, 1915 judgment, the Court also “ordered, adjudged and
21 decreed” that the 1912 Arizona Huachuca Water Company is entitled to the “entire use
22 and possession of those certain springs on said [sic] McCoy Reservoir site, numbered 2,
23 3 and 4, and situate[d] on the lands and premises described in the pleadings, and all of
24 the water flowing from said springs numbered 2, 3, and 4, situate[d] on said McCoy
25 Springs Reservoir site.”
26
27
28

1 65. Similarly, on January 27, 1917, the Superior Court of the State of Arizona in
2 and for the County of Cochise, having jurisdiction over the parties and subject matter,
3 entered a final judgment adjudicating another portion of the subject RS2339 and RS2340
4 rights in favor of the 1912 Arizona Huachuca Water Company and against Joseph S.
5 Parmerlee based on a jury verdict in case docket 1374. The case was fully and fairly
6 litigated through jury trial between the 1912 Arizona Huachuca Water Company and
7 Joseph S. Parmerlee. The Court entered a judgment finding:
8

9
10 Plaintiff [1912 Arizona Huachuca Water Company] is entitled to the
11 possession [of]. . . that certain spring known as Clark Spring No. 11,
12 situated on the divide between Miller and Carr Canyon, in the Huachuca
13 Mountains, in the County of Cochise, State of Arizona, and also, the right
14 of way for said pipeline leading from said Clark Spring No. 11 to the main
15 pipe line of the plaintiff running to the City of Tombstone, and further for
16 such lands surrounding said Clark Spring No. 11, as are necessary to the
17 beneficial use of said springs, and it is further adjudged that plaintiff is
18 entitled to, and do have, possession of those certain lands and premises,
19 springs and water rights, and waters, as above described in the complaint,
20 known as Clark Spring No. 11.

21
22 **SPECIFIC FACTS EVIDENCING THE CONTINUOUS**
23 **USE OF THE SUBJECT RS2339 AND RS2340 RIGHTS**
24

25 66. As reported in the Tombstone Epitaph, a newspaper with a wide local
26 distribution, on July 15, 1882, the portion of the subject RS2339 and RS2340 rights
27 consisting of a pipeline into Miller Canyon with a main supply dam had been erected in
28 Miller's Canyon by July 15, 1882.

 67. As of July 15, 1882, as reported in the Tombstone Epitaph, 300,000 gallons of
water would flow per day (approximately 208 gallons per minute) with a maximum
daily flow of 800,000 gallons (approximately 555 gallons per minute) "from the various

1 feeders” in Miller Canyon into the foregoing pipeline portion of the subject RS2339 and
2 RS2340 rights.

3
4 68. By April 13, 1890, as evidenced by the opinion letter of prestigious territorial
5 attorney Col. William Herring written to the Arizona Territorial Legislature,
6 Tombstone’s municipal water system consisting of a pipeline branching into Miller and
7 Carr Canyons, with various auxiliary lines and reservoirs, which is encompassed by the
8 subject RS2339 and RS2340 rights, was substantially complete and in continuous use.

9
10 69. All or substantially all of the pipeline and auxiliary lines, catchments,
11 reservoirs and diversions which are encompassed by the subject RS2339 and RS2340
12 rights remained in continuous use from as early as 1882, but not later than 1916, until
13 the Monument Fire of 2011, as evidenced by:

14
15 (a) official Cochise County maps generated on or about 1889, 1914, and 1916
16 showing substantially all of the foregoing water system continuously on the ground in or
17 near their historical location;

18
19 (b) General Land Office surveys and related field notes generated between 1901
20 and 1906, as well as U.S. Geological Survey maps published periodically beginning in
21 the 1920s to the present date;

22
23 (c) the aforesaid approved 1913 permit from the Department of Interior based on
24 several surveys of the main branches and reservoirs of the pipeline encompassed by the
25 subject RS2339 and RS2340 rights generated between 1908 and 1913;

1 (d) Forest Service official correspondence and letter determinations dated January
2 12, 1908, April 6, 1908, September 22, 1908, April 4, 1916, and December 29, 1916,
3 expressly recognizing the subject RS2339 and RS2340 rights;
4

5 (e) correspondence dated April 27, 1925 from the Department of Interior to the
6 1912 Huachuca Water Company acknowledging the completed construction of the main
7 branches and reservoirs of the pipeline encompassed by the subject RS2339 and RS2340
8 rights;
9

10 (f) numerous Forest Service special use permits for the main pipelines and
11 headsprings encompassed by the subject RS2339 and RS2340 rights, and related
12 correspondence with Tombstone or its predecessors in interest;
13

14 (g) numerous Forest Service special use permit inspection reports from 1909 until
15 the present date, which do not report any abandonment or maintenance problems with
16 regard to the municipal water system infrastructure encompassed by the foregoing
17 special use permits and the subject RS2339 and RS2340 rights;
18

19 (h) numerous engineering reports produced for Tombstone between 1949 and the
20 present date describing the output of water and the consumption of water from
21 Tombstone's Huachuca Mountain system;
22

23 (i) a letter finding from the Bureau of Land Management dated December 20,
24 1955, stating "this pipeline and water system was set up in or about the year 1881;"
25

26 (j) a Forest Service permit for an access road to Clark Spring No. 11 dated June
27 16, 1967 and eventual affirmative grant of easement for access road to Clark Spring No.
28 11 on September 3, 1991;

1 (k) following a forest fire in 1977, an emergency grant from the State of Arizona
2 (via Governor Raul Castro) in the amount of \$50,000 was made to repair and restore
3 Tombstone's Huachuca Mountain water system, which repair work was approved by
4 Defendants;
5

6 (l) the filing of sworn statements of claim and claimant for Miller Spring No. 1,
7 Rock Spring No. 16, Clark Spring No. 11, Carr Spring No. 13 (global: also known as
8 "Head Spring No. 13") and Gardner Spring No. 24 in April and May of 1979 with the
9 Arizona State Land Department, the amendment of the foregoing statements of claim
10 with the designation of two additional points of diversion on September 28, 1990, and
11 the further amendment of the foregoing statements of claim with the designation of all
12 sources and diversions identified in the foregoing notices of appropriation between April
13 and June, 2012, with the Arizona Department of Water Resources;
14

15 (m) in correspondence dated March 19, 1990, Defendants declared to Tombstone,
16 "[t]he Coronado National Forest recognizes the prior uses of water from Miller Canyon
17 by the City of Tombstone. We do not intend to conflict with prior water rights holders in
18 Miller Canyon;"
19

20 (n) in 1993, another devastating fire in the Huachuca Mountains damaged the
21 Tombstone waterline. Upon information and belief, Defendants allowed substantial
22 repairs to be made to the Gardner, Miller and Carr Spring sites, including repairs and re-
23 grading of hundreds of feet of roadway upon and along the public highway right of way
24 easements in Miller and Carr Canyons.
25
26
27
28

1 (o) Forest Service archeological and cultural resource inspection reports and
2 findings during the 1980s, 1990s and 2000s, which evidence the location of water
3 structures and conveyances on the ground corresponding to those encompassed by the
4 subject RS2339 and RS2340 rights, including a report by Forest Service employee
5 William B. Gillespie dated October 2002 and entitled “The Huachuca Water Company
6 Pipeline;”
7

8 (p) Sworn record testimony from past and current Tombstone employees and
9 contractors attesting to the use of motorized vehicles and mechanized equipment
10 between 1969 and 2005 to maintain water structures, water conveyances, and roads
11 encompassed by the subject RS2339 and RS2340 rights; and
12

13 (q) other facts to be stated upon discovery.
14

15 70. On December 4, 1997, Tombstone entered into a settlement agreement with
16 several third parties to compromise pending litigation initiated against it in the Superior
17 Court for the State of Arizona, Cochise County, entitled, “E.W. Henderson, et al, v. City
18 of Tombstone,” under case docket CV 95-000294. The aforesaid litigation was filed
19 against Tombstone on March 2, 1995 to prevent the closure of the Huachuca Mountain
20 water system on September 1, 1995. The settlement agreement specifically provides in
21 relevant part:
22

23
24 The City shall have a duty to reasonably maintain the Tombstone
25 Aqueduct so long as the City owns the Tombstone Aqueduct . . . including
26 but not limited to: (1) properly maintaining and operating the Tombstone
27 Aqueduct in accordance with established engineering standards . . . (4)
28 promptly removing any undue accumulation of debris, garbage or offal;
and (5) removing obstructions which significantly impede the Tombstone
Aqueduct’s water carrying capacity. In the event of any interruption in the

1 delivery of water to Plaintiffs as a result of an act of God or unavoidable
2 accident, the City shall remedy the interruption as expeditiously as is
3 reasonably possible . . . In the event of any interruption in the delivery of
4 non-potable water to the Plaintiffs as a result of a breakdown or
5 malfunction of the Tombstone Aqueduct, including the collection works at
6 the Springs, the City shall repair or replace the Tombstone Aqueduct or the
7 collection works as expeditiously as is reasonably possible . . .

8 71. Neither Tombstone nor any of its predecessors in interest have ever
9 abandoned the subject RS2339 and RS2340 rights.

10 **OVERVIEW OF LAW GOVERNING**
11 **RS2477 PUBLIC HIGHWAY RIGHTS OF WAY IN ARIZONA**

12 72. RS2477 established federal recognition of public highways established by
13 long continuous public use and maintenance and this law remained effective until the
14 Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(c)(2)(A), which
15 grandfathered previously vested rights under RS2477.

16 73. Until 1901, no local statutory law existed in the Arizona Territory governing
17 the establishment of public highways; instead, by custom and local authority, county
18 boards of supervisors would declare public roads based on their inherent legislative
19 authority.
20

21 74. Later, in 1901, Ariz. Civ. Code para. 3956 was enacted, which provided: “All
22 roads and highways in the territory of Arizona which have been located as public
23 highways by order of the board of supervisors, and all roads in public use which have
24 been recorded as public highways, or which may be recorded by authority of the board
25 of supervisors, from and after the passage of this title, are hereby declared public
26
27
28

1 highways; and all roads in the territory of Arizona now in public use, which do not come
2 within the foregoing provisions of this section, are hereby declared vacated.”

3
4 **SPECIFIC FACTS CONCERNING**
5 **RS2477 PUBLIC HIGHWAY RIGHTS OF WAY**
6 **INTO MILLER AND CARR CANYONS**

7 75. The Cochise County Board of Supervisor Minutes from November 5, 1889, at
8 Volume 2, Pages 556-557, provides: “Ordered that the following described roads in
9 Cochise County Arizona Territory be and the same are hereby designated and declared
10 to be public roads and highways in the places they are now made and used respectively,
11 and such space on each side of said roads respectively, as may be necessary for public
12 use and convenience, and it is further ordered that this order and the following
13 description of roads be recorded with the Office of the County Recorder of Cochise
14 County ... From Charleston to Miller and Carr’s Canyon by the Huachuca Water Co’s
15 reservoir and to summit.”

16
17 76. The foregoing declaration describes the roadways later located in the map of
18 the Huachuca Mountain Water system recorded by the Cochise County Recorder on
19 August 2, 1901, at Book 000, page 13.

20
21 77. The current location of the foregoing roadways have been surveyed as
22 indicated on Exhibits 15 through 21, which are genuine copies of the originals to which
23 they relate.

24
25 78. The public, Tombstone, and/or Tombstone’s predecessors in interest to the
26 subject RS2339 and RS2340 rights continuously accessed and used the public highways
27 in Miller and Carr Canyons, as legally described in Exhibit 1 (pp. 49-74) and shown in
28

1 Exhibits 15 through 21, (hereinafter the “subject RS2477 rights”) from no later than
2 November 5, 1889 until the Monument Fire of 2011, while operating motorized and
3 mechanized vehicles and equipment.
4

5 **JURISDICTIONAL FACTS CONCERNING**
6 **THE SUBJECT RS2339, RS2340, AND RS2477 RIGHTS**

7 79. The subject RS2339, RS2340 and RS2477 rights are currently located within
8 the boundaries of the portion of the Coronado National Forest that was originally
9 designated the Huachuca Forest Reserve by virtue of the November 6, 1906
10 Proclamation of President Theodore Roosevelt, 34 Stat. 3255.
11

12 80. The November 6, 1906 Proclamation of President Theodore Roosevelt,
13 specifically provided that this “proclamation will not take effect upon any lands . . .
14 which may be covered by any prior valid claim.”
15

16 81. The plain public meaning of the November 6, 1906 Proclamation of President
17 Theodore Roosevelt is that lands covered by “any prior valid claim” were not included
18 within the forest reserve that has since become known as the Coronado National Forest.
19

20 82. Lands covered by “any prior valid claim” before November 6, 1906 would
21 not have been included within the Miller Peak Wilderness Area, which the Arizona
22 Wilderness Act of 1984, Pub. L. No. 98–406, 98 Stat. 1485, only applies to a portion of
23 the lands within the Coronado National Forest, although the boundaries of the area
24 cannot be ascertained on the ground due to defects in the official legal description.
25

26 83. According to page 13 of the July 1, 1905 Forest Service Use Book, page 20 of
27 the July 1, 1906 Forest Service Use Book, and page 31 of the July, 1907 Forest Service
28

1 Use Book, “A valid claim is defined as one initiated in good faith under some act of
2 Congress and continued by use consistent with the character of the claim and necessary
3 for its actual development.”
4

5 84. “Reg. 1” of the 1905 and 1906 Forest Service Use Books provides: “Persons
6 having valid claims under the public land laws *or* legal titles to lands within forest
7 reserves are free to occupy and enjoy their holdings.”
8

9 85. The phrase “public land laws” was one commonly used by Department of
10 Interior and the Department of Agriculture during the late Nineteenth Century and early
11 Twentieth Century to refer to all federal laws under which some claim of right could be
12 asserted to the use or occupancy of federal lands.
13

14 86. The plain meaning and public understanding of the term “valid claim” during
15 1906 would have broadly included both patented and non-patented claims on federal
16 lands, including RS2339, RS2340 and RS2477 rights.
17

18 87. Leaving aside the Gardner Spring Auxiliary Pipeline ROW and Gardner
19 Spring No. 24 Reservoir Site, which were not developed until on or after April 29, 1908,
20 the subject RS2339, RS2340 and RS2477 rights legally described at Exhibit 1 (pp. 1-31,
21 46-74) would constitute “valid claims” as contemporaneously understood by the public
22 and the federal government at the time of the establishment of the Huachuca Forest
23 Reserve.
24

25 88. Because the subject RS2339, RS2340 and RS2477 rights legally described at
26 Exhibit 1 (pp. 1-31, 46-74) (leaving aside the Gardner Spring Auxiliary Pipeline ROW
27 and Gardner Spring No. 24 Reservoir Site) vested and were used continuously before
28

1 November 6, 1906, the Presidential Proclamation that established the Huachuca Forest
2 Reserve did not take effect on the lands they encumbered, and those lands would never
3 have become part of the Huachuca Forest Reserve, and therefore cannot be part of the
4 Coronado National Forest or the Miller Peak Wilderness as a matter of law.
5

6 **FACTS CONCERNING THE MONUMENT FIRE DISASTER OF 2011**

7 89. Between May 29, 2011 and July 26, 2011, the Monument Fire and subsequent
8 landslides destroyed all or substantially all of Tombstone's reservoirs and pipelines in
9 Miller Canyon, Marshall Canyon, the "Divide," and Carr Canyon; all of which was
10 encompassed by the subject RS2339 and RS2340 rights.
11

12 90. Between May 29, 2011 and July 26, 2011, roads, pipelines, springs and spring
13 sites throughout Tombstone's Huachuca Mountain municipal water system and
14 encompassed by the subject RS2339, RS2340, and RS2477 rights were swept away
15 and/or buried under boulders, rocks, massive mudslides and other debris; this completely
16 disrupted water flow from Tombstone's Huachuca Mountain municipal water system.
17

18 **FACTS CONCERNING DEFENDANTS' REFUSAL TO PERMIT TOMBSTONE**
19 **TO FREELY AND FULLY RESTORE ITS HUACHUCA MOUNTAIN WATER**
20 **INFRASTRUCTURE**

21 91. On July 19, 2011, Tombstone City Archivist Nancy Sosa engaged in a
22 telephone call with Forest Service employee George McKay advising him of the damage
23 to Tombstone's 130 year old water system and seeking contact information to ensure the
24 city was fully authorized to restore the system.
25
26
27
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1 92. On July 21, 2011, Forest Service employee George McKay sent at least two
2 emails to Sosa identifying Duane Bennett and Phoebe Patterson as contact persons at the
3 Forest Service with whom to coordinate restoration work.
4

5 93. On July 21, 2011, Nancy Sosa called 529-803-2838 and spoke with Forest
6 Service employee Duane Bennett about restoring the Huachuca Mountain water system.
7 Bennett advised Sosa that Tombstone could do whatever repairs were necessary within
8 the "1962 permitted areas," which were fenced in, but that other areas would require a
9 new permit.
10

11 94. Attached hereto as Exhibit 22 is a genuine copy of the 1962 special use permit
12 between the U.S. Forest Service and Tombstone.
13

14 95. Between July 21, 2011 and August 4, 2011, Tombstone conducted an
15 assessment of necessary restoration work and its engineering firm, Gannett Fleming
16 generated a preliminary assessment regarding necessary restoration work, a genuine
17 copy of which is attached hereto as Exhibit 23.
18

19 96. On July 26, 2011, Tombstone Mayor Henderson declared a State of
20 Emergency.
21

22 97. On August 17, 2011, pursuant to A.R.S. § 26-303(D), Arizona Governor
23 Janice K. Brewer declared a State of Emergency pertaining to the water supply for the
24 City of Tombstone and appropriated money for emergency repairs, directing that the
25 "State of Arizona Emergency Response and Recovery Plan be used to direct and control
26 state and other assets and authorize the Director of the Arizona Division of Emergency
27 Management to coordinate state assets."
28

1 98. On September 13, 2011, Tombstone's agent in charge of reconstructing the
2 Huachuca water system within the scope of the subject RS2339 and RS2340 rights,
3 Kevin Rudd, telephoned Duane Bennett and left a voice mail message regarding the
4 City's intention to move forward with the restoration of the Huachuca Mountain water
5 system.
6

7 99. Neither Bennett nor any other Forest Service employee responded to any
8 communication from Tombstone regarding the proposed restoration work between
9 September 13, 2011 and October 3, 2011.
10

11 100. On October 3, 2011, Sosa drove to the Office of the Sierra Vista Ranger
12 District to speak with Bennett and furnish him with evidence of Tombstone's chain of
13 title to the subject RS2339 and RS2340 rights. Sosa met with Bennett and asked what
14 Tombstone needed to do to move forward with the restoration of the Huachuca
15 Mountain water system. Bennett responded by declaring that the City did not own
16 anything in the Coronado Forest and until his concerns over ownership were resolved, he
17 could not issue a permit. Bennett said that he had copies of all of the notices of
18 appropriation for the City's headspring claims, as well as the 1913 Department of
19 Interior survey, and that the Huachuca Water Company had no right to sell anything to
20 Tombstone. Bennett further stated that in the absence of proof of ownership, he would
21 need a detailed proposal of the work to be performed to allow any repairs to move
22 forward.
23
24
25

26 101. On October 13, 2011, Tombstone City Clerk/Manager George Barnes sent a
27 letter and email to Defendants requesting a "written response" with a "date certain" for
28

1 the issuance of work permits “to enable city forces to make emergency repairs to our
2 aqueduct and associated springs.”

3
4 102. No later than October 13, 2011, and at all relevant times subsequent thereto,
5 Defendants were legally and/or equitably obligated to have reasonably considered
6 Tombstone’s proposed restoration work in light of the following facts, legal principles,
7 directives and/or guidelines:

8
9 (a) the fact that Tombstone was empowered by Governor Jan Brewer under a
10 declared State of Emergency and given state assistance to wield all of the police powers
11 of the State of Arizona in service of fully restoring its municipal water system
12 encompassed by the subject RS2339 and RS2340 rights after the Monument Fire of
13 2011 under Ariz. Rev. Stat. § 26-301(15) (“combined efforts of the state and the political
14 subdivision”), Ariz. Rev. Stat. § 26-303(B), (E)(1) (“all police power vested in the
15 state”), and Ariz. Admin. Code R8-2-301(8) (“state assistance is needed to supplement .
16 . . . political subdivisions’ efforts and capabilities to save lives, protect property and
17 public health and safety, or to lessen or avert the threat of a disaster in Arizona”);

18
19 (b) the fact that Defendant, U.S. Department of Agriculture, never retracted,
20 amended or revised its aforesaid repeated letter recognitions of the subject RS2339 and
21 RS2340 rights, nor statements that special use permitting was not required to exercise
22 and enjoy such rights;

23
24 (c) the then-governing rule of law in the U.S. Court of Appeals for the Ninth
25 Circuit that yielding to the exercise of rights and privileges under an existing special use
26 permit, RS2339, RS2340 and/or RS2477 does not constitute agency action triggering the
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1 need for interagency consultations under the National Environmental Protection Act or
2 the Endangered Species Act;

3 (d) the fact that delay of the restoration work would deprive Tombstone of the
4 beneficial use of water, secondary rights implied by such water rights, as well as federal
5 water rights of way to which it had vested property rights guaranteed under the Fifth
6 Amendment of the United States Constitution;

7 (e) the national public policy favoring “principled deference to state water law”
8 and the use of the “national forest system principally as a means of enhancing the
9 quantity of water that would be available to the settlers of the arid West,” which cannot
10 be overridden by ecological considerations, as articulated in *United States v. New*
11 *Mexico*, 438 U.S. 696, 718-22 (1978) (discussing 16 U.S.C. § 551);

12 (f) the specific provision of the Wilderness Act of 1964, 16 U.S.C. § 1133(a)(1),
13 which states, “[n]othing in this chapter shall be deemed to be in interference with the
14 purpose for which national forests are established;”

15 (g) the specific provision of the Wilderness Act of 1964, 16 U.S.C. § 1133(c),
16 which states the ban on motorized and mechanized equipment within a wilderness area
17 is subject to exceptions “as specifically provided for in this Act and . . . existing private
18 rights;”

19 (h) the specific provision of the Wilderness Act of 1964, 16 U.S.C. § 1134(a),
20 providing that in “any case where State-owned or privately owned land is completely
21 surrounded by national forest lands within areas designated by this chapter as
22 wilderness, such State or private owner shall be given such rights as may be necessary to
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1 assure adequate access to such State-owned or privately owned land by such State or
2 private owner and their successors in interest;”

3 (i) the specific provision of the Arizona Wilderness Act of 1984, 98 Stat. 1485, §
4 302(a), which states its regulatory provisions are “[s]ubject to valid existing rights.”

5 (j) the specific provisions of 36 C.F.R. § 251.50(b) and (e), which state:

6 “[n]othing in this section prohibits the temporary occupancy of National Forest System
7 lands without a special use authorization when necessary for the protection of life and
8 property in emergencies, if a special use authorization is applied for and obtained at the

9 earliest opportunity, unless waived pursuant” to a determination by the authorized
10 officer that: (1) “The proposed use will have such nominal effects on National Forest
11 System lands, resources, or programs that it is not necessary to establish terms and
12 conditions in a special use authorization to protect National Forest System lands and
13 resources or to avoid conflict with National Forest System programs or operations;” (2)

14 “The proposed use is regulated by a State agency or another Federal agency in a manner
15 that is adequate to protect National Forest System lands and resources and to avoid
16 conflict with National Forest System programs or operations;” or (3) “The proposed use
17 is not situated in a congressionally designated wilderness area, and is a routine operation
18 or maintenance activity within the scope of a statutory right-of-way for a highway
19 pursuant to R.S. 2477 (43 U.S.C. 932, repealed Oct. 21, 1976) or for a ditch or canal
20 pursuant to R.S. 2339 (43 U.S.C. 661, as amended), or the proposed use is a routine
21 operation or maintenance activity within the express scope of a documented linear right-
22 of-way;”

23 of-way;”

24 of-way;”

25 of-way;”

26 of-way;”

27 of-way;”

28 of-way;”

1 (k) the specific provision of 2300 Forest Service Manual, § 2323.43d, which
2 allows motorized and mechanized transportation within a Wilderness area that was
3 “practiced before the area was designated wilderness” and requires the Forest Service to
4 “permit maintenance or reconstruction of existing [water] structures . . . [including]
5 reservoirs, ditches, and related facilities for the control or use of water that were under
6 valid special-use permit or other authority when the area involved was incorporated
7 under the Wilderness Act;”
8
9

10 (l) the specific provision of the 2700 Forest Service Manual, § 2718.31, which
11 instructs Forest Service personnel to “determine whether a road has been accepted”
12 under RS2477 by examining state law and consulting “with the Office of the General
13 Counsel on a case-by-case basis” and that “[t]he Forest Service exercises limited control
14 over R.S. 2477 roads but may take legal action if necessary to protect surrounding
15 adjacent National Forest System lands from undue degradation or nuisance.”
16
17

18 (m) the specific provisions of the 2700 Forest Service Manual, § 2719.10, entitled
19 “uses for which special use authorizations are not required,” which instructs Forest
20 Service employees: (1) to “[c]onsult with the Office of General Counsel on a case-by-
21 case basis” with regard to waiving any special use authorization requirement for
22 “[r]outine operation or maintenance activities within the scope of a statutory right-of-
23 way for a highway pursuant to R.S. 2477 . . . [or] for a ditch or canal pursuant to R.S.
24 2339 . . . or routine operation or maintenance activities within the express scope of a
25 documented linear right-of-way, when these uses do not occur within a Congressionally
26 designated wilderness area;” (2) that a “formal grant or document is not required” to
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1 recognize uses under RS2339 and RS2477; (3) to “[o]bserve the boundaries that existed
2 at the time the grant was accepted;” (4) that “[r]outine operation or maintenance
3 activities within the scope of a statutory right-of-way for a highway pursuant to R.S.
4 2477 include a variety of activities to preserve the integrity and safe use of the road,
5 such as surface rock replacement; grading; snow removal; seal coats and asphalt
6 overlays; culvert and bridge replacements; removal of rock and landslides from the road
7 prism; repair of washouts and other damage from erosion; and the installation and
8 maintenance of signs and other devices for traffic control, information, and safety;” and
9 (5) that “[r]outine operation or maintenance activities within the scope of a statutory
10 right for a ditch or canal pursuant to R.S. 2339 include such activities as recurrent
11 removal and deposition of silt and sediment from fish screens, diversion structures,
12 canals, weirs, and ditches; armoring of dams, ditches, or canals with rocks or other
13 protective materials to prevent or remedy damage from erosion, avalanches, or
14 landslides; lining of ditches to prevent or repair leaks and seepage; minor cutting or
15 pruning of vegetation within or immediately adjacent to a water development facility
16 that might be impeding or precluding the storage, diversion, or free-flowing transmission
17 of water; and recurrent adjustment, opening, and closing of diversions, headgates,
18 valves, and other devices necessary to control the timing and volume of water flows
19 consistent with the use of the water being stored, diverted, and transmitted within the
20 right-of-way;”
21
22
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25

26 (n) the specific provisions of the 5500 Forest Service Manual, § 5509.11, Chpt.
27 60, § 62.12 which include the “MacCleery letter” in order “to provide background
28

1 information and clarification for the guidance contained in FSM 5520.11 - 5520.13,” and
2 which states: “[t]he Department [of Agriculture] will be careful to avoid any action that
3 will reduce the rights conferred under pre-FLPMA grants . . . we do not assert that pre-
4 FLPMA rights of way for water conveyance and storage systems must be subjected to a
5 repermitting process. The Department recognizes that long-standing uses ought not be
6 diminished by insignificant defects in survey or description made many years ago, or a
7 change in the end use of the water off the Federal lands.”
8
9

10 (o) the specific provisions of the 5500 Forest Service Manual, § 5522.1, entitled
11 “Grants For Water Conveyance Facilities,” which instructs Forest Service employees:
12 “[t]he direction in this section applies to all water conveyance system grants now
13 administered by the Secretary of Agriculture, which were previously authorized and
14 administered by the Secretary of the Interior, including those granted by the Act of July
15 26, 1866” and further provides that Forest Service employees shall: (1) “Administer
16 valid existing easements, which have been shown to exist prior to October 21, 1976,
17 according to the public land law under which the grant was made. The grant is not
18 diminished by defects in a survey or description made many years ago.” (2) “Administer
19 easements according to the rights conferred under the grant, and Department of Interior
20 regulations at 43 CFR Part 2800, unless otherwise ordered by a court of competent
21 authority. Grants authorize occupancy for particular purposes, and provide for use of the
22 area actually occupied and used, or described in the easement or statute.” (3) “Allow use
23 of a road when part of an existing right-of-way if it is adjacent to the system and was
24 constructed as part of the system.” (4) “Allow a holder to perform maintenance and
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1 minor improvements within the easement right-of-way. A new authorization is not
2 needed for normal maintenance or minor changes made in the facilities on the right-of-
3 way to maintain capacity of the ditch as it existed on October 21, 1976.” (5) “Allow a
4 holder access to the easement on existing roads;” and/or
5

6 (p) the specific provisions of the 5500 Forest Service Manual, § 5522.11, entitled
7 “1866 Act Rights-of-Way,” which instructs Forest Service employees that “[p]olicy in
8 this section applies to rights-of-way for ditches and canals constructed under provisions
9 of section 9 of the Act of July 26, 1866 (14 Stat. 253, 30 U.S.C. 51; 43 U.S.C. 661; sec.
10 2339, Revised Statutes). General policies in section 5522.1 also apply to these grants.
11 Rights-of-ways obtained under the 1866 Act were not formally documented and must be
12 individually verified through water decrees, permits, water use records, deeds, ditch
13 location statements, field survey notes filed with the Bureau of Land Management, water
14 rights applications, testimony, court decrees, water administrative records, irrigation
15 records, ditch rider notes, or other historical data. These rights-of-way, when verified,
16 are a valid use of National Forest System land despite the absence of an authorizing
17 document, and the Forest Service has recognized the existence of many such rights-of-
18 ways since the National Forests were established,” and further provides: (1) Forest
19 Service employees shall “[a]dminister valid easements in accordance with the above
20 1866 Act and the various court decisions dealing with facilities constructed under that
21 statute;” (2) “Easements are an outstanding property right and are permanent until
22 relinquished or abandoned.”
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1 103. On October 19, 2011, without having taken into reasonable consideration
2 any of the matters set forth in paragraph 102, Bennett emailed Barnes and instructed
3 Tombstone to “refrain from using motorized or mechanized equipment” with regard to
4 the restoration of the Huachuca Mountain water system.
5

6 104. On October 24, 2011, George Barnes emailed a letter to Forest Service
7 employee Glenn Frederick, copying Jim Upchurch, requesting immediate permission to
8 restore all of the spring sites and pipelines covered by the 1962 special use permit using
9 motorized and mechanized equipment, and further enclosing a copy of the August 4,
10 2011 Gannett-Fleming assessment report (Exhibit 23) detailing proposed reconstruction
11 work for nearly all of the water structures and conveyances encompassed by the subject
12 RS2339 and RS2340 rights (a genuine copy of said letter is attached hereto as Exhibit
13 24).
14
15

16 105. On October 26, 2011, without having taken into reasonable consideration
17 any of the matters set forth in paragraph 102, Bennett emailed to Barnes various legal
18 filings from an irrelevant legal dispute between the Department of the Interior and the
19 U.S. Forest Service between 1915 and 1918, which invalidated the aforesaid 1913
20 permit issued by the Department of the Interior within forest reserve lands, but which
21 specifically stated that the determination did not affect the subject RS2339 and RS2340
22 rights. Bennett, however, did not respond to the aforesaid October 24, 2011 request nor
23 to the October 13, 2011 request for a date certain for the issuance of any work permit.
24
25

26 106. Without having taken into reasonable consideration any of the matters set
27 forth in paragraph 102, Defendants by and through Glenn Frederick in an email
28

1 communication on October 26, 2011 to then-City Clerk/Manager George Barnes,
2 refused to allow the construction or rebuilding of any permanent water structures, such
3 as dams, reservoirs, or catchments within the scope of the subject RS2339 and RS2340
4 rights.
5

6 107. On November 1, 2011, without having taken into reasonable consideration
7 any of the matters set forth in paragraph 102, Glenn Frederick, as well as Forest Service
8 employees Water Keys and John F. Schaefer traveled to the Huachuca Mountain and
9 personally ordered Tombstone employees and contractors, including Kevin Rudd, to
10 cease all of their restoration work under threat of arrest on the worksite near Miller
11 Spring No. 1 in the Huachuca Mountains.
12

13 108. On November 3, 2011, Mayor Henderson, George Barnes, Nancy Sosa, City
14 Attorney Randy Bays, Jim Upchurch, Glenn Frederick, George McKay, and Duane
15 Bennett participated in a telephonic conference call together. During the call, Henderson,
16 Barnes, Sosa, and Bays reiterated that they were seeking immediate authorization to
17 commence restoration work using motorized and mechanized equipment throughout all
18 of the spring sites and pipelines covered by the 1962 special use permit (specifically,
19 Carr Spring No. 13, Gardner Spring No. 24, Clark Spring No. 11, Rock Spring No. 16,
20 Rock Auxiliary Spring No. 17, and Miller Spring No. 1), and further explained that they
21 were also seeking to restore the balance of the Huachuca water system infrastructure
22 covered by the subject RS2339 and RS2340 rights. Mayor Henderson requested a
23 blanket permit to complete all of the work outlined in their August 4, 2011 assessment
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1 report from Gannett-Fleming. Upchurch agreed to issue the requested authorizations for
2 all of the work within three days.

3
4 109. On November 3, 2011, without having taken into reasonable consideration
5 any of the matters set forth in paragraph 102, immediately after the foregoing conference
6 call and without considering or addressing the scope of the subject RS2339 and RS2340
7 rights, Forest Service employee Diane Tallaferro emailed Upchurch and other Forest
8 Service personnel, directing them to:
9

10 (a) “minimize the level of development on the old road bed/trail;”

11 (b) walk “equipment if at all possible;”

12 (c) prevent use of equipment for “future facility developments or improvements;”

13 (d) limit repairs to “current facilities” to only address “just the current
14 emergency;” and
15

16 (e) restrict Tombstone to only being allowed to take the amount of water for
17 which they have “historically” used, “not more.”
18

19 110. On November 4, 2011, without having taken into reasonable consideration
20 any of the matters set forth in paragraph 102, Forest Service employee W. Gillespie
21 recommended cultural clearance for Tombstone’s restoration work provided that
22 “impacts to rock-masonry features be avoided” and “actions be limited to recently
23 functioning portions of the water system.”
24

25 111. On November 4, 2011, Defendants approved an MRDG that facially
26 contemplated the full restoration of Tombstone’s Huachuca Mountain water system (a
27 genuine copy of the foregoing MRDG is attached hereto as Exhibit 25); and yet, without
28

1 having taken into reasonable consideration any of the matters set forth in paragraph 102,
2 Upchurch nevertheless emailed Barnes and advised him that “this is a short term
3 solution and only includes access to the lower Miller Spring,” but that “we will be
4 meeting next week and will keep you informed as to the next steps for work on
5 additional springs.”

6
7 112. On November 7, 2011, without having taken into reasonable consideration
8 any of the matters set forth in paragraph 102, Upchurch issued a decision memorandum
9 limiting Tombstone to solely restoring and protecting the spring site at Miller Spring No.
10 1 without addressing any other spring site or right of way encompassed by the 1962
11 permit or the subject RS2339, RS2340, and RS2477 rights (a genuine copy of said
12 decision memorandum is attached hereto as Exhibit 26).

13
14
15 113. On December 5, 2011, Barnes submitted a letter requesting Defendants
16 allow them to fully restore all of Tombstone’s Huachuca Mountain water infrastructure
17 as encompassed within the subject RS2339 and RS2340 rights, stating “[w]hile the
18 Forest Service appears to be dealing with the permitting process one spring at a time we
19 want it to be clear that we have been requesting a permit covering all of the spring water
20 supplies to which we have Notices of Appropriation . . . [a]gain we must ask when we
21 can expect a blanket permit so that we can repair our water system under the Governor’s
22 existing State of Emergency” (a genuine copy of said letter is attached hereto as Exhibit
23 27).

24
25
26 114. On December 7, 2011, without having taken into reasonable consideration
27 any of the matters set forth in paragraph 102, Upchurch responded to said December 5,
28

1 2011 letter without granting the permission it requested, falsely stating Tombstone had
2 only provided “detailed information” for Miller and Gardner Springs despite the
3 previous delivery of the Gannett-Fleming August 4, 2011 assessment report and the
4 letter of October 24, 2011.
5

6 115. On December 8 and 9, 2011, without having taken into reasonable
7 consideration any of the matters set forth in paragraph 102, Defendants approved an
8 MRDG solely for temporary restoration work at the Gardner Spring No. 24 spring site (a
9 genuine copy of the December 9, 2011 MRDG is attached hereto as Exhibit 28).
10 Defendants did not consider or approve the restoration of all of the Huachuca Mountain
11 water system within the scope of the subject RS2339 and RS2340 rights.
12
13

14 116. On December 22, 2011, without having taken into reasonable consideration
15 any of the matters set forth in paragraph 102, Defendants issued a decision memorandum
16 authorizing solely hand reconstruction of a 6 foot by 10 foot catchment basin, the
17 installation of a 4 inch pipe, and the use of a mini-excavator to bury 3000 feet of pipe
18 along the west side of the Miller Creek trail (a genuine copy of the foregoing decision
19 memorandum is attached hereto as Exhibit 29).
20

21 117. Without having taken into reasonable consideration any of the matters set
22 forth in paragraph 102, Defendants by and through email from Forest Service employee
23 Kathleen Nelson to City Project Manager Kevin Rudd on February 28, 2012 are
24 requiring only hand tools to be used in repairs of infrastructure within the scope of the
25 subject RS2339 and RS2340 rights as of March 1, 2012.
26
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28

1 118. Without having taken into reasonable consideration any of the matters set
2 forth in paragraph 102, Defendants currently prohibit Tombstone from:

3 (a) freely using motorized vehicles to access the real property encompassed by
4 the subject 1962 permit and the subject RS2339, RS2340 and RS2477 rights;

5 (b) freely using mechanized tools and equipment to maintain its Huachuca
6 Mountain water system encompassed by the subject 1962 permit and the subject RS2339
7 and RS2340 rights;

8 (c) freely and fully restoring its permanent water structures and conveyances,
9 including diversions, flumes, catchments, reservoirs and pipelines, which are within the
10 scope of the subject 1962 permit and the subject RS2339 and RS2340 rights; and/or

11 (d) freely engaging in ground-disturbing maintenance and restoration work within
12 the scope of the subject 1962 permit and the subject RS2339 and RS2340 rights.

13 119. Tombstone has been able to find on the ground the nineteen (19) headsprings
14 known as Miller Spring No. 1, McCoy Spring No. 4, Maple Spring No. 7, Maple Spring
15 No. 8, Maple Spring No. 9, Lower Spring No. 10, Clark Spring No. 11, Brearley Spring
16 No. 12, Head Spring No. 13 (global: also known as "Carr Spring No. 13"), Cabin Spring
17 No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No.
18 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, Storrs Spring
19 No. 21, Hoagland Spring No. 23, and Gardner Spring No. 24 (as legally described in
20 Exhibit 1 (pp. 32-43, 45) and depicted in Exhibits 3 through 14), but it is not possible for
21 Tombstone to reasonably access, permanently restore and/or reasonably protect from
22 future disasters said headsprings, and related diversions, catchments, reservoirs and
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1 pipelines, without using motorized and mechanized equipment and vehicles to engage in
2 ground-disturbing excavation, maintenance and repair work, including the installation of
3 permanent water structures and conveyances, upon and along the reservoir sites and
4 rights of way encompassed by the relevant portion of the subject RS2339, RS2340 and
5 RS2477 rights.
6

7 120. Although Tombstone has not yet been able to find the six (6) headsprings
8 known as McCoy Spring No. 2, McCoy Spring No. 3, Marshall Spring No. 5, Bench
9 Spring No. 6, and Quartz Spring No. 22 on the ground, as legally described in Exhibit 1
10 (pp. 33, 45, 46-48) and depicted in Exhibit 2 (Figures III.1, III.2, Appendix 1), historical
11 documentation does allow for the approximate location of the same on the ground for
12 purposes of engineering the beneficial use and conveyance of water. However, it is not
13 possible for Tombstone to find, reasonably access, permanently restore, and reasonably
14 protect from future disasters said headsprings, and related diversions, catchments,
15 reservoirs and pipelines, without using motorized and mechanized equipment and
16 vehicles to engage in ground-disturbing excavation, maintenance and repair work,
17 including the installation of permanent water structures and conveyances, upon and
18 along the reservoir sites and rights of way encompassed by the relevant portion of the
19 subject RS2339, RS2340 and RS2477 rights.
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24 121. Because of Defendants' continuing refusal to take into reasonable
25 consideration any of the matters set forth in paragraph 102, and its prohibition on
26 Tombstone freely accessing the subject RS2477 rights and exercising its 1962 special
27 use permit as well as Tombstone's RS2339 and RS2340 rights to fully restore its
28

1 encompassed water structures and conveyances, only Miller Spring No. 1, Head
2 Spring No. 13, and Gardner Spring No. 24 are currently flowing, due to partial or
3 temporary repairs.
4

5 122. During the monsoons of the summer of 2012, in June, the temporary repairs
6 at Head Spring No. 13 were destroyed by flooding and landslides, and Defendants only
7 permitted Tombstone to rebuild temporary water structures and conveyances by hand.
8

9 123. The partial or temporary repairs Defendants have allowed to Miller Spring
10 No. 1, Head Spring No. 13, and Gardner Spring No. 24 are at imminent risk of being
11 washed away during any sustained period of heavy rains in the Huachuca Mountains,
12 and especially during Monsoon season.
13

14 124. To oppose Tombstone's cause of action in this case, which was in part
15 founded upon enforcing the subject RS2339, RS2340 and RS2477 rights, Defendants
16 filed declarations from Duane Bennett on January 13, 2012 and April 30, 2012, Walt
17 Keyes on April 30, 2012, and George McKay on April 30, 2012. However, none of the
18 declarations acknowledged, analyzed or addressed the subject RS2339, RS2340, and
19 RS2477 rights, nor did they take into reasonable consideration any of the matters set
20 forth in paragraph 102.
21
22

23 125. None of Defendants' previous legal filings before the district court or higher
24 courts in this proceeding have taken into reasonable consideration the subject RS2339,
25 RS2340 and RS2477 rights, nor have they taken into reasonable consideration any of the
26 matters set forth in paragraph 102.
27
28

1 126. In the course of jurisdictional discovery in this proceeding, Defendants have
2 admitted that Tombstone had a custom and practice of using motorized and mechanized
3 equipment within the Coronado National Forest and the Miller Peak Wilderness to
4 maintain Tombstone's Huachuca Mountain water system.
5

6 127. Without having taken into reasonable consideration any of the matters set
7 forth in paragraph 102, Defendants refuse to allow mechanized or motorized vehicles
8 and equipment to access and maintain Tombstone's Huachuca Mountain water system
9 encompassed by the subject RS2339 and RS2340 rights without amending Tombstone's
10 1962 special use permit to allow for such access.
11

12 128. Without having taken into reasonable consideration any of the matters set
13 forth in paragraph 102, Defendants refuse to allow mechanized or motorized vehicles
14 and equipment to access and maintain Tombstone's Huachuca Mountain water system
15 unless Tombstone secures authorization from Defendants in addition to holding the 1962
16 special use permit and subject RS2339 and RS2340 rights, and despite the public
17 highways established in Millers and Carr canyons under RS2477.
18

19 129. Because of Defendants' refusal to take into reasonable consideration any of
20 the matters set forth in paragraph 102 and their prohibition on Tombstone freely
21 accessing the subject RS2477 rights and exercising its RS2339 and RS2340 rights to
22 fully restore its encompassed water structures and conveyances using motorized vehicles
23 and mechanized equipment, and the seasonal nature of the water produced by the various
24 springs:
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1 (a) Tombstone has lost and will continue to lose peak monthly water production;
2 and

3
4 (b) Tombstone is receiving approximately 150 gallons per minute on average
5 from its Huachuca Mountain municipal water supply, which is substantially less water
6 than what could otherwise be delivered based on historical records indicating a fully
7 restored municipal water system within the scope of the subject RS2339 and RS2340
8 rights would regularly deliver between 250 and 400 gallons per minute on average.
9

10 130. Tombstone depends on its Huachuca Mountain water supply and has no
11 ready, cost-effective or reliable alternative water supply for all of the reasons set forth at
12 pages 23 through 43 of the preliminary engineering report attached hereto as Exhibit 2.
13

14 131. Public health and safety is threatened every minute that passes while
15 Defendants prohibit Tombstone from freely using motorized and mechanized equipment
16 and vehicles to access and engage in ground-disturbing excavation, maintenance and
17 repair work to find, permanently restore, and reasonably protect from future disasters the
18 headsprings, and related diversions, catchments, reservoirs and pipelines, upon and
19 along the reservoir sites and rights of way encompassed by the relevant portion of the
20 subject RS2339, RS2340 and RS2477 rights.
21

22 132. The loss of Tombstone's Huachuca Mountain municipal water supply, which
23 is encompassed by the subject RS2339 and RS2340 rights, threatens public health and
24 safety as set forth at page 23 of the preliminary engineering report attached hereto as
25 Exhibit 2.
26
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1 133. Safe and complete repair of Tombstone's water infrastructure within the
2 scope of the subject RS2339 and RS2340 rights, as set forth at pages 35 through 51, as
3 well as Appendices 9, 9A and 10, of the preliminary engineering report attached hereto
4 as Exhibit 2, requires the freedom and autonomy to make decisions in the field (without
5 Forest Service micro-management and interference) to use a track-operated John Deere
6 JD200D excavator or equivalent throughout the reservoir sites and rights of way
7 encompassed by the subject RS2339, RS2340 and RS2477 rights, as legally described in
8 Exhibit 1, where the same is accessible by such equipment. This is because the terrain
9 has huge boulders, giant felled trees, huge piles of gravel and/or sand that must be
10 moved and rearranged to locate headsprings, restore catchments and reservoirs, and
11 rebuild diversionary flumes as a safety and protective measure to deflect future water
12 flows from injuring workers in the area and destroying the spring catchments and access
13 to the springs themselves. Otherwise, the City's water structures and conveyances will
14 be periodically destroyed by weather and flow events, depriving the City of a continuous
15 water supply.

16 134. Safe and complete repair of Tombstone's water infrastructure, as set forth at
17 pages 35 through 51, as well as Appendices 9, 9A and 10, of the preliminary engineering
18 report attached hereto as Exhibit 2, also requires the freedom and autonomy to make
19 decisions in the field to use a mini excavator equal to a John Deere JD60, or equivalent,
20 a gas cutoff saw, chain saw, 4x4 pickups and flatbed trucks, 48" ATV or UTV, and a
21 generator, upon and along the reservoir sites and rights of way encompassed by the
22 subject RS2339, RS2340 and RS2477 rights relating to the headsprings known as Miller
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1 Spring No. 1, McCoy Group Spring Nos. 2, 3, 4, Head Spring No. 13, Cabin Spring No.
2 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17,
3 Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, Storrs Spring No.
4 21, Quartz Spring No. 22, and Gardner Spring No. 24, as legally described in Exhibit 1
5 (pp. 1-10, 12-15, 18-19, 23-33, 37-45, 49-74).
6

7 135. Safe and complete repair of Tombstone's water infrastructure as set forth at
8 pages 35 through 51, as well as Appendices 9, 9A and 10, of the preliminary engineering
9 report attached hereto as Exhibit 2, requires the freedom and autonomy to make
10 decisions in the field to use an X85 Vermeer Cable Plow, or equivalent, upon and along
11 the reservoir sites and rights of way encompassed by the subject RS2339, RS2340 and
12 RS2477 rights at or near the headsprings known as Marshall Spring No. 5, Bench Spring
13 No. 6, Maple Group Spring Nos. 7, 8, and 9, Gird Reservoir No. 9 ½, Lower Spring No.
14 No. 10, Clark Spring No. 11, Brearley Spring No. 12, and Hoagland Spring No. 23, as
15 legally described in Exhibit 1 (pp. 11, 16-17, 20-22, 34-36, 46-74).
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19 136. Geological, hydrological and weather conditions and events, including fires,
20 droughts, tremors, monsoons, landslides and flooding, in the Huachuca Mountains in
21 Miller, Marshall and Carr Canyons and the "Divide" between them, periodically alter the
22 landscape and/or bury, temporarily dry-up, and/or shift the location of headsprings,
23 water structures and water conveyances, which entails the need for a wide area in which
24 to site, construct and maintain water structures and conveyances corresponding to the
25 dimensions of the rights of way and reservoir sites legally described in Exhibit 1 (pp. 1-
26 48) and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14, as well
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28

1 as the need for freedom and autonomy to access and engage in ground-disturbing
2 maintenance of water structures and conveyances within such areas utilizing motorized
3 vehicles and mechanized equipment, as described in paragraphs 133 through 135 of the
4 General Allegations, in order to exercise or enjoy any related water rights, federal water
5 rights of way, and secondary rights.
6

7
8 **CLAIMS FOR RELIEF**

9 **Count I**

10 **First Quiet Title Claim**

11 **Federal Water Rights of Way and/or Secondary Rights Concerning Miller Spring**
12 **No. 1, Clark Spring No. 11, Head Spring No. 13, Rock Spring No. 16,**
13 **and Rock Auxiliary Spring No. 17**

14 1. Tombstone adopts and realleges collectively as paragraph 1 of this Count
15 paragraphs 3 through 136 of the General Allegations.

16 2. Tombstone holds federal water rights of way and/or secondary rights under
17 RS2339 and RS2340 for the construction and maintenance of water structures and
18 conveyances, including catchments, dams, reservoirs, ditches, flumes, pipelines,
19 aqueducts and canals, servicing Miller Spring No. 1, Clark Spring No. 11, Head Spring
20 No. 13, Rock Spring No. 16, and Rock Auxiliary Spring No. 17, as those headsprings
21 are legally described in Exhibit 1 (pp. 32, 36, 37, 39).
22

23 3. In order to make beneficial use of the water produced by Miller Spring No. 1,
24 Clark Spring No. 11, Head Spring No. 13, Rock Spring No. 16, and Rock Auxiliary
25 Spring No. 17 and to use and fully enjoy its federal water rights of way and/or secondary
26 rights, it is absolutely necessary for Tombstone to use motorized vehicles and
27
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1 mechanized equipment to site, access, occupy, construct and maintain: (a) water
2 structures, including catchments, protective flumes, and reservoirs, anywhere within the
3 Miller Spring No. 1 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of
4 this Count, encompassing only rights of way relating to point of diversion for Clark
5 Spring No. 11), Head Spring No. 13 Reservoir Site, and the Rock Spring No. 16 & 17
6 Reservoir Site, as legally described in Exhibit 1 (pp. 18, 22, 23, 25, 36) and depicted in
7 Exhibits 2 through 14; and (b) water conveyances, including flumes, ditches, aqueducts,
8 and pipelines, anywhere within the Miller Canyon Pipeline Right of Way (for purposes
9 of this Count, excluding the Gardner Spring Auxiliary Pipeline ROW), the Carr Canyon
10 Pipeline Right of Way (for purposes of this Count, excluding Auxiliary Pipeline ROWs),
11 and the Clark Canyon (the "Divide") Pipeline Right of Way (for purposes of this Count,
12 encompassing only rights of way relating to the point of diversion for Clark Spring No.
13 11), as legally described in Exhibit 1 (pp. 1-9, 12-13, 16-17, 36) and depicted in Exhibits
14 2 (Figures III.1 and III.2, Appendix 1) through 14.

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19 4. Accordingly, Tombstone's federal water rights of way and/or secondary rights
20 under RS2339 and RS2340 for the construction and maintenance of water structures and
21 conveyances servicing Miller Spring No. 1, Clark Spring No. 11, Head Spring No. 13,
22 Rock Spring No. 16, and Rock Auxiliary Spring No. 17 include: (a) the right to access,
23 occupy, construct and maintain water structures and conveyances within the Miller
24 Canyon Pipeline Right of Way (for purposes of this Count, excluding the Gardner
25 Spring Auxiliary Pipeline ROW), the Carr Canyon Pipeline Right of Way (for purposes
26 of this Count, excluding Auxiliary Pipeline ROWs), the Clark Canyon (the "Divide")
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1 Pipeline Right of Way (for purposes of this Count, encompassing only rights of way
2 relating to the point of diversion for Clark Spring No. 11), the Miller Spring No. 1
3 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of this Count,
4 encompassing only rights of way relating to the point of diversion for Clark Spring No.
5 11), Head Spring No. 13 Reservoir Site, and the Rock Spring No. 16 & 17 Reservoir
6 Site, as legally described in Exhibit 1 (pp. 1-9, 12-13, 16-18, 22-23, 25, 36) and depicted
7 in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14; and (b) the right to use
8 motorized vehicles and mechanized equipment to engage in related ground disturbing
9 activities within the foregoing areas.

12 5. Since the Monument Fire of 2011, Defendants have interfered with
13 Tombstone's construction and maintenance of water structures and conveyances within
14 the Miller Canyon Pipeline Right of Way (for purposes of this Count, excluding the
15 Gardner Spring Auxiliary Pipeline ROW), the Carr Canyon Pipeline Right of Way (for
16 purposes of this Count, excluding the Auxiliary Pipeline ROWs), the Clark Canyon (the
17 "Divide") Pipeline Right of Way (for purposes of this Count, encompassing only rights
18 of way relating to the point of diversion for Clark Spring No. 11), the Miller Spring No.
19 1 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of this Count,
20 encompassing only rights of way relating to the point of diversion for Clark Spring No.
21 11), Head Spring No. 13 Reservoir Site, and the Rock Spring No. 16 & 17 Reservoir
22 Site, as legally described in Exhibit 1 (pp. 1-9, 12-13, 16-18, 22-23, 25, 36) and depicted
23 in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14, and such conduct is
24 clouding Tombstone's title to the same.

1 6. As against Defendants, the Court should quiet Tombstone's title to the Miller
2 Canyon Pipeline Right of Way (for purposes of this Count, excluding the Gardner
3 Spring Auxiliary Pipeline ROW), the Carr Canyon Pipeline Right of Way (for purposes
4 of this Count, excluding the Auxiliary Pipeline ROWs), the Clark Canyon (the "Divide")
5 Pipeline Right of Way (for purposes of this Count, encompassing only rights of way
6 relating to the point of diversion for Clark Spring No. 11), the Miller Spring No. 1
7 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of this Count,
8 encompassing only rights of way relating to the point of diversion for Clark Spring No.
9 11), Head Spring No. 13 Reservoir Site, and the Rock Spring No. 16 & 17 Reservoir
10 Site, as legally described in Exhibit 1 (pp. 1-9, 12-13, 16-18, 22-23, 25, 36) and depicted
11 in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14, as valid federal water
12 rights of way and/or secondary rights under RS2339 and RS2340 because Tombstone
13 has suffered or is likely to suffer irreparable harm from the cloud on title created by
14 Defendants' conduct and has no adequate remedy at law to clear the cloud on title, and
15 Tombstone's requested permanent injunctive relief is favored by the public interest and
16 the balance of equities.

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21 WHEREFORE, Plaintiff City of Tombstone requests:

22
23 1. This court declare, adjudge, and decree under the Declaratory Judgment Act,
24 28 U.S.C. § 2201 and 5 U.S.C. §§ 701, 702 and 704, and the Quiet Title Act, 28 U.S.C.
25 § 2409a, Tombstone holds federal water rights of way and/or secondary rights under
26 RS2339 and RS2340 to access, occupy, construct and maintain water structures and
27 conveyances, including catchments, dams, reservoirs, ditches, flumes, pipelines,
28

1 aqueducts and canals, within the Miller Canyon Pipeline Right of Way (for purposes of
2 this Count, excluding the Gardner Spring Auxiliary Pipeline ROW), the Carr Canyon
3 Pipeline Right of Way (for purposes of this Count, excluding the Auxiliary Pipeline
4 ROWs), the Clark Canyon (the “Divide”) Pipeline Right of Way (for purposes of this
5 Count, encompassing only rights of way relating to the point of diversion for Clark
6 Spring No. 11), the Miller Spring No. 1 Reservoir Site, Clark Spring No. 11 Reservoir
7 Site (for purposes of this Count, encompassing only rights of way relating to the point of
8 diversion for Clark Spring No. 11), Head Spring No. 13 Reservoir Site, and the Rock
9 Spring No. 16 & 17 Reservoir Site, as legally described in Exhibit 1 (pp. 1-9, 12-13, 16-
10 18, 22-23, 25, 36) and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1)
11 through 14, or otherwise within such other scope or dimension of the subject RS2339
12 and RS2340 rights as is reasonably necessary for Tombstone to divert and convey water
13 from the corresponding headsprings.
14

15 2. That this court permanently enjoin the Defendants, their agents, employees,
16 successors, and all persons acting in concert or participating with them under their
17 direction, from:
18

19 (a) clouding Tombstone’s title to federal water rights of way and/or secondary
20 rights under RS2339 and RS2340 to access, occupy, construct and maintain water
21 structures and conveyances, including catchments, dams, reservoirs, ditches, flumes,
22 pipelines, aqueducts and canals, within the Miller Canyon Pipeline Right of Way (for
23 purposes of this Count, excluding the Gardner Spring Auxiliary Pipeline ROW), the Carr
24 Canyon Pipeline Right of Way (for purposes of this Count, excluding the Auxiliary
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1 Pipeline ROWs), the Clark Canyon (the “Divide”) Pipeline Right of Way (for purposes
2 of this Count, encompassing only rights of way relating to the point of diversion for
3 Clark Spring No. 11), the Miller Spring No. 1 Reservoir Site, Clark Spring No. 11
4 Reservoir Site (for purposes of this Count, encompassing only rights of way relating to
5 the point of diversion for Clark Spring No. 11), Head Spring No. 13 Reservoir Site, and
6 the Rock Spring No. 16 & 17 Reservoir Site, as legally described in Exhibit 1 (pp. 1-9,
7 12-13, 16-18, 22-23, 25, 36) and depicted in Exhibits 2 (Figures III.1 and III.2,
8 Appendix 1) through 14, or otherwise clouding such other scope or dimension of the
9 subject RS2339 and RS2340 rights as is reasonably necessary for Tombstone to divert
10 and convey water from the corresponding headsprings; and/or
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12

13
14 (b) unreasonably interfering with Tombstone’s use of motorized vehicles and
15 mechanized equipment, as described in paragraphs 133 through 135 of the General
16 Allegations, to access, occupy, construct and maintain water structures and conveyances,
17 including catchments, dams, reservoirs, ditches, flumes, pipelines, aqueducts and canals,
18 within the Miller Canyon Pipeline Right of Way (for purposes of this Count, excluding
19 the Gardner Spring Auxiliary Pipeline ROW), the Carr Canyon Pipeline Right of Way
20 (for purposes of this Count, excluding the Auxiliary Pipeline ROWs), the Clark Canyon
21 (the “Divide”) Pipeline Right of Way (for purposes of this Count, encompassing only
22 rights of way relating to the point of diversion for Clark Spring No. 11), the Miller
23 Spring No. 1 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of this
24 Count, encompassing only rights of way relating to the point of diversion for Clark
25 Spring No. 11), Head Spring No. 13 Reservoir Site, and the Rock Spring No. 16 & 17
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1 Reservoir Site, as legally described in Exhibit 1 (pp. 1-9, 12-13, 16-18, 22-23, 25, 36)
2 and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14;

3
4 3. That this Court award such different, further or additional relief as appropriate
5 or necessary to achieve justice and equity between the parties, including the award of
6 attorneys' fees, litigation expenses and costs against Defendants as provided by
7 applicable law.

8
9 **Count II**

10 **Second Quiet Title Claim**

11 **Federal Water Rights of Way and/or Secondary Rights Concerning McCoy Spring**
12 **No. 4, Maple Spring No. 7, Maple Spring No. 8, Maple Spring No. 9, Lower Spring**
13 **No. 10, Brearley Spring No. 12, Cabin Spring No. 14, Cabin Auxiliary Spring No.**
14 **15, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, Storrs**
Spring No. 21, and Hoagland Spring No. 23

15 1. Tombstone adopts and realleges collectively as paragraph 1 of this Count
16 paragraphs 3 through 136 of the General Allegations.

17
18 2. Tombstone holds federal water rights of way and/or secondary rights under
19 RS2339 and RS2340 for the construction and maintenance of water structures and
20 conveyances, including catchments, dams, reservoirs, ditches, flumes, pipelines,
21 aqueducts and canals, servicing McCoy Spring No. 4, Maple Spring No. 7, Maple Spring
22 No. 8, Maple Spring No. 9, Lower Spring No. 10, Brearley Spring No. 12, Cabin Spring
23 No. 14, Cabin Spring Auxiliary No. 15, Smith Spring No. 18, Porter Spring No. 19,
24 O'Brien Spring No. 20, Storrs Spring No. 21, and Hoagland Spring No. 23, as those
25 headsprings are legally described in Exhibit 1 (pp. 33-36, 38, 40-43).
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1 3. In order to make beneficial use of the water produced by McCoy Spring No. 4,
2 Maple Spring No. 7, Maple Spring No. 8, Maple Spring No. 9, Lower Spring No. 10,
3 Brearley Spring No. 12, Cabin Spring No. 14, Cabin Spring Auxiliary No. 15, Smith
4 Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, Storrs Spring No. 21, and
5 Hoagland Spring No. 23, and to use and fully enjoy its federal water rights of way and/or
6 secondary rights, it is absolutely necessary for Tombstone to use motorized vehicles and
7 mechanized equipment to site, access, occupy, construct and maintain: (a) water
8 structures, including catchments, protective flumes, and reservoirs, anywhere within the
9 McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count,
10 encompassing only rights of way relating to the point of diversion for McCoy Spring
11 No. 4), the Maple Springs No. 7, 8 & 9 Reservoir Site, the Lower Spring No. 10
12 Reservoir Site, the Cabin Spring No. 14 & Cabin Spring Auxiliary No. 15 Reservoir
13 Site, the Smith Spring No. 18 Reservoir Site, the Porter Spring No. 19 Reservoir Site,
14 the O'Brien Spring No. 20 Reservoir Site, and the Storrs Spring No. 21 Reservoir Site,
15 as legally described in Exhibit 1 (pp. 19-21, 24, 26-29, 33-35), and as depicted in
16 Exhibits 2 through 14; and (b) water conveyances, including flumes, ditches, aqueducts,
17 and pipelines, anywhere within Miller Canyon Pipeline Right of Way (for purposes of
18 this Count, solely the portion extending from the City of Tombstone to the point of
19 diversion for McCoy Spring No. 4), Marshall Canyon Pipeline Right of Way, the Carr
20 Canyon Pipeline Right of Way (for purposes of this Count, including only the area
21 encompassed by the Cabin Spring Auxiliary Pipeline ROW, the Smith Spring Auxiliary
22 Pipeline ROW, the O'Brien Spring Auxiliary Pipeline ROW, and the Storrs Spring
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1 Auxiliary Pipeline ROW), the Clark Canyon (the “Divide”) Pipeline Right of Way (for
 2 purposes of this Count, encompassing only the portion extending from the Miller
 3 Canyon Pipeline Right of Way to the points of diversion for Brearley Spring No. 12 and
 4 Hoagland Spring No. 23), as legally described in Exhibit 1 (pp. 1-17, 36) and as depicted
 5 in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14.

7 4. Accordingly, Tombstone’s federal water rights of way and/or secondary rights
 8 under RS2339 and RS2340 for the construction and maintenance of water structures and
 9 conveyances servicing McCoy Spring No. 4, Maple Spring No. 7, Maple Spring No. 8,
 10 Maple Spring No. 9, Lower Spring No. 10, Brearley Spring No. 12, Cabin Spring No.
 11 14, Cabin Auxiliary Spring No. 15, Smith Spring No. 18, Porter Spring No. 19, O’Brien
 12 Spring No. 20, Storrs Spring No. 21, and Hoagland Spring No. 23 include: (a) the right
 13 to access, occupy, construct and maintain water structures and conveyances within the
 14 Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the portion
 15 extending from the City of Tombstone to the point of diversion for McCoy Spring No.
 16 4), Marshall Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right of Way (for
 17 purposes of this Count, including only the area encompassed by the Cabin Spring
 18 Auxiliary Pipeline ROW, the Smith Spring Auxiliary Pipeline ROW, the O’Brien Spring
 19 Auxiliary Pipeline ROW, and the Storrs Spring Auxiliary Pipeline ROW), the Clark
 20 Canyon (the “Divide”) Pipeline Right of Way (for purposes of this Count, encompassing
 21 only the portion extending from the Miller Canyon Pipeline Right of Way to the points
 22 of diversion for Brearley Spring No. 12 and Hoagland Spring No. 23), the McCoy
 23 Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count, encompassing
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1 only rights of way relating to the point of diversion for McCoy Spring No. 4), the Maple
2 Springs No. 7, 8 & 9 Reservoir Site, the Lower Spring No. 10 Reservoir Site, the Cabin
3 Spring No. 14 & Cabin Spring Auxiliary No. 15 Reservoir Site, the Smith Spring No. 18
4 Reservoir Site, the Porter Spring No. 19 Reservoir Site, the O'Brien Spring No. 20
5 Reservoir Site, and the Storrs Spring No. 21 Reservoir Site, as legally described in
6 Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and depicted in Exhibits 2 (Figures III.1
7 and III.2, Appendix 1) through 14; and (b) the right to use motorized vehicles and
8 mechanized equipment to engage in related ground disturbing activities within the
9 foregoing areas.

10
11
12 5. Since the Monument Fire of 2011, Defendants have interfered with
13 Tombstone's construction and maintenance of water structures and conveyances within
14 the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the portion
15 extending from the City of Tombstone to the point of diversion for McCoy Spring No.
16 4), Marshall Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right of Way (for
17 purposes of this Count, including only the area encompassed by the Cabin Spring
18 Auxiliary Pipeline ROW, the Smith Spring Auxiliary Pipeline ROW, the O'Brien Spring
19 Auxiliary Pipeline ROW, and the Storrs Spring Auxiliary Pipeline ROW), the Clark
20 Canyon (the "Divide") Pipeline Right of Way (for purposes of this Count, encompassing
21 only the portion extending from the Miller Canyon Pipeline Right of Way to the points
22 of diversion for Brearley Spring No. 12 and Hoagland Spring No. 23), the McCoy
23 Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count, encompassing
24 only rights of way relating to the point of diversion for McCoy Spring No. 4), the Maple
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1 Springs No. 7, 8 & 9 Reservoir Site, the Lower Spring No. 10 Reservoir Site, the Cabin
2 Spring No. 14 & Cabin Spring Auxiliary No. 15 Reservoir Site, the Smith Spring No. 18
3 Reservoir Site, the Porter Spring No. 19 Reservoir Site, the O'Brien Spring No. 20
4 Reservoir Site, and the Storrs Spring No. 21 Reservoir Site, as legally described in
5 Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and depicted in Exhibits 2 (Figures III.1
6 and III.2, Appendix 1) through 14, and such conduct is clouding Tombstone's title to the
7 same.
8

9
10 6. As against Defendants, the Court should quiet Tombstone's title to the Miller
11 Canyon Pipeline Right of Way (for purposes of this Count, solely the portion extending
12 from the City of Tombstone to the point of diversion for McCoy Spring No. 4), Marshall
13 Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right of Way (for purposes of
14 this Count, including only the area encompassed by the Cabin Spring Auxiliary Pipeline
15 ROW, the Smith Spring Auxiliary Pipeline ROW, the O'Brien Spring Auxiliary Pipeline
16 ROW, and the Storrs Spring Auxiliary Pipeline ROW), the Clark Canyon (the "Divide")
17 Pipeline Right of Way (for purposes of this Count, encompassing only the portion
18 extending from the Miller Canyon Pipeline Right of Way to the points of diversion for
19 Brearley Spring No. 12 and Hoagland Spring No. 23), the McCoy Springs Group No. 2,
20 3 & 4 Reservoir Site (for purposes of this Count, encompassing only rights of way
21 relating to the point of diversion for McCoy Spring No. 4), the Maple Springs No. 7, 8 &
22 9 Reservoir Site, the Lower Spring No. 10 Reservoir Site, the Cabin Spring No. 14 &
23 Cabin Spring Auxiliary No. 15 Reservoir Site, the Smith Spring No. 18 Reservoir Site,
24 the Porter Spring No. 19 Reservoir Site, the O'Brien Spring No. 20 Reservoir Site, and
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1 the Storrs Spring No. 21 Reservoir Site, as legally described in Exhibit 1 (pp. 1-17, 19-
2 21, 24, 26-29, 33-36) and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1)
3 through 14, as valid federal water rights of way and/or secondary rights under RS2339
4 and RS2340 because Tombstone has suffered or is likely to suffer irreparable harm from
5 the cloud on title created by Defendants' conduct and has no adequate remedy at law to
6 clear the cloud on title, and Tombstone's requested permanent injunctive relief is
7 favored by the public interest and the balance of equities.
8
9

10 WHEREFORE, Plaintiff City of Tombstone requests:

11 1. This court declare, adjudge, and decree under the Declaratory Judgment Act,
12 28 U.S.C. § 2201 and 5 U.S. C. §§ 701, 702 and 704, and the Quiet Title Act, 28 U.S.C.
13 § 2409a, Tombstone holds federal water rights of way and/or secondary rights under
14 RS2339 and RS2340 to access, occupy, construct and maintain water structures and
15 conveyances, including catchments, dams, reservoirs, ditches, flumes, pipelines,
16 aqueducts and canals, within the Miller Canyon Pipeline Right of Way (for purposes of
17 this Count, solely the portion extending from the City of Tombstone to the point of
18 diversion for McCoy Spring No. 4), Marshall Canyon Pipeline Right of Way, the Carr
19 Canyon Pipeline Right of Way (for purposes of this Count, including only the area
20 encompassed by the Cabin Spring Auxiliary Pipeline ROW, the Smith Spring Auxiliary
21 Pipeline ROW, the O'Brien Spring Auxiliary Pipeline ROW, and the Storrs Spring
22 Auxiliary Pipeline ROW), the Clark Canyon (the "Divide") Pipeline Right of Way (for
23 purposes of this Count, encompassing only the portion extending from the Miller
24 Canyon Pipeline Right of Way to the points of diversion for Brearley Spring No. 12 and
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1 Hoagland Spring No. 23), the McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for
2 purposes of this Count, encompassing only rights of way relating to the point of
3 diversion for McCoy Spring No. 4), the Maple Springs No. 7, 8 & 9 Reservoir Site, the
4 Lower Spring No. 10 Reservoir Site, the Cabin Spring No. 14 & Cabin Spring Auxiliary
5 No. 15 Reservoir Site, the Smith Spring No. 18 Reservoir Site, the Porter Spring No. 19
6 Reservoir Site, the O'Brien Spring No. 20 Reservoir Site, and the Storrs Spring No. 21
7 Reservoir Site, as legally described in Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and
8 depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14, or otherwise
9 within such other scope or dimension of the subject RS2339 and RS2340 rights as is
10 reasonably necessary for Tombstone to divert and convey water from the corresponding
11 headsprings.
12

13
14
15 2. That this court permanently enjoin the Defendants, their agents, employees,
16 successors, and all persons acting in concert or participating with them under their
17 direction, from:
18

19 (a) clouding Tombstone's title to federal water rights of way and/or secondary
20 rights under RS2339 and RS2340 to access, occupy, construct and maintain water
21 structures and conveyances, including catchments, dams, reservoirs, ditches, flumes,
22 pipelines, aqueducts and canals, within the Miller Canyon Pipeline Right of Way (for
23 purposes of this Count, solely the portion extending from the City of Tombstone to the
24 point of diversion for McCoy Spring No. 4), Marshall Canyon Pipeline Right of Way,
25 the Carr Canyon Pipeline Right of Way (for purposes of this Count, including only the
26 area encompassed by the Cabin Spring Auxiliary Pipeline ROW, the Smith Spring
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1 Auxiliary Pipeline ROW, the O'Brien Spring Auxiliary Pipeline ROW, and the Storrs
2 Spring Auxiliary Pipeline ROW), the Clark Canyon (the "Divide") Pipeline Right of
3 Way (for purposes of this Count, encompassing only the portion extending from the
4 Miller Canyon Pipeline Right of Way to the points of diversion for Brearley Spring No.
5 12 and Hoagland Spring No. 23), the McCoy Springs Group No. 2, 3 & 4 Reservoir Site
6 (for purposes of this Count, encompassing only rights of way relating to the point of
7 diversion for McCoy Spring No. 4), the Maple Springs No. 7, 8 & 9 Reservoir Site, the
8 Lower Spring No. 10 Reservoir Site, the Cabin Spring No. 14 & Cabin Spring Auxiliary
9 No. 15 Reservoir Site, the Smith Spring No. 18 Reservoir Site, the Porter Spring No. 19
10 Reservoir Site, the O'Brien Spring No. 20 Reservoir Site, and the Storrs Spring No. 21
11 Reservoir Site, as legally described in Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and
12 depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14, or otherwise
13 clouding such other scope or dimension of the subject RS2339 and RS2340 rights as is
14 reasonably necessary for Tombstone to divert and convey water from the corresponding
15 headsprings; and/or

16 (b) unreasonably interfering with Tombstone's use of motorized vehicles and
17 mechanized equipment, as described in paragraphs 133 through 135 of the General
18 Allegations, to access, occupy, construct and maintain water structures and conveyances,
19 including catchments, dams, reservoirs, ditches, flumes, pipelines, aqueducts and canals,
20 within the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the
21 portion extending from the City of Tombstone to the point of diversion for McCoy
22 Spring No. 4), Marshall Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right
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1 of Way (for purposes of this Count, including only the area encompassed by the Cabin
 2 Spring Auxiliary Pipeline ROW, the Smith Spring Auxiliary Pipeline ROW, the O'Brien
 3 Spring Auxiliary Pipeline ROW, and the Storrs Spring Auxiliary Pipeline ROW), the
 4 Clark Canyon (the "Divide") Pipeline Right of Way (for purposes of this Count,
 5 encompassing only the portion extending from the Miller Canyon Pipeline Right of Way
 6 to the points of diversion for Brearley Spring No. 12 and Hoagland Spring No. 23), the
 7 McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count,
 8 encompassing only rights of way relating to the point of diversion for McCoy Spring
 9 No. 4), the Maple Springs No. 7, 8 & 9 Reservoir Site, the Lower Spring No. 10
 10 Reservoir Site, the Cabin Spring No. 14 & Cabin Spring Auxiliary No. 15 Reservoir
 11 Site, the Smith Spring No. 18 Reservoir Site, the Porter Spring No. 19 Reservoir Site,
 12 the O'Brien Spring No. 20 Reservoir Site, and the Storrs Spring No. 21 Reservoir Site,
 13 as legally described in Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and depicted in
 14 Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14;

15 3. That this Court award such different, further or additional relief as appropriate
 16 or necessary to achieve justice and equity between the parties, including the award of
 17 attorneys' fees, litigation expenses and costs against Defendants as provided by
 18 applicable law.

24 **Count III**

25 **Third Quiet Title Claim**

26 **Federal Water Rights of Way and/or Secondary Rights Concerning McCoy Spring**
 27 **No. 2, McCoy Spring No. 3, Marshall Spring No. 5, Bench Spring No. 6, Gird**
 28 **Reservoir No. 9 ½, and Quartz Spring No. 22**

1
2 1. Tombstone adopts and realleges collectively as paragraph 1 of this Count
3 paragraphs 3 through 136 of the General Allegations.

4 2. Tombstone holds federal water rights of way and/or secondary rights under
5 RS2339 and RS2340 for the construction and maintenance of water structures and
6 conveyances, including catchments, dams, reservoirs, ditches, flumes, pipelines,
7 aqueducts and canals, servicing McCoy Spring No. 2, McCoy Spring No. 3, Marshall
8 Spring No. 5, Bench Spring No. 6, and Quartz Spring No. 22, as those headsprings are
9 legally described at Exhibit 1 (pp. 33, 44, 46, 47).
10
11

12 3. In order to make beneficial use of the water produced by McCoy Spring No. 2,
13 McCoy Spring No. 3, Marshall Spring No. 5, Bench Spring No. 6, and Quartz Spring
14 No. 22, and to use and fully enjoy its federal water rights of way and/or secondary
15 rights, it is absolutely necessary for Tombstone to use motorized vehicles and
16 mechanized equipment to site, access, occupy, construct and maintain: (a) water
17 structures, including catchments, protective flumes, and reservoirs, anywhere within the
18 McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count,
19 encompassing only rights of way relating to the point of diversion for McCoy Spring
20 No. 2 and McCoy Spring No. 3), the Quartz Spring No. 22 Reservoir Site, the Marshall
21 Spring No. 5 Reservoir Site, the Bench Spring No. 6 Reservoir Site, and the Gird
22 Reservoir No. 9 ½ Reservoir Site, as legally described in Exhibit 1 (pp. 19, 30, 33, 46-
23 48), and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1), 12 and 14; and (b)
24 water conveyances, including flumes, ditches, aqueducts, and pipelines, anywhere within
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26
27
28

1 the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the portion
2 extending from the City of Tombstone to the point of diversion for McCoy Spring No. 2,
3 McCoy Spring No. 3 and Quartz Spring No. 22) and the Marshall Canyon Pipeline Right
4 of Way (for purposes of this Count, solely the portion extending from the Miller Canyon
5 Pipeline Right of Way to Marshall Spring No. 5, Bench Spring No. 6, and the Gird
6 Reservoir No. 9 ½), as legally described in Exhibit 1 (pp. 1-11, 33, 44, 46-48), and
7 depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1), 12 and 14.
8
9

10 4. Accordingly, Tombstone's federal water rights of way and/or secondary rights
11 under RS2339 and RS2340 for the construction and maintenance of water structures and
12 conveyances servicing McCoy Spring No. 2, McCoy Spring No. 3, Marshall Spring No.
13 5, Bench Spring No. 6, and Quartz Spring No. 22 include: (a) the right to access, occupy,
14 construct and maintain water structures and conveyances within the Miller Canyon
15 Pipeline Right of Way (for purposes of this Count, solely the portion extending from the
16 City of Tombstone to the point of diversion for McCoy Spring No. 2, McCoy Spring No.
17 3 and Quartz Spring No. 22), the Marshall Canyon Pipeline Right of Way (for purposes
18 of this Count, solely the portion extending from the Miller Canyon Pipeline Right of
19 Way to Marshall Spring No. 5, Bench Spring No. 6, and the Gird Reservoir No. 9 ½),
20 the McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count,
21 encompassing only rights of way relating to the point of diversion for McCoy Spring
22 No. 2 and McCoy Spring No. 3), the Quartz Spring No. 22 Reservoir Site, the Marshall
23 Spring No. 5 Reservoir Site, the Bench Spring No. 6 Reservoir Site, and the Gird
24 Reservoir No. 9 ½ Reservoir Site, as legally described in Exhibit 1 (pp. 1-11, 19, 30, 33,
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1 44, 46-48), and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1), 12 and 14;
2 and (b) the right to use motorized vehicles and mechanized equipment to engage in
3 related ground disturbing activities within the foregoing areas.
4

5 5. Since the Monument Fire of 2011, Defendants have interfered with
6 Tombstone's construction and maintenance of water structures and conveyances within
7 the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the portion
8 extending from the City of Tombstone to the point of diversion for McCoy Spring No. 2,
9 McCoy Spring No. 3 and Quartz Spring No. 22), the Marshall Canyon Pipeline Right of
10 Way (for purposes of this Count, solely the portion extending from the Miller Canyon
11 Pipeline Right of Way to Marshall Spring No. 5, Bench Spring No. 6, and the Gird
12 Reservoir No. 9 ½), the McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes
13 of this Count, encompassing only rights of way relating to the point of diversion for
14 McCoy Spring No. 2 and McCoy Spring No. 3), the Quartz Spring No. 22 Reservoir
15 Site, the Marshall Spring No. 5 Reservoir Site, the Bench Spring No. 6 Reservoir Site,
16 and the Gird Reservoir No. 9 ½ Reservoir Site, as legally described in Exhibit 1 (pp. 1-
17 11, 19, 30, 33, 44, 46-48), and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix
18 1), 12 and 14, and such conduct is clouding Tombstone's title to the same.
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20
21
22

23 6. As against Defendants, the Court should quiet Tombstone's title to the Miller
24 Canyon Pipeline Right of Way (for purposes of this Count, solely the portion extending
25 from the City of Tombstone to the point of diversion for McCoy Spring No. 2, McCoy
26 Spring No. 3 and Quartz Spring No. 22), the Marshall Canyon Pipeline Right of Way
27 (for purposes of this Count, solely the portion extending from the Miller Canyon
28

1 Pipeline Right of Way to Marshall Spring No. 5, Bench Spring No. 6, and the Gird
2 Reservoir No. 9 ½), the McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes
3 of this Count, encompassing only rights of way relating to the point of diversion for
4 of this Count, encompassing only rights of way relating to the point of diversion for
5 McCoy Spring No. 2 and McCoy Spring No. 3), the Quartz Spring No. 22 Reservoir
6 Site, the Marshall Spring No. 5 Reservoir Site, the Bench Spring No. 6 Reservoir Site,
7 and the Gird Reservoir No. 9 ½ Reservoir Site, as legally described in Exhibit 1 (pp. 1-
8 11, 19, 30, 33, 44, 46-48), and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix
9 1), 12 and 14, as valid federal water rights of way and/or secondary rights under RS2339
10 and RS2340 because Tombstone has suffered or is likely to suffer irreparable harm from
11 the cloud on title created by Defendants' conduct and has no adequate remedy at law to
12 clear the cloud on title, and Tombstone's requested permanent injunctive relief is
13 favored by the public interest and the balance of equities.

14
15
16 WHEREFORE, Plaintiff City of Tombstone requests:

17
18 1. This court declare, adjudge, and decree under the Declaratory Judgment Act,
19 28 U.S.C. § 2201 and 5 U.S. C. §§ 701, 702 and 704, and the Quiet Title Act, 28 U.S.C.
20 § 2409a, Tombstone holds federal water rights of way and/or secondary rights under
21 RS2339 and RS2340 to access, occupy, construct and maintain water structures and
22 conveyances, including catchments, dams, reservoirs, ditches, flumes, pipelines,
23 aqueducts and canals, within the Miller Canyon Pipeline Right of Way (for purposes of
24 this Count, solely the portion extending from the City of Tombstone to the point of
25 diversion for McCoy Spring No. 2, McCoy Spring No. 3 and Quartz Spring No. 22), the
26 Marshall Canyon Pipeline Right of Way (for purposes of this Count, solely the portion
27
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1 extending from the Miller Canyon Pipeline Right of Way to Marshall Spring No. 5,
2 Bench Spring No. 6, and the Gird Reservoir No. 9 ½), the McCoy Springs Group No. 2,
3 3 & 4 Reservoir Site (for purposes of this Count, encompassing only rights of way
4 relating to the point of diversion for McCoy Spring No. 2 and McCoy Spring No. 3), the
5 Quartz Spring No. 22 Reservoir Site, the Marshall Spring No. 5 Reservoir Site, the
6 Bench Spring No. 6 Reservoir Site, and the Gird Reservoir No. 9 ½ Reservoir Site, as
7 legally described in Exhibit 1 (pp. 1-11, 19, 30, 33, 44, 46-48), and depicted in Exhibits
8 2 (Figures III.1 and III.2, Appendix 1), 12 and 14, or otherwise within such other scope
9 or dimension of the subject RS2339 and RS2340 rights as is reasonably necessary for
10 Tombstone to divert and convey water from the corresponding headsprings.
11

12
13
14 2. That this court permanently enjoin the Defendants, their agents, employees,
15 successors, and all persons acting in concert or participating with them under their
16 direction, from:

17 (a) clouding Tombstone's title to federal water rights of way and/or secondary
18 rights under RS2339 and RS2340 to access, occupy, construct and maintain water
19 structures and conveyances, including catchments, dams, reservoirs, ditches, flumes,
20 pipelines, aqueducts and canals, within the Miller Canyon Pipeline Right of Way (for
21 purposes of this Count, solely the portion extending from the City of Tombstone to the
22 point of diversion for McCoy Spring No. 2, McCoy Spring No. 3 and Quartz Spring No.
23 22), the Marshall Canyon Pipeline Right of Way (for purposes of this Count, solely the
24 portion extending from the Miller Canyon Pipeline Right of Way to Marshall Spring No.
25 5, Bench Spring No. 6, and the Gird Reservoir No. 9 ½), the McCoy Springs Group No.
26
27
28

1 2, 3 & 4 Reservoir Site (for purposes of this Count, encompassing only rights of way
2 relating to the point of diversion for McCoy Spring No. 2 and McCoy Spring No. 3), the
3 Quartz Spring No. 22 Reservoir Site, the Marshall Spring No. 5 Reservoir Site, the
4 Bench Spring No. 6 Reservoir Site, and the Gird Reservoir No. 9 ½ Reservoir Site, as
5 legally described in Exhibit 1 (pp. 1-11, 19, 30, 33, 44, 46-48), and depicted in Exhibits
6 2 (Figures III.1 and III.2, Appendix 1), 12 and 14, or otherwise clouding such other
7 scope or dimension of the subject RS2339 and RS2340 rights as is reasonably necessary
8 for Tombstone to divert and convey water from the corresponding headsprings; and/or
9
10

11 (b) unreasonably interfering with Tombstone's use of motorized vehicles and
12 mechanized equipment, as described in paragraphs 133 through 135 of the General
13 Allegations, to access, occupy, construct and maintain water structures and conveyances,
14 including catchments, dams, reservoirs, ditches, flumes, pipelines, aqueducts and canals,
15 within the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the
16 portion extending from the City of Tombstone to the point of diversion for McCoy
17 Spring No. 2, McCoy Spring No. 3 and Quartz Spring No. 22), the Marshall Canyon
18 Pipeline Right of Way (for purposes of this Count, solely the portion extending from the
19 Miller Canyon Pipeline Right of Way to Marshall Spring No. 5, Bench Spring No. 6,
20 and the Gird Reservoir No. 9 ½), the McCoy Springs Group No. 2, 3 & 4 Reservoir Site
21 (for purposes of this Count, encompassing only rights of way relating to the point of
22 diversion for McCoy Spring No. 2 and McCoy Spring No. 3), the Quartz Spring No. 22
23 Reservoir Site, the Marshall Spring No. 5 Reservoir Site, the Bench Spring No. 6
24 Reservoir Site, and the Gird Reservoir No. 9 ½ Reservoir Site, as legally described in
25
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28

1 Exhibit 1 (pp. 1-11, 19, 30, 33, 44, 46-48), and depicted in Exhibits 2 (Figures III.1 and
2 III.2, Appendix 1), 12 and 14;

3
4 3. That this Court award such different, further or additional relief as appropriate
5 or necessary to achieve justice and equity between the parties, including the award of
6 attorneys' fees, litigation expenses and costs against Defendants as provided by
7 applicable law.
8

9 **Count IV**

10 **Fourth Quiet Title Claim**

11 **Secondary Rights Concerning Gardner Spring No. 24**

12 1. Tombstone adopts and realleges collectively as paragraph 1 of this Count
13 paragraphs 3 through 136 of the General Allegations.
14

15 2. Tombstone holds secondary rights under RS2339 and RS2340 for the
16 construction and maintenance of water structures and conveyances, including
17 catchments, dams, reservoirs, ditches, flumes, pipelines, aqueducts and canals, servicing
18 Gardner Spring No. 24, as that headspring is legally described in Exhibit 1 (p. 45).
19

20 3. In order to make beneficial use of the water produced by Gardner Spring No.
21 24, and to use and fully enjoy its secondary rights, it is absolutely necessary for
22 Tombstone to use motorized vehicles and mechanized equipment to site, access, occupy,
23 construct and maintain: (a) water structures, including catchments, protective flumes,
24 and reservoirs, anywhere within the Gardner Spring No. 24 Reservoir Site, as legally
25 described in Exhibit 1 (p. 31) and depicted in Exhibits 2 (Figures III.1 and III.2,
26 Appendix 1) and 14; and (b) water conveyances, including flumes, ditches, aqueducts,
27
28

1 and pipelines, anywhere within the Miller Canyon Pipeline Right of Way (for purposes
2 of this Count, solely the Gardner Spring Auxiliary Pipeline ROW) and the Gardner
3 Spring No. 24 Reservoir Site, as legally described in Exhibit 1 (pp. 9-10, 31), and
4 depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) and 14.
5

6 4. Accordingly, Tombstone's secondary rights under RS2339 and RS2340 for the
7 construction and maintenance of water structures and conveyances servicing Gardner
8 Spring No. 24 include: (a) the right to access, occupy, construct and maintain water
9 structures and conveyances within the Miller Canyon Pipeline Right of Way (for
10 purposes of this Count, solely the Gardner Spring Auxiliary Pipeline ROW) and the
11 Gardner Spring No. 24 Reservoir Site, as legally described in Exhibit 1 (pp. 9-10, 31),
12 and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) and 14; and (b) the right
13 to use motorized vehicles and mechanized equipment to engage in related ground
14 disturbing activities within the foregoing areas.
15
16

17 5. Since the Monument Fire of 2011, Defendants have interfered with
18 Tombstone's construction and maintenance of water structures and conveyances within
19 the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the Gardner
20 Spring Auxiliary Pipeline ROW) and the Gardner Spring No. 24 Reservoir Site, as
21 legally described in Exhibit 1 (pp. 9-10, 31) and depicted in Exhibits 2 (Figures III.1 and
22 III.2, Appendix 1) and 14, and such conduct is clouding Tombstone's title to the same.
23
24

25 6. As against Defendants, the Court should quiet Tombstone's title to the Miller
26 Canyon Pipeline Right of Way (for purposes of this Count, solely the Gardner Spring
27 Auxiliary Pipeline ROW) and the Gardner Spring No. 24 Reservoir Site, as legally
28

1 described in Exhibit 1 (pp. 9-10, 31), and depicted in Exhibits 2 (Figures III.1 and III.2,
2 Appendix 1) and 14, as valid secondary rights under RS2339 and RS2340 because
3 Tombstone has suffered or is likely to suffer irreparable harm from the cloud on title
4 created by Defendants' conduct and has no adequate remedy at law to clear the cloud on
5 title, and Tombstone's requested permanent injunctive relief is favored by the public
6 interest and the balance of equities.
7

8
9 WHEREFORE, Plaintiff City of Tombstone requests:

10 1. This court declare, adjudge, and decree under the Declaratory Judgment Act,
11 28 U.S.C. § 2201 and 5 U.S. C. §§ 701, 702 and 704, and the Quiet Title Act, 28 U.S.C.
12 § 2409a, Tombstone holds secondary rights under RS2339 and RS2340 to access,
13 occupy, construct and maintain water structures and conveyances, including catchments,
14 dams, reservoirs, ditches, flumes, pipelines, aqueducts and canals, within the Miller
15 Canyon Pipeline Right of Way (for purposes of this Count, solely the Gardner Spring
16 Auxiliary Pipeline ROW) and the Gardner Spring No. 24 Reservoir Site, as legally
17 described in Exhibit 1 (pp. 9-10, 31), and depicted in Exhibits 2 (Figures III.1 and III.2,
18 Appendix 1) and 14, or otherwise within such other scope or dimension of the subject
19 RS2339 and RS2340 rights as is reasonably necessary for Tombstone to divert and
20 convey water from the corresponding headspring.
21
22

23
24 2. That this court permanently enjoin the Defendants, their agents, employees,
25 successors, and all persons acting in concert or participating with them under their
26 direction, from:
27
28

1 (a) clouding Tombstone's title to secondary rights under RS2339 and RS2340 to
2 access, occupy, construct and maintain water structures and conveyances, including
3 catchments, dams, reservoirs, ditches, flumes, pipelines, aqueducts and canals, within the
4 Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the Gardner
5 Spring Auxiliary Pipeline ROW) and the Gardner Spring No. 24 Reservoir Site, as
6 legally described in Exhibit 1 (pp. 9-10, 31), and depicted in Exhibits 2 (Figures III.1
7 and III.2, Appendix 1) and 14, or otherwise clouding such other scope or dimension of
8 the subject RS2339 and RS2340 rights as is reasonably necessary for Tombstone to
9 divert and convey water from the corresponding headspring; and/or

12 (b) unreasonably interfering with Tombstone's use of motorized vehicles and
13 mechanized equipment, as described in paragraphs 133 through 135 of the General
14 Allegations, to access, occupy, construct and maintain water structures and conveyances,
15 including catchments, dams, reservoirs, ditches, flumes, pipelines, aqueducts and canals,
16 within the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the
17 Gardner Spring Auxiliary Pipeline ROW) and the Gardner Spring No. 24 Reservoir Site,
18 as legally described in Exhibit 1 (pp. 9-10, 31), and depicted in Exhibits 2 (Figures III.1
19 and III.2, Appendix 1) and 14;

22 3. That this Court award such different, further or additional relief as appropriate
23 or necessary to achieve justice and equity between the parties, including the award of
24 attorneys' fees, litigation expenses and costs against Defendants as provided by
25 applicable law.
26
27
28

Count V

First APA Claim

Arbitrary, Capricious and Unlawful Conduct Concerning Miller Spring No. 1, Clark Spring No. 11, Carr Spring No. 13, Rock Spring No. 16, Rock Auxiliary Spring No. 17, and Gardner Spring No. 24

1. Tombstone adopts and realleges collectively as paragraph 1 of this Count paragraphs 3 through 136 of the General Allegations, as well as paragraphs 2 through 4 of Count I and paragraphs 2 through 4 of Count IV.

2. The lands encumbered by the portion of the subject RS2339 and RS2340 rights consisting of the Miller Canyon Pipeline Right of Way (for purposes of this paragraph, excluding solely the Gardner Spring Auxiliary Pipeline ROW), the Carr Canyon Pipeline Right of Way (for purposes of this Count, excluding the Auxiliary Pipeline ROWs), the Clark Canyon (the “Divide”) Pipeline Right of Way (for purposes of this Count, encompassing only rights of way relating to the point of diversion for Clark Spring No. 11), the Miller Spring No. 1 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of this Count, encompassing only the point of diversion for Clark Spring No. 11), Head Spring No. 13 Reservoir Site, the Rock Spring No. 16 & 17 Reservoir Site, as legally described in Exhibit 1 (pp. 1-10, 12-13, 16-18, 22-23, 25, 36) and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14, as well as the Miller Canyon Public Highway Right of Way and the Carr Canyon Public Highway Right of Way under RS2477, as depicted in Exhibits 1 (pp. 49-74), 15 through 21 (hereinafter the “lands encumbered by prior valid claims”), were never incorporated into the Coronado National Forest, any prior forest reserve, nor the Miller Peak Wilderness.

1 3. Defendants have never had jurisdiction to compel Tombstone to seek special
2 use permitting or additional express authorization from said Defendants to access,
3 maintain, bury, or construct water structures and conveyances consisting of ditches,
4 pipelines, flumes, catchments and/or reservoirs on the lands encumbered by prior valid
5 claims, which were otherwise authorized by the subject RS2339, RS2340 and RS2477
6 rights.
7

8 4. The special use permitting historically secured by Tombstone and its
9 predecessors from Defendant, U.S. Department of Agriculture, to access, maintain or
10 construct water structures consisting of ditches, pipelines, flumes, catchments and/or
11 reservoirs on the lands encumbered by prior valid claims, was sought and obtained
12 voluntarily solely to avoid disputes over the existence and scope of the relevant portion
13 of the subject RS2339 and RS2340 rights, and to allow for the installation of fencing and
14 other improvements that are not encompassed by the subject RS2339 and RS2340 rights.
15

16 5. Defendant U.S. Department of Agriculture issued a Special Use Permit to
17 Tombstone on May 14, 1962 (Exhibit 22) for the purpose of “[c]onstructing, maintaining
18 and using a municipal water supply with the right of fencing the six (6) water sources. (5
19 parcels);” it also contemplates the use of a strip of land 16,700 feet long and 50 feet wide
20 on national forest land for access and pipelines to Miller Spring No. 1, Clark Spring No.
21 11, Carr Spring No. 13 (also known as Head Spring No. 13), Rock Spring No. 16, Rock
22 Auxiliary Spring No. 17, and Gardner Spring No. 24.
23

24 6. Tombstone remains fully authorized under the 1962 special use permit to
25 construct, maintain and use its municipal water system on the lands encumbered by prior
26
27
28

1 valid claims, as well as with respect to Gardner Spring No. 24, because Defendants have
2 never properly suspended or revoked that permit in accordance with the procedures
3 outlined by 36 CFR 251.60(a) and (f) (citing 36 CFR 251.54(g)(3)(ii)), or any other
4 administrative process.
5

6 7. As a matter of law, the 1962 special use permit must be construed according to
7 contract principles, with the issuing agency regarded as the drafter and all ambiguities
8 construed against the issuing agency.
9

10 8. The 1962 special use permit clearly contemplates the construction,
11 maintenance, and use of a municipal water supply on the lands encumbered by prior
12 valid claims, as well as with respect to Gardner Spring No. 24, but is subject to all valid
13 claims and is otherwise silent and, therefore, facially ambiguous as to whether it
14 contemplates the use of motorized and mechanized vehicles and equipment in accessing
15 and maintaining the spring sites, water structures and water conveyances it encompasses,
16 as well as to whether it contemplates maintenance work involving ground-disturbing
17 activities.
18
19

20 9. Until the Monument Fire of 2011, the custom, practice and course of dealing
21 between the parties with respect to the 1962 special use permit, and prior special use
22 permits issued by the Forest Service, establishes that the parties to the permits, including
23 Tombstone and Defendant, U.S. Department of Agriculture, intended for the free and
24 unhindered use of motorized vehicles and mechanized equipment by Tombstone to
25 access both the lands encumbered by prior valid claims and the lands encompassed by
26 the portion of the Miller Canyon Pipeline Right of Way consisting of the Gardner Spring
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1 Auxiliary Pipeline ROW and the Gardner Spring No. 24 Reservoir Site, over the public
2 highways established by the subject RS2477 rights, as well as to engage in ground
3 disturbing activities, if necessary, to maintain the permanent water structures and
4 conveyances encompassed by the relevant portion of the subject RS2339 and RS2340
5 rights, including ditches, pipelines, flumes, catchments and reservoirs, as well as other
6 structures authorized by the permits.
7

8
9 10. After the Monument Fire of 2011, despite the foregoing mutual understanding
10 of the 1962 special use permit, Defendants prohibited Tombstone's free and unhindered
11 use of motorized vehicles and mechanized equipment to access both the lands
12 encumbered by prior valid claims and the lands encumbered by the Gardner Spring
13 Auxiliary Pipeline ROW and the Gardner Spring No. 24 Reservoir Site, and further
14 prohibited Tombstone from maintaining and fully restoring water structures and
15 conveyances upon such lands using the methods described in paragraphs 133 through
16 135 of the General Allegations (hereinafter the "proposed restoration work") by:
17

18
19 (a) ordering Tombstone on October 3, 19, 26 and November 1, 2011 to cease its
20 restoration work;

21
22 (b) issuing a decision memorandum on November 7, 2011 that limited the
23 proposed restoration work to the water structures and conveyances encompassed by the
24 portion of the subject RS2339 and RS2340 rights relating to Miller Spring No. 1;

25
26 (c) issuing a decision memorandum on December 7, 2011 that limited the
27 proposed restoration work to temporary repairs to the water structures and conveyances
28

1 encompassed by the portion of the subject RS2339 and RS2340 rights relating to
2 Gardner Spring No. 24; and

3 (d) subsequently ordering Tombstone to perform maintenance work of water
4 structures and conveyances encompassed by the subject RS2339 and RS2340 by hand
5 and without motorized vehicular access notwithstanding the subject RS2339, RS2340,
6 and RS2477 rights.
7

8 11. Defendants abused their discretion and acted arbitrarily, capriciously, and
9 unlawfully by:
10

11 (a) exercising jurisdiction over the lands encumbered by prior valid claims to
12 compel Tombstone to seek special use permitting or additional express authorization
13 from said Defendants before allowing Tombstone to perform the proposed restoration
14 work despite the fact that the custom, practice and course of dealing between the parties
15 and predecessors in interest established the proposed restoration work was already
16 authorized by the 1962 special use permit and the subject RS2339, RS2340 and RS2477
17 rights; and
18

19 (b) effectively suspending or revoking the 1962 special use permit with respect to
20 the maintenance of water structures and conveyances on both the lands encumbered by
21 prior valid claims and the lands encumbered by the Gardner Spring Auxiliary Pipeline
22 ROW and the Gardner Spring No. 24 Reservoir Site, without following the procedures
23 outlined by 36 CFR 251.60(a) and (f) (citing 36 CFR 251.54(g)(3)(ii)), or any other
24 administrative process.
25
26
27
28

1 12. Further, with respect to the Gardner Spring Auxiliary Pipeline ROW and the
2 Gardner Spring No. 24 Reservoir Site, and, alternatively, even if Defendants had
3 jurisdiction over the lands encumbered by prior valid claims with respect to the relevant
4 portion of the subject RS2339, RS2340 and RS2477 rights, and even if the 1962 special
5 use permit did not contemplate authorizing the proposed restoration work, Defendants
6 abused their discretion and have acted arbitrarily, capriciously, and unlawfully by
7 prohibiting Tombstone from engaging in the proposed restoration work in the following
8 ways:
9

10 (a) by interpreting and applying federal law as prohibiting and pre-empting
11 Tombstone's police power authority to engage in the proposed restoration work despite:
12 (1) the weighty federalism interests favoring the proposed restoration work under Ariz.
13 Rev. Stat. § 26-301(15), Ariz. Rev. Stat. § 26-303(B), (E)(1), and Ariz. Admin. Code
14 R8-2-301(8); (2) the lack of any clear or unequivocal intention on the part of Congress
15 requiring such preemption; and (3) the lack of any clear or unequivocal indication in any
16 regulation, policy directive, or guideline implementing federal law requiring such
17 preemption.
18

19 (b) by effectively revoking Defendant, U.S. Department of Agriculture's,
20 previous recognition of the subject RS2339 and RS2340 rights without notice or an
21 opportunity to be heard, contrary to the due process guaranteed by the Fifth Amendment
22 to the United States Constitution;
23

24 (c) by initiating interagency consultations under the National Environmental
25 Protection Act and the Endangered Species Act and causing needless delay during a
26
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28

1 State of Emergency without serving any legitimate public purpose even though the
2 proposed restoration work did not require any agency action, contrary to the due process
3 guaranteed by the Fifth Amendment to the United States Constitution;
4

5 (d) by depriving Tombstone of the beneficial use of water, secondary rights
6 implied by such water rights, and federal water rights of way to which it has had vested
7 property rights guaranteed under the Fifth Amendment of the United States Constitution
8 at all relevant times, without legal authority, serving any legitimate public purpose or
9 providing just compensation;
10

11 (e) by completely failing to consider the subject RS2339, RS2340, and RS2477
12 rights in connection with Tombstone's proposed restoration work, contrary to the due
13 process guaranteed by the Fifth Amendment to the United States Constitution;
14

15 (f) by completely failing to consider the implications of the subject RS2339,
16 RS2340, and RS2477 rights in connection with Tombstone's proposed restoration work
17 under *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of
18 1964, 16 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984,
19 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, §
20 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest Service
21 Manual, §§ 5509.11, 5522.1, 5522.11;
22

23 (g) by prohibiting Tombstone's proposed use of motorized and mechanized
24 vehicles and equipment in connection with the proposed restoration work even though
25 such usage would largely occur outside of the boundaries of any properly designated
26 Wilderness Area, and, in any event, would have been clearly authorized under the
27
28

1 Wilderness Act of 1964, 16 U.S.C. §§ 1133(c), 1134(a), the Arizona Wilderness Act of
2 1984, 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service
3 Manual, § 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest
4 Service Manual, §§ 5509.11, 5522.1, 5522.11;

5
6 (h) by failing to authorize Tombstone's proposed ground-disturbing maintenance
7 of water structures in connection with the proposed restoration work even though that
8 work would largely occur outside of the boundaries of any properly designated
9 Wilderness Area, and, in any event, would have been clearly authorized under *United*
10 *States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of 1964, 16
11 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984, 98 Stat.
12 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, § 2323.43d,
13 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest Service Manual, §§
14 5509.11, 5522.1, 5522.11;

15
16 (i) by demanding Tombstone locate specific spring sites, as well as furnish
17 precise legal descriptions, extensive proof of formal grants, documents, instruments, and
18 surveys before allowing the proposed restoration work, contrary to the guidelines plainly
19 set out in 2700 Forest Service Manual, § 2719.10, and 5500 Forest Service Manual, §§
20 5509.11, 5522.1, 5522.11 and without having any legitimate or reasonable basis to
21 question the legitimacy of the subject RS2339, RS2340, and RS2477 rights;

22
23 (j) by failing to consult with the Office of General Counsel with regard to
24 determining whether special use authorization could be waived or was otherwise
25 unnecessary for the proposed restoration work, contrary to 2700 Forest Service Manual,
26
27
28

1 §§ 2718.31, 2719.10 and without having any legitimate or reasonable basis for such
2 deviation;

3
4 (k) by refusing to consider, address, or authorize the portion of Tombstone's
5 proposed restoration work relating to Clark Spring No. 11, Head Spring No. 13, Rock
6 Spring No. 16, and Rock Auxiliary Spring No. 17, while at the same time authorizing
7 essentially the same restoration work for Miller Spring No. 1 based on essentially the
8 same information, contrary to the due process guaranteed by the Fifth Amendment to the
9 United States Constitution; and/or
10

11 (l) by refusing to consider, address, or authorize the portion of Tombstone's
12 proposed restoration work relating to Clark Spring No. 11, Head Spring No. 13, Rock
13 Spring No. 16, and Rock Auxiliary Spring No. 17, based primarily on the decision to
14 only allow restoration work that would not affect masonry structures, would be limited
15 to "current facilities," and would only restore those water structures that were "recently
16 functioning," all of which are considerations that are completely irrelevant or contrary to
17 the factors that must be considered under the Wilderness Act of 1964, 16 U.S.C. §§
18 1133(c), 1134(a), the Arizona Wilderness Act of 1984, 98 Stat. 1485, § 302(a), 36
19 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, § 2323.43d, 2700 Forest
20 Service Manual, §§ 2718.31, 2719.10, and 5500 Forest Service Manual, §§ 5509.11,
21 5522.1, 5522.11, as well as all other applicable federal laws, regulations, policy
22 directives and guidelines.
23
24
25

26 13. The foregoing abusive, arbitrary, capricious and unlawful conduct by
27 Defendants in prohibiting Tombstone from engaging in the proposed restoration work is
28

1 sufficiently final and ripe for review under the Administrative Procedure Act, 5 U.S.C. §
2 701 et seq., because:

3 (a) Defendants have caused Tombstone immediate, continuing, and determinable
4 injury, which is capable of judicial remediation, consisting of the impairment of: (1) its
5 sovereign interest in preserving and exercising jurisdiction and control over municipal
6 property and infrastructure that is essential to its continued existence, which is
7 guaranteed by the text, structure and context of the United States Constitution, including
8 the Tenth Amendment; (2) its sovereign police power interest in protecting public health
9 and safety, which is protected by the text, structure and context of the United States
10 Constitution, including the Tenth Amendment; and (3) its vested water rights, secondary
11 rights, and federal water rights of way, which are protected by the Fifth Amendment to
12 the United States Constitution.
13

14 (b) Defendants have adopted the final administrative position that special use
15 authorization or additional express authorization from the Forest Service will always be
16 required for the use of motorized and mechanized vehicles and equipment upon and
17 along the lands encumbered by prior valid claims, as well as with respect to Gardner
18 Spring No. 24, notwithstanding the subject RS2339, RS2340 and RS2477 rights;
19

20 (c) although partial restoration work of the water structures encompassed by the
21 portion of the subject RS2339 and RS2340 rights relating to Miller Spring No. 1, Carr
22 Spring No. 13 (also known as Head Spring No. 13) and Gardner Spring No. 24 had been
23 allowed by Defendants, the proposed restoration work relating to said springs has not
24 been completed or fully authorized, and periodic fire and flooding events ensure that
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1 there will be a recurring and continuous need for Tombstone to use motorized and
2 mechanized vehicles and equipment upon and along the encumbered lands to engage in
3 similar restoration work with respect to said springs in the future; and/or
4

5 (d) available administrative processes have been exhausted or pursuing them is
6 futile in view of the following facts: (1) the Forest Service has concluded deliberations
7 over the scope of Tombstone's 1962 special use permit and the subject RS2339, RS2340
8 and RS2477 rights with respect to the proposed restoration work; (2) the delay
9 associated with any additional administrative process before seeking judicial review
10 would cause Tombstone to suffer continued irreparable harm; (3) Defendants'
11 imposition of restrictions on Tombstone's exercise of the 1962 special use permit,
12 RS2339 and RS2340 rights and access to the subject RS2477 rights, which frustrate their
13 purpose, has been so consistent and unyielding that they constitute a final administrative
14 decision; (4) Defendants' imposition of restrictions on Tombstone's vested rights stem
15 from the findings in decision memoranda that are expressly deemed not subject to
16 administrative appeal; and (5) in view of Defendants continuous failure and refusal to
17 acknowledge their past recognitions of the validity of the subject RS2339 and RS2340
18 rights, it is apparent Defendants will not consider any administrative request by
19 Tombstone reasonably or in good faith.
20
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22
23

24 14. Tombstone has a clear right to judicial review of Defendants' aforesaid
25 abusive, arbitrary, capricious and unlawful conduct under the Administrative Procedure
26 Act, 5 U.S.C. § 701 *et seq.*, is at imminent risk of irreparable harm from Defendants'
27 unlawful conduct, has no adequate remedy at law, is likely to succeed on the merits, and
28

1 the award of preliminary and permanent injunctive relief as hereafter requested is
2 favored by the public interest and the balance of equities.

3
4 WHEREFORE, Plaintiff City of Tombstone requests:

5 1. This court declare, adjudge, and decree that Defendants abused their discretion
6 and acted arbitrarily, capriciously and/or unlawfully by:

7 (a) compelling Tombstone to seek special use permitting or additional express
8 authorization before allowing Tombstone to perform the proposed restoration work;

9 (b) reaching a final decision regarding the proposed restoration work without
10 taking into consideration the legal principles, directives, factors and/or guidelines set out
11 by the Fifth and Tenth Amendments to the United States Constitution, *United States v.*
12 *New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of 1964, 16 U.S.C. §§
13 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984, 98 Stat. 1485, §
14 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, § 2323.43d, 2700
15 Forest Service Manual, §§ 2718.31, 2719.10, and/or 5500 Forest Service Manual, §§
16 5509.11, 5522.1, 5522.11; and/or
17

18 (c) by otherwise reaching a final decision on the proposed restoration work in a
19 manner that was an abuse of discretion, arbitrary, capricious and unlawful;
20

21 2. That this court preliminarily and/or permanently enjoin the Defendants, their
22 agents, employees, successors, and all persons acting in concert or participating with
23 them under their direction, from:
24

25 (a) unreasonably interfering with Tombstone's performance of the proposed
26 restoration work, specifically Tombstone's use of motorized vehicles and mechanized
27
28

1 equipment upon and along the Miller Canyon Public Highway Right of Way and the
2 Carr Canyon Public Highway Right of Way under RS2477, as legally described in
3 Exhibit 1 (pp. 49-74), and depicted in Exhibits 15 through 21, to access the Miller
4 Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right of Way (for purposes of
5 this Count, excluding the Auxiliary Pipeline ROWs), the Clark Canyon (the “Divide”) Pipeline
6 Pipeline Right of Way (for purposes of this Count, encompassing only rights of way
7 relating to the point of diversion for Clark Spring No. 11), the Miller Spring No. 1
8 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of this Count,
9 encompassing only rights of way relating to the point of diversion for Clark Spring No.
10 11), Head Spring No. 13 Reservoir Site, the Rock Spring No. 16 & 17 Reservoir Site,
11 and the Gardner Spring No. 24 Reservoir Site, as legally described in Exhibit 1 (pp. 1-
12 10, 12-13, 16-18, 22-23, 25, 31, 36) and depicted in Exhibits 2 (Figures III.1 and III.2,
13 Appendix 1) through 14, and to maintain and to fully restore water structures and
14 conveyances within the scope of the aforesaid portion of the subject RS2339 and
15 RS2340 rights, including ditches, pipelines, flumes, catchments and reservoirs, as
16 described in paragraphs 133 through 135 of the General Allegations, or otherwise within
17 such other scope or dimension of the subject RS2339 and RS2340 rights as is reasonably
18 necessary for Tombstone to divert and convey water from the corresponding
19 headsprings;

25 (b) reaching a final decision on Tombstone’s current or future use of motorized
26 vehicles and mechanized equipment over Miller Canyon Public Highway Right of Way
27 and the Carr Canyon Public Highway Right of Way under RS2477, as legally described
28

1 in Exhibit 1 (pp. 49-74), and depicted in Exhibits 15 through 21, to access the Miller
2 Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right of Way (for purposes of
3 this Count, excluding the Auxiliary Pipeline ROWs), the Clark Canyon (the “Divide”)
4 Pipeline Right of Way (for purposes of this Count, encompassing only rights of way
5 relating to the point of diversion for Clark Spring No. 11), the Miller Spring No. 1
6 Reservoir Site, Clark Spring No. 11 Reservoir Site (for purposes of this Count,
7 encompassing only rights of way relating to the point of diversion for Clark Spring No.
8 11), Head Spring No. 13 Reservoir Site, the Rock Spring No. 16 & 17 Reservoir Site,
9 and the Gardner Spring No. 24 Reservoir Site, as legally described in Exhibit 1 (pp. 1-
10 10, 12-13, 16-18, 22-23, 25, 31, 36) and depicted in Exhibits 2 (Figures III.1 and III.2,
11 Appendix 1) through 14, and to maintain and to fully restore water structures within the
12 scope of the aforesaid portion of the subject RS2339 and RS2340 rights, including
13 ditches, pipelines, flumes, catchments and reservoirs, without taking into consideration
14 the legal principles, directives, factors and/or guidelines set out by the Fifth and Tenth
15 Amendments to the United States Constitution, *United States v. New Mexico*, 438 U.S.
16 696, 705-18 (1978), the Wilderness Act of 1964, 16 U.S.C. §§ 1133(a)(1), 1133(c),
17 1134(a), the Arizona Wilderness Act of 1984, 98 Stat. 1485, § 302(a), 36 C.F.R. §
18 351.50(b) and (e), 2300 Forest Service Manual, § 2323.43d, 2700 Forest Service
19 Manual, §§ 2718.31, 2719.10, and/or 5500 Forest Service Manual, §§ 5509.11, 5522.1,
20 5522.11; and/or
21
22
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24
25

26 (c) from otherwise acting in a manner that is an abuse of discretion, arbitrary,
27 capricious and unlawful;
28

3. That, if the Court determines that additional permits or modified permits are required to allow Tombstone to perform the proposed restoration work, that this Court order Defendants to immediately issue the necessary or modified permits without unreasonable restrictions imposed by, or interference from, the Defendants, their agents, employees, successors, and all persons acting in concert or participating with them under their direction.

4. That this Court award such different, further or additional relief as appropriate or necessary to achieve justice and equity between the parties, including the award of attorneys' fees, litigation expenses and costs against Defendants as provided by applicable law.

Count VI

Second APA Claim

Arbitrary, Capricious and Unlawful Conduct Concerning McCoy Spring No. 4, Maple Spring No. 7, Maple Spring No. 8, Maple Spring No. 9, Lower Spring No. 10, Brearley Spring No. 12, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21

1. Tombstone adopts and realleges collectively as paragraph 1 of this Count paragraphs 3 through 136 of the General Allegations, as well as paragraphs 2 through 4 of Count II.

2. The lands encumbered by the portion of the subject RS2339 and RS2340 rights of way consisting of federal water rights of way and secondary rights relating to the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the portion extending from the City of Tombstone to the point of diversion for McCoy Spring No.

1 4), Marshall Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right of Way (for
2 purposes of this Count, including only the area encompassed by the Cabin Spring
3 Auxiliary Pipeline ROW, the Smith Spring Auxiliary Pipeline ROW, the O'Brien Spring
4 Auxiliary Pipeline ROW, and the Storrs Spring Auxiliary Pipeline ROW), the Clark
5 Canyon (the "Divide") Pipeline Right of Way (for purposes of this Count, encompassing
6 only the portion extending from the Miller Canyon Pipeline Right of Way to the points
7 of diversion for Brearley Spring No. 12 and Hoagland Spring No. 23), the McCoy
8 Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count, encompassing
9 only rights of way relating to the point of diversion for McCoy Spring No. 4), the Maple
10 Springs No. 7, 8 & 9 Reservoir Site, the Lower Spring No. 10 Reservoir Site, the Cabin
11 Spring No. 14 & Cabin Spring Auxiliary No. 15 Reservoir Site, the Smith Spring No. 18
12 Reservoir Site, the Porter Spring No. 19 Reservoir Site, the O'Brien Spring No. 20
13 Reservoir Site, and the Storrs Spring No. 21 Reservoir Site, as legally described in
14 Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and depicted in Exhibits 2 (Figures III.1
15 and III.2, Appendix 1) through 14, (hereinafter the "lands encumbered by prior valid
16 claims"), were never incorporated into the Coronado National Forest, any prior forest
17 reserve, nor the Miller Peak Wilderness.
18

19 3. Defendants have never had jurisdiction to compel Tombstone to seek special
20 use permitting or additional express authorization from said Defendants to access,
21 maintain, bury, or construct water structures consisting of ditches, pipelines, flumes,
22 catchments and/or reservoirs on the lands encumbered by prior valid claims, which were
23 otherwise authorized by the subject RS2339, RS2340 and RS2477 rights.
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1 4. The special use permitting historically secured by Tombstone and its
2 predecessors from Defendant, U.S. Department of Agriculture, to access, maintain or
3 construct water structures consisting of ditches, pipelines, flumes, catchments and/or
4 reservoirs on the lands encumbered by prior valid claims, was sought and obtained
5 voluntarily solely to avoid disputes over the existence and scope of the relevant portion
6 of the subject RS2339 and RS2340 rights, and to allow for the installation of fencing and
7 other improvements that are not encompassed by the subject RS2339 and RS2340 rights.
8
9

10 5. Before the Monument Fire of 2011, Defendants repeatedly and continuously
11 allowed Tombstone to use heavy motorized and mechanized vehicles and equipment to
12 access, maintain, repair and restore its municipal water system on the lands encumbered
13 by prior valid claims.
14

15 6. Since the Monument fire, Defendants have prohibited Tombstone's free and
16 unhindered use of motorized vehicles and mechanized equipment to access the lands
17 encumbered by prior valid claims over the public highways established by the subject
18 RS2477 rights, and to maintain and restore the permanent water structures and
19 conveyances encompassed by the relevant portion of the subject RS2339 and RS2340
20 rights, including ditches, pipelines, flumes, catchments and reservoirs, as described in
21 paragraphs 133 through 135 of the General Allegations (hereinafter the "proposed
22 restoration work") by:
23
24

25 (a) ordering Tombstone on October 3, 19, 26 and November 1, 2011 to cease its
26 restoration work;
27
28

1 (b) issuing a decision memorandum on November 7, 2011 that limited the
2 proposed restoration work to the water structures and conveyances encompassed by the
3 portion of the subject RS2339 and RS2340 rights relating to Miller Spring No. 1;
4

5 (c) issuing a decision memorandum on December 22, 2011 that limited the
6 proposed restoration work to temporary repairs to the water structures and conveyances
7 encompassed by the portion of the subject RS2339 and RS2340 rights relating to
8 Gardner Spring No. 24; and
9

10 (d) subsequently ordering Tombstone to perform maintenance work of water
11 structures and conveyances encompassed by the subject RS2339 and RS2340 by hand
12 and without motorized vehicular access notwithstanding the subject RS2339, RS2340,
13 and RS2477 rights.
14

15 7. Defendants acted arbitrarily, capriciously, and unlawfully by exercising
16 jurisdiction over the lands encumbered by prior valid claims to compel Tombstone to
17 seek special use permitting or additional express authorization from said Defendants
18 before allowing Tombstone to perform the proposed restoration work despite the fact
19 that the custom, practice and course of dealing between the parties and predecessors in
20 interest established the proposed restoration work was already authorized by the subject
21 RS2339, RS2340 and RS2477 rights.
22

23
24 8. Alternatively, even if Defendants had jurisdiction over the lands encumbered
25 by prior valid claims with respect to the relevant portion of the subject RS2339, RS2340
26 and RS2477 rights, Defendants have acted arbitrarily, capriciously, and unlawfully by
27
28

1 prohibiting Tombstone from engaging in the proposed restoration work in the following
2 ways:

3 (a) by interpreting and applying federal law as prohibiting and pre-empting
4 Tombstone's police power authority to engage in the proposed restoration work despite:
5 (1) the weighty federalism interests favoring the proposed restoration work under Ariz.
6 Rev. Stat. § 26-301(15), Ariz. Rev. Stat. § 26-303(B), (E)(1), and Ariz. Admin. Code
7 R8-2-301(8); (2) the lack of any clear or unequivocal intention on the part of Congress
8 requiring such preemption; and (3) the lack of any clear or unequivocal indication in any
9 regulation, policy directive, or guideline implementing federal law requiring such
10 preemption.
11

12 (b) by effectively revoking Defendant, U.S. Department of Agriculture's,
13 previous recognition of the subject RS2339 and RS2340 rights without notice or an
14 opportunity to be heard, contrary to the due process guaranteed by the Fifth Amendment
15 to the United States Constitution;
16

17 (c) by initiating interagency consultations under the National Environmental
18 Protection Act or the Endangered Species Act and causing needless delay during a State
19 of Emergency without serving any legitimate public purpose even though the proposed
20 restoration work did not require any agency action, contrary to the due process
21 guaranteed by the Fifth Amendment to the United States Constitution;
22

23 (d) by depriving Tombstone of the beneficial use of water, secondary rights
24 implied by such water rights, and federal water rights of way to which it has had vested
25 property rights guaranteed under the Fifth Amendment of the United States Constitution
26
27
28

1 at all relevant times, without legal authority, serving any legitimate public purpose or
2 providing just compensation;

3 (e) by completely failing to consider the subject RS2339, RS2340, and RS2477
4 rights in connection with Tombstone's proposed restoration work, contrary to the due
5 process guaranteed by the Fifth Amendment to the United States Constitution;

6 (f) by completely failing to consider the implications of the subject RS2339,
7 RS2340, and RS2477 rights in connection with Tombstone's proposed restoration work
8 under *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of
9 1964, 16 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984,
10 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, §
11 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest Service
12 Manual, §§ 5509.11, 5522.1, 5522.11;

13 (g) by prohibiting Tombstone's proposed use of motorized and mechanized
14 vehicles and equipment in connection with the proposed restoration work even though
15 such usage would largely occur outside of the boundaries of any properly designated
16 Wilderness Area, and, in any event, would have been clearly authorized under the
17 Wilderness Act of 1964, 16 U.S.C. §§ 1133(c), 1134(a), the Arizona Wilderness Act of
18 1984, 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service
19 Manual, § 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest
20 Service Manual, §§ 5509.11, 5522.1, 5522.11.

21 (h) by failing to authorize Tombstone's proposed ground-disturbing maintenance
22 of water structures and conveyances in connection with the proposed restoration work
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1 even though that work would largely occur outside of the boundaries of any properly
2 designated Wilderness Area, and, in any event, would have been clearly authorized
3 under *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of
4 1964, 16 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984,
5 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, §
6 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest Service
7 Manual, §§ 5509.11, 5522.1, 5522.11;
8
9

10 (i) by demanding Tombstone locate specific spring sites, as well as furnish
11 precise legal descriptions, extensive proof of formal grants, documents, instruments, and
12 surveys before allowing the proposed restoration work, contrary to the guidelines plainly
13 set out in 2700 Forest Service Manual, § 2719.10, and 5500 Forest Service Manual, §§
14 5509.11, 5522.1, 5522.11 and without having any legitimate or reasonable basis to
15 question the legitimacy of the subject RS2339, RS2340, and RS2477 rights;
16
17

18 (j) by failing to consult with the Office of General Counsel with regard to
19 determining whether special use authorization could be waived or was otherwise
20 unnecessary for the proposed restoration work, contrary to 2700 Forest Service Manual,
21 §§ 2718.31, 2719.10 and without having any legitimate or reasonable basis for such
22 deviation;
23

24 (k) by refusing to consider, address, or authorize the portion of Tombstone's
25 proposed restoration work relating to McCoy Spring No. 4, Maple Spring No. 7, Maple
26 Spring No. 8, Maple Spring No. 9, Lower Spring No. 10, Brearley Spring No. 12, Cabin
27 Spring No. 14, Cabin Auxiliary Spring No. 15, Smith Spring No. 18, Porter Spring No.
28

1 19, O'Brien Spring No. 20, and Storrs Spring No. 21, while at the same time authorizing
2 essentially the same restoration work for Miller Spring No. 1 based on essentially the
3 same information; and/or
4

5 (l) by refusing to consider, address, or authorize Tombstone's proposed
6 restoration work based primarily on the decision to only allow restoration work that
7 would not affect masonry structures, would be limited to "current facilities," and would
8 only restore those water structures and conveyances that were "recently functioning," all
9 of which are considerations that are completely irrelevant or contrary to the factors that
10 must be considered under the Wilderness Act of 1964, 16 U.S.C. §§ 1133(c), 1134(a),
11 the Arizona Wilderness Act of 1984, 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and
12 (e), 2300 Forest Service Manual, § 2323.43d, 2700 Forest Service Manual, §§ 2718.31,
13 2719.10, and 5500 Forest Service Manual, §§ 5509.11, 5522.1, 5522.11, as well as all
14 other applicable federal laws, regulations, policy directives and guidelines.
15
16

17 9. The foregoing arbitrary, capricious and unlawful conduct by Defendants in
18 prohibiting Tombstone from engaging in the proposed restoration work is sufficiently
19 final and ripe for review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.,
20 because:
21

22 (a) Defendants have caused Tombstone immediate, continuing, and determinable
23 injury, which is capable of judicial remediation, consisting of the impairment of: (1) its
24 sovereign interest in preserving and exercising control over municipal property and
25 infrastructure that is essential to its continued existence, which is guaranteed by the text,
26 structure and context of the United States Constitution, including the Tenth Amendment;
27
28

1 (2) its sovereign police power interest in protecting public health and safety, which is
2 protected by the text, structure and context of the United States Constitution, including
3 the Tenth Amendment; and (3) its vested water rights, secondary rights, and federal
4 water rights of way, which are protected by the Fifth Amendment to the United States
5 Constitution.
6

7 (b) Defendants have adopted the final administrative position that special use
8 authorization or additional express authorization from the Forest Service will always be
9 required for the use of motorized and mechanized vehicles and equipment upon and
10 along the lands encumbered by prior valid claims, notwithstanding the subject RS2339,
11 RS2340 and RS2477 rights; and/or
12

13 (c) available administrative processes have been exhausted or pursuing them is
14 futile in view of the following facts: (1) the Forest Service has concluded deliberations
15 over the scope of the subject RS2339, RS2340 and RS2477 rights with respect to the
16 proposed restoration work; (2) the delay associated with any additional administrative
17 process before seeking judicial review would cause Tombstone to suffer continued
18 irreparable harm; (3) Defendants' imposition of restrictions on Tombstone's exercise of
19 RS2339 and RS2340 rights and access to the subject RS2477 rights, which frustrate their
20 purpose, has been so consistent and unyielding that they constitute a final administrative
21 decision; (4) Defendants' imposition of restrictions on Tombstone's vested rights stem
22 from the findings in decision memoranda that are expressly deemed not subject to
23 administrative appeal; and (5) in view of Defendants continuous failure and refusal to
24 acknowledge their past recognitions of the validity of the subject RS2339 and RS2340
25
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28

1 rights, it is apparent Defendants will not consider any administrative request by
2 Tombstone reasonably or in good faith.

3
4 10. Tombstone has a clear right to judicial review of Defendants' aforesaid
5 arbitrary, capricious and unlawful conduct under the Administrative Procedure Act, 5
6 U.S.C. § 701 *et seq.*, is at imminent risk of irreparable harm from Defendants' unlawful
7 conduct, has no adequate remedy at law, is likely to succeed on the merits, and the
8 award of preliminary and permanent injunctive relief as heretofore requested is favored
9 by the public interest and the balance of equities.
10

11 WHEREFORE, Plaintiff City of Tombstone requests:

12 1. This court declare, adjudge, and decree that Defendants abused their discretion
13 and acted arbitrarily, capriciously and/or unlawfully by:
14

15 (a) compelling Tombstone to seek special use permitting or additional express
16 authorization before allowing Tombstone to perform the proposed restoration work;
17

18 (b) reaching a final decision regarding the proposed restoration work without
19 taking into consideration the legal principles, directives, factors and/or guidelines set out
20 by the Fifth and Tenth Amendments to the United States Constitution, *United States v.*
21 *New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of 1964, 16 U.S.C. §§
22 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984, 98 Stat. 1485, §
23 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, § 2323.43d, 2700
24 Forest Service Manual, §§ 2718.31, 2719.10, and/or 5500 Forest Service Manual, §§
25 5509.11, 5522.1, 5522.11; and/or
26
27
28

1 (c) by otherwise reaching a final decision on the proposed restoration work in a
2 manner that was an abuse of discretion, arbitrary, unreasonable and unlawful;
3

4 2. That this court preliminarily and/or permanently enjoin the Defendants, their
5 agents, employees, successors, and all persons acting in concert or participating with
6 them under their direction, from:

7 (a) unreasonably interfering with Tombstone's performance of the proposed
8 restoration work, specifically Tombstone's use of motorized vehicles and mechanized
9 equipment over the public highways established by the subject RS2477 rights to access
10 the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the portion
11 extending from the City of Tombstone to the point of diversion for McCoy Spring No.
12 4), Marshall Canyon Pipeline Right of Way, the Carr Canyon Pipeline Right of Way (for
13 purposes of this Count, including only the area encompassed by the Cabin Spring
14 Auxiliary Pipeline ROW, the Smith Spring Auxiliary Pipeline ROW, the O'Brien Spring
15 Auxiliary Pipeline ROW, and the Storrs Spring Auxiliary Pipeline ROW), the Clark
16 Canyon (the "Divide") Pipeline Right of Way (for purposes of this Count, encompassing
17 only the portion extending from the Miller Canyon Pipeline Right of Way to the points
18 of diversion for Brearley Spring No. 12 and Hoagland Spring No. 23), the McCoy
19 Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count, encompassing
20 only rights of way relating to the point of diversion for McCoy Spring No. 4), the Maple
21 Springs No. 7, 8 & 9 Reservoir Site, the Lower Spring No. 10 Reservoir Site, the Cabin
22 Spring No. 14 & Cabin Spring Auxiliary No. 15 Reservoir Site, the Smith Spring No. 18
23 Reservoir Site, the Porter Spring No. 19 Reservoir Site, the O'Brien Spring No. 20
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1 Reservoir Site, and the Storrs Spring No. 21 Reservoir Site, as legally described in
2 Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and depicted in Exhibits 2 (Figures III.1
3 and III.2, Appendix 1) through 14, and to maintain and to fully restore water structures
4 within the scope of the aforesaid portion of the subject RS2339 and RS2340 rights,
5 including ditches, pipelines, flumes, catchments and reservoirs, as described in
6 paragraphs 133 through 135 of the General Allegations, or otherwise within such other
7 scope or dimension of the subject RS2339 and RS2340 rights as is reasonably necessary
8 for Tombstone to divert and convey water from the corresponding headsprings;
9
10

11 (b) reaching a final decision on Tombstone's current or future use of motorized
12 vehicles and mechanized equipment over the public highways established by the subject
13 RS2477 rights to access the Miller Canyon Pipeline Right of Way (for purposes of this
14 Count, solely the portion extending from the City of Tombstone to the point of diversion
15 for McCoy Spring No. 4), Marshall Canyon Pipeline Right of Way, the Carr Canyon
16 Pipeline Right of Way (for purposes of this Count, including only the area encompassed
17 by the Cabin Spring Auxiliary Pipeline ROW, the Smith Spring Auxiliary Pipeline
18 ROW, the O'Brien Spring Auxiliary Pipeline ROW, and the Storrs Spring Auxiliary
19 Pipeline ROW), the Clark Canyon (the "Divide") Pipeline Right of Way (for purposes of
20 this Count, encompassing only the portion extending from the Miller Canyon Pipeline
21 Right of Way to the points of diversion for Brearley Spring No. 12 and Hoagland Spring
22 No. 23), the McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this
23 Count, encompassing only rights of way relating to the point of diversion for McCoy
24 Spring No. 4), the Maple Springs No. 7, 8 & 9 Reservoir Site, the Lower Spring No. 10
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1 Reservoir Site, the Cabin Spring No. 14 & Cabin Spring Auxiliary No. 15 Reservoir
2 Site, the Smith Spring No. 18 Reservoir Site, the Porter Spring No. 19 Reservoir Site,
3 the O'Brien Spring No. 20 Reservoir Site, and the Storrs Spring No. 21 Reservoir Site,
4 as legally described in Exhibit 1 (pp. 1-17, 19-21, 24, 26-29, 33-36) and depicted in
5 Exhibits 2 (Figures III.1 and III.2, Appendix 1) through 14, and to maintain and to fully
6 restore water structures within the scope of the aforesaid portion of the subject RS2339
7 and RS2340 rights, including ditches, pipelines, flumes, catchments and reservoirs,
8 without taking into consideration the legal principles, directives, factors and/or
9 guidelines set out by the Fifth and Tenth Amendments to the United States Constitution,
10 *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of 1964,
11 16 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984, 98 Stat.
12 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, § 2323.43d,
13 2700 Forest Service Manual, §§ 2718.31, 2719.10, and/or 5500 Forest Service Manual,
14 §§ 5509.11, 5522.1, 5522.11; and/or

15 (c) from otherwise acting in a manner that is an abuse of discretion, arbitrary,
16 capricious and unlawful;

17 3. That, if the Court determines that additional permits or modified permits are
18 required to allow Tombstone to perform the proposed restoration work, that this Court
19 order Defendants to immediately issue the necessary or modified permits without
20 unreasonable restrictions imposed by, or interference from, the Defendants, their agents,
21 employees, successors, and all persons acting in concert or participating with them under
22 their direction;

EXHIBIT B

1 described in Exhibit 1 (pp. 1-11, 19, 33, 46-48), and depicted in Exhibits 2 (Figures III.1
2 and III.2, Appendix 1), 12 and 14 (hereinafter the “lands encumbered by prior valid
3 claims”), were never incorporated into the Coronado National Forest, any prior forest
4 reserve, nor the Miller Peak Wilderness.
5

6 3. Defendants have never had jurisdiction to compel Tombstone to seek special
7 use permitting or additional express authorization from said Defendants to access,
8 maintain, bury, or construct water structures consisting of ditches, pipelines, flumes,
9 catchments and/or reservoirs on the lands encumbered by prior valid claims, which were
10 otherwise authorized by the subject RS2339, RS2340 and RS2477 rights.
11

12 4. The special use permitting historically secured by Tombstone and its
13 predecessors from Defendant, U.S. Department of Agriculture, to access, maintain or
14 construct water structures and conveyances consisting of ditches, pipelines, flumes,
15 catchments and/or reservoirs on the lands encumbered by prior valid claims, was sought
16 and obtained voluntarily solely to avoid disputes over the existence and scope of the
17 relevant portion of the subject RS2339 and RS2340 rights, and to allow for the
18 installation of fencing and other improvements that are not encompassed by the subject
19 RS2339 and RS2340 rights.
20
21

22 5. Before the Monument Fire of 2011, Defendants repeatedly and continuously
23 allowed Tombstone to use heavy motorized and mechanized vehicles and equipment to
24 access, maintain, repair and restore its municipal water system on the lands encumbered
25 by prior valid claims.
26
27
28

1 6. Since the Monument fire, Defendants have prohibited Tombstone's free and
2 unhindered use of motorized vehicles and mechanized equipment to access the lands
3 encumbered by prior valid claims over the public highways established by the subject
4 RS2477 rights and to maintain and restore the water structures and conveyances
5 encompassed by the relevant portion of the subject RS2339 and RS2340 rights,
6 including ditches, pipelines, flumes, catchments and reservoirs, as described in
7 paragraphs 133 through 135 of the General Allegations (hereinafter the "proposed
8 restoration work") by:
9

11 (a) ordering Tombstone on October 3, 19, 26 and November 1, 2011 to cease its
12 restoration work;
13

14 (b) issuing a decision memorandum on November 7, 2011 that limited the
15 proposed restoration work to the water structures and conveyances encompassed by the
16 portion of the subject RS2339 and RS2340 rights relating to Miller Spring No. 1;
17

18 (c) issuing a decision memorandum on December 22, 2011 that limited the
19 proposed restoration work to temporary repairs to the water structures and conveyances
20 encompassed by the portion of the subject RS2339 and RS2340 rights relating to
21 Gardner Spring No. 24; and
22

23 (d) subsequently ordering Tombstone to perform maintenance work of water
24 structures and conveyances encompassed by the subject RS2339 and RS2340 by hand
25 and without motorized vehicular access notwithstanding the subject RS2339, RS2340,
26 and RS2477 rights.
27
28

1 7. Defendants acted arbitrarily, capriciously, and unlawfully by exercising
2 jurisdiction over the lands encumbered by prior valid claims to compel Tombstone to
3 seek special use permitting or additional express authorization from said Defendants
4 before allowing Tombstone to perform the proposed restoration work despite the fact
5 that the custom, practice and course of dealing between the parties and predecessors in
6 interest established the proposed restoration work was already authorized by the subject
7 RS2339, RS2340 and RS2477 rights.
8

9
10 8. Alternatively, even if Defendants had jurisdiction over the lands encumbered
11 by prior valid claims with respect to the relevant portion of the subject RS2339, RS2340
12 and RS2477 rights, Defendants have acted arbitrarily, capriciously, and unlawfully by
13 prohibiting Tombstone from engaging in the proposed restoration work in the following
14 ways:
15

16 (a) by interpreting and applying federal law as prohibiting and pre-empting
17 Tombstone's police power authority to engage in the proposed restoration work despite:
18 (1) the weighty federalism interests favoring the proposed restoration work under Ariz.
19 Rev. Stat. § 26-301(15), Ariz. Rev. Stat. § 26-303(B), (E)(1), and Ariz. Admin. Code
20 R8-2-301(8); (2) the lack of any clear or unequivocal intention on the part of Congress
21 requiring such preemption; and (3) the lack of any clear or unequivocal indication in any
22 regulation, policy directive, or guideline implementing federal law requiring such
23 preemption.
24

25 (b) by effectively revoking Defendant, U.S. Department of Agriculture's,
26 previous recognition of the subject RS2339 and RS2340 rights without notice or an
27
28

1 opportunity to be heard, contrary to the due process guaranteed by the Fifth Amendment
2 to the United States Constitution;

3 (c) by initiating interagency consultations under the National Environmental
4 Protection Act or the Endangered Species Act and causing needless delay during a State
5 of Emergency without serving any legitimate public purpose even though the proposed
6 restoration work did not require any agency action, contrary to the due process
7 guaranteed by the Fifth Amendment to the United States Constitution;
8

9 (d) by depriving Tombstone of the beneficial use of water, secondary rights
10 implied by such water rights, and federal water rights of way to which it has had vested
11 property rights guaranteed under the Fifth Amendment to the United States Constitution
12 at all relevant times, without legal authority, serving any legitimate public purpose or
13 providing just compensation;
14

15 (e) by completely failing to consider the subject RS2339, RS2340, and RS2477
16 rights in connection with Tombstone's proposed restoration work, contrary to the due
17 process guaranteed by the Fifth Amendment to the United States Constitution;
18

19 (f) by completely failing to consider the implications of the subject RS2339,
20 RS2340, and RS2477 rights in connection with Tombstone's proposed restoration work
21 under *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of
22 1964, 16 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984,
23 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, §
24 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest Service
25 Manual, §§ 5509.11, 5522.1, 5522.11;
26
27
28

1 (g) by prohibiting Tombstone's proposed use of motorized and mechanized
2 vehicles and equipment in connection with the proposed restoration work even though
3 such usage would largely occur outside of the boundaries of any properly designated
4 Wilderness Area, and, in any event, would have been clearly authorized under the
5 Wilderness Act of 1964, 16 U.S.C. §§ 1133(c), 1134(a), the Arizona Wilderness Act of
6 1984, 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service
7 Manual, § 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest
8 Service Manual, §§ 5509.11, 5522.1, 5522.11.

11 (h) by failing to authorize Tombstone's proposed ground-disturbing maintenance
12 of water structures and conveyances in connection with the proposed restoration work
13 even though that work would largely occur outside of the boundaries of any properly
14 designated Wilderness Area, and, in any event, would have been clearly authorized
15 under *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of
16 1964, 16 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984,
17 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, §
18 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and 5500 Forest Service
19 Manual, §§ 5509.11, 5522.1, 5522.11;

23 (i) by demanding Tombstone locate specific spring sites, as well as furnish
24 precise legal descriptions, extensive proof of formal grants, documents, instruments, and
25 surveys before allowing the proposed restoration work, contrary to the guidelines plainly
26 set out in 2700 Forest Service Manual, § 2719.10, and 5500 Forest Service Manual, §§
27
28

1 5509.11, 5522.1, 5522.11 and without having any legitimate or reasonable basis to
2 question the legitimacy of the subject RS2339, RS2340, and RS2477 rights;

3 (j) by failing to consult with the Office of General Counsel with regard to
4 determining whether special use authorization could be waived or was otherwise
5 unnecessary for the proposed restoration work, contrary to 2700 Forest Service Manual,
6 §§ 2718.31, 2719.10 and without having any legitimate or reasonable basis for such
7 deviation; and/or
8

9
10 (k) by refusing to consider, address, or authorize Tombstone's proposed
11 restoration work based primarily on the decision to only allow restoration work that
12 would not affect masonry structures, would be limited to "current facilities," and would
13 only restore those water structures and conveyances that were "recently functioning," all
14 of which are considerations that are completely irrelevant or contrary to the factors that
15 must be considered under the Wilderness Act of 1964, 16 U.S.C. §§ 1133(c), 1134(a),
16 the Arizona Wilderness Act of 1984, 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and
17 (e), 2300 Forest Service Manual, § 2323.43d, 2700 Forest Service Manual, §§ 2718.31,
18 2719.10, and 5500 Forest Service Manual, §§ 5509.11, 5522.1, 5522.11, as well as all
19 other applicable federal laws, regulations, policy directives and guidelines.
20
21
22

23 9. The foregoing arbitrary, capricious and unlawful conduct by Defendants in
24 prohibiting Tombstone from engaging in the proposed restoration work is sufficiently
25 final and ripe for review under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.,
26 because:
27
28

1 (a) Defendants have caused Tombstone immediate, continuing, and determinable
2 injury, which is capable of judicial remediation, consisting of the impairment of: (1) its
3 sovereign interest in preserving and exercising jurisdiction and control over municipal
4 property and infrastructure that is essential to its continued existence, which is
5 guaranteed by the text, structure and context of the United States Constitution, including
6 the Tenth Amendment; (2) its sovereign police power interest in protecting public health
7 and safety, which is protected by the text, structure and context of the United States
8 Constitution, including the Tenth Amendment; and (3) its vested water rights, secondary
9 rights, and federal water rights of way, which are protected by the Fifth Amendment to
10 the United States Constitution.
11

12
13
14 (b) Defendants have adopted the final administrative position that special use
15 authorization or additional express authorization from the Forest Service will always be
16 required for the use of motorized and mechanized vehicles and equipment upon and
17 along the lands encumbered by prior valid claims, notwithstanding the subject RS2339,
18 RS2340 and RS2477 rights; and/or
19

20 (c) available administrative processes have been exhausted or pursuing them is
21 futile in view of the following facts: (1) the Forest Service has concluded deliberations
22 over the scope of the subject RS2339, RS2340 and RS2477 rights with respect to the
23 proposed restoration work; (2) the delay associated with any additional administrative
24 process before seeking judicial review would cause Tombstone to suffer continued
25 irreparable harm; (3) Defendants' imposition of restrictions on Tombstone's exercise of
26 RS2339 and RS2340 rights and access to the subject RS2477 rights, which frustrate their
27
28

1 purpose, has been so consistent and unyielding that they constitute a final administrative
2 decision; (4) Defendants' imposition of restrictions on Tombstone's vested rights stem
3 from the findings in decision memoranda that are expressly deemed not subject to
4 administrative appeal; and (5) in view of Defendants continuous failure and refusal to
5 acknowledge their past recognitions of the validity of the subject RS2339 and RS2340
6 rights, it is apparent Defendants will not consider any administrative request by
7 Tombstone reasonably or in good faith.
8

9
10 10. Tombstone has a clear right to judicial review of Defendants' aforesaid
11 arbitrary, capricious and unlawful conduct under the Administrative Procedure Act, 5
12 U.S.C. § 701 *et seq.*, is at imminent risk of irreparable harm from Defendants' unlawful
13 conduct, has no adequate remedy at law, is likely to succeed on the merits, and the
14 award of preliminary and permanent injunctive relief as heretofore requested is favored
15 by the public interest and the balance of equities.
16

17 WHEREFORE, Plaintiff City of Tombstone requests:
18

19 1. This court declare, adjudge, and decree that Defendants abused their discretion
20 and acted arbitrarily, capriciously and/or unlawfully by:
21

22 (a) compelling Tombstone to seek special use permitting or additional express
23 authorization before allowing Tombstone to perform the proposed restoration work;

24 (b) reaching a final decision regarding the proposed restoration work without
25 taking into consideration the legal principles, directives, factors and/or guidelines set out
26 by the Fifth and Tenth Amendments to the United States Constitution, *United States v.*
27 *New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness Act of 1964, 16 U.S.C. §§
28

1 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of 1984, 98 Stat. 1485, §
2 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service Manual, § 2323.43d, 2700
3 Forest Service Manual, §§ 2718.31, 2719.10, and/or 5500 Forest Service Manual, §§
4 5509.11, 5522.1, 5522.11; and/or
5

6 (c) by otherwise reaching a final decision on the proposed restoration work in a
7 manner that is an abuse of discretion, arbitrarily, capricious and unlawful;
8

9 2. That this court preliminarily and/or permanently enjoin the Defendants, their
10 agents, employees, successors, and all persons acting in concert or participating with
11 them under their direction, from:

12 (a) unreasonably interfering with Tombstone's performance of the proposed
13 restoration work, specifically Tombstone's use of motorized vehicles and mechanized
14 equipment over the public highways established by the subject RS2477 rights to access
15 the Miller Canyon Pipeline Right of Way (for purposes of this Count, solely the portion
16 extending from the City of Tombstone to the point of diversion for McCoy Spring No. 2
17 and McCoy Spring No. 3), the Marshall Canyon Pipeline Right of Way (for purposes of
18 this Count, solely the portion extending from the Miller Canyon Pipeline Right of Way
19 to Marshall Spring No. 5, Bench Spring No. 6, and the Gird Reservoir No. 9 ½), the
20 McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes of this Count,
21 encompassing only rights of way relating to the point of diversion for McCoy Spring
22 No. 2 and McCoy Spring No. 3), the Marshall Spring No. 5 Reservoir Site, the Bench
23 Spring No. 6 Reservoir Site, and the Gird Reservoir No. 9 ½ Reservoir Site, as legally
24 described in Exhibit 1 (pp. 1-11, 19, 33, 46-48), and depicted in Exhibits 2 (Figures III.1
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1 and III.2, Appendix 1), 12 and 14, and to maintain and to fully restore water structures
2 and conveyances within the scope of the aforesaid portion of the subject RS2339 and
3 RS2340 rights, including ditches, pipelines, flumes, catchments and reservoirs, as
4
5 alleged in paragraphs 133 through 135 of the General Allegations, or otherwise within
6 such other scope or dimension of the subject RS2339 and RS2340 rights as is reasonably
7 necessary for Tombstone to use and convey water from the corresponding headsprings;
8

9 (b) reaching a final decision on Tombstone's current or future use of motorized
10 vehicles and mechanized equipment over the public highways established by the subject
11 RS2477 rights to access the Miller Canyon Pipeline Right of Way (for purposes of this
12 Count, solely the portion extending from the City of Tombstone to the point of diversion
13 for McCoy Spring No. 2 and McCoy Spring No. 3), the Marshall Canyon Pipeline Right
14 of Way (for purposes of this Count, solely the portion extending from the Miller Canyon
15 Pipeline Right of Way to Marshall Spring No. 5, Bench Spring No. 6, and the Gird
16 Reservoir No. 9 ½), the McCoy Springs Group No. 2, 3 & 4 Reservoir Site (for purposes
17 of this Count, encompassing only rights of way relating to the point of diversion for
18 McCoy Spring No. 2 and McCoy Spring No. 3), the Marshall Spring No. 5 Reservoir
19 Site, the Bench Spring No. 6 Reservoir Site, and the Gird Reservoir No. 9 ½ Reservoir
20 Site, as legally described in Exhibit 1 (pp. 1-11, 19, 33, 46-48), and depicted in Exhibits
21 2 (Figures III.1 and III.2, Appendix 1), 12 and 14, and to maintain and to fully restore
22 water structures and conveyances within the scope of the aforesaid portion of the subject
23 RS2339 and RS2340 rights, including ditches, pipelines, flumes, catchments and
24 reservoirs, without taking into consideration the legal principles, directives, factors
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1 and/or guidelines set out by the Fifth and Tenth Amendments to the United States
2 Constitution, *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978), the Wilderness
3 Act of 1964, 16 U.S.C. §§ 1133(a)(1), 1133(c), 1134(a), the Arizona Wilderness Act of
4 1984, 98 Stat. 1485, § 302(a), 36 C.F.R. § 251.50(b) and (e), 2300 Forest Service
5 Manual, § 2323.43d, 2700 Forest Service Manual, §§ 2718.31, 2719.10, and/or 5500
6 Forest Service Manual, §§ 5509.11, 5522.1, 5522.11; and/or
7

8 (c) from otherwise acting in a manner that is an abuse of discretion, arbitrary,
9 capricious and unlawful;
10

11 3. That, if the Court determines that additional permits or modified permits are
12 required to allow Tombstone to perform the proposed restoration work, that this Court
13 order Defendants to immediately issue the necessary or modified permits without
14 unreasonable restrictions imposed by, or interference from, the Defendants, their agents,
15 employees, successors, and all persons acting in concert or participating with them under
16 their direction;
17

18 4. That this Court award such different, further or additional relief as appropriate
19 or necessary to achieve justice and equity between the parties, including the award of
20 attorneys' fees, litigation expenses and costs against Defendants as provided by
21 applicable law.
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Count VIII

Fourth APA Claim

Violation of Tenth Amendment

1. Tombstone adopts and realleges collectively as paragraph 1 of this Count paragraphs 3 through 136 of the General Allegations.

2. The principle of state sovereignty limits all “enumerated powers of the National Government” under the Tenth Amendment to the U.S. Constitution as a background principle of our system of dual sovereignty. *Bond v. United States*, 131 S. Ct. 2355, 2366 (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”).

3. 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).

4. The principle of state sovereignty guaranteed by the Tenth Amendment prohibits the federal government from taking actions that threaten the “States’ continued existence.” *Alden v. Maine*, 527 U.S. 706, 713-14 (1999).

5. The principle of state sovereignty guaranteed by the Tenth Amendment also precludes Congress from regulating the States in their sovereign capacity. *Printz v. U.S.*, 521 U.S. 898, 920 (1997) (“[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States”) (quoting *New York v. U.S.*, 505 U.S. 144, 166 (1992)).

1 6. The prohibition on Congress regulating the States in their sovereign capacity
2 extends to efforts to “indirectly” coerce “a State to adopt a federal regulatory system as
3 its own.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601-03 (2012).
4

5 7. Further, states and their political subdivisions are guaranteed under the Tenth
6 Amendment sufficient autonomy from the federal government so that they can exercise
7 traditionally reserved powers that are essential to their sovereign existence. *Printz*, 521
8 U.S. at 923-24, 932.
9

10 8. Although the U.S. Court of Appeals for the Ninth Circuit does not yet
11 recognize the revival of the traditional governmental functions test under the Tenth
12 Amendment, it remains true that only the three prong test of *Nat’l League of Cities v.*
13 *Usery*, 426 U.S. 833 (1976), harmonizes all of the Supreme Court’s federalism
14 jurisprudence since 1989. *Massachusetts v. Sebelius*, 698 F.Supp.2d 234, 252 n.154
15 (E.D. Mass. 2010) (the “‘traditional government functions’ analysis [is]. . . appropriate
16 in light of more recent Supreme Court cases”). Accordingly, the traditional
17 governmental functions test of *Nat’l League of Cities* is relevant when assessing whether
18 the principle of state sovereignty has been violated.
19
20

21 9. The loss of a municipal water supply threatens the continued existence of a
22 political subdivision of a State as a matter of law. *Brush v. Commissioner*, 300 U.S. 352,
23 370-71 (1937) (“[T]he acquisition and distribution of a supply of water for the needs of
24 the modern city involve the exercise of essential governmental functions, and this
25 conclusion is fortified by a consideration of the public uses to which the water is put.
26 Without such a supply, public schools, public sewers so necessary to preserve health,
27
28

1 fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds,
2 and public baths could not exist. And this is equivalent, in a very real sense, to saying
3 that the city itself would then disappear”).
4

5 10. Because a State only exists through its agencies, political instrumentalities
6 and subdivisions, an existential threat to a State’s political subdivision is equally a threat
7 to the continued existence of the State itself.
8

9 11. In the wake of the Monument Fire of 2011, Tombstone was fully authorized
10 as an agency of the State of Arizona to wield all of the State’s police powers to protect
11 public health and safety by fully restoring its municipal water system. Ariz. Rev. Stat.
12 §26-301(15); Ariz. Rev. Stat. §26-303(B), (E)(1); Ariz. Admin. Code R8-2-301(8).
13

14 12. Defendants’ hindrance of Tombstone’s effort to fully restore its municipal
15 water supply using motorized and mechanized vehicles and equipment as a duly
16 authorized state agency during a declared State of Emergency threatened the State’s
17 continued existence, and thereby violated the principle of state sovereignty as guaranteed
18 by the Tenth Amendment to the U.S. Constitution.
19

20 13. Defendants’ mandate that Tombstone use horses and hand tools to restore its
21 municipal water supply during a declared State of Emergency, rather than motorized and
22 mechanized vehicles and equipment as per the proposed restoration work, unless
23 Tombstone first secured additional special use authorization(s), violated the principle of
24 state sovereignty as guaranteed by the Tenth Amendment to the U.S. Constitution
25 because it constituted an effort to regulate the State of Arizona when it was acting in a
26 sovereign capacity and to compel it to adopt a federal regulatory system as its own.
27
28

1 14. Finally, Defendants have violated the principle of state sovereignty as
2 guaranteed by the Tenth Amendment because the Forest Service regulated Tombstone
3 when it is acting in a purely sovereign capacity with respect to sovereign property that is
4 essential to protecting public health and safety and also within the scope of the town's
5 concurrent sovereign jurisdiction. Such conduct (a) regulates "states as states," (b)
6 concerns essential attributes of state sovereignty, and (c) impairs governmental functions
7 traditionally assigned to the States.
8
9

10 15. The conclusion that Defendants' aforesaid conduct violates the Tenth
11 Amendment remains valid even if Defendants were somehow authorized by federal laws
12 that purported to clearly and unequivocally preempt such state action, even if
13 Defendants had jurisdiction over the lands encumbered by the subject RS2339, RS2340
14 and RS2477 rights, and even if Tombstone were not exercising any valid property right
15 or special use permit.
16
17

18 16. The foregoing unconstitutional conduct by Defendants in prohibiting
19 Tombstone from engaging in the proposed restoration work is sufficiently final and ripe
20 for review under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.*, because
21 Defendants have caused Tombstone immediate, continuing, and determinable injury,
22 which is capable of judicial remediation and likely to recur, consisting of the impairment
23 of Tombstone's sovereign interest: (a) in preserving and exercising police power
24 jurisdiction over lands within the boundaries of the State of Arizona as an agent of the
25 State during a State of Emergency; (b) in preserving and exercising jurisdiction and
26
27
28

1 control over essential municipal infrastructure; and (c) in protecting public health and
2 safety, as a political subdivision and authorized agent of the State.

3
4 17. Tombstone has a clear right to judicial review of Defendants' aforesaid
5 unconstitutional conduct under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et*
6 *seq.*, has suffered and is at imminent risk of irreparable harm from Defendants'
7 unconstitutional conduct, has no adequate remedy at law, is likely to succeed on the
8 merits, and the award of preliminary and permanent injunctive relief as heretofore
9 requested is favored by the public interest and the balance of equities.
10

11 WHEREFORE, Plaintiff, CITY OF TOMBSTONE, requests:

12
13 1. This court declare, adjudge, and decree that Defendants acted
14 unconstitutionally in violation of the Tenth Amendment by compelling Tombstone to
15 seek special use permitting or additional express authorization before allowing
16 Tombstone to perform the proposed restoration work.
17

18 2. That this court preliminarily and/or permanently enjoin the Defendants, their
19 agents, employees, successors, and all persons acting in concert or participating with
20 them under their direction, from unreasonably interfering with Tombstone's
21 performance of the proposed restoration work, specifically Tombstone's use of
22 motorized vehicles and mechanized equipment over the public highways established by
23 the subject RS2477 rights to access the lands encumbered by the subject RS2339 and
24 RS2340 rights, as legally described in Exhibit 1, and depicted in Exhibits 2 (Figures III.1
25 and III.2, Appendix 1) through 14, in order to maintain and to fully restore water
26 structures and conveyances within the scope of the subject RS2339 and RS2340 rights,
27
28

1 including ditches, pipelines, flumes, catchments and reservoirs, as described in
2 paragraphs 133 through 135 of the General Allegation, or otherwise within such other
3 scope or dimension of the subject RS2339 and RS2340 rights as is reasonably necessary
4 for Tombstone to divert and convey water from the corresponding headsprings;
5

6 3. That this Court award such different, further or additional relief as appropriate
7 or necessary to achieve justice and equity between the parties, including the award of
8 attorneys' fees, litigation expenses and costs against Defendants as provided by
9 applicable law.
10

11 **RESPECTFULLY SUBMITTED** on this 18th day of November, 2013 by:

12 s/Nicholas C. Dranias
13 Nicholas C. Dranias (029267)
14 **GOLDWATER INSTITUTE**
15 **SCHARF-NORTON CENTER FOR**
16 **CONSTITUTIONAL LITIGATION**
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VERIFICATION

Pursuant to 28 U.S.C. § 1746, and based on personal knowledge and/or reasonably certain knowledge obtained in the course of performing my official duties as an agent of the City of Tombstone at the relevant time, I declare under penalty of perjury that paragraphs 1 and 2 of the Introduction, as well as 78, 89 through 101, 103 through 108, and 111 through 135 of the General Allegations are true and correct to the best of my knowledge.

s/George Barnes 11/18/2013
 George Barnes Date
 Former City Clerk/Manager
 City of Tombstone

s/Nancy Sosa 11/18/2013
 Nancy Sosa Date
 City of Tombstone Archivist

Pursuant to 28 U.S.C. § 1746, and based on personal knowledge and/or reasonably certain knowledge obtained after a thorough investigation of the facts and applying generally accepted principles in the field of legal history, and based on my expertise in the field of legal history, I declare under penalty of perjury that paragraphs 8 through 77, and 79 through 88 of the General Allegations are true and correct to the best of my knowledge.

s/Jack August 11/18/2013
 Dr. Jack August Date
 Visiting Scholar in Legal History
 Snell & Wilmer L.L.P.
 Ph.D., University of New Mexico, History
 M.A., University of Arizona, History
 B.A., Yale University, American Studies

1 Pursuant to 28 U.S.C. § 1746, and based on personal knowledge and/or
2 reasonably certain knowledge obtained after a thorough investigation of the facts and
3 applying generally accepted principles in the field of hydrology, and based on my
4 expertise in the field of hydrology and the vesting and perfection requirements of
5 Arizona water law, I declare under penalty of perjury that paragraphs 28, 29, 42, and 129
6 through 136 of the General Allegations are true and correct to the best of my knowledge.
7
8
9

10
11 s/Don W. Young 11/18/2013
12 Dr. Don W. Young Date
13 Ph.D., University of Arizona, Hydrology & Water Resources
14 M.S., Edinboro University, Botany
15 B.S., University of Miami, Biology
16
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CERTIFICATE OF SERVICE

**PROPOSED VERSION OF DOCUMENT ELECTRONICALLY FILED BY ECF
and COPIES** sent via e-mail this 18th day of November, 2013 to:

Parties and Counsel Served	
<p>Attorneys for Plaintiff</p> <p>P. Randall Bays, Esq. Bays Law, P.C. 100 S. 7th Street Sierra Vista, AZ 85635</p>	<p>Attorneys for Defendants</p> <p>JOHN S. LEONARDO United States Attorney District of Arizona CHARLES A. DAVIS Assistant U.S. Attorney Arizona State Bar No. 014386 405 W. Congress, Suite 4800 Tucson, Arizona 85701-5040 Telephone: (520) 620-7300 charles.davis2@usdoj.gov</p>
<p>JOANNA K. BRINKMAN Attorney US Dept of Justice – Environmental Enforcement Section P.O. Box 7611 Ben Franklin Station Washington, DC 20044-7611 joanna.brinkman@usdoj.gov</p>	<p>CASSANDRA CASAUS CURRIE Attorney USDA Office of the General Counsel P.O. Box 586 Albuquerque, NM 87103-0586 Phone: (505)248-6009 Fax: (505)248-6013 cassandra.currie@usda.gov</p>

s/Nicholas C. Dranias