

**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,	)	Civil Action No. 11-845-TUC-FRZ
v.	)	
	)	Hon. Frank R. Zapata, presiding judge
UNITED STATES OF AMERICA; U.S.	)	
DEPARTMENT OF AGRICULTURE;	)	
TOM VILSAK, in an official capacity;	)	<b>STATEMENT OF MATERIAL FACTS</b>
TOM TIDWELL, in an official capacity;	)	<b>IN SUPPORT OF PLAINTIFF'S</b>
and CAL JOYNER, in an official capacity;	)	<b>MOTION FOR PARTIAL SUMMARY</b>
	)	<b>JUDGMENT</b>
Defendants.	)	
_____	)	

1. Beginning no later than July 15, 1882, the City of Tombstone's municipal water supply has included waters flowing from headspring sources of surface watercourses in Miller and Carr Canyons, and the "Divide" between them, including waters from Miller Spring No. 1, McCoy Springs Group No. 2, 3 & 4, Marshall Spring No. 5, Bench Spring No. 6, Maple Springs No. 7, 8 & 9, Lower Spring No. 10, Clark Spring No. 11, Head Spring No. 13, Cabin Spring No. 14 & Cabin Spring Auxiliary No. 15, Rock Springs No. 16 & 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, Storrs Spring No. 21, Quartz Spring No. 22, Hoagland Spring No. 23, and Gardner Spring No. 24, as legally described in Exhibit 1 (pp. 32-45) and depicted in

1 Exhibits 2 (figures III.1 and III.2, Appendix 1) through 14 of the Verified Second  
2 Amended Complaint (hereinafter collectively the “Tombstone Headsprings”). (August  
3 Decl., ¶¶26-29, 33-35, 38, 49-77 and Exs. 3 through 12, 12-2, 12-3, 13 through 43, 45  
4 through 71, 71-1, 74 through 78, 80; Clark Decl., ¶¶7-14; Young Decl., ¶¶12-29;  
5 Dranias Decl., Ex. B (LeFevre Dep., pp.; 46(5:25), 47(1:11), 88(18:25), 90(24:25),  
6 107(6:15), 145(7:17), Exs. 7, 20 (FS005893-5897)).)

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8  
9 2. Between 1881 and 1890, the 1881 Indiana Huachuca Water Company,  
10 acquired by deed competing water rights claims to the Tombstone Headsprings and with  
11 respect to such claims, complied with pre-1893 local customs--rooted in local laws-- that  
12 provided for the acquisition, vesting and perfection of water rights and appurtenant  
13 easements through the “location” of the spring headwaters of canyon watercourses and  
14 direct “beneficial use,” which required diversion and development through a dam, flume  
15 or catchment to allow use of the water. (August Decl., ¶¶26-29, 33-38, 40-51, 59-66, and  
16 Exs. 3 through 39, 47 through 50, 56 through 56-2, 57-1, 60 through 71-1, 74 through  
17 75, 80.)

18  
19  
20 3. Between 1901 and 1909, with respect to each of the Tombstone Headsprings,  
21 the 1881 Indiana Huachuca Water Company complied with Ariz. Terr. Session Laws,  
22 15th Legis. Assembly, Act No. 86 (April 13, 1893) and Ariz. Terr. Rev. Stat. §§ 73-4168  
23 through 4170, 73-4175 (1901), which required water rights and immediate appurtenant  
24 rights of way for water infrastructure to be vested and perfected by placing a monument,  
25 including a notice of appropriation describing the water source in its vicinity and  
26 contemporaneously recording a duplicate with the Office of the Cochise County  
27  
28

1 Recorder of Deeds. (August Decl., ¶¶26, 27, 33-35, 38, 40-52, 56, 65-77 and Exs. 3  
2 through 43, 47 through 50, 56 through 56-2, 57-1, 60 through 71-1, 74 through 75, 80.)  
3

4 4. By virtue of a series of transactions, including an ordinance designating the  
5 1881 Huachuca Water Company as the City of Tombstone's municipal water supply  
6 franchisee enacted on September 9, 1881; the May 14, 1909 foreclosure sale of the 1881  
7 Huachuca Water Company's water rights and rights of way to A.E. Davis; the  
8 September 30, 1912 conveyance by deed and bill of sale of said water rights and rights  
9 of way to the 1912 Huachuca Water Company; the January 10, 1938 conveyance by  
10 deed and bill of sale of said water rights and rights of way to the 1937 Huachuca Water  
11 Company; and the April 14, 1947 conveyance by deed and bill of sale of said water  
12 rights and rights of way to the City of Tombstone, the City of Tombstone is the final and  
13 current grantee in the chain of title to:  
14  
15

16 (a) the Miller Canyon Pipeline Right of Way (for purposes of this paragraph  
17 excluding the Gardner Spring Auxiliary Pipeline ROW);  
18

19 (b) the Carr Canyon Pipeline Right of Way (for purposes of this paragraph,  
20 excluding the Auxiliary Pipeline ROWs);  
21

22 (c) the Clark Canyon (the "Divide") Pipeline Right of Way (for purposes of this  
23 paragraph, encompassing only rights of way relating to the point of diversion for Clark  
24 Spring No. 11);  
25

26 (d) the Miller Spring No. 1 Reservoir Site;  
27  
28

1 (e) Clark Spring No. 11 Reservoir Site (for purposes of this paragraph,  
2 encompassing only rights of way relating to the point of diversion for Clark Spring No.  
3 11);  
4

5 (f) Head Spring No. 13 Reservoir Site; and

6 (g) the Rock Spring No. 16 & 17 Reservoir Site; all as legally described by  
7 corresponding reference in Exhibit 1 (pp. 1-10, 12-13, 16-18, 22-23, 25, 31, 36) and  
8 depicted in Exhibits 3 through 14 to the Verified Second Amended Complaint  
9 (hereinafter collectively the foregoing reservoir sites and rights of way are referenced as  
10 the "Count I Rights").  
11

12 (August Decl., ¶¶26, 27, 33-37, 40-52, 56, 57, 59-77 and Exs. 3 through 12-2, 13 through  
13 14, 24 through 27, 30 through 31, 45 through 56-1, 57, 60 through 71, 71-1, 74 through  
14 75, 80; Clark Decl., ¶¶7-14.)  
15

16 5. By virtue of a series of transactions, including an ordinance designating the  
17 1881 Huachuca Water Company as the City of Tombstone's municipal water supply  
18 franchisee enacted on September 9, 1881; the May 14, 1909 foreclosure sale of the 1881  
19 Huachuca Water Company's water rights and rights of way to A.E. Davis; the  
20 September 30, 1912 conveyance by deed and bill of sale of said water rights and rights  
21 of way to the 1912 Huachuca Water Company; the January 10, 1938 conveyance by  
22 deed and bill of sale of said water rights and rights of way to the 1937 Huachuca Water  
23 Company; and the April 14, 1947 conveyance by deed and bill of sale of said water  
24 rights and rights of way to the City of Tombstone, the City of Tombstone is the final and  
25 current grantee in the chain of title to:  
26  
27  
28

1 (a) the Miller Canyon Pipeline Right of Way (for purposes of this paragraph,  
2 including solely the Gardner Spring Auxiliary Pipeline ROW); and

3 (b) the Gardner Spring No. 24 Reservoir Site; both as legally described in Exhibit  
4 1 (pp. 9-10, 31), and depicted in Exhibits 2 (Figures III.1 and III.2, Appendix 1) and 14  
5 to the Verified Second Amended Complaint (hereinafter collectively the foregoing  
6 reservoir site and right of way are referenced as the “Count IV Rights”).  
7  
8 (August Decl., ¶¶26, 27, 33-37, 40-52, 56, 57, 59-77 and Exs. 3 through 12-2, 43, 45  
9 through 56-1, 57-1, 60 through 71, 71-1, 75, 80; Clark Decl., ¶¶7-14.)

11 6. The Count I Rights and Count IV Rights were claimed and accepted by the  
12 City of Tombstone’s franchisee agent and predecessor in interest, the 1881 Huachuca  
13 Water Company, no later than June 24, 1905 as to the Count I Rights and no later than  
14 February 29, 1909 as to the Count IV Rights, in the same or substantially the same  
15 locations as legally described in Exhibit 1 (pp. 1-10, 12-13, 16-18, 22-23, 25, 31, 36) and  
16 depicted in Exhibits 2 (Figures III.1 and III.2) through 14 of the Verified Second  
17 Amended Complaint, by the public posting and recordation of corresponding notices of  
18 appropriation, as well as by the construction of corresponding water infrastructure  
19 diverting the water sources known as Miller Spring No. 1, Clark Spring No. 11, Head  
20 Spring (a/k/a/ Carr Spring) No. 13, Rock Spring No. 16, and Rock Spring No. 17 to the  
21 City of Tombstone’s municipal water supply. (August Decl., ¶¶26-27, 33-35, 38, 40-52,  
22 56, 59-77 and Exs. 4 through 12, 12-2 through 12-3, 13 through 14, 24 through 27, 30  
23 through 31, 56 through 56-1, 57, 60 through 71, 74 through 75, 80; Clark Decl., ¶¶7-13;  
24 Verified Sec. Amend Compl., ¶¶19-71 and Exs. 1 through 4, 6, 11, 14.)  
25  
26  
27  
28

1           7. The dimensions of the Miller Canyon Public Highway Right of Way and the  
 2 Carr Canyon Public Highway Right of Way, as legally described in Exhibit 1 (pp. 49-  
 3 74), and depicted in Exhibits 15 through 21 of the Verified Second Amended Complaint  
 4 (hereinafter collectively referenced as the “RS2477 Public Highway Rights of Way”),  
 5 which include rights of way with a 20 foot width from the center line, as well as the  
 6 Count I Rights and the Count IV Rights, which include approximately 5 acre reservoir  
 7 sites and rights of way with a 50 foot width from the center line, reflect the minimum  
 8 amount of land that is and, under local customs existing between 1881 and 1913 as to  
 9 the Count I Rights and the Count IV Rights, was regarded as reasonably necessary to  
 10 fulfill their intended purposes. (August Decl., ¶¶26-27, 39-48, 59 through 64, 66 through  
 11 77, and Exs. 4 through 43, 56, 57-2, 65, 66, 68 through 71, 81; Clark Decl., ¶¶7-16;  
 12 Young Decl. ¶¶30-32; Dranias Decl., Ex. C (McKay Dep., Exs. 40-42).)

16           8. The use of motorized vehicles and mechanized equipment, such as a track-  
 17 operated John Deere JD200D excavator or equivalent, a John Deere JD60 or equivalent,  
 18 a gas cutoff saw, chain saw, 4x4 pickups and flatbed trucks, 48” ATV or UTV, and  
 19 generators, throughout the land that is covered by the Count I Rights, Count IV Rights  
 20 and the RS2477 Public Highway Rights of Way, has been usual and customary by the  
 21 City of Tombstone since at least 1969 in accessing, constructing, maintaining, restoring,  
 22 and protecting the encompassed water infrastructure in order to maintain a continuous  
 23 municipal water supply from the Tombstone Headsprings. (Sosa MSJ Decl., ¶11, Exs. 2-  
 24 3; Dranias Decl., Ex. D (Upchurch Dep., pp. 62(3:16), 73(1:19), 89(17:25)-96(1:9));  
 25 Valenzuela Decl., ECF 50-10, Ex. F, ¶¶3-6; Gradillas Decl., ECF 50-10, Ex. G, ¶¶4-9;

1 Pulsifer Decl., ECF 50-10, Ex. H, ¶¶3-6; Reames Decl., ECF 50-10, Ex. I, ¶¶3-15;  
 2 Cameron Decl., ECF 50-10, Ex. J, ¶¶3-7; Verified Sec. Amend Compl., ¶¶ 69, 78, 126,  
 3 Exs. 25 (p. 3), 28 (p. 5).)

4  
 5 9. The free and unhindered use of motorized vehicles and mechanized equipment,  
 6 such as a track-operated John Deere JD200D excavator or equivalent, a John Deere  
 7 JD60 or equivalent, a gas cutoff saw, chain saw, 4x4 pickups and flatbed trucks, 48”  
 8 ATV or UTV, and generators, throughout the land that is covered by the Count I Rights,  
 9 Count IV Rights and the RS2477 Public Highway Rights of Way is absolutely necessary  
 10 for Tombstone to access, construct, maintain, restore, and protect the encompassed water  
 11 infrastructure in order to maintain a continuous municipal water supply from the  
 12 Tombstone Headsprings. (Young Decl., ¶¶33-37.)

13  
 14  
 15 10. Apart from interruptions caused by geological, hydrological and weather  
 16 conditions and events, temporary financial incapacity, and recent U.S. Forest Service  
 17 interference, the Count I Rights and Count IV Rights have been continuously exercised  
 18 to furnish a municipal water supply from the Tombstone Headsprings since at least June  
 19 23, 1905 (as to the Count I Rights) and February 29, 1909 (as to the Count IV Rights)  
 20 until the Monument Fire of 2011. (August Decl., ¶¶26-27, 30-32, 49-50, 58, 65-77 and  
 21 Exs. 3 through 12, 12-2 through 12-3, 13 through 43, 45 through 78, 80 through 81; Sosa  
 22 MSJ Decl., ¶12; Dranias Decl., Ex. B (LeFevre Dep., Ex. 20 (FS005893-5897))).

23  
 24  
 25 11. The City of Tombstone has been contractually prohibited from abandoning  
 26 the Count I Rights and Count IV Rights since at least December 4, 1997. (August Decl.,  
 27 ¶58 and Exs. 76 through 78.)  
 28

1           12. In written statements received on or about March 30, 1908, April 4, 1908,  
2 May 3, 1908, March 21, 1916, and December 20, 1955, the U.S. Forest Service obtained  
3 information that all or part of the Count I Rights and Count IV Rights were regarded as  
4 federal grants under the Congressional Act of July 26, 1866, 14 Stat. 253, and the  
5 Congressional Act of July 9, 1870, 16 Stat. 218, codified at 43 U.S.C. § 661 (specifically  
6 the provisions commonly known as “RS2339” and “RS2340”). (August Decl., ¶¶51, 52,  
7 76, 77, and Exs. 58, 67, 71-1; Dranias Decl., Ex. C (McKay Dep., Exs. 38, 40).)

10           13. In written statements issued on or about January 12, 1908, January 27, 1908,  
11 April 6, 1908, May 8, 1908, May 9, 1908, September 22, 1908, April 4, 1916, December  
12 29, 1916, and September 29, 1917, the U.S. Forest Service repeatedly recognized that all  
13 or part of the Count I Rights and Count IV Rights had been granted and confirmed by  
14 RS2339/RS2340. (August Decl., ¶¶51, 52, 76, and Exs. 59 through 61, 67 through 67-1;  
15 Dranias Decl., Ex. A (Bennett Dep., Exs. 36, 69, 70) and Ex. C (McKay Dep., Exs. 41,  
16 42).)

19           14. The RS2477 Public Highway Rights of Way are in the same or substantially  
20 the same locations as the Miller Canyon and Carr Canyon Roads declared by Cochise  
21 County on November 5, 1889. (August Decl., ¶¶78-82 and Exs. 12-1, 56; Clark Decl.,  
22 ¶¶15-16; Sosa MSJ Decl., ¶10.)

24           15. Until the Monument Fire of 2011, the RS2477 Public Highway Rights of Way  
25 have been in continuous use as a public thoroughfare since at least November 5, 1889  
26 and by the City of Tombstone since at least 1969. (August Decl., ¶¶78-82 and Exs. 12-1,  
27 56; Sosa MSJ Decl., ¶10; Valenzuela Decl., ECF 50-10, Ex. F, ¶¶3-6; Gradillas Decl.,  
28



1 ECF 50-10, Ex. G, ¶¶4-9; Pulsifer Decl., ECF 50-10, Ex. H, ¶¶3-6; Reames Decl., ECF  
2 50-10, Ex. I, ¶¶3-15; Cameron Decl., ECF 50-10, Ex. J, ¶¶3-7; Verified Sec. Amend  
3 Compl., ¶¶ 69, 78, 126, Exs. 25 (p. 3), 28 (p. 5).)

4  
5 16. The lands covered by the Count I Rights and RS2477 Public Highway Rights  
6 of Way, as legally described in Exhibit 1 (pp. 1-10, 12-13, 16-18, 22-23, 25, 31, 36, 49-  
7 74), and depicted in Exhibits 3 through 21 of the Verified Second Amended Complaint,  
8 are not and never have been part of the Coronado National Forest or any other Forest  
9 Reserve because they were expressly excluded from the November 6, 1906 presidential  
10 proclamation establishing the Huachuca Forest Reserve. (August Decl., ¶¶83-90 and  
11 Exs. 59 through 61, 67, 79; Clark Decl., ¶¶17-20; Dranias Decl., Ex. C (McKay Dep.,  
12 Ex. 44).)

13  
14  
15 17. In written statements issued on or about January 12, 1908, January 27, 1908,  
16 April 4, 1916, and September 29, 1917, the U.S. Forest Service recognized that special  
17 use permitting was optional regarding the uses of lands covered by rights of way granted  
18 and confirmed by RS2339/RS2340 and intended only to prevent “misunderstandings.”  
19 (August Decl., ¶52 and Exs. 59, 67(p.3); Dranias Decl., Ex. A (Bennett Dep., Exs. 36,  
20 69).)

21  
22  
23 18. In a written statement issued on or about February 5, 2008, the U.S. Forest  
24 Service recognized that it has no regulatory jurisdiction over lands covered by rights of  
25 way granted and confirmed by the Congressional Act of July 26, 1866, 14 Stat. 253, and  
26 the Congressional Act of July 9, 1870, 16 Stat. 218, codified at 43 U.S.C. § 661  
27  
28

1 (specifically the provisions commonly known as “RS2339” and “RS2340”). (August  
2 Decl., ¶¶53-55; Barnes MSJ Decl., ¶32.)

3  
4 19. The special use permit drafted and issued by the U.S. Forest Service to the  
5 City of Tombstone on May 14, 1962 (hereinafter the “1962 SUP”) for a portion of the  
6 lands covered by the Count I Rights and Count IV Rights states it is “subject to all valid  
7 claims” and was intended to authorize the construction of fencing around water sources  
8 to protect against water contamination by hikers, not to conflict with the Count I Rights  
9 and Count IV Rights (August Decl., ¶57 and Exs. 72 through 73; Verified Sec. Amend  
10 Compl., ¶¶4-9 and Ex. 22.)

11  
12 20. Between May 29, 2011 and July 26, 2011, substantially all of the roads,  
13 pipelines, springs and catchments throughout the City of Tombstone’s Huachuca  
14 Mountain municipal water system, including infrastructure within the scope of the Count  
15 I Rights and Count IV Rights and RS2477 Public Highway Rights of Way, were swept  
16 away and/or buried under boulders, rocks, massive mudslides and other debris; this  
17 completely disrupted water flow from the Tombstone Headsprings into the City’s  
18 municipal water supply. (August Decl., ¶32; Young Decl., ¶¶15-29; Sosa MSJ Decl.,  
19 ¶¶9, 13, 14; Verified Sec. Amend Compl., ¶¶1, 89, 90, 129-133 and Exs. 2, 23 through  
20 29.)

21  
22  
23  
24 21. From August 17, 2011 until the present date, the City of Tombstone has been  
25 authorized by Arizona Governor Jan Brewer under a declared State of Emergency and  
26 given state assistance to wield all of the police powers of the State of Arizona in service  
27 of fully restoring its Huachuca Mountain municipal water system and related roadway  
28

1 access, including the portion encompassed by the Count I Rights and Count IV Rights  
2 and RS2477 Public Highway Rights of Way, under Ariz. Rev. Stat. § 26-301(15), Ariz.  
3 Rev. Stat. § 26-303(B), (D), (E)(1), and Ariz. Admin. Code R8-2-301(8). (Grassman  
4 Decl., ECF 50-10, Ex. D, ¶4 and Ex. 2; Sosa MSJ Decl., ¶¶17-18.)

5  
6 22. On October 3, 2011, the United States' claimed interest in the encumbered  
7 land became adverse to that of the City of Tombstone. That is the date when U.S. Forest  
8 Service employee Duane Bennett told City Archivist Nancy Sosa that the City of  
9 Tombstone did not own anything in the Coronado National Forest and its predecessor,  
10 the Huachuca Water Company, had no right to sell the City of Tombstone anything.  
11 (Sosa MSJ Decl., ¶19.)

12  
13  
14 23. Beginning on or about October 3, 2011 and continuing until the present date,  
15 the U.S. Forest Service has exercised compulsory regulatory jurisdiction over the lands  
16 covered by the Count I Rights, Count IV Rights, and RS2477 Public Highway Rights by  
17 prohibiting the City of Tombstone from:

18  
19 (a) freely using motorized vehicles upon and along the covered lands;

20 (b) freely using mechanized tools and equipment to maintain its Huachuca  
21 Mountain water system upon and along the covered lands;

22 (c) freely and fully restoring its permanent water structures and conveyances,  
23 including diversions, flumes, catchments, reservoirs and pipelines, upon and along the  
24 covered lands; and

25 (d) freely engaging in ground-disturbing maintenance and restoration work upon  
26 and along covered lands.  
27  
28

1 (Sosa MSJ Decl., ¶¶19-30; Barnes MSJ Decl., ¶¶6-20; Rudd App. Ct. Decl., ¶¶8-13;  
2 Dranias Decl., Ex. D (Upchurch, pp. 64(2:11), 67-73(1:19), 125(19:25), 126(1:9),  
3 131(18:25), 132(1:5)); Verified Sec. Amend Compl., ¶¶91-136 and Exs. 24 through 29.)  
4

5 24. On at least three occasions prior to commencing litigation, specifically  
6 October 13, 2011, October 24, 2011 and December 5, 2011, the City of Tombstone  
7 made written demands upon the U.S. Forest Service to allow for it to complete the  
8 proposed restoration work within the scope of the Count I Rights and Count IV Rights.  
9 (Barnes MSJ Decl., ¶¶8, 10, 17; Verified Sec. Amend Compl., ¶¶101, 104, 113 and Exs.  
10 24, 27.)  
11

12 25. The City's October 24, 2011 written restoration demand included a detailed  
13 written proposal for the restoration of water infrastructure within the scope of the Count  
14 I Rights and Count IV Rights, and elsewhere within the City's municipal water system,  
15 which was contemporaneously deemed sufficient paperwork for approval of the  
16 proposed work by Forest Service Hydrologist Robert LeFevre. (Barnes MSJ Decl., ¶10;  
17 Dranias Decl., Ex. B (LeFevre Dep., pp. 27(18:25)-28(1:6); 40(3:12), 46(5:25),  
18 47(1:11), 52(24:25), 53(1:4), 166(12:25), 167(1:17), 176(23:25), 177-78, 179(3:9);  
19 228(7:15), Exs. 16, 17); Verified Sec. Amend Compl., ¶104 and Exs. 23, 24.)  
20  
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22

23 26. The U.S. Forest Service responded initially to the City's October 13, 2011  
24 and October 24, 2011 restoration work demands by refusing, respectively, on October  
25 19, 2011 and November 1, 2011 to allow the City to perform the proposed restoration  
26 work. (Barnes MSJ Decl., ¶¶9, 13.)  
27  
28

1           27. Later, on November 3, 2011, the Service agreed to the City's October 24,  
2 2011 restoration work demand verbally, but then reneged on that verbal agreement on  
3 November 4, 2011 based on the decision to allow restoration work only at recently  
4 functioning portions of the City's water system; later allowing restoration work solely at  
5 Miller Spring No. 1 pursuant to a special use authorization issued on November 7, 2011,  
6 implicitly denying substantially all of the City of Tombstone's October 13, 2011 and  
7 October 24, 2011 restoration work demands. (Barnes MSJ Decl., ¶¶14-16; Dranias  
8 Decl., Ex. B (LeFevre Dep., Ex. 20 (FS005890, FS005897)); Verified Sec. Amend  
9 Compl., ¶¶108-112 and Ex. 26.)

10           28. With regard to the City's December 5, 2011 demand, the U.S. Forest Service  
11 responded by falsely claiming on December 7, 2011 that it lacked detailed information  
12 regarding the proposed restoration work beyond Miller Spring No. 1 and Gardner Spring  
13 no. 24, even though it had possession of the proposal evidenced by Exhibit 23 to the  
14 Verified Second Amended Complaint; and the Service ultimately approved only partial  
15 temporary restoration work at Gardner Spring No. 24 pursuant to a special use  
16 authorization issued on December 22, 2011, denying most of the City of Tombstone's  
17 October 13, 2011, October 24, 2011 and December 5, 2011 restoration work demands.  
18 (Barnes MSJ Decl., ¶¶18, 19; Verified Sec. Amend Compl., ¶¶114, 115 and Ex. 28.)

19           29. In the course of processing and granting the two special use authorizations for  
20 restoration work at Miller Spring No. 1 and Gardner Spring No. 24, the Forest Service  
21 itself repeatedly rendered final administrative findings that the destruction of the City's  
22 Huachuca Mountain water system threatened public health and safety; including:  
23  
24  
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1 Overall, the damage to the City's water system has impaired its ability to  
2 provide customers with a safe and reliable source of potable water.  
(Verified Sec. Amend Compl., ¶¶111, 112, 115, 116 and Ex. 26 (p. 1).)

3  
4 [T]aking no action would threaten the water supply for the citizens of  
5 Tombstone. Therefore, emergency actions are warranted to protect life and  
6 property values outside of wilderness . . . The loss of the water resources  
7 from the wilderness could be devastating to the City of Tombstone. The  
8 basis to take action is the threat to life, property, and other resource values  
9 outside wilderness. (Verified Sec. Amend Compl., ¶¶111, 112, 115, 116  
10 and Exs. 25 (p. 8), 28 (p. 10).)

11 The cost to Tombstone to supply sufficient and safe drinking water to its  
12 [sic] citizens as well as loss of income to businesses of Tombstone that are  
13 dependent on a water and water facilities to conduct business. (Verified  
14 Sec. Amend Compl., ¶¶111, 112, 115, 116 and Exs. 25 (p. 11), 28 (p. 16).)

15 The action is necessary for the health and safety of human life for the  
16 community of Tombstone in the form of providing a sufficient water  
17 supply. (Verified Sec. Amend Compl., ¶¶111, 112, 115, 116 and Exs. 25  
18 (p. 12), 28 (p. 17), 29 (p. 1).)

19 Debris from flooding has damaged the pipelines, catch basins, and  
20 collection structures, resulting in a decrease in the potable water supply for  
21 the citizens of Tombstone. (Verified Sec. Amend Compl., ¶¶111, 112, 115,  
22 116 and Exs. 25 (p. 1), 28 (p. 1), 29 (p. 1).)

23 Because of the emergency public health issue related to the availability of  
24 potable water to citizens of the COT, I decided that public involvement in  
25 this NEPA review would be limited . . . (Verified Sec. Amend Compl.,  
26 ¶¶111, 112, 115, 116 and Exs. 26 (p. 4), 29 (p. 4).)

27 The action is necessary for the health and safety of human life for the  
28 community of Tombstone. Water from the springs is needed for safe  
drinking water for residents as well as visitors to this tourism based  
economy, as well as for emergency fire suppression. (Verified Sec. Amend  
Compl., ¶¶111, 112, 115, 116 and Exs. 25 (p. 12), 28 (p. 17).)

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

1 completion. (Verified Sec. Amend Compl., ¶¶111, 112, 115, 116 and Ex.  
2 28 (p. 17).)

3 30. In the course of reaching and rendering final administrative decisions  
4 regulating the City of Tombstone's restoration work upon and along the lands covered  
5 by the Count I Rights and Count IV Rights and the RS2477 Public Highway Rights of  
6 Way, and conducting the instant litigation between July 21, 2011 and the present date,  
7 the U.S. Forest Service never addressed or considered:  
8

9 (a) the legal effect of RS2339/RS2340/RS2477;

10 (b) any of its prior written statements recognizing all or part of the Count I Rights  
11 and Count IV Rights as having been granted and confirmed by RS2339/RS2340;  
12

13 (c) any information it received that all or part of the Count I Rights and Count IV  
14 Rights were claimed under RS2339/RS2340; and  
15

16 (d) any policy guiding administrative action with respect to the exercise of rights  
17 under RS2339/RS2340/RS2477.

18 (Dranias Decl., Ex. D (Upchurch Dep., pp. 15(14:25)-16(1:19), 24(22:25)-25(1:23),  
19 28(8:25)-21, 89 (17:25)-98(1:4), 113(7:25)-114(1:17), 121-122(1:5), 133(19:25)-  
20 135(1:21)), Ex. A (Bennett Dep., pp. 70(7:25)-80(1:10), 81(15:25)-84(1:19), 86(7:25)-  
21 93(1:8), 96(23:25)-100(1:13), 129(12:25), 130(1:20); 151(21:25)-158(1:4), 167(19:25)-  
22 169(1:11), 177(14:25)-178(1:19)), Ex. B (LeFevre, p. 75(5:12), Ex. 20), Ex. C (McKay  
23 Dep., pp. 18(5:25)-20(1:3), 21(18:25)-23(1:20), 27(24:25)-29(1:8), 37(22:25)-39(1:16),  
24 72(11:25)-73(1:5), 118(25)-119(1:3)); Sosa MSJ Decl., ¶¶19-44; Barnes MSJ Decl., ¶¶  
25 21-33; Verified Sec. Amend Compl., ¶¶91-136 and Exs. 24 through 29, *inter alia.*)  
26  
27  
28

1           31. In a written statement issued on or about February 5, 2008, the U.S. Forest  
2 Service admitted that there was a systemic, agency-wide problem of its personnel being  
3 ignorant of, and inconsistent in applying, RS2339. (Sosa MSJ Decl., ¶36; Barnes MSJ  
4 Decl., ¶26.)  
5

6           32. Today, including the two sources repaired with the Forest Service's  
7 permission, only three of the City's mountain water sources are currently flowing; those  
8 three sources could be swept away by monsoons at any time due to the Forest Service's  
9 refusal to allow the completion of permanent repairs. (Young Decl. ¶¶48-50.)  
10

11           33. The viability of the City of Tombstone as a municipality as well as public  
12 health and safety are threatened every day that the City cannot freely use motorized  
13 vehicles and mechanized equipment to access the lands covered by the Count I Rights  
14 and Count IV Rights and RS2477 Public Highway Rights of Way, and the City's  
15 Huachuca Mountain municipal water system, including the portion encompassed by the  
16 Count I and Count IV Rights, is not fully restored to historical specifications as set forth  
17 at pages 35 through 51, as well as Appendices 9, 9A and 10, of the preliminary  
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1 engineering report attached as Exhibit 2 to the Verified Second Amended Complaint.  
2 (Young Decl., ¶¶38-51; Wright Decl., ECF 50-10, Ex. C, ¶¶5-14.)  
3  
4

5 **RESPECTFULLY SUBMITTED** on this 11th day of April, 2014 by:

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7 Nicholas C. Dranias (029267)  
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**CERTIFICATE OF SERVICE**

**DOCUMENT ELECTRONICALLY FILED BY ECF and COPIES** sent via e-mail  
this 11th day of April, 2014 to:

<b>Parties and Counsel Served</b>	
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