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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.	Civil Action No. 11-845-TUC-FRZ Hon. Frank R. Zapata, presiding judge **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES**

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INTRODUCTION

Contrary to Defendants' insistence that past preliminary injunction rulings predetermine their summary judgment motion, such rulings are neither binding nor final adjudications. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). As discussed below, a fresh look at Tombstone's case, with the benefit of expert testimony and jurisdictional discovery, warrants the denial of Defendants' motion for summary judgment with prejudice.

THE ACTUAL MATERIAL FACTS

Defendants have advanced little or no admissible evidence in support of their motion.[1] PSCF ¶¶1-70. The truth is very different than the story they tell. In reality, the Forest Service always had enough information to understand where Tombstone's proposed work would take place, how it would take place, and what justified it. PSCF ¶¶ 157-62. The Forest Service expressly recognized the subject RS2339/2340 rights on April 6, 1908 and April 4, 1916, and further recognized that Tombstone was the successor to those rights in reports issued in February 1999 and October 2002. PSCF ¶¶84-109, 113-16. Such recognition coincides with state court adjudications in 1915 and 1917 vindicating Tombstone's predecessor's claims to substantial portions of the subject RS2339/2340 rights. PSCF ¶¶262-67. Indeed, for decades, the Forest Service correspondingly yielded to Tombstone's use of mechanized equipment and motorized vehicles on the covered lands.

[1] Tombstone herewith moves for the Court to sustain the objections advanced in its Response to Defendants' Statement of Material Facts and Statement of Controverting Material Facts ("PSCF") and to strike or limit Defendants' evidence as therein requested. Also, the testimony of Defendants' sole affiant, Duane Bennett, should be disregarded because substantial portions are false and credibility determinations may not be made on summary judgment. *Compare* PSCF ¶¶31-33, 37, 42, 46, 56-58, 61-64, 66, and 70 *with S.E.C. v. Koracorp Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978).

PSCF ¶¶159, 169(e), (f), (g), 179(f), (g), (h), 219, 250. Moreover, on October 24, 2011, Tombstone gave the Forest Service all of the information it requested to determine whether to yield to the proposed restoration of the City's entire Huachuca Mountain water system—including a detailed engineering assessment. PSCF ¶¶149-50, 157. After initially refusing to allow that work, and threatening City employees with arrest for performing it on November 1, 2011, the Forest Service then agreed to the proposed work on November 3, 2011. PSCF ¶¶151-55. The Forest Service even conducted an environmental assessment recommending approval of the proposed work on November 4, 2011. PSCF ¶¶168-69. But soon after, the Forest Service reneged, issuing non-appealable decisions on November 7 and December 22, 2011 that disregarded and rejected Tombstone's work proposal almost entirely. PSCF ¶¶170-72, 177-78, 180-84.

ARGUMENT

Defendants' jurisdictional defenses are meritless as a matter of law and Tombstone's prima facie case raises genuine issues of fact on the merits, precluding summary judgment.

I. Counts I through IV Are Timely.

The QTA's waiver of sovereign immunity applies to disputes over both fee estates and estates that are less than a fee, including implied easements by necessity. *Kinscherff v. U.S.*, 586 F.2d 159, 161 (10th Cir. 1978). Accordingly, Counts I through III seek a declaration and permanent injunction against the United States under the QTA establishing the City's title to various federal water rights of way; Count IV, by contrast, seeks the same relief limited to confirming the City's title to secondary rights of way relating to Gardner Spring No. 24. As such, Counts I through IV are meritorious because: (a) Tombstone is the

final grantee of the subject RS2339/2340 rights; and (b) those rights clearly include the secondary right to perform the proposed work.[2] PSCF ¶¶72-83, 242-51. Nevertheless, with respect to Counts I, II, III and IV, Defendants contend that the QTA's statute of limitations expired decades ago by virtue of forest reserve or wilderness area designations, the terms of special use permits, overlapping land patent grants, and alleged disputes between and among the City, the Forest Service, the Huachuca Water Company, and the Department of the Interior.

In advancing these contentions, however, Defendants do not attempt to explain how an abandoned dispute with the Department of the Interior over the occupancy of lands outside of the Coronado National Forest has any relevancy to defending Tombstone's claims against the Forest Service with regard to lands within the boundaries of the

[2] Tombstone seeks access to the lands covered by the subject RS2477 rights as part of the proposed work. Similar to RS2339/RS2340 rights of way, an RS2477 public highway right of way is a federal grant that is accepted by the establishment of a public highway across federal lands in accordance with state law. *Cent. Pac. Ry. Co. v. Alameda Cnty.*, 284 U.S. 463, 468 (1932); *Shultz v. Dep't of Army*, 10 F.3d 649, 656 (9th Cir. 1993); *Sierra Club v. Hodel*, 848 F.2d 1068, 1082 (10th Cir. 1988); *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974). This occurred with respect to the adjacent roads furnishing access to the City's RS2339/RS2340 rights of way. *Compare* PSCF ¶¶82, 250, 257 *with Rodgers v. Ray*, 457 P.2d 281, 283 n.2 (Ariz. App. 1969). In *Hazel Green Ranch, LLC v. U.S. Dep't of the Interior*, 490 Fed. Appx. 880 (9th Cir. 2012), the Ninth Circuit found that, because California recognizes an abutting landowner's easement over a public road as a property right, not merely as a right of access akin to the right of the public, such an easement is sufficient interest in property to assert a claim against the U.S. under the Quiet Title Act. *Id.* at 881. Arizona, like California, recognizes an abutting landowner's easement as a property right. *See, e.g.*, *City of Phoenix v. Garretson*, 322 P.3d 149, 152 (Ariz. 2014). Although analyzed by courts as a type of easement (*see, e.g.*, *United States v. Big Horn Land & Cattle Co.*, 17 F.2d 357, 365 (8th Cir. 1927)), RS2339/2340 rights of way are actually hybrid property interests that include elements of fee and easement interests in land. PSCF ¶71. Among the secondary rights included within the scope of the subject RS2339/2340 rights is a right of access. PSCF ¶¶250-59. Accordingly, Tombstone should be viewed as analogous to a fee owner for purposes of vindicating the subject RS2477 rights.

Coronado National Forest (it has none). PSCF ¶¶4-6, 8-14, 18, 19, 132-44. Defendants offer no interpretation of the meaning of the caveat contained in each of the special use permits at issue that "[t]his permit is subject to all valid claims" (the caveat explodes their defense). PSCF ¶¶7, 15-17, 25-26, 28-30, 119-31. They offer no argument as to why a reasonable holder of the subject RS2339/2340 rights would view land patent grants as interposing adverse title interests when those grants expressly protect the subject RS2339/2340 rights. *Compare* PSCF ¶2 *with A.T. West and Sons*, 56 Interior Dec. (D.O.I.) 387, 1938 WL 4126 (Nov. 2, 1938). Defendants offer nothing to overcome the facts that the Forest Service recognized the subject RS2339/2340 rights on April 6, 1908 and April 4, 1916; disavowed that its investigations into the occupancy of the covered lands implied any adverse relationship on March 6, 1917; and ultimately closed all investigations into the occupancy of the covered lands on April 2, 1921. PSCF ¶¶84-109. Defendants offer no explanation as to why the Forest Service did not object when it was copied on the Department of Interior's December 20, 1955 letter recognizing the subject RS2339/2340 rights. PSCF ¶¶110-11. And Defendants neglect to mention that as late as July 21, 2011, Forest Service employee George McKay acknowledged that "Tombstone has a waterline easement and water rights." PSCF ¶116.

Instead of grappling with the inconvenient truth (the parties enjoyed an essentially harmonious relationship in regard to the subject RS2339/2340/2477 rights before the Monument Fire of 2011), Defendants' theory seems to be that any degree of federal ownership, supervision, or regulation of the covered lands would have served to trigger the accrual and expiration of the QTA's statute of limitations. Contrary to Defendants' analysis,

the QTA's statute of limitations is not triggered unless the federal government's actions can be reasonably interpreted as an effort by the federal government to claim "exclusive" ownership and control over the covered lands, rather than merely asserting an interest in the servient estate, adjacent property or in supervising or regulating the use of the covered lands. *Skranak v. Castenada*, 425 F.3d 1213, 1216-17 (9th Cir. 2005); *McFarland v. Norton*, 425 F.3d 724, 727-29 (9th Cir. 2005); *Michel v. U.S.*, 65 F.3d 130, 132 (9th Cir. 1995); *see also Roth v. U.S.*, 326 F. Supp. 2d 1163, 1167 (D. Mont. 2003) (citing *Overland Ditch and Reservoir Co. v. U.S.*, 1996 WL 33484927 (D. Colo. 1996)). The reason for this rule of law is that "[t]he government's claim to [concurrent] ownership and control of the servient tenement can be entirely consistent with private ownership of an easement." *McFarland*, 425 F.3d at 726-27. Further, "mild interference with the use of an easement pursuant to the government's own property interests will not start the statute of limitations running." *Id.*; *see also* PSCF ¶84. Furthermore, where a right of way holder may reasonably believe the federal government has some degree of relevant regulatory or supervisory powers, courts must "distinguish reasonable regulations that happen to restrict use of the easement from actions taken incident to the government's claim of exclusive ownership." *Id.* Relatedly, the Ninth Circuit has long ruled that the QTA's statute of limitations clock is reset whenever a reasonable person might think the federal government abandoned its original adverse interest—even if the abandonment takes place after the initial expiration of the limitations period. *Shultz v. Dep't of Army, U.S.*, 886 F.2d 1157, 1161 (9th Cir. 1989). This is because the QTA must not be interpreted as if it required lawsuits to be filed with a hair trigger—which Defendants' theory would otherwise require. *McFarland*, 425 F.3d at 726-27.

Applying these legal principles, the Ninth Circuit has rejected claims that the following actions triggered the QTA's statute of limitations: (a) a "general ban on snowmobile use within the boundaries of Glacier National Park" which obstructed a specific means of access (*McFarland*); (b) "the installation of barriers, cables with locks in 1976, and later gates with locks" which intermittently prevented access (*McFarland*); (c) "consensually negotiated" access restrictions (*Skranak*); (d) "requiring a permit for further use" (*Skranak*); and (e) the imposition of access restrictions that were intermittently abandoned (*Michel* and *Shultz*). Further, the district court in *Roth* also ruled specifically with respect to water right of way claims that knowledge of the government's "ownership interest in the land upon which the dam and reservoir were built was insufficient to trigger the running of the limitations period" under the QTA. 326 F. Supp. 2d at 1168. The court found that evidence the plaintiff's predecessor sought a "special use permit" to build a dam "does not mean" that "he knew, or should have known" that the agency claimed an adverse title interest. *Id.* The court further ruled that the "fact that the special use permit was revocable does not mean that the Government necessarily contested the presence of an easement" because "[e]ven if the Forest Service had revoked the special use permit, an easement for the dam and reservoir could nevertheless remain." *Id.*

Similarly, prior to the Monument Fire of 2011, Defendants never acted in a manner consistent with a claim of "exclusive" ownership and control over the lands covered by the subject RS2339/2340/2477 rights. In fact, the U.S. Forest Service formally recognized the subject RS2339/2340 rights on April 6, 1908 and April 4, 1916. PSCF ¶¶84-109. These recognitions were rendered based on the longstanding authority of the Forest Service to

administer forest lands in light of valid existing claims under RS2339—authority that has been acknowledged and implemented as a matter of administrative policy as recently as February 5, 2008. PSCF ¶¶129-31. They were clearly the equivalent of disclaimers by the Forest Service as to any adverse title interest in the covered lands. *Cf. Soda Flat Co. v. Hodel*, 670 F. Supp. 879, 888-89 (E.D. Cal. 1987).

Consistently with the recognition of the subject RS2339/2340 rights, the Forest Service never objected to the Department of Interior's December 20, 1955 letter recognizing the subject RS2339/2340 rights. PSCF ¶¶110-11. Correspondingly, when the survey map supporting the 1913 DOI permit was recorded by Tombstone in 1965, the Forest Service never attempted to clear their supposedly exclusive title even though that map depicted rights of way within the Coronado National Forest boundaries. PSCF ¶112. Likewise, instead of objecting to the spring, pipeline and road survey map and the notices of appropriation that were recorded between 1901 and 1908, the Forest Service has acknowledged them as the legal basis of Tombstone's water system. PSCF ¶¶113(e), (f), 244. Further, Defendants admit that Plaintiff customarily used motorized vehicles on supposedly closed roads in the Miller Peak Wilderness Area to service its water system. PSCF ¶¶159, 169(g), 179(h). And without refutation by any credible Forest Service employee, there is overwhelming evidence that Defendants customarily yielded to Plaintiff maintaining, constructing, and reconstructing the infrastructure associated with its Huachuca Mountain water system throughout the covered lands until the Monument Fire of 2011. PSCF ¶250.

In view of this evidence, even if the Forest Service had ever claimed an adverse interest in title to the covered lands, a reasonable person could only conclude that the Forest Service abandoned such an interest in light of the actual uses of the covered lands. *Michel*, 65 F.3d at 132; *Shultz*, 886 F.2d at 1161. Indeed, prior to 1976, the mechanics of unequivocal grants under RS2339/2340 would have required the Forest Service to do more than intermittently obstruct the use of the covered lands to provoke a reasonable belief that the Service claimed an adverse title interest. This is because RS2339/2340 rights of way were automatically and unequivocally granted on non-forest lands prior to 1976 based on the construction and use of a water structure or conveyance. *Compare* PSCF ¶ 71 *with* B*roder v. Natoma Water & Mining Co.*, 101 U.S. 274, 275 (1879); *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1103-04 (9th Cir. 2005); *Hunter v. U.S.*, 388 F.2d 148, 153 (9th Cir. 1967). Moreover, even on forest lands, water rights have been appropriable and water rights of way are recognized as secondary rights bundled with water rights under Arizona state law. *Compare* PSCF ¶ 71 *with Bydlon v. U.S.*, 175 F. Supp. 891, 898-900 (Ct. Cl. 1959); *Bickel v. Hansen*, 819 P.2d 957, 960 (Ariz. App. 1991); Restatement (Third) of Property (Servitudes) § 2.15 (2000). Thus, so long as Tombstone continued to use, reconstruct and maintain its water system and access roads prior to 1976, a reasonable person would have to conclude that the City was the direct and continuous recipient of corresponding grants of RS2339/2340 rights of way or implied easements, which continuously reset any limitations period as against any intermittent adverse title claim asserted by the Forest Service.

Lastly, a reasonable person would never construe the 1909, 1948 and 1962 special use permits as giving notice of an adverse title claim. The revocability of a permit, or any

other term limiting the permit, says nothing about the underlying easement or right of way. *Roth*, 326 F. Supp. 2d at 1168. That is especially clear here where all three permits expressly state: "[t]his permit is subject to all valid claims." This caveat affirmatively precludes any permit term from being reasonably interpreted as clouding the subject RS2339/2340 rights. PSCF ¶¶119-22.[3] The facts also show that permitting was sought and obtained either consensually (with respect to the Count I, II and III Rights), as in *Skranak*, 425 F.3d at 1217-18, or (with respect to the Count IV Rights) based on the Forest Service's assertion of supervisory or regulatory authority, as in *McFarland*, 425 F.3d at 727-29, and *Roth*, 326 F. Supp. 2d at 1168. PSCF ¶¶123-31. There is no extrinsic evidence that justifies a reasonable interpretation of the special use permits as asserting exclusive ownership of the covered lands by the Forest Service. Even Forest Supervisor Jim Upchurch has admitted that there is no conflict between special use permitting and the subject RS2339/2340 rights. PSCF ¶¶127-28. The same admission is evidenced by the Forest Service's own RS2339 policy

[3] Defendants' QTA defense is enmeshed with an aspect of the merits of Tombstone's APA claim in Counts V through VII that the Forest Service's conduct constituted a *de facto* suspension or revocation of the 1962 special use permit in violation of the requirements of 36 C.F.R. § 251.60(a), (f) (citing 36 C.F.R. § 251.54(g)(3)(ii)) and procedural due process under the Fifth Amendment. This is because the Forest Service is not free to interpret a special use permit as it wishes. *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 604 (1st Cir. 1991). Rather, permits are construed according to contract principles. *Natural Res. Defense Council, Inc. v. Cnty. of Los Angeles*, 725 F.3d 1194, 1205 (9th Cir. 2013); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995); *Fallini v. Hodel*, 725 F. Supp. 1113, 1117-18 (D. Nev. 1989). Because permit ambiguities are construed against the issuing agency and any such construction must take into consideration the parties' course of dealing, *Fallini*, 725 F. Supp. at 1117-18, the "valid claim" caveat must be construed as protecting the subject RS2339/2340/2477 rights from any term contained in the permit that might otherwise prejudice them. Thus, Defendants effectively suspended or revoked the 1962 special use permit by unilaterally interpreting its terms to obstruct the proposed work, which fell within the scope of the subject RS2339/2340/2477 rights. PSCF ¶¶119-31, 219.

directive from February 5, 2008. PSCF ¶¶129-30. Accordingly, Defendants' QTA limitations defense must fail.

II. Count III is Pled with Adequate Particularity.

In view of the nature of RS2339/2340 rights, Count III has been pled with adequate particularity. RS2339 and RS2340 rights were never granted with precise linear dimensions. They were granted with dimensions that were determined by local laws, customs and court decisions. *Compare* PSCF ¶ 71 *with California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-155 (1935); *Jennison v. Kirk*, 98 U.S. 453, 459-60 (1878); *Basey v. Gallagher*, 87 U.S. 670, 684 (1874); *Hage v. U.S.*, 51 Fed.Cl. 570, 581-82 (Fed. Ct. Cl. 2002); Peter C. Fleming, *Vested Pre-FLPMA Rights of Way for Water Conveyance Facilities*, 25 Feb. Colo. Law 83 (1996); PSCF ¶71. That is undoubtedly why the Forest Service ordinarily instructs its personnel to refrain from demanding formal instruments of conveyance before recognizing RS2339/2340/2477 rights of way. PSCF ¶¶192(b), 195, 216.

As alleged, the Count III Rights describe reasonable lines of enjoyment based on local laws, customs and court decisions. PSCF ¶¶71, 77-79, 83, 262-67. Moreover, according to expert surveyor Andrew Clark, the Count III Rights can be located based on the allegations of the Verified Second Amended Complaint; and Defendants are fully capable of defending Count III on the merits. PSCF ¶¶77-79. It is not necessary to adjudicate Tombstone's water rights to reach the City's right of way claims. *Store Safe Redlands Assocs. v. United States*, 35 Fed. Cl. 726, 733-34 (Fed. Cl. 1996) (ruling the water "adjudication process is to determine relative rights 'for administrative purposes' and is not necessary to demonstrate a protected property interest" for other purposes). Count III thus furnishes

sufficient particularity to give fair notice to Defendants.[4] Nothing more is required for this Court to have jurisdiction to reach the merits of Count III. *See generally U.S. v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010).

III. Counts V through VIII are Not Precluded by the QTA.

Counts V through VII essentially allege that the Forest Service rendered final decisions that arbitrarily and capriciously: (a) ignored and summarily rejected Tombstone's proposed work; (b) breached Tombstone's 1962 special use permit; (c) failed to consider and yield to the subject RS2339/2340/2477 rights; and (d) failed to consider and yield to the federalism interests at issue. Count VIII alleges such conduct poses an unconstitutional threat to the continued existence of Arizona.

Defendants contend that the QTA precludes this Court from reaching the merits of Counts V through VIII because the requested remedy would impact federal property. But the coincidence of relief under the APA and the QTA does not necessarily preclude judicial review of independently arbitrary and capricious agency conduct. *Robinson v. U.S.*, 586 F.3d 683, 688 (9th Cir. 2009). Moreover, neither the APA nor the QTA can be construed as completely precluding prospective equitable relief where the injury ripening a claim of ultra vires or unconstitutional conduct under Article III did not arise until after the purported expiration of the limitations period. To claim otherwise would presume that Congress may

[4] Unlike *Bd. of Commr's of Catron Cnty. v. U.S.*, 934 F. Supp. 2d 1298 (D.N.M. 2013), Tombstone's complaint includes surveys and legal descriptions for adjacent properties, historical metes and bounds descriptions for the Count III rights, corresponding state court judgments, and an engineering map showing the approximate location of related rights of way and reservoir sites. PSCF ¶¶ 76, 262-67

violate constitutional guarantees and the separation of powers between the judicial and legislative branches by mere statute purporting to control the jurisdiction of the lower courts—which it may not.[5]

In any event, no case sustains Defendants' notion that an administrative agency is free under the APA to ignore relevant property rights because the agency believes relief is time-barred under the QTA. In fact, the Ninth Circuit previously swat down this defense in *Skranak*, 425 F.3d at 1218. As a matter of law, where the existence of a right of way is relevant to administrative decision-making, as here,[6] it must be considered regardless of the availability of a remedy under the QTA because the owner's title still exists[7] and is, therefore, still relevant to administrative decision-making. *Id.*

Furthermore, regardless of the current status of relief under the QTA, Counts V through VIII still allege independently meritorious claims. First, wholly apart from any claim about the subject RS2339/2340/2477 rights, the facts show that Tombstone has

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[5] *Compare Block v. North Dakota ex. Rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 286 n.23 (1983) *with U.S. Shoe Corp. v. U.S.*, 907 F. Supp. 408, 424-25 (CIT 1995) (Musgrave, J., concurring) (citing *Marbury v. Madison*, 5 U.S. 137 (1803); *Bartlett v. Bowen*, 816 F.2d 695, 708 (D.C. Cir. 1987); *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2nd Cir. 1948); *Int'l Tel. & Tel. Corp. v. Alexander*, 396 F. Supp. 1150, 1163 n.31 (D. Del. 1975); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1427 (1987)).

[6] Defendants' QTA defense is enmeshed with the merits of Tombstone's case because the relevancy of the subject RS2339/2340/2477 rights to the administrative decisions at issue is premised on the facts and law establishing that the existence, dimensions and scope of the subject RS2339/2340/2477 rights is valid and includes the proposed work, the Forest Service lacks compulsory regulatory jurisdiction over the covered lands, and the 1962 permit must be construed as protecting such rights. PSCF ¶¶71-267.

[7] The QTA only "limits the time in which a quiet title suit against the U.S. can be filed" it "does not purport to effectuate a transfer of title." *Skranak*, 425 F.3d at 1218 (citing *Block*, 461 U.S. at 291). Consequently, "[i]f a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under § 2409a(f)." *Id.*

advanced a prima facie case that the Forest Service arbitrarily and capriciously suspended or revoked the 1962 special use permit without due process because: (a) the permit's ambiguous gaps should be construed against the Forest Service and filled by reasonable terms based on the parties' course of conduct and dealing, which established that Tombstone was authorized under the permit to use mechanized and motorized equipment to restore and maintain its entire municipal water supply without formally applying for additional authorizations; and (b) the Forest Service breached the permit by demanding formal work proposals before authorizing work already allowed by the permit, limiting restoration work to recently functioning or non-masonry components, and compelling the use of horses and hand tools for maintenance and restoration work, all in an effort to displace Tombstone's beneficial use of water. *Natural Res. Defense Council, Inc.*, 725 F.3d at 1205; *Nw. Envtl. Advocates*, 56 F.3d at 982; *Fallini*, 725 F. Supp. at 1117-18; PSCF ¶¶159, 169(e), (f), (g), 179(f), (g), (h), 219, 226, 227, 228, 250, 259.

Second, regardless of the availability of QTA relief, the Forest Service's failure to consider the pre-1906 establishment of the subject RS2339/2340/2477 rights still caused it to regulate lands over which it has no jurisdiction, which is arbitrary and capricious—especially in the absence of any jurisdictional analysis by the regulating agency. *Kansas v. U.S.*, 249 F.3d 1213, 1229 (10th Cir. 2001). Simply put, the lands covered by the Count I through III Rights never have been part of the Miller Peak Wilderness Area, the Coronado National Forest or any predecessor Forest Reserve. PSCF ¶¶229-41. The November 6, 1906 Presidential Proclamation establishing the original Huachuca Forest Reserve expressly excluded "lands . . . covered by any prior valid claim." PSCF ¶230. The term "valid claim"

has always been publicly understood as encompassing RS2339/2340/2477 rights. PSCF ¶¶231 -36; *Stockley v. U.S.*, 260 U.S. 532, 536, 541-42 (1923) (construing exclusion of "existing valid claims" as including an unpatented possessory claim on land and suggesting agency was "without authority" to issue regulatory instructions affecting such claims); *Aleknagik Natives Ltd. v. U.S.*, 806 F.2d 924, 927 (9th Cir. 1986) (construing "valid existing rights" as including possessory claim on land based on mere "legitimate expectation"). Tombstone's predecessor held valid claims under RS2339/2340/2477 against the lands covered by the Count I through III Rights prior to November 6, 1906. PSCF ¶¶237-38. Thus, the Forest Service never had regulatory jurisdiction to obstruct the portion of the proposed work, which is within the scope of the Count I, II and III Rights. *Minard Run Oil Co. v. Forest Service*, 670 F.3d 236, 251, 252 n.14-15 (3d Cir. 2011) (holding Forest Service's regulatory jurisdiction only applies to "public forests and national forests"); *U.S. v. Srnsky*, 271 F.3d 595, 600 n.5-6 (4th Cir. 2001) (observing the Forest Service's regulatory jurisdiction applies only to "forests reserved from public land").[8]

Third, the Forest Service's preemption of the proposed work is independently actionable under the APA because of the federalism interests at stake. It is a "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides'" the "usual constitutional balance of federal and state powers." *Bond v. U.S.*, 134 S. Ct. 2077, 2089 (2014) (quoting *Gregory v. Ashcroft*, 501

[8] *Adams v. U.S.*, 255 F.3d 787, 795 (9th Cir. 2001), is distinguishable because it dealt with a situation involving lands over which the relevant agency otherwise had geographical jurisdiction; and it did not address the municipal exercise of rights of way in direct service of emergency police power objectives.

U.S. 452, 460 (1991)). In arriving at such certainty, courts must not defer to "agency proclamations of preemption" but should perform their "own conflict determination" based on the "substance of state and federal law." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). The usual constitutional balance recognizes that 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). Accordingly, *Srnsky* rejected the claim that the Alaska National Interest Lands Conservation Act preempted state law access easements, based on the ruling that all of the relevant federal laws were designed to avoid conflict with state law and to protect state law rights. *Id.*, 271 F.3d at 603. Here, the same conclusion is even more compelling because Congress deliberately yielded to local custom, law and court decisions in furnishing the substance of the subject RS2339/2340/2477 rights; and also consistently protected those rights in subsequent laws. *Compare* Congressional Acts of July 26, 1866, 14 Stat. 253 and July 9, 1870, 16 Stat. 218, codified at 43 U.S.C. § 661, sec. 9; *Jennison*, 98 U.S. at 459-60; *Basey*, 87 U.S. at 684, *with* Act of Nov. 6, 1906 (1906); Wilderness Act of 1964, 16 U.S.C. §§ 1133(c), 1133(d)(6), 1134(a); Arizona Wilderness Act of 1984, 98 Stat. 1485, § 302(a); 43 U.S.C. §§ 1761(c)(2)(A), 1769(a).

But even apart from the subject RS2339/2340/2477 rights, Tombstone acted under authority of state law furnished by a State of Emergency. PSCF ¶¶175, 253; Ariz. Rev. Stat. §26-301(15); Ariz. Rev. Stat. §26-303(B), (E)(1); Ariz. Admin. Code R8-2-301(8). The Forest Service's own regulations contemplate deferring to such state agency action in regard to special use regulation. 36 C.F.R. § 251.50(a), (b), (e)(2). Moreover, Tombstone's proposed work clearly fits within the purpose of the national forest system. The Supreme Court has

specifically ruled: (a) that the laws governing the national forest system exhibit a principled deference to plenary state power over laws governing water use, (b) "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West," and (c) Congress did not intend "to partially defeat this goal" for "aesthetic, environmental, recreational and 'fish' purposes." *U.S. v. New Mexico*, 438 U.S. 696, 606-07, 704, 708, 713, 718 (1978). Correspondingly, before Defendants advanced their contrary litigation position, the Forest Service itself determined that NEPA compliance did not require preemption of the proposed work.[9]

As in *Srnsky*, no federal law, regulation or policy has the "clear and manifest" purpose of authorizing, much less requiring, the Forest Service to preempt Tombstone's proposed work. Following *Srnsky*, there was no lawful basis for the Forest Service to construe federal law as nevertheless preempting Tombstone's proposed work. *Bond*, 134 S. Ct. at 2089-94; *Wyeth*, 555 U.S. at 565 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Indeed, it was patently arbitrary and capricious for the Forest Service to ignore and summarily reject Tombstone's October 24, 2011 proposal. *North Germany Area Council v. FLRA*, 805 F.2d 1044 (D.C. Cir. 1986). Accordingly, Counts V through VIII would still have merit even if the Court completely disregarded any title dispute over the subject RS2339/2340/2477 rights and focused exclusively on the contractual theory, jurisdictional

[9] The Forest Service ruled that Tombstone had no right to administratively appeal the November 7 and December 22, 2011 decisions based on "36 C.F.R 215.4(a) and 215.12(f)," which waive administrative review for decisions that assert a "categorical exclusion" from NEPA. PSCF ¶¶183-84; 40 C.F.R. § 1508.4.

principles and federalism interests supporting Tombstone's proposed work. Hence, the QTA does not and cannot completely preclude Counts V through VIII.

IV. Counts V through VIII are Ripe for Judicial Review.

The City's cause of action is not a "pre-enforcement" action. In fact, Tombstone exposed itself to arrest in performing the initial portions of the proposed restoration work. PSCF ¶¶145-53, 165. The Forest Service has thereby caused Plaintiff to suffer the loss of use and enjoyment of previously recognized rights of way, the loss of use and enjoyment of the 1962 special use permit, the loss of the beneficial use of water, the impairment of its sovereign interests as a political subdivision of Arizona, and a continuing threat to public health and safety[10]. PSCF ¶¶37, 156, 163-64, 213-15, and 253-59. These injuries-in-fact constitute irreparable harm as a matter of law. *Park Vill. Apt. Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1119 (9th Cir. 2011); *Kansas*, 249 F. 3d at 1218; *U.S. v. Midway Heights Cnty. Water Dist.*, 695 F. Supp. 1072, 1075 (E.D. Cal. 1988). They are also plainly redressable by the requested declaratory judgment and permanent injunction. Counts V through VIII thus meet the Article III minima of an injury-in-fact, caused by defendant, which is redressable by a court order. *Buono v. Kempthorne*, 502 F.3d 1069, 1077 (9th Cir.

[10] Imposing a risk of injury "greater than a reasonable man would incur" constitutes irreparable harm. 5 J. Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 1937 (§ 523), p. 4398 (2d ed. 1919); *M.R. v. Dreyfus*, 663 F.3d 1100, 1102 (9th Cir. 2011). Tombstone currently faces the same threat to public health and safety that prompted the Forest Service to administratively find threats to public health and safety justified restoration work at Miller Spring No. 1 and Gardner Spring No. 24. PSCF ¶¶169(c), (d), 179(e), 254-57. Just as the tribe in *Native Vill. of Quinhagak v. U.S.*, 35 F.3d 388, 393, 394 n.5 (9th Cir. 1994), did not have to starve to death in order to demonstrate irreparable harm from fishing regulations, neither should Tombstone be forced to deliver arsenic poisoned well-water to its citizens to prove irreparable injury.

2007). Even from a prudential perspective, the City's cause of action was ripened by the "Hobson's Choice" foisted upon it: Either comply with the Forest Service's claim of regulatory authority or be arrested and suffer even more irreparable harm. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir. 2001); *Ass'n of Am. Medical Colleges v. U.S.*, 217 F.3d 770, 783 (9th Cir. 2000) (citing *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967)).

Finally, Tombstone is not required to obtain a judgment from the Court under the QTA as to the subject RS2339/2340 rights to prudentially "ripen" the Fifth Amendment claims for APA relief alleged in Counts V through VII because the Forest Service already recognized the subject RS2339/2340 rights. PSCF ¶¶85-109. The Forest Service has also recognized Tombstone as the successor to those rights. PSCF ¶¶113-15, 169(e), 179(f). The Forest Service cannot plead ignorance about its own institutional knowledge of these facts as a jurisdictional defense because such ignorance would itself evidence arbitrary and capricious decision-making and independently justify judicial review under the APA. *Sierra Club v. EPA*, 671 F.3d 955, 964-69 (9th Cir. 2012); *Ass'n of Irritated Residents v. EPA*, 632 F.3d 584, 590-91 (9th Cir. 2011); *cf. Bell v. Derwinski*, 2 Vet. App. 611, 612 (Vet. App. 1992) (citing *Murincsak v. Derwinski*, 2 Vet. App. 363 (Vet. App. 1992)). Moreover, Tombstone need not wade through the Forest Service's preferred process of seeking spring-by-spring restoration work authorization because the City's cause of action is premised on the injury in fact from the Forest Service's undisputedly final "overall plan" of refusing to consider and yield to the *entirety* of the City's work proposal. *Cf. Sierra Club v. Marita*, 46 F.3d 606, 614 (7th Cir. 1995). Therefore, there is no need to initiate a new administrative process to determine whether the subject RS2339/2340 rights were validly established. This Court

should instead defer to the Forest Service's past administrative determinations recognizing those rights. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984).[11] Accordingly, Counts V through VIII are ripe for judicial review. *State of Cal. ex rel. State Water Res. Control Bd. v. F.E.R.C.*, 966 F.2d 1541, 1562 (9th Cir. 1992).

V. Administrative Remedies Have Been Exhausted.

In proclaiming that Tombstone should have administratively appealed the Forest Service's November 7 and December 22, 2011 decisions, Defendants neglect to mention that both decisions state plainly: "[t]his decision is not subject to an administrative review or appeal." PSCF ¶¶183-84. In other words, the Forest Service previously determined that no administrative review or appeal was available to Tombstone. This interpretation of regulations governing the availability of administrative appeal must be accorded *Chevron* deference. *Auer v. Robbins*, 519 U.S. 452, 457 (1997) (citing *Chevron, U.S.A., Inc.*, 467 U.S. 837). The same is not true of Defendants' newfound administrative exhaustion defense. Agency litigation positions are not entitled to deference because they are often biased, inconsistent, and unreliable. *Price*, 697 F.3d at 829-31. Accordingly, this Court should reject Defendants' administrative exhaustion defense.

VI. Further Pursuit of Administrative Remedies is Futile.

[11] To the extent that Defendants question the merits of past administrative determinations in litigation (which is unclear), their litigation stance is not entitled to any deference whatsoever. *Price v. Stevedoring Serv. of America, Inc.*, 697 F.3d 820, 829-31 (9th Cir. 2012). Even if the Forest Service attempted to administratively retract its past recognition of the subject RS2339/2340 rights, the Court would still be required to defer to the original 1908 and 1916 letters as being more contemporaneous to the passage of the governing statutes. *Washington Water Power Co. v. FERC*, 775 F.2d 305, 322-23 (D.C. Cir. 1985).

An agency's litigation position can evidence that it has predetermined an issue such that administrative exhaustion is futile and unnecessary. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). Here, Defendants contend that they do not have any obligation to consider the subject RS2339/2340/2477 rights in administrative proceedings until Tombstone secures relief under the QTA, which they also claim is time-barred. This litigation position logically precludes Defendants from reaching any outcome in further administrative proceedings that would consider or yield to the subject RS2339/2340/2477 rights, as requested by the City in Counts V through VIII. The pursuit of administrative remedies is thus futile.

A lack of institutional competence is also a basis for ruling administrative exhaustion futile. *McCarthy*, 503 U.S. at 147. The Court in *McCarthy* applied this principle not only to recognize and excuse administrative exhaustion for constitutional claims, but also where the relevant agency "does not bring to bear any special expertise on the type of issue presented for resolution." *Id.* At 155. As with the Bureau of Prison's lack of institutional competency over an Eighth Amendment claim, the Forest Service has no special expertise warranting deference to Tombstone's Tenth Amendment constitutional claim in Count VIII. Moreover, just like the discrete issue of the "failure to render medical care," which was deemed outside of the Bureau of Prisons' expertise in *McCarthy*, the evidence here shows that RS2339/2340 rights are outside of the Forest Service's institutional competence. *Id.*; PSCF ¶¶210-17.

Furthermore, when an administrative agency already demonstrates a closed mind and summarily rejects a claim, the pursuit of further administrative remedies is also futile. *Crowley v. U.S.*, 56 Fed. Cl. 291, 297 (2003). In *Crowley*, for example, a decision denying

claims without explanation or analysis was found to prove the futility of administrative exhaustion. Here, the Forest Service ignored and summarily rejected Tombstone's proposed work almost entirely in its November 7 and December 22, 2011 decisions, disregarding internal policies regarding RS2339/2477 rights. PSCF ¶¶172, 182, 189-212, 261. Without explanation or analysis, the Forest Service arbitrarily restricted the City to working in what it claimed was a Wilderness Area despite having as much information for the proposed work outside of any such Area. PSCF ¶¶198-209. The Service's summary denial also reneged on the parties' November 3, 2011 agreement to yield to such work and disregarded the fact that the environmental assessment in the November 4, 2011 MRDG recommended yielding to such work. *Id.* This happened after local Forest Service personnel were instructed to limit the City's work to recently functioning facilities and non-masonry features. PSCF ¶¶185(d), (e), 186, 188, 226. In view of these facts, there is no reason to believe that further administrative consideration of additional proposals from the City would result in a more favorable outcome—especially when Defendants' litigation position is that only three spring sites have ever been recently functioning. Concern about agency bias is only heightened by evidence indicating that the Forest Service has been seeking to perfect an in-stream water flow permit for Miller Canyon that seeks so much water that it would displace Tombstone's municipal uses during low flow seasons. PSCF ¶227. These facts are far more indicative of agency bias than in *Crowley*, which excuses administrative exhaustion. PSCF ¶228.

Administrative exhaustion is excused where requiring the pursuit of administrative remedies essentially begs the question of the "merits of [plaintiff's] lawsuit." *Barry v. Barchi*, 443 U.S. 55, 63, n.10 (1979). Here, Tombstone contends that (a) the Forest Service has no

regulatory jurisdiction over the lands covered by the subject RS2339/2340/2477 rights except for those relating to Gardner Spring No. 24; (b) requiring special use authorization for the proposed work would breach the existing permit, thereby suspending or revoking the permit without due process, and also work a regulatory taking of the underlying RS2339/2340/2477 rights; and (c) federalism interests require yielding to the proposed work. Thus, requiring the City to exhaust administrative remedies begs the question of the merits of Plaintiff's jurisdictional, federalism and constitutional claims that such exhaustion would be *ultra vires*. Administrative exhaustion is, therefore, excused. *Skinner & Eddy Corp. v. U.S.*, 249 U.S. 557, 562 (1919).

Finally, the exhaustion of administrative remedies is futile "where plaintiff will suffer irreparable injury if the administrative decision is not [judicially] reviewed." *Am. Horse Prot. Ass'n v. Frizzell*, 403 F. Supp. 1206, 1215 (D.C. Nev. 1975); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 499 (9th Cir. 1980); *see also Bowen v. City of New York*, 476 U.S. 467, 483 (1986). Tombstone suffers irreparable harm every day it is unable to fully restore its water supply. PSCF ¶¶254-57. The Forest Service has not placed or enforced any reasonable time limit on their *ad hoc* sequential spring-by-spring approach to the proposed restoration work. PSCF ¶¶ 147, 152, 222, 225. This is clear evidence of the futility of pursuing administrative remedies. *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591-92 (1926).

VII. Counts V through VIII Challenge Final Agency Actions.

Counts V through VIII challenge at least three distinct actions by the Forest Service: (a) the November 1, 2011 decision to arrest Tombstone's employees and contractors if they

did not cease and desist from performing the proposed restoration work without further authorization; (b) the November 7, 2011 decision to grant conditional authorization to restore solely Miller Spring No. 1 and thereby reject summarily Plaintiff's October 24, 2011 restoration work proposal; and (c) the December 22, 2011 decision to grant conditional authorization to restore solely Gardner Spring No. 24 and thereby reject summarily Tombstone's December 5, 2011 demand for approval of Plaintiff's October 24, 2011 restoration work proposal. PSCF ¶¶145-82. All of these decisions are final in the sense required for judicial review under the APA.

Defendants' November 1, 2011 arrest threat is analogous to the compliance order held to be final agency action in *Sackett v. EPA*, 132 S. Ct. 1367 (2012). In *Sackett*, as here, the issue was "whether the regulated party" was within the regulating agency's jurisdiction. *Id.* at 1374. In *Sackett*, as here, the agency used its coercive power to "strong-arm" compliance with its asserted regulatory jurisdiction. *Id.* As in *Sackett*, there is no reason to believe that any underlying statutory authority in this case was designed to enable agencies to strong-arm regulated parties "into 'voluntary compliance' without the opportunity for judicial review." *Id.* Following *Sackett*, Defendants' November 1, 2011 arrest threat is a final agency decision, which is subject to judicial review under the APA.

Secondly, the principles applied in *Sackett* demonstrate that the November 7 and December 22, 2011 decisions are final agency actions subject to judicial review. The Court observed in *Sackett* that reviewable agency action includes "even a 'failure to act.'" *Id.* at 1371 (citing 5 U.S.C. § 551(13), 701(b)(2)). Hence, the failure of the November 7 and December 22, 2011 decisions to address and yield to the entirety of Tombstone's work

proposal is reviewable. The Court in *Sackett* also noted the EPA's compliance order "determined rights or obligations" by imposing a legal obligation on the Sacketts to "restore their property according to an agency-approved [Restoration Work] [P]lan." *Id.* at 1368. Similarly, the November 7 and December 22, 2011 decisions impose upon Tombstone various land restoration obligations. PSCF ¶¶172, 181-82. The Court further observed that the EPA's compliance order marked the "'consummation' of the agency's decisionmaking process" because the order was "not subject to further agency review." *Id.* at 1369. The same is true of the decisions here. PSCF ¶¶183-84. Taken together, the Forest Service has rendered at least three decisions that are final for judicial review.[12]

VIII. APA Judicial Review Applies to Counts V through VIII.

The Court should reject Defendants' contention that it has no mandatory duties upon which to premise judicial review under the APA. In challenging the existence of a reviewable "mandatory duty," Defendants are relying on the APA's exception to judicial review for decisions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is narrow. There is a strong "presumption of judicial review" for any final agency action. *Eisinger v. Fed. Lab. Rel. Auth.*, 218 F.3d 1097, 1103 (9th Cir. 2000). One looks to the source of the power to act to determine if agency action was meant to be committed exclusively to agency discretion. *Id.* If the power source does not clearly and unequivocally preclude judicial review under the APA, then judicial review will be deemed authorized. *Id.*

[12] Additionally, by obstructing the proposed work, the Forest Service breached the permit's caveat protecting such valid claims; thereby effectively suspending or revoking the 1962 permit, which would also be a final decision under 36 C.F.R. § 251.60(a)(1)(ii).

The Forest Service's authority to act here includes the U.S. Constitution, the Organic Act, 16 U.S.C. §§ 475, 481, 551, the Wilderness Act of 1964, 16 U.S.C. §§ 1133, 1134, the Arizona Wilderness Act of 1984, 98 Stat. 1485, the Proclamation of President Theodore Roosevelt, Act of Nov. 6, 1906 (1906), 36 C.F.R. § 251.50, and the 1962 Special Use Permit itself. None of these authorities preclude judicial review. Accordingly, judicial review is available under the APA. *Eisinger*, 218 F.3d at 1103.

Indeed, the Fifth and Tenth Amendments obviously impose a mandatory duty on the Forest Service to furnish procedural and substantive due process in regulatory decisions that affect liberty and property interests, to refrain from taking property rights without just compensation, and to respect state sovereignty.[13] This duty is implicated by the contractual, regulatory takings, jurisdictional, and federalism theories advanced by Counts V through VIII. The 1962 Special Use Permit, as interpreted according to the City's contractual theory, also furnishes a mandatory duty to yield to the proposed work. Further, the text of 36 C.F.R. § 251.50 precludes the notion that decisions regarding special use regulation of RS2339/2340/2477 rights are exclusively a matter of internal Forest Service discretion.

36 C.F.R. § 251.50(a) and (b) state that special use regulation applies "unless that requirement is waived by paragraphs (c) through (e)(3) of this section." Importantly, this waiver is furnished automatically by the very text of the regulation. Thus, 36 C.F.R. § 251.50(a) and (b) imposes a mandatory duty on Forest Service personnel to exclude from

[13] Tombstone has standing to assert these interests. *U.S. v. 50 Acres of Land,* 469 U.S. 24, 31 (1984); *In re Real Estate Title and Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 765 (3d Cir. 1989); *Middlesex Cnty. Util. Auth. v. Sayreville*, 690 F.2d 358, 362 (3d Cir. 1982); *Friends of Earth v. Carey*, 552 F.2d 25, 33-34 (2d Cir. 1977).

special use regulation precisely what is specified in "paragraphs (c) through (e)(3)." Those paragraphs, in turn, provide judicially manageable standards that specifically reference, and exclude from special use regulation, the enjoyment of RS2339/2340/2477 rights under circumstances analogous to the underlying facts of this case. This demonstrates the existence of a clear mandatory duty to yield to the subject RS2339/RS2340/RS2477 rights apart from what the Fifth and Tenth Amendments dictate. *KOLA, Inc. v. U.S.*, 882 F.2d 361, 363-64 (9th Cir. 1989).

The interpretation of 36 C.F.R. § 251.50(a) and (b) as mandating the exclusion of RS2339/2340/2477 rights from special use regulation under the circumstances specified therein is fully consistent with the principle of constitutional avoidance. This is because an uncompensated regulatory taking would result if Tombstone were forced to obtain an additional authorization for the same use already granted as a matter of right by RS2339/2340/2477. *Washington Water Power Co.*, 775 F.2d at 276. The foregoing interpretation is also consistent with the Forest Service's own February 5, 2008 directive which underscores its lack of regulatory jurisdiction over RS2339 rights. PSCF ¶130. It is likewise consistent with the Forest Service's own manuals as to how special use authorization regulation must yield to RS2339/2340/2477 rights in a variety of contexts similar to the proposed restoration work. PSCF ¶¶190-95.[14] It is fully consistent with the approach taken with regard to similar access rights by the Ninth Circuit. *See Montana*

[14] The Forest Service's guidelines and manual provisions have probative value as to whether 36 C.F.R. § 251.50(a) and (b) entail a mandatory duty because deference is accorded to agency manuals. *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68 (1st Cir. 2006).

Wilderness Ass'n v. U.S., 655 F.2d 951, 957 (9th Cir. 1981); *Skranak*, 425 F.3d at 1218-19. And it is consistent with the governing framework of law. *Compare Oregon Natural Desert Ass'n v. U.S. Forest Service*, 312 F. Supp. 2d 1337, 1339-46 (D. Or. 2004) ("shall" indicates mandatory duty); *accord Davis v. Romney*, 355 F. Supp. 29, 43 (D.C. Pa. 1973), *with* 16 U.S.C. §§ 475 (mandating "national forests . . . shall be . . . administered in accordance with . . . securing favorable conditions of water flows"), 1133(a)(1), (c) (mandating the Act "shall" not interfere "with the purpose for which national forests are established" and excluding "existing private rights" from regulation), 1134(a), (b) (mandating State or private owner "shall be given such rights as may be necessary to assure adequate access" and the Secretary of Agriculture "shall . . . permit ingress and egress") (emphasis added). Accordingly, Defendants' November 1, November 7, and December 22, 2011 decisions are judicially reviewable under the APA as alleged in Counts V through VIII.[15]

IX. Count VIII is Meritorious as a Matter of Law.

Defendants misconstrue Tombstone's Tenth Amendment claim as facially attacking various statutes. In fact, Tombstone is challenging the application of the referenced statutes as unconstitutional under the unique facts of this case. *Bond*, 134 S. Ct. at 2094 (Scalia,

[15] Notably, neither the QTA's nor the APA's waiver of sovereign immunity is the exclusive basis for the requested relief because a waiver of sovereign immunity is not necessary for equitable relief from ultra vires or unconstitutional misconduct by defendant officers. *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 692, 696-97, 702 (1949); *Ex Parte Young*, 209 U.S. 123, 160 (1908); *U.S. v. Lee*, 106 U.S. 196, 213 (1882); *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. 1988). Accordingly, the Verified Second Amended Complaint (ECF 135) alternatively premises this Court's jurisdiction on its equitable power to entertain an officer suit for prospective equitable relief under 28 U.S.C. §§ 1331, 1361, 1367, 2201, and 2202.

Thomas, Alito, JJ., concurring) (recognizing Tenth Amendment challenge to the "application" of an otherwise valid general law). The bottom line is that the Forest Service obstructed the restoration of essential water infrastructure by a desert town, during a declared State of Emergency, after a devastating natural disaster, in a desert state where essential water supplies are unavoidably located throughout federal lands. PSCF ¶258; Ross Gorte, *Federal Land Ownership: Overview and Data*, pp. 3-8 (C.R.S. Feb. 8, 2012).[16] The Forest Service's interference with the proposed work thus threatens Arizona's "continued existence" in violation of the principles of state sovereignty enforced in *Alden v. Maine*, 527 U.S. 706, 713-14 (1999) and *Brush v. Comm'r*, 300 U.S. 352, 366-67, 370-71 (1937) (holding loss of water supply "is equivalent, in a very real sense, to saying that the city itself would then disappear").[17]

Additionally, the federal government's interference with Tombstone's autonomy amounts to impermissible commandeering. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct.

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[16] Count VIII does not hinge on viability of Tombstone's title claim to the subject RS2339/2340 rights. Federal lands are governed by common law principles. *Canova v. Shell Pipeline Co.*, 290 F.3d 753, 756-60 (5th Cir. 2002). Under the common law, a rule of necessity always conditions property rights. *See, e.g.*, *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910). One has a common law privilege to invade the property of another to save life and limb during an emergency. Restatement (Second) of Torts § 197, p. 355 (1965). Accordingly, even if Tombstone somehow were acting as a trespasser (and to the very extent the Forest Service might be acting as a proprietor under the Property Clause), the Forest Service should have nevertheless yielded to Tombstone's privileged water supply restoration work during a declared State of Emergency.

[17] Although *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 541 (1985), rejected the distinction between essential and non-essential governmental functions applied in *Brush*, the Supreme Court has never overturned *Brush*'s specific holding that the loss of a municipal water supply poses a unique existential threat. The doctrine of *stare decisis* thus commands fidelity to that rationale of *Brush*. *Winslow v. FERC*, 587 F.3d 1133, 1135 n.4 (D.C. Cir. 2009) (holding "[v]ertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court'").

2566, 2601-03 (2012), the Supreme Court held that the anti-commandeering holdings of *Printz v. U.S.*, 521 U.S. 898, 933 (1997), and *New York v. U.S.*, 505 U.S. 144, 174-75 (1992), extend beyond directly commanding states to legislate or to execute federal laws. The Court ruled that the same principles also prohibit Congress from exercising its Spending Power in such a way as to "indirectly" coerce "a State to adopt a federal regulatory system as its own." *Sebelius*, 132 S. Ct. at 2601-03. The Court has thus confirmed that commandeering is a species of impermissible coercion; and that the rule against commandeering is an implication of the principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz*, 521 U.S. at 920 (quoting *New York*, 505 U.S. at 166). Running Arizona's designated police power agent through a gauntlet of *ad hoc* regulations before allowing the restoration of essential public infrastructure during a State of Emergency, in which public health and safety is threatened, is at least as coercive to the State as the denial of Medicaid funding.

Lastly, Count VIII is also supported by the application of the test applied in *Nat. League of Cities v. Usery*, 426 U.S. 833 (1976), which has been revived by the rationale of *Alden*, *Printz* and *New York* according to courts and scholars.[18] By obstructing the proposed work, the Forest Service regulated Tombstone when it was acting in a sovereign capacity

[18] *See, e.g.*, *U.S. v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997) (applying the three prong "traditional governmental function" test of *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), which originates from *Nat. League of Cities*); *accord U.S. v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996); *Dragovich v. U.S. Dep't of the Treasury*, 764 F. Supp. 2d 1178, 1189 (N.D. Cal. 2011); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 Harv. J.L. & Pub. Pol'y 947, 954 (2008) (arguing *Garcia* has been overturned *sub silencio*); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1283, 1299 (June 2000).

with respect to sovereign property that is essential to protecting public health and safety. If words mean anything, such conduct (a) regulates "states as states," (b) concerns essential attributes of state sovereignty, and (c) impairs governmental functions traditionally assigned to the States; thus easily passing *National League of Cities*' test of unconstitutionality under the Tenth Amendment. *Id.* at 852-54. Taken together, Count VIII should be sustained on the merits as a matter of law.

CONCLUSION

In the final analysis, the best explanation for the Forest Service's conduct is not to be found in Defendants' meritless jurisdictional defenses. It is to be found in two items of evidence: 1) an email in which Forest Service personnel were instructed to limit Tombstone's work only to recently functioning, non-masonry infrastructure; and 2) efforts by the Forest Service to perfect an in-stream water permit, which would lay claim to more water than can be shared between the Forest Service and Tombstone. PSCF ¶¶185-86, 226-27. This evidence best explains why the April 6, 1908 and April 4, 1916 determination letters, together with all governing laws, directives, guidelines and policies have been conveniently forgotten. It also explains why the Forest Service has predetermined never to allow Tombstone the freedom of action and sovereignty guaranteed by federal law, the Fifth and the Tenth Amendments. Simply put, the Forest Service wants Tombstone's water; and to get it, the Forest Service has stopped the City from fully restoring its water system. PSCF ¶¶226-27. Sadly, this is not the first time the Forest Service has engaged in such capricious behavior. *See, e.g.*, *U.S. v. Estate of Hage*, 2013 WL 2295696, at *42-43, 49 (D. Nev. 2013). Hopefully, it will be the last.

RESPECTFULLY SUBMITTED on this 25th day of June, 2014 by:

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