

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

Nicholas C. Dranias (330033)  
Christina Sandefur (027983)  
500 E. Coronado Rd.  
Phoenix, AZ 85004  
P: (602) 462-5000/F: (602) 256-7045  
[ndranias@goldwaterinstitute.org](mailto:ndranias@goldwaterinstitute.org)  
[csandefur@goldwaterinstitute.org](mailto:csandefur@goldwaterinstitute.org)  
Attorneys for Plaintiff

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

|                                  |   |                                       |
|----------------------------------|---|---------------------------------------|
| CITY OF TOMBSTONE,               | ) | Civil Action No. 11-845-TUC-FRZ       |
|                                  | ) |                                       |
| Plaintiffs,                      | ) | Hon. Frank R. Zapata, presiding judge |
| v.                               | ) |                                       |
|                                  | ) | <b>CITY OF TOMBSTONE’S</b>            |
| UNITED STATES OF AMERICA, et al, | ) | <b>MEMORANDUM IN SUPPORT OF</b>       |
|                                  | ) | <b>MOTION FOR PRELIMINARY</b>         |
| Defendants.                      | ) | <b>INJUNCTION</b>                     |
|                                  | ) |                                       |
|                                  | ) |                                       |

**Overview of the Facts**

Between May and July 2011, the “Monument Fire” engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone’s water 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. (SOF 1.) In response, Arizona Governor Jan Brewer declared a state of emergency specifically for the City of

1 Tombstone. (SOF 3.) Defendants have repeatedly recognized the ongoing emergency.  
2 (SOF 18.)

3  
4 Despite the manifest emergency facing the desert-parched City of Tombstone,  
5 Defendants are now refusing to allow Tombstone to take immediate emergency action to  
6 repair its Huachuca Mountain water infrastructure. (SOF 5.) Instead, claiming ignorance  
7 of Tombstone's water rights, Defendants initially required Tombstone to use hand tools  
8 to restore and rebuild critical elements of its water supply and infrastructure in the  
9 Huachuca Mountains in a "special use authorization decision" for Gardner Springs No.  
10 24, which took thirty days to issue. (SOF 14.) More recently, they are also prohibiting or  
11 interfering with Tombstone's access to numerous spring sites. (SOF 5-12.) Most  
12 recently, Defendants even attempted to bar Tombstone from using a wheelbarrow to  
13 conduct its emergency repairs. (SOF 13.) As a result, only three springs are currently  
14 feeding Tombstone's municipal water system. (SOF 15.) Given that repairs and  
15 reconstruction could have been completed with heavy equipment and vehicles in a  
16 month or less, Defendants have prevented Tombstone from enjoying the beneficial use  
17 of water from twenty-two of the twenty-five springs it owns for nearly three months,  
18 since first impeding the City's emergency repair work in October 2011. (SOF 5, 15.)

19  
20 The resulting delay in emergency repairs and denial of the beneficial use of water  
21 from the Huachuca Mountains is forcing Tombstone to rely upon and consider  
22 developing potable well water for its water supply. But the City's well water sources are  
23 historically and imminently at risk of arsenic contamination. (SOF 19.) They barely  
24 provide enough supply to handle peak consumption demand, leaving aside fire

1 suppression needs. (SOF 28.) Moreover, delays in repairs resulting from Defendants'  
2 insistence on hand tools are also depriving Tombstone of the water needed to justify the  
3 development of modern water distribution systems for adequate fire suppression—  
4 imposing the looming threat of a disastrous and uncontrollable fire that could easily burn  
5 down the entire historic district. (SOF 29, 35.)

7         Hand tools cannot do the job that needs to be done to avert the ongoing  
8 emergency. As a result of the Monument Fire disaster, the terrain throughout the  
9 Huachuca Mountains has huge boulders, giant felled trees, huge piles of gravel and sand  
10 that must be moved and rearranged to rebuild a diversionary flume as a safety and  
11 protective measure to deflect future water flows from injuring workers in the area and  
12 destroying the spring catchments and access to the springs themselves. The City's water  
13 structures simply cannot be safely rebuilt or fully utilized in the future without these  
14 protective flumes in place. (SOF 38.) Full repair and burial of the auxiliary water lines  
15 from the City's springs to its main is also needed to protect them from future weather  
16 events. Otherwise, the City's water structures will be periodically destroyed by weather  
17 and flow events, depriving the City of a continuous water supply. (SOF 39.)

18 Accordingly, safe and complete repair of Tombstone's water infrastructure, which is  
19 essential to provide safe drinking water and adequate fire suppression, requires the  
20 heavy equipment and vehicles identified in the First Amended Complaint.

21         Despite court-ordered mediation, the parties remain at loggerheads. Fortunately,  
22 history is often instructive. In 1916, Tombstone's predecessor in interest to the property  
23 rights at issue, the Huachuca Water Company, wrote a letter to Defendants asking for  
24

1 confirmation of its vested rights. In response, the Forest Service did not impede access to  
2 ancient spring heads, pipelines and related rights of way. It did not demand a permit  
3 (although it freely granted them). Instead, the Forest Service admitted that the Huachuca  
4 Water Company already had full right and title to the Huachuca Mountain water  
5 infrastructure under federal law. (SOF 72.) What was abundantly obvious to Defendants  
6 in 1916 is now being completely disregarded. But it is not because Tombstone is  
7 differently situated than the Huachuca Water Company. Tombstone was transferred all  
8 of the Huachuca Water Company's property rights and permit privileges in 1947. (SOF  
9 80.) Defendants investigated the transfer of permits and subsequently approved it in  
10 1948 and 1949. (SOF 81-82.)

11  
12  
13  
14 The different treatment accorded Tombstone by Defendants is also not explained  
15 by some newfound defect in the City's chain of title—somehow discovered by Forest  
16 Service officials nearly a century distant from the facts on the ground in 1916. In fact,  
17 the chain of title to Tombstone's water rights, infrastructure and rights of way in the  
18 Huachuca Mountains is clear. Tombstone actually holds *previously adjudicated* water  
19 rights, as well as appurtenant and independent land use, pipeline and access rights of  
20 way. (SOF 75-79.)

21  
22  
23 Finally, the different treatment accorded Tombstone today is not explained by  
24 any change in the exercise of its vested rights in the Huachuca Mountains. Motorized  
25 and mechanized vehicles and equipment, both heavy and light, have *always* been utilized  
26 by Tombstone to access, repair, maintain and construct water structures, both before and  
27 after the passage of the Arizona Wilderness Act of 1984. (SOF 91-113.) Tombstone has  
28

1 *always* constructed and reconstructed permanent water structures destroyed by periodic  
2 flood and fire events. (SOF 114-115.) Substantial ground displacement within the scope  
3 of its land use and right of way easements is and *always has been* absolutely necessary  
4 simply as a matter of ordinary maintenance. (SOF 116-119.) Indeed, Tombstone's vested  
5 rights expressly grant the City the right to excavate and make cuts in the land, to  
6 construct and maintain flumes, ditches, pipelines, canals, reservoirs and dams. (SOF 48.)  
7 And in 1962, Defendants gave Tombstone an open-ended special use permit to construct  
8 improvements and maintain its "municipal water supply" in accordance with its vested  
9 rights. Defendants have never formally suspended or revoked that permit. (SOF 83.)  
10 They are simply ignoring it.

#### 14 **ARGUMENT**

15 Defendants' conduct in this case can only be explained as an arbitrary and  
16 capricious effort to enforce fealty to a clearly erroneous interpretation of federal law.  
17 Fortunately, injunctive relief is fully within the scope of judicial review under the  
18 Administrative Procedure Act, as well as to enforce constitutional guarantees. *Nelson v.*  
19 *United States*, 64 F.Supp.2d 1318, 1321, 1226 (N.D. Ga. 1999); *see generally Koog v.*  
20 *United States*, 79 F.3d 452, 463 (5<sup>th</sup> Cir. 1996). Accordingly, under Counts I, II, III and  
21 V of their First Amended Complaint, Plaintiffs respectfully request a preliminary  
22 injunction barring Defendants from interfering with Tombstone's vested rights.

25 Preliminary injunctions are granted upon the weighing of four factors: (1)  
26 whether the plaintiff is likely to succeed on the merits, (2) whether the plaintiff is likely  
27 to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of  
28

equities tips in his favor, and (4) whether an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a modified “sliding scale” approach to preliminary injunctions in which “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9<sup>th</sup> Cir. 2011). These elements weigh strongly in favor of the requested preliminary relief.

**I. Tombstone is Certain to Suffer Irreparable Harm Without Intervention.**

Irreparable injury includes the impairment or threatened loss of rights or interests in real property. *Park Vill. Apt. Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150, 1119 (9<sup>th</sup> Cir. 2011). Irreparable injury also includes impairment of sovereign interests without notice or opportunity to be heard. *Kansas v. United States*, 249 F.3d 1213, 1228 (10<sup>th</sup> Cir. 2001). Finally, irreparable injury also includes harm or threats of harm to public health and safety. *United States v. Midway Heights County Water Dist.*, 695 F. Supp. 1072, 1075 (E.D. Cal. 1988); *Taverns for Tots, Inc. v. City of Toledo*, 307 F. Supp. 2d 933, 945 (N.D. Ohio 2004). In the present case, Defendants’ commandeering of Tombstone’s municipal water supply is certain to cause irreparable harm.

Water rights are real property interests under Arizona law. *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 406 (App. 2008). As determined by Defendants in 1916, Tombstone holds title to water rights and water structure and pipeline right of way

1 easements pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 (“1866  
2 Act”). (SOF 72.) Title protected by the 1866 Act is superior to any conflicting land  
3 patent. *California v. United States*, 438 U.S. 645, 657 n.11 (1978). Water rights and  
4 rights of way for water structures obtained under local custom and laws must be  
5 recognized under the 1866 Act. *Jennison v. Kirk*, 98 U.S. 453, 456, 460 (1878). Securing  
6 these rights requires no federal approval because the 1866 Act automatically protects  
7 rights recognized under local custom or law. *Utah Power & Light Co. v. United States*,  
8 243 U.S. 389, 405 (1917).

11 Title to all of Tombstone’s water rights and easements was obtained in full  
12 compliance with local custom and territorial law, which at all relevant times allowed for  
13 the acquisition of water rights as well as appurtenant and independent right of way  
14 easements by: a) “locating” a water source through posting a notice of appropriation at  
15 the point of diversion, recordation of the notice, and subsequent development and  
16 beneficial use; or b) by quit claim deed transfer of existing water rights and appurtenant  
17 easements. (SOF 46.) Moreover, in 1915, Tombstone’s entire water structure and  
18 pipeline right of way easements were adjudicated as appurtenant to the right to make  
19 beneficial use of McCoy Group Spring Nos. 2, 3 and 4. (SOF 76.) Tombstone’s water  
20 rights and appurtenant easements to Clark Spring No. 11 were also fully and finally  
21 adjudicated in its favor *vis a vis* a conflicting federal land patent holder in 1917. (SOF  
22 78.) Given the 1866 Act’s requirement of federal deference to local custom and law with  
23  
24  
25  
26  
27  
28

1 respect to water rights and right of way easements, Tombstone's rights have clearly  
2 vested beyond a shadow of a doubt.<sup>1</sup>

3  
4 Significantly, not only the vesting, but the "measure" of water rights and right of  
5 way easements is determined by contemporaneous local custom and law under the 1866  
6 Act. *California*, 438 U.S. at 656-57; *Hage v. United States*, 51 Fed. Cl. 570, 580-84  
7 (Fed. Cl. 2002); *Store Safe Redlands Assocs.*, 35 Fed. Cl. at 737 (Fed. Cl. 1996). In  
8 accordance with then-local custom, Tombstone's water rights and easements expressly  
9 include the right to occupy parcels surrounding the spring heads, road right of ways, the  
10 land underneath and on either side of its pipelines, as well as the right to excavate and  
11 make cuts in the land, to construct and maintain flumes, ditches, pipelines, canals,  
12 reservoirs and dams. These rights are not dispensable; they are appurtenant to making  
13 beneficial use of the spring water in the Huachuca Mountains. (SOF 46-48.)

14  
15 Accordingly, Defendants' actions in impeding Tombstone from accessing,  
16 maintaining and repairing its water system impair the City's real property interests.  
17  
18

---

19  
20 <sup>1</sup> The Arizona Supreme Court has specifically held that Arizona's water laws cannot  
21 constitutionally divest or prejudice previously vested water rights. *San Carlos Apache*  
22 *Tribe v. Superior Court*, 193 Ariz. 195 (Ariz. Sup. Ct. 1999) (holding "[t]he Legislature  
23 may not . . . change the legal consequence of events completed before the statute's  
24 enactment" under the principle guaranteed by Ariz. Const. art II, sec. 4); *see also* A.R.S.  
25 § 45-171 (protecting previously vested water rights from impairment by Arizona's  
26 current water law); A.R.S. § 45-182(B)(3) (exempting water rights recognized by prior  
27 court order from registration). Accordingly, despite the pendency of water adjudication  
28 proceedings under state law, Tombstone's vested rights are still capable of enforcement  
in federal court under statutory and constitutional provisions that are independent of 43  
U.S.C. § 666. *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).



1 Indeed, because of Defendants' actions in challenging Tombstone's property rights, the  
2 statute of limitations for Tombstone's quiet title cause of action has begun to tick.  
3  
4 *Michel v. United States, Dep't of the Interior*, 65 F.3d 130, 132 (9th Cir. Wash. 1995). A  
5 cloud on Tombstone's title now exists and the City has no choice but to file suit to  
6 protect its rights. Moreover, the City has been effectively evicted from its own rights of  
7 way. Consequently, it is certain Defendants are causing and will continue to cause  
8 irreparable harm by obstructing the exercise of Tombstone's vested rights and denying  
9 the City customary means of access to its water structures. *Park Vill. Apt. Tenants Ass'n*,  
10 636 F.3d at 1119. But this case is not just about vindicating water rights in a desert land.

11  
12 By declaring a state of emergency with specific regard to Tombstone, Governor  
13 Brewer exercised "all police power vested in the state by the constitution and laws of  
14 this state" to alleviate the peril facing Tombstone from the loss of its municipal water  
15 supply. A.R.S. §§ 26-301(15), 26-303(E). In other words, all police powers of the State,  
16 including those wielded by Tombstone, have been marshaled to reestablish the City's  
17 municipal water supply. In response, Defendants have undermined this effort by  
18 effectively suspending or revoking the Forest Service's 1916 recognition of  
19 Tombstone's vested rights and the City's 1962 special use permit; and they have done so  
20 without making appropriate administrative findings or giving Tombstone a meaningful  
21 notice or an opportunity to be heard as required by 36 CFR 251.60(a) and (f) (citing 36  
22 CFR 251.54(g)(3)(ii)). Defendants' interference with Tombstone's police power  
23 mandate has also forced the City to rely almost exclusively on groundwater sources, in  
24 contravention of the public policy set out in A.R.S. § 45-401, *et seq.* (SOF 19.) Taken  
25  
26  
27  
28

1 together, Defendants have unquestionably caused irreparable harm by impairing  
2 Tombstone's sovereign interests as a political subdivision of the State. *Kansas*, 249 F.3d  
3 at 1228.  
4

5 Governor Brewer's declaration of a state of emergency underscores the threat to  
6 public health and safety faced by Tombstone. The loss of Tombstone's municipal water  
7 supply has caused a shortage of water for both consumption and fire suppression during  
8 peak demand. (SOF 28-31.) The resulting fire hazard is readily apparent from the fact  
9 that in December 2010 a devastating fire broke out in Tombstone's 19th Century  
10 wooden structure historic downtown district. The entire business district could easily  
11 have been lost. (SOF 32-34.) The threat facing Tombstone is further heightened by the  
12 fact that, without its municipal water supply, the City cannot justify modernizing its  
13 water distribution system to address this fire hazard. (SOF 35.) This clear and present  
14 danger is compounded by the arsenic contamination of the city's well-water supply,  
15 which could deprive the city of safe potable well-water sources at any time. (SOF 27-  
16 28.) These dangerous conditions caused by Defendants' intransigence irreparably injure  
17 Tombstone because the fire hazard, arsenic poisoning risk, and water shortage afflicting  
18 the City pose at least as much of a threat to public health and safety as second-hand  
19 smoke in a bar. *See Taverns for Tots, Inc.*, 307 F. Supp. 2d at 945.  
20  
21  
22  
23

## 24 **II. The Equities and Public Interest Favor Tombstone.**

25 Public health and safety is a "paramount" public interest. *Hodel v. Va. Surface*  
26 *Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981). Defendants have repeatedly  
27 conceded the weightiness of Tombstone's public health and safety public interests. (SOF  
28

18.) By contrast, there is no such interest supporting Defendants' refusal to honor Tombstone's 1962 special use permit and vested rights. Moreover, Tombstone's public health and safety interest is not offset by any *bona fide* environmental interest. Any environmental footprint from the work Tombstone seeks to perform will be washed away by the next monsoon. (SOF 120.) Even if there were a lasting footprint, environmental interests are not better served by requiring Tombstone to build only temporary structures with hand tools. Those structures will be washed away in the next monsoon. (*Id.*) Given the inevitability of seasonal monsoons and periodic flood events in the Huachuca Mountains, it makes no sense to force Tombstone to repair and rebuild temporary structures *ad infinitum* with the continuous ground displacement that entails. To the contrary, the only rational way to minimize impacts on the environment is to allow Tombstone to build permanent water catchments and protective flumes that minimize the need to perform future repair work and maintenance.<sup>2</sup> (SOF 119.) In short, the public interest favors Tombstone's requested relief. Correspondingly, the equities also favor Tombstone's requested relief because Defendants' opposition to the requested relief is premised on an arbitrary and capricious reversal of their 1916 recognition of Tombstone's vested rights and a groundless refusal to honor the plain meaning of the City's 1962 special use permit.

---

<sup>2</sup> The unfortunate reality is that the devastation wrought by the Monument Fire in Miller and Carr Canyons has been utterly destroyed the previous ecosystem. (SOF 1, 36.) Despite issuing numerous Freedom of Information Act requests, Plaintiff has been furnished with no post-Monument Fire ecological studies suggesting otherwise.

1 **III. Tombstone Has a Likelihood of Success on the Merits.**

2 Serious questions going to the merits are raised by Plaintiffs' claims. As a matter  
3 of state law, Governor Brewer's emergency proclamation gives Tombstone concurrent  
4 police power jurisdiction with the federal government with respect to its water rights and  
5 rights of way in the Huachuca Mountains. *Kleppe v. New Mexico*, 426 U.S. 529, 542-43  
6 (1976). In preventing Tombstone from exercising such power, Defendants are essentially  
7 proclaiming that Congress gave them the power to preempt the state's police powers  
8 during a grave public health and safety emergency. But there is no such preemption  
9 clause in the Wilderness Act. Therefore, implied preemption is an unstated premise of  
10 Defendants' regulatory actions. The Supreme Court, however, has emphasized that  
11 preemption of a state's police powers is never presumed. *Wyeth v. Levine*, 555 U.S. 555,  
12 565 (2009). Instead, a presumption of non-preemption exists. *Cipollone v. Liggett*  
13 *Group*, 505 U.S. 504, 518 (1992). Moreover, where an ambiguity exists, federal law and  
14 policy must be construed to accommodate sovereign state interests. *Chamber of*  
15 *Commerce of the United States v. Whiting*, 131 S.Ct.1968, 1985 (2011). This principle is  
16 especially apt in the context of federal-state relations impacting water rights, to which a  
17 national policy of comity applies. *United States v. Mexico*, 438 U.S. 696, 713-18 (1978).  
18

19 **A. Serious Questions are Raised by Tombstone's APA Claims.**

20 In view of the foregoing principles of law, the arbitrary and capricious nature of  
21 Defendants conduct is readily apparent. Tombstone has an open-ended 1962 special use  
22 permit broadly allowing for the maintenance and improvement of its municipal water  
23 supply. The permit does not restrict the means of access or maintenance. In fact, it arises  
24  
25  
26  
27  
28

1 from an approved application that authorized Tombstone “to do improvement work at all  
2 of the spring impound areas and along all of the existing and future pipelines, when such  
3 improvements are deemed necessary.” (SOF 83.) And yet, Defendants have interpreted  
4 this permit as somehow barring the customary use of heavy equipment and vehicles.<sup>3</sup>  
5

6 Viewed against the background principle of comity and presumption of non-  
7 preemption, Defendants’ restrictive interpretation of Tombstone’s 1962 permit is  
8 manifestly arbitrary and unreasonable. It completely disregards the scope of  
9 Tombstone’s vested rights as well as the fact that the Forest Service’s own guidelines  
10 require it to “permit maintenance or reconstruction of existing [water] structures . . .  
11 [including] reservoirs, ditches and related facilities for the control or use of water that  
12 were under valid special use permit or other authority when the area involved was  
13 incorporated under the Wilderness Act.” 2300 Forest Service Manual, Ch. 20, §  
14 2323.44d. It also violates guidelines allowing motorized and mechanized transportation  
15 that “practiced before the area was designated as Wilderness.” *Id.*  
16  
17  
18

19 Neither the regulatory power conferred on Congress by the Property Clause, U.S.  
20 Const. Art. IV, Sec. 3, Cl. 2, nor the Wilderness Act itself justifies Defendants’ arbitrary  
21 interpretation of Tombstone’s permit—especially in view of Tombstone’s underlying  
22 vested rights. It is a basic principle of property law that a servient owner may not  
23 regulate the use of easements in such a way as to frustrate the purpose for which the  
24  
25

---

26 <sup>3</sup> Under *Sackett v. EPA*, 2012 U.S. LEXIS 2320 \*9-11 (2012), Defendants’ conduct in  
27 obstructing Tombstone’s necessary repair work constitutes final administrative action  
28 because it is readily apparent from their final “special use authorization” decision that  
deliberations over the scope of Tombstone’s 1962 special use permit have concluded.

1 easement was granted. *United States v. Estate of Hage*, 2011 U.S. Dist. LEXIS 53019 \*  
2 28 (D. Nev. 2011) (citing *St. James Vill., Inc. v. Cunningham*, 210 P.3d 190, 192, 194  
3 (Nev. 2009)). Likewise, Defendants cannot invoke a permit issued based on authority of  
4 the Property Clause to justify regulating Tombstone's right of way easements so as to  
5 infringe those easements by frustrating the purpose for which they were granted. *See*  
6 *generally City of Baker City v. United States*, 2011 U.S. Dist. LEXIS 105915 \* 15 (D.  
7 Or. Sept. 19, 2011). In fact, 16 U.S.C. §1134(a) guarantees that state and private owners  
8 of interests in lands surrounded by a wilderness area "shall be given such rights as may  
9 be necessary to assure adequate access to such State-owned or privately owned land by  
10 such State or private owner and their successors in interest." 16 U.S.C. §1134(a);  
11 *Oregon Chapter of Sierra Club*, 172 IBLA 27, 42 (2007). Moreover, §1134(b) requires  
12 the Forest Service to permit means of ingress and egress "customarily enjoyed" for valid  
13 occupancies located within wilderness areas.

14  
15 Taken together, the law clearly stands against Defendants' restrictive  
16 interpretation of Tombstone's 1962 special use permit and vested rights. Nothing in the  
17 Wilderness Act suggests any intent by Congress to preempt or diminish Tombstone's  
18 customary and rightful ability to use, repair and rebuild its Huachuca Mountain water  
19 infrastructure using heavy vehicles and equipment. In effect, Defendants have violated  
20 Tombstone's vested rights by lawlessly suspending or revoking Tombstone's permit  
21 without following any of the procedures set out in 36 CFR 251.60(a) and (f).  
22 Tombstone's APA claims thus raise serious questions going to the merits.  
23  
24  
25  
26  
27  
28

1           **B. Serious Questions are Raised by Tombstone’s 10<sup>th</sup> Amendment Claims.**

2           The Tenth Amendment limits expressly delegated federal power notwithstanding  
3 the Supremacy Clause because “[i]mpermissible interference with state sovereignty is  
4 not within the National Government’s enumerated powers.” *Bond v. United States*, 131  
5 S. Ct. 2355, 2366 (2011). One of the clearest examples of impermissible interference  
6 with state sovereignty is federal commandeering of the organs or officials of state  
7 government. *New York v. United States*, 505 U.S. 144, 166 (1992). But the ban on  
8 commandeering is not a constitutional axiom. It is a corollary of the first principle that  
9 “[t]he Framers explicitly chose a Constitution that confers upon Congress the power to  
10 regulate individuals, not States.” *Printz v. United States*, 521 U.S. 898, 920 (1997).  
11

12           This principle applies even to plenary powers of the federal government. For  
13 example, *Massachusetts v. Sebelius*, 698 F.Supp.2d 234, 235-46 (E.D. Mass. 2010),  
14 recently enforced the Tenth Amendment to strike down the Defense of Marriage Act  
15 even though Congress’ spending power was at issue. Just as the Tenth Amendment  
16 limits the reach of the Spending Clause, so does the Tenth Amendment limit the reach of  
17 the Property Clause.  
18

19           In the present case, by overriding a gubernatorial emergency proclamation and  
20 commandeering Tombstone’s essential sovereign property under the auspices of the  
21 Wilderness Act, Defendants are *literally* directly regulating the State through its political  
22 subdivision. Defendants are thereby depriving the State of its structural autonomy here  
23 just as assuredly as if they had directly commanded Tombstone’s Mayor to use hand  
24 tools to repair the city’s water infrastructure himself. For this reason, Defendants’  
25  
26  
27  
28

1 commandeering of Tombstone's essential municipal property violates the principle of  
2 state sovereignty enforced in *Printz*, 521 U.S. at 920. Simply put, from the perspective of  
3 state autonomy, there are no material differences between commandeering municipal  
4 officials and commandeering essential municipal property of the sort *without which*  
5 *there would be no municipality*. This conclusion is reinforced by the Supreme Court's  
6 revival of the legal framework applied in *National League of Cities v. Usery*, 426 U.S.  
7 833 (1976). *See New York*, 505 U.S. at 161-66 (citing *Hodel v. Virginia Surface Mining*  
8 *& Recl. Assn.*, 452 U.S. 264, 287-88 (1981), which applied *National League of Cities*).

11       The Forest Service's refusal to allow Tombstone to repair its water supplies  
12 violates the principle of state sovereignty under *National League of Cities* because it 1)  
13 regulates "states as states," 2) concerns attributes of state sovereignty, and 3) impairs the  
14 state's ability to structure integral operations in areas of traditional governmental  
15 functions. *National League of Cities*, 426 U.S. at 852-54. First, as discussed above,  
16 Defendants' regulatory interference with Tombstone's vested rights during a declared  
17 state of emergency constitutes the regulation of the State, not individuals. Second, the  
18 Forest Service's regulations concern essential attributes of state sovereignty because the  
19 Supreme Court has specifically recognized that maintenance of a municipal water  
20 system is an essential government function. *Brush v. Commissioner*, 300 U.S. 352, 370-  
21 71 (1937). The same is true about fire protection. *Goldstein v. Chestnut Ridge Volunteer*  
22 *Fire Co.*, 218 F.3d 337, 343 (4th Cir. 2000). Third, federal interference with  
23 Tombstone's ability to protect public health and safety is a textbook example of  
24 impairment of governmental functions traditionally assigned to the States. *National*



1 *League of Cities*, 426 U.S. at 851. Taken together, Defendants' conduct raises serious  
2 questions going to the merits of Tombstone's Tenth Amendment claim.  
3

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

5 s/Nicholas C. Dranias  
6 Nicholas C. Dranias (330033)  
7 **GOLDWATER INSTITUTE**  
8 **SCHARF-NORTON CENTER FOR**  
9 **CONSTITUTIONAL LITIGATION**  
10 500 E. Coronado Rd.  
11 Phoenix, AZ 85004  
12 P: (602) 462-5000/F: (602) 256-7045  
13 ndranias@goldwaterinstitute.org  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

**ELECTRONICALLY FILED BY ECF and COPIES** sent via e-mail this 30<sup>th</sup> day of March, 2012 to:

| <b>Parties and Counsel Served</b>  |   |
|--|---|
| Attorneys for Plaintiff  | Attorneys for Defendants  |
| P. Randall Bays, Esq.<br>Bays Law, P.C.<br>100 S. 7th Street<br>Sierra Vista, AZ 85635                                   | ANN BIRMINGHAM SCHEEL<br>ACTING UNITED STATES<br>ATTORNEY<br>District of Arizona<br>CHARLES A. DAVIS<br>Assistant U.S. Attorney<br>Arizona State Bar No. 014386<br>405 W. Congress, Suite 4800<br>Tucson, Arizona 85701-5040<br>Telephone: (520) 620-7300<br><a href="mailto:charles.davis2@usdoj.gov">charles.davis2@usdoj.gov</a> |
| Robert F. Palmquist, Esq.<br>Strickland & Strickland, P.C.<br>4400 E. Broadway Blvd., Suite 700<br>Tucson, AZ 85711-3517 | CASSANDRA CASAUS CURRIE<br>Attorney<br>USDA Office of the General Counsel<br>P.O. Box 586<br>Albuquerque, NM 87103-0586<br>Phone: (505)248-6009<br>Fax: (505)248-6013<br><a href="mailto:cassandra.currie@usda.gov">cassandra.currie@usda.gov</a>   |
| Richard W. Goeken<br>Smith Curie & Hancock LLP<br>1025 Connecticut Ave., Ste 600<br>Washington, DC 20036                 | JOANNA K. BRINKMAN<br>Attorney<br>US Dept of Justice – Environmental<br>Enforcement Section<br>P.O. Box 7611 Ben Franklin Station<br>Washington, DC 20044-7611<br><a href="mailto:joanna.brinkman@usdoj.gov">joanna.brinkman@usdoj.gov</a>  |