

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

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

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

I. The state of emergency in Tombstone

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

1 the Huachuca Mountain municipal water system was completely disrupted. (Exhibit A
2 (First Amended Complaint), ¶ 48.)

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4 2. On July 26, 2011, Tombstone Mayor Henderson declared a State of
5 Emergency. (Exh. A, ¶ 49.)

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

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13 4. On August 23, 2011, the City of Tombstone began initial contact with
14 necessary agencies to begin emergency temporary repairs to the water line and
15 reservoirs, to include: USFS, BLM, AZDEMA, Army Corp. Engineers, ADWR. Every
16 agency has been fully cooperative except Defendant U.S. Department of Agriculture
17 Forest Service which has purposely thwarted Tombstone’s attempts to repair its water
18 pipeline. (Exh. A, ¶ 51.)

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20 5. Despite the manifest emergency facing the desert-parched City of Tombstone,
21 Defendants are refusing to allow Tombstone to take reasonable emergency action to
22 repair its Huachuca Mountain water infrastructure. Since October of 2011, officials of
23 Defendant U.S. Department of Agriculture have repeatedly and continuously ordered
24 Tombstone’s employees both verbally and by electronic communication under threats of
25 criminal prosecution to refrain from exercising its vested rights in the Huachuca
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1 Mountains by refusing to allow Tombstone to use heavy and light vehicles upon and
2 along the road right of way easements in Carr and Miller Canyon, heavy and light
3 mechanized equipment to construct, rebuild and maintain water structures within the
4 scope of the City's vested rights. (Exh. A, ¶ 61.)

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6 6. Despite requests by Nancy Sosa in person of Defendants' representative Duane
7 Bennett on October 3, 2011, Defendants by and through Glenn Frederick in an email
8 communication on October 26, 2011 to City Clerk/Manager George Barnes refused to
9 allow the construction or rebuilding of any permanent water structures, such as dams,
10 reservoirs, or catchments at the land use and right of way easements including and
11 surrounding Mill Spring No. 1, McCoy Group Spring Nos. 2, 3, 4, Marshall Spring No.
12 5, Bench Spring No. 6, Maple Group Spring Nos. 7, 8, and 9, Gird Reservoir No. 9 ½,
13 Lower Spring No. 10, Clark Spring No. 11, Brearley Spring No. 12, Head Spring No.
14 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock
15 Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No.
16 20, and Storrs Spring No. 21; Quartz Spring No. 22, Hoagland Spring No. 23, and
17 Gardner Spring No. 24. (Exh. A, ¶ 62 (Exh. 62).)

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19 7. Despite letter requests on December 5, 2011 by City Clerk/Manager George
20 Barnes to Defendants' representative Jim Upchurch, the Defendants by and through Jim
21 Upchurch in a letter written on December 7, 2011 are preventing Tombstone from
22 conducting any repairs or construction at the spring heads located at McCoy Group
23 Spring Nos. 2, 3, 4, Marshall Spring No. 5, Bench Spring No. 6, Maple Group Spring
24 Nos. 7, 8, and 9, Gird Reservoir No. 9 ½, Lower Spring No. 10, Clark Spring No. 11,
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1 Brearley Spring No. 12, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock
2 Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No.
3 19, O'Brien Spring No. 20, and Storrs Spring No. 21; Quartz Spring No. 22, and
4 Hoagland Spring No. 23. (Exh. A, ¶ 63 (Exhs. 63-64).)

6 8. Despite requests by email from City Project Manager Kevin Rudd to
7 Defendants' representatives Kathleen Nelson and Walter Keyes on November 29, 2011,
8 Defendants by and through Walter Keyes in an email written to Kevin Rudd on
9 December 2, 2011 have refused and are preventing Tombstone from building any above-
10 grade protective flumes at the land use and right of way easements including and
11 surrounding Gardner Spring No. 24. (Exh. A, ¶ 64 (Exh. 65).)

14 9. Despite requests by email from City Project Manager Kevin Rudd to
15 Defendants' representative Jim Upchurch on November 14, 2011, Defendants by and
16 through Jim Upchurch in a letter written to City Clerk/Manager George Barnes on
17 December 1, 2011 have refused and are preventing Tombstone from building any repairs
18 or construction at the spring head locations of Head Spring No. 13, Cabin Spring No. 14,
19 Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17,
20 Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring
21 No. 21. (Exh. A, ¶ 65 (Exh. 66).)

24 10. Despite requests by letter from George Barnes to Defendants' representative
25 Jim Upchurch on January 13, 2012, Defendants by and through Jim Upchurch in a letter
26 written to George Barnes on January 26, 2012 are refusing to allow any emergency
27 repairs at the locations of Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary
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Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21, Maple Group Spring Nos. 7, 8, and 9, Clark Spring No. 11. (Exh. A, ¶ 66 (Exh. 67).)

11. Defendants by and through email from its representative Kathleen Nelson to City Project Manager Kevin Rudd on February 28, 2012 are requiring only hand tools to be used in repairs at the land use and right of way easements including and surrounding the spring sites and pipelines servicing Mill Spring No. 1, McCoy Group Spring Nos. 2, 3, 4, Marshall Spring No. 5, Bench Spring No. 6, Maple Group Spring Nos. 7, 8, and 9, Gird Reservoir No. 9 ½, Lower Spring No. 10, Clark Spring No. 11, Brearley Spring No. 12, Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21; Quartz Spring No. 22, Hoagland Spring No. 23, and Gardner Spring No. 24 as of March 01, 2012. (Exh. A, ¶ 67 (Exh. 68).)

12. As of March 1, 2012, Defendants will not allow the City of Tombstone free and unimpaired access to its water system in the Huachuca Mountains. Defendants currently only allow hand tools to restore nearly all of its water supply and infrastructure in the Huachuca Mountains. (Exhibit B (Supplemental Declaration of Kevin Rudd), ¶ 11; Exh. A, ¶ 68.)

13. As recently as Tuesday, March 27, 2012, Tombstone's Public Works Manager Kevin Rudd went into the Huachuca Mountains with his crew and a wheelbarrow carrying hand tools to complete scheduled work on Miller Canyon. In

1 response, the Forest Service ranger on duty initially denied the crew their usual access to
2 the Wilderness Area, claiming the wheelbarrow was "mechanized equipment" under the
3 Wilderness Act, which the Miller MRDG prohibits. Acting District Ranger Kathleen
4 Nelson verified that wheelbarrows are prohibited mechanized equipment in a phone call
5 with Kevin Rudd. Finally, at the end of the day, Ranger Nelson gave Kevin Rudd verbal
6 permission to take the wheelbarrow into the Wilderness Area for all future work on
7 Miller Canyon. She said the Forest Service would amend the Miller MRDG and replace
8 "mechanized equipment" with "motorized equipment." Ranger Nelson confirmed
9 permission via email on Wednesday, March 28. (Exh. B, ¶ 12; Exh. A, ¶ 68.)

12 14. Defendants' informal compliance orders correspond to and are prompted by
13 the findings contained in a final "special use authorization" decision memorandum
14 written by the Coronado National Forest Supervisor pertaining to Gardner Springs No.
15 24 dated December 22, 2011. (Exh. A, ¶ 69.)

17 15. Because of Defendants' de facto prohibition on Tombstone enjoying and
18 exercising substantially all of its vested rights, only Miller Spring No. 1, Gardner Spring
19 No. 24 and Head Spring No. 13 are currently flowing, due to temporary repairs. (Exh. A,
20 ¶ 70.)

22 16. Because of Defendants' de facto prohibition on Tombstone enjoying and
23 exercising its vested rights, and the seasonal nature of the water produced by the various
24 springs, Tombstone has lost and will continue to lose peak monthly water production
25 from springs to which it has had vested rights for well over a century. (Exh. A, ¶ 71.)
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17. Because of Defendants' de facto prohibition on Tombstone enjoying and exercising substantially all of its vested rights, Tombstone is receiving less than a third of what water could otherwise be delivered based on historical records indicating a fully repaired municipal water system would regularly deliver 400 gallons per minute. The temporary repairs Defendants have allowed to Miller Spring No. 1 and Gardner Spring No. 24 are likely to be washed away during the first summer rainstorm, reducing the water flow by 80 gallons per minute. The lack of water from Tombstone's Huachuca mountain sources threatens public health and safety because of high consumption demand by residents and tourists, the history of arsenic contamination of Tombstone's wells, the need to be able to continuously replenish the City's water reserves, which are also used for fire suppression purposes, and the risks of well pumps or electricity failing. (Exh. A, ¶ 72 (*See* Exhs. 61 and 69).)

a. Inadequacy of water for drinking and fire protection

18. The weightiness of Tombstone's public health and safety public interest in reestablishing its municipal water supply has been admitted by Defendants in unequivocal terms:

[T]aking no action may threaten the water supply for the citizens of Tombstone. Therefore actions are warranted to protect life and property values outside of wilderness. The Forest Service is authorized to allow emergency treatments to . . . protect life, and property values outside of the wilderness. . . .

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

(Exhibit A, ¶ 57 (Exh. 61) Miller Spring MRDG at 1, 8, Gardner Spring MRDG at 10; ¶ 69 (Exh. 69) Miller Spring decision memorandum at 1, 6, Gardner Spring MRDG at 4.)

1 19. The delay in emergency repairs is forcing Tombstone to rely upon potable
2 well water for its water supply. The City's well water sources are historically and
3 imminently at risk of arsenic contamination. (Exhibit C (Declaration of Jack Wright), ¶
4 5-12.)

6 20. The Maximum Contaminate Limit (MCL) for arsenic in drinking water is 10
7 parts per billion (PPB). An arsenic level higher than 10 PPB is unsafe for human
8 consumption. The purpose of this arsenic standard is to "protect health by reducing the
9 occurrence of carcinogenic (e/g/, lung and bladder cancers) and non-carcinogenic (e.g.
10 skin damage, circulatory disorders, etc.) diseases that can result from unhealthful levels
11 of arsenic exposure." (Exh. C, ¶ 4 (Exh. 2).)

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

24 22. Well No. 1 contains arsenic levels of 11 to 12 PPB. (Exh. C, ¶ 6 (Exhs. 3-9).)

25 23. If Tombstone were to use water from Well No. 1 to provide drinking water to
26 the residents and visitors of Tombstone, the City would be in violation of the arsenic
27 standards established by ADEQ. Accordingly, Tombstone cannot use the water from
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1 Well No. 1 unless it follows one of two options. The first option would involve blending
2 water from Well No. 1 with Huachuca Mountain spring water to dilute the arsenic
3 content. To do this, Tombstone would have to obtain ADEQ approval before
4 distributing the water. But to date, the ADEQ has not approved Tombstone's blending
5 plan for Well No. 1. The second option would involve installing an arsenic removal
6 system. The estimated cost of such a system is between \$250,000 and \$300,000, which
7 is currently cost-prohibitive for the city. In either event, both options require use of
8 Huachuca Mountain spring water for consumption. (Exh. C, ¶ 7 (Exh. 10).)

11 24. Well No. 2 currently contains water that is safe for human consumption.
12 However, there is an ongoing risk Well No. 2 could become unsafe due to the natural
13 process of the leaching and erosion of the natural arsenic deposits. Accordingly, Well
14 No. 2 is tested for arsenic levels on an annual basis. The most recent reading of the water
15 sources occurred on or about Jan. 30, 2012. In the past year, Well No. 2 has contained
16 arsenic levels of 6 PPB. (Exh. C, ¶ 8 (Exh. 11).)

19 25. Well No. 3 is no longer used and has been completely taken out of service
20 since 2006 because of high arsenic levels that were unsafe. (Exh. C, ¶ 9 (Exh. 12).)

21 26. The City's potable water consumption typically ranges between 100 and 300
22 gallons per minute depending on the season. The peak potable water consumption
23 season typically begins in mid-May, when consumption can rise regularly to 300 gallons
24 per minute. Between mid-May and the beginning of August, city potable water
25 consumption can completely use up the available water from Well No. 2. (Exh. C, ¶ 10.)
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1 27. It is possible that Well No. 2 could fail due to arsenic contamination equaling
2 or exceeding the levels found in Well Nos. 1 or 3. If so, this would not be detected for
3 another ten months due to the City's current monitoring program. In the meantime, the
4 health and safety of citizens and residents in the City are at risk because only
5 approximately 100 gallons per minute are flowing out of the Huachuca Mountain spring
6 water sources. This would not be an adequate flow to blend with Well No. 2 to ensure
7 potable water is at or below safe levels of arsenic if Well No. 2's arsenic contamination
8 equaled or exceeded that of Well Nos. 1 or 3. (Exh. C, ¶ 11.)

11 28. Even if contamination was discovered and the City stopped drawing water
12 from Well No. 2 in time to avoid any health risk to the public, there would not be
13 enough safe drinking water for Tombstone's residents and tourists given the current
14 amount of water flowing from Huachuca Mountain spring water sources. At 100 gallons
15 per minute flowing from the springs, during peak season, the City's 1,000,000 gallon
16 reservoir, and 100,000 and 300,000 gallon storage tanks would be completely depleted
17 in approximately five days. (Exh. C, ¶ 12.)

20 29. The City also lacks adequate water for fire suppression needs. This is because
21 Well Nos. 1 through 3 produce water through pumps that require electricity. Should the
22 pumps or electric power fail for any lengthy period of time, the only local source of
23 water for fire suppression needs would be from the Huachuca Mountain spring water
24 sources and the City's 1,000,000 gallon reservoir, and 100,000 and 300,000 gallon
25 storage tanks. Even without water being diverted for fire suppression, these reserves
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1 could be depleted in fewer than four days by peak potable water consumption. (Exh. C, ¶
2 13.)

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4 30. Given the history of arsenic contamination of Tombstone's wells, the need to
5 be able to continuously replenish the City's water reserves, which are also used for fire
6 suppression purposes, and the risks of the City's pumps or electricity failing, it is
7 essential to public health and safety in the City of Tombstone that the Huachuca
8 Mountain spring water sources provide a regular flow of at least 400 gallons per minute.
9 Due to the seasonal nature of the spring water flow, this is only possible if all twenty-
10 four of the City of Tombstone's spring heads are restored and connected to the aqueduct
11 serving the City. (Exh. C, ¶ 14.)
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13
14 31. Tombstone is a tinder box because of the all-wood structures located within
15 its six block historical business district. The wood structures are especially flammable
16 because of a shared attic that exists between them. In a fire, the shared attic would
17 channel superheated air quickly from building to building, spreading any fire that might
18 develop. The only structure in the downtown historic district that has a sprinkler system
19 is the Birdcage Theater. That is why Governor Brewer issued her emergency
20 proclamation authorizing emergency repairs to Tombstone's water infrastructure in the
21 Huachuca Mountains. (Exhibit D (Declaration of Jesse Grassman), ¶ 4 (Exh. 2).)
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23
24 32. On December 8, 2010, there was a fire at the premises of Six Gun City, which
25 is located just to the south of the main street of the Tombstone historic business district.
26 On that day, a fully-engulfed fire (a fire that completely engulfed the structures from the
27 inside-out with flames reaching 200 feet) was reported to dispatch. Fire fighters arrived
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1 within seven minutes of dispatch and discovered three structures on fire or catching fire.
2 Glowing embers about the size of a hand were picked up by the wind and blown three
3 blocks away. If any of these embers landed on roofs in the historic district, those
4 buildings could have easily caught fire. Even with the fires contained to the area around
5 Six Gun City, and two fire engines on site to fight the blaze, it took 20 minutes to
6 “knock down” (put out) the fire. It then took 5 hours to “mop up” (extinguish all
7 potential risks of fire). Even with the use of compressed air foam in addition to water,
8 approximately 65,000 gallons of water were used for knock down and mop up. (Exh. D,
9 ¶ 6.)

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

17 34. If a fully-engulfed fire (a fire that completely engulfed the structures from the
18 inside-out with flames reaching 200 feet) similar to the fire at Six Gun City spread to
19 three blocks of Tombstone’s six block historical district during the late spring or summer
20 months, the City would not have enough water flowing to maintain adequate water
21 pressure and supplies to fight and suppress such a fire even with a modern distribution
22 system. This is because fighting such a fire during knock down would require at least 12
23 fire engines each pumping on average approximately 1250 gallons per minute for
24 approximately three and a half hours, or approximately 2.8 to 3 million gallons of water
25 depending on the use of compressed air foam (this coverage would require the
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1 participation of nearly every community that has agreed to provide Tombstone with back
2 up coverage). Under these circumstances, even assuming a modern distribution system
3 with 2,800,000 gallons of water in reserve and available for fire suppression, the City
4 would need its water storage replenished at a rate of not less than 900 gallons per minute
5 to maintain adequate water reserves and pressure to sustain merely the knock down
6 phase of fire suppression. Even if all potable and non-potable well water sources were
7 diverted to fire suppression, the reservoirs and tanks cannot currently be replenished at a
8 rate greater than approximately 500 gallons per minute from those wells and
9 approximately 100 gallons per minute from the city's Huachuca Mountain sources. The
10 City would need at least 400 gallons per minute from its Huachuca Mountain sources to
11 replenish its supplies faster than they would be used. (Exh. D, ¶ 8.)

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15 35. The lack of adequate water flow from the Huachuca Mountains thus presents
16 a monumental dilemma and fire safety hazard for the City of Tombstone. The City's
17 current distribution system cannot furnish enough water to allow for the fire department
18 to suppress a fire that would engulf more than a city block. There is no way to justify
19 modernizing the City's current distribution system to allow for the ability to deliver
20 enough water to suppress a fire that could spread to multiple blocks in the historic
21 district if the City is limited to less than 400 gallons per minute from its Huachuca
22 Mountain sources. Tombstone is a disaster waiting to happen without that water. (Exh.
23 D, ¶ 9.)

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27 **b. Damage and necessary repair work**

28 36. The Monument Fire and resultant flooding and mudslides completely

1 destroyed and buried vast swaths of the City's rights of way in as much as fifteen feet of
2 mud and boulders. Iron pipelines were bent like spaghetti around trees. The current
3 condition of Carr and Miller Canyons in the Huachuca Mountains is completely different
4 in nearly every respect from their condition prior to the Monument Fire. Past history
5 shows that these disaster events are periodic, as evidenced by the 1977 and 1993 flood
6 events. Moreover, powerful flooding and flows accompany each year's monsoons. (Exh.
7 B, ¶ 12.)
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10 37. The December 2011MRDG for the Gardner (No. 24) spring, approved the use
11 of the following equipment: mini excavator equal to John Deere JD60, gas cutoff saw,
12 chain saw, 4x4 pickups and flatbed trucks, 48" ATV or UTV, generator, hand tools.
13 (Exh. B, ¶ 8 (Exh. 2).)
14

15 38. Full repair of each of the 24 springs will require use of the equipment
16 approved in the Gardner MRDG. Additionally, a track operated John Deere JD200D
17 excavator or equivalent is needed for the repairs and rebuilding because the terrain has
18 huge boulders, giant felled trees, huge piles of gravel and sand that must be moved and
19 rearranged to rebuild a diversionary flume as a safety and protective measure to deflect
20 future water flows from injuring workers in the area and destroying the spring
21 catchments and access to the springs themselves. The City's water structures simply
22 cannot be safely rebuilt or fully utilized in the future without these protective flumes in
23 place. Otherwise, the City's water structures will be periodically destroyed by weather
24 and flow events, depriving the City of a continuous water supply. (Exh. B, ¶ 9.)
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1 39. In addition to the above-mentioned equipment, full repair and burial of the
2 auxiliary water lines from the City's springs to the aqueduct requires use of the X85
3 Vermeer Cable Plow because of the conditions of the ground previously described and
4 the need to minimize the time disrupting and disturbing the soil. The cable plow would
5 take two to three weeks to complete the restoration of the waterlines whereas hand tools
6 would take several months. Use of the plow is needed in Marshall Canyon: Marshall
7 (No. 5), Bench (No. 6), Maple Group (Nos. 7, 8, and 9), Gird Reservoir (No. 9 ½), and
8 Lower (No. 10); and in the Divide: Clark (No. 11), Brearley (No. 12), and Hoagland
9 (No. 23). (Exh. B, ¶ 10.)

12 **II. Tombstone's chain of title and recognition of Tombstone's vested rights**

13 40. On July 22, 1881, James McCoy granted the Huachuca Water Company
14 rights to all water "rising and flowing" in Miller and Carr Canyons, various five acre
15 existing mill sites in the foregoing canyons, "the road leading into and through said
16 Miller Canon [sic] and the right of way belonging to said road," the "right of way
17 belonging to the line of water pipe, projected . . . from said Miller and Dublin [also
18 known as Carr] Canon [sic] to the City of Tombstone, Cochise County, Territory of
19 Arizona," and "all appurtenances and privileges thereto incident" by a deed making
20 reference to previous deeds of real estate recorded in the Pima County Recorder of
21 Deeds Office, in book 7, pages 135-37, book 9, pages 795-97, book 10, pages 135-37, in
22 the Cochise County Recorder of Deeds Office, in book 1, pages 468 et seq., as well as to
23 an unrecorded deed from John W. Campbell dated July 8, 1881. (Exhibit E
24 (Supplemental Declaration of Nancy Sosa), ¶ 11 (Exh. 1); Exh. A, ¶ 13 (Exh. 1).)

1 41. James McCoy, in turn, previously received:

2 a) A deed on July 8, 1881 from John W. Campbell conveying a five acre mill site
3 as well as “all the water rising and flowing in Miller Canon” which Campbell
4 acquired “by purchase or actual possession” in addition to “all his right, title and
5 interest to the road leading into and through said canon and the right of way thereof.”
6 (Exh. E, ¶ 12 (Exh. 2); Exh. A, ¶ 13 (Exh. 2))
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8 b) A quit claim deed on June 28, 1881 from Benjamin Rinehart and David C.
9 Field for a mill site, “all water rising and flowing on and through the Mill Site which
10 was located . . . in Miller Canon” and all “right, title and interest in or to any other
11 water rising or flowing in said Miller Canon.” (Exh. E, ¶ 12 (Exh. 3); Exh. A, ¶ 13
12 (Exh. 3))
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15 c) A deed on February 25, 1881 from Richard Find for all “right, title and interest
16 in and to “all the water flowing” in Dublin (also known as Carr) Canon. (Exh. E, ¶ 12
17 (Exh. 4); Exh. A, ¶ 13 (Exh. 4))
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19 d) A deed on February 9, 1881 from Levi J. Gird for “all of the right, title and
20 interest . . . to a certain spring of water [Gird Reservoir No. 9 1/2] . . . located by said
21 L.J. Gird on the 31st Day of December 1880” in “Miller Canon . . . for the purpose of
22 furnishing water to the town of Tombstone, and that said spring flows about 30,000
23 gallons per day.” (Exh. E, ¶ 12 (Exh. 5); Exh. A, ¶ 13 (Exh. 5))
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25 42. On November 17, 1881, the Huachuca Water Company was granted rights to
26 a “piece of ground 160 feet by 250 feet in length” within the limits of the “Bonton
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1 Mining Claim,” consisting of a “reservoir ground” by lease agreement from A.H.
2 Emanuel and C.H. Light. (Exh. E, ¶ 13 (Exh. 6); Exh. A, ¶ 14 (Exh. 6).)

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4 43. On February 21, 1883, the Huachuca Water Company was granted rights to
5 all “right, title and interest in and to the water rising and flowing in ‘Maple’ otherwise
6 known or called ‘Miller Canon’” by a quit claim deed from James McCoy. (Exh. E, ¶ 14
7 (Exh. 7); Exh. A, ¶ 15 (Exh. 7).)

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9 44. James McCoy, in turn, previously received:

10 a) A deed on March 27, 1882 from H. H. Hollenstein of “Maple Canon” (also
11 known as Miller Canyon) of “all his right, title and interest in the water rising and
12 flowing in Maple otherwise called Miller canon.” (Exh. E, ¶ 15 (Exh. 8); Exh. A, ¶
13 15 (Exh. 8).)

14
15 b) A deed on September 6, 1881 from J. Lindsey and O. D. Merrill for a five acre
16 mill site and “all the water rising and flowing on said mill site” which were located
17 on the “twentieth day of May 1880” and recorded in the Office of the Recorder of
18 Cochise County in book 1 of records of millsites, pages 94-95. (Exh. E, ¶ 15 (Exh.
19 9); Exh. A, ¶ 15 (Exh. 9).)

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21 45. On November 24, 1888, the Cochise County Recorder recorded the aforesaid
22 July 22, 1881 and February 21, 1883 deeds from James McCoy to the Huachuca Water
23 Company. (Exh. E, ¶ 16 (Exh. 10); Exh. A, ¶ 16 (Exh. 10).)

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25 46. From the text of foregoing quit claim deed transactions and other recordings
26 in the Office of the Cochise and Pima County Recorders, it is apparent that the grantors
27 to James McCoy were original appropriators or in actual possession and enjoyment of
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1 the transferred water sources and any related parcels of land and structures, which were
2 included in the deed. The consistency of the practice of using quit claim deeds to transfer
3 such rights between 1880 and 1883 indicates that local customs allowed for the transfer
4 of ownership of water rights and appurtenant right of way easements from original
5 appropriators through quit claim deeds. Additionally, it is apparent that local customs
6 allowed for the transfer of and right to possess and use parcels of land in the vicinity of
7 water sources as part of the bundle of rights being acquired. In the absence of any
8 contrary governing territorial laws during this time frame, by accepting quit claim deeds
9 for various water rights and appurtenant structures and right of way easements, the
10 Huachuca Water Company was acting in conformity with local customs and practices in
11 acquiring rightful ownership of the referenced water rights, appurtenant structures and
12 land use and right of way easements. Significantly, the scope of the rights described in
13 the earliest deeds from James McCoy obtained by the Huachuca Water Company on
14 July 22, 1881 encompass all of the water rights and easements claimed by Tombstone in
15 this case. (Exh. E, ¶ 17 (Exh. 1).)

20 47. On April 13, 1890, prestigious territorial attorney Col. William Herring wrote
21 an opinion letter to the Arizona Territorial Legislature describing the Huachuca Water
22 Company's municipal water system and how the related property rights were obtained
23 pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and supersede all
24 conflicting land patents or homesteads. (Exh. E at 18 (Exh. 11); Exh. A ¶ 17 (Exh. 11).)
25 This letter is significant because it confirms that, in the mind of a leading legal expert at
26 the time, the rights claimed by the Huachuca Water Company in the Huachuca
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1 Mountains were acquired and being exercised fully in accord with local laws and
2 customs. Its existence also shows that the Huachuca Water Company Huachuca
3 Mountain pipeline and water system was fully operational and serving the City of
4 Tombstone no later than 1890, and that the Huachuca Water Company was making
5 beneficial use of its water rights. This conclusion is further supported by the fact that a
6 franchise ordinance enacted on September 9, 1881 granted the Huachuca Water
7 Company a franchise with Tombstone to supply potable and fire suppression purposes.
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9 (Exh. E, ¶ 18 (Exh. 12).)

11 48. In addition to the transfer and acquisition of rights evidenced by the foregoing
12 quit claim deeds and the claimed beneficial use of water evidenced by the foregoing
13 letter and ordinance, testimony in the February 15, 1906 Deposition of William H.
14 Brearley further evidences the Company's continuous compliance with local customs
15 and laws in regard to obtaining and maintaining its water rights and appurtenant
16 easements. Between 1880 and 1909, it is apparent that local customs provided for the
17 acquisition of water rights and appurtenant easements through "location" of a water
18 source, which consisted of placing a monument and placing a notice of appropriation
19 describing the water source in its vicinity, as well as recording a duplicate with the
20 Office of the County Recorder of Deeds, and through subsequent "beneficial use," which
21 required development of the source site to allow use of the water that it could generate.
22 It is also apparent that local customs regarding the nature of the lands uses that were
23 appurtenant to the beneficial use of water borrowed from mining practices and allowed
24 the appropriator to claim five acre parcels around or adjacent to water sources and for
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1 siting water structures and to ensure continuous control over springs that may shift their
2 location over time. In addition to the right to build ditches, canals, pipelines and flumes
3 (customarily involving the construction of above grade berms), local customs also
4 included extensive rights of land development as appurtenant to water rights, including
5 the right to excavate and cut into the land, erect dams and reservoirs. As discussed
6 below, the documentary evidence indicates that, out of an abundance of caution, the
7 Huachuca Water Company fully complied with these local customs, and with territorial
8 laws that codified them between 1901 and 1908. (Exh. E, ¶ 19 (Exh. 13); Exh. A, ¶ 19
9 (Exh. 13).)

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12 49. On April 1, 1904, with respect to Mill Spring No. 1 (also known as “Main
13 Spring No. 1”), the Huachuca Water Company through General Agent William H.
14 Brearley posted notice of appropriation at the place of diversion by placing a monument
15 and leaving a duplicate notice in a can in the monument.” Again, on June 23, 1905, the
16 Huachuca Water Company through General Agent A.H. Gardner posted yet another
17 notice of appropriation at the place of diversion by placing a monument and leaving a
18 duplicate notice in a can in the monument, and contemporaneously recorded notice of
19 the same in the Cochise County Recorder’s Office. The notice attested to prior location
20 of the site on 1883 and claimed the beneficial use of all waters produced by said spring
21 for beneficial purposes, as well as appurtenant rights to maintain an existing pipe or
22 flume line, possession of “sufficient grounds” upon which to construct and maintain the
23 pipeline, possession of an approximately five acre parcel “upon which said spring is
24 situated,” for “excavations, cuts or reservoirs,” and related road right of way easements.
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1 Actual beneficial use through development of the site was made by the Huachuca Water
2 Company. (Exh. E, ¶ 20 (Exhs. 14-15; Exh. 13, p. 3); Exh. A, ¶ 19 (Exhs. 14-15; Exh.
3 13, p. 3).)

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5 50. On July 27, 1901, with respect to Spring No. 2 in McCoy Group, the
6 Huachuca Water Company through General Agent William H. Brearley posted notice of
7 appropriation at the place of diversion by placing a monument and leaving a duplicate
8 notice in a can in the monument, and contemporaneously recorded notice of the same in
9 the Cochise County Recorder's Office under Ariz. Terr. Session Laws, 15th Legis.
10 Assembly, Act No. 86 (April 13, 1893). The notice attested to prior location of the site
11 on 1883 and claimed the beneficial use of all waters produced by said spring for
12 beneficial purposes, as well as appurtenant rights to maintain an existing pipe or flume
13 line, to construct and maintain an additional pipeline, possession of "ground upon which
14 the pipe or flume line is now laid . . . with so much ground and soil adjacent to said pipe
15 or flume line as may be necessary for the use and maintenance of said flume or pipe
16 line," possession of an approximately five acre parcel "upon which said spring is
17 situated," for "cuts, Excavations [sic] or reservoirs," and related road right of way
18 easements. Actual beneficial use through development of the site was made by the
19 Huachuca Water Company. (Exh. E, ¶ 21 (Exhs. 16-1; *see also* Exh. 13, pp. 2-4); Exh.
20 A, ¶ 19 (Exhs. 16-17; *see also* Exh. 13, pp. 2-4).)

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25 51. On July 27, 1901, with respect to Spring No. 3 and Spring No. 4 in McCoy
26 Group, the Huachuca Water Company through General Agent William H. Brearley
27 posted notice of appropriation at the place of diversion by placing a monument and
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1 leaving a duplicate notice in a can in the monument, and contemporaneously recorded
2 notice of the same in the Cochise County Recorder's Office under Ariz. Terr. Session
3 Laws, 15th Legis. Assembly, Act No. 86 (April 13, 1893). The notice attested to prior
4 location of the site on 1888 and claimed the beneficial use of all waters produced by said
5 spring for beneficial purposes, as well as appurtenant rights to maintain an existing pipe
6 or flume line as well as to construct and maintain an additional pipeline, possession of
7 "ground upon which the pipe or flume line is now laid . . . with so much ground and soil
8 adjacent to said pipe or flume line as may be necessary for the use and maintenance of
9 said flume or pipe line," possession of an approximately five acre parcel "upon which
10 said spring is situated," for "cuts, Excavations [sic] or reservoirs," and related road right
11 of way easements. Actual beneficial use through development of the site was made by
12 the Huachuca Water Company. (Exh. E, ¶ 22 (Exhs. 17-18; *see also* Exh. 13, pp. 2-4);
13 Exh. A, ¶ 19 (Exhs. 17-18; *see also* Exh. 13, pp. 2-4).)

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18 52. On July 28, 1901, with respect to Marshall Spring No. 5 "situated in Marshall
19 Canyon" and "being desirous of ratifying, confirming, amending and further defining,
20 establishing, and perfecting the aforesaid appropriation," the Huachuca Water Company
21 through General Agent William H. Brearley further posted notice of appropriation at the
22 place of diversion by placing a monument and leaving a duplicate notice in a can in the
23 monument, and contemporaneously recorded notice of the same in the Cochise County
24 Recorder's Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
25 (April 13, 1893). The notice attested to prior location of the site on 1888 and claimed the
26 beneficial use of all waters produced by said spring for beneficial purposes, as well as
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1 appurtenant rights to maintain an existing pipe or flume line, to construct and maintain
2 an additional pipeline, possession of “ground upon which the pipe or flume line is now
3 laid . . . with so much ground and soil adjacent to said pipe or flume line as may be
4 necessary for the use and maintenance of said flume or pipe line,” possession of an
5 approximately five acre parcel “upon which said spring is situated,” for “excavations,
6 cuts or reservoirs,” and related road right of way easements. Actual beneficial use
7 through development of the site was made by the Huachuca Water Company. (Exh. E, ¶
8 23 (Exhs. 19-20; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 19-20; *see also* Exh. 13,
9 pp. 2-4).)

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12 53. On July 28, 1901, with respect to Bench Spring No. 6 “situated in Marshall
13 Canyon” and “being desirous of ratifying, confirming, amending and further defining,
14 establishing, and perfecting the aforesaid appropriation,” the Huachuca Water Company
15 through General Agent William H. Brearley further posted notice of appropriation at the
16 place of diversion by placing a monument and leaving a duplicate notice in a can in the
17 monument, and contemporaneously recorded notice of the same in the Cochise County
18 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
19 (April 13, 1893). The notice attested to prior location of the site on 1888 and claimed the
20 beneficial use of all waters produced by said spring for beneficial purposes, as well as
21 appurtenant rights to maintain an existing pipe or flume line, to construct and maintain
22 an additional pipeline, possession of “ground upon which the pipe or flume line is now
23 laid . . . with so much ground and soil adjacent to said pipe or flume line as may be
24 necessary for the use and maintenance of said flume or pipe line,” possession of an
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1 approximately five acre parcel “upon which said spring is situated,” for “excavations,
2 cuts or reservoirs,” and related road right of way easements. Actual beneficial use
3 through development of the site was made by the Huachuca Water Company. (Exh. E, ¶
4 24 (Exhs. 21-22; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 21-22; *see also* Exh. 13,
5 pp. 2-4).)

7 54. On July 28, 1901, with respect to Lower Auxiliary Spring No. 9, Middle
8 Auxiliary Spring No. 8 and Upper Spring No. 7 of the Maple Group “situated in
9 Marshall Canyon,” the Huachuca Water Company through General Agent William H.
10 Brearley posted notice of appropriation at the place of diversion by placing a monument
11 and leaving a duplicate notice in a can in the monument, and contemporaneously
12 recorded notice of the same in the Cochise County Recorder’s Office under Ariz. Terr.
13 Session Laws, 15th Legis. Assembly, Act No. 86 (April 13, 1893). The notice attested to
14 prior location of the site on 1888 and claimed the beneficial use of all waters produced
15 by said springs for beneficial purposes, as well as appurtenant rights to maintain an
16 existing pipe or flume line, to construct and maintain an additional pipeline, possession
17 of “ground upon which the pipe or flume line is now laid . . . with so much ground and
18 soil adjacent to said pipe or flume line as may be necessary for the use and maintenance
19 of said flume or pipe line,” possession of an approximately five acre parcel “upon which
20 said spring is situated,” for “excavations, cuts or reservoirs,” and related road right of
21 way easements. Actual beneficial use through development of the site was made by the
22 Huachuca Water Company. (Exh. E, ¶ 25 (Exhs. 23-24; *see also* Exh. 13, pp. 2-4); Exh.
23 A, 19 (Exhs. 23-24; *see also* Exh. 13, pp. 2-4).)

1 55. On July 29, 1901, with respect to Lower Spring No. 10 “situated in Marshall
2 Canyon,” the Huachuca Water Company through General Agent William H. Brearley
3 further posted notice of appropriation at the place of diversion by placing a monument
4 and leaving a duplicate notice in a can in the monument, and contemporaneously
5 recorded notice of the same in the Cochise County Recorder’s Office under Ariz. Terr.
6 Session Laws, 15th Legis. Assembly, Act No. 86 (April 13, 1893). The notice attested to
7 prior location of the site on 1890 and claimed the beneficial use of all waters produced
8 by said spring for beneficial purposes, as well as appurtenant rights to maintain an
9 existing pipe or flume line, to construct and maintain an additional pipeline, possession
10 of “ground upon which the pipe or flume line is now laid . . . with so much ground and
11 soil adjacent to said pipe or flume line as may be necessary for the use and maintenance
12 of said flume or pipe line,” possession of an approximately five acre parcel “upon which
13 said spring is situated,” for “excavations, cuts or reservoirs,” and related road right of
14 way easements. Actual beneficial use through development of the site was made by the
15 Huachuca Water Company. (Exh. E, ¶ 26 (Exhs. 25-26; *see also* Exh. 13, pp. 2-4); Exh.
16 A, ¶ 19 (Exhs. 25-26; *see also* Exh. 13, pp. 2-4).)

21 56. On July 29, 1901, with respect to Clark Spring No. 11 “situated in the divide,
22 between Miller and Carr canyons” and “being desirous of ratifying, confirming,
23 amending and further defining, establishing, and perfecting the aforesaid appropriation,”
24 the Huachuca Water Company through General Agent William H. Brearley further
25 posted notice of appropriation at the place of diversion by placing a monument and
26 leaving a duplicate notice in a can in the monument, and contemporaneously recorded
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1 notice of the same in the Cochise County Recorder's Office under Ariz. Terr. Session
2 Laws, 15th Legis. Assembly, Act No. 86 (April 13, 1893). The notice attested to prior
3 location on 1888 and claimed the beneficial use of all waters produced by said spring for
4 beneficial purposes, as well as appurtenant rights to maintain an existing pipe or flume
5 line as well as to construct and maintain an additional pipeline, possession of "ground
6 upon which the pipe or flume line is now laid . . . with so much ground and soil adjacent
7 to said pipe or flume line as may be necessary for the use and maintenance of said flume
8 or pipe line," possession of an approximately five acre parcel "upon which said spring is
9 situated," for "excavations, cuts or reservoirs," and related road right of way easements.
10 Actual beneficial use through development of the site was made by the Huachuca Water
11 Company. (Exh. E, ¶ 27 (Exhs. 27-28; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs.
12 27-28; *see also* Exh. 13, pp. 2-4).)

16 57. On July 29, 1901, with respect to Brearley Spring No. 12 "situated in the
17 divide, between Miller and Carr canyons" and "being desirous of ratifying, confirming,
18 amending and further defining, establishing, and perfecting the aforesaid appropriation,"
19 the Huachuca Water Company through General Agent William H. Brearley posted
20 notice of appropriation at the place of diversion by placing a monument and leaving a
21 duplicate notice in a can in the monument, and contemporaneously recorded notice of
22 the same in the Cochise County Recorder's Office under Ariz. Terr. Session Laws, 15th
23 Legis. Assembly, Act No. 86 (April 13, 1893). The notice attested to prior location on
24 1888 and claimed the beneficial use of all waters produced by said spring for beneficial
25 purposes, as well as appurtenant rights to maintain an existing pipe or flume line, to
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1 construct and maintain an additional pipeline, possession of “ground upon which the
2 pipe or flume line is now laid . . . with so much ground and soil adjacent to said pipe or
3 flume line as may be necessary for the use and maintenance of said flume or pipe line,”
4 possession of an approximately five acre parcel “upon which said spring is situated,” for
5 “excavations, cuts or reservoirs,” and related road right of way easements. Actual
6 beneficial use through development of the site was made by the Huachuca Water
7 Company. (Exh. E, ¶ 28 (Exhs. 28-29; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs.
8 28-29; *see also* Exh. 13, pp. 2-4).)

11 58. On July 29, 1901, with respect to Head Spring No. 13 in Carr Canyon and
12 “being desirous of ratifying, confirming, amending and further defining, establishing,
13 and perfecting the aforesaid appropriation,” the Huachuca Water Company through
14 General Agent William H. Brearley further posted notice of appropriation at the place of
15 diversion by placing a monument and leaving a duplicate notice in a can in the
16 monument, and contemporaneously recorded notice of the same in the Cochise County
17 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
18 (April 13, 1893). The notice attested to prior location on 1888 and claimed the beneficial
19 use of all waters produced by said spring for beneficial purposes, as well as appurtenant
20 rights to maintain an existing pipe or flume line, to construct and maintain an additional
21 pipeline, possession of “ground upon which the pipe or flume line is now laid . . . with
22 so much ground and soil adjacent to said pipe or flume line as may be necessary for the
23 use and maintenance of said flume or pipe line,” possession of an approximately five
24 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”
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1 and related road right of way easements. Actual beneficial use through development of
2 the site was made by the Huachuca Water Company. (Exh. E, ¶ 29 (Exhs. 30-31; *see*
3 *also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 30-31; *see also* Exh. 13, pp. 2-4).)

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5 59. On July 29, 1901, with respect to Cabin Spring No. 14 in Carr Canyon and
6 “being desirous of ratifying, confirming, amending and further defining, establishing,
7 and perfecting the aforesaid appropriation,” the Huachuca Water Company through
8 General Agent William H. Brearley posted notice of appropriation at the place of
9 diversion by placing a monument and leaving a duplicate notice in a can in the
10 monument, and contemporaneously recorded notice of the same in the Cochise County
11 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
12 (April 13, 1893). The notice attested to prior location on 1888 and claimed the beneficial
13 use of all waters produced by said spring for beneficial purposes, as well as appurtenant
14 rights to maintain an existing pipe or flume line, to construct and maintain an additional
15 pipeline, possession of “ground upon which the pipe or flume line is now laid . . . with
16 so much ground and soil adjacent to said pipe or flume line as may be necessary for the
17 use and maintenance of said flume or pipe line,” possession of an approximately five
18 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”
19 and related road right of way easements. Actual beneficial use through development of
20 the site was made by the Huachuca Water Company. (Exh. E, ¶ 30 (Exhs. 32-33; *see*
21 *also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 32-33; *see also* Exh. 13, pp. 2-4).)

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27 60. On July 29, 1901, with respect to Cabin Auxiliary Spring No. 15 in Carr
28 Canyon and “being desirous of ratifying, confirming, amending and further defining,

1 establishing, and perfecting the aforesaid appropriation,” the Huachuca Water Company
2 through General Agent William H. Brearley further posted notice of appropriation at the
3 place of diversion by placing a monument and leaving a duplicate notice in a can in the
4 monument, and contemporaneously recorded notice of the same in the Cochise County
5 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
6 (April 13, 1893). The notice attested to prior location on 1888 and claimed the beneficial
7 use of all waters produced by said spring for beneficial purposes, as well as appurtenant
8 rights to maintain an existing pipe or flume line, to construct and maintain an additional
9 pipeline, possession of “ground upon which the pipe or flume line is now laid . . . with
10 so much ground and soil adjacent to said pipe or flume line as may be necessary for the
11 use and maintenance of said flume or pipe line,” possession of an approximately five
12 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”
13 and related road right of way easements. Actual beneficial use through development of
14 the site was made by the Huachuca Water Company. (Exh. E, ¶ 31 (Exhs. 33-34; *see*
15 *also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 33-34; *see also* Exh. 13, pp. 2-4).)

20 61. On July 29, 1901, with respect to Rock Spring No. 16 in Carr Canyon and
21 “being desirous of ratifying, confirming, amending and further defining, establishing,
22 and perfecting the aforesaid appropriation,” the Huachuca Water Company through
23 General Agent William H. Brearley further posted notice of appropriation at the place of
24 diversion by placing a monument and leaving a duplicate notice in a can in the
25 monument, and contemporaneously recorded notice of the same in the Cochise County
26 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
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1 (April 13, 1893). The notice attested to prior location on 1888 and claimed the beneficial
2 use of all waters produced by said spring for beneficial purposes, as well as appurtenant
3 rights to maintain an existing pipe or flume line as well as to construct and maintain an
4 additional pipeline, possession of “ground upon which the pipe or flume line is now laid
5 . . . with so much ground and soil adjacent to said pipe or flume line as may be necessary
6 for the use and maintenance of said flume or pipe line,” possession of an approximately
7 five acre parcel “upon which said spring is situated,” for “excavations, cuts or
8 reservoirs,” and related road right of way easements. Actual beneficial use through
9 development of the site was made by the Huachuca Water Company. (Exh. E, ¶ 32
10 (Exhs. 35-36; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 35-36; *see also* Exh. 13,
11 pp. 2-4).)

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15 62. On July 29, 1901, with respect to Rock Auxiliary Spring No. 17 in Carr
16 Canyon and “being desirous of ratifying, confirming, amending and further defining,
17 establishing, and perfecting the aforesaid appropriation,” the Huachuca Water Company
18 through General Agent William H. Brearley further posted notice of appropriation at the
19 place of diversion by placing a monument and leaving a duplicate notice in a can in the
20 monument, and contemporaneously recorded notice of the same in the Cochise County
21 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
22 (April 13, 1893). The notice attested to prior location on 1888 and claimed the beneficial
23 use of all waters produced by said spring for beneficial purposes, as well as appurtenant
24 rights to maintain an existing pipe or flume line, to construct and maintain an additional
25 pipeline, possession of “sufficient ground” for the pipeline, possession of an
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1 approximately five acre parcel “upon which said spring is situated,” for “excavations,
2 cuts or reservoirs,” and related road right of way easements. Actual beneficial use
3 through development of the site was made by the Huachuca Water Company. (Exh. E, ¶
4 33 (Exhs. 36-37; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 36-37; *see also* Exh. 13,
5 pp. 2-4).)

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7 63. On July 29, 1901, with respect to Smith Spring No. 18 in Carr Canyon and
8 “being desirous of ratifying, confirming, amending and further defining, establishing,
9 and perfecting the aforesaid appropriation,” the Huachuca Water Company through
10 General Agent William H. Brearley posted notice of appropriation at the place of
11 diversion by placing a monument and leaving a duplicate notice in a can in the
12 monument, and contemporaneously recorded notice of the same in the Cochise County
13 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
14 (April 13, 1893). The notice attested to prior location on 1888 and claimed the beneficial
15 use of all waters produced by said spring for beneficial purposes, as well as appurtenant
16 rights to maintain an existing pipe or flume line, to construct and maintain an additional
17 pipeline, possession of “sufficient ground” for the pipeline, possession of an
18 approximately five acre parcel “upon which said spring is situated,” for “excavations,
19 cuts or reservoirs,” and related road right of way easements. Actual beneficial use
20 through development of the site was made by the Huachuca Water Company. (Exh. E, ¶
21 34 (Exhs. 38-39; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 38-39; *see also* Exh. 13,
22 pp. 2-4).)

1 64. On July 29, 1901, with respect to Porter Spring No. 19 in Carr Canyon, the
2 Huachuca Water Company through General Agent William H. Brearley further posted
3 notice of appropriation at the place of diversion by placing a monument and leaving a
4 duplicate notice in a can in the monument, and contemporaneously recorded notice of
5 the same in the Cochise County Recorder's Office under Ariz. Terr. Session Laws, 15th
6 Legis. Assembly, Act No. 86 (April 13, 1893). The notice attested to prior location on
7 1888 the beneficial use of all waters produced by said spring for beneficial purposes, as
8 well as appurtenant rights to maintain an existing pipeline, to construct and maintain an
9 additional pipeline, possession of an approximately five acre parcel "upon which said
10 spring is situated," for "excavations, cuts or reservoirs," and related road right of way
11 easements. Actual beneficial use through development of the site was made by the
12 Huachuca Water Company. (Exh. E, ¶ 35 (Exhs. 40-41; *see also* Exh. 13, pp. 2-4); Exh.
13 A, ¶ 19 (Exhs. 40-41; *see also* Exh. 13, pp. 2-4.)

14 65. On July 29, 1901, with respect to O'Brien Spring No. 20 in Carr Canyon and
15 "being desirous of ratifying, confirming, amending and further defining, establishing,
16 and perfecting the aforesaid appropriation," the Huachuca Water Company through
17 General Agent William H. Brearley further posted notice of appropriation at the place of
18 diversion by placing a monument and leaving a duplicate notice in a can in the
19 monument, and contemporaneously recorded notice of the same in the Cochise County
20 Recorder's Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
21 (April 13, 1893). The notice attested to location on 1888 and claimed the beneficial use
22 of all waters produced by said spring for beneficial purposes, as well as appurtenant
23 rights to maintain an existing pipeline, to construct and maintain an additional pipeline,
24 possession of an approximately five acre parcel "upon which said spring is situated,"
25 for "excavations, cuts or reservoirs," and related road right of way easements. Actual
26 beneficial use through development of the site was made by the Huachuca Water
27 Company. (Exh. F, ¶ 35 (Exhs. 40-41; *see also* Exh. 13, pp. 2-4); Exh. B, ¶ 19 (Exhs.
28 40-41; *see also* Exh. 13, pp. 2-4).)

1 rights to maintain an existing pipe or flume line, to construct and maintain an additional
2 pipeline, possession of “sufficient ground” for the pipeline, possession of an
3 approximately five acre parcel “upon which said spring is situated,” for “excavations,
4 cuts or reservoirs,” and related road right of way easements. Actual beneficial use
5 through development of the site was made by the Huachuca Water Company. (Exh. E, ¶
6 36 (Exhs. 42-43; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 42-43; *see also* Exh. 13,
7 pp. 2-4).)
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10 66. On July 29, 1901, with respect to Storrs Spring No. 21 in Carr Canyon and
11 “being desirous of ratifying, confirming, amending and further defining, establishing,
12 and perfecting the aforesaid appropriation,” the Huachuca Water Company through
13 General Agent William H. Brearley posted notice of appropriation at the place of
14 diversion by placing a monument and leaving a duplicate notice in a can in the
15 monument, and contemporaneously recorded notice of the same in the Cochise County
16 Recorder’s Office under Ariz. Terr. Session Laws, 15th Legis. Assembly, Act No. 86
17 (April 13, 1893). The notice attested to location on 1888 and claimed the beneficial use
18 of all waters produced by said spring for beneficial purposes, as well as appurtenant
19 rights to maintain an existing pipe or flume line, to construct and maintain an additional
20 pipeline, possession of “sufficient ground” for the pipeline, possession of an
21 approximately five acre parcel “upon which said spring is situated,” for “excavations,
22 cuts or reservoirs” and related road right of way easements. Actual beneficial use
23 through development of the site was made by the Huachuca Water Company. (Exh. E, ¶
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1 37 (Exhs. 44-45; *see also* Exh. 13, pp. 2-4); Exh. A, ¶ 19 (Exhs. 44-45; *see also* Exh. 13,
2 pp. 2-4).)

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4 67. On or about September 7, 1901, with respect to Quartz Spring No. 22 in
5 Miller Canyon, Huachuca Water Company General Agent William H. Brearley posted
6 notice of appropriation at the place of diversion, by placing a monument and leaving a
7 duplicate notice in a can in the monument, and contemporaneous recording of the same
8 in the Cochise County Recorder's Office under Ariz. Terr. Rev. Stat. §§ 73-4168
9 through 4170, 73-4175 (1901). The notice attested to the beneficial use of all waters
10 produced by said spring for beneficial purposes, as well as appurtenant rights to an
11 existing pipeline, to construct and maintain a "flu[m]e [sic]" to a "receiving box" and
12 then a "pipeline" to the "main leading from the Miller Canon [sic]," possession of
13 "sufficient ground" for the pipeline, possession of an approximately five acre parcel
14 "upon which said spring is situated," for "excavations, cuts or reservoirs," and related
15 road right of way easements. Actual beneficial use through development of the site was
16 made by the Huachuca Water Company. (Exh. E, ¶ 38 (Exhs. 46-47; *see also* Exh. 13,
17 pp. 2-4); Exh. A, ¶ 19 (Exhs. 46-47; *see also* Exh. 13, pp. 2-4).)

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19
20
21 68. All of the Huachuca Water Company's preceding water rights and right of
22 way easements, including reservoir, siting, road and pipeline right of way easements
23 relating to Notices of Appropriation recorded during the year of 1901 were further
24 located by specific reference to a hand drawn map of Miller, Marshall and Carr
25 Canyons, which was recorded with the Cochise County Recorder's Office on August 2,
26 1901 at Book 000, page 13. (Exh. E, ¶ 39 (Exh. 49); Exh. A, ¶ 20 (Exh. 49).)

1 69. Subsequently, on or about June 23, 1905, with respect to Hoagland Spring
2 No. 23 “situated in the divide between Marshall and Carr Canyon” on or about June 23,
3 1905, Huachuca Water Company General Agent A.H. Gardner posted notice of
4 appropriation at the place of diversion and contemporaneously recorded the same in the
5 Cochise County Recorder’s Office under Ariz. Terr. Rev. Stat. §§ 73-4168 through
6 4170, 73-4175 (1901). The location of the spring and appurtenant rights was previously
7 established by beneficial use and possession on or about April 1, 1904 by Mr. A.
8 Hoagland placing a monument and posting notice of appropriation at the place of
9 diversion. The notice attested to the beneficial use of all waters produced by said spring
10 for beneficial purposes, as well as appurtenant rights for an existing pipeline to the
11 “main reservoir of the Huachuca Water Company,” possession of “sufficient ground” for
12 the pipeline, possession of an approximately five acre parcel “upon which said spring is
13 situated,” for “excavations, cuts or reservoirs,” and related road right of way easements.
14 (Exh. E, ¶ 40 (Exh. 48; *see also* Exh. 13, pp. 3-4); Exh. A, ¶ 19 (Exh. 48; *see also* Exh.
15 13, pp. 3-4).)

16 70. Finally, on or about April 29, 1908, Huachuca Water Company President A.E.
17 Davis posted notice of appropriation at the place of diversion for Gardner Spring No. 24
18 in Miller Canyon and contemporaneously recorded a duplicate of the same in the
19 Cochise County Recorder’s Office. The notice attested to property rights including, but
20 not limited to, the beneficial use of all waters produced by said spring for beneficial
21 purposes, as well as appurtenant rights for a pipeline to the “main reservoir of the
22 Huachuca Water Company,” possession of “sufficient ground” for the pipeline,
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1 possession of an approximately five acre parcel “upon which said springs are located,”
2 for the construction of “reservoirs, flumes, catch basins, boxes, pipes and other
3 paraphernalia” through “excavations” and “cuts” in the land, and related road right of
4 way easements. (Exh. E, ¶ 41 (Exh. 50); Exh. A, ¶ 21 (Exh. 50).)

6 71. The validity of the foregoing customary and lawful methods of appropriating
7 the beneficial use of water and appurtenant land use and right of way easements was
8 recognized by the federal government as early as March 8, 1913, when the U.S.
9 Department of the Interior accepted a surveyed map showing the Huachuca Water
10 Company’s water structures, pipelines and related easements as of 1908, as well as
11 certain of the foregoing water sources, and issued a permit under the Act of February 15,
12 1901, 31 Stat. 790, to the Huachuca Water Company recognizing the Company’s right to
13 exercise its vested rights as based upon lawful perpetual right of way easements granted
14 by Defendant United States pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.
15 § 661. The foregoing map was previously recorded by the Huachuca Water Company
16 with the Cochise County Recorder of Deeds on August 1, 1908 at Book 000, page 676,
17 and subsequently recorded on January 9, 1911 and again on February 8, 1965. (Exh. E, ¶
18 42 (Exhs. 51-52); Exh. A, ¶ 25 (Exhs. 51-52).)

22 72. On or about March 21, 1916, the Huachuca Water Company’s President
23 wrote a letter to Defendant U.S. Department of Agriculture Forest Service, stating:

25 I wish to sya [sic] that this plant has been in operation continously [sic]
26 since September 1881 supplying Tombstone and surrounding country with
27 water and that our right of way and water rights and sites for reservoirs
28 have not only been reconized [sic] by the Department of Interior but have
been reconzied [sic] many times and acknowledged by the Department of

1 Agriculture and the Forest Service in particular and what we now want to is
2 to ask you to clear this matter and see if you cant [sic] get the Department
3 of Agriculture if in reviewing this case NOW thinks we should have more
4 done, that they state what it is and we will proceed on our part or if with
5 them they may do so—our right of way, reservoir sites, springs and all
6 rights should be reconized [sic] so that we may know just what they
7 consider they are and we also think the width of right of way should be
8 fixed definitely, kindly take the matter up for determination and oblige.

9 The April 4, 1916 response by the Acting District Forester was very different than
10 that given to Tombstone by today's Defendants:

11 As stated in your letter it is our understanding that your plant has been in
12 operation since before the creation of the Forest and the Forest Service has
13 recognized the existence of a right of way for your reservoir and pipelines
14 across the Forest under sections 2339 and 2340 U.S. Revised Statutes [the
15 Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661].

16 (Exh. E, ¶ 43 (Exh. 55); Exh. A, ¶ 32 (Exh. 55).)

17 73. Numerous other letters containing similar admissions exist in Defendants'
18 records and archives. In fact, after February 15, 1901 and prior to December 1, 1946, the
19 Huachuca Water Company received numerous letters and special use permits issued by
20 Defendant U.S. Department of Agriculture Forest Service, which cumulatively and
21 continuously recognized the Huachuca Water Company's property interests within the
22 Huachuca Forest Reserve (now known as the Coronado National Forest), in addition to
23 permitting additional improvements of the land possessed by the Huachuca Water
24 Company, such as the construction of housing and fencing in the Huachuca Forest
25 Reserve (now known as the Coronado National Forest). (Exh. E, ¶ 43; Exh. A, ¶ 33.)

26 74. The Huachuca Water Company's rights were challenged at least twice in
27 court and in each occasion the Huachuca Water Company prevailed in enforcing its
28

1 rights. For example, on November 15, 1915, the Superior Court of the State of Arizona
2 in and for the County of Cochise entered a final judgment adjudicating a portion of the
3 Huachuca Water Company's vested rights in the Huachuca Mountains. The case was
4 litigated through bench trial between the Huachuca Water Company and J.E.
5 Tomblinson. (Exh. E, ¶ 44 (Exh. 53); Exh. A, ¶ 26 (Exh. 53).)

6
7 75. In the November 24, 1915 judgment, the Court "ordered, adjudged and
8 decreed" that the Huachuca Water Company is entitled to possession of:
9

10 all those certain lands and premises . . . in that certain tract of land,
11 described as follows, E ½ of W ½ of the NE ¼ of the SE ¼ of Section 23,
12 Township 23 S., Range 20 E. Gila & Salt River Basin Meridian, in so far as
13 it lies, and that said land and premises lieing [sic] between the main pipe
14 line of the said Plaintiff and the lowest bed of the canyon through which
15 said pipeline runs, said lands and premises lying to the South and West of
16 said pipe line and the right-of-way for said pipe line, and the land on which
said pipe line is situated, said lands and premises extending from the spring
and tap, highest up said canyon, to the lowest tap and opening into the main
pipe line of the Plaintiff.

17 (Exh. E, ¶ 45 (Exh. 53); Exh. A, ¶ 27 (Exh. 53).)

18 76. In the November 15, 1915 judgment, the Court also "ordered, adjudged and
19 decreed" that the Huachuca Water Company is entitled to the "entire use and possession
20 of those certain springs on said [sic] McCoy Reservoir site, numbered 2, 3 and 4, and
21 situate[d] on the lands and premises described in the pleadings, and all of the water
22 flowing from said springs numbered 2, 3, and 4, situate[d] on said McCoy Springs
23 Reservoir site." (Exh. E, ¶ 46 (Exh. 53); Exh. A, ¶ 28 (Exh. 53).)
24
25

26 77. Similarly, on January 27, 1917, the Superior Court of the State of Arizona in
27 and for the County of Cochise entered a final judgment adjudicating another portion of
28

1 the Huachuca Water Company's vested rights in the Huachuca Mountains based on a
2 jury verdict. The case was fully and fairly litigated through jury trial between the
3 Huachuca Water Company and Joseph S. Parmerlee. (Exh. E, ¶ 47 (Exh. 54); Exh. A, ¶
4 29 (Exh. 54).)

6 78. In the January 17, 1917 jury verdict supporting the January 27, 1917
7 judgment, the jury found that the Huachuca Water Company "used the waters of Clark
8 Springs No. 11 before the year 1910 for the purpose of supplying water for consumption
9 by the people of Tombstone," that the Huachuca Water Company posted notice of
10 appropriation at Clark Springs No. 11 in July 1901, and that the Huachuca Water
11 Company never abandoned the spring. (Exh. E, ¶ 48 (Exh. 54); Exh. A, ¶ 30 (Exh. 54).)

14 79. Based on the jury verdict, the Court entered a judgment finding:

15 Plaintiff is entitled to the possession [of]. . . that certain spring known as
16 Clark Spring No. 11, situated on the divide between Miller and Carr
17 Canyon, in the Huachuca Mountains, in the County of Cochise, State of
18 Arizona, and also, the right of way for said pipeline leading from said Clark
19 Spring No. 11 to the main pipe line of the plaintiff running to the City of
20 Tombstone, and further for such lands surrounding said Clark Spring No.
21 11, as are necessary to the beneficial use of said springs, and it is further
adjudged that plaintiff is entitled to, and do have, possession of those
certain lands and premises, springs and water rights, and waters, as above
described in the complaint, known as Clark Spring No. 11.

22 (Exh. E, ¶ 49 (Exh. 54); Exh. A, ¶ 31 (Exh. 54).)

23 80. The validity of the Huachuca Water Company's property rights accrues to the
24 benefit of Tombstone because all of the foregoing rights and privileges were
25 incorporated by reference in the quit claim deed and bill of sale dated April 14, 1947, in
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27
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1 which the Huachuca Water Company granted Tombstone all of its vested rights as well
2 as all interests in outstanding permits. (Exh. E, ¶ 50 (Exh. 56); Exh. A, ¶ 34 (Exh. 56).)

3
4 81. Until the Monument Fire, the validity of the transfer of rights between the
5 Huachuca Water Company and Tombstone was continuously recognized by the federal
6 government. For example, on or about March 16, 1948, Defendant U.S. Department of
7 Agriculture Forest Service issued a special use permit to Tombstone allowing it to
8 exercise all of its vested rights acquired from the Huachuca Water Company after
9 reviewing the foregoing quit claim deed and bill of sale and independently investigating
10 the substance of the transaction. (Exh. E, ¶ 51 (Exh. 57).)

11
12 82. Additionally, on or about December 21, 1949, after reviewing and
13 investigating the quit claim deed and bill of sale given to Tombstone by the Huachuca
14 Water Company, the U.S. Department of Interior approved the transfer to Tombstone of
15 the permit previously granted to the Huachuca Water Company on March 8, 1913,
16 waiving future permit fees because of the use of the underlying vested rights for
17 municipal purposes. (Exh. E, ¶ 51 (Exh. 57); Exh. A, ¶ 37 (Exh. 57).)

18
19 83. In 1962, Defendants gave Tombstone an open-ended special use permit to
20 construct and maintain its “municipal water supply” in accordance with its vested rights.
21 That permit was based on a Forest Service-approved application that not only authorized
22 the construction of numerous permanent structures in the Huachuca Mountains at a cost
23 of nearly \$9,683.25 in 1962 dollars (nearly \$73,000 in 2012 dollars), but which also
24 specifically authorized Tombstone “to do improvement work at all of the spring
25 impound areas and along all of the existing and future pipelines, when such
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1 improvements are deemed necessary.” This special use permit has never been revoked or
2 superseded. (Exh. E, ¶ 51 (Exh. 58); Exh. A, ¶ 39 (Exh. 58, pp. 9, 11).)

3
4 84. The U.S. Geological Survey map from 1977 references and depicts
5 Tombstone’s water structures and pipelines. (Exh. E, ¶ 51 (Exh. 58).)

6 85. In 1977, a forest fire devastated much of the vegetation with much of the
7 Huachuca Mountains. Mayor Marjorie Colvin declared a State of Emergency. The
8 State of Arizona (via Governor Raul Castro) issued an emergency grant in the amount of
9 \$50,000 in emergency funding to repair the water line at Carr, Gardner and Miller
10 reservoirs. (Exh. A, ¶ 42.)

11
12 86. In 1978, the USFS District Ranger in Hereford met with representatives of
13 Tombstone to discuss City of Tombstone rights in the Huachuca Mountains pertaining to
14 the water line and acquiring permits to conduct repairs. Defendants allowed the repairs
15 to be made. (Exh. A, ¶ 43.)

16
17 87. In 1984, the Miller Peak Wilderness Area was established, encompassing the
18 portion of Tombstone’s vested rights in the Huachuca Mountains located in the E ½ of
19 W ½ of the NE ¼ of the SE ¼ of Section 23, Township 23 S., Range 20 E. Gila & Salt
20 River Basin Meridian, Cochise County, State of Arizona. (Exh. A, ¶ 44.)

21
22 88. On March 19, 1990, the U.S. Forest Service declared to Tombstone, “[t]he
23 Coronado National Forest recognizes the prior uses of water from Miller Canyon by the
24 City of Tombstone. We do not intend to conflict with prior water rights holders in Miller
25 Canyon.” (Exh. E, ¶ 51 (Exh. 59); Exh. A, ¶ 45 (Exh. 59).)

1 89. Currently, the U.S. Department of Interior Bureau of Land Management
2 specifically recognizes on its Master Serial Register that Tombstone holds permanent
3 right of way easements corresponding to its vested rights and also reports continuous use
4 of those easements. (Exh. E, ¶ 51 (Exh. 60); Exh. A, ¶ 46 (Exh. 60).)

6 90. In 1993, another devastating fire in the Huachuca Mountains damaged the
7 Tombstone waterline. Upon information and belief, Defendants allowed substantial
8 repairs to be made to the Gardner, Miller and Carr Spring sites, including repairs and re-
9 grading of hundreds of feet of roadway upon and along the public highway right of way
10 easements in Miller and Carr Canyons. (Exh. A, ¶ 47.)

12 **III. Tombstone's enjoyment and exercise of its vested rights**

14 **a. Use of motorized and mechanized vehicles to repair, maintain, and** 15 **construct water structures**

16 91. Between 1969 and 1973, the City's work crew travelled in pickup trucks at
17 least 10 times upon and along the roads shown on the 1901 map (Exh. 49) up to the
18 furthest end of those roadways in both Miller and Carr Canyon. The area they drove
19 upon appeared to be unpaved roads and drivable by ordinary vehicles. Members of the
20 public often used these roads at that time. (Exhibit F (Declaration of Carlos Valenzuela),
21 ¶ 4.)

23 92. Between 1969 and 1973, working pipelines and catchments were servicing
24 water sources in Miller and Carr Canyons. The Gardner Springs catchment at the top of
25 the Miller Canyon was producing good amounts of water. (Exh. F, ¶ 5.)
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1 93. Between 1969 and 1973,, the wash and the catchments feeding the pipeline
2 shown in the 1901 map (Exh. 49) and at Gardner Springs were constantly filled with
3 brush, mud and boulders that would wash down from the mountain when it would rain.
4
5 City workers cleared the wash and catchments of this debris. (Exh. F, ¶ 6.)

6 94. Between 1974 and 1980, City work crews performed maintenance work on
7 the City of Tombstone's aqueduct and catchments at the locations and upon and along
8 the right-of-way roadways shown in the 1901 map, as well as at the Gardner Springs
9 catchment located in Miller Canyon. They rode in pickup trucks as well as an old six
10 wheel drive army truck known as a "Deuce and a Half" upon and along the right-of-way
11 shown on the 1901 map (Exh. 49) up to the furthest end of those roadways. The rights of
12 way they drove upon appeared to be unpaved roads and drivable by ordinary vehicles.
13
14 Members of the public often used these roads in the foregoing timeframe. (Exhibit G
15 (Declaration of Alex Gradillas), ¶ 4.)
16

17 95. Between 1974 and 1980, water was flowing at the Gardner Springs
18 catchment, and functioning aqueducts/pipelines and/or catchments were servicing the
19 water sources in Miller and Carr Canyons, as well as at the "Divide." (Exh. G, ¶ 5.)
20

21 96. According to Joe Perotti, the City's now-deceased Public Works Director, a
22 tracked backhoe was used in the reconstruction efforts for the Huachuca Mountain
23 aqueduct and catchments after the flood of 1993 throughout Miller Canyon to remove
24 debris and large boulders. (Exh. G, ¶ 8.)
25

26 97. Between 1979 and 1983, the City's work crew travelled in pickup trucks at
27 least 10 times upon and along the roads shown on the 1901 map (Exh. 49) up to the
28

1 furthest end of those roadways in Miller Canyon. The area they drove upon appeared to
2 be unpaved roads and drivable by ordinary vehicles. Members of the public often used
3 these roads at that time. (Exhibit H (Declaration of Bruce Pulsifer), ¶ 4.)
4

5 98. Between 1979 and 1983, working pipelines and catchments were serving
6 water sources in Miller Canyon. The intake would sometimes get clogged up with debris
7 and in order to restore the water supply the crew would sometimes go up to the canyon
8 to clean and make repairs to the pipelines. The Gardner Springs catchment at the top of
9 the Miller Canyon was producing good amounts of water. (Exh. H, ¶ 5.)
10

11 99. Between 1990 to 1992 and 2002 to 2004, City work crews took semi-weekly
12 trips on Mondays and Fridays into the Huachuca Mountains to maintain the springs.
13 They performed regular maintenance and repair work on or in the immediate vicinity of
14 the following springs: Miller No. 1, Clark No. 11, Rock No. 16, Upper Maple No. 7, and
15 Gardner No. 24. This work included, among other things: checking the springs for
16 leaks; clearing leaves and other debris from the springs, catch basins, and pipes; and
17 repairing any damage. (Exhibit I (Declaration of Robert Reames), ¶ 4.)
18
19

20 100. Between 1990 to 1992 and 2002 to 2004, to access Miller Spring No. 1,
21 Clark Spring No. 11, Rock Spring No. 16, and Upper Maple Spring No. 7, the work
22 crew regularly drove 4 by 4 pickup trucks upon and along the right-of-way roads shown
23 on the 1901 map (Exh. 49). They drove within 100 feet of the foregoing springs on a
24 regular basis. (Exh. I, ¶ 5.)
25

26 101. At least two times a year, between 1990 to 1992 and 2002 to 2004, heavy
27 rains would send rocks tumbling down the mountain side, displacing the pipeline and
28

1 damaging Miller Spring No. 1, Clark Spring No. 11, Rock Spring No. 16, and Upper
2 Maple Spring No. 7. Work crews performed necessary repair work on the springs and
3 welding work on the pipeline. (Exh. I, ¶ 6.)
4

5 102. To access the damaged Miller Spring No. 1, Clark Spring No. 11, Rock
6 Spring No. 16, and Upper Maple Spring No. 7 and pipeline, the crew drove a backhoe
7 and welding truck upon and along the right-of-way roads shown on the 1901 map (Exh.
8 49). (Exh. I, ¶ 7.)
9

10 103. In 2000, substantial leaks were discovered in the pipeline approximately one
11 mile east of the San Pedro River. A work crew repaired the pipe by cutting it, welding it
12 and installing new sections. (Exh. I, ¶ 8.)
13

14 104. To access the damaged pipeline, the crew drove a trackhoe excavator,
15 backhoe and welding truck upon and along the right-of-way roads shown on the 1901
16 map (Exh. 49). (Exh. I, ¶ 9.)
17

18 105. The foregoing work done between 1990 to 1992 and 2000 to 2004 used a
19 welding truck, heavy duty pickup, backhoe, trackhoe, and front end loader. (Exh. I, ¶ 10-
20 13.)
21

22 106. The welding truck used between 1990 to 1992 and 2000 to 2004 had a 2 ton
23 weight capacity (10,000 lbs.). It had all-wheel drive to six tires, with four dual tires in
24 the back and two tires in the front. The dual tires were about 10 inches wide and about
25 35 to 40 inches high; the inside tread to the outside tread on the dual tires involve at least
26 17 inches of displacement. The truck included a small winch crane and had a tool box.
27 It also had a generator and a DC welder. (Exh. I, ¶ 10.)
28

1 107. The heavy duty pickup truck (Ford F250) pulled a long trailer
2 (approximately 10 to 20 feet long) with extra metal pipe. (Exh. I, ¶ 11.)

3
4 108. The backhoe used between 1990 to 1992 and 2000 to 2004 was a Case 580
5 or larger, and there was at least one working alongside of me at my worksites. (Exh. I, ¶
6 12.)

7 109. The trackhoe excavator was present in the Huachuca Mountains on at least
8 four occasions between 2000-2004. Along with it there was also a Case front end
9 loader, which had about a 1.5 – 2 yard bucket. (Exh. I, ¶ 13.)

10
11 110. In or around July or August 2001, welding work was conducted at or in the
12 immediate vicinity of the Carr Canyon Springs numbers 16, 17, and 18, and in the
13 immediate vicinity of Miller Canyon Springs numbers 2, 3 and 4. The welding work was
14 conducted within approximately a 200 feet radius of these locations. (Exhibit
15 (Declaration of Greg Cameron), ¶ 3.)

16
17 111. In or around July or August 2001, in traveling to the Carr Canyon and Miller
18 Canyon worksites, City workers drove upon and along the right of way roads shown on
19 the 1901 map (Exh. 49) at least twice in both canyons. Maintenance workers from the
20 City and other contractors regularly drove 4 by 4 pickups to conduct reconnaissance of
21 the work sites and areas upon and along the rights of ways shown on the attached map,
22 and beyond, into rougher wilderness. These vehicles included a Highly Modified Kaiser
23 M35 A2 truck, which is more commonly known as a “deuce and a half” military truck. It
24 is a fairly large service truck that has a Gross Vehicle Weight of 9 Tons (18,000 lbs.
25 licensed and registered). It is all-wheel drive to six tires, with two dual tires in the back
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1 and two tires in the front. The dual tires are about 10 inches wide and about 40 inches
2 high each; the inside tread to the outside tread on the dual tires involve at least 17 inches
3 of displacement. The truck included a crane, work deck, tool boxes and cutting torches.
4 (Exh. J, ¶ 4.)

6 112. In or around July or August 2001, reconnaissance vehicles and the “deuce
7 and a half” were followed upon and along the City’s rights of way as shown in the 1901
8 map (Exh. 49) by a heavy duty pickup (probably a Dodge D-250) that was pulling a long
9 trailer (approximately 20 to 30 feet long) with extra metal pipe. (Exh. J, ¶ 5.)

11 113. At least one backhoe, a Case 580 or larger, was working at these worksites at
12 or in the immediate vicinity of the Carr Canyon Springs numbers 16, 17, and 18, and in
13 the immediate vicinity of Miller Canyon Springs numbers 2, 3 and 4 in or around July or
14 August 2001. (Exh. J, ¶ 5.)

16 **b. Construction and reconstruction of permanent water structures**

18 114. Between 1974 and 1980, numerous structures and diversions were built in
19 both Miller and Carr Canyons; including, without limitation, a rock and concrete half-
20 moon shaped dam-like catchment that was six to eight feet high and approximately
21 twenty feet wide across the right of way shown at the top of Carr or Miller Canyon. This
22 structure, as well as many other catchments were washed-out after the 1977 floods; but
23 all of the pipelines for the aqueduct and smaller catchments were rebuilt in Miller and
24 Carr Canyons, as well as at the “Divide” before 1980. (Exh. G, ¶ 7.)

26 115. During 1979 or 1980, a work crew restored a dam to connect to the City’s
27 pipeline. The dam was approximately four feet high and went across the canyon, which
28

1 was approximately twenty feet wide. It created a pool of water that filled the pipeline
2 with a good supply of water. (Exh. H, ¶ 6.)
3

4 **c. Historical necessity of substantial ground displacement as a matter of**
5 **ordinary maintenance**

6 116. The maintenance work conducted among and around the spring heads and
7 right of ways owned by Tombstone in the Huachuca Mountains between 1974 and 1980
8 involved significant amounts of ground disturbance. The aqueduct itself was
9 continuously situated in a man-made shallow wash about two feet deep and about ten to
10 twelve feet wide. That wash and the catchments feeding it were constantly subject to
11 debris that would wash down from the mountain when it would rain. Debris including
12 brush, mud, as well as small and large boulders would typically block the catchments
13 and wash. Between 1974 and 1980, work crews continuously cleared the wash of this
14 debris and maintained it in a condition free from obstruction. (Exh. G, ¶ 6.)
15
16

17 117. The maintenance work between 1990 to 1992 and 2002 to 2004 involved
18 considerable ground displacement throughout the City of Tombstone's rights-of-way as
19 shown in the 1901 map (Exh. 49). The backhoe would use its bucket to excavate areas
20 upon, along and around the City of Tombstone's pipeline to remove debris to gain
21 access to the metal for welding. Dirt, brush and small and large boulders would be set
22 aside in this process by the backhoe. The backhoe would also lift broken sections of pipe
23 away and assist in the placement of new pipe. Many truckloads of dirt and debris were
24 removed in the course of performing my welding work. After completing the welding
25
26
27
28

1 work, the backhoe would then typically rebury the pipeline with displaced dirt. (Exh. I, ¶
2 14.)

3
4 118. Welding work in or around July or August 2011 at or in the immediate
5 vicinity of the Carr Canyon Springs numbers 16, 17, and 18, and in the immediate
6 vicinity of Miller Canyon Springs numbers 2, 3 and 4 involved considerable ground
7 displacement throughout the City of Tombstone's rights of way as shown in the 1901
8 map (Exh. 49). A backhoe used its bucket to excavate areas upon, along and around the
9 City of Tombstone's pipeline to remove debris so that workers could gain access to the
10 metal for welding. In this process, the backhoe set aside dirt, brush and small and large
11 boulders. The backhoe also lifted broken sections of pipe away and assisted in the
12 placement of new pipe. Many truckloads of dirt and debris were removed in the course
13 of performing the welding work. After completing the welding work, the backhoe
14 would then typically rebury the pipeline with displaced dirt. (Exh. J, ¶ 6.)

15
16
17 119. The foregoing work constituted usual and customary maintenance work.
18 There would be no other way to maintain the line and keep water flowing from the
19 Mountains over the years without conducting the earthmoving and welding operations.
20 (Exh. J, ¶ 7; Exh. I, ¶ 15.)

21
22
23 **IV. Necessary repair and maintenance work's minimal impact on the environment**

24 120. Any disturbance to the wilderness caused by the equipment necessary to
25 conduct repair work will be minimal because the footprint left from the equipment will
26 be completely eradicated by any subsequent flow events, especially during the yearly
27 monsoons, which are typical in the Miller and Carr Canyons. Additionally, allowing the
28

1 rebuilding of permanent structures that are protected by flumes to divert such flow
2 events will help avoid the necessity of repair work in the future. (Exh. B, ¶ 12.)
3
4

5 **RESPECTFULLY SUBMITTED** on this 30th day of March, 2012 by:
6
7

8 s/Nicholas C. Dranias

Nicholas C. Dranias (330033)

Christina Sandefur (027983)

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CERTIFICATE OF SERVICE

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

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