

**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,	)	
	)	
Defendants.	)	<b>CITY OF TOMBSTONE’S</b>
	)	<b><u>VERIFIED</u> FIRST AMENDED</b>
	)	<b>COMPLAINT FOR DECLARATORY</b>
	)	<b>AND INJUNCTIVE RELIEF</b>
	)	

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**INTRODUCTION**

1. What is at stake in this case is the life or death of historic Tombstone, Arizona. Between May and July 2011, the “Monument Fire” engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone water infrastructure is located. In July 2011, the monsoon rains were record-breaking. With no vegetation to absorb the runoff, huge mudslides forced boulders—some the size of Volkswagens—to tumble down the mountain sides crushing Tombstone’s waterlines and destroying reservoirs, thus, shutting off Tombstone’s main source of water. In some areas, Tombstone’s

1 pipeline is under 12 feet of mud, rocks and other debris; while in other places, it is  
2 hanging in mid-air due to the ground being washed out from under it. In response,  
3 Arizona Governor Jan Brewer declared a state of emergency specifically for the City of  
4 Tombstone. The State of Arizona further appropriated emergency funds to assist  
5 Tombstone in repairing its waterlines and reservoirs.  
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7         2. Despite the manifest emergency facing the desert-parched City of Tombstone,  
8 Defendants are refusing to allow Tombstone to take reasonable emergency action to  
9 repair its century-old Huachuca Mountain water infrastructure. Instead, they are  
10 enforcing fealty to an arbitrary, capricious and unlawful interpretation of federal law by  
11 requiring Tombstone to use hand tools and suggesting using horses to restore its water  
12 supply. This conduct violates Tombstone's sovereignty as a political subdivision of the  
13 State of Arizona because it deprives the City, its residents and visitors of essential  
14 municipal property, adequate fire suppression capabilities, and safe drinking water. But  
15 it is not too late to rescue "The Town Too Tough to Die." As discussed below, the Court  
16 should grant Tombstone declaratory and injunctive relief under the Administrative  
17 Procedure Act, the Quiet Title Act, and the Tenth Amendment to the U.S. Constitution.  
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## 22                                   **JURISDICTION**

23         3. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28  
24 U.S.C. § 1361 (action to compel an officer of the United States to perform his or her  
25 duty), 28 U.S.C. § 1367 (supplemental jurisdiction where question raises important  
26 federalism issues under 10th amendment of the U.S. Constitution), 28 U.S.C. §  
27 1391(b)(2) (a civil action where the claim arose and a judicial district in which a  
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1 substantial part of the events or omissions giving rise to the claim occurred, or a  
2 substantial part of property that is the subject of the action is situated), 28 U.S.C. §  
3 1391(e)(2) (A civil action in which a defendant is an officer or employee of the United  
4 States or any agency thereof acting in his official capacity or under color of legal  
5 authority, or an agency of the United States, or the United States and where a substantial  
6 part of the events or omissions giving rise to the claim occurred or a substantial part of  
7 property that is the subject of the action is situated), 28 U.S.C. § 2201 (declaratory  
8 relief) and/or 20 U.S.C. § 2202 (injunctive relief).

#### 11 **PARTIES**

12 4. Plaintiff, the City of Tombstone (“Tombstone”), is a duly incorporated  
13 municipality within Cochise County, Arizona which holds title to vested rights as herein  
14 alleged.

15 5. Defendant, UNITED STATES OF AMERICA, holds title or adversely  
16 possesses and claims to hold title to certain real property in conflict with the Plaintiff’s  
17 vested rights as herein alleged.

18 6. Defendants, U.S. DEPARTMENT OF AGRICULTURE, TOM VILSAK in his  
19 official capacity as the Secretary of Agriculture, TOM TIDWELL, in his official  
20 capacity as the Chief Forester of the USDA Forest Service, CORBIN NEWMAN, in his  
21 official capacity as Regional Forester for the Southwestern Region of the U.S. Forest  
22 Service, are the administrators of the Miller Peak Wilderness Area within which  
23 Defendants claim a portion of Plaintiff’s vested rights are located. Upon information  
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1 and belief, CORBIN NEWMAN is the person authorized to grant emergency permits to  
2 access USFS property.

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4 7. Tombstone has not joined as a party defendant the U.S. Department of the  
5 Interior Bureau of Land Management, or any of its officials, because the foregoing  
6 agency has assisted Tombstone's archivist in locating historical documents, has been  
7 fully aware of Tombstone's emergency needs, and has not yet interfered with or denied  
8 Plaintiff's vested rights as herein alleged. Plaintiff believes that the Bureau of Land  
9 Management will continue to recognize Plaintiff's vested rights as herein alleged.  
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11 8. Tombstone has not joined as a party defendant the U.S. Department of the  
12 Interior, Fish and Wildlife Service, or any of its officials, because the foregoing agency  
13 has not yet interfered with or denied Plaintiff's vested rights as herein alleged.  
14 Additionally, Plaintiff believes that the Fish and Wildlife service will recognize  
15 Plaintiff's vested rights as herein alleged. This is because, on March 8, 2012, the Fish  
16 and Wildlife Service granted an expedited Freedom of Information Request made at the  
17 direction of undersigned counsel regarding various environmental studies in the  
18 Huachuca Mountains on the basis of the imminent threat to Tombstone's water supply  
19 and fire suppression capabilities as set out in the previously filed declarations of Jack  
20 Wright and Jesse Grassman.  
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24 9. Tombstone has not joined as party defendants Thomas Beatty, Edith Beatty,  
25 Beatty Living Trust and Beatty Guest Ranch & Orchard LLC (hereinafter the "Beattys"),  
26 because the prospective equitable relief sought in this Complaint seeks to enforce  
27 Plaintiff's rights only as against the named federal Defendants and only with respect to  
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1 the property Plaintiff owns. Despite diligent efforts, Tombstone has no evidence  
2 warranting an inference that granting such relief would adversely affect any property  
3 interest claimed or held by the Beattys. Moreover, Defendants have not furnished  
4 Tombstone with documentary proof of any interest claimed or held by the Beattys or any  
5 obligation owed by Defendants to the Beattys that could possibly be affected by the  
6 relief herein sought. This is despite a Freedom of Information Request sent at the  
7 direction of undersigned counsel, which was received by the USDA Forest Service on or  
8 about March 2, 2012. Finally, undersigned counsel has made an effort to meet with the  
9 Beattys to determine the nature of their concerns and the meeting has been refused.

10  
11 10. The Court is able to accord complete relief among existing parties without  
12 impairing or impeding any non-party's interests or leaving any existing party subject to a  
13 substantial risk of incurring double, multiple, or otherwise inconsistent obligations  
14 because of the interest.

### 15 **SOVEREIGN IMMUNITY**

16  
17 11. The doctrine of sovereign immunity is inapplicable to the individuals named  
18 as defendants acting in their official capacity because prospective equitable relief is  
19 being sought and they have acted without lawful authority as herein alleged.

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21 12. As to Defendants UNITED STATES OF AMERICA and U.S.  
22 DEPARTMENT OF AGRICULTURE sovereign immunity has been expressly waived  
23 under 5 U.S. C. §§ 701, 702 and 704 (judicial review of administrative acts and  
24 omissions) and 28 U.S.C. § 2409a.

**General Allegations Applicable to All Counts**

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

Attached hereto as Exhibit 1 is a genuine copy of said deed (Tombston381-87). James McCoy, in turn, previously received:

a. A quit claim deed on July 8, 1881 from John W. Campbell conveying a five acre mill site as well as "all the water rising and flowing in Miller Canon" which Campbell acquired "by purchase or actual possession" in addition to "all his right, title and interest to the road leading into and through said canon and the right of way thereof." Attached hereto as Exhibit 2 is a genuine copy of said quit claim deed (Tombston400-01).

b. A quit claim deed on June 28, 1881 from Benjamin Rinehart and David C. Field for a mill site, "all water rising and flowing on and through the Mill Site which

1 was located . . . in Miller Canon” and all “right, title and interest in or to any other water  
2 rising or flowing in said Miller Canon.” Attached hereto as Exhibit 3 is a genuine copy  
3 of said quit claim deed (Tombston415-17).  
4

5 c. A deed on February 25, 1881 from Richard Gird for all “right, title and  
6 interest in and to “all the water flowing” in Dublin (also known as Carr) Canyon.  
7 Attached hereto as Exhibit 4 is a genuine copy of said deed (Tombston389).  
8

9 d. A deed on February 9, 1881 from Levi J. Gird for “all of the right, title and  
10 interest . . . to a certain spring of water [Gird Reservoir No. 9 1/2] . . . located by said  
11 L.J. Gird on the 31<sup>st</sup> Day of December 1880” in “Miller Canon . . . for the purpose of  
12 furnishing water to the town of Tombstone, and that said spring flows about 30,000  
13 gallons per day.” Attached hereto as Exhibit 5 is a genuine copy of said deed  
14 (Tombston404-05).  
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16 14. On November 17, 1881, the Huachuca Water Company was granted rights to  
17 a “piece of ground 160 feet by 250 feet in length” within the limits of the “Bonton  
18 Mining Claim,” consisting of a “reservoir ground” by lease agreement from A.H.  
19 Emanuel and C.H. Light. Attached hereto as Exhibit 6 is a genuine copy of said  
20 agreement (Tombston431).  
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22 15. On February 21, 1883, the Huachuca Water Company was granted rights to  
23 all “right, title and interest in and to the water rising and flowing in ‘Maple’ otherwise  
24 known or called ‘Miller Canon’” by a quit claim deed from James McCoy. Attached  
25 hereto as Exhibit 7 is a genuine copy of said quit claim deed (Tombston 392-93).  
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27 Previously, James McCoy received:  
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1           a.       A quit claim deed on March 27, 1882 from Henry Hollenstein of “Maple  
2 Canon” (also known as Miller Canyon) of “all his right, title and interest in the water  
3 rising and flowing in Maple otherwise called Miller canon.” Attached hereto as Exhibit 8  
4 is a genuine copy of said quit claim deed (Tombston 396-97).

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6           b.       A deed on September 6, 1881 from J. Lindsey and O. D. Merrill for a five  
7 acre mill site and “all the water rising and flowing on said mill site” which were located  
8 on the “twentieth day of May 1880” and recorded in the Office of the Recorder of  
9 Cochise County in book 1 of records of millsites, pages 94-95. Attached hereto as  
10 Exhibit 9 is a genuine copy of said deed (Tombston426-29).

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12           16. On November 24, 1888, the Cochise County Recorder recorded the aforesaid  
13 July 22, 1881 and February 21, 1883 deeds from James McCoy to the Huachuca Water  
14 Company. Exhibit 10 (Tombston381-386).

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16           17. On April 13, 1890, prestigious territorial attorney Col. William Herring wrote  
17 an opinion letter to the Arizona Territorial Legislature describing the Huachuca Water  
18 Company’s water system and how the related property rights were obtained pursuant to  
19 the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and supersede all conflicting land  
20 patents or homesteads. A genuine copy of said opinion letter is attached hereto as  
21 Exhibit 11 (Tombston419-22).

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24           18. After the Huachuca Water Company began supplying the City of Tombstone  
25 with water for potable and fire suppression purposes pursuant to a franchise ordinance  
26 enacted on September 9, 1881 (attached hereto as Exhibit 12 (Tombston424-25) is a  
27 genuine copy of said ordinance), and no later than April 13, 1890, the Huachuca Water  
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1 Company made continuous appropriation and beneficial use of the rising and flowing  
2 water, as well as appurtenant and independent right of way easements to the possession  
3 of land for reservoirs, water structures, ditches, flumes, canals, pipelines and roads in  
4 Miller, Marshall, and Carr Canyons, and the “divide” between Miller and Carr Canyons,  
5 pursuant to the foregoing quit claim deeds, for beneficial pursuant to local custom and  
6 the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661.  
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9 19. Accordingly, prior to the November 6, 1906 Proclamation of President  
10 Theodore Roosevelt establishing the Huachuca Forest Reserve (now known as the  
11 Coronado National Forest) in Arizona,<sup>1</sup> and long before the Arizona Wilderness Act of  
12 1984, Tombstone’s predecessor in interest, the Huachuca Water Company, held the  
13 following vested property rights (hereinafter referenced as the “vested rights”):  
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15 a. As early as July 22, 1881 and no later than on or about the year 1883,  
16 based on prior appropriation, beneficial use, and the aforesaid deeds and quit claim  
17 deeds, the Huachuca Water Company held vested property rights to Miller Spring No. 1  
18 (also known as “Main Spring No. 1”) situated in Miller Canyon pursuant to local custom  
19 and the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661; including, but not limited to,  
20 the beneficial use of all waters produced by said spring for beneficial purposes, as well  
21 as appurtenant and independent rights to maintain an existing pipe or flume line,  
22 possession of “sufficient grounds” upon which to construct and maintain the pipeline,  
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26 <sup>1</sup> The Huachuca Forest Reserve was subsequently consolidated with the Baboquivari and  
27 Tumacacori as the Garces National Forest. *See* Executive Order of President T.  
28 Roosevelt, No. 908 (July 2, 1908). The Garces National Forest then was consolidated  
with Coronado National Forest and retained the name Coronado National Forest. *See*  
Proclamation of President Taft, No. 1121 (April 17, 1911).

1 possession of an approximately five acre parcel “upon which said spring is situated,” for  
2 “excavations, cuts or reservoirs,” and related road right of way easements. Subsequently,  
3 on April 1, 1904, the Huachuca Water Company through General Agent William H.  
4 Brearley posted notice of appropriation at the place of diversion by placing a monument  
5 and leaving a duplicate notice in a can in the monument; Brearley, however, reported  
6 that he “did not leave the original notice for record with the County Recorder as the  
7 claim had been recorded at the time said Spring was located in 1883.” A genuine copy of  
8 the February 15, 1906 Deposition of William H. Brearley is attached as Exhibit 13, p. 3.  
9 Again, on June 23, 1905, the Huachuca Water Company through General Agent A.H.  
10 Gardner posted yet another notice of appropriation at the place of diversion by placing a  
11 monument and leaving a duplicate notice in a can in the monument, and  
12 contemporaneously recorded notice of the same in the Cochise County Recorder’s  
13 Office under Ariz. Terr. Rev. Stat. §§ 73-4168 through 4170, 73-4175 (1901). A true and  
14 correct copy and transcription of the foregoing notice of appropriation, recorded by the  
15 Cochise County Recorder’s Office on June 24, 1905 at Misc. Book 11, pages 263-64, is  
16 attached as Exhibit 14. A true and correct copy of the contemporaneous survey of the  
17 possessory rights relating to said spring currently maintained in the Tombstone City  
18 Archives is attached hereto as Exhibit 15.

24           b.       As early as July 22, 1881 and no later than on or about the year 1883,  
25 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
26 Huachuca Water Company held vested property rights relating to Spring No. 2 in  
27 McCoy Group “situated in Miller Canyon” pursuant to local custom and the Act of July  
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1 26, 1866, 14 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use  
2 of all waters produced by said spring for beneficial purposes, as well as appurtenant and  
3 independent rights to maintain an existing pipe or flume line, to construct and maintain  
4 an additional pipeline, possession of “ground upon which the pipe or flume line is now  
5 laid . . . with so much ground and soil adjacent to said pipe or flume line as may be  
6 necessary for the use and maintenance of said flume or pipe line,” possession of an  
7 approximately five acre parcel “upon which said spring is situated,” for “cuts,  
8 Excavations [sic] or reservoirs,” and related road right of way easements. Subsequently,  
9 on July 27, 1901, “being desirous of ratifying, confirming, amending and further  
10 defining, establishing, and perfecting the aforesaid appropriation,” the Huachuca Water  
11 Company through General Agent William H. Brearley further posted notice of  
12 appropriation at the place of diversion by placing a monument and leaving a duplicate  
13 notice in a can in the monument, and contemporaneously recorded notice of the same in  
14 the Cochise County Recorder’s Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis.  
15 Assembly, Act No. 86 (April 13, 1893). A true and correct copy and transcription of the  
16 related notice of appropriation, recorded by the Cochise County Recorder’s Office on  
17 August 2, 1901 at Misc. Book 5, pages 416-17, is attached as Exhibit 16; *see also*  
18 Exhibit 13, pp. 2-4. A true and correct copy of the contemporaneous survey of the  
19 possessory rights relating to said spring currently maintained in the Tombstone City  
20 Archives is attached hereto as Exhibit 17.

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27 c. As early as July 22, 1881 and no later than on or about the year 1888,  
28 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the

1 Huachuca Water Company held vested property rights relating to Spring No. 3 and  
2 Spring No. 4 in McCoy Group “situated in Miller Canyon” pursuant to local custom and  
3 the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the  
4 beneficial use of all waters produced by said spring for beneficial purposes, as well as  
5 appurtenant and independent rights to maintain an existing pipe or flume line as well as  
6 to construct and maintain an additional pipeline, possession of “ground upon which the  
7 pipe or flume line is now laid . . . with so much ground and soil adjacent to said pipe or  
8 flume line as may be necessary for the use and maintenance of said flume or pipe line,”  
9 possession of an approximately five acre parcel “upon which said spring is situated,” for  
10 “cuts, Excavations [sic] or reservoirs,” and related road right of way easements.

11 Subsequently, on July 27, 1901, “being desirous of ratifying, confirming, amending and  
12 further defining, establishing, and perfecting the aforesaid appropriation,” the Huachuca  
13 Water Company through General Agent William H. Brearley further posted notice of  
14 appropriation at the place of diversion by placing a monument and leaving a duplicate  
15 notice in a can in the monument, and contemporaneously recorded notice of the same in  
16 the Cochise County Recorder’s Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis.  
17 Assembly, Act No. 86 (April 13, 1893). A true and correct copy and transcription of the  
18 related notice of appropriation, recorded by the Cochise County Recorder’s Office on  
19 August 2, 1901 at Misc. Book 5, pages 416-17, is attached as Exhibit 18; *see also*  
20 Exhibit 13, pp. 2-4. A true and correct copy of the contemporaneous survey of the  
21 possessory rights relating to said spring currently maintained in the Tombstone City  
22 Archives is attached hereto as Exhibit 17.

1           d.       As early as July 22, 1881 and no later than on or about the year 1888,  
2 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
3 Huachuca Water Company held vested property rights relating to Marshall Spring No. 5  
4 “situated in Marshall Canyon” pursuant to local custom and the Act of July 26, 1866, 14  
5 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use of all waters  
6 produced by said spring for beneficial purposes, as well as appurtenant and independent  
7 rights to maintain an existing pipe or flume line, to construct and maintain an additional  
8 pipeline, possession of “ground upon which the pipe or flume line is now laid . . . with  
9 so much ground and soil adjacent to said pipe or flume line as may be necessary for the  
10 use and maintenance of said flume or pipe line,” possession of an approximately five  
11 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”  
12 and related road right of way easements. Subsequently, on July 28, 1901, “being  
13 desirous of ratifying, confirming, amending and further defining, establishing, and  
14 perfecting the aforesaid appropriation,” the Huachuca Water Company through General  
15 Agent William H. Brearley further posted notice of appropriation at the place of  
16 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, 15<sup>th</sup> Legis. Assembly, Act No. 86  
19 (April 13, 1893). A true and correct copy and transcription of the related notice of  
20 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
21 Misc. Book 5, pages 417-19, is attached as Exhibit 19; *see also* Exhibit 13, pp. 2-4. A  
22 true and correct copy of the contemporaneous survey of the possessory rights relating to  
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1 said spring currently maintained in the Tombstone City Archives is attached hereto as  
2 Exhibit 20.

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4 e. As early as July 22, 1881 and no later than on or about the year 1888,  
5 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
6 Huachuca Water Company held vested property rights relating to Bench Spring No. 6  
7 “situated in Marshall Canyon” pursuant to local custom and the Act of July 26, 1866, 14  
8 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use of all waters  
9 produced by said spring for beneficial purposes, as well as appurtenant and independent  
10 rights to maintain an existing pipe or flume line, to construct and maintain an additional  
11 pipeline, possession of “ground upon which the pipe or flume line is now laid . . . with  
12 so much ground and soil adjacent to said pipe or flume line as may be necessary for the  
13 use and maintenance of said flume or pipe line,” possession of an approximately five  
14 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”  
15 and related road right of way easements. Subsequently, on July 28, 1901, “being  
16 desirous of ratifying, confirming, amending and further defining, establishing, and  
17 perfecting the aforesaid appropriation,” the Huachuca Water Company through General  
18 Agent William H. Brearley further posted notice of appropriation at the place of  
19 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, 15<sup>th</sup> Legis. Assembly, Act No. 86  
22 (April 13, 1893). A true and correct copy and transcription of the related notice of  
23 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
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1 Misc. Book 5, pages 419-20, is attached as Exhibit 21; *see also* Exhibit 13, pp. 2-4. A  
2 true and correct copy of the contemporaneous survey of the possessory rights relating to  
3 said spring currently maintained in the Tombstone City Archives is attached hereto as  
4 Exhibit 22.  
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6 f. As early as July 22, 1881 and no later than on or about the year 1888,  
7 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
8 Huachuca Water Company held vested property rights relating to Lower Auxiliary  
9 Spring No. 9, Middle Auxiliary Spring No. 8 and Upper Spring No. 7 of the Maple  
10 Group “situated in Marshall Canyon” pursuant to local custom and the Act of July 26,  
11 1866, 14 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use of  
12 all waters produced by said springs for beneficial purposes, as well as appurtenant and  
13 independent rights to maintain an existing pipe or flume line, to construct and maintain  
14 an additional pipeline, possession of “ground upon which the pipe or flume line is now  
15 laid . . . with so much ground and soil adjacent to said pipe or flume line as may be  
16 necessary for the use and maintenance of said flume or pipe line,” possession of an  
17 approximately five acre parcel “upon which said spring is situated,” for “excavations,  
18 cuts or reservoirs,” and related road right of way easements. Subsequently, on July 28,  
19 1901, the Huachuca Water Company through General Agent William H. Brearley  
20 further posted notice of appropriation at the place of diversion by placing a monument  
21 and leaving a duplicate notice in a can in the monument, and contemporaneously  
22 recorded notice of the same in the Cochise County Recorder’s Office under Ariz. Terr.  
23 Session Laws, 15<sup>th</sup> Legis. Assembly, Act No. 86 (April 13, 1893). A true and correct  
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1 copy and transcription of the related notice of appropriation, recorded by the Cochise  
2 County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 420-22, is attached  
3 as Exhibit 23; *see also* Exhibit 13, pp. 2-4. A true and correct copy of the  
4  
5 contemporaneous survey of the possessory rights relating to said spring currently  
6 maintained in the Tombstone City Archives is attached hereto as Exhibit 24.

7 g. As early as July 22, 1881 and no later than on or about the year 1890,  
8  
9 based on prior appropriation, beneficial use, and the aforesaid deeds and quit claim  
10 deeds, the Huachuca Water Company held vested property rights relating to Gird  
11 Reservoir No. 9 1/2 in Marshall Canyon pursuant to local custom and the Act of July 26,  
12 1866, 14 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use of  
13  
14 all waters produced by said spring and appurtenant and independent rights to possess  
15 and maintain the reservoir, and underlying land.

16 h. As early as July 22, 1881 and no later than on or about the year 1890,  
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18 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
19 Huachuca Water Company held vested property rights relating to Lower Spring No. 10  
20 "situated in Marshall Canyon" pursuant to local custom and the Act of July 26, 1866, 14  
21 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use of all waters  
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23 produced by said spring for beneficial purposes, as well as appurtenant and independent  
24 rights to maintain an existing pipe or flume line, to construct and maintain an additional  
25 pipeline, possession of "ground upon which the pipe or flume line is now laid . . . with  
26  
27 so much ground and soil adjacent to said pipe or flume line as may be necessary for the  
28 use and maintenance of said flume or pipe line," possession of an approximately five



1 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”  
2 and related road right of way easements. Subsequently, on July 29, 1901, “being  
3 desirous of ratifying, confirming, amending and further defining, establishing, and  
4 perfecting the aforesaid appropriation,” the Huachuca Water Company through General  
5 Agent William H. Brearley further posted notice of appropriation at the place of  
6 diversion by placing a monument and leaving a duplicate notice in a can in the  
7 monument, and contemporaneously recorded notice of the same in the Cochise County  
8 Recorder’s Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis. Assembly, Act No. 86  
9 (April 13, 1893). A true and correct copy and transcription of the related notice of  
10 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
11 Misc. Book 5, pages 422-23, is attached as Exhibit 25; *see also* Exhibit 13, pp. 2-4. A  
12 true and correct copy of the contemporaneous survey of the possessory rights relating to  
13 said spring currently maintained in the Tombstone City Archives is attached hereto as  
14 Exhibit 26.

15 i. As early as July 22, 1881 and no later than on or about the year 1888,  
16 based on prior appropriation, beneficial use, and the aforesaid quitclaim deeds, the  
17 Huachuca Water Company held vested property rights relating to Clark Spring No. 11  
18 “situated in the divide, between Miller and Carr canyons” pursuant to local custom and  
19 the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the  
20 beneficial use of all waters produced by said spring for beneficial purposes, as well as  
21 appurtenant and independent rights to maintain an existing pipe or flume line as well as  
22 to construct and maintain an additional pipeline, possession of “ground upon which the  
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1 pipe or flume line is now laid . . . with so much ground and soil adjacent to said pipe or  
2 flume line as may be necessary for the use and maintenance of said flume or pipe line,”  
3 possession of an approximately five acre parcel “upon which said spring is situated,” for  
4 “excavations, cuts or reservoirs,” and related road right of way easements. Subsequently,  
5 on July 29, 1901, “being desirous of ratifying, confirming, amending and further  
6 defining, establishing, and perfecting the aforesaid appropriation,” the Huachuca Water  
7 Company through General Agent William H. Brearley further posted notice of  
8 appropriation at the place of diversion by placing a monument and leaving a duplicate  
9 notice in a can in the monument, and contemporaneously recorded notice of the same in  
10 the Cochise County Recorder’s Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis.  
11 Assembly, Act No. 86 (April 13, 1893). A true and correct copy and transcription of the  
12 related notice of appropriation, recorded by the Cochise County Recorder’s Office on  
13 August 2, 1901 at Misc. Book 5, pages 424-25, is attached as Exhibit 27; *see also*  
14 Exhibit 13, pp. 2-4. A true and correct copy of the contemporaneous survey of the  
15 possessory rights relating to said spring currently maintained in the Tombstone City  
16 Archives is attached hereto as Exhibit 28.

21 j. As early as July 22, 1881 and no later than on or about the year 1888,  
22 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
23 Huachuca Water Company held vested property rights relating to Brearley Spring No.  
24 12 “situated in the divide, between Miller and Carr canyons” pursuant to local custom  
25 and the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661; including, but not limited to,  
26 the beneficial use of all waters produced by said spring for beneficial purposes, as well  
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1 as appurtenant and independent rights to maintain an existing pipe or flume line, to  
2 construct and maintain an additional pipeline, possession of “ground upon which the  
3 pipe or flume line is now laid . . . with so much ground and soil adjacent to said pipe or  
4 flume line as may be necessary for the use and maintenance of said flume or pipe line,”  
5 possession of an approximately five acre parcel “upon which said spring is situated,” for  
6 “excavations, cuts or reservoirs,” and related road right of way easements. Subsequently,  
7 on July 29, 1901, “being desirous of ratifying, confirming, amending and further  
8 defining, establishing, and perfecting the aforesaid appropriation,” the Huachuca Water  
9 Company through General Agent William H. Brearley further posted notice of  
10 appropriation at the place of diversion by placing a monument and leaving a duplicate  
11 notice in a can in the monument, and contemporaneously recorded notice of the same in  
12 the Cochise County Recorder’s Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis.  
13 Assembly, Act No. 86 (April 13, 1893). A true and correct copy and transcription of the  
14 related notice of appropriation, recorded by the Cochise County Recorder’s Office on  
15 August 2, 1901 at Misc. Book 5, pages 424-25, is attached as Exhibit 29; *see also*  
16 Exhibit 13, pp. 2-4. A true and correct copy of the contemporaneous survey of the  
17 possessory rights relating to said spring currently maintained in the Tombstone City  
18 Archives is attached hereto as Exhibit 28.

24 k. As early as July 22, 1881 and no later than on or about the year 1888,  
25 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
26 Huachuca Water Company held vested property rights relating to Head Spring No. 13 in  
27 Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat. 253, 43  
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1 U.S.C. § 661; including, but not limited to, the beneficial use of all waters produced by  
2 said spring for beneficial purposes, as well as appurtenant and independent rights to  
3 maintain an existing pipe or flume line, to construct and maintain an additional pipeline,  
4 possession of “ground upon which the pipe or flume line is now laid . . . with so much  
5 ground and soil adjacent to said pipe or flume line as may be necessary for the use and  
6 maintenance of said flume or pipe line,” possession of an approximately five acre parcel  
7 “upon which said spring is situated,” for “excavations, cuts or reservoirs,” and related  
8 road right of way easements. Subsequently, on July 29, 1901, “being desirous of  
9 ratifying, confirming, amending and further defining, establishing, and perfecting the  
10 aforesaid appropriation,” the Huachuca Water Company through General Agent William  
11 H. Brearley further posted notice of appropriation at the place of diversion by placing a  
12 monument and leaving a duplicate notice in a can in the monument, and  
13 contemporaneously recorded notice of the same in the Cochise County Recorder’s  
14 Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis. Assembly, Act No. 86 (April 13,  
15 1893). A true and correct copy and transcription of the related notice of appropriation,  
16 recorded by the Cochise County Recorder’s Office on August 2, 1901 at Misc. Book 5,  
17 pages 425-27, is attached as Exhibit 30; *see also* Exhibit 13, pp. 2-4. A true and correct  
18 copy of the contemporaneous survey of the possessory rights relating to said spring  
19 currently maintained in the Tombstone City Archives is attached hereto as Exhibit 31.

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25 1. As early as July 22, 1881 and no later than on or about the year 1888,  
26 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
27 Huachuca Water Company held vested property rights relating to Cabin Spring No. 14 in  
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1 Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat. 253, 43  
2 U.S.C. § 661; including, but not limited to, the beneficial use of all waters produced by  
3 said spring for beneficial purposes, as well as appurtenant and independent rights to  
4 maintain an existing pipe or flume line, to construct and maintain an additional pipeline,  
5 possession of “ground upon which the pipe or flume line is now laid . . . with so much  
6 ground and soil adjacent to said pipe or flume line as may be necessary for the use and  
7 maintenance of said flume or pipe line,” possession of an approximately five acre parcel  
8 “upon which said spring is situated,” for “excavations, cuts or reservoirs,” and related  
9 road right of way easements. Subsequently, on July 29, 1901, “being desirous of  
10 ratifying, confirming, amending and further defining, establishing, and perfecting the  
11 aforesaid appropriation,” the Huachuca Water Company through General Agent William  
12 H. Brearley further posted notice of appropriation at the place of diversion by placing a  
13 monument and leaving a duplicate notice in a can in the monument, and  
14 contemporaneously recorded notice of the same in the Cochise County Recorder’s  
15 Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis. Assembly, Act No. 86 (April 13,  
16 1893). A true and correct copy and transcription of the related notice of appropriation,  
17 recorded by the Cochise County Recorder’s Office on August 2, 1901 at Misc. Book 5,  
18 pages 427-28, is attached as Exhibit 32; *see also* Exhibit 13, pp. 2-4. A true and correct  
19 copy of the contemporaneous survey of the possessory rights relating to said spring  
20 currently maintained in the Tombstone City Archives is attached hereto as Exhibit 33.  
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27 m. As early as July 22, 1881 and no later than on or about the year 1888,  
28 based on prior appropriation, beneficial use, and aforesaid quit claim deeds, the

1 Huachuca Water Company held vested property rights relating to Cabin Auxiliary  
2 Spring No. 15 in Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14  
3 Stat. 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use of all waters  
4 produced by said spring for beneficial purposes, as well as appurtenant and independent  
5 rights to maintain an existing pipe or flume line, to construct and maintain an additional  
6 pipeline, possession of “ground upon which the pipe or flume line is now laid . . . with  
7 so much ground and soil adjacent to said pipe or flume line as may be necessary for the  
8 use and maintenance of said flume or pipe line,” possession of an approximately five  
9 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”  
10 and related road right of way easements. Subsequently, on July 29, 1901, “being  
11 desirous of ratifying, confirming, amending and further defining, establishing, and  
12 perfecting the aforesaid appropriation,” the Huachuca Water Company through General  
13 Agent William H. Brearley further 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, 15<sup>th</sup> Legis. Assembly, Act No. 86  
17 (April 13, 1893). A true and correct copy and transcription of the related notice of  
18 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
19 Misc. Book 5, pages 427-28, is attached as Exhibit 34; *see also* Exhibit 13, pp. 2-4. A  
20 true and correct copy of the contemporaneous survey of the possessory rights relating to  
21 said spring currently maintained in the Tombstone City Archives is attached hereto as  
22 Exhibit 33.

1           n.       As early as July 22, 1881 and no later than on or about the year 1888,  
2 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
3 Huachuca Water Company held vested property rights relating to Rock Spring No. 16 in  
4 Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat. 253, 43  
5 U.S.C. § 661; including, but not limited to, the beneficial use of all waters produced by  
6 said spring for beneficial purposes, as well as appurtenant and independent rights to  
7 maintain an existing pipe or flume line as well as to construct and maintain an additional  
8 pipeline, possession of “ground upon which the pipe or flume line is now laid . . . with  
9 so much ground and soil adjacent to said pipe or flume line as may be necessary for the  
10 use and maintenance of said flume or pipe line,” possession of an approximately five  
11 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs,”  
12 and related road right of way easements. Subsequently, on July 29, 1901, “being  
13 desirous of ratifying, confirming, amending and further defining, establishing, and  
14 perfecting the aforesaid appropriation,” the Huachuca Water Company through General  
15 Agent William H. Brearley further posted notice of appropriation at the place of  
16 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, 15<sup>th</sup> Legis. Assembly, Act No. 86  
19 (April 13, 1893). A true and correct copy and transcription of the related notice of  
20 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
21 Misc. Book 5, pages 428-30, is attached as Exhibit 35; *see also* Exhibit 13, pp. 2-4. A  
22 true and correct copy of the contemporaneous survey of the possessory rights relating to  
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1 said spring currently maintained in the Tombstone City Archives is attached hereto as  
2 Exhibit 36.

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4 o. As early as July 22, 1881 and no later than on or about the year 1888,  
5 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
6 Huachuca Water Company held vested property rights relating to Rock Auxiliary Spring  
7 No. 17 in Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat.  
8 253, 43 U.S.C. § 661; including, but not limited to, the beneficial use of all waters  
9 produced by said spring for beneficial purposes, as well as appurtenant and independent  
10 rights to maintain an existing pipe or flume line, to construct and maintain an additional  
11 pipeline, possession of “sufficient ground” for the pipeline, possession of an  
12 approximately five acre parcel “upon which said spring is situated,” for “excavations,  
13 cuts or reservoirs,” and related road right of way easements. Subsequently, on July 29,  
14 1901, “being desirous of ratifying, confirming, amending and further defining,  
15 establishing, and perfecting the aforesaid appropriation,” the Huachuca Water Company  
16 through General Agent William H. Brearley further posted notice of appropriation at the  
17 place of diversion by placing a monument and leaving a duplicate notice in a can in the  
18 monument, and contemporaneously recorded notice of the same in the Cochise County  
19 Recorder’s Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis. Assembly, Act No. 86  
20 (April 13, 1893). A true and correct copy and transcription of the related notice of  
21 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
22 Misc. Book 5, pages 428-30, is attached as Exhibit 37; *see also* Exhibit 13, pp. 2-4. A  
23 true and correct copy of the contemporaneous survey of the possessory rights relating to  
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1 said spring currently maintained in the Tombstone City Archives is attached hereto as  
2 Exhibit 36.

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4 p. As early as July 22, 1881 and no later than on or about the year 1888,  
5 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
6 Huachuca Water Company held vested property rights relating to Smith Spring No. 18 in  
7 Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat. 253, 43  
8 U.S.C. § 661; including, but not limited to, the beneficial use of all waters produced by  
9 said spring for beneficial purposes, as well as appurtenant and independent rights to  
10 maintain an existing pipe or flume line, to construct and maintain an additional pipeline,  
11 possession of “sufficient ground” for the pipeline, 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. Subsequently, on July 29, 1901, “being  
14 desirous of ratifying, confirming, amending and further defining, establishing, and  
15 perfecting the aforesaid appropriation,” the Huachuca Water Company through General  
16 Agent William H. Brearley further posted notice of appropriation at the place of  
17 diversion by placing a monument and leaving a duplicate notice in a can in the  
18 monument, and contemporaneously recorded notice of the same in the Cochise County  
19 Recorder’s Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis. Assembly, Act No. 86  
20 (April 13, 1893). A true and correct copy and transcription of the related notice of  
21 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
22 Misc. Book 5, pages 430-31, is attached as Exhibit 38; *see also* Exhibit 13, pp. 2-4. A  
23 true and correct copy of the contemporaneous survey of the possessory rights relating to  
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1 said spring currently maintained in the Tombstone City Archives is attached hereto as  
2 Exhibit 39.

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4 q. As early as July 22, 1881 and no later than on or about the year 1888,  
5 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
6 Huachuca Water Company held vested property rights relating to Porter Spring No. 19  
7 in Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat. 253, 43  
8 U.S.C. § 661; including, but not limited to, the beneficial use of all waters produced by  
9 said spring for beneficial purposes, as well as appurtenant and independent rights to  
10 maintain an existing pipeline, to construct and maintain an additional pipeline,  
11 possession of an approximately five acre parcel “upon which said spring is situated,” for  
12 “excavations, cuts or reservoirs,” and related road right of way easements. Subsequently,  
13 on July 29, 1901, the Huachuca Water Company through General Agent William H.  
14 Brearley further posted notice of appropriation at the place of diversion by placing a  
15 monument and leaving a duplicate notice in a can in the monument, and  
16 contemporaneously recorded notice of the same in the Cochise County Recorder’s  
17 Office under Ariz. Terr. Session Laws, 15<sup>th</sup> Legis. Assembly, Act No. 86 (April 13,  
18 1893). A true and correct copy and transcription of the related notice of appropriation,  
19 recorded by the Cochise County Recorder’s Office on August 2, 1901 at Misc. Book 5,  
20 pages 431-32, is attached as Exhibit 40; *see also* Exhibit 13, pp. 2-4. A true and correct  
21 copy of the contemporaneous survey of the possessory rights relating to said spring  
22 currently maintained in the Tombstone City Archives is attached hereto as Exhibit 41.  
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1           r.       As early as July 22, 1881 and no later than on or about the year 1888,  
2 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
3 Huachuca Water Company held vested property rights relating to O'Brien Spring No. 20  
4 in Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat. 253, 43  
5 U.S.C. § 661; including, but not limited to, the beneficial use of all waters produced by  
6 said spring for beneficial purposes, as well as appurtenant and independent rights to  
7 maintain an existing pipe or flume line, to construct and maintain an additional pipeline,  
8 possession of "sufficient ground" for the pipeline, possession of an approximately five  
9 acre parcel "upon which said spring is situated," for "excavations, cuts or reservoirs,"  
10 and related road right of way easements. Subsequently, on July 29, 1901, "being  
11 desirous of ratifying, confirming, amending and further defining, establishing, and  
12 perfecting the aforesaid appropriation," the Huachuca Water Company through General  
13 Agent William H. Brearley further 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, 15<sup>th</sup> Legis. Assembly, Act No. 86  
17 (April 13, 1893). A true and correct copy and transcription of the related notice of  
18 appropriation, recorded by the Cochise County Recorder's Office on August 2, 1901 at  
19 Misc. Book 5, pages 433-34, is attached as Exhibit 42; *see also* Exhibit 13, pp. 2-4. A  
20 true and correct copy of the contemporaneous survey of the possessory rights relating to  
21 said spring currently maintained in the Tombstone City Archives is attached hereto as  
22 Exhibit 43.

1           s.       As early as July 22, 1881 and no later than on or about the year 1888,  
2 based on prior appropriation, beneficial use, and the aforesaid quit claim deeds, the  
3 Huachuca Water Company held vested property rights relating to Storrs Spring No. 21 in  
4 Carr Canyon pursuant to local custom and the Act of July 26, 1866, 14 Stat. 253, 43  
5 U.S.C. § 661; including, but not limited to, the beneficial use of all waters produced by  
6 said spring for beneficial purposes, as well as appurtenant and independent rights to  
7 maintain an existing pipe or flume line, to construct and maintain an additional pipeline,  
8 possession of “sufficient ground” for the pipeline, possession of an approximately five  
9 acre parcel “upon which said spring is situated,” for “excavations, cuts or reservoirs”  
10 and related road right of way easements. Subsequently, on July 29, 1901, “being  
11 desirous of ratifying, confirming, amending and further defining, establishing, and  
12 perfecting the aforesaid appropriation,” the Huachuca Water Company through General  
13 Agent William H. Brearley further 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, 15<sup>th</sup> Legis. Assembly, Act No. 86  
17 (April 13, 1893). A true and correct copy and transcription of the related notice of  
18 appropriation, recorded by the Cochise County Recorder’s Office on August 2, 1901 at  
19 Misc. Book 5, pages 434-35, is attached as Exhibit 44; *see also* Exhibit 13, pp. 2-4. A  
20 true and correct copy of the contemporaneous survey of the possessory rights relating to  
21 said spring currently maintained in the Tombstone City Archives is attached hereto as  
22 Exhibit 45.

1           t.       On or about September 7, 1901, based on prior appropriation and  
2 beneficial use, posting and recordation of notice of appropriation, as well as the  
3 aforesaid quit claim deeds, the Huachuca Water Company held vested property rights  
4 relating to Quartz Spring No. 22 in Miller Canyon pursuant to local custom, Ariz. Terr.  
5 Rev. Stat. §§ 73-4168 through 4170, 73-4175 (1901), and the Act of July 26, 1866, 14  
6 Stat. 253, 43 U.S.C. § 661, including, but not limited to, the beneficial use of all waters  
7 produced by said spring for beneficial purposes, as well as appurtenant and independent  
8 rights to an existing pipeline, to construct and maintain a “flu[m]e [sic]” to a “receiving  
9 box” and then a “pipeline” to the “main leading from the Miller Canon [sic],” possession  
10 of “sufficient ground” for the pipeline, possession of an approximately five acre parcel  
11 “upon which said spring is situated,” for “excavations, cuts or reservoirs,” and related  
12 road right of way easements. The location of the spring and appurtenant and independent  
13 rights was established by Huachuca Water Company General Agent William H. Brearley  
14 posting notice of appropriation at the place of diversion, by placing a monument and  
15 leaving a duplicate notice in a can in the monument, and contemporaneous recording of  
16 the same in the Cochise County Recorder’s Office. A true and correct copy and  
17 transcription of the related notice of appropriation, recorded by the Cochise County  
18 Recorder’s Office on September 10, 1901 at Misc. Book 5, pages 463-64, is attached as  
19 Exhibit 46; Exhibit 13, pp. 2-4. A true and correct copy of the contemporaneous survey  
20 of the possessory rights relating to said spring currently maintained in the Tombstone  
21 City Archives is attached hereto as Exhibit 47.  
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1           u.       On or about June 23, 1905, based on prior appropriation and beneficial  
2 use, posting and recordation of notice of appropriation, as well as the aforesaid quit  
3 claim deeds, the Huachuca Water Company held vested property rights relating to  
4 Hoagland Spring No. 23 “situated in the divide between Marshall and Carr Canyon”  
5 pursuant to local custom, Ariz. Terr. Rev. Stat. §§ 73-4168 through 4170, 73-4175  
6 (1901), and the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661, including, but not  
7 limited to, the beneficial use of all waters produced by said spring for beneficial  
8 purposes, as well as appurtenant and independent rights for an existing pipeline to the  
9 “main reservoir of the Huachuca Water Company,” possession of “sufficient ground” for  
10 the pipeline, possession of an approximately five acre parcel “upon which said spring is  
11 situated,” for “excavations, cuts or reservoirs,” and related road right of way easements.  
12 The location of the spring and appurtenant and independent rights was established by  
13 beneficial use and possession on or about April 1, 1904 by Mr. A. Hoagland placing a  
14 monument and posting notice of appropriation at the place of diversion; additionally, on  
15 or about June 23, 1905, Huachuca Water Company General Agent A.H. Gardner posted  
16 notice of appropriation at the place of diversion, and contemporaneous recording of the  
17 same in the Cochise County Recorder’s Office. A true and correct copy and  
18 transcription of the related notice of appropriation, recorded by the Cochise County  
19 Recorder’s Office on June 24, 1905 at Misc. Book 11, pages 261-62, is attached as  
20 Exhibit 48; *see also* Exhibit 13, pp. 3-4.  
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27           20. All of the Huachuca Water Company’s water rights and right of way  
28 easements, including reservoir, siting, road and pipeline right of way easements relating

1 to Notices of Appropriation recorded during the year of 1901 were further located by  
2 specific reference to a hand drawn map of Miller, Marshall and Carr Canyons, which  
3 was recorded with the Cochise County Recorder's Office on August 2, 1901 at Book  
4 000, page 13. A genuine copy of said map is attached hereto as Exhibit 49.

6 21. After the proclamation establishing the Huachuca Forest Reserve (now known  
7 as the Coronado National Forest) in Arizona, but still long before the Arizona  
8 Wilderness Act of 1984, on or about April 27, 1908, Huachuca Water Company  
9 President A.E. Davis posted notice of appropriation at the place of diversion for Gardner  
10 Spring No. 24 in Miller Canyon and contemporaneously recorded a duplicate of the  
11 same in the Cochise County Recorder's Office. A true and correct copy and transcription  
12 of the related notice of appropriation, recorded by the Cochise County Recorder's Office  
13 on April 29, 1908 at Misc. Book 16, pages 247-49, is attached as Exhibit 50. The notice  
14 claimed property rights including, but not limited to, the beneficial use of all waters  
15 produced by said spring for beneficial purposes, as well as appurtenant and independent  
16 rights for a pipeline to the "main reservoir of the Huachuca Water Company,"  
17 possession of "sufficient ground" for the pipeline, possession of an approximately five  
18 acre parcel "upon which said springs are located," for the construction of "reservoirs,  
19 flumes, catch basins, boxes, pipes and other paraphernalia" through "excavations" and  
20 "cuts" in the land, and related road right of way easements.

25 22. The rights relating to Gardner Spring No. 24 referenced by the foregoing  
26 notice of appropriation relate back to the Huachuca Water Company's rights to all  
27 waters rising and flowing in Miller Canyon, which were obtained by quit claim deed on  
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1 July 22, 1881 in accordance with then-existing local customs and the Act of July 26,  
2 1866, 14 Stat. 253, 43 U.S.C. § 661.

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4 23. Additionally, the rights referenced in the notice of appropriation for Gardner  
5 Spring No. 24 are also among the Huachuca Water Company's vested rights pursuant to  
6 Ariz. Terr. Rev. Stat. §§ 73-4168 through 4170, 73-4175 (1901), and the Act of July 26,  
7 1866, 14 Stat. 253, 43 U.S.C. § 661, because the Organic Administration Act of 1897,  
8 30 Stat. 36, 16 U. S. C. § 481, exempts water that has been lawfully appropriated under  
9 state or federal law from reserved lands.  
10

11 24. Accordingly, on or about April 27, 1908, the rights referenced in the notice of  
12 appropriation for Gardner Spring No. 24 were among the Huachuca Water Company's  
13 "vested rights" pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661.  
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15 25. On or about March 8, 1913, based on a surveyed map showing and/or  
16 referencing the Huachuca Water Company's vested rights, the U.S. Department of the  
17 Interior issued a permit under the Act of February 15, 1901, 31 Stat. 790, to the  
18 Huachuca Water Company recognizing the Company's right to exercise its vested rights  
19 as based upon lawful perpetual right of way easements and land use easements granted  
20 by Defendant United States pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.  
21 § 661. Attached hereto as Exhibit 51 is a transcription of text granting said permit, the  
22 permit is included on the map identified as Exhibit 52; attached hereto as Exhibit 52 is a  
23 genuine copy of said map (with an approval signature of Department of the Interior  
24 Assistant Secretary Lewis C. Laylin dated March 8, 1913). The foregoing map was  
25 previously recorded by the Huachuca Water Company with the Cochise County  
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1 Recorder of Deeds on August 1, 1908 at Book 000, page 676, and subsequently recorded  
2 on January 9, 1911 and again on February 8, 1965.

3  
4 26. On November 15, 1915, the Superior Court of the State of Arizona in and for  
5 the County of Cochise entered a final judgment adjudicating a portion of the Huachuca  
6 Water Company's vested rights in the Huachuca Mountains. The case was fully and  
7 fairly litigated through bench trial between the Huachuca Water Company and J.E.  
8 Tomblinson. A true and correct copy and transcription of the related judgment is  
9 attached as Exhibit 53.  
10

11 27. In the November 24, 1915 judgment, the Court "ordered, adjudged and  
12 decreed" that the Huachuca Water Company is entitled to possession of:  
13

14 all those certain lands and premises . . . in that certain tract of land,  
15 described as follows, E ½ of W ½ of the NE ¼ of the SE ¼ of Section 23,  
16 Township 23 S., Range 20 E. Gila & Salt River Basin Meridian, in so far  
17 as it lies, and that said land and premises lieing [sic] between the main pipe  
18 line of the said Plaintiff and the lowest bed of the canyon through which  
19 said pipeline runs, said lands and premises lying to the South and West of  
20 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.

21 Exhibit 53 (emphasis added).

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

1 flowing from said springs numbered 2, 3, and 4, situate[d] on said McCoy Springs  
2 Reservoir site.” Exhibit 53.

3  
4 29. On January 27, 1917, the Superior Court of the State of Arizona in and for the  
5 County of Cochise entered a final judgment adjudicating another portion of the  
6 Huachuca Water Company’s vested rights in the Huachuca Mountains based on a jury  
7 verdict. The case was fully and fairly litigated through jury trial between the Huachuca  
8 Water Company and Joseph S. Parmerlee. A true and correct copy and transcription of  
9 the related judgment is attached as Exhibit 54.

10  
11 30. In the January 17, 1917 jury verdict supporting the January 27, 1917  
12 judgment, the jury found that the Huachuca Water Company “used the waters of Clark  
13 Springs No. 11 before the year 1910 for the purpose of supplying water for consumption  
14 by the people of Tombstone,” that the Huachuca Water Company posted notice of  
15 appropriation at Clark Springs No. 11 in July 1901, and that the Huachuca Water  
16 Company never abandoned the spring. Exhibit 54.

17  
18  
19 31. Based on the jury verdict, the Court entered a judgment finding:

20 Plaintiff is entitled to the possession [of]. . . that certain spring known as  
21 Clark Spring No. 11, situated on the divide between Miller and Carr  
22 Canyon, in the Huachuca Mountains, in the County of Cochise, State of  
23 Arizona, and also, the right of way for said pipeline leading from said  
24 Clark Spring No. 11 to the main pipe line of the plaintiff running to the  
25 City of Tombstone, and further for such lands surrounding said Clark  
26 Spring No. 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.

27 Exhibit 54.  
28

1           32. On or about April 4, 1916, in response to a March 21, 1916 letter written by  
2 the Huachuca Water Company's President regarding the status of the right of way and  
3 water rights, the Acting District Forester wrote a letter to the Huachuca Water Company  
4 stating: "[I]t is our understanding that your plant has been in operation since before the  
5 creation of the Forest and the Forest Service has recognized the existence of a right of  
6 way for your reservoir and pipelines across the Forest under sections 2339 and 2340  
7 U.S. Revised Statutes [the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661]." A  
8 genuine copy of said letters is attached hereto as Exhibit 55. Upon information and  
9 belief, numerous other letters containing similar admissions exist in Defendants' records  
10 and archives.

11           33. Upon information and belief, after February 15, 1901 and prior to December  
12 1, 1946, the Huachuca Water Company received numerous special use permits issued by  
13 Defendant U.S. Department of Agriculture Forest Service, which cumulatively and  
14 continuously recognized the Huachuca Water Company's continuous enjoyment of and  
15 entitlement to exercise its vested rights within the Huachuca Forest Reserve (now known  
16 as the Coronado National Forest), in addition to permitting additional improvements of  
17 the land possessed by the Huachuca Water Company, such as the construction of  
18 housing and fencing in the Huachuca Forest Reserve (now known as the Coronado  
19 National Forest).

20           34. By quit claim deed and bill of sale dated April 14, 1947, the Huachuca Water  
21 Company granted Tombstone all of its vested rights as well as all interests in outstanding  
22 permits. A genuine copy of said deed and bill of sale is attached hereto as Exhibit 56.  
23  
24  
25  
26  
27  
28

1           35. The recording of the foregoing 1901 and 1913 maps depicting road right of  
2 way easements in Miller and Carr Canyon, combined with the public use and affirmative  
3 acceptance of such roadways by Tombstone through the 1947 quit claim deed and bill of  
4 sale, established public highways under Arizona law granting corresponding public  
5 highway right of way easements to the City of Tombstone pursuant to the Act of July 26,  
6 1866, 14 Stat. 253, 43 U.S.C. § 661. The term “vested rights” as used with respect to  
7 Tombstone includes the public highway right of way easements granted by this Act.  
8

9           36. By acquiring the Huachuca Water Company’s municipal water system right  
10 of way easements as evidenced in its 1913 U.S. Department of Interior-approved map  
11 and the 1901 right of way easement map recorded with the Cochise County Recorder of  
12 Deeds, and receiving approval of the transfer of permits, Tombstone was granted  
13 corresponding “[r]ights of way for the construction and maintenance of dams, reservoirs,  
14 water plants, ditches, flumes, pipes, tunnels, and canals, within and across the national  
15 forests of the United States” pursuant to the Forest Right-of-Way Act of 1905, 16 U. S.  
16 C. § 524, which was then in existence. The term “vested rights” as used with respect to  
17 Tombstone includes the right of way easements created by this Act.  
18

19           37. On or about December 21, 1949, after reviewing and investigating the quit  
20 claim deed and bill of sale given to Tombstone by the Huachuca Water Company, the  
21 U.S. Department of Interior approved the transfer to Tombstone of the permit previously  
22 granted to the Huachuca Water Company on March 8, 1913, waiving future permit fees  
23 because of the use of the underlying vested rights for municipal purposes. Attached as  
24 Exhibit 57 is a genuine copy of the transfer document (Tombston482).  
25  
26  
27  
28

1           38. Upon information and belief, on or about March 16, 1948, Defendant U.S.  
2 Department of Agriculture Forest Service issued a special use permit to Tombstone  
3 allowing it to exercise all of its vested rights acquired from the Huachuca Water  
4 Company after reviewing the foregoing quit claim deed and bill of sale and  
5 independently investigating the substance of the transaction. This special use permit has  
6 only been partially superseded and remains in effect as to the remainder of its  
7 authorization.  
8  
9

10           39. During 1962, the U.S. Forest Service issued a rent-free special use permit of  
11 unlimited duration recognizing and authorizing the exercise of Tombstone's vested  
12 rights to construct, maintain and use a municipal water supply with perimeter fencing  
13 and other permanent structures around six sources on five parcels (commonly known as  
14 the Rock, Carr, Clark, Miller and Gardner Springs). This special use permit has never  
15 been revoked, suspended, modified or superseded. Attached as Exhibit 58 is a genuine  
16 copy of the foregoing 1962 permit.  
17  
18

19           40. Defendants' 1962 special use permit superseded their earlier 1948 permit only  
20 as to the uses of the identified five acre parcels, it did not supersede any other  
21 authorization contained in the 1948 permit to enjoy and exercise the vested rights  
22 obtained by Tombstone from the Huachuca Water Company.  
23

24           41. Upon information and belief, U.S. Geological Survey maps from 1949, 1962,  
25 1977 and subsequent years reference Tombstone's vested rights and evidence continued  
26 use of permanent water structures and roadways.  
27  
28

1           42. In 1977, a forest fire devastated much of the vegetation with much of the  
2 Huachuca Mountains. Mayor Marjorie Colvin declared a State of Emergency. The  
3 State of Arizona (via Governor Raul Castro) issued an emergency grant in the amount of  
4 \$50,000 in emergency funding to repair the water line at Carr, Gardner and Miller  
5 reservoirs.  
6

7           43. In 1978, the USFS District Ranger in Hereford met with representatives of  
8 Tombstone to discuss City of Tombstone rights in the Huachuca Mountains pertaining to  
9 the water line and acquiring permits to conduct repairs. Defendants allowed the repairs  
10 to be made.  
11

12           44. In 1984, the Miller Peak Wilderness Area was established, encompassing the  
13 portion of Tombstone's vested rights in the Huachuca Mountains located in the E ½ of  
14 W ½ of the NE ¼ of the SE ¼ of Section 23, Township 23 S., Range 20 E. Gila & Salt  
15 River Basin Meridian, Cochise County, State of Arizona.  
16

17           45. Nevertheless, as late as March 19, 1990, Defendants declared to Tombstone,  
18 "[t]he Coronado National Forest recognizes the prior uses of water from Miller Canyon  
19 by the City of Tombstone. We do not intend to conflict with prior water rights holders in  
20 Miller Canyon." Attached hereto as Exhibit 59 is a true and accurate copy of said letter  
21 (Tombston519).  
22

23           46. Currently, the U.S. Department of Interior Bureau of Land Management  
24 specifically recognizes on its Master Serial Register that Tombstone holds permanent  
25 right of way easements and land use easements corresponding to its vested rights and  
26  
27  
28

1 also reports continuous use of those easements. Attached hereto as Exhibit 60 is a true  
2 and accurate copy of said register (Tombston770-771).

3  
4 47. In 1993, another devastating fire in the Huachuca Mountains damaged the  
5 Tombstone waterline. Upon information and belief, Defendants allowed substantial  
6 repairs to be made to the Gardner, Miller and Carr Spring sites, including repairs and re-  
7 grading of hundreds of feet of roadway upon and along the public highway right of way  
8 easements in Miller and Carr Canyons.

9  
10 48. Between May 29, 2011 and July 26, 2011, the Monument Fire and subsequent  
11 landslides destroyed Tombstone's reservoirs and pipelines in Miller Canyon, destroyed  
12 the Clark, Brearley and Hoagland Spring areas in the "Divide", caused massive flooding  
13 in Carr Canyon disrupting nearly all springs in Carr Canyon and Head Springs  
14 Reservoir. Flooding completely obliterated Marshall Canyon, leaving only catch  
15 basin/reservoir at Maple Group Springs No. 7, 8 & 9 intact. Roads, pipelines, springs  
16 and spring sites throughout Tombstone's Huachuca Mountain municipal water system  
17 were buried under boulders, rocks, massive mudslides and other debris. Water flow from  
18 the Huachuca Mountain municipal water system was completely disrupted.

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

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

1 state and other assets and authorize the Director of the Arizona Division of Emergency  
2 Management to coordinate state assets.”

3  
4 51. On August 23, 2011, the City of Tombstone began initial contact with  
5 necessary agencies to begin emergency temporary repairs to the water line and  
6 reservoirs, to include: USFS, BLM, AZDEMA, Army Corp. Engineers, ADWR. Every  
7 agency has been fully cooperative except Defendant U.S. Department of Agriculture  
8 Forest Service which has purposely thwarted Tombstone’s attempts to repair its water  
9 pipeline.  
10

11 52. In light of the periodic disasters afflicting Tombstone’s water structures in the  
12 Huachuca Mountains and other weather events preventing Tombstone from enjoying its  
13 vested rights, it is absolutely essential to the enjoyment and exercise of the City’s vested  
14 rights that the City have sufficient autonomy to use heavy and light vehicles upon and  
15 along the road right of way easements in Carr and Miller Canyon, heavy and light  
16 mechanized equipment, as well as hand tools, to construct, rebuild and maintain water  
17 structures, flumes, dams, reservoirs, pipelines, and roadways within the scope of the  
18 City’s vested rights.  
19  
20

21 53. Tombstone’s vested rights explicitly include the right to engage in substantial  
22 ground displacement as well as to erect new permanent structures throughout its right of  
23 way easements, including the right to make cuts, excavations, ditches, flumes, dams, and  
24 reservoirs, all as appurtenant rights associated with the City’s water rights.  
25

26 54. Tombstone’s permit from Defendant U.S. Department of Interior authorizes  
27 the City to engage in substantial ground displacement, as well as to erect new permanent  
28



1 structures throughout its right of way easements, including the right to make cuts,  
2 excavations, ditches, flumes, dams, and reservoirs, all as appurtenant rights associated  
3 with the City's water rights.  
4

5 55. Tombstone's 1948 and 1962 special use permits from Defendant U.S.  
6 Department of Agriculture authorize the City to engage in substantial ground  
7 displacement as well as to erect new permanent structures throughout its right of way  
8 easements, including the right to make cuts, excavations, ditches, flumes, dams, and  
9 reservoirs, all as appurtenant rights associated with the City's water rights.  
10

11 56. In fact, prior to 1984 and as recently as October 2011, members of the public  
12 and employees of Tombstone customarily and regularly used heavy and light motorized  
13 vehicles upon and along the road right of way easements in Carr and Miller Canyon,  
14 which are included among the City's vested rights and referenced in the maps.  
15 Employees of Tombstone also customarily and regularly used heavy and light  
16 mechanized equipment, as well as hand tools, to construct, rebuild, repair and maintain  
17 water structures, flumes, dams, reservoirs, pipelines, and roadways within the scope of  
18 the City's vested rights, often involving substantial ground displacement and the erection  
19 of new permanent structures.  
20  
21  
22

23 57. During November and December 2011, Defendant U.S. Department of  
24 Agriculture repeatedly admitted that Tombstone has historically used mechanized means  
25 to access and repair its Huachuca Mountain water infrastructure in the Huachuca Forest  
26 Reserve (now known as the Coronado National Forest), both before and after that  
27 Wilderness Area was designated in 1984, including in the aftermath of natural events  
28

1 which damaged Tombstone's water infrastructure in 1977 and again in 1993. Attached  
2 hereto collectively as Exhibit 61 are genuine copies of Defendants' Minimum  
3 Requirement Decision Guide for Miller Spring No. 1 and Gardner Spring No. 24.  
4

5 58. Safe and complete repair of Tombstone's water infrastructure, which is  
6 essential to provide safe drinking water and adequate fire suppression, requires the use  
7 of a track operated John Deere JD200D excavator or equivalent throughout the land  
8 which is subject to Tombstone's vested rights. This is because the terrain has huge  
9 boulders, giant felled trees, huge piles of gravel and sand that must be moved and  
10 rearranged to rebuild a diversionary flume as a safety and protective measure to deflect  
11 future water flows from injuring workers in the area and destroying the spring  
12 catchments and access to the springs themselves. The City's water structures simply  
13 cannot be safely rebuilt or fully utilized in the future without these protective flumes in  
14 place. Otherwise, the City's water structures will be periodically destroyed by weather  
15 and flow events, depriving the City of a continuous water supply.  
16  
17  
18

19 59. Safe and complete repair of Tombstone's water infrastructure, which is  
20 essential to provide safe drinking water and adequate fire suppression, also requires a  
21 mini excavator equal to John Deere JD60 gas cutoff saw, chain saw, 4x4 pickups and  
22 flatbed trucks, 48" ATV or UTV, a generator, and hand tools at Miller Spring No. 1,  
23 McCoy Group Spring Nos. 2, 3, 4, Quartz Spring No. 22, Gardner Spring No. 24, Head  
24 Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No.  
25 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien  
26 Spring No. 20, and Storrs Spring No. 21.  
27  
28

1           60. Finally, safe and complete repair of Tombstone's water infrastructure, which  
2 is essential to provide safe drinking water and adequate fire suppression, requires use of  
3 the X85 Vermeer Cable Plow at Marshall Spring No. 5, Bench Spring No. 6, Maple  
4 Group Spring Nos. 7, 8, and 9), Gird Reservoir No. 9 ½, Lower Spring No. 10, Clark  
5 Spring No. 11, Brearley Spring No. 12, and Hoagland Spring No. 23. This is for full  
6 repair and burial of the auxiliary water lines from the City's springs to its main to protect  
7 them from future weather events.  
8  
9

10           61. Nevertheless, since October of 2011, officials of Defendant U.S. Department  
11 of Agriculture have repeatedly and continuously ordered Tombstone's employees both  
12 verbally and by electronic communication under threats of criminal prosecution to  
13 refrain from exercising its vested rights in the Huachuca Mountains by refusing to allow  
14 Tombstone to use heavy and light vehicles upon and along the road right of way  
15 easements in Carr and Miller Canyon, heavy and light mechanized equipment to  
16 construct, rebuild and maintain water structures within the scope of the City's vested  
17 rights.  
18  
19

20           62. Despite requests by Nancy Sosa in person of Defendants' representative  
21 Duane Bennett on October 3, 2011, Defendants by and through Glenn Frederick in an  
22 email communication on October 26, 2011 to City Clerk/Manager George Barnes  
23 refused to allow the construction or rebuilding of any permanent water structures, such  
24 as dams, reservoirs, or catchments at the land use and right of way easements including  
25 and surrounding Mill Spring No. 1, McCoy Group Spring Nos. 2, 3, 4, Marshall Spring  
26 No. 5, Bench Spring No. 6, Maple Group Spring Nos. 7, 8, and 9, Gird Reservoir No. 9  
27  
28

1 ½, Lower Spring No. 10, Clark Spring No. 11, Brearley Spring No. 12, Head Spring No.  
2 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock  
3 Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No.  
4 20, and Storrs Spring No. 21; Quartz Spring No. 22, Hoagland Spring No. 23, and  
5 Gardner Spring No. 24. Attached hereto as Exhibit 62 is a genuine copy of the related  
6 correspondence.  
7

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

22  
23 64. Despite requests by email from City Project Manager Kevin Rudd to  
24 Defendants' representatives Kathleen Nelson and Walter Keyes on November 29, 2011,  
25 Defendants by and through Walter Keyes in an email written to Kevin Rudd on  
26 December 2, 2011 have refused and are preventing Tombstone from building any above-  
27 grade protective flumes at the land use and right of way easements including and  
28

1 surrounding Gardner Spring No. 24. Attached hereto as Exhibit 65 is a genuine copy of  
2 the related correspondence.

3  
4 65. Despite requests by email from City Project Manager Kevin Rudd to  
5 Defendants' representative Jim Upchurch on November 14, 2011, Defendants by and  
6 through Jim Upchurch in a letter written to City Clerk/Manager George Barnes on  
7 December 1, 2011 have refused and are preventing Tombstone from building any repairs  
8 or construction at the spring head locations of Head Spring No. 13, Cabin Spring No. 14,  
9 Cabin Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17,  
10 Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring  
11 No. 21. Attached hereto as Exhibit 66 is a genuine copy of the related correspondence.  
12  
13

14 66. Despite requests by letter from George Barnes to Defendants' representative  
15 Jim Upchurch on January 13, 2012, Defendants by and through Jim Upchurch in a letter  
16 written to George Barnes on January 26, 2012 are refusing to allow any emergency  
17 repairs at the locations of Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary  
18 Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No.  
19 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs Spring No. 21, Maple  
20 Group Spring Nos. 7, 8, and 9, and Clark Spring No. 11. Attached hereto as Exhibit 67 is  
21 a genuine copy of the related correspondence.  
22  
23

24 67. Defendants by and through email from its representative Kathleen Nelson to  
25 City Project Manager Kevin Rudd on February 28, 2012 are requiring only hand tools to  
26 be used in repairs at the land use and right of way easements including and surrounding  
27 the spring sites and pipelines servicing Mill Spring No. 1, McCoy Group Spring Nos. 2,  
28

1 3, 4, Marshall Spring No. 5, Bench Spring No. 6, Maple Group Spring Nos. 7, 8, and 9,  
2 Gird Reservoir No. 9 ½, Lower Spring No. 10, Clark Spring No. 11, Brearley Spring No.  
3 12, Head Spring No. 13, Cabin Spring No. 14, Cabin Auxiliary Spring No. 15, Rock  
4 Spring No. 16, Rock Auxiliary Spring No. 17, Smith Spring No. 18, Porter Spring No.  
5 19, O'Brien Spring No. 20, and Storrs Spring No. 21; Quartz Spring No. 22, Hoagland  
6 Spring No. 23, and Gardner Spring No. 24 as of March 01, 2012. Attached hereto as  
7 Exhibit 68 is a genuine copy of the related correspondence.  
8  
9

10 68. As of March 1, 2012, Defendants will not allow the City of Tombstone free  
11 and unimpaired access to its municipal water system in the Huachuca Mountains to  
12 maintain their municipal water supply. As recently as March 25, 2012, Defendants'  
13 Forest Service employees even initially refused to allow Tombstone to use a  
14 wheelbarrow during its repair work. Defendants currently only allow non-mechanical  
15 hand tools to perform rebuilding and repair work on the City's municipal water system  
16 in Carr and Miller Canyons. This amounts to a de facto prohibition on Tombstone  
17 enjoying and exercising substantially all of its vested rights.  
18  
19

20 69. Defendants' aforesaid informal compliance orders enforce the restrictions  
21 contained in certain "special use authorization" decision memoranda issued in  
22 November and December 2011, which contain the specific statement that they are not  
23 subject to administrative review. Attached hereto as Exhibit 69 is a genuine copy of said  
24 decision memorandum. In view of these findings, it is futile for Tombstone to pursue  
25 administrative remedies because of the ongoing public health and safety emergency in  
26 which every minute of delay threatens irreparable harm, and the fact that there are little  
27  
28

1 or no material differences between the vehicles and equipment needed for the work at  
2 Gardner Springs and the work that is currently necessary throughout the land that is  
3 subject to Tombstone's vested rights.  
4

5 70. Because of Defendants' de facto prohibition on Tombstone enjoying and  
6 exercising substantially all of its vested rights, only Miller Spring No. 1, Gardner Spring  
7 No. 24 and Head Spring No. 13 are currently flowing, due to temporary repairs.  
8

9 71. Because of Defendants' de facto prohibition on Tombstone enjoying and  
10 exercising its vested rights, and the seasonal nature of the water produced by the various  
11 springs, upon information and belief, Tombstone has lost and will continue to lose peak  
12 monthly water production from springs to which it has had vested rights for well over a  
13 century.  
14

15 72. Because of Defendants' de facto prohibition on Tombstone enjoying and  
16 exercising substantially all of its vested rights, Tombstone is receiving less than a third  
17 of what water could otherwise be delivered based on historical records indicating a fully  
18 repaired municipal water system would regularly deliver 400 gallons per minute. The  
19 temporary repairs Defendants have allowed to Miller Spring No. 1 and Gardner Spring  
20 No. 24 are likely to be washed away during the first summer rainstorm, reducing the  
21 water flow by at least 80 gallons per minute. As Defendants have repeatedly admitted  
22 (*see* Exhibits 61 and 69), the lack of water from Tombstone's Huachuca Mountain  
23 sources threatens public health and safety.  
24  
25

26 73. The loss of Tombstone's Huachuca Mountain municipal water supply  
27 imminently threatens public health and safety because of the current lack of sufficient  
28

1 water supply for both consumption and fire suppression during peak demand. The  
2 imminence of the fire hazard facing Tombstone is readily apparent from the fact that in  
3 December 2010 a devastating fire broke out in Tombstone's downtown district. The  
4 entire business district could easily have been lost. The threat facing Tombstone is  
5 further heightened by the fact that, without the City's Huachuca Mountain water supply,  
6 the City cannot currently expand or modernize its water distribution system to address  
7 the imminent and ongoing fire hazard created by its all-wood construction historical  
8 district. This clear and present danger is compounded by the historically increasing  
9 arsenic contamination of the city's well-water supply, which could deprive the city of  
10 safe potable well-water sources at any time.

## 13 CLAIMS FOR RELIEF

### 14 Count I – First APA Claim

#### 15 **Defendants have Arbitrarily and Capriciously Refused to Honor Tombstone's 1962** 16 **Special Use Permit.**

17 74. Plaintiff incorporates by reference paragraphs 1 to 73 *supra*.

18 75. Defendant U.S. Department of Agriculture issued a Special Use Permit (SUP)  
19 to Tombstone on May 14, 1962, pursuant to an Act of February 15, 1901 (*see* 43 U.S.C.  
20 § 959), which authorized Tombstone, among other things, to enjoy and exercise its  
21 vested rights to use five parcels of land of 5 acres each, a strip of land 16,700 feet long  
22 and 50 feet wide on national forest land as identified on maps attached to and made a  
23 part of the SUP.  
24  
25  
26  
27  
28



1           76. The 1962 SUP was issued to Tombstone for the purpose of “[c]onstructing,  
2 maintaining and using a municipal water supply with the right of fencing the six (6)  
3 water sources. (5 parcels).” The 1962 SUP does not place any restrictions on  
4 Tombstone’s exercise and enjoyment of its vested rights that would impair the  
5 Tombstone’s vested rights of way and appurtenant and independent rights to construct  
6 needed repairs to its Huachuca Mountain Water Infrastructure in order to restore full  
7 beneficial use of its water rights using necessary equipment and vehicles, including  
8 heavy equipment and vehicles as well as mechanized equipment and vehicles.  
9

10           77. Tombstone remains fully authorized under the 1962 SUP to construct,  
11 maintain and use its municipal water system because Defendants have never suspended  
12 or revoked that permit in accordance with the procedures outlined in by 36 CFR  
13 251.60(a) and (f) (citing 36 CFR 251.54(g)(3)(ii)), or any other administrative process.  
14

15           78. Tombstone has repeatedly sought access to access, maintain, repair and  
16 restore its municipal water system and perform necessary construction with the heavy  
17 motorized and mechanized vehicles and equipment necessary to do so as is allowed  
18 under its 1962 SUP and in accordance with its vested rights.  
19

20           79. Before the Monument Fire, Defendants repeatedly and continuously allowed  
21 Tombstone to use heavy motorized and mechanized vehicles and equipment to access,  
22 maintain, repair and restore its municipal water system.  
23

24           80. Since the Monument fire, Defendants have not allowed the access sought by  
25 Tombstone to maintain, repair and restore its municipal water system using heavy  
26 motorized and mechanized vehicles and equipment that is allowed under its 1962 SUP.  
27  
28

1 As recently as March 26, 2012, Defendants have attempted to prevent even the use of  
2 wheelbarrows for such purposes. However, the limited equipment and access offered by  
3 Defendants do not meet the needs of Tombstone maintain, repair and restore its  
4 municipal water system to full use, even though the access, repairs and equipment  
5 sought by Tombstone are fully permissible under the terms of its 1962 SUP.  
6

7 81. Defendants are arbitrarily and capriciously refusing to honor its 1962 SUP  
8 and have effectively suspended or revoked the permit without following the procedures  
9 outlined in by 36 CFR 251.60(a) and (f) (citing 36 CFR 251.54(g)(3)(ii)), or any other  
10 administrative process.  
11

12 82. Available administrative processes have been exhausted or pursuing them is  
13 futile because: a) Under *Sackett v. EPA*, 2012 U.S. LEXIS 2320 \*9-11 (2012),  
14 Defendants' conduct in obstructing Tombstone's necessary repair work constitutes final  
15 administrative action because it is readily apparent from their final "special use  
16 authorization" decision that deliberations over the scope of Tombstone's 1962 special  
17 use permit have concluded; b) the issuance of the 1962 SUP, which is still in effect, was  
18 final administrative action and Defendants have no lawful authority to require  
19 Tombstone to seek further appeals from decisions interfering with the rights and  
20 privileges already authorized by its existing 1962 SUP; c) the delay associated with any  
21 additional administrative process before seeking judicial review would cause Tombstone  
22 to suffer continued irreparable harm; d) Defendants' imposition of restrictions on  
23 Tombstone's vested rights which frustrate their purpose has been so consistent and  
24 unyielding that they constitute a final administrative decision; e) Defendants' imposition  
25  
26  
27  
28

1 of restrictions on Tombstone's vested rights stem from the findings in decision  
2 memoranda that Defendants have deemed not subject to administrative appeal (Exhibits  
3 61 and 69); f) even if Defendants' refusal to honor the 1962 SUP were appealable within  
4 the agency, such an appeal would not be required under the futility exception as the  
5 appeal would go to the Regional Forester who has already adopted repeatedly refused to  
6 honor the 1962 SUP; and g) in view of Defendants' past recognitions of the validity of  
7 Tombstone's vested rights, Defendants' arbitrary and capricious denial of Tombstone's  
8 vested rights establishes that Defendants will not consider any administrative request  
9 reasonably or in good faith. Accordingly, there has been final agency action by  
10 Defendants denying Tombstone's right to access its municipal water system.

11  
12  
13  
14 83. Defendants' ongoing refusal to recognize and grant Tombstone the access it  
15 has requested to maintain, repair and restore its municipal water system violates the  
16 1962 SUP, its authorizing legislation, and Tombstone's underlying vested rights.

17  
18 84. Accordingly, Defendants' ongoing failure to authorize the access requested by  
19 Tombstone to maintain, repair and restore its municipal water system as provided for by  
20 its 1962 SUP is arbitrary, capricious and an abuse of discretion or otherwise not in  
21 accordance with law pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et  
22 seq. and Tombstone has a clear right to judicial review of such conduct.

23  
24 85. Tombstone is at imminent risk of irreparable harm from Defendants' unlawful  
25 conduct, has no adequate remedy at law, is likely to succeed on the merits, and the  
26 City's claim for preliminary and permanent injunctive relief is favored by the public  
27 interest and the balance of equities.  
28

**Count II – Second APA Claim**

**Defendants are Arbitrarily, Capriciously and Unlawfully Preempting Tombstone’s  
Emergency Police Power Exercise of its Vested Rights.**

86. Plaintiff incorporates by reference paragraphs 1 to 73 and 75 to 83, *supra*.

87. The Wilderness Act of 1964 (16 U.S.C. § 1131 et seq.) provides for the establishment of a National Wilderness Preservation System to be comprised of designated wilderness areas.

88. Under the Wilderness Act the designation of a wilderness area is expressly made “subject to existing private rights.” *Id.* at § 1131(c).

89. In October, 1976, Congress passed the Federal Land and Management Policy Act of 1976 (43 U.S.C. § 1701 et seq.; hereinafter “FLMPA”) which recognized all grants of land use rights rights-of-way prior to 1976. Section 701 of Pub. L. 94-579 provided that:

(a) Nothing in this Act [see Short Title note under this section], or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].

This provision of the Public Law was codified under 43 U.S. C. § 1761(c)(2)(A), which states:

Nothing in this subsection shall be construed as affecting any grants made by any previous Act. To the extent any such previous grant of right-of-way is a valid existing right, it shall remain in full force and effect unless an owner thereof notifies the Secretary of Agriculture that such owner elects to have a municipal water system on such right-of-way governed by the provisions of this subsection and submits a written application for issuance of an easement pursuant to this subsection, in which case upon the issuance of an easement pursuant to this subsection such previous grant shall be deemed to have been relinquished and shall terminate.

1  
2 90. On or about August 28, 1984 Congress enacted the “Arizona Wilderness Act  
3 of 1984”, 98 Stat. 1485, P.L. 98-406, §101(a)(14) of which designated the Miller Peak  
4 Wilderness Area on lands surrounding portions of Tombstone’s municipal water system,  
5 but which also required that administration of the Area was to be conducted “subject to  
6 valid existing rights.” *Id.* at § (a)(14)(b).  
7

8 91. Tombstone’s vested rights predate FLMPA, the creation of the Huachuca  
9 Federal Forest Reserve in 1906 and the designation of the Coronado National Forest in  
10 1911, which were also created subject to valid existing rights. *See* Proclamation of  
11 President Theodore Roosevelt establishing the Huachuca Forest Reserve (now known as  
12 the Coronado National Forest) in Arizona, 34 Stat. 3255 (Nov. 6, 1906) (“This  
13 proclamation will not take effect upon any lands . . . which may be covered by any  
14 prior valid claim, so long as the . . . claim exists.”).  
15  
16

17 92. Tombstone’s vested rights give it the right to access its municipal water  
18 system with heavy mechanized equipment in order to maintain, repair and restore  
19 Tombstone’s full use of that system.  
20

21 93. Both before and after the designation of the Miller Peak Wilderness Area,  
22 Tombstone has accessed, maintained, repaired and restored its municipal water system  
23 to full use with heavy motorized and mechanized equipment.  
24

25 94. Tombstone has repeatedly sought access to repair, maintain and restore its  
26 water delivery system to full use with the heavy motorized and mechanized equipment  
27 necessary to do so as allowed by its valid existing rights.  
28

1           95. To date, Defendants have not allowed Tombstone the access it seeks to  
2 maintain, repair and restore its municipal water system to full use under its vested  
3 existing rights but instead the Defendants has engaged in extended negotiations, site  
4 visits, and lengthy delays, including ongoing offers as to the limited equipment and  
5 access that it will allow to restore the use of Tombstone's water supply.  
6

7           96. The limited equipment and access offered by the Defendants to date do not  
8 meet the needs of Tombstone to maintain, repair and restore its municipal water system  
9 to full use even though the access and equipment sought to be used by Tombstone is  
10 fully permissible under Tombstone's valid existing rights.  
11

12           97. Despite the fact that Tombstone's valid existing rights predate the creation of  
13 the Miller Peak Wilderness Area, Defendants are currently regulating Tombstone's  
14 rights to access its municipal water system to maintain repair and restore to that system  
15 to full use as though such access were subject to the Wilderness Act.  
16

17           98. But when the Governor of Arizona declares a state of emergency, as she has  
18 done here, she has exercised "all police power vested in the state by the constitution and  
19 laws of this state" in order to alleviate the underlying disaster or extreme peril. A.R.S. §§  
20 26-301(15), 26-303(E). This gubernatorial proclamation gives Tombstone concurrent  
21 police power jurisdiction to repair its water infrastructure in accordance with its vested  
22 rights.  
23

24           99. Additionally, by denying Tombstone access to its Huachuca Mountain water  
25 supply, Defendants are forcing Tombstone to disregard the State of Arizona's declared  
26  
27  
28

1 public policy and laws against utilizing groundwater sources when reasonable  
2 alternatives are available, which is set out in A.R.S. § 45-401, *et seq.*

3  
4 100. In preventing Tombstone from exercising power and jurisdiction to repair its  
5 water infrastructure in accordance with its vested rights, Defendants are acting as if  
6 Congress gave them the power to preempt the state's police powers with respect to a  
7 political subdivision's exercise of vested rights during a grave public health and safety  
8 emergency.  
9

10 101. There is no express preemption clause in the Wilderness Act, FLMPA or any  
11 other federal law giving Defendants any regulatory authority to justify their conduct.  
12

13 102. In view of the federalism interests protected by the Tenth Amendment,  
14 implied preemption of Arizona's police powers in exercising Tombstone's vesting rights  
15 cannot be presumed. To the contrary, if at all possible, the Wilderness Act of 1964,  
16 FLMPA and the Arizona Wilderness Act of 1984, and any other federal law relied upon  
17 by Defendants, if any, should be construed to accommodate the sovereign state interests  
18 at issue in this case, rather than to displace them.  
19

20 103. In light of the principle of state sovereignty at issue in this case, the  
21 foregoing clauses of the Wilderness Act of 1964, FLMPA and the Arizona Wilderness  
22 Act of 1984 must be construed as intended by Congress as jurisdictional limitations on  
23 the scope of Defendants' regulatory authority as against Tombstone's exercise of  
24 previously vested rights.  
25

26 104. The foregoing clauses of the Wilderness Act of 1964, FLMPA and the  
27 Arizona Wilderness Act of 1984 must be construed as intended by Congress to bar  
28

1 Defendants from invoking the Wilderness Act of 1964, FLMPA and the Arizona  
2 Wilderness Act of 1984 as authority for preempting Tombstone's emergency police  
3 power exercise of its vested rights.  
4

5 105. Because Tombstone has been denied the access it requests to safely  
6 maintain, repair and restore its municipal water system to full use despite an existing  
7 SUP and any further administrative review would be futile, there has been final agency  
8 action by Defendants denying Tombstone's existing rights to access its municipal water  
9 system in order to maintain, repair and restore its full use.  
10

11 106. Defendants' ongoing failure to grant Tombstone the access it has requested  
12 to maintain, repair and restore the full use of its municipal water system pursuant to its  
13 vested rights violates both the Wilderness Act of 1964 and the Arizona Wilderness Act  
14 of 1984.  
15

16 107. Accordingly, Defendants' ongoing failure to authorize the access requested  
17 by Tombstone to maintain, repair and restore the full use of its municipal water system is  
18 arbitrary, capricious and an abuse of discretion or otherwise not in accordance with law  
19 pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq. and Tombstone has  
20 a clear right to judicial review of such conduct.  
21

22 108. Tombstone has suffered or is likely to suffer irreparable harm from  
23 Defendants' unlawful conduct, has no adequate remedy at law, is likely to succeed on  
24 the merits, and the City's claim for preliminary and permanent injunctive relief is  
25 favored by the public interest and the balance of equities.  
26  
27  
28



**Count III – Third APA Claim**

**Even If Tombstone’s Vested Rights are Subject to Regulation, Defendants are Regulating Tombstone Arbitrarily, Capriciously and Unlawfully.**

109. Plaintiff incorporates by reference paragraphs 1 to 73, 75 to 83, 87 to 91, and 98 to 102, *supra*.

110. Both before and after the designation of the Miller Peak Wilderness Area, Tombstone has accessed, maintained, repaired and restored the use of its municipal water system with heavy motorized and mechanized equipment.

111. Tombstone’s vested right of access to maintain, repair and restore the use of its municipal water system was expressly recognized in Defendants’ 1962 Special Use Permit and was a valid existing right at the time of the designation of the Miller Peak Wilderness Area and remains so today.

112. Assuming *arguendo* that the “subject to existing rights” clauses contained in the Wilderness Act of 1964 and the Arizona Wilderness Act of 1984 are not jurisdictional limitations and that Tombstone’s vested rights are subject to reasonable regulation by Defendants under the Wilderness Act, 16 U.S.C. § 1531 et seq., then Tombstone’s rights to access, maintain, repair and restore the use of its municipal water system remain affirmatively protected by two grandfathering provisions of that Act.

113. 16 U.S.C. § 1134(a) of the Wilderness Act guarantees that where a state or private owner’s property interest is surrounded by a wilderness area, the owner shall be given “such rights as may be necessary to assure adequate access to such State-owned or

1 privately owned land by such State or private owner and their successors in interest.” 16  
 2 U.S.C. §1134(a).

3  
 4 114. Additionally, 16 U.S.C. § 1134(b) of the Wilderness Act provides that  
 5 Defendants shall, by reasonable regulation, “permit ingress and egress to such  
 6 surrounded areas by means which have been or are being customarily enjoyed with  
 7 respect to other such areas similarly situated.”

8  
 9 115. In recognition that § 1134 (a) and (b) of the Wilderness Act provide  
 10 Tombstone with “adequate access” and such ingress and egress as it has “customarily  
 11 enjoyed” to its pre-existing municipal water system that is now surrounded by  
 12 wilderness, the Forest Service Manual 2300, Chapter 20 “Wilderness Management” §  
 13 2323.43d “Existing Water Development Structures” states that:  
 14

15 If needed and in the public interest or part of a valid existing right, permit  
 16 maintenance or reconstruction of existing structures that does not change  
 17 the location, size, or type, or which would not increase the storage capacity  
 18 of the reservoir. Structures include reservoirs, ditches and related facilities  
 19 for the control or use of water that were under valid special use permit or  
 20 other authority when the area involved was incorporated under the  
 21 Wilderness Act . . . .

22 Do not permit the use of motorized equipment and mechanized  
 23 transportation for maintenance of water-development structures *except*  
 24 *were practiced before the area was designated wilderness . . . .*

25 Emphasis added.

26 116. Defendants has made no determination that allowing Tombstone full  
 27 motorized and mechanized access to maintain, repair and restore the full use of its  
 28 municipal water facility is not “needed and in the public interest” and given the

1 circumstances facing the citizens of Tombstone, such a determination cannot be  
2 reasonably made.

3  
4 117. Especially in view of the significant federalism interests at issue in this case,  
5 § 1134 (a) and (b) should be construed as entitling Tombstone to access to its  
6 surrounded municipal water system with the heavy motorized and mechanized  
7 equipment as it has customarily done in order to maintain, repair and restore that system  
8 to full use.

9  
10 118. As set forth above, Tombstone has repeatedly sought adequate access to  
11 maintain, repair and restore its municipal water system to full use with heavy motorized  
12 and mechanized equipment as it has done in the past and as is allowed by the Wilderness  
13 Act such circumstances.

14  
15 119. To date, Defendants have denied Tombstone the access it seeks to maintain  
16 repair, and restore its municipal water system to full use as is allowed to Tombstone  
17 under the Wilderness Act.

18  
19 120. The limited equipment and access offered by Defendants to date do not meet  
20 the needs of Tombstone to repair, maintain and restore its municipal water system to full  
21 use even though the access equipment sought by Tombstone is fully grandfathered and  
22 permissible under the Wilderness Act as is recognized by the Forest Service's own  
23 manual provision set forth above.

24  
25 121. Because Tombstone has been denied the reasonable access it requests to  
26 maintain, repair and restore its municipal water system to full use and any further  
27  
28

1 administrative review would be futile, there has been final agency action by Defendants  
2 denying Tombstone's right to access its municipal water system.

3  
4 122. Defendants' ongoing refusal to grant Tombstone the access it has requested  
5 to maintain, repair and restore its municipal water system to full use pursuant to its valid  
6 existing rights violates the Wilderness Act of 1964 and the Arizona Wilderness Act of  
7 1984.

8  
9 123. Accordingly, Defendants' ongoing failure to authorize the access requested  
10 by Tombstone to maintain, repair and restore its municipal water system to full use is  
11 arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law  
12 pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq. and Tombstone has  
13 a clear right to judicial review of such conduct.

14  
15 124. Tombstone has suffered or is likely to suffer irreparable harm from  
16 Defendants' unlawful conduct, has no adequate remedy at law, is likely to succeed on  
17 the merits, and the City's claim for preliminary and permanent injunctive relief is  
18 favored by the public interest and the balance of equities.

19  
20 **Count IV – Quiet Title**

21 125. Plaintiff incorporates by reference paragraphs 1 to 73 and 87 to 91, *supra*.

22  
23 126. Tombstone holds title to the beneficial use of water and appurtenant and  
24 independent road, siting, water structure, canal, pipeline, flume, ditch, construction,  
25 maintenance, and excavation right of way easements relating to 25 springs in the  
26 Huachuca Mountains pursuant to the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661.  
27  
28

1           127. Additionally or alternatively, Tombstone holds title to public highway right  
2 of way easements corresponding to the dimensions of the appurtenant and independent  
3 road right of way easements relating to said 25 springs pursuant to the Act of July 26,  
4 1866, 14 Stat. 253, 43 U.S.C. § 661.  
5

6           128. Additionally or alternatively, Tombstone holds title to right of way  
7 easements for the construction and maintenance of dams, reservoirs, water plants,  
8 ditches, flumes, pipes, and canals corresponding to the dimensions of the appurtenant  
9 and independent siting, water structure, canal, pipeline, flume, ditch, construction,  
10 maintenance, and excavation right of way easements relating to said 25 springs pursuant  
11 to the Forest Right-of-Way Act of 1905, 16 U. S. C. § 524.  
12  
13

14           129. Tombstone's foregoing right of way easements have been duly recorded  
15 pursuant to A.R.S. § 33-411.01 and are protected property interests under A.R.S. § 33-  
16 401.  
17

18           130. Tombstone's foregoing water rights are protected under A.R.S. § 45-171,  
19 and either are exempted from registry and further adjudication or related statements of  
20 claim have been registered in accordance with A.R.S. § 45-182, and related statements  
21 of claimant have been filed in accordance with A.R.S. § 45-254.  
22

23           131. Based on the final judgments entered by the Superior Court of the State of  
24 Arizona in and for the County of Cochise during 1915 and 1917, which were fully and  
25 fairly litigated with actual contemporaneous notice to Defendants, principles of  
26 federalism and comity warrant the conclusion that: a) Tombstone's vested property  
27 rights as they pertain to the City's municipal water system structures, pipeline and  
28

1 related right of way easements; and b) Tombstone's title to the beneficial use of the  
 2 waters flowing from McCoy Group Springs No. 2, 3 and 4, and Clark Spring No. 11.

3  
 4 132. To the extent that any right of way utilized by Tombstone for its municipal  
 5 water supply is not an express easement, Plaintiff has prescriptively acquired a  
 6 corresponding non-possessory interest in land, specifically the right of use, pursuant to  
 7 the laws of the State of Arizona. *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 208, 818 P.2d  
 8 190, 193 (App. 1991)

9  
 10 133. Defendants are interfering with Tombstone's previously described vested  
 11 rights and by their interference they are clouding title to Tombstone's vested rights.

12  
 13 134. The Court should quiet title to Tombstone's vested rights as against  
 14 Defendants by declaring their validity and granting a permanent injunction barring  
 15 Defendants from interfering with them because Tombstone has suffered or is likely to  
 16 suffer irreparable harm from the cloud of title created by Defendants' conduct and has  
 17 no adequate remedy at law to clear the cloud on title, and the City's claim for permanent  
 18 injunctive relief is favored by the public interest and the balance of equities.

#### 19 20 **Count V – Tenth Amendment Claim**

21 **Defendants' Interference with Tombstone's Emergency Police Power Exercise of its**  
 22 **Vested Rights Violates the Principle of State Sovereignty Guaranteed by the Tenth**  
 23 **Amendment.**

24 135. Plaintiff incorporates by reference paragraphs 1 to 73 and 98 to 100 supra.

25 136. The principle of state sovereignty limits the scope of federal power under the  
 26 Tenth Amendment to the U.S. Constitution. *Bond v. United States*, 131 S. Ct. 2355  
 27 (2011) ("Impermissible interference with state sovereignty is not within the enumerated  
 28

1 powers of the National Government, and action that exceeds the National Government's  
2 enumerated powers undermines the sovereign interests of States").

3  
4 137. The principle of state sovereignty guarantees sufficient autonomy to the  
5 states and political subdivisions of the states, including Plaintiff, from the federal  
6 government so that they can exercise traditionally reserved powers that are essential to  
7 their sovereign existence. *Printz v. U.S.*, 521 U.S. 898, 923-24, 932 (1997).

8  
9 138. Tombstone's acquisition, maintenance, and enjoyment of water rights and  
10 appurtenant and independent property rights within the Coronado National Forest for the  
11 benefit of its residents is an exercise of traditionally reserved powers that is essential to  
12 its sovereign existence as a political subdivision of the State of Arizona because public  
13 health and safety within Plaintiff's jurisdictional limits cannot otherwise be adequately  
14 protected and its own physical existence cannot otherwise be sustained.

15  
16 139. Defendants' regulatory interference with Tombstone's emergency police  
17 power exercise of its vested rights violates the principle of state sovereignty as  
18 guaranteed by the Tenth Amendment to the U.S. Constitution and Tombstone has a clear  
19 right to judicial review of such conduct.

20  
21 140. Tombstone has suffered or is likely to suffer irreparable harm from  
22 Defendants' unlawful conduct, has no adequate remedy at law, is likely to succeed on  
23 the merits, and the City's claim for preliminary and permanent injunctive relief is  
24 favored by the public interest and the balance of equities.  
25  
26  
27  
28

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiff City of Tombstone requests:

1. This court declare, adjudge, and decree under the Declaratory Judgment Act, 28 U.S.C. § 220 and 15 U.S. C. §§ 701, 702 and 704 that Defendants' interference with Tombstone's vested rights under Arizona law, the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and/or the Forest Right-of-Way Act of 1905, 16 U. S. C. § 524, in refusing to allow Tombstone to repair its Huachuca Mountain Water Infrastructure and restore full rightful beneficial use of its water rights using necessary equipment and vehicles, including heavy equipment and vehicles as well as mechanized equipment and vehicles, is arbitrary, capricious, an abuse of discretion and/or unlawful.

2. This court declare, adjudge, and decree under the Declaratory Judgment Act, 28 U.S.C. § 220 and 15 U.S. C. §§ 701, 702 and 704, and the Quiet Title Act, 28 U.S.C. § 2409a, that Plaintiff holds the previously described vested rights in property as against Defendants under Arizona law, the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and/or the Forest Right-of-Way Act of 1905, 16 U. S. C. § 524, as shown on the surveys of the attached 1901 and 1913 recorded maps, as well as the 1962 SUP and surveys of the individual spring and reservoir sites.

3. This court declare, adjudge, and decree under the Declaratory Judgment Act, 28 U.S.C. § 2201 that Defendants' interference with Tombstone's vested rights under Arizona law, the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and/or the Forest Right-of-Way Act of 1905, 16 U. S. C. § 524, in refusing to allow Tombstone to repair its Huachuca Mountain Water Infrastructure and restore full rightful beneficial use of its



1 water rights using necessary equipment and vehicles, including heavy equipment and  
 2 vehicles as well as mechanized equipment and vehicles, violates the principle of state  
 3 sovereignty guaranteed by the Tenth Amendment to the U.S. Constitution.  
 4

5 4. That this court preliminarily and/or permanently enjoin the Defendants, their  
 6 agents, employees, successors, and all persons acting in concert or participating with  
 7 them under their direction, from interfering with Tombstone's vested rights under  
 8 Arizona law, the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 and/or the Forest  
 9 Right-of-Way Act of 1905, 16 U. S. C. § 524, to repair its Huachuca Mountain Water  
 10 Infrastructure and restore full rightful beneficial use of its water rights using necessary  
 11 equipment and vehicles, including heavy equipment and vehicles as well as mechanized  
 12 equipment and vehicles as follows:  
 13  
 14

- 15 • the use of a track-operated John Deere JD200D excavator or equivalent, as  
 16 needed, throughout Tombstone's spring locations, land use and right of way in  
 17 the Huachuca Mountains to restore previous improvements as shown on the  
 18 surveys of the attached 1901 and 1913 recorded maps, as well as the 1962  
 SUP and surveys of the individual spring and reservoir sites;
- 19 • a mini excavator equal to John Deere JD60 gas cutoff saw, chain saw, 4x4  
 20 pickups and flatbed trucks, 48" ATV or UTV, a generator, and hand tools at  
 21 Miller Spring No. 1, McCoy Group Spring Nos. 2, 3, 4, Quartz Spring No. 22,  
 22 Gardner Spring No. 24, Head Spring No. 13, Cabin Spring No. 14, Cabin  
 23 Auxiliary Spring No. 15, Rock Spring No. 16, Rock Auxiliary Spring No. 17,  
 24 Smith Spring No. 18, Porter Spring No. 19, O'Brien Spring No. 20, and Storrs  
 Spring No. 21 to restore previous improvements as shown on the surveys of  
 the attached 1901 and 1913 recorded maps, as well as the 1962 SUP and  
 surveys of the individual spring and reservoir sites; and
- 25 • use of an X85 Vermeer Cable Plow at Marshall Spring No. 5, Bench Spring  
 26 No. 6, Maple Group Spring Nos. 7, 8, and 9, Gird Reservoir No. 9 ½, Lower  
 27 Spring No. 10, Clark Spring No. 11, Brearley Spring No. 12, and Hoagland  
 28 Spring No. 23 to bury pipelines along rights of way shown on the surveys of

1 the attached 1901 and 1913 recorded maps, as well as the 1962 SUP and  
2 surveys of the individual spring and reservoir sites.

3  
4 5. That, if the Court determines that additional permits or modified permits are  
5 required to allow Tombstone to repair its Huachuca Mountain Water Infrastructure and  
6 restore full rightful beneficial use of its water rights using necessary equipment and  
7 vehicles, including heavy equipment and vehicles as well as mechanized equipment and  
8 vehicles, that this Court order Defendants to immediately issue the necessary or  
9 modified permits under its emergency jurisdiction without unreasonable restrictions  
10 imposed by, or interference from, the Defendants, their agents, employees, successors,  
11 and all persons acting in concert or participating with them under their direction.  
12

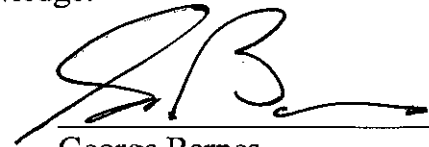
13  
14 6. Grant such other relief as this Court deems appropriate, including the award of  
15 attorneys' fees, litigation expenses and costs against Defendants as provided by  
16 applicable law.  
17

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

19 s/Nicholas C. Dranias  
20 Nicholas C. Dranias (330033)  
21 **GOLDWATER INSTITUTE**  
22 **SCHARF-NORTON CENTER FOR**  
23 **CONSTITUTIONAL LITIGATION**  
24 500 E. Coronado Rd.  
25 Phoenix, AZ 85004  
26 P: (602) 462-5000/F: (602) 256-7045  
27 [ndranias@goldwaterinstitute.org](mailto:ndranias@goldwaterinstitute.org)  
28

**VERIFICATION**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

A handwritten signature in black ink, appearing to read 'GB', is written over a horizontal line.

George Barnes  
City Clerk/Manager  
City of Tombstone

Executed this 30th day of March, 2012.

**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>	
<p>Attorneys for Plaintiff</p> <p>P. Randall Bays, Esq. Bays Law, P.C. 100 S. 7th Street Sierra Vista, AZ 85635</p>	<p>Attorneys for Defendants</p> <p>ANN BIRMINGHAM SCHEEL ACTING UNITED STATES ATTORNEY District of Arizona CHARLES A. DAVIS Assistant U.S. Attorney Arizona State Bar No. 014386 405 W. Congress, Suite 4800 Tucson, Arizona 85701-5040 Telephone: (520) 620-7300 <a href="mailto:charles.davis2@usdoj.gov">charles.davis2@usdoj.gov</a></p>
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s/Nicholas C. Dranias

**City of Tombstone v. United States of America, et al**  
**Case No: 11-845-TUC-FRZ**

**Appendix Table of Contents**

**Exhibit**

**Description**

1	Genuine copy of July 22, 1881 deed from James McCoy (Tombston381-87)
2	Genuine copy of July 8, 1881 quit claim deed from John W. Campbell (Tombston400-01)
3	Genuine copy of June 28, 1881 quit claim deed from Benjamin Rinehart and David C. Field (Tombston415-417)
4	Genuine copy of February 25, 1881 deed from Richard Gird (Tombston389)
5	Genuine copy of February 9, 1881 deed from Levi J. Gird (Tombston404-05)
6	Genuine copy of November 16, 1881 lease agreement from A.H. Emanuel and C.H. Light (Tombston431)
7	Genuine copy of February 21, 1883 quit claim deed from James McCoy (Tombston392-93)
8	Genuine copy of March 27, 1882 quit claim deed from Henry Hollenstein (Tombston396-97)
9	Genuine copy of September 6, 1881 deed from J. Lindsey and O.D. Merrill (Tombston426-29)
10	Deeds from James McCoy, dated July 22, 1881 and February 21, 1883, recorded by the Cochise County Recorder on Noveber 24, 1888 (Tombston381-386)
11	Genuine copy of April 13, 1890 opinion letter from attorney Col. William Herring to the Arizona Territorial Legislature (Tombston419-22)
12	Genuine copy of September 9, 1881 franchise ordinance (Tombston424-25)
13	Genuine copy of the February 15, 1906 Deposition of William H. Brearley
14	A true and correct copy and transcription of the notice of appropriation for Miller Spring No. 1 (also known as "Main Spring No. 1"), recorded by the Cochise County Recorder's Office on June 24, 1905 at Misc. Book 11, pages 263-64
15	A true and correct copy of the contemporaneous survey of the possessory rights relating to Miller Spring No. 1 (also known as "Main Spring No. 1") currently maintained in the Tombstone City Archives
16	A true and correct copy and transcription of the notice of appropriation for Spring No. 2 in McCoy Group, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 416-17
17	A true and correct copy of the contemporaneous survey of the possessory rights relating to Spring No. 2 in McCoy Group currently maintained in the Tombstone City Archives
18	A true and correct copy and transcription of the notice of appropriation for Spring No. 3 and Spring No. 4 in McCoy Group, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 416-17
19	A true and correct copy and transcription of the notice of appropriation for Marshall Spring No. 5, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 417-19

20	A true and correct copy of the contemporaneous survey of the possessory rights relating to Marshall Spring No. 5 currently maintained in the Tombstone City Archives
21	A true and correct copy and transcription of the notice of appropriation for Bench Spring No. 6 , recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 419-20
22	A true and correct copy of the contemporaneous survey of the possessory rights relating to Bench Spring No.6 currently maintained in the Tombstone City Archives
23	A true and correct copy and transcription of the notice of appropriation for Lower Auxiliary Spring No. 9, Middle Auxiliary Spring No. 8 and Upper Spring No. 7 of the Maple Group, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 420-22
24	A true and correct copy of the contemporaneous survey of the possessory rights relating to Lower Auxiliary Spring No. 9, Middle Auxiliary Spring No. 8 and Upper Spring No. 7 of the Maple Group currently maintained in the Tombstone City Archives
25	A true and correct copy and transcription of the notice of appropriation for Lower Spring No. 10, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 422-23
26	A true and correct copy of the contemporaneous survey of the possessory rights relating to Lower Spring No. 10 currently maintained in the Tombstone City Archives
27	A true and correct copy and transcription of the notice of appropriation for Clark Spring No. 11 , recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 424-25
28	A true and correct copy of the contemporaneous survey of the possessory rights relating to Clark Spring No. 11 currently maintained in the Tombstone City Archives
29	A true and correct copy and transcription of the notice of appropriation for Brearley Spring No. 12, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 424-25
30	A true and correct copy and transcription of the notice of appropriation for Head Spring No. 13 , recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 425-27
31	A true and correct copy of the contemporaneous survey of the possessory rights relating to Head Spring No. 13 currently maintained in the Tombstone City Archives
32	A true and correct copy and transcription of the notice of appropriation for Cabin Spring No. 14, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 427-28
33	A true and correct copy of the contemporaneous survey of the possessory rights relating to Cabin Spring No. 14 currently maintained in the Tombstone City Archives
34	A true and correct copy and transcription of the notice of appropriation for Cabin Auxiliary Spring No. 15, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 427-28
35	A true and correct copy and transcription of the notice of appropriation for Rock Spring No. 16, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 428-30

36	A true and correct copy of the contemporaneous survey of the possessory rights relating to Rock Spring No. 16 currently maintained in the Tombstone City Archives
37	A true and correct copy and transcription of the notice of appropriation for Rock Auxiliary Spring No. 17, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 428-30
38	A true and correct copy and transcription of the notice of appropriation for Smith Spring No. 18, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 430-31
39	A true and correct copy of the contemporaneous survey of the possessory rights relating to Smith Spring No. 18 currently maintained in the Tombstone City Archives
40	A true and correct copy and transcription of the notice of appropriation for Porter Spring No. 19, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 431-32
41	A true and correct copy of the contemporaneous survey of the possessory rights relating to Porter Spring No. 19 currently maintained in the Tombstone City Archives
42	A true and correct copy and transcription of the notice of appropriation for O'Brien Spring No. 20, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 433-34
43	A true and correct copy of the contemporaneous survey of the possessory rights relating to O'Brien Spring No. 20 currently maintained in the Tombstone City Archives
44	A true and correct copy and transcription of the notice of appropriation for Storrs Spring No. 21, recorded by the Cochise County Recorder's Office on August 2, 1901 at Misc. Book 5, pages 434-35
45	A true and correct copy of the contemporaneous survey of the possessory rights relating to Storrs Spring No. 21 currently maintained in the Tombstone City Archives
46	A true and correct copy and transcription of the notice of appropriation for Quartz Spring No. 22, recorded by the Cochise County Recorder's Office on September 10, 1901 at Misc. Book 5, pages 463-64
47	A true and correct copy of the contemporaneous survey of the possessory rights relating to Quartz Spring No. 22 currently maintained in the Tombstone City Archives
48	A true and correct copy and transcription of the notice of appropriation for Hoagland Spring No. 23, recorded by the Cochise County Recorder's Office on June 24, 1905 at Misc. Book 11, pages 261-62
49	Genuine copy of hand drawn map of Miller, Marshall and Carr Canyons, which was recorded with the Cochise County Recorder's Office on August 2, 1901 at Book 000, page 13
50	A true and correct copy and transcription of the notice of appropriation for Gardner Spring No. 24, recorded by the Cochise County Recorder's Office on April 29, 1908 at Misc. Book 16, pages 247-49
51	Transcription of text granting March 8, 1913 permit issued by the U.S. Department of the Interior, under the Act of February 15, 1901, 31 Stat. 790, to the Huachuca Water Company



52	Genuine copy of March 8, 1913 survey map (with an approval signature of Department of the Interior Assistant Secretary Lewis C. Laylin dated March 8, 1913).
53	A true and correct copy and transcription of the November 24, 1915 judgment
54	A true and correct copy and transcription of the January 27, 1917 judgment
55	Genuine copy of April 4, 1916 letter from Acting District Forester to the Huachuca Water Company
56	Genuine copy of April 14, 1947 quit claim deed and bill of sale where Huachuca Water Company granted Tombstone all of its vested rights as well as all interests in outstanding permits
57	Genuine copy of December 21, 1949 transfer document approved by the U.S. Department of Interior
58	Genuine copy of the 1962 rent-free special use permit issued to Tombstone by the U.S. Forest Service
59	A true and accurate copy of the March 19, 1990 register from Forest Supervisor, James Abbott
60	A true and accurate copy of the U.S. Department of Interior Bureau of Land Management Master Serial Register
61	Genuine copies of Defendants' Minimum Requirement Decision Guide for Miller Spring No. 1 and Gardner Spring No. 24.
62	Genuine copy of Glenn Frederick email communication, dated October 26, 2011, to City Clerk/Manager George Barnes
63	Genuine copy of George Barnes' December 5, 2011 correspondence to Jim Upchurch, U.S. Forest Supervisor
64	Genuine copy of Jim Upchurch's December 7, 2011 correspondence to George Barnes, City Manager
65	Genuine copy of email correspondence between City Project Manager Kevin Rudd and Defendants' representatives Kathleen Nelson and Walter Keyes , dated November 29, 2011 and December 2, 2011
66	Genuine copy of Jim Upchurch's December 1, 2011 correspondence to George Barnes, City Clerk/Manager
67	Genuine copy of Jim Upchurch's January 26, 2012 correspondence to George Barnes, City Clerk/Manager
68	Genuine copy of email correspondence between representative Kathleen Nelson to City Project Manager Kevin Rudd, dated February 28, 2012
69	Genuine copy of December 22, 2011 decision memorandum written by the Coronado National Forest Supervisor pertaining to Gardner Springs No. 24