Case No. 12-16172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF TOMBSTONE;
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity); TOM TIDWELL (in his official capacity); CORBIN NEWMAN (in his official capacity);
Defendants-Appellees.

REPLY IN SUPPORT OF 9th CIR. R. 27-3 EMERGENCY MOTION FOR INJUNCTION PENDING INTERLOCUTORY APPEAL

Appeal from the United States District Court for the State of Arizona
Case No. 4:11-CV-00845-FRZ, Hon. Frank Zapata, presiding

Tombstone's Huachuca Mountain water supply is life to its 1,562 residents. It is also life to Southeastern Arizona during wildfire season. Astoundingly, Defendants are still refusing to allow Tombstone to freely and fully restore its Huachuca Mountain water system: (a) six years after arsenic contamination left just one of Tombstone's wells producing safe potable water, (b) sixteen months after a fire at Six Gun City nearly burned Tombstone's historic downtown to the ground, (c) nine months after the Monument Fire's denuding of forests caused

monsoon flooding to destroy the water system, (d) three weeks after wildfires have returned to the Huachuca Mountains, (e) in the midst of peak seasonal demand for potable water, and (f) just one month before monsoon season returns. Defendants are setting up Tombstone and Southeastern Arizona for a repeat of the Six Gun City and Monument Fire disasters—or worse.

This is not how decent human beings treat each other. It is not how federal law requires Defendants to behave. It is not how federal officers must treat a political subdivision of the State of Arizona under the Tenth Amendment. For these reasons, Tombstone's entitlement to an injunction is indisputably clear.[1]

Rebuttal Argument

Leaving aside their starkly different account of interactions between the parties (*compare* Def. Resp. 6-7 *with* App. 142-45, 154-55), Defendants fail to squarely grapple with the fact that completing repairs to Tombstone's water system requires nothing more than what they already approved during the first week of November 2011 with respect to Miller Spring. It requires usual and customary work that mirrors what has been repeatedly done for decades with Defendants'

[1] The Quiet Title Act does not bar the requested relief. Officer suits for unconstitutional actions are barred only where allowing the suit to proceed would have the substantive effect of permanently clouding United States' title after the statute of limitations specified in the Act has expired. *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 285 (1983). This narrow judicially-created expansion of sovereign immunity has no applicability to a *timely* officer suit for *temporary* injunctive relief, even if it incidentally affects federal property interests.

knowing acquiescence. *Compare* App. 503-04, 517-20 *with* 155-56, 162-68, 465, 612-36.

Defendants' newfound claim that nine months of administrative review have been necessary for mandatory interagency consultations is a mere pretext. As a matter of law, no agency action requiring consultation is triggered if the Forest Service yields to Tombstone exercising its rights under the 1866 Mining Act. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1111 (9th Cir. 2005). The fact that Defendants now pretend that interagency consultations are required only proves their bad faith and the futility of exhausting administrative remedies. Tombstone's only practicable option is to request emergency injunctive relief.[2]

I. The Certainty of Irreparable Harm is Indisputable.

All of the ingredients are currently in the mix for a repeat of the Six Gun City and Monument Fire disasters—or worse. Peak potable water consumption indisputably occurs during May. App. 529(¶10). At this time, Tombstone residents

[2] It is impracticable to require Tombstone to first present this motion to the district court. Requiring Tombstone to do so would only cause the very irreparable harm that this motion seeks to avoid. No case cited by Defendants for the contrary proposition deals with circumstances in which every day of delay in affording the requested relief undermines public health and safety. Nor does any such case involve a record in which the district court previously denied two requests for temporary injunctive relief after months of briefings and deliberations—even going so far as to bar the moving party from filing a reply brief. Under these circumstances, and given the lower court's erroneous reliance on sovereign immunity to justify its ruling, there is no reason to believe the third time would be the charm.

and visitors regularly use all of the potable water from Tombstone's one remaining safe and fully operational well. App. 527(¶5). If that well breaks down, there will not be enough water flowing from the Huachuca Mountains to furnish potable water for more than a few days—much less to address the tinderbox conditions that exist in Tombstone's historic downtown. App. 529-30, 561-63. At the same time, Tombstone is located in a region that is presently subject to an extremely high wildfire risk. App. 27, 38. Wildfires are already starting to burn in the Huachuca Mountains. App. 27(¶14). Denying Tombstone the ability to fully restore its municipal water system thus threatens not only Tombstone, but the entire region because the system is needed for wildfire suppression efforts—as ironically evidenced by the Forest Service's own use of the system during the Monument Fire. App. 27(¶16), 156-57(¶20).

Nevertheless, Defendants contend that the threat to public health and safety is speculative because Tombstone's three operating springs are supposedly delivering roughly the same amount of water reported in a handful of public records from decades ago. Leaving aside obvious foundational problems that preclude assigning any probative value to such evidence, this is a completely specious argument. Defendants know full well that not all of Tombstone's mountain spring water sources are flowing. Their own crimped reading of Tombstone's 1962 special use permit admits that Tombstone has a right to draw

from *six*, not merely *three*, mountain spring sources. Def. Resp. 9. Moreover, Defendants advanced more recent evidence stating Tombstone's mountain spring flows reach 400 gallons per minute between December and July, not the current 100 to 150 gallons per minute. *Compare* Def. Resp. 20 n.10 *with* App. 638; *see also* 218(¶72), 530. Furthermore, Defendants cannot reasonably deny that Tombstone currently faces an imminent threat to human life and property of equal or greater magnitude than the threat the town faced when Defendants approved temporary repairs to Gardner Spring in December 2011. App. 456-74. This is because it is undisputed that those repairs will be washed away in the impending monsoons. App. 142(¶6), 213(¶58), 215-16(¶64), 504(¶9). Thus, unless the requested relief is granted, Tombstone will soon find itself facing the same water shortage that Defendants repeatedly and consistently described as a grave threat to public health and safety. App. 465, 467, 471-72.

Especially in a dry year, conscientious public officials should recognize that Tombstone needs to permanently restore every water source it owns for truly adequate fire suppression capacity and potable water. Given that Tombstone has the undisputed right to the beneficial use of *six* springs and the clearly documented right to all waters rising and flowing from *twenty-five* springs and the surrounding canyons under the 1866 Mining Act (App. 576-608), a reasonable level of public health and safety is being denied *every day* that Defendants force the town to rely

upon only *three* mountain spring water catchments—one of which is soon to be washed away. Defendants' commandeering of Tombstone's water system indisputably poses a greater and more certain threat to public health and safety than secondhand smoke in a bar, which was held to cause sufficient irreparable harm to warrant preliminary injunctive relief in *Taverns for Tots, Inc. v. City of Toledo*, 307 F. Supp. 2d 933, 945 (N.D. Ohio 2004).

II. The Public Interest and Equities Favor an Injunction Pending Appeal.

Defendants advance no competent evidence of any actual conflict between the requested relief and any public interest or equity. Their asserted environmental interest in obstructing Tombstone's restoration work is entirely abstract. In fact, just as they sandbagged Tombstone's restoration work, Defendants have frivolously resisted Freedom of Information Act requests seeking proof of their environmental claims. App. 40-42. Such behavior, in combination with the absence of any significant record evidence of Defendants' environmental claims, tends to confirm that the Monument Fire and subsequent flooding substantially destroyed the ecosystem that previously existed in the Huachuca Mountains.[3] App. 505-06(¶12). In substance, Defendants are seeking to elevate the preservation of a *moonscape* over Tombstone's paramount public health and safety interest.

[3] Even if the Huachuca Mountain ecosystem is reviving, the available evidence from Fish and Wildlife indicates that heavy construction is routinely approved near spotted owl habitats, including nesting sites. App. 44-45.

Apart from its unsupported environmental claims, Defendants completely evade the argument that national policy and federal law actually favor the requested relief. Most significantly, Defendants do not deny or even address the fact that the Forest Service expressly recognized the existence of rights of way for Tombstone's municipal water system under the 1866 Mining Act *in 1916*. App. 414.

Despite such evasion, it should not be forgotten that Tombstone's water system predates all legal authority claimed by Defendants to justify their behavior. Moreover, the federal laws, regulations and guidelines at issue in this case are expressly made "subject" to Tombstone's 1866 Mining Act rights and customary exercises of those rights. Pla. Mot. 18-19. There is also an undisputed national policy requiring deference to state sovereignty with respect to water ownership and development. *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978). In view of this national policy and the foregoing savings clauses protecting Tombstone's 1866 Mining Act rights, it is readily apparent that federal law must be construed to accommodate, rather than somehow to impliedly preempt, the town's concurrent police power jurisdiction to restore its water supply. *Compare Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976), *with Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1987 (2011); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). For this reason, the public interest and equities favor the requested relief.

III. Tombstone's Tenth Amendment Claim Raises Serious Questions.

Defendants want to reduce the Tenth Amendment to a meaningless tautology by arguing that limitless power was delegated to the federal government under the Property Clause and therefore the Tenth Amendment reserves nothing to the States to limit that power. But *Alden v. Maine*, 527 U.S. 706, 713-14 (1999), very clearly ruled that the background principles of the Constitution preclude construing *any* federal power as entailing the power to threaten the continued existence of the States. In *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011), the Court *unanimously* reiterated the Constitution's assumption that *all* federal powers are limited by the principle of state sovereignty. There is no going back to the contrary dicta of *Kleppe* because there is no such thing as limitless federal power.

Furthermore, *Reno v. Condon*, 528 U.S. 141 (2000), does not in any way preclude Tombstone's Tenth Amendment claim. *Reno* certainly does not embrace *Garcia*'s core holding that the political process affords states their sole remedy for violations of the Tenth Amendment. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554-55 (1985). Instead, *Reno* ruled that a federal law does not facially violate the Tenth Amendment when it applies to both private and public entities "acting purely as commercial sellers" and "suppliers to the market for motor vehicle information." *Reno*, 528 U.S. at 150 n.3, 151. This ruling has nothing to do with Tombstone's Tenth Amendment claim.

Rather than facially attacking federal law, this case challenges the unconstitutional and sustained misapplication of federal law by Defendants to frustrate Tombstone's ability to exist as an autonomous political subdivision of the State of Arizona. Because Tombstone is a fire prone desert town with a history of close calls with disaster, Defendants' commandeering of the town's water system threatens both Tombstone's very existence as a political subdivision of the State of Arizona *and* the State's sovereign right to maintain the existence of its political subdivisions. This existential threat undermines the Constitution's assumption of the "states' continued existence." *Alden,* 527 U.S. at 713-14. The federal law at issue in *Reno* posed no such immediate existential threat to South Carolina.

Furthermore, unlike the law at issue in *Reno*, Defendants' conduct plainly violates the constitutional principles enforced in *Printz v. United States*, 521 U.S. 898, 920 (1997), and also passes the three prong unconstitutionality test[4] of *National League of Cities v. Usery*, 426 U.S. 833, 852-54 (1976). Unlike the commercial activity at issue in *Reno*, Tombstone's maintenance of a municipal water system to provide adequate potable water and fire suppression capability is at the core of the sovereign powers reserved to a political subdivision of the State. *Brush v. Commissioner*, 300 U.S. 352, 370-73 (1937). Contrary to Defendants'

[4] There is no "fourth" prong. Whether the relation of state and federal interests is such that the nature of the federal interest justifies state submission is the *ultimate issue* that an application of the three prong test tries to determine.

claim that they are only regulating federal lands, the Forest Service recognized that the federal government did not own Tombstone's water system or the underlying rights of way *in 1916*. App. 414. Additionally, in seeking to restore its water system, Tombstone has been specifically charged to exercise the State's concurrent police power jurisdiction over federal lands under a declared State of Emergency.[5] Defendants' conduct thus regulates Tombstone when it is acting in a purely sovereign capacity with respect to sovereign property that is essential to protecting public health and safety *and* also within the scope of the town's concurrent sovereign jurisdiction. If words mean anything, such conduct (a) regulates "states as states," (b) concerns essential attributes of state sovereignty, and (c) impairs governmental functions traditionally assigned to the States; thus easily passing *National League of Cities*' test of unconstitutionality. It also *literally* violates the first principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz*, 521 U.S. at 920. The same is not true about the federal law challenged in *Reno*.

Reno thus does not deflect the serious questions raised by Tombstone's Tenth Amendment claim. Significantly, Defendants make no other effort to

[5] Defendants misconstrue Arizona law in contending that the State of Emergency declared by Governor Brewer only authorized a $50,000 grant to the City. The purpose of authorizing the grant as part of a declared State of Emergency was to authorize the restoration of Tombstone's water supply using "all police power vested in the state." Ariz. Rev. Stat. § 26-303(E).

harmonize *Garcia* with current federalism precedent. It simply cannot be done. By contrast, only the three prong test of *National League of Cities* easily harmonizes all of the Supreme Court's federalism jurisprudence since 1989. Tombstone was not the first one to notice. *Massachusetts v. Sebelius*, 698 F.Supp.2d 234, 252 n.154 (E.D. Mass. 2010) ("'the traditional government functions' analysis [is]. . . appropriate in light of more recent Supreme Court cases"). Whether the three prong test of *National League of Cities* is regarded as revived by logical implication or through *New York*'s citation to *Hodel*, it should be recognized as controlling. *New York v. United States*, 505 U.S. 144, 160, 166 (1992) (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)); *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997)). For this reason, Tombstone's Tenth Amendment claim raises serious questions going to the merits, which warrants the requested relief.

RESPECTFULLY SUBMITTED on this 29th day of May, 2012 by:

s/Nicholas C. Dranias
Nicholas C. Drnias
Christina Sandefur
GOLDWATER INSTITUTE
Scharf-Norton Ctr. for Const. Gov't
500 E. Coronado Rd.
Phoenix, AZ 85004
P: (602) 462-5000/F: (602) 256-7045
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

THE ATTACHED FILING HAS BEEN ELECTRONICALLY FILED BY ECF and COPIES, have been served upon the persons identified with email addresses in the following Service List via e-mail this 29th day of May, 2012.

s/Nicholas C. Dranias

SERVICE LIST
Attorneys for Defendants, UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity as the Chief Forester of the USDA Forest Service); TOM TIDWELL (in his official capacity as Regional Forester for the Southwestern Region of the U.S. Forest Service); and CORBIN NEWMAN (in his official capacity as Regional Forester for the Southwestern Region of the U.S. Forest Service) David C. Shilton Appellate Section, Environment & Natural Resources Division, U.S. Dept. of Justice, P.O. Box 7415 Washington, D.C. 20044 Phone: (202) 514-5580 David.Shilton@usdoj.gov Charles A. Davis Assistant U.S. Attorney Arizona State Bar No. 014386 405 W. Congress, Suite 4800 Tucson, Arizona 85701-5040 Phone: (520) 620-7300 charles.davis2@usdoj.gov Joanna K. Brinkman US Dept. of Justice – Environmental Enforcement Section P.O. Box 7611 Ben Franklin Station Washington, DC 20044-7611 Phone: (202) 305-0476 joanna.brinkman@usdoj.gov