IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Tombstone, City of, Plaintiff, v. United States of America, et al., Defendants.	No. CV-11-00845-TUC-FRZ **ORDER**

Pending before the Court is Defendants' Motion for Summary Judgment on Jurisdictional Grounds [Doc. 152] ("Motion"). Plaintiff has filed Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. 171] ("Response") and Defendants have filed Defendants' Reply Brief in Support of Motion for Summary Judgment on Jurisdictional Grounds [Doc. 182] ("Reply"). Plaintiff filed a motion requesting leave to file a sur-reply [Doc. 185], Defendants responded [Doc. 188] and Plaintiff has filed its reply [Doc. 189]. The Court has reviewed the materials submitted by the parties and is fully apprised.[1] As more fully set forth below, the Court will deny Plaintiff's request to file a sur-reply as the Court will not consider the one (1) additional piece of evidence submitted by Defendants in their Reply that prompted Plaintiff's request to file a sur-reply. The Court will also grant Defendants' Motion concluding that it is without jurisdiction to hear this matter.

[1] Tombstone's request for oral argument (submitted in its motion for leave to file a sur-reply [*see* Doc. 185 at p. 4]), is denied as the Court determines that the parties have had an adequate opportunity to discuss the law and evidence. *See Lake at La Vegas Investors Group v. Pa. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

Introduction

At issue is whether this Court has jurisdiction to determine whether Plaintiff, the City of Tombstone ("Plaintiff" or "Tombstone"), is the holder of certain rights-of-way used to convey water across United States Forest Service land to Tombstone.[2] On December 28, 2011, Tombstone filed a 131 page[3] Verified Second Amended Complaint asserting eight (8) claims for relief: Four claims (Counts I-IV) seeking to quiet title under the Quiet Title Act, 28 U.S.C. §2409a (the "QTA"), three claims (Counts V-VII) alleging violations of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. (the "APA"), and a final claim (Count VIII) alleging a violation of the Tenth Amendment to the United States Constitution. *See* Doc. 135. Defendants have moved for entry of summary judgment in their favor on all of Tombstone's claims arguing that this Court is without jurisdiction to determine the merits of the claims alleged in Tombstone's Verified Second Amended Complaint. *See* Doc. 152. Whether this Court has jurisdiction to determine Tombstone's claim to use the alleged rights-of-way requires the Court to primarily conduct an examination into matters of legal interpretation and historical fact. The Court begins with a very brief overview of the legislation under which Tombstone claims to have acquired its claimed rights-of-way, The Act of 1866, followed by a discussion of evidentiary issues and the facts. The Court concludes its Order with a decision on the merits of Defendants' Motion.

The Act of 1866

The American West is a looming space, and the history of its pioneers' tangled relationship with Washington bureaucrats, and the resulting animosity, still looms large. *Kane County Utah v. Salazar*, 562 F.3d 1077, 1092 (10th Cir. 2009) (C.J. Henry, concurring). Central to this dispute is legislation passed by Congress in 1866, just after

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[2] Nothing in the Court's opinion is to be construed as adjudicating Plaintiff's right to use the water that is conveyed via the alleged rights-of-way that are at issue in this case.

[3] (exclusive of exhibits)

the Civil War, before many parts of the West had even begun to be settled. *See* Act of July 26, 1866, c. 262, 14 Stat. 251, 253. The Act of 1866 was a "general mining law," but Section 9, also known as R.S. 2339, contained a general grant of rights-of-way to those holding a water right, without restriction on the use made of the water. R.S. 2340 is a related right-of-way provision to the "primitive legislation" known as the Act of 1866. *See Utah Power Light Company v. United States*, 249 U.S. 389, n.6, 37 S.Ct. 387, 61 L.Ed. 791 (1917) ("…§§ 2339 and 2340 of the Revised Statues, originally enacted in 1866 [14 Stat. at L. 253, chap. 262, §9] and 1870 [19 Stat. at L. 218, chap. 235, § 17, Comp. Stat. 1918, §§4647, 4648]. By them the right of way over the public lands was granted for ditches, canals, and reservoirs used in diverting, storing, and carrying water for 'mining, agriculture, manufacturing, or other purposes.' The extent of the right of way in point of width or area was not stated, and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record. Obviously this legislation was primitive…")

Section 8, also known as R.S. 2477, was an open-ended grant of "the right of way for the construction of highways over public lands, not reserved for public uses." *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005) (quoting Act of July 26, 1866 ch. 262, § 8, 14 Stat. 251, 253, *codified at* 43 U.S.C. § 932, repealed by Federal Land Policy Management Act of 1976 (FLPMA), Pb.L. No. 94-579 706(a), 90 Stat. 2743). The Act of 1866 remained in effect for 110 years and most of the transportation routes of the West were established under the authority of R.S. 2477. *Id.* In 1976, however, Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation. *Id.* at 741.

In its Verified Second Amended Complaint Tombstone primarily seeks to quiet title to alleged rights-of-way purportedly granted to its predecessor in interest, the Huachuca Water Company, under R.S. 2339, R.S. 2340 and R.S. 2477.

…

Evidentiary Issues

Relevance and Rule 105

The Court concludes that the dispositive facts are, in large part, not genuinely in dispute. Despite advancing lengthy and quite verbose[4] objections to certain of Defendants' statements of fact, Tombstone actually admits the very statements of fact that it seemingly objects to arguing that the Court can only consider the subject facts for purposes of Tombstone's claim (and not for purposes of Defendants' defense). Tombstone argues that the facts set forth by Defendant are not relevant to proving Defendants' defenses in addition to relying upon Federal Rule of Evidence 105. *See e.g.*, Doc. 172 at ¶ 2 ("This objection is based on relevance … their admissibility should be limited pursuant to Fed. R. Evid. 105 to the purpose of proving that Defendants have, in fact, continuously recognized, rather than disputed and clouded, Plaintiff's title to the subject RS2339/2340/2477 rights; and subject to such evidentiary limitation, Plaintiff admits … paragraph 2.") Tombstone fails to cite any case law in support of its novel application of Federal Rule of Evidence 105 and the Court concludes that Tombstone's reliance on Rule 105 is misplaced.

Federal Rule of Evidence 105 only applies, by its very terms, to evidence received in a jury trial. *See* Fed.R.Evid. 105 ("If the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.") (Underlying added.) In reaching the conclusion that Rule 105 is inapplicable here, the Court notes that Rule 105 assists in advancing the purpose of Rule 403, Fed.R.Evid., which is designed to guard against unfair prejudice to a party. *See* Fed.R.Evid. 105, advisory committee note ("A close relationship exists between this rule and Rule 403 which requires exclusion when 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' The

[4] For example, Tombstone's objection to Defendants' statement of fact number 2 is four (4) pages in length. *See* Plaintiff's Objections, Responses, and Statement of Controverting Facts in Opposition to Defendants' Separate Statement of Facts [Doc. 172] at pp. 4-8.

present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403.")

Here, at the summary judgment stage, the Court is required to consider all relevant and otherwise admissible evidence to determine whether there is a genuine issue of material fact for trial. *See Montoya v. Orange County Sherriff's Dept.*, 987 F.Supp.2d 981, 994 (C.D.Cal. 2013) (Objections based on Rule 401 (relevance) and Rule 403 are inapplicable at the summary judgment stage. Summary judgment can be granted "only when there is no genuine dispute of material fact. It cannot rely on irrelevant facts, and thus relevance objections are redundant." *Burch v. Regents of Univ. Cal.*, 433 F.Supp.2d 1110, 1119 (E.D.Cal. 2006). While the court may consider the plaintiff's views on whether the defendant's evidence is relevant, it need not exclude evidence at the summary judgment stage for danger of unfair prejudice, confusion of the issues, or any other grounds outlined in Rule 403.) Tombstone's objections to Defendants' statements of fact based on relevance are overruled. Likewise, the Court will not consider evidence for a limited purpose at this stage. The Court will deem Defendants' statements of fact nos. ¶¶ 2-3, 5-37, 42-43, 46, 54, 63, 65 and 68-70 undisputed. *See* Doc. 185 at p. 5 at ll. 20-21 (wherein Tombstone sets forth the statements of fact that it objects to on relevance grounds and those for which Tombstone seeks "restricted admission").

Admissibility of Maps

Tombstone has lodged an objection to certain maps submitted by Defendants. Tombstone argues the maps are hearsay and that Defendants have not made a showing that the maps "ordinarily, accurately and/or completely depict the subject RS2339/RS2340/RS2477 rights." *See e.g.*, Doc. 172 at p. 5. The Court notes that the maps submitted by Defendants largely indicate that they were prepared by some branch or division of the federal government or Cochise County, Arizona, by an official, in the regular course of duty, who presumably has no motive to state anything but the truth. As such, the Court concludes the maps submitted by Defendants are admissible. *See Bost v.*

United States, 103 F.2d 717, 721 (9th Cir. 1939) (printed maps prepared by the United States Department of Agriculture Forest Service and United States Geological Survey were admissible to show nonexistence of topographic features alleged by defendant to exist); *United States v. Romaine*, 255 F. 253, 254, 255 (9th Cir. 1919) (maps made by the United States Coast and Geodetic Survey that were disregarded by the trial court should have been given full credence … the court might properly take judicial notice of the accuracy of the official plats of the United States Coast and Geodetic Survey). *See also, Long v. U.S.*, 59 F.2d 602, 603 (4th Cir. 1932) (admitting records prepared by the government under the residual exception to the hearsay rule[5] noting that the records satisfied the "necessity and circumstantial guaranty of trustworthiness" requirements). The Court will consider the maps submitted by Defendants.

Authentication and Ancient Documents

Tombstone has objected to a number of documents submitted by Defendants on the grounds of inadequate authentication. *See e.g.*, Doc. 172 at p. 16, ll. 10-11 (objecting to Defendants' exhibit 19 – a letter from the United States Department of Interior authored in 1940 - based on relevance and authenticity). Defendants' objection based upon relevance is overruled as discussed above. *See Montoya*, 987 F.Supp.2d at 994 (objections based on Rule 401 are inapplicable at the summary judgment stage). As mentioned above, this matter calls upon the Court to consider, *inter alia*, matters of historical fact. After conducting an examination of the evidence, the Court determines that most, if not all, of the documents relevant to the jurisdictional issue before the Court are ancient documents. Rule 901(b)(8), Fed.R.Evid., provides that ancient documents are authenticated when they (A) are in a condition that creates no suspicion about their authenticity; (B) were in a place where, if authentic, they would likely be; and (C) are at least 20 years old when offered. *See* Fed.R.Evid. 901(b)(8). Plaintiff has failed to put forth any specific facts that call into question the authenticity of the documents proffered by Defendants. The Court notes that Plaintiff has also presented a number of ancient

[5] (now, Rule 807, Fed.R.Evid.)

documents for this Court's consideration. The Court will consider the ancient documents[6] that have been put forth by both parties.

Hearsay and Ancient Documents

To the extent any of the ancient documents are alleged to contain hearsay, the Court determines that any such hearsay is admissible under Rule 803(16), Fed.R.Evid., (which sets forth as a specific exception to the hearsay rule statements contained in ancient documents). To the extent Tombstone has lodged an objection based upon hearsay within hearsay the Court concludes that any double hearsay is admissible after application of both Rules 803(16), Fed.R.Evid., and 807, Fed.R.Evid. Rule 803(16), Fed.R.Evid., provides, in relevant part:

> The following are not excluded by the rule against hearsay regardless of whether the declarant is unavailable as a witness: … [a] statement in a document that is at least 20 years old and whose authenticity is established.

See Fed.R.Evid. 803(16). Rule 803(16) clearly provides for the admissibility of any hearsay contained within the ancient documents submitted in this case.

Rule 805 governs the admissibility of hearsay within hearsay and provides that hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule. *See* Rule 805, Fed.R.Evid. Rule 807, Fed.R.Evid., is the residual exception to the rule against the admissibility of hearsay. Rule 807, Fed.R.Evid., provides that a hearsay statement is not excluded by the rule against hearsay where the statement has circumstantial guarantees of trustworthiness, is offered as evidence of a material fact, is more probative on the point for which it is offered than other evidence that the proponent can obtain, and admitting the statement will best serve the purposes of the Rules of Evidence. *See* Fed.R.Evid. 807.

The Court notes that the ancient documents presented to the Court were prepared by either a government official[7], an attorney writing on behalf of the Huachuca Water

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[6] (that the Court deems relevant to the jurisdictional issue before it)

[7] (for example, an individual from the United States Department of the Interior)

Company or the City of Tombstone, an individual within the Division of Watershed Management, or the Forest Supervisor. *See e.g.*, Doc. 153 at Ex. 14 (letter written on Department of the Interior letterhead dated 1913); Ex. 18 (letter authored by attorney for the Huachuca Water Company dated 1940); Ex. 25 (letter authored by attorney for the City of Tombstone dated 1949); Ex. 26 (memorandum authored by the director of the Division of Watershed Management dated 1961); and Ex. 30 (letter authored by United States Forest Supervisor dated 1962). The Court concludes that based upon the characteristics, contents, and the purported authors of the documents, the documents bear a sufficient guarantee of trustworthiness to be admissible under the residual exception to the hearsay rule. *See Long, supra*, 59 F.2d at 603 (admitting records prepared by the government under the residual exception to the hearsay rule noting that the records satisfied the "necessity and circumstantial guaranty of trustworthiness" requirements). Having already determined that Rule 803(16), Fed.R.Evid., allows for the admissibility of any hearsay contained within in the ancient documents, the Court further concludes that Rule 807, Fed.R.Evid., allows for the admissibility of any double hearsay that may be contained within the ancient documents.

To the extent a party has lodged an evidentiary objection that was not discussed above, the objection is overruled to the extent the Court relies on the objected-to evidence in issuing this Order. The Court now turns to the facts.

The Facts

The Huachuca Forest Reserve (reserved public lands) was established on November 6, 1906, by Presidential Proclamation. On March 4, 1907, the Huachuca Forest Reserve became the Huachuca National Forest. The Huachuca National Forest was combined with the Boboquivari and Tumacacori National Forests to establish the Garces National Forest and the Dragoon, Santa Catalina and Santa Rita Reserves were combined to establish the Coronado National Forest by Executive Order on July 2, 1908. On April 21, 1910, certain lands within the Territory of Arizona were added to and eliminated from the Garces National Forest by Presidential Proclamation. On July 1, 1910, certain lands within the Territory of Arizona were transferred from, added to and eliminated from the

Coronado National Forest by Presidential Proclamation. On April 17, 1911, the Garces National Forest was added to the Coronado National Forest by Presidential Proclamation.

Tombstone claims the right to access 25 natural springs located in sections 10, 11, 14, 15, 22, 23 and 26, T. 23, S., R. 20 E., G. & S. R. M., AZ. Doc. 153 at ¶¶2, 3. The lands upon which Tombstone claims its R.S. 2339, R.S. 2340, and R.S. 2477 rights-of-way are all located within the boundaries of the Coronado National Forest (originally designated the Huachuca Forest Reserve by virtue of the November 6, 1906 Proclamation of President Roosevelt). Doc. 172 at ¶229. Generally speaking, the lands in the general area of the 25 springs to which the City of Tombstone is asserting rights, title, and interest within T. 23 S., R. 20 E., have been in federal ownership since the Gadsden Treaty in 1853, commonly known as the Gadsden Purchase, as amended and ratified by the United States Senate and approved by the Presidents of Mexico and the United States in 1854. Doc. 153 at ¶3.

The "Transfer Act of February 1, 1905" authorized the transfer of the Forest Reserves from the Department of the Interior, General Land Office, to the Department of Agriculture, Bureau of Forestry. *Id*. at ¶4. Section 1 of the Act provided that "The Secretary of the Department of Agriculture shall, from and after the passage of this Act, execute or cause to be executed all laws affecting public lands heretofore reserved under the provisions of section twenty four of the Act entitled 'An Act to repeal the timber-culture laws, and for other purpose,' approved March third, eighteen hundred and ninety-one, and Acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands." *Id*.

On April 6, 1908, the U.S Forester recognized that the Huachuca Water Company had a right of way under R.S. 2339 and R.S. 2340 for its reservoir and pipe line. Doc. 172 at ¶87. On January 29, 1909, the Acting Forest Supervisor for the Garces National Forest issued a "Special Use Permit" to the Huachuca Water Company to use "approximately 2800 feet" of National Forest System land "five feet on each side of

pipe" for the purpose "of connecting Gardner Spring with the main pipe line." Doc. 153 at ¶7. On February 28, 1913, the General Land Office (GLO) Commissioner recommended, in regards to the Huachuca Water Company's 1908 application to the Secretary of the Interior for a right of way permit under the authority of the Act of February 15, 1901, that "permission be granted it to use the right of way for reservoirs and pipelines shown on the map herewith submitted, and that your signature be affixed to the endorsement of the map to this effect." The recommendation states that the right of way is located in Tps. 20, 21, 22, and 23 E., R. 21 E., G. and S. R. B. and M., Phoenix land district, Arizona" and "the lands affected are not within the limits of any government reservation nor has it been withdrawn for any purpose." Doc. 153 at ¶8. On March 8, 1913, the Assistant Secretary of the Interior approved the GLO Commissioner's February 28, 1913 recommendation to grant permission to the Huachuca Water Company to use the right of way across unreserved public lands. The Secretary of the Interior affixed his signature to the recommendation and to the endorsement on the map. *Id*. at ¶9. On August 11, 1915, the GLO Assistant Commissioner in the Washington Office instructed the Register and Receiver at the U.S. Land Office in Phoenix, AZ to cancel the notation of the extension of the right of way permit granted to the Huachuca Water Company on March 8, 1913 over National Forest System lands on the township tract books under the provision of the Act of February 15, 1901. The GLO Assistant Commissioner stated:

> While the company showed the location of its pipe lines and certain reservoirs in T. 23 S., R. 20 E., on the map filed in this office, inasmuch as said township is included in the boundaries of a national forest, the permit granted by the Department on March 8, 1913, would not affect such lands, inasmuch as the Secretary of Agriculture has exclusive jurisdiction over the granting of permits under said act, insofar as national-forest lands are affected.

Id. at ¶10. The GLO Assistant Commissioner further stated, "It was error, therefore, to note on the records of your office the existence of the right of way over national-forest lands by virtue of the permit." *Id*.

The Huachuca Water Company appealed the August 11, 1915 instructions from the Commissioner of the General Land Office to cancel the notation of the extension of the right of way in favor of the company over certain National Forest System lands. Doc. 153 at ¶11. On January 24, 1916, the Assistant Secretary of the Interior affirmed the August 11, 1915 GLO instructions to cancel the notation in the Phoenix GLO township tract books of reservoirs and pipe lines right of way permit within the boundaries of the National Forest. *Id*. The Assistant Secretary of Interior stated that on "the date of approval of the aforesaid map, the Department of Agriculture exercised the supervision over national forests, and was vested with exclusive power to grant permits for right of way through the same." *Id*. He further stated the "claim to the company that it has enjoyed the uninterrupted use of its pipe lines and reservoir sites for a long period of time is immaterial to the matter." *Id*. The January 24, 1916 Departmental decision was transmitted to Huachuca Water Company on January 27, 1916. *Id*. In correspondence dated January 22, 1940, the Huachuca Water Company, through counsel, requested that GLO waive its rental fee due to the United States for occupancy of public lands. *Id*. at ¶12. In correspondence dated February 12, 1940, the GLO denied Huachuca Water Company's requested fee waiver. *Id*. at ¶13. The correspondence provided:

> The records show this application for right-of-way was filed August 8, 1908, and was approved by the Department March 8, 1913, under the act of February 15, 1901 (31 Stat. 790). By such approval the water company obtained a permit of use, subject to revocation at the discretion of the Secretary of the Interior. This permit did not confer any rights, easement or interest in, to or over the public lands affected thereby.

Id. The Huachuca Water Company continued to pay annual rent for its permit through 1949. *Id*. at ¶14.

The 1948 Special Use Permit

In 1948, the City of Tombstone applied for and was issued a United States Forest Service special use permit for a right-of-way for its pipeline. *Id*. at ¶15. The 1948 special use permit, which cancelled and superseded permits issued to the Huachuca Water Company in 1909 and 1913, permitted "3 strips fifty feet in width being 25 feet on either

side of pipelines" located in Sec. 11, 12, 13, 14, 15, 23, 24 and 26, T. 23 S. R. 20 E. and Sec 7 and 18, T. 23 S., R. 21 E., G & SRBM: one pipeline servicing Miller and Gardner Springs, one pipeline servicing Carr Spring, and one lateral pipeline servicing Clark Spring. Doc. 153 at ¶15. Relevant terms of the 1948 special use permit provide:

> 2. The permittee shall comply with the regulations of the Department of Agriculture governing the National Forest
> […]
> 12. Upon the abandonment, termination, or revocation of this permit, and in the absence of an agreement to the contrary, the permittee, if all the rental charges due the Government have been paid, may, within a reasonable period to be determined by the issuing officer, remove all structures which have been placed on the premises by him, except where the material was furnished by the Forest Service, but upon failure to remove the structures within that period they shall become property of the United States.

Id. at Ex. 21. A copy of the executed special use permit was sent to Tombstone by the Forest Supervisor through correspondence dated March 19, 1948, and provided, in part: "This permit legalizes the use of the Forest land which is occupied by the pipe line in question." *Id.* at Ex. 22. In correspondence dated August 3, 1949, the BLM informed Anthony T. Deddens, legal counsel for Tombstone, that because the City of Tombstone was not a party to the permit at the time it was issued and since no application for assignment was ever filed by the Huachuca Water Company or the City of Tombstone, the City of Tombstone had not acquired any obligation or rights under the permit; and such use an occupancy by the City of Tombstone since April 1947 is a trespass against the United States. *Id.* at ¶18. In correspondence dated August 19, 1949, BLM informed counsel for Tombstone that the following notation appears of record on the BLM serial record: "May 3, 2916: GLO (decision) of April 29, 1916, transmits copy of Departmental decision Jan. 24, 1916, which affirms decision Aug. 11, 1915, canceling R. of W. as to affected lands in National Forest. (Notice direct to Secretary of Company from G.L.O.)" *Id.* at ¶19. The BLM then advised Tombstone's counsel that in view of the DOI Department Decision of January 24, 1916, "the permit with this Bureau did not include the lands within the Forest Reserve in T. 23 S., R. 20 E., and T. 23 S., R. 21 E., and very

probably the applicant had a separate permit with the Forest Service for lands within the boundaries of said Forest Reserve." Doc. 153 at Ex. 20 at p. 3 and Ex. 24. In correspondence dated August 20, 1949, Anthony R. Deddens, legal counsel for Tombstone, wrote in response to the BLM correspondence dated August 19, 1949 advising the BLM that "the City of Tombstone does have a permit from the Forest Service for the lands involved within the boundaries of the Forest Reserve." *Id*. at ¶20 at Ex. 25.

The 1962 Special Use Permit

On May 4, 1962, Tombstone submitted an application for a revised special use permit, the stated purpose of which was:

> To collect water from spring areas described herein; to transport said water to Tombstone, Arizona, via pipeline; to impound and improve spring areas for water protection and collection.

The application listed five spring sites: Rock, Carr, Clark, Miller, and Gardner. *Id.* at ¶22 and Ex. 27 and 28. On May 14, 1962, Tombstone was issued a "revocable and nontransferable" special use permit that superseded the 1948 special use permit. The permit related to the following described lands:

> Five (5) parcels of land at five (5) acres each and a strip of land 16,700 ft. long and 50 ft. wide (25 ft. on either side of the centerline) on National Forest land in Section 10, 12, 13, 14, 15, 23, 24, and 26, T23S, R20E, and Sections 7 and 18, T23S, R21E, G&SRB&M, as shown on the map entitled City of Tombstone, Water Pipelines, Springs, and Spring Impound Areas, dated 2-1-62, and prepared by S. Taylor. These maps are made a part of this permit.

Id. at ¶23 at Ex. 29. The stated purpose of the 1962 special use permit is for "[c]constructing, maintaining and using a municipal water supply with the right of fencing the six (6) water sources." *Id*. at ¶24. Pursuant to its terms, the 1962 special use permit "may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service." *Id*. at ¶25. Relevant terms of the 1962 special use permit provide:

> 6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by the permit.
> […]
> 9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privileged granted by this permit.
> […]
> 11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

Doc. 153 at Ex. 29 at FS000140. The map attached to the 1962 special use permit only shows pipelines to Carr, Clark, Gardner, Miller, and Rock Springs, located in Carr and Miller Canyons and on the hydrological divide between Carr and Miller Canyons. *Id*. at FS000105.

The 1977 Carr Fire

In 1977, the Carr fire burned more than 9,000 acres in Carr and Miller Canyons, and the resulting flood destroyed Miller, Gardner, and Carr Spring developments, as well as the pipelines and access roads to those three springs. *Id*. at ¶31. After the Carr fire, the road in Miller Canyon, crossing through the private land, was closed by the private landowners (the Beatty family). No public travel across the private land has been allowed since that time. Subsequent to the flood, the road was rebuilt up to Miller Spring. At the point just west from Miller Spring where the road crosses the main channel from north side to the south side of the canyon, the road was completely washed out and difficult to navigate on horseback. *Id*. The road from Miller Spring up to Gardner Spring was never repaired and was not passable by any wheeled vehicle. *Id*. at ¶32. The road was subsequently decommissioned as Forest Development Road 56 and re-commissioned as Forest Development Trail 106 prior to 1984. *Id*. Since 1977, Tombstone has been

allowed sporadic vehicular access across the private lands to Miller Spring, but has been required to walk up to Gardner Spring. Doc. 153 at ¶32. The road to Carr Spring is essentially a drive way that passes within 200 feet of a resident before heading up to Carr Spring. *Id*. at ¶33. After a segment of the road on private land was destroyed by the 1977 flood, it remained unserviceable for several months. *Id*. In May 1978 the then-Mayor of Tombstone applied for a permit to reroute the road to remain on the north side of the creek but the request was denied and the old road was rebuilt on the same route. *Id*. Also in 1978, Tombstone applied for a special use permit to construct a water tank for Carr and Rock Springs because the catch basins were destroyed in the 1977 Carr fire. *Id*. at ¶34. Tombstone's special use permit application spawned the Forest Service to prepare an Environmental Analysis Report and Cultural Resource Report. *Id*.

In April 1979, Tombstone filed a "Statement of Claim of Right to Use Public Waters of the State" for five water sources within the Coronado National Forest in the Water Rights Claim Registry for the State of Arizona: Carr Spring (36-75713), Gardner Spring (36-75714), Clark Spring (36-75715), Rock Spring (36-75716), and Miller Spring (36-75717). *Id*. at ¶35. In June 1979, Tombstone filed a Statement of Claimant ("39") in the matter of determination of relative rights to the use of waters of the San Pedro River and its tributary watersheds for five water sources within the Coronado National Forest in the Water Rights Claims Registry for the State of Arizona: Carr (39-000728), Gardner (39-000729), Clark (39-000730), Rock (39-000731), and Miller (39-000732) Springs. *Id*. at ¶36.

The Monument Fire of 2011

In 2011 fire ravaged the area where Tombstone's alleged rights-of-way were located. As a result of flooding that occurred thereafter, between May and July 2011, substantially all of the roads, pipelines, and catchments throughout Tombstone's water system were destroyed. Doc. 172 at ¶252.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine dispute of material fact, and judgment should be granted as a matter of law. Fed.R.Civ.P. 56(a). Summary

judgment is proper if the nonmoving party fails to make a showing sufficient to establish the existence of an essential element of his case on which he will bear the burden of proof at trial. *Fitzgerald v. U.S.*, 932 F.Supp. 1195, 1199-1200 (D.Ariz. 1996), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The disputed facts(s) must be material. *Id*. at 1200, citing *Celotex*, 477 U.S. at 322. Substantive law determines which facts are material. *Id*. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*., quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Moreover, the dispute must be genuine. *Id*. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*., quoting *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party. *Id*. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Id*., citing *Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11.

Counts I – IV of the Verified Second Amended Complaint

The Quiet Title Act

The Quiet Title Act, 28 U.S.C. §2409a, provides, "the exclusive means by which adverse claimants [can] challenge the United States' title to real property." *Bradley v. Schafer*, 2010 WL 5105049 at *3 (D. Mont. 2010), *aff'd* 467 Fed. App'x 713 (9th Cir. 2012),[8] quoting *Lesnoi, Inc. v. U.S.*, 170 F.3d 1188, 1191 (9th Cir. 1999). While the Quiet Title Act thus waives the United States' sovereign immunity in a civil action "to adjudicate a title to real property in which the United States claims an interest," any such action must be brought within the applicable limitations period. *Id*., quoting 28 U.S.C. §2409a. Under §2409a(g), a civil action to quiet title is "barred unless it is commenced within twelve years of the date upon which it accrued." *Id*., quoting 28 U.S.C. §

[8] On appeal, Tom Vilsack was substituted for his predecessor, Edward T. Schafer, as Secretary of the Department of Agriculture. *See Bradley v. Vilsack*, 467 Fed. App'x 713 (9th Cir. 2012).

2409a(g). Any "[s]uch action shall be deemed to have accrued on the date the plaintiff or his predecessor-in-interest knew or should have known of the claim of the United States." *Bradley*, 2010 WL 5105049, at *3, quoting 28 U.S.C. §2409a(g).

The Ninth Circuit reads "[t]he statutory term 'should have known' [as] impart[ing] a test of reasonableness," pursuant to which the appropriate "question is whether the United States' action would have alerted a reasonable landowner that the government claimed an interest in the land." *Id*., quoting *Shultz v. Dept. of Army, U.S.*, 886 F.2d 1157, 1160 (9th Cir. 1989). Under this reasonableness standard, no explicit notice of the government's claim is necessary. *Id.*, citing *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 738 (8th Cir. 2001). "The government's claim need not be 'clear and unambiguous.' " *Id*., quoting *Spirit Lake Tribe*, 262 F.3d at 738. *See also State of Cal. ex rel. State Land Com'n v. Yuba Goldfields, Inc.*, 752 F.2d 393, 397 (9th Cir. 1985). All that is necessary to trigger the statute of limitations "is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Id*., quoting *Spirit Lake Tribe*, 262 F.3 at 738. Because the statute of limitations "constitutes a condition on the waiver of sovereign immunity," it is strictly construed in favor of the Government." *Id*. at *4, quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1987). "If the statute of limitations has run on a waiver of sovereign immunity, federal courts lack jurisdiction." *Id*., quoting *Skranak v. Castenada*, 425 F.3d 1213, 1216 (9th Cir. 2005). (Additional citations omitted.)

Defendants argue that Tombstone's QTA claims can be resolved on the basis of two undisputed material facts: the existence and terms of the 1948 and 1962 special use permits. For its argument Defendants rely primarily upon *Bradley v. Schafer, supra. See* Doc. 182 at pp. 3-6, ll. 7-18. Plaintiff does not address *Bradley*. Rather, Plaintiff first argues that the QTA's statute of limitations is not triggered unless the federal government's actions can be reasonably interpreted as an effort by the federal government to claim "exclusive" ownership and control over the lands, rather than merely asserting an interest in the servient estate, adjacent property or in supervising or regulating the use of the covered lands. Doc. 171 at pp. 10-11, ll. 27-6. Plaintiff argues that prior to the Monument Fire of 2011 Defendants never acted in a manner consistent

with a claim of "exclusive" ownership and control over the lands covered by the alleged R.S. 2339/R.S. 2340 rights and also argues that the U.S. Forest Service formally recognized Tombstone's alleged rights close to over 110 years ago, in April 1908 and April 1916. Doc. 171 at p. 12, ll. 22-26. Second, Tombstone argues that even if the Forest Service had claimed an adverse interest in the relevant land, a reasonable person could only conclude that it abandoned such an interest in light of Tombstone's use of the land. *Id*. at p. 14, ll. 1-5. Tombstone argues that since R.S. 2339/R.S. 2340 rights-of-way were automatically granted based upon the construction and use of a water structure or conveyance (rather than through a formal instrument of conveyance), as long as Tombstone continued to use its water system a reasonable person would have to conclude that Tombstone was a continuous recipient of grants of R.S. 2339/R.S. 2340 rights of way and the limitations period was continuously reset. *Id*. at p. 14, ll. 8-25. Finally, pointing to language in the 1962 and 1948 special use permits that states, "[t]his permit is subject to all valid claims," Plaintiff argues that "a reasonable person would never construe the … special use permits as giving notice of an adverse title claim." *Id*. at pp. 14-15, ll. 26-6.

The Court has examined the cases cited by both parties in support of their respective positions and determines that *Bradley* cited by Defendants control the outcome of Plaintiff's claims under the QTA. In *Bradley*, the plaintiffs sued to quiet title to an easement for the operation and maintenance of a reservoir on national forest land. Despite the existence of a string of special use permits dating back to 1916, the plaintiffs claimed independent easement rights under the 1891 General Right of Way Act. The defendant United States argued that the statute of limitations barred the claim because the plaintiffs' predecessor in interest had notice of the government's adverse interest as early as 1916, and repeatedly thereafter, by virtue of the language set forth in the series of special use permits governing the maintenance and operation of the reservoir. *Id*. at *4. The 1916 special use permit was issued by the Forest Service for the express purpose of granting the plaintiffs permission to use the land at issue for a reservoir. *Id*. Furthermore, in 1973, when a new special use permit was issued, that permit stated that it was not

transferrable, would terminate "at the discretion of the Forester" and contained the following abandonment language:

> Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

2010 WL 5105049 at *5. In *Bradley*, the court held that such language put the plaintiff on notice of the government's adverse title claim and started the statute of limitations running.

The Court also finds persuasive *United States v. Abrahamsen*, 2007 WL 1071926 (D. Mont. 2007), a case cited by neither party, but relied upon by the court in *Bradley*. In *Abrahamsen*, the United States District Court for the District of Montana held that abandonment language substantially similar to that in *Bradley* contained within special use permits put permit holder Tin Cup and its predecessors-in-interest on notice of the government's claim of exclusive ownership of the land. *Abrahamsen* reasoned, in relevant part:

> In contrast, if a permittee is required to remove all structures and improvements from the land once a permit is revoked lest they become the property of the landowner, the permittee is precluded from possessing an easement. If Tin Cup possessed an easement on the land underlying the Dam, it would be entitled to maintain and operate the Dam even after the special use permit was terminated. The permit's provision to the contrary, thus, constituted an adverse claim of exclusive ownership by the Government that triggered the statute of limitations.

2007 WL 1071926, at *2.

Here, Plaintiff cannot overcome the holdings of *Bradley* and *Abrahamsen* in light of nearly identical language contained in the 1948 and 1962 special use permits. It is undisputed that the 1962 special use permit provides, *inter alia*,

> Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

Doc. 153 at ¶23 at Ex. 29. Because of this language Tombstone knew, or should have known, as of at least 1962, that the United States claimed an adverse interest in the land covered by the alleged R.S. 2339/R.S. 2340 rights-of-way. As stated by *Abrahamsen*, if a permittee, here, Tombstone, is required to remove all structures and improvements from the land once a permit is revoked lest they become the property of the landowner, here, the United States, the permittee is precluded from possessing an easement. *See Abrahamsen*, 2007 WL 1071926 at *2.

Plaintiff's novel argument that its continued use of the pipeline continually reset the statute of limitations clock does not save its QTA claims. Plaintiff cites no case law that supports its "continual grant of R.S. 2339/R.S. 2340 rights of way" argument. This is not surprising given that the effect of the repeal of The Act of 1866 was that there could be no new rights issued under the Act. *See Southern Utah Wilderness Alliance*, 425 F.3d at 741 ("There could be no new R.S. 2477 rights of way after 1976.")[9] Plaintiff's continued use of the pipeline could not have caused it to be "the direct and continuous recipient of corresponding grants of RS2339/2340 rights of way […] which continuously reset any limitations period"[10] as such a determination would be contrary to well

[9] Because all of the sections of the 1866 Act were adopted together, the companion rights-of-way provisions are to be construed similarly. *See Adams v. United States*, 3 F.3d 1254, 1260 (9th Cir. 1993), *citing United States v. Gates of the Mountains Lakeshore Homes*, 732 F.2d 1411, 1413 n.4 (9th Cir. 1984). Although *Southern Utah Wilderness Alliance* involved rights asserted under R.S. 2477, the rule announced therein applies equally to Tombstone's alleged claims under R.S. 2339/R.S. 2340.

[10] *See* Doc. 171 at p. 8, ll. 22-25.

established case law.

Plaintiff's "valid claim" argument also misses the mark. Plaintiff urges the Court to conclude that language contained in the special use permits that provides "[t]his permit is subject to all valid claims" can only be interpreted as "expressly protect[ing] the subject RS2339/RS2340 rights." Doc. 171 at p. 10, ll. 7-8. (Underlining omitted.) While the Court has its reservations about the interpretation advanced by Plaintiff,[11] since the Court, at this stage, is only concerned with determining whether Plaintiff had notice that Defendants claimed an adverse interest in the subject lands, the Court need not decide what the "valid claims" language in the special use permits actually means. Even assuming, *arguendo*, that Plaintiff's interpretation of the "valid claims" language is correct,[12] given the inclusion of the above noted language which provides that structures or improvements not removed upon "abandonment, termination, revocation, or cancellation" of the permit will become property of the United States, Plaintiff was undisputedly put on notice that the United States claimed an interest in the property covered by the alleged R.S. 2339/R.S. 2340 rights-of-way and the 12 year limitations period began running. Finally, that the United States acknowledged Tombstone's alleged

[11] Permits are construed according to contract principles and federal law controls the interpretation of a contract entered into pursuant to federal law when the United States is a party. *Kennewick Irr. Dist. v. U.S.*, 880 F.2d 1018, 1032 (9th Cir. 1989). The Court notes that the interpretation of the "valid claims" language advanced by Tombstone is seemingly contrary to the well settled principle that 1866 Act rights-of-way are to be narrowly viewed; are to be construed in favor of the government instead of the right-of-way holder; and that such rights-of-way are subject to reasonable regulation by the federal government to protect the public lands and wildlife. *See e.g., United States v. Jenks*, 22 F.3d 1513, 1518 (10th 1994) (government may regulate access over Forest Service lands to private inholdings); *Wilkenson v. Dept. of Interior*, 634 F.Supp. 1265, 1280 (D. Colo. 1986) (government may ban commercial access along 1866 Act road right-of-way to protect National Park); *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1242-43 (D. Utah 2000) (similar); *Elko County Board of Supervisors v. Gliskman*, 909 F. Supp. 759, 764 (D. Nev. 1995) (government retains broad authority to regulate use and maintenance of existing 1866 Act ditch rights, so long as the regulation did not prohibit use of the vested rights).

[12] (and the Court is not determining that Plaintiff's interpretation of the "valid claims" language contained in the special use permit is the correct interpretation)

R.S. 2339/R.S. 2340 rights-of-way 100 years ago (in 1906 and 1916) does not operate to save Plaintiff's QTA claims. Based upon the language contained in the 1962 special use permit the Court concludes that, as of 1962, Tombstone was on notice that Defendants claimed to have an interest in the lands covered by the alleged R.S. 2339/R.S. 2340 rights-of-way adverse to that of Tombstone's. *See Bradley; Abrahamsen*.[13] As it is undisputed that Plaintiff failed to file its action seeking to quiet title to the alleged R.S. 2339/R.S. 2340 rights-of-way within the applicable limitations period, summary judgment in favor of Defendant on Counts I through IV of Plaintiff's Verified Second Amended Complaint will be granted.

Plaintiff's Claims Under R.S. 2477

The purpose of the Quiet Title Act is "to determine which named party has superior claim to a certain piece of property." *Friends of Panamint Valley v. Kempthorne*, 499 F.Supp.2d 1165, 1174 (E.D. Cal. 2007), quoting *Cadorette v. United States*, 988 F.2d 215, 223 (1st Cir. 1993). Congress thus permitted challenges to the United States' claim of title to real property only to parties who themselves claim an interest in title. *Id*. *See Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001) (recognizing that a federal quiet title action must fail if the plaintiff "does not claim a property interest to which title may be quieted.").[14] The requirement that this condition be met is neither discretionary nor flexible because the terms of the waiver of sovereign

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[13] Because the Court concludes that Counts I – IV of the Verified Second Amended Complaint are time barred the Court does not reach Defendant's argument that Plaintiff failed to state a claim under the QTA based upon Plaintiff's alleged failure to plead Count III with the required degree of particularity. *See* Doc. 152 at pp. 8-9, ll. 6-8.

[14] Section 2409a(d), Title 28 U.S.C., provides, in relevant part:

> The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title or interest claimed by the United States.

28 U.S.C. §2409a(d).

immunity limit the scope of the court's jurisdiction. *Friends of Panamint Valley*, 499 F.Supp.2d at 1174, citing *United States v. Mottaz*, 476 U.S. 834, 841, 106 S.Ct. 224, 90 L.Ed.2d 841 (1986).

As mentioned above, R.S. 2477 was an open-ended grant of the right of way for the construction of highways over public lands, not reserved for public uses. "Courts which have addressed whether a plaintiff, as a member of the public, can assert a title under the Quiet Title Act for access to routes established pursuant to R.S. 2477 have ruled that there is no subject matter jurisdiction." *County of Shoshone v. United States*, 912 F.Supp.2d 912, 922 (D. Idaho 2012), quoting *Friends of Panamint Valley v. Kempthorne*, 499 F.Supp.2d 1165 (E.D. Cal. 2007). In other words, the right to use a public road is not itself a right or interest in property as recognized by the Quiet Title Act. *Id.*, citing *Public Lands for the People, Inc. v. U.S. Dept. of Agriculture*, 733 F.2d 1172, 1193 (E.D.Cal. 2010). "Th[at] interest … must be some interest in the title to the property." *Id*., quoting *Kinscherff v. United States*, 586 F.2d 159, 160 (10th Cir. 1978). *See also Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001) ("…the right of an individual to use a public road is not a right or interest in property for purposes of the Quiet Title Act. The proper plaintiff … is the governmental entity that owns the easement.")

In Arizona, 'public highways' are limited to those established in the manner provided by law and to no others. *State ex rel Herman v. Cardon*, 112 Ariz. 548, 549, 544 P.2d 657, 658 (Ariz. 1976) (en banc), *citing Territory v. Richardson*, 8 Ariz. 336, 339-40, 76 P. 456 (1904); *Tucson Consolidated Copper v Reese*, 12 Ariz. 226, 100 P. 777 (1909); *Champie v. Castle Hot Springs Company*, 27 Ariz. 463, 233 P. 1107 (1925). (Additional citations omitted.) Public highways can be established by the state, A.R.S. §28-1861 *et seq*., by counties, A.R.S. §18-201 *et seq*., by incorporated cities, A.R.S. §9-276, and incorporated towns, A.R.S. §9-240 *et seq*. *State ex rel Herman*, 112 Ariz. at 549, 544 P.2d at 658.

Plaintiff's Verified Second Amended Complaint alleges, *inter alia*:

> The Cochise County Board of Supervisor Minutes from November 5, 1889, at Volume 2, [p]ages 556-557, provides: "Ordered that the following described roads in Cochise County Arizona Territory be and the same are hereby designated and declared to be public roads and highways in the places they are now made and used respectively, and such space on each side of said roads respectively, as may be necessary for public use and convenience, and it is further ordered that this order and the following description of roads be recorded with the Office of the County Recorder of Cochise County … From Charleston to Miller and Carr's Canyon by the Huachuca Water Co[.]'s reservoir and to summit."
> …
> The public, Tombstone, and/or Tombstone's predecessors in interest to the subject RS2339 and RS2340 rights continuously accessed and used the public highways in Miller and Carr Canyons … (hereinafter the "subject RS2477 rights") from no later than November 5, 1889 until the Monument First of 2011, while operating motorized and mechanized vehicles and equipment.

Doc. 135 at ¶¶ 75 and 78. (Underlining added.) Tombstone's Verified Second Amended Complaint does not allege that Tombstone holds an interest in the Miller and Carr Canyon roads separate from that of Cochise County. *See Id.* In its response to Defendants' statement of facts, Tombstone states, in relevant part, "The RS 2477 [r]ights cover the same or substantially the same lands as the Miller Canyon and Carr Canyon Roads declared by Cochise County on November 5, 1889 and designated in the 1901 Survey Map." Doc. 172 at ¶241. Tombstone further states, "Until the Monument Fire of 2011, the RS2477 [p]ublic [h]ighway [r]ights of [w]ay have been in continuous use as a public thoroughfare since at least November 5, 1889 and by the City of Tombstone since at least 1969." Doc. 172 at ¶248.[15]

As set forth above, case law clearly holds that the right to use a public road is not itself a right or interest in property as recognized by the Quiet Title Act. Case law is

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[15] This statement of fact is included under the section entitled, "Fact Showing Plaintiff's Ownership of the subject RS2339/2340 rights and *Use of the RS2477 Rights*." Doc. 172 at p. 131, ll. 14-14. (Emphasis added.) The language of this heading supports the Court's conclusion that Plaintiff did not plead, and has not established, that it has standing to bring a claim under the Quiet Title Act with respect to the alleged R.S. 2477 rights.

equally clear that the proper plaintiff is the governmental entity that owns the alleged easement. Here, as demonstrated by the allegations contained in Tombstone's Verified Second Amended Complaint and the statements made by Tombstone in its response to Defendants' statement of facts, it is undisputed that Cochise County is the owner of the alleged R.S. 2477 right-of-way. As such, the Court will grant summary judgment in favor of Defendants with respect to Plaintiff's claim under R.S. 2477.

The Court rejects Plaintiff's assertion in its Opposition that "Tombstone should be viewed as analogous to a fee owner for purposes of vindicating the subject R.S. 2477 rights." Doc. 171 at p. 9, n. 2. The Court notes that it appears that Plaintiff is making an effort to rewrite its Verified Second Amended Complaint as Tombstone did not allege in its Verified Second Amendment Complaint that it "should be viewed as analogous to fee owner" for purposes of its claim based on R.S. 2477. *See* Doc. 135. When appropriate, courts will deem new claims that are raised in an opposition to a motion for summary judgment as a motion to amend the pleadings. *Union Pacific R.R. Co. v. Coast Packing Co.*, 236 F.Supp.2d 1130, 1133 (C.D. Cal. 2002), citing *Kaplan v. Rose*, 49 F.3d 1363 (9th Cir. 1994); *389 Orange Street Partner v. Ciarcia*, 179 F.3d 656, 665-66 (9th Cir. 1999). The court may deny amendment of a pleading for bad faith, undue delay, prejudice to the opposing party, or futility of the amendment. *Union Pacific R.R. Co.*, 236 F.Supp.2d at 1133. Here, as explained below, Tombstone's effort to amend its pleading will be denied on the grounds that amendment would be futile.

"It should go without saying … that neither an R.S. 2477 right-of-way nor the public road it contains are owned in fee as all that is granted by R.S. 2477 is the nonpossessory right to use the right-of-way for a public road." *Fairhurst Family Ass'n, LLC v. U.S. Forest Service, Dept. of Agriculture*, 172 F.Supp.2d 1328, 1332 n.4 (D.Colo. 2001); *Sierra Club v. Hodel*, 848 F.2d 1068, 1083 (10th Cir. 1988), *overruled on other grounds*, 956 F.2d 970 (10th Cir. 1992) (identifying a right-of-way as an easement); RESTATEMENT (Third) of Property: Servitudes §1.2(1) (defining an easement). The government entity that owns the right-of-way and road created by operation of R.S. 2477

has the requisite interest to quiet title in the right-of-way. *Fairhurst Family Ass'n, LLC*, 172 F.Supp.2d at 1332, n.5, citing *Long*, 236 F.3d at 915 (government entity owns easement for public road); *Kinscherff*, 586 F.2d at 161 (noting New Mexico statute providing that public rights-of-way vest with state). Here, as discussed above, it is undisputed that Cochise County owns the road "from Charleston to Miller and Carr's Canyon" and Cochise County, therefore, has the requisite interest to quiet title in the alleged R.S. 2477 right-of-way. As such, even if the Court were to view Tombstone as "analogous to a fee owner" for purposes of its claim under R.S. 2477, Tombstone's claim would still fail as rights under R.S. 2477 are not held in fee. *See Fairhurst Family Ass'n, LLC*, 172 F.Supp.2d at 1332 n.4 (an R.S. 2477right-of-way is not owned in fee).

Plaintiff also points out that under *Hazel Green Ranch, LLC v. U.S. Dep't of the Interio*r, 490 Fed.App'x. 880, 881 (9th Cir. 2012), the Ninth Circuit held that an abutting land owner's easement over a public roadway was a sufficient interest in property to state a claim against the United States under the Quiet Title Act. Doc. 171 at p. 9, n. 2. Tombstone argues, "Arizona, like California, recognizes an abutting landowner's easement as a property right." *Id*. From there, Plaintiff advocates that the Court should determine that it has a sufficient title interest in the land to state a claim under the Quiet Title Act.[16] *Id*. The Court rejects Tombstone's argument. Here, the Court is not yet concerned with the substantive issues of R.S. 2477. Rather, the Court must determine initially whether there is subject matter jurisdiction before it can proceed to further questions. *See Friends of Panamint Valley*, 499 F.Supp.2d at 1176 (the court first must determine initially whether it has subject matter jurisdictions before proceeding to further questions of whether federal or state law applies to plaintiff's claim to quiet title to alleged R.S. 2477 right-of-way).

The scope of the Quiet Title Act is a federal question and the answer must be sought in federal law. *Id*. As a federal statute, the Quiet Title Act must be interpreted in

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[16] (Plaintiff so advocates even though it has not established that it owns any land abutting the alleged R.S. 2477 right-of-way.)

accordance with the principals of federal law, and while federal courts may properly look to state law as an aid in determining the application of statutory language to specific facts, such state law should be compatible with the purpose of the legislation so as to find the rule that will best effectuate the federal policy. *Friends of Panamint Valley*, 449 F.Supp.2d at 1176-77, citing *Vincent Murphy Chevrolet Co., Inc. v. United States*, 766 F.2d 449, 451 (10th Cir. 1985). *Friends of Panamint Valley* held that even if California state law would allow a member of the public to bring a quiet title action, the district court could not rely upon such law where it would conflict with federal law. *Id.*, citing *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (under Supremacy Clause, federal law prevails where state and federal law conflict).

In light of the foregoing, the Court concludes that even if Arizona recognizes an abutting landowner's easement as a property right,[17] the Court could not rely upon such law as it conflicts with federal law. Federal law indisputably holds that members of the public do not have a sufficient title interest in lands covered by alleged R.S. 2477 right-of-way that is required to bring an action under the Quiet Title Act. Tombstone does not have standing to bring a claim under the Quiet Title Act based on any alleged rights under R.S. 2477. Defendants' request for summary judgment on Tombstone's claims that are based upon R.S. 2477 will be granted.

Counts V through VII of the Verified Second Amended Complaint

The Administrative Procedures Act

Pursuant to the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "The APA waives sovereign immunity for suits against federal officers in which the plaintiff seeks nonmonetary relief. The APA, however, does not waive immunity as to any claims which are expressly or impliedly forbidden by 'any other statute that grants consent to suit.' The Quiet Title Act …is such an act." *Skranak v. Castenada*, 425 F.3d 1213 (9th

[17] (and Plaintiff has not established such)

Cir. 2005), quoting *Metro. Water Dist. of S. California v. United States*, 830 F.2d 139, 143 (9th Cir. 1987) (citing *Block v. North Dakota*, 461 U.S. 273, 286, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983)).

Defendants advance three arguments for this Court's lack of jurisdiction over Tombstone's claims brought under the APA. First, Defendants argue that that this Court lacks jurisdiction over Tombstone's claims that are brought under the APA because the QTA is the exclusive means for challenging title. Defendants assert that Tombstone's APA claims are not ripe for adjudication because Tombstone has not first adjudicated whether and to what extent its claimed rights actually exist. Doc. 152 at pp. 9-11. Second, Defendants argue that Tombstone's APA claims must be dismissed for lack of jurisdiction because Tombstone has failed to exhaust its administrative remedies. *Id*. at pp. 11-13. Finally, Defendants argue that Tombstone's APA claims must be dismissed because Tombstone has not challenged any final agency action nor identified any mandatory duties that Defendants failed to take. *Id*. at pp. 14-20. Without either an identifiable final agency action or a discrete action that was legally required yet not taken, Defendants assert that this Court is without jurisdiction to Plaintiff's claims brought under the APA. *Id*.

In its Response, Tombstone focuses heavily on the alleged facts surrounding its efforts to obtain permission to restore certain springs, repeatedly arguing to the Court that Defendants' alleged conduct was arbitrary and capricious. In essence, much of Tombstone's Response puts the proverbial cart before the horse; at this stage, the Court is only concerned with whether it has jurisdiction to hear Tombstone's claims. Having foraged Tombstone's Response for its argument on the jurisdictional issue, the Court concludes that Tombstone argues that this Court has jurisdiction to hear the APA claims because: (1) the lands covered by Tombstone's alleged R.S. 2339/R.S. 2340 rights-of-way have never been within the jurisdiction of the U.S. Forest Service [Doc. 171 at pp. 17-22]; (2) further pursuit of administrative remedies would be futile [*Id*. at 25-28]; and (3) this Court has the ability to review mandatory duties that the Forest Service was

required to take (but did not take). *Id*. at pp. 30-33.

Having reviewed Tombstone's Verified Second Amended Complaint in connection with its Response, the Court determines that the essence of Tombstone's claims under the APA involves the dispute of title to the lands covered by the alleged R.S. 2339/R.S. 2340 rights-of-way. As more fully set forth below, case law is clear that the QTA provides the exclusive remedy for claims involving title disputes.[18] Accordingly, the Court will grant summary judgment in favor of Defendants on Counts V-VII of Tombstone's Verified Second Amended Complaint.

Counts V-VII of Tombstone's Verified Second Amended Complaint allege, in pertinent part, that the lands encumbered by the R.S. 2339/R.S. 2340/R.S. 2477 rights "were never incorporated into the Coronado National Forest, any prior forest reserve, nor the Miller Peak Wilderness[]," *see* Doc. 135 at p. 84 at ¶ 2; p. 99 at ¶ 2; and p. 112 at ¶ 2; that Defendants "have never had jurisdiction to compel Tombstone to seek special use permitting or additional express authorization from said Defendants to access, maintain, bury, or construct water structures consisting of ditches, pipelines, flumes, catchments and/or reservoirs on the lands encumbered by prior valid claims, which were otherwise authorized by the subject R.S. 2339, R.S. 2340 and R.S. 2477 rights[]," *see* Doc. 135 at p. 85 at ¶ 3; p. 99 at ¶ 3; and p. 112 at ¶ 3; and that Defendants abused their discretion and acted arbitrarily, capriciously, and unlawfully by exercising jurisdiction over the lands encumbered by prior "valid claims" to require Tombstone to obtain special use permitting from Defendants before allowing Tombstone to perform restoration work. *See* Doc. 135 at p. 88 at ¶ 11(a); p. 101 at ¶ 7; and p. 114 at ¶ 7. Plaintiff repeats the above allegations in its Response, arguing, "[s]imply put, the lands covered by the Count I through III Rights never have been a part of the Miller Peak Wilderness Area, the Coronado National

[18] Because the Court concludes that it does not have jurisdiction to hear Plaintiff's APA claims for the reason that the QTA is the exclusive remedy for Plaintiff's alleged claims, the Court does not address the additional reasons for the grant of summary judgment advanced by Defendant in its Motion.

Forest or any predecessor Forest Reserve." *See* Doc. 171 at p. 13, ll. 22-25.

The United States Supreme Court has described the QTA as addressing suits in which the plaintiff asserts an ownership interest in Government-held property. *Match-E-Be-Nash-She-Wish-Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2207, 183 L.Ed.2d 211 (2012) ("*Patchak*"). In *Block v. North Dakota*, 461 U.S. 273, the United States Supreme Court considered North Dakota's claim to land that the United States viewed as its own. *Patchak*, 132 S.Ct. at 2207. The Court held that North Dakota could not circumvent the QTA's statute of limitations by invoking other causes of action, among them the APA. *Id*., citing *Block*, 461 U.S. at 277-78, 286 n. 22, 103 S.Ct. 1811. The crux of the Court's reasoning was that Congress had enacted the QTA to address exactly the kind of suit North Dakota had brought – a title dispute over ownership of certain riverbed located in the Little Missouri River. *Patchak*, 132 S.Ct. at 2207.

Four years after *Block* was decided, in 1986, the United States Supreme Court decided *United States v. Mottaz*, 476 U.S. 834, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986). In *Mottaz*, the United States Supreme Court considered whether the QTA, or instead the Tucker Act or General Allotment Act, governed the plaintiff's suit respecting certain allotments of land held by the United States. *Patchak*, 132 S.Ct. at 2207. The *Mottaz* Court held that the QTA was the relevant statute because the plaintiff herself asserted title to the property. *Mottaz* held:

> At no time in this proceeding did [the plaintiff] drop her claim for title. To the contrary, the claim for title is the essence and bottom line of [the plaintiff's] case.

Mottaz, 476 U.S. at 842, quoting Brief for Respondent at 3. (Additional citations omitted.) That fact, *Mottaz* held, brought the suit "within the [QTA's] scope": "What [the plaintiff] seeks is a declaration that she alone possesses valid title." *Patchak*, 132 S.Ct. at 2208, quoting *Mottaz*, 476 U.S. at 842.

In 1994, in *Alaska v. Babbitt*, the United States Court of Appeals for the Ninth Circuit followed the United States Supreme Court's pronouncement in *Block* and held "[t]he Quiet Title Act is 'the exclusive means' by which adverse claimants can challenge

the United States' title to real property," and that a claimant "cannot avoid the limitations of the Quiet Title Act" by "seeking review under the Administrative Procedure Act." 182 F.3d 672, 674 (9th Cir. 1999). Ten years later, in *Robinson v. U.S.*, 586 F.3d 683, 688 (9th Cir. 2009), the Ninth Circuit noted it that "has repeatedly held that both disputes over the right to an easement and suits seeking a declaration as to the scope of an easement fall within the purview of the QTA." In *Robinson*, the circuit acknowledged that the plaintiffs were not seeking a declaration either establishing their right to the easement or determining its scope, but, rather, were seeking relief in tort. Nevertheless, *Robinson* observed "resolution of [the plaintiffs'] tort claims may require the court to consider the terms of the easement," *id*., therefore suggesting such consideration could potentially bring the plaintiffs' claim within the purview of the QTA. The Ninth Circuit held:

> We adopt a pragmatic approach and conclude that a suit that actually challenges the federal government's title, however denominated, falls within the scope of the QTA regardless of the remedy sought. To hold otherwise would merely allow parties to avoid the limitations of the QTA by raising contract or tort claims. At the same time, a suit that does not challenge title but instead concerns the use of land as to which title is not disputed can sound in tort or contract and not come within the scope of the QTA.

Robinson, 586 F.3d at 688.

Four years after *Robinson*, the Ninth Circuit's decision *McMaster v. United States*, 731 F.3d 881, 889-900 (9th Cir. 2013), re-recognized the decision of *Block* and recognized the decision of *Patchak* holding, "it remains clear that under both Supreme Court precedent and our precedent that the QTA provides the exclusive remedy for claims involving adverse title disputes with the government." In that case, the Ninth Circuit held that the "essence and bottom line" of McMaster's APA was a dispute against the government over title to the reserve surface estate of the Oro Grande mining claim. *Id*. at 900. *McMaster* held that it was not a case where the government had disclaimed its title and the claims were founded on administrative wrongdoing; "[a]s in *Block*, 'the only 'administrative wrongdoing' [that McMaster claims is] the government's alleged

wrongful assertion of title itself.' " *Id*. (Citations omitted.)

Here, as demonstrated by the above quoted language from Tombstone's Verified Second Amended Complaint as well as the repetition of this position in its Response, the essence and bottom line of the case is a dispute of title. Indeed, the allegations which form the basis for Tombstone's APA claims begin with the very assertion that the lands encumbered by the alleged R.S. 2339/R.S. 2340/R.S. 2477 rights "were never incorporated into the Coronado National Forest, any prior forest reserve, nor the Miller Peak Wilderness[ ]" and that Defendants "have never had jurisdiction to compel Tombstone to seek special use permitting … on the lands encumbered by prior valid claims, which were otherwise authorized by the subject R.S. 2339, R.S. 2340 and R.S. 2477 rights." As such, in light of the foregoing case law, this Court is compelled to conclude, in the words of the United States Supreme Court in *Mottaz*, that "the claim for title is the essence and bottom line of [Tombstone's] case." *Mottaz*, 476 U.S. at 842.

Skranak v. Castenada relied upon by Tombstone is distinguishable. In *Skranak*, the Ninth Circuit distinguished *Block, supra*, concluding that *Block* bars judicial review of an agency's resolution of state or common law claims not raised in an administrative proceeding. *Block* does not however, prevent a district court from reviewing an agency's failure to resolve such claims. 425 F.2d at 1218. *Skranak* held, "[b]ecause the Skranaks and Harpole only challenge the Forest Service's failure to resolve whether they had easements, the district court has jurisdiction to entertain a claim under the APA." *Id*. Here, in contrast to *Skranak* and as pointed out by Defendants, Tombstone does not allege that the Forest Service failed to resolve whether it had easements. Indeed, Tombstone has neither alleged nor established that it actually requested that the Forest Service determine whether it had rights-of-way under R.S. 2339, R.S. 2340 or R.S. 2477 at the administrative level. *See* Doc. 135 at pp. 84-122. The undisputed evidence establishes that Tombstone never requested that the Forest Service make an administrative determination of its claimed R.S. 2339, R.S. 2340 or R.S. 2477 rights of way prior to instituting this action. As such, the Court is bound to conclude that *Skranak*

does not control. *See also, Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 981-82 (9th Cir. 2011) (plaintiff could not invoke "futility" exception to the APA, where plaintiff had not submitted one complete permit application).

Tombstone cannot invoke the APA as an end-run around the limitations provision of the QTA. For the foregoing reasons, the Court concludes that the QTA provides the exclusive remedy for title disputes against the government. As such, summary judgment in favor of Defendants on Counts V-VII will be granted.

Count VIII of the Verified Second Amended Complaint

The Tenth Amendment to the United States Constitution

The Tenth Amendment makes explicit that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *New York v. United States*, 505 U.S. 144, 155, 112 S.Ct. 2408 (1992) (O'Conner, J.). In the final count of its Verified Second Amended Complaint, Tombstone alleges that Defendants' hindrance of Tombstone's effort to fully resort its municipal water supply using motorized and mechanized vehicles and equipment as a duly authorized state agency during a declared [s]tate of [e]mergency violates the Tenth Amendment to the United States Constitution. Doc. 135 at p. 125 at ¶12. Tombstone also alleges that Defendants have violated the principle of state sovereignty as guaranteed by the Tenth Amendment because the Forest Service regulated Tombstone when it was acting in a purely sovereign capacity with respect to sovereign property that is essential to protecting public health and safety. *Id.* at p. 126 at ¶14. The Court concludes that Tombstone has failed to put forth sufficient evidence creating a genuine issue for trial on its Tenth Amendment claim and, for this reason, summary judgment in favor of Defendants will be granted.

To start, in its Response, Tombstone urges the Court to apply the overruled traditional or integral government functions test set forth in *Nat'l League of Cities v. Usery*, 426 U.S. 832, 852, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57, 105 S.Ct. 1005, 83 L.Ed.2d

1016 (1985), in deciding Defendants' Motion. *See* Doc. 171 at pp. 35-36, ll. 17-8. The Court rejects Tombstone's invitation to apply the traditional governmental functions test to its Tenth Amendment claim. Indeed, this Court has previously rejected an earlier invitation by Tombstone to apply the overruled government functions test and the United States Court of Appeals for the Ninth Circuit has done the same. *See* Doc. 58 at p. 11, n.4 ("Plaintiff cites the test in *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) to support its position; however, *Nat'l League of Cities* was overruled and the test is nevertheless inapplicable in this case. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *New York v. U.S.*, 505 U.S. at 160; *City of Tombstone v. United States*, 501 Fed.App'x. 681, 682 (9th Cir. 2012) ("It is the Supreme Court's prerogative alone to overrule its precedents. *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011) (en banc). We therefore have no authority to apply the traditional or integral governmental functions test Tombstone has urged. *Nat'l League of Cities v. Usery*, 426 U.S. 832, 852, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556-57, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).")

Analyzing, as it must, Tombstone's Tenth Amendment claim under controlling Supreme Court authority, the Court determines that it is bound to enter judgment in favor of Defendants. In its response to Defendants' Motion, Tombstone's Tenth Amendment argument generally avers that "the federal government's interference with Tombstone's autonomy amounts to impermissible commandeering." Doc. 171 at p. 34, ll. 15-16. Relying upon *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 256, 2601-03 (2012), Tombstone continues on to state, in relevant part, "the Court has thus confirmed that commandeering is a species of impermissible coercion; and that the rule against commandeering is an implication of the principle that '[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.'" *Id*. at p. 35, ll. 7-12. Tombstone concludes with the following allegation: "Running Arizona's designated police power agent through a gauntlet of *ad hoc* regulations before allowing the restoration of essential public infrastructure during a [s]tate of [e]mergency,

in which public health and safety is threatened, is at least as coercive to the State as the denial of Medicaid funding." *Id*. p. 35, ll. 12-16. The Court concludes that Tombstone's argument is simply unsupported rhetoric.

It is true that Congress may not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161, citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 88, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). Here, however, there is simply no evidence that Tombstone was compelled to enact or enforce any federal regulatory program. Nor is there any evidence that Tombstone was compelled to assist in the enforcement of federal statutes regulating private individuals. Indeed, as Defendants point out, federal laws that regulate state activity do not run afoul of the Tenth Amendment where they do not require the state to enact specific laws or regulations or require the state to aid in the enforcement of a federal law. *See Reno v. Condon*, 528 U.S. 141, 151 (2000) (Driver's Privacy Protection Act (the "Act") which restricts the nonconsensual sale or release by a State of a driver's personal information does not violate the Tenth Amendment as the Act does not require the States in their sovereign capacity to regulate their own citizens, but regulates the states as the owners of databases.); *New York*, 505 U.S. at 156 (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations); *United States v. City and County of San Francisco*, 310 U.S. 16, 29-30 (1940) (city power supply generated in a National Park and National Forest was subject to federal regulation under the Property Clause). As the United States Supreme Court stated in *Reno*:

> Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometime legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Reno, 528 U.S. at 150-51 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). Tombstone has failed to present any evidence from which a reasonable trier of

fact could conclude that the federal government compelled it to enact or enforce a federal law. Likewise, Tombstone has failed to present any evidence whatsoever that it was compelled to assist in the enforcement of any federal statute regulating private individuals.

Tombstone's reliance upon *Nat'l Fed'n of Indep. Bus. v. Sebelius* is misplaced. In *Sebelius*, the Court addressed, *inter alia*, whether Congress' power under the Spending Clause improperly coerced States to adopt federal Medicaid changes that would occur under the Patient Protection and Affordable Care Act (the "Act"). *Sebelius* held that where, instead of simply refusing to grant new funds to the States that will not accept the new conditions, the legislation also threatened to withhold those States' existing Medicaid funds, Congress impermissibly leveled a threat on the States that "serve[d] no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act." 132 S.Ct. at 2603. Here, again, Tombstone has pointed to no evidence that it was coerced to enforce or enact any federal legislation. Tombstone has failed in its burden to put forth any evidence that would establish that the federal government's required compliance with federal laws governing federal lands violates the Tenth Amendment. Summary judgment in favor of Defendants on Tombstone's claim brought under the Tenth Amendment (Count VIII) is granted.

Tombstone's Claim of an Alternative Basis for Jurisdiction

In a footnote to its Opposition, Tombstone attempts to put forth an alternative basis for this Court's jurisdiction for its claims under the Quiet Title Act and the Administrative Procedures Act. Tombstone argues:

> Notably, neither the QTA nor the APA's waiver of sovereign immunity is the exclusive basis for the requested relief because a waiver of sovereign immunity is not necessary for equitable relief from ultra vires or unconstitutional misconduct by defendant officers. *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1985); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 692, 696-97, 702 (1949); *Ex Parte Young*, 209 U.S. 123, 160 (1980); *U.S. v. Lee*, 106 U.S. 196, 213 (1882); *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. 1988). Accordingly, the Verified Second Amendment Complaint (ECF 135) alternatively premises the Court's jurisdiction on its

> equitable power to entertain an officer suit for prospective equitable relief under 28 U.S.C. §§ 1331, 1361, 1367, 2201, and 2202.

Doc. 171 at p. 33, fn. 15. Tombstone's argument, advanced in a footnote, is so severely underdeveloped that the Court will not consider it. *See Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (Refusing to address issues not accompanied by legal argument and holding, "[w]hen reading ITOW's brief, one wonders if ITOW, in its own version of the 'spaghetti approach,' has heaved the entire contents of a pot against the wall in hopes that something would stick. We decline, however, to sort through the noodles in search of ITWO's claim." citing *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").)

Tombstone's Request to File a Sur-Reply

Tombstone filed a motion seeking leave to file a sur-reply in light of the fact that Defendants submitted one (1) additional piece of evidence in its reply in support of its Motion. *See* Doc. 182. The single piece of additional evidence submitted by Defendants is a letter dated April 10, 2013, purportedly written by the Mayor of the City of Tombstone. *See* Doc. 182 at Ex. A. In its motion seeking leave to file a sur-reply Tombstone asserts, in pertinent part,

> [I]f Defendants' new evidence and related argument are not ignored and stricken from the record, Plaintiff has a right to advance a sur-reply brief to fully explain how the letter is inadmissible and further explaining why the undisputed testimony advanced by Plaintiff is controlling as to: (a) any question of the public health and safety threats faced by the City; and (b) the adequacy of information possessed by the Forest Service to yield to the proposed restoration work.

See Doc. 185 at p. 4, ll. 8-14. The Court did not consider the additional piece of evidence or any argument related to the additional piece of evidence in issuing its decision on the merits of Defendants' Motion. As such, Plaintiff's request for leave to file a sur-reply will be denied as no reason to file a sur-reply exists. *See Hill v. England*, 2005 WL 3031136 at *1 (E.D. Cal. 2005) (although the court may in its discretion allow the filing of a sur-

reply, this discretion should be exercised in favor of allowing a sur-reply only where a valid reason for such additional briefing exists).

Conclusion

Accordingly, IT IS HEREBY ORDERED,

(1) Defendants' Motion for Summary Judgment on Jurisdictional Grounds [Doc. 152] is **granted**;

(2) Plaintiff's motion requesting leave to file a sur-reply [Doc. 185] is **denied**; and

(3) The Clerk of the Court is hereby directed to enter judgment and close the case.

Dated this 12th day of March, 2015.