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

**CITY OF TOMBSTONE,**

Plaintiff,

v.

**UNITED STATES OF AMERICA, U.S.  
DEPARTMENT OF AGRICULTURE;  
TOM VILSAK in his official capacity as the  
Secretary of Agriculture; TOM TIDWELL,  
in his official capacity as the Chief Forester  
of the USDA Forest Service; CORBIN  
NEWMAN, in his official capacity as  
Regional Forester for the Southwestern  
Region of the U.S. Forest Service;**

Defendants,

**CASE NO.**

**COMPLAINT FOR DECLARATORY  
JUDGMENT; QUIET TITLE; AND  
INJUNCTIVE RELIEF- Re: WATER  
RIGHTS WITHIN WILDERNESS AREA**

Assigned to Honorable Judge:

**INTRODUCTION**

1. Plaintiff holds title to land, easements and rights-of-way contained within the Huachuca Mountains and a right-of-use to water for municipal purposes according to the laws of the United States and the State of Arizona, and also holds a grant, or right, for the operation and

maintenance of rights-of way to deliver this water to the citizens of the City of Tombstone, Cochise County, Arizona (hereinafter referred to as **Tombstone**) and to various other residents along the 26 mile long pipeline. These rights-of-way cross land within the wilderness area of the Huachuca Mountains in Southeast Arizona, which make up a part of the Coronado National Forest, which is owned by the Defendant United States of America and controlled, managed and maintained by the Southwest Region of the U.S. Forest Service, an agency of the U.S. Department of Agriculture. The land, easements and rights-of-way are shown on a map attached hereto as exhibit (1) and incorporated herein by this reference. Exhibit (1) shows the springs and reservoirs feeding the Tombstone water pipeline, also called the Tombstone aqueduct and are separately referred to therein by numbers, (example; spring 1, 2, 3, etc) as well as the location of the pipeline making up the aqueduct.

2. On May 20, 1880, Tombstone (through the Huachuca Water Company), and pursuant to Arizona Territorial law and federal law, obtained the first of many rights to Huachuca Mountain spring water from the federal government and began the construction of a metal pipe type aqueduct that would traverse more than 26 miles for the sole purpose of bringing spring water from the Huachuca Mountains to the citizens of Tombstone.

3. On April 27, 1908, the last of 24 springs was appropriated to Tombstone from the United States.

4. The Tombstone aqueduct dumps into a 1.2 million gallon reservoir on the outskirts of Tombstone.

5. The Huachuca Mountain springs have been Tombstone's primary source of water since 1881. Additionally, since 1881, the Tombstone aqueduct has provided water to a number

of residents in the Hereford, Arizona area. During the time Tombstone aqueduct has been in use, various residents living along the pipeline route have tapped into the pipeline to obtain water and paid a tap fee to the City. Federal and State law require that all surface water be filtered and disinfected before it is supplied for potable purposes. The spring water flowed through an aqueduct into a 1.2 million gallon reservoir just outside Tombstone, where the water was treated before use. However, the water supplied to the residents along the aqueduct could not be treated. In 1995, ADEQ ordered Tombstone to temporarily close the pipeline, forcing Tombstone to use well water. ADEQ subsequent sued Tombstone in Maricopa County to force compliance. See, Maricopa County Superior Court case CV96-05590. Between 1995 and 1998, Tombstone was sued in Cochise County in CV95000294 by a number of residents that had tapped into the pipeline to prevent closure and by the State of Arizona (Arizona Department of Environmental Quality (ADEQ)). Federal and State law required that the water be filtered. On March 3, 1998, the Cochise County Superior Court entered a stipulated order that allowed Tombstone to continue to supply unfiltered water to residents along the aqueduct. Attached hereto as Exhibit (3) and incorporated herein by this reference is the stipulation and order filed in Cochise County and with the Cochise County Recorder's Office. This stipulated order also resolved the case filed in Maricopa County. Water continued to flow through the Tombstone aqueduct until mid 2011.

6. From May 29 2011 until July 2, 2011, a catastrophic forest fire, called the Monument Fire, burned much of the Huachuca Mountains where the springs are located that feed into the Tombstone water pipeline. Soon after the Monument fire was extinguished, record rain began to fall in July 2011, thus causing massive mud and rock slides due to the fact that the

vegetation had been consumed by fire. Volkswagen sized boulders landed on many areas of the metal pipeline, thus damaging the pipeline and preventing spring water from accessing the pipeline and literally shutting off the stream of Huachuca Mountain water to the City of Tombstone.

7. On August 17, 2011, Arizona Governor Janice K. Brewer declared a State of Emergency pertaining to the water supply for the City of Tombstone and allotted monies for emergency repairs. The repairs are required to be completed by January 31, 2011. To this end, Tombstone rented earth moving equipment and vehicles to repair the pipeline.

8. On August 23, 2011, City of Tombstone began initial contact with necessary agencies to begin emergency temporary repairs to water line and reservoirs, to include: USFS, BLM, AZDEMA, Army Corp. Engineers, ADWR.

9. Permission to access the wilderness area and pipeline was granted by every federal agency except the U.S. Forest Service, which only recently provided Tombstone with a temporary permit to access only the lower levels of only one canyon (Miller Canyon). In fact, employees and officials of the U.S. Forest Service have, on multiple occasions purposely prevented Tombstone from accessing its land and right-of-ways and, in fact, threatened to arrest Tombstone employees if they did not cease and desist from working on the pipeline until “proper permits were obtained from the Regional Forester.” And, although the Regional Forester has determined that Tombstone’s issue is, in fact, an emergency, he has done very little to expedite the permit process and has refused to return multiple telephone calls from Tombstone’s City Attorney. The emergency funds are being wasted on rented vehicles and equipment that remain idle in the mountains waiting for additional permits from the USFS. Several of these rental

vehicles and pieces of equipment, standing idle, have been vandalized and damaged, resulting in additional expenses to the City that could have been devoted to repairs to its water line.

10. Tombstone's water supply is currently in a critical state. Additionally, the winter months are Tombstone's busiest time of year in terms of additional water consumption due to the increase in tourism, Tombstone's primary source of revenue.

11. Plaintiff requests adjudication under the Quiet Title Act, 28 U.S.C. § 2409a (2006), that Plaintiff hold title contained within the Coronado National Park wilderness area and a right-of-way across the National Forest System lands and public lands owned by Defendant United States of America in accordance with express easements, or in accordance with the prescriptive easements as alleged herein.

12. Plaintiff requests a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201 (2010) that:

a. 1866 Grant:

(1) The Plaintiff holds land, easements and rights-of-way as shown on a map attached hereto as exhibit (1) in accordance with 43 U.S.C. § 661 which is contained within or crosses land owned by Defendants and which supplies water through a metal aqueduct owned by Tombstone.

(2) The Plaintiff has the right and obligation to operate and to maintain this right-of-way within 50-feet on each side of the center line of Plaintiff's right-of-way, without fee and without any additional authorization from Defendants in accordance with 43 U.S.C. § 661 (see also 43 U.S.C. § 1769(a) and 16 U.S.C. §§ 472 and 524). Alternatively, the Plaintiff has the right and obligation to operate and to maintain this right-of-way within a reasonable

number of feet on each side of the center line of Plaintiff's right-of-way without fee and without any additional authorization from Defendants in accordance with 43 U.S.C. § 661 (see also 43 U.S.C. § 1769(a) and 16 U.S.C. §§ 472 and 524).

b. Express Easement:

(1) The Plaintiff holds an express easement across the land managed by Defendant U.S. Forest Service via *Serial Number AZPHX-0 000447 as granted by the Department of the Interior Bureau of Land Management*. Additionally, Plaintiff holds an express right-of-way across the land owned by the Defendants, specifically through *Right-of-Way Serial Number AZPHX-0 000447 as granted by the Department of the Interior Bureau of Land Management*.

(2) The scope of Plaintiff's easement is that defined in the recorded express easement which includes the right and obligation to operate and maintain the right-of-way without fee and without any additional authorization from Defendants. Alternatively, to the extent the Plaintiff's easement is not fully defined, Plaintiff has the right and obligation to operate and to maintain this right-of-way with a reasonable number of feet on each side of the center line of Plaintiff's right-of-way without fee and without any additional authorization from Defendants in accordance with the recorded express easement.

c. Prescriptive Easement:

(1) The Plaintiff holds the above referenced property and rights-of-way by prescription across the land owned by the Defendants.

(2) The Plaintiff has the right and obligation to operate and to maintain this right-of-way with a reasonable number of feet on each side of the center line of Plaintiff's

right-of-way without fee and without any additional authorization from Defendants.

d. Tenth Amendment to the U.S. Constitution: State sovereignty limits the scope of federal power under the Tenth Amendment to the U.S. Constitution

13. Plaintiff seeks an emergency temporary injunction and a permanent injunction pursuant to 28 U.S.C. § 2202 that enjoins the U.S. Forest Service or any other federal agency from interfering with Tombstone's efforts to repair its pipeline within the Coronado National Forest or any other public lands owned and/or managed by the United States of America.

### **JURISDICTION AND VENUE**

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

### **PARTIES**

15. Plaintiff, the City of Tombstone, is a duly incorporated municipality within

Cochise County, Arizona. Its charter was approved by the federal government. On the 1<sup>st</sup> day of November 1879, 320 acres of unsurveyed lands of the United States in the Territory of Arizona, County of Pima, Tombstone Mining District, known and called the Town site of Tombstone were incorporated by the name of the Village of Tombstone. On September 22, 1880, President Rutherford B. Hayes approved the application by the Mayor and Council of the Village of Tombstone for a three hundred and twenty acre townsite and issued a Patent to the Village of Tombstone. This Patent was recorded by S. W. Clark, Recorder of the General Land Office on September 22, 1880. On July 1, 1881, the official city map No. 303 was recorded by M. Kelliher with the Cochise County Recorder's Office. The federal charter granted Tombstone's common council the right "to provide the city with wholesome water, and to that end, for that purpose, may exercise, use, enjoy and carry out in the name of a said corporation, any and all measures requisite and necessary therefore; powers to perform which is given said corporation by the provisions of Section 1, Article II." See, Tombstone City Charter.

16. Defendant, UNITED STATES OF AMERICA is the owner of real property upon which part of the Plaintiff's land ownership and rights-of-way exists, as alleged herein.

17. Defendants, U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK in his official capacity as the Secretary of Agriculture, TOM TIDWELL, in his official capacity as the Chief Forester of the USDA Forest Service, CORBIN NEWMAN, in his official capacity as Regional Forester for the Southwestern Region of the U.S. Forest Service, are now the administrators of some real property upon which part of Plaintiff's land ownership and rights-of-way exists, as alleged herein. Upon information and belief, CORBIN NEWMAN is the person authorized to grant emergency permits to access USFS property.

## STATEMENT OF FACTS

18. On November 1, 1879, the Village of Tombstone was officially established, pursuant to Arizona Territorial law, by order of the Pima County Board of Supervisors. On September 22, 1880, the U.S. General Land Office, pursuant to federal law relating to townsites on the U.S. public domain, issued a federal patent to the Village of Tombstone. From about 1877 to 1890, the town's mines produced USD \$40 to \$85 million in silver bullion, the largest productive silver district in Arizona. Its population grew from 100 to around 14,000 in less than 7 years. In 1881, it became the county seat of the new Cochise County. By 1881, citizens of Tombstone (which included the legendary Earps and Clantons) had established a bowling alley, four churches, an ice house, a school, two banks, three newspapers, and an ice cream parlor, alongside 110 saloons, 14 gambling halls, and numerous dancing halls and brothels. The entire population of Tombstone lived and worked on top of miles of underground silver mines. On July 4, 1961, Tombstone was registered as a historic site with the United States Department of Interior, National Park Service, National Register of Historic Places.

19. The following springs and reservoirs with the Huachuca Mountains (Coronado National Forest) were found and acquired on behalf of Tombstone in order to supply Tombstone with water:

a. In 1880, the location of Mill Site Miller Spring No. 1 was discovered in Miller Canyon. The June 23, 1905, Notice of Appropriation issued under Chapter 1 Title 73 Laws of Arizona 1901 was recorded on June 24, 1905 with the Cochise County Recorder along with a map of main reservoir at Miller Spring No. 1.

b. In 1882, the location of McCoy Group No. 2, 3, & 4 Springs was

discovered in Miller Canyon. The July 27, 1901 Notice of Appropriation issued under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with a map of McCoy Group Springs No. 2, 3, & 4.

c. In 1888, the location of Marshall Spring No. 5 was discovered in Marshall Canyon. The July 28, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Marshall Spring No. 5.

d. In 1888, the location of Bench Spring No. 6 was discovered in Marshall Canyon. The July 28, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Bench Spring No. 6.

e. In 1888, the location of Maple Group No. 7, 8, & 9 was discovered in Marshall Canyon. The July 28, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Maple Group No. 7, 8 & 9.

f. On December 31, 1880, the location of Gird Reservoir 9 ½ was surveyed and established in Marshall Canyon. The real property deed for Gird Reservoir 9 ½ was recorded on February 9, 1881 with the Cochise County Recorder.

g. In 1890, the location of Lower Spring No. 10 was discovered in Marshall Canyon (July 28, 1901: Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Lower Spring No. 10).

h. In 1883, the location of Clark Spring No. 11 was discovered in a canyon

called the “Divide.” The July 27, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 30, 1901 with the Cochise County Recorder along with a map of Clark Spring No. 11.

i. On January 1, 1886, the location of Brearley Spring No. 12 was discovered in a canyon called the “Divide.” The July 27, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 30, 1901 with the Cochise County Recorder along with a map of Brearley Spring No. 12.

j. On February 25, 1881, the location of Head Spring No. 13 was discovered in Carr Canyon . The July 29, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Head Spring No. 13.

k. In 1888, the location of Cabin Spring No. 14 was discovered in Carr Canyon. The July 29, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with a map of Cabin Spring No. 14.

l. In 1888, the location of Cabin Auxiliary No. 15 was discovered in Carr Canyon . The July 29, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with a map of Cabin Auxiliary No. 15.

m. In 1888, the location of Rock Spring No. 16 was discovered in Carr Canyon. The August 2, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with a map of Rock Spring No. 16.

n. In 1888, the location of Rock Auxiliary No. 17 was discovered in Carr Canyon. The August 2, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded

on August 2, 1901 with the Cochise County Recorder along with a map of Rock Auxiliary No. 17.

o. In 1888, the location of Smith Spring No. 18 was discovered in Carr Canyon. The August 2, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Smith Spring No. 18.

p. In 1888, the location of Porter Spring No. 19 was discovered in Carr Canyon . The July 29, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Porter Spring No. 19.

q. In 1888, the location of O'Brien Spring No. 20 was discovered in Carr Canyon. The August 2, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of O'Brien Spring No. 20.

r. In 1888, the location of Storrs Spring No. 21 was discovered in Carr Canyon. The August 2, 1901 Notice of Appropriation under Act 86 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with two maps of Storrs Spring No. 21.

s. On September 6, 1901, the location of Quartz Spring No. 22 was discovered in Miller Canyon. The September 7, 1901 Notice of Appropriation under Chapter 1 Title 73 Laws of Arizona 1901 was recorded on September 10, 1901 with the Cochise County Recorder along with two maps of Quartz Spring No. 22.

t. In 1905, the location of Hoagland Spring No. 23 was discovered in a

canyon called the “Divide.” The June 23, 1905 Notice of Appropriation under Chapter 1 Title 73 Laws of Arizona 1901 was recorded on June 24, 1905 with the Cochise County Recorder.

u. In 1908, the location of Gardner Spring was discovered in Miller Canyon. The April 27, 1908 Notice of Appropriation under Chapter 1 Title 73 Laws of Arizona 1901 was recorded on April 29, 1908 with the Cochise County Recorder.

20. On July 22, 1881, James S. McCoy sold all of his interests in the springs he acquired along with mill sites and water rights and property to the Huachuca Water Company, a company incorporated in the State of Indiana. The sale and transfer of land was recorded in Book 1, Pages 757-760 Deeds of Real Estate with the Cochise County Recorder on November 24, 1888.

21. On September 9, 1881, Tombstone’s city council passed ordinance #24 that granted to the Huachuca Water Company a franchise to furnish the City Of Tombstone an additional water supply. The ordinance was signed by Seward B. Chapin, Clerk of the Common Council, V.A. Gregg, City Attorney, and by John P. Clum, Mayor. In 1881 the population of Tombstone was 6,000. Around 1885, the population was around 10,000 making it the largest city in the territory. Although water wells were dug, there was insufficient ground water to meet Tombstone’s needs. It was hauled from various locations until 1881, when the Huachuca Water Company built a 26 mile pipeline from the Huachuca Mountains to Tombstone. No sooner was a pipeline completed than Tombstone's silver mines struck water and contaminated the well water. Today, the level of arsenic is so high that the water from the Huachuca Mountains is blended to make well water safe.

22. In 1890, William Herring, attorney for the Huachuca Water Company, submitted

an opinion to the U.S. General Land Office. This legal opinion concluded that the water rights and right-of-way established by Huachuca Water Company were validly established and maintained pursuant to territorial and federal law.

23. In 1891, Congress passed the Act of March 3, 1891, (32 U.S. Stat. L. 1095, 43 U.S.C. Sections 946-949), which provided for rights-of-way across federal lands for operation and maintenance of reservoirs, canals and laterals.

24. In 1897, the United States established the Forest Reserve under the Department of Interior.

25. On February 1, 1905, the United States Congress passed the Transfer Act of 1905, which transferred management of the forest reserves from the Department of Interior to the Department of Agriculture. See, Feb. 1, 1905, c. 288, 33 Stat. 628 §§ 1, 4. 16 U.S.C. Sections 472, 524, recognized rights-of-way for pipelines serving municipal water uses established pursuant to the laws of states or territories in which the forest reserves were located. However, the Department of Interior did not transfer responsibility for water appropriations that it had made prior to 1905. The Department of Interior continued to monitor and manage those appropriations and the respective rights, titles and interests in those appropriations.

26. In 1906, President Theodore Roosevelt established Huachuca Forest Reserve, which recognized prior occupants and rights in the Forest Reserve. 34 Stat. L. Part 3 3255 (1906).

27. In 1908, the First Judicial District in and for the County of Cochise, Territory of Arizona ordered the sale of the Huachuca Water Company. The Court in approving the sale recognized as validly established and maintained all existing water rights currently claimed by

the City of Tombstone. A.E. Davis purchased the company and registered the corporation with the Arizona Corporation Commission.

28. On February 14, 1912, Arizona became the nation's 48<sup>th</sup> state. Article 17 of the Arizona Constitution recognized all water rights previously granted.

29. On March 20, 1913, the Department of Interior accepted the sale of Huachuca Water Company and transfers all rights, title, property, etc to A.E. Davis, and signed PHX0447 which acknowledged the rights-of-way for the Huachuca Water Company of its reservoirs and pipeline to the City of Tombstone.

30. Between 1941 and 1943, the U.S. War Department was interested in purchasing the iron pipeline of the Huachuca Water Company for the war effort. Fort Huachuca, which is situated at the base of the Huachuca Mountains, was re-established as a significant military installation. The Arizona Corporation Commission stepped in and stated that a viable water source needed to be found to support Tombstone before the sale of the pipeline could take place. Multiple tests were conducted and no viable alternate water source was found. The plan to purchase the pipeline for Fort Huachuca was abandoned in the interest of the citizens of Tombstone.

31. On April 14, 1947, the City of Tombstone purchased the Huachuca Water Company.

32. On December 21, 1949, all rights, title, property, etc. were transferred to the City of Tombstone by the Department of Interior and State of Arizona pertaining to the Huachuca Water Company. A perpetual right-of-way was granted to the City of Tombstone under the original PHX0447 Right-of-Way given to Huachuca Water Company in 1913.

33. In 1962, the United States Forest Service recognized Tombstone's reservoir locations on the pipeline within the Coronado National Forest and assigned a special use permit for Carr, Rock, Clark, Miller and Gardner reservoir locations.

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

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

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

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

35. In 1977, a forest fire devastated much of the vegetation with much of the Huachuca Mountains. Mayor Marjorie Colvin declared a State of Emergency. The State of

Arizona (via Governor Raul Castro) issued an emergency grant in the amount of \$50,000 in emergency funding to repair the water line at Carr, Gardner and Miller reservoirs.

36. In 1978, the USFS District Ranger in Hereford met with representatives of Tombstone to discuss City of Tombstone rights in the Huachuca Mountains pertaining to the water line and acquiring permits to conduct repairs. Permits were granted and the repairs were made.

37. On December 29, 1989, the USFS attempted to force City of Tombstone to sign new Appropriations of Water with only one spring location. By way of letter from the Tombstone City Attorney, dated February 26, 1990, the request was denied with Tombstone asserting its rights to all of the springs previously appropriated to Tombstone. On March 19, 1990, the USFS issued a response which acknowledged Tombstone's previous rights in Miller Canyon.

38. In 1993, another devastating fire in the Huachuca Mountains damaged the Tombstone waterline. Repairs were made to Gardner, Miller and Carr reservoirs with a permit from USFS.

39. On July 30, 1998 the District Ranger issued a report stating: Any actions relating to implementation of the management option to purchase the Tombstone Pipeline water for use by Sierra Vista and/or Fort Huachuca should consider the need for this water right. Tombstone did not act on this report.

40. Between May 29, 2011 and July 26, 2011, the Monument Fire and subsequent landslides destroyed Tombstone's reservoirs and pipelines in Miller Canyon, destroyed the Clark, Brearley and Hoagland Spring areas in the "Divide", caused massive flooding in Carr Canyon

affecting all springs in Carr Canyon and Head Springs Reservoir. Flooding completely obliterated Marshall Canyon, leaving only catch basin/reservoir at Maple Group Springs No. 7, 8 & 9 intact.

41. On July 26, 2011, Mayor Henderson declared a State of Emergency.

42. On August 17, 2011, Arizona Governor Janice K. Brewer declared a State of Emergency pertaining to the water supply for the City of Tombstone and appropriated money for emergency repairs. ***Repairs are required to be completed by February 15, 2012.***

43. On August 23, 2011, the City of Tombstone began initial contact with necessary agencies to begin emergency temporary repairs to the water line and reservoirs, to include: USFS, BLM, AZDEMA, Army Corp. Engineers, ADWR. Every agency has been fully cooperative except the USFS, which has purposely thwarted Tombstone's attempts to repair its water pipeline.

44. As of December 5, 2011, the USFS has issued one (1) permit for the lower spring heads in Miller Canyon and stalling on the issuance of any other permits. Tombstone's 1.2 million gallon reservoir that catches the water from the Huachuca Mountains is virtually dry, thus prompting emergency action by this Court. Additionally, since the inception of attempts by the City to obtain appropriate permits from the U.S. Forest Service to enable the repairs of its water lines, as set forth in this Complaint, City employees have been repeatedly subjected to demeaning, abusive and harassing behavior and responses to requests by officials of the U.S. Forest Service. These actions by the agents of the U.S. Forest Service have been taken in violation of federal law and the internal policies and regulations of the U.S. Forest Service, and have effectively blocked efforts by the City to deal with its emergency water situation as

described in this Complaint.

## **CLAIMS FOR RELIEF**

### **I. FIRST CLAIM FOR RELIEF -1866 GRANT (43 U.S.C. § 661, 30 U.S.C. § 51)**

45. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 44 inclusive.

46. 43 U.S.C. § 661 provides:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (30 U.S.C. § 51 contains the same language stated above).

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.

Codified by R.S. 2339 derived from Act July 26, 1866, c. 262, § 9, 14 Stat. 253

47. That statute was amended on October 21, 1976, via 90 Stat. 2793, which became effective on and after Oct. 21, 1976, insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System amended section to read as follows:

“Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.”

“All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights as may have been acquired under or recognized by this section.”

48. From July 26, 1866 until its amendment on October 21, 1976, Section 9 of the Act of July 26, 1866 (43 U.S.C. § 661) allowed for the construction of rights-of-way across and upon the public domain of the United States of America, which included the Huachuca Mountains (now Coronado National Forest) and 26 miles of open land.

49. Arizona water law recognized the prior appropriation system for establishing water rights. In *Hill v. Lenormand*, 2 Ariz. 354, 357-358, 16 P. 266 (Ariz.Terr. Jan 12, 1888), the Arizona Supreme Court stated:

So that, as we take it, it was wholly immaterial whether plaintiffs owned their lands at the time of the appropriation or not. The federal government by act of congress, July 26, 1886, (see section 2339, Rev. St. U. S.,) confirmed all rights to

the use of water acquired by prior appropriation; and by the act of congress of July 9, 1870, it is provided that all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested or accrued water-rights, etc., acquired under the ninth section of the said act of July 26, 1866.

See also, *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339, 29 S.Ct. 493, 53 L.Ed. 822 (U.S.Ariz. Apr 19, 1909)(the doctrine of appropriation, as now recognized, was to some extent in force by custom in Arizona); and see, *Verde Water & Power Co. v. Salt River Valley Water Users' Ass'n*, 22 Ariz. 305, 197 P. 227 (1921)(the rule that the right to an easement for a reservoir, ditch, or canal, over the public lands claimed under section 2339, Revised Statutes of the United States, relates back to the commencement of the work or notice of appropriation, provided that the work is prosecuted with due diligence). *Certiorari Denied by Verde Water & Power Co v. Salt River Valley Water Users' Ass'n*, 257 U.S. 643, 42 S.Ct. 53, 66 L.Ed. 412 (U.S.Ariz. Oct 24, 1921). Additionally, Arizona first codified the right to appropriate water in 1901. See, Civ.Code 1901, § 4169, now A.R.S. § 45-151. A.R.S. § 45-151 states in part: “The person, the state of Arizona or a *political subdivision* thereof first appropriating the water shall have the better right.”

50. Under the 1866 Grant Act, the U.S. Supreme Court determined that a right-of-way to convey water is established through the construction of a pipeline. *San Jose Land & Water Co. v. San Jose Ranch Co.*, 189 U.S. 177, 23 S.Ct. 487 (1903).

51. Consistent with the grant of authority under Section 9 of the Act of July 26, 1866 and Arizona law, Plaintiff’s predecessors-in-interest acquired water rights and constructed a 26 mile right-of-way across and upon the public domain of the United States. Construction predated the conversion of public land to the National Forest System.

52. Plaintiff's predecessors-in-interest operated and maintained this right-of-way from 1881 until December 21, 1949, when the City of Tombstone purchased all rights, title and interests then held by the Huachuca Water Company, which included the 26 mile pipeline, various easements, rights-of-way and real property within the Coronado National Forest wilderness area.

53. Since December 21, 1949, the City of Tombstone has owned, managed and maintained the pipeline, maintained the right-of-way within 50 feet on each side of the centerline of the right-of-way, the reservoirs and other interests acquired by its predecessors-in-interest, consistent with the grant conveyed by Section 9 of the Act of July 26, 1866, codified as 43 U.S.C. § 661.

54. Plaintiff has the duty and right to operate the right-of-way described herein and to maintain said right-of-way within 50 feet on each side of the centerline of the right-of-way without payment of any fee to the Defendants and without any authorization from the Defendants beyond the requirement to conform to Section 9 of the Act of July 26, 1866, codified as 43 U.S.C. § 661 and 16 U.S.C. §§ 472 and 524.

55. Plaintiff claims this right to the land, easements, and rights-of-way generally described in Exhibits 1 and 2 (Bates 1-94).

## **II. SECOND CLAIM FOR RELIEF- EXPRESS EASEMENTS UPON PORTIONS OF THE NATIONAL FOREST SYSTEM LANDS**

56. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1-55.

57. Plaintiff has acquired a nonpossessory interest in land, specifically the right of use

under express documents of record pursuant to the laws of the State of Arizona under A.R.S. § 33-401.

58. Plaintiff's express easements and rights-of-way were duly recorded pursuant to A.R.S. § 33-411.01.

59. Plaintiff's express easements and rights-of-way are valid and the provisions of the easement documents and Arizona law control the scope and nature of the easements.

60. Plaintiff's express easements and rights-of-way remained in effect when the U.S. Forest Service later acquired management and control of the Coronado National Wilderness Area and prior to the private ownership transfer of federal lands to private owners.

61. The creation of the National Park Service via 16 U.S.C. § 1 on August 16, 1916 did not affect or modify Tombstone's express easements and rights-of-way according to 16 U.S.C. § 4.

62. To the extent the rights-of-way described herein are subject to an express easement, Plaintiff has a duty and right to operate the rights-of-way and to maintain said rights-of-way consistent with the recorded express easement without payment of any fee to the U.S. Forest Service and without any additional authorization from the U.S. Forest Service.

### **III. THIRD CLAIM FOR RELIEF- PRESCRIPTIVE EASEMENTS**

63. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 62 inclusive.

64. Plaintiff has acquired a non-possessory interest in land, specifically the right of use, pursuant to the laws of the State of Arizona. *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 208, 818 P.2d 190, 193 (App.1991).

65. Plaintiff's right to use is based on Plaintiff's water rights.

66. Plaintiff's predecessor-in-interest began use of the rights-of-way described herein in 1880, before the public lands were designated as "wilderness" subject to protection.

67. Plaintiff's and its predecessor-in-interest's use of this land (1) has actually and visibly been used for a specific purpose, (2) for ten years, and (3) that the use was non-permissive, meaning it began and continued under a claim of right that was inconsistent with and hostile to the claim of the true owner.

68. To the extent the rights-of-way described herein are subject to a prescriptive easement, Plaintiff has the duty and right to operate the rights-of-way and to maintain said rights-of-way consistent with the prescriptive easement without payment of any fee to Defendants and without any additional authorization from Defendants.

**FOURTH CLAIM FOR RELIEF- STATE SOVEREIGNTY UNDER THE TENTH  
AMENDMENT TO THE U.S. CONSTITUTION**

69. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 68 inclusive.

70. This Court has supplemental jurisdiction where a question raises important federalism issues. *Allapattah Services, Inc. v. Exxon Corp.*, 362 F.3d 739, 754 (11th Cir. 2004), Certiorari granted in part by *Exxon Corp. v. Allapattah Services, Inc.*, 543 U.S. 924, 125 S.Ct. 317 (2004)(The Supreme Court has always shown a special solicitude toward policing the boundaries of our federal system of government and protecting the limited independence and sovereignty of states guaranteed by the Tenth Amendment).

71. Principles of state sovereignty limit the scope of federal power under the Tenth Amendment to the U.S. Constitution. *Bond v. United States*, 131 S. Ct. 2355 (2011) (“Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government’s enumerated powers undermines the sovereign interests of States”); *Printz v. U.S.*, 521 U.S. 898, 923-24, 932 (1997) (“When a ‘Law . . . for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty . . . it is not a ‘Law . . . proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] act of usurpation’ which ‘deserves to be treated as such . . . . [it violates] the very principle of separate state sovereignty’ for Congress ‘to compromise the structural framework of dual sovereignty’) (citing The Federalist No. 33; Gary Lawson & Patricia B. Granger, The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 297-326, 330-33 (1993)).

72. Principles of state sovereignty guarantee sufficient autonomy to the states and political subdivisions of the states, including Plaintiff, from the federal government so that they can exercise traditionally reserved powers that are essential to their sovereign existence.

73. Plaintiff’s acquisition, maintenance, and enjoyment of water rights and appurtenant property rights within the Coronado National Forest for the benefit of its residents and others tapped into the Tombstone aqueduct is an exercise of traditionally reserved powers that is essential to Plaintiff’s sovereign existence as a political subdivision of the state because public health and safety within Plaintiff’s jurisdictional limits cannot otherwise be adequately protected.

74. Defendants’ interference with Plaintiff’s right and obligation to repair and

maintain its land, reservoirs and pipelines located within the Coronado National Forest and its rights-of-way within 50 feet on each side of the center line of Plaintiff's right-of-way violates principles of state sovereignty guaranteed by the Tenth Amendment to the U.S. Constitution.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff requests:

1. This court declare, adjudge, and decree via the Quiet Title Act, 28 U.S.C. § 2409a, or the Declaratory Judgment Act, 28 U.S.C. § 2201, that the Plaintiff holds land within and a right-of-way across the land owned by Defendants, under any one of the following means:
  - a. 1866 Grant: This court declare, adjudge, and decree that: (1) the Plaintiff holds land and rights-of-way across the land owned by Defendants in accordance with 43 U.S.C. § 661 and (2) the Plaintiff has the right and obligation to operate and to maintain this land and rights-of-way within 50 feet on each side of the center line of Plaintiff's rights-of-way without fee and without any additional authorization from Defendants pursuant to 16 U.S.C. §§ 472, and 524.
  - b. Express Easement: This court declare, adjudge, and decree that: (1) the Plaintiff holds land and an express easement across the land owned by Defendants, the scope of Plaintiff's land holdings and express easements are recorded with the Cochise County Recorder, and as such, (2) the Plaintiff has the right and obligation to operate and to maintain this land and rights-of-way within 50 feet on each side of the center line of Plaintiff's rights-of-way without fee and without any additional authorization from Defendants.
  - c. Prescriptive Easement: This court declare, adjudge, and decree that: (1) the Plaintiff holds land and a right-of-way by prescription across the land owned by Defendants, and

as such, (2) the Plaintiff has the right and obligation to operate and to maintain this land and rights-of-way within 50 feet on each side of the center line of Plaintiff's rights-of-way without fee and without any additional authorization from Defendants.

d. This Court declare that state sovereignty limits the scope of federal power under the Tenth Amendment to the U.S. Constitution.

2. That this court enjoin the Defendants, their agents, employees, successors, and all persons acting in concert or participating with them, from interfering with Plaintiff, either directly or indirectly, with Plaintiff's right and obligation to repair and maintain its land and reservoirs located within the Coronado National Forest and its rights-of-way within 50 feet on each side of the center line of Plaintiff's rights-of-way without fee and without any additional authorization from Defendants and in accordance with 16 U.S.C. § 1133(c), which exempts existing private rights from enforcement of wilderness restrictions.

3. That, if the Court determines that permits are required to make the repairs and maintain its property and easements, that this Court order Defendants to immediately issue the necessary permits under its emergency jurisdiction without unreasonable restrictions imposed by, or interference from, the Defendants, their agents, employees, successors, and all persons acting in concert or participating with them.

4. Grant such other relief as this Court deems appropriate, to include the award of attorneys fees and costs.

RESPECTFULLY SUBMITTED this 28 day of December 2011,

BAYS LAW PC

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P. RANDALL BAYS

Attorney for Plaintiff

STRICKLAND & STRICKLAND P.C.

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ROBERT PALMQUIST  
Attorney for Plaintiff

A copy of the foregoing mailed  
this 28 day of December 2011 to:

United States Attorney  
405 West Congress Street, Suite 4800  
Tucson, Arizona 85701-4050  
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By \_\_\_\_\_