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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTY OF COCHISE**

BEATTY'S QUESTIONS RE: PLAINT BEATTY'S QUESTIONS RE: PLAINT AND ORCHARD, LLC, THOMAS BEATTY SR., EDITH M. BEATTY, BEATTY LIVING TRUST, Defendants.		No. CV201200499 RULE 26.1 DISCLOSURE STATEMENT OF THE DEFENDANTS/ COUNTERCLAIMANTS
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The Defendants/Counterclaimants, by and through the undersigned attorney, hereby submit this Disclosure Statement pursuant to Rule 26.1 of the Arizona Rules of Civil Procedure.

a. Factual Basis of the Claim and Defenses.

The real property which is the subject of this dispute, located in the Miller Canyon area of the Huachuca Mountains, was obtained by the United States of America in the Gadsden Purchase and retained its status as federal property until it was conveyed by patent to the Defendants' predecessor in interest, James Tomblinson, in 1919. During the period from 1880 to 1881, the Huachuca Water Company constructed a water pipeline across this federal land to convey water to the City of Tombstone, located on the other side of the San Pedro River valley. In 1901, the Huachuca Water Company filed various documents designated as "Notice of Appropriation" with the Cochise County Recorder, which asserted various claims to certain springs, water sources, ground for the use and enjoyment of these water sources, and certain five-acre parcels of land in the vicinity of these water sources. One of these "Notices," as recorded by the Cochise County Recorder at Misc. Book 5, pages 416-417 on August 2, 1901, underlies Plaintiff's claims in this litigation. Said notice claims "McCoy Group Springs No. 2, No. 3, No. 4" and five acres around them. No title to these five acres or any part thereof was ever conveyed by the United States to the Huachuca Water Company. The use of a right-of-way that was granted on March 8, 1913 by the Department of Interior, over a portion of the subject property, was withdrawn as erroneously granted on August 11, 1915.

At or around the time that this "Notice" was filed, one or more small flumes and pipelines were alleged to have been constructed to connect the water sources designated as McCoy Springs to the main pipeline. Then, as now, Miller Canyon was subject to periodic floods which would destroy such improvements, and if in fact said flumes and pipelines were constructed there is no evidence to indicate that they were ever re-constructed after the first major flood. By 1918 the evidence shows that the Huachuca Water Company had stopped taking water from McCoy springs.

On November 6, 1906, President Roosevelt established the Huachuca Forest Reserve, which included the land at issue here. This area subsequently became the Huachuca National Forest in 1907, was merged into the Garces National Forest in 1908, and was subsequently included within the Coronado National Forest in 1911.

In 1913, Mr. James Tomblinson filed a homestead application for a ten acre parcel of federal land, located at the confluence of Miller Creek and Marshall Canyon Creek, in the U.S. Land Office in Phoenix, as a preliminary step in obtaining a homestead patent for this property. Approximately 1.8 acres of this homestead overlapped with the five-acre so-called "McCoy Reservoir Site," as it had been described in the 1911 application submitted by the Huachuca Water Company to the Department of the Interior for permission to use federal land, which five-acre parcel differed in orientation from that originally described in the Huachuca Water Company's 1901 "Notice of Appropriation." In 1914, the Huachuca Water Company brought a lawsuit against Mr. Tomblinson in the Cochise County Superior Court seeking to establish its right to possess this property, to remove Mr. Tomblinson from this property, and to enjoin him from entering upon the property. The United States, as the owner of this property, was not joined in this

litigation. During the pendency of this litigation, the U. S. Dept. of Interior advised the Huachuca Water Company that the Company's claimed use rights to the federal property at issue in the Cochise County litigation, if valid, would not prevent the issuance of a federal patent to Mr. Tomblinson. On November 24, 1915, a judgment was entered in favor of the Huachuca Water Company, holding that that company was entitled to the use and possession of the water and the property described in its "Notice" and granting restitution of the property to the Company.

Notwithstanding this state court judgment, on October 11, 1919, the United States issued homestead patent No. 712269 to Mr. James Tomblinson for the ten-acre parcel of land for which he had filed the homestead application, namely the east half of the west half of the northeast quarter of the southeast quarter of section 23, township 23 south, range 20 east, of the Gila and Salt River Meridian. Said patent was by its terms issued subject to "rights to ditches and reservoirs used in connection with [vested] water rights" and "a right of way for ditches or canals constructed by the authority of the United States." The patent was filed with the Cochise County Recorder on May 11, 1925. Neither at the time of the issuance of the patent nor thereafter did the Huachuca Water Company use or construct any reservoir on this property. Nor were there any ditches, flumes or pipelines in use from the McCoy Springs group to the main pipeline at that time or thereafter.

The ownership of the Tomblinson patent has been transferred various times over the subsequent ninety-three years, during which time Mr. Tomblinson and his successors in interest have had open and peaceable possession of the property, have paid property taxes on this land, have put to beneficial use water from McCoy Springs taken from within the patented area to the exclusion of any other user, and have constructed numerous improvements. These improvements include a historic cabin, a sixty-foot well, and a hummingbird viewing pavilion which are located within the portion of the patented property now claimed by Tombstone as part of its five-acre "reservoir site." The Defendants are the current legal and beneficial owners of this property. No claim of ownership was asserted by the Huachuca Water Company, the Defendants' predecessors in interest, during the period from 1919 until 1947, when its interests were quitclaimed to the City of Tombstone. No claim was thereafter made by the City of Tombstone for the possession or ownership of the subject property until 2012.

In 1984 the Miller Peak Wilderness was established, immediately adjoining on the west side the lands included in the Tomblinson patent. The use of motorized equipment in wilderness areas is regulated by federal law.

b. The legal theories upon which each claim or defense is based.

The Huachuca Water Company could only obtain such interests in federal land as have been authorized under applicable federal law. No federal law permitted it to obtain a fee interest in the claimed five-acre parcel. At the time of the 1919 patent to Mr. Tomblinson, the Huachuca Water Company was making no use of McCoy Springs and Mr. Tomblinson therefore took fee title unburdened by any such use.

The Act of 1866, 43 U.S.C. §661, does not grant title to public land, but merely recognizes use rights in the nature of conditional easements. *Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co.*, 24 Idaho 63, 133 P. 655 (Idaho 1913). There is nothing in this Act which would permit federal property interests to be alienated to parties designating dry land as a "reservoir site" or claiming an arbitrary amount of acreage as "necessary grounds for the use and enjoyment" of water rights. Instead it looks to the actual use of the land. The courts have repeatedly held that rights vest under the 1866 Act only on completion of the construction of the ditches, canals and reservoirs in question. *Bear Lake & River Waterworks & Irr. Co. v. Garland*, 164 U.S. 1, 41 L.Ed. 327, 17 Sup. Ct. Rep. 712 (1896); *Verde Water & Power Co. v Salt River Valley Water Users' Ass'n*, 22 Ariz 305, 197 P 227 (Ariz. 1921); cert den (1921) 257 US 643, 66 L Ed 412, 42 S Ct 53; *United States v Rickey Land & Cattle Co.*, 164 F 496 (CCD Cal 1908). They have likewise held that patented land cannot later be burdened under authority of the 1866 Act by any use greater than that being made at the time of the patent. *Krieger v Pacific Gas & Electric Co.*, 119 Cal App 3d 137, 173 Cal Rptr 751 (1981); *Greenley Irr. Co. v Von Trotha*, 48 Colo 12, 108 P 985 (1910); *Vestal v Young*, 147 Cal 715, 82 P 381 (1905); *Felsenthal v Warring*, 40 Cal App 119, 180 P 67 (1919). As the Huachuca Water Company was making no use of McCoy Springs at the time Mr. Tomblinson took fee title to the land, his ownership was not burdened by any such use.

The Act of 1891, 43 U.S.C. §§ 946-94, applied only to companies formed for the purposes of irrigation, and therefore not to the Huachuca Water Company. The Huachuca Water Company was specifically advised of this fact by letter from the Department of the Interior of January 27, 1909. Though subsidiary uses of water other than for irrigation may be permitted under this Act, the courts have strictly held that such uses are allowed only to companies whose primary purpose is agricultural irrigation. *Kern River Co. v United States*, 257 US 147, 66 L Ed 175, 42 S Ct 60 (1921); *Pine River Irrigation Dist. v. United States*, 656 F. Supp. 2d 1298 (2009). With respect to lands within a national forest, the Act moreover would have required a formal grant of right-of-way approved by the Department of Agriculture, which the Huachuca Water Company never obtained. Even rights-of-way properly granted under the 1891 Act are by its terms forfeited as to the portions not completed within five years. No McCoy Reservoir has

ever been constructed.

The Act of 1901, 43 U.S.C. §959, empowered the Secretary of the Interior to grant permits for water conduits and reservoirs on public land, again with the condition that permits across forest land be approved by the Department of Agriculture. The Act expressly states that “any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation, or park.” The Secretary of the Interior did grant the use of a right-of-way to the Huachuca Water Company for its Tombstone pipeline on March 8, 1913. Given the absence of Agriculture Department approval, the Department of the Interior determined on August 11, 1915 that its grant did not apply to the national forest lands at issue here, and directed that any contrary notations in its records be corrected.

At the time of the issuance of the patent to James Tomblinson, the Huachuca Water Company had no ditches or reservoirs used in connection with vested water rights in McCoy Springs, nor did it have any right of way across the patented land for ditches or canals constructed by the authority of the United States. Mr. Tomblinson took fee title to his homestead free of any claims by the Huachuca Water Company to the so-called “McCoy Reservoir Site.” Any action to recover real property from a person in peaceable and adverse possession, and cultivating, using or enjoying the property, paying taxes thereon, and claiming under a deed or deeds duly recorded, shall be commenced within five years after the cause of action accrues, and not afterward. A.R.S. § 12-525. This limitation barred any claim that the Huachuca Water Company may have had to the subject property prior to the time that any such alleged interest may have been transferred to the City of Tombstone.

A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward. A.R.S. § 12-526. This limitation barred any claim that the Huachuca Water Company may have had to the subject property prior to the time that any such alleged interest may have been transferred to the City of Tombstone.

c. The names, addresses, and telephone numbers of the witnesses that the Petitioner expects to call at trial with a fair description of the substance of each witness’ expected testimony.

- a. Thomas Beatty, Sr.
2173 Miller Canyon Road
Hereford, AZ 85615
(520) 378-2728

Mr. Beatty will testify that he is the owner of the subject property and has lived on a portion of this land since 1967. He will describe the manner in which this property has been used since that time and the absence of any reservoir, flumes or pipelines from McCoy Springs area during that time. He will also testify that he has not seen any evidence on this property that the City of Tombstone or the Huachuca Water Company used or occupied any reservoir site in the area that has been claimed by the City. He will describe the manner in which this property has been used for access by Tombstone’s agents and employees during this time, with his permission. He will also describe the nature of, and changes caused by various floods over this property which have occurred during this time.

- b. Edith Beatty
2173 Miller Canyon Road
Hereford, AZ 85615
(520) 378-2728

Ms. Beatty is the wife of Thomas Beatty, Sr. and a co-owner of the subject property. She will provide testimony on similar issues.

- c. Thomas Beatty, Jr.
2173 Miller Canyon Road
Hereford, AZ 85615
(520) 378-2728

Mr. Beatty is the son of Tom, Sr. and Edith Beatty and has grown up on this property. He has done various construction work in the vicinity of the area designated as McCoy Springs over many years. He will testify that he has not seen any evidence of any

reservoir either in use or previously constructed in this area and that there are no existing pipelines or flumes connecting the McCoy Springs group to the main pipeline in this area. He will also testify about the changes to this area that have been caused by several significant flood events and the damages that have been done by these events.

d. George W. McKay
Regional Title Claims Specialist
Southwest Region, U. S. Forest Service
300 W. Congress
Tucson, AZ 85701
(520) 388-8300

Mr. McKay will provide testimony regarding the ownership and status of the subject property. See his Declarations of January 13, 2012 and April 30, 2012, as previously provided in the pending federal litigation *Tombstone v. United States*.

e. Duane Bennett
U. S. Forest Service
Coronado National Forest
4070 South Avenida Saracino
Hereford, AZ 85615
(520) 378-0311

Mr. Bennett will provide testimony regarding the use and development of the subject property. See his Declarations of January 13, 2012, and April 30, 2012, as previously provided in the pending federal litigation *Tombstone v. United States*.

d. The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

In addition to the persons listed herein, there are many people identified in the many documents related to this matter that have been prepared over the preceding one hundred and thirty years or so. The available information relating to these persons is described in those documents, which are being provided in connection with the Response to the Request for Production of Documents provided on this same date.

e. The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

See above. We are not aware of any written or recorded statements related to these issues, other than those which have been prepared in connection with the pending federal litigation between the City of Tombstone and the United States. Copies of those statements will be re-provided electronically in response to the Request for Production of Documents on this same date.

f. The name and address of each person the Petitioner expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the custodian of copies of any reports prepared by the expert.

This party may call as experts those federal officials who have previously provided statements and evidence in the pending federal litigation between the City of Tombstone and United States. See ¶ 3 above. Copies of those statements and that identification will be re-provided electronically. These experts will be expected to provide testimony about the process for obtaining an interest in federal property, the nature of any interests that may have been acquired in the subject area, and whether or not there is sufficient evidence of actual use of a reservoir site in the subject area to constitute a vested right upon the Defendants' property.

This will be supplemented if an additional witness is identified.

g. The computation and measure of the damages alleged and information regarding such damages.

No damages, other than attorney's fees, are being requested in this litigation.

h. The existence, location, custodian and general description of any tangible evidence, relevant documents or electronically stored information that the Petitioner plans to use at trial and relevant insurance agreements.

There are no relevant insurance agreements. All other relevant tangible, documentary or electronically stored information, except for the real property itself, is being provided in connection with the Response to the Request for Production of Documents, submitted on this same date. The condition of the subject real property itself, under the custody and ownership of the Defendants, provides demonstrative evidence of the absence of certain improvements constructed by the Huachuca Water Company and the City of Tombstone on this property, as well as the long-standing use and enjoyment of the property by Defendants and their predecessors in interest.

i. A list of documents and electronically stored information, or a list of categories of voluminous documents, believed to be relevant.

See above.

This Disclosure Statement will be supplemented if and when additional documents, witnesses and information are identified, made available, or produced.

DATED this 26th day of November, 2012.

Defendants

P.O. Box 1836
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John A. MacKinnon, Attorney for

The foregoing was mailed on
November 26, 2012 to:

P. Randall Bays

Bays Law, P.C.
100 S. Seventh Street
Sierra Vista, AZ 85635