

BAYS LAW PC
100 S. Seventh Street
SIERRA VISTA, AZ 85635
Tel: (520)459-2639

1 P. RANDALL BAYS, ESQ./013479
2 **BAYS LAW, PC**
3 100 S. Seventh Street
4 Sierra Vista, Arizona 85635
5 (520) 459-2639
6 rbays@bayslaw.com
7 Tombstone City Attorney

FILED
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MARY ELLEN DUNLAP
CLERK OF SUPERIOR COURT
DEPUTY
SV

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

7 **CITY OF TOMBSTONE,**)
8)
9 Plaintiff,)
10)
11 v.)
12 **BEATTY'S GUEST RANCH AND**)
13 **ORCHARD, LLC, THOMAS BEATTY SR,**)
14 **EDITH M BEATTY, BEATTY LIVING**)
15 **TRUST,**)
16)
17 Defendants.)

NO. CV201200499

REPLY TO MOTION TO SET ASIDE DEFAULT

Assigned to the Honorable

15 Plaintiff, CITY OF TOMBSTONE, by and through its attorney, P. RANDALL BAYS,
16 files this REPLY to the Motion to Set aside Default and states as follows:

17 1. The Defendants asserts there has not been a decision since 1985 indicating that a
18 court has authorized what Mr. Bays is requesting. However, the Defendants apparently did not
19 review the main case cited in Tombstone's Motion. *Ulibarri v. Gerstenberger*, 178 Ariz. 151,
20 163-164, 871 P.2d 698, 710-711 (App. 1993)(The Arizona cases have found excusable neglect
21 where the attorney had established and was utilizing office procedures designed to ensure a
22 timely response, but was "deflected from this purpose by one of the many interruptions that beset
23 practitioners in modern law practice.").

24 Also, the Defendants failed to provide any statute or case law that negates the law
25 provided by Plaintiffs in support of the Motion to Set Aside. *Sax v. Superior Court, Pima*
26 *County*, 147 Ariz. 518, 711 P.2d 657 (App. 1985). The Defendants cite the *Osterkamp* decision
27 in their Response. However, the holding in *Osterkamp* merely stated that "the party wishing to
28 set aside the default will have a 'greater burden' in establishing a basis for setting aside the
default than before the rule was amended." *Osterkamp* did not negate any prior holdings nor
did it change the procedure for setting aside a default, i.e:

1 The law *favours* resolution of litigation on the merits; therefore, when considering
2 a motion to set aside a default, all doubts are to be resolved *in favor* of the
3 defaulted party. In determining whether the default should be set aside, this Court
4 has *broad discretion*, although the discretion is a legal, and not an arbitrary or
5 personal discretion. *Id.* "The legal criteria which a court is to consider on a
6 motion to set aside a default are: 1) did the defendant act promptly in seeking
7 relief from the entry of default; 2) was the failure to file a timely answer due to
8 mistake, inadvertence, surprise or excusable neglect; and 3) did the defendant
9 establish a meritorious defense?" *Id.* The general test of what is excusable is
10 whether the neglect or inadvertence is such as might be the act of a reasonably
11 prudent person under the circumstances. *Id.*

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2. Each of the "additional facts" that the Defendants assert are all within the time
Mr. Bays' Mother and legal assistant for Tombstone was dying, died and was buried. The key
facts in this case was that Bays Law was training a new receptionist and legal assistant during the
same time that Mr. Bays, a sole practitioner, was required to spend substantial time from his
office assisting his dying mother and his father who was then, and is now, suffering from
dementia and is in need of assistance in is medical affairs and personal affairs, to include
transportation to the VA hospital in Tucson for MRIs and other treatment. Care for Mr. Bays'
father was done by Mr. Bays' mother until late September 2012 when she could no longer leave
the home because of her physical state. Mr. Bays' mother died on November 8. She was buried
on November 20, two days before Thanksgiving. Mr. Bays was solely responsible for
organizing the funeral arrangements and comforting his grieving father until the rest of the family
showed up on November 19. On November 23, 2012, Mr. Bays' parent's home flooded the
first time from a broken water heater, thus, prompting Mr. Bays' father to reside with Mr. Bays.
In addition to arranging the repair of the home, Mr. Bays had to go through a mountain of papers
to manage the financial affairs of both of his parents. On December 30, 2012, a water pipe in
ceiling of Mr. Bays' father's home froze and broke and flooded the entire house again.
However, this time, destroyed much of the ceiling and walls. Although these facts constitute Mr.
Bays personal issues, they also demonstrate that Mr. Bays was not in a position to properly train
his new receptionist and deadlines for filing a response were never calendared.

28 Mr. MacKinnon asserts that he sent a letter. The letter did not contain a date for filing an
answer and thus would not have been picked up by the receptionist. Mr. MacKinnon asserts that
he sent an e-mail to Mr. Bays on November 27, 2012. First, it should be noted that Mr. Bays e-

1 mails do not go to the receptionist for calendaring. Second, Mr. Bays receives between 50-100
2 e-mails per day, most of it is junk. Third, Mr. Bays does not recall receiving the e-mail
3 MacKinnon claims he sent on November 27, 2012. Upon receiving the Response to the Motion,
4 Mr. Bays checked his e-mails from MacKinnon and found 19 e-mails sent by MacKinnon to
5 Bays on November 26, 2012 but none sent on November 27, 2012. Mr. Bays does not read e-
6 mails every day and is not his primary means of communicating with attorneys on legal matters.
7 In this case, based on the facts stated above, Mr. Bays had over 1700 e-mails that he went
8 through in early January, 2013. Mr. Bays has never authorized Mr. MacKinnon to use e-mail as
9 the primary means of communication between the attorneys.

10 **Meritorious Defense**

11 **Res Judicata**

12 The Defendants claim their patent is not subject to res judicata because it was issued after
13 the 1915 decision from the federal government. The Defendants did not provide any case law
14 demonstrating that their federal patent negates the 1915 decision. Furthermore, their patent
15 specifically contains language :

16 “Subject to any vested and cured water rights for mining, agriculture, manufacturing, or other
17 purposes, and rights to ditches and reservoirs used in connection with such water rights as may
18 be recognized and acknowledge by the local customs, laws and **decisions of courts** and there is
19 reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by
20 the authority of the United States.” See, Exhibit (A) to the counterclaim. Exhibit (B) to the
21 counterclaim contains similar language.
22

23 Additionally, 43 U.S.C. § 661 provides:

24 Whenever, by priority of possession, rights to the use of water for mining,
25 agricultural, manufacturing, or other purposes, have vested and accrued, and the
26 same are recognized and acknowledged by the local customs, laws, and the
27 decisions of courts, the possessors and owners of such vested rights shall be
28 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,

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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.

Adverse Possession

The Defendants state, for the first time, that their “adverse possession” claim is against the Huachuca Water Company, Tombstone’s predecessor-in-interest. The Huachuca Water Company was a public utility and therefore had the same immunity as the state or a municipality from statutes governing adverse possession.

Also, the Beatty’s lack standing to sue for “adverse possession” on behalf of their predecessors-in-interest. On April 14, 1947, the City of Tombstone purchased the Huachuca Water Company, many years before the Beatty’s acquired their ownership interest. 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. 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. This special use permit included the McCoy Group reservoir and the property disputed here.

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].

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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.

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. The repairs included the property at issue here.

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. These repairs again included the property at issue here.

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.

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.

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

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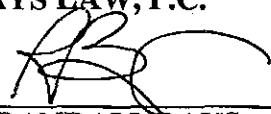
Sierra Vista and/or Fort Huachuca should consider the need for this water right. Tombstone did not act on this report.

There are sufficient facts to warrant a meritorious defense:

WHEREFORE, Tombstone request that the default be set aside and this matter continue toward litigation on the merits.

DATED this 17 day of January, 2012.

BAYS LAW, P.C.



P. RANDALL BAYS
Tombstone City Attorney

Original of the foregoing
mailed this 17th
day of January, 2013, to:

JOHN A MACKINNON
LAW OFFICE OF JOHN A. MACKINNON, PLLC
PO BOX 1836
BISBEE AZ 85603
Attorney for Defendants