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

CASE NO. CV201200499

26.1 DISCLOSURE STATEMENT

CITY OF TOMBSTONE,
Plaintiff,
v.
BEATTY'S GUEST RANCH AND
ORCHARD, LLC, THOMAS BEATTY SR,
EDITH M BEATTY, BEATTY LIVING
TRUST,
Defendants.

COMES NOW the Plaintiff, CITY OF TOMBSTONE, by and through counsel
undersigned, and pursuant to Rule 26.1, Arizona Rules of Civil Procedure as Amended, makes
disclosure as follows:
I. Summary of the claims.

The BEATTY's counterclaim requests a declaratory judgment and to quiet title to a five-
acre reservoir site known as the McCoy group and reservoir located in the Huachuca Mountains,
within Miller Canyon. The BEATTY's claim is premised on a federal patent and deed
originating from James Tomblinson as well as adverse possession. See, ¶ 53 of the
Counterclaim. Apparently, in 1913, Mr. Tomblinson filed a homestead application with the U.
S. Land Office in Phoenix for a ten acre parcel of federal land located in Miller Canyon the
overlaps approximately 1.8 acres of Tombstone's five-acre McCoy parcel. The BEATTY's

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believe their claim to, at least, 1.8 acres of the McCoy reservoir site is superior to Tombstone's claim because it originated from a homestead patent issued by the federal government. In the alternative, they are claiming, at least, 1.8 acres of the McCoy reservoir site by adverse possession. Tombstone believes its rights are superior as to ownership of the land and water rights because of the judgment issued out of Cochise County against Tombinson in 1915 to the same five-acre McCoy reservoir site and water rights and was never appealed and therefore is subject to the doctrine of res judicata. The Tombinson federal patent was issued "subject to any vested and cured water rights for mining, agriculture, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledge by the local customs, laws and **decisions of courts** and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States." Also, "adverse possession" is not applicable to municipalities engaged in a public water system.

2. The factual basis of Tombstone's claims

1. 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 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

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1 numerous dancing halls and brothels. The entire population of Tombstone lived and worked on

2 top of miles of underground silver mines. On July 4, 1961, Tombstone was registered as a

3 historic site with the United States Department of Interior, National Park Service, National

4 Register of Historic Places.

5 2. The following springs and reservoirs that are subject to this litigation were found

6 and acquired on behalf of Tombstone in order to supply Tombstone with water:

7 a. In 1880, the location of Mill Site Miller Spring No. 1 was discovered in

8 Miller Canyon. The June 23, 1905, Notice of Appropriation issued under Chapter 1 Title 73

9 Laws of Arizona 1901 was recorded on June 24, 1905 with the Cochise County Recorder along

10 with a map of main reservoir at Miller Spring No. 1.

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

12 discovered in Miller Canyon. The July 27, 1901 Notice of Appropriation issued under Act 86

13 Acts of 1893 was recorded on August 2, 1901 with the Cochise County Recorder along with a

14 map of McCoy Group Springs No. 2, 3, & 4.

15 3. On July 22, 1881, James S. McCoy sold all of his interests in the springs he

16 acquired along with mill sites and water rights and property to the Huachuca Water Company, a

17 company incorporated in the State of Indiana. The sale and transfer of land was recorded in

18 Book 1, Pages 757-760 Deeds of Real Estate with the Cochise County Recorder on November

19 24, 1888.

20 4. On September 9, 1881, Tombstone's city council passed ordinance #24 that

21 granted to the Huachuca Water Company a franchise to furnish the City Of Tombstone an

22 additional water supply. The ordinance was signed by Seward B. Chapin, Clerk of the Common

23 Council, V.A. Gregg, City Attorney, and by John P. Clum, Mayor. In 1881 the population of

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1 Tombstone was 6,000. Although water wells were dug, there was insufficient ground water to
2 meet Tombstone's needs. It was hauled from various locations until 1881, when the Huachuca
3 Water Company built a 26 mile pipeline from the Huachuca Mountains to Tombstone. No
4 sooner was a pipeline completed than Tombstone's silver mines struck water and contaminated
5 the well water. Today, the level of arsenic is so high that the water from the Huachuca
6 Mountains is blended to make well water safe.
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9 In 1890, attorney William Herring submitted an opinion to the U.S. General Land
10 Office. This legal opinion concluded that the water rights and right-of-way established by
11 Huachuca Water Company, Tombstone's predecessor-in-interest, were validly established and
12 maintained pursuant to territorial and federal law.
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14 In 1891, Congress passed the Act of March 3, 1891, (32 U.S. Stat. L. 1095, 43
15 U.S.C. Sections 946-949), which provided for rights-of-way across federal lands for operation
16 and maintenance of reservoirs, canals and laterals.
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18 On July 27, 1901, the Huachuca Water Company received from the United States
19 a Notice of Appropriation for McCoy spring #2 a flume to a box 148 Northeast, then to the main
20 underneath, upon the tract herein before, described for the purpose of developing and storing
21 the waters of said McCoy Springs #2, 3, and 4, and intends to construct such additional cuts,
22 excavations or reservoirs as may be necessary for the complete use and enjoyment of the waters
23 herein appropriated."
24
25 In 1906, President Theodore Roosevelt established Huachuca Forest Reserve,
26 which recognized prior occupants and rights in the Forest Reserve. 34 Stat. L. Part 3 3255
27 (1906).
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29 In 1908, the First Judicial District in and for the County of Cochise, Territory of

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Arizona (case # 5295) ordered the sale of the Huachuca Water Company to A. E. Davis who then registered his ownership of the corporation with the Arizona Corporation Commission. The Court in approving the sale recognized as validly established and maintained all existing water rights currently claimed by the City of Tombstone. The 1908 specifically dealt with the holdings of the Huachuca Water Company that included the land and water rights to the McCoy springs and reservoir. The judgment ordered the sale of the Huachuca Water Company and its holdings, including the "water rights and privileges, rights-of-way, and other easements, tenements and hereditaments, dams, tanks, storage reservoirs, main and branch wrought iron pipes, . . . , pertaining to the gravity distribution system from the Huachuca Mountains to the City of Tombstone." Additionally, a survey map that was completed in May 1908 by John A Rockfellow and used in the 1908 lawsuit in case # 5295 between Davis and the Huachuca Water Company clearly shows the McCoy reservoir by name.

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

11. 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.

12. On November 24, 1915, in 1915, the Huachuca Water Company sued James Tomblinson (the BEATTY's predecessor in interest) over the land and water rights that are subject to this lawsuit today. After a contested hearing, Judge Lockwood entered judgment in favor of the Huachuca Water Company and against Tomblinson to the McCoy reservoir site including three springs and 5 acres at issue in this case. See, Judgment dated November 24,

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1915 in Cochise County Superior Court case number 1090.

13. As stated in the attached judgment, Cochise County Superior Court Judge

Lockwood ruled: "It is further ordered, adjudged and decreed that the Plaintiff (Huachuca Water Company) is entitled to, and do have possession of those certain lands and premises, and springs and water, as above described, and that the Plaintiff have a writ of restitution and possession, placing Plaintiff in possession of said premises and for cost taxed in the sum of Fifteen and 70/100 (\$15.70) dollars." Furthermore a writ of restitution was ordered to be delivered upon by

Special Execution of the Cochise County Sheriff on May 25, 1916 by the Judge. In the Sheriff's Return on Writ of Special Execution in Case Number 1090, Sheriff Harry Wheeler reported the only property of James Tomblinson on the premises to be delivered were (20) twenty apple trees planted by Tomblinson two years prior to the June 2, 1916 date of Special Execution. There was no reference to any structures or anything else of value other than the apple trees. *Id.*

14. Additionally, Judge Lockwood made separate detailed findings of fact and

conclusions of law.

A. Finding #2 made the finding that Huachuca Water Company made a valid location of water rights of the various springs known as the McCoy Springs #2, 3, and 4 and the ground necessary for the proper enjoyment of such water right and that such appropriation is still a valid and subsisting appropriation.

B. Finding # 3 of the Findings of Fact state: "The ground necessary for the

proper enjoyment of such water right is the ground premises and lands embraced in the McCoy reservoir site described in the pleadings and lying in being in that certain tract of land described as follows: E 1/2 of W 1/4 of the N E 1/4 of the S E 1/4 of Section 23, Township 23 S. Range 20 East, Gila & salt River Basin Meridian, in so far as it lies between the pipe line of the said

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1 Plaintiff, the Huachuca Water Company, and the lowest bed of the canyon, through which said
2 pipe line runs. Said lands and premises lying to the south and west of said pipe line, and also the
3 right-of-way for said pipe line and the ground on which said pipe line rests, said lands and
4 premises extending from the spring and tap highest up said canyon to the lowest tap and opening
5 in the main pipe line of said Plaintiff, embraced in said McCoy Reservoir site, as described in the
6 pleadings.”
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9 C. Finding #4 states: “The Court further finds that the said Plaintiff is entitled
10 to the use of all of the water from the said McCoy Springs following through said premises and
11 that the Plaintiff is entitled to the same in its natural purity and polluted from any source.”
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13 15. Neither judgment was ever subject to appeal.
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15 16. Apparently, as a result of the 1915 lawsuit, on October 11, 1919, Tomblinson
16 filed for a federal patent from the United States, Patent number 023942. However, Patent
17 number 023942 specifically deals with the land which is not subject to this lawsuit. To the
18 extent there may be some overlap of land, the deeds upon which the BEATTYs claim ownership
19 of the 5 acre parcel and water subject to this litigation state:
20 “Subject to any vested and cured water rights for mining, agriculture, manufacturing, or
21 other purposes, and rights to ditches and reservoirs used in connection with such water rights as
22 may be recognized and acknowledge by the local customs, laws and **decisions of courts** and
23 there is reserved from the lands hereby granted a right of way thereon for ditches or canals
24 constructed by the authority of the United States.” See, Exhibit (A) to the counterclaim. Exhibit
25 (B) to the counterclaim contains similar language.
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27 17. Between 1941 and 1943, the U.S. War Department was interested in purchasing
28 the iron pipeline of the Huachuca Water Company for the war effort. Fort Huachuca, which is

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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.

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

19. 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.

20. 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.

21. The Huachuca Mountain springs, including the McCoy Group, 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

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1 residents along the aqueduct could not be treated. In 1995, ADEQ ordered Tombstone to
2 temporarily close the pipeline, forcing Tombstone to use well water. ADEQ subsequently sued
3 Tombstone in Maricopa County to force compliance. See, Maricopa County Superior Court case
4 CV96-05590. Between 1995 and 1998, Tombstone was sued in Cochise County in
5 CV95000294 by a number of residents that had tapped into the pipeline to prevent closure and by
6 the State of Arizona (Arizona Department of Environmental Quality (ADEQ)). Federal and
7 State law required that the water be filtered. On March 3, 1998, the Cochise County Superior
8 Court entered a stipulated order that allowed Tombstone to continue to supply unfiltered water to
9 residents along the aqueduct. This stipulated order also resolved the case filed in Maricopa
10 County. Water continued to flow through the Tombstone aqueduct until mid 2011.
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15 From May 29, 2011 until July 2, 2011, a catastrophic forest fire, called the
16 Monument Fire, burned much of the Huachuca Mountains where the springs are located that feed
17 into the Tombstone water pipeline. Soon after the Monument fire was extinguished, record rain
18 began to fall in July 2011, thus causing massive mud and rock slides due to the fact that the
19 vegetation had been consumed by fire. Volkswagen sized boulders landed on many areas of the
20 metal pipeline, thus damaging the pipeline and preventing spring water from accessing the
21 pipeline and literally shutting off the stream of Huachuca Mountain water to the City of
22 Tombstone.
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25 On August 17, 2011, Arizona Governor Janice K. Brewer declared a State of
26 Emergency pertaining to the water supply for the City of Tombstone and allotted monies for
27 emergency repairs. The repairs were required to be completed by January 31, 2012. To this end,
28 Tombstone rented earth moving equipment and vehicles to repair the pipeline.

24. On August 23, 2011, City of Tombstone began initial contact with necessary

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1 agencies to begin emergency temporary repairs to water line and reservoirs, to include: USFS, BLM, AZDEMA, Army Corp. Engineers, ADWR.

25. The U.S. Forest Service provided Tombstone with a temporary permit to access the lower levels of Miller Canyon. The McCoy Group is located in Miller Canyon and the Maple Group is located in Marshal Canyon, which connects to Miller Canyon. Both groups of springs require access via an easement over real property owned by the Defendants.

26. THOMAS L BEATTY SR and EDITH M BEATTY purchased certain parcels in Miller Canyon, subject to Tombstone's grants, easements and rights-of-way:

a.	105-58-004	.36 Acres	Acquired March 7, 1967	Book 466, Page 464
b.	105-58-003	4.45 Acres	Acquired May 27, 1983	Book 1677, Page 205
c.	105-58-002A	5.19 Acres	Acquired January 4, 1985	Book 1823, Page 381
27.	On August 19, 2009, THOMAS and EDITH BEATTY transferred ownership of parcels 105-58-002A and 105-58-003 into the BEATTY LIVING TRUST via documents # 20422 and 20423.			

3. The Legal Theory

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.

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

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.”

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.

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, *Bogwillas 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

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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."

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). 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.

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. 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

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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. 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.

Res Judicata or Claim Preclusion

A prior final decree granting possession and quieting title to the land in a suit between same parties or their privies is jurisdictionally barred by the doctrine of res judicata of all issues applicable to title in present suit. *Lee v Johnson*, 70 Ariz. 122, 127, 216 P.2d 722, 726 (1950). Once a court of general jurisdiction of this state has issued a final decree, even if it is erroneous, it is entitled to have its decisions honored under the doctrine of res judicata and may not be

relitigated. *State ex rel. Lassen v. Self-Realization Fellowship Church*, 21 Ariz.App. 233, 236, 517 P.2d 1280, 1283 (App. 1974). A trial court exceeds its jurisdiction if it allows the issues to be relitigated once a prior court issues a final judgment that is not appealed. *Casa Grande Trust Co. v. Superior Court In and For Pinal County*, 8 Ariz.App. 163, 165, 444 P.2d 521, 523 (App. 1968).

The Cochise County Judgment dated November 24, 1915 granted Tombstone's predecessors in interest possession and title to "the ground necessary for the proper enjoyment of such water right is the ground premises and lands embraced in the McCoy reservoir site described in the pleadings and lying in being in that certain tract of land described as follows: E ½ of W ½ of the N E 1/4 of the S E 1/4 of Section 23, Township 23 S. Range 20 East, Gila &

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1 salt River Basin Meredian, in so far as it lies between the pipe line of the said Plaintiff, the
2 Huachuca Water Company, and the lowest bed of the canyon, through which said pipe line runs.
3 Said lands and premises lying to the south and west of said pipe line, and also the right-of-way
4 for said pipe line and the ground on which said pipe line rests, said lands and premises extending
5 from the spring and tap highest up said canyon to the lowest tap and opening in the main pipe
6 line of said Plaintiff, embraced in said McCoy Reservoir site, as described in the pleadings.”
7 Furthermore, the Court ordered a writ of restitution to be delivered upon by Special Execution of
8 the Cochise County Sheriff on May 25, 1916. In the Sheriff's Return on Writ of Special
9 Execution in Case Number 1090, Sheriff Harry Wheeler reported the only property of James
10 Tomblinson on the premises to be delivered were (20) twenty apple trees planted by Tomblinson
11 two years prior to the June 2, 1916 date of Special Execution.
12 The BEATTYs are requesting that this Court issue another order granting them the same
13 rights and title to the five-acre parcel site for the McCoy Group as was granted to Tombstone's
14 predecessor-in-interest in the 1915 Judgment. The BEATTYs are barred by the doctrine of res
15 judicata to re-litigate that issue.
16 ***Adverse Possession***
17 Under A.R.S. § 12-510, municipalities are immune from the bar of limitations when
18 acting in a governmental capacity as agents of the State in matters of state-wide concern. *City*
19 *of Bisbee v. Cochise County*, 50 Ariz. 360, 72 P.2d 439 (1937). Where the municipality was
20 acting in a *public* capacity rather than in a private or proprietary capacity, the immunity under
21 A.R.S. 12-510 applies to the municipality. *Reeves v. City of Phoenix*, 1 Ariz.App. 157, 400 P.2d
22 364 (App. 1965). Here, it is obvious that Tombstone is collecting water for a public purpose and
23 therefore, is immune from any statute of limitations.

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1 Additionally, res judicata bars a party from claiming title by adverse possession when a
2 prior action adjudicated title to the same land between the same parties or their privies. *Lee v*
3 *Johnson*, 70 Ariz. 122, 127, 216 P.2d 722, 726 (1950). Here we have the same land and parties
4 at issue.
5 Plaintiff has acquired a nonpossessory interest in land, specifically the right of use under
6 express documents of record pursuant to the laws of the State of Arizona under A.R.S. § 33-401.
7 Plaintiff's express easements and rights-of-way were duly recorded pursuant to A.R.S. §
8 33-411.01.

9 Plaintiff's express easements and rights-of-way are valid and the provisions of the
10 easement documents and Arizona law control the scope and nature of the easements.
11 Plaintiff's express easements and rights-of-way remained in effect when the U.S. Forest
12 Service later acquired management and control of the Coronado National Wilderness Area and
13 prior to the private ownership transfer of federal lands to private owners.
14 The creation of the National Park Service via 16 U.S.C. § 1 on August 16, 1916 did not
15 affect or modify Tombstone's express easements and rights-of-way according to 16 U.S.C. § 4.

16 To the extent the rights-of-way described herein are subject to an express easement,
17 Plaintiff has a duty and right to operate the rights-of-way and to maintain said rights-of-way
18 consistent with the recorded express easement.
19 Plaintiff has acquired a non-possessory interest in land, specifically the right of use,
20 pursuant to the laws of the State of Arizona. *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 208, 818
21 P.2d 190, 193 (App.1991).

22 Plaintiff's right to use is based on Plaintiff's water rights.
23 Plaintiff's predecessor-in-interest began use of the rights-of-way described herein in
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1880.

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.

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.

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.

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.

3. Witnesses

A. Kevin Rudd, Project Manager for the City of Tombstone, P.O. Box 339,

Tombstone, Arizona 85638, 520-457-2202.

Mr. Rudd is an employee of the City of Tombstone and is employed as the project

manager for rebuilding the Tombstone aqueduct after the Monument Fire and monsoons of 2011

destroyed the aqueduct. He will testify concerning his observation of the aqueduct, springs and

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reservoir as well as is observation of fencing recently placed over the aqueduct and the BEATTY's attempts to prevent access to Tombstone.

B. Robert Lefevre, 3530 S. Grady Ave, Tucson, AZ 85730,

Email: rlefevre3530@msn.com

Mr. Lefevre is a former employee of the United States Forest Service and recently

retired. While employed with the USFS, he was the Coronado Forest Hydrologist and Watershed

Program Manager. He will testify concerning his knowledge of Tombstone's rights to land,

rights-of-way and easements in the Miller Canyon Creek area within the McCoy reservoir site.

D. All witnesses listed by Defendant;

E. Plaintiff reserves the right to supplement as discovery progresses.

4. Names of Individuals giving Statements.

All of the witnesses listed herein, except Kevin Gilbert have provided deposition

testimony and/or declarations in case City of Tombstone vs the United States.

5. Expert Witnesses.

A. Nancy Sosa, Historical Archivist and Researcher for the City of Tombstone, P.O.

Box 339, Tombstone, Arizona 85638, 520-457-2202.

Ms. Sosa currently employed by the City of Tombstone as the city's historical archivist

and researcher. Also, she has resided in Tombstone the majority of my 36 year life and am very

familiar with Tombstone, its water issues and its tourist season. Since January 2011, she has

been tasked with finding, preserving, organizing and indexing Tombstone's public documents

dating back to 1880. These records include, but are not limited to, council minutes book from

1880 to 1982, tax assessment rolls, court records, dockets, deeds, and hundreds of maps spanning

over 130 years. She is also a published author of books pertaining to Tombstone's wealthy

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history. She is considered an expert concerning Tombstone's historical documents. Ms. Sosa
has reviewed in detail the historical public documents pertaining to Tombstone's aqueduct,
springs, deeds, rights-of-way and reservoirs within the Huachuca Mountains. Ms. Sosa will
testify concerning Tombstone's historical rights to land, easements and rights-of-way to the
McCoy Group reservoir site and springs associated with the McCoy group.
B. Kevin Gilbert, Gilbert Technical Survey (GTS), 1601 S. Paseo San Luis, Sierra
Vista, Arizona 85635, 520-458-5730.
Mr. Gilbert is a licensed surveyor in Arizona. He will testify concerning his efforts to
survey the McCoy reservoir site as well as described the survey he created and had recorded with
the Cochise County Recorder's Office.
C. Alan W. O'Brien, P.E., Project Manager, Gannett Fleming, Inc., Suite 250, 4722
North 24th Street, Phoenix AZ 85016, (602)558-8817.
Mr. O'Brien will testify concerning the Preliminary Engineering Report the company put
together on October 3, 2012 for the City of Tombstone concerning emergency repair work need
for Tombstone's Canyon Water Supply facilities. The report completed by Gannett Fleming
includes independent research it undertook to determine Tombstone's past water collection
facilities within Miller Canyon, to include the McCoy reservoir and springs.

6. Location of evidence or documents.


All documents submitted herewith or previously filed with the Court.

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BAYS LAW P.C.
1700 S. HWY 92
SIERRA VISTA, AZ 85635
Tel: (520)459-2639

7. Documents.

Documents have previously been disclosed
DATED this 14 day of January, 2013.

BAYS LAW, P.C.

By: _____
P. RANDALL BAYS
Attorney for Plaintiff

Copies of the foregoing mailed
this 14 day of January, 2013, to:

John A. Mackinnon, Esq.
PO Box 1836
Bisbee, AZ 85603
Attorney for Defendants

By: 