Case No. 12-16172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF TOMBSTONE;
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity); TOM TIDWELL (in his official capacity); CORBIN NEWMAN (in his official capacity);
Defendants-Appellees.

9th CIR. R. 27-3 EMERGENCY MOTION UNDER F.R.A.P. 8 FOR INJUNCTION PENDING INTERLOCUTORY APPEAL

Appeal from the United States District Court for the State of Arizona
Case No. 4:11-CV-00845-FRZ, Hon. Frank Zapata, presiding

It is not too late to rescue "The Town Too Tough to Die." As discussed below, this Court should grant Tombstone an injunction pending appeal under the Tenth Amendment. The principle of state sovereignty animating this emergency motion is that the federal government only has the power to regulate individuals, not the States. Defendants are unconstitutionally, and dangerously, regulating the State of Arizona by impeding the City of Tombstone's efforts to restore its municipal water system during a declared State of Emergency.

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

9th CIR. R. 27-3 CERTIFICATE

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Facts Showing the Existence and Nature of the Claimed Emergency

Tombstone files this emergency motion because relief is needed in less than 21 days to prevent irreparable harm. Defendants have refused to allow the City to freely and fully repair and restore its 130 year old water infrastructure in the Huachuca Mountains—a municipal water system that dates back to the days of Wyatt Earp and Doc Holliday.

It is now peak season for water consumption in Tombstone and there is not

enough water flowing from the Huachuca Mountain water system to support both adequate safe drinking water and fire suppression. App. 529-30, 563. Worse still, the springs that have been restored are seasonal and will experience diminished flow this summer and, to the extent the flow continues, temporary repairs allowed to one of the three springs currently operating are likely to wash away in the annual impending Monsoon. App. 218, 504. Moreover, wildfires are currently raging throughout Arizona, including a recent fire in the Huachuca Mountains, and Tombstone is contractually obligated to furnish the Arizona State Forester with water and equipment to combat regional wildfires. App. 23-28. Faced with a lack of water flowing from the Huachuca Mountains, and only a partially repaired water system, Tombstone may not be able to perform under this contract, undermining the wildfire-fighting capacity of federal, state and local agencies in the region.

Previously, between May and July 2011, the Monument Fire engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone's water supply infrastructure is located. In July 2011, the monsoon rains were record-breaking. With no vegetation to absorb the runoff, huge mudslides forced boulders—some the size of Volkswagens—to tumble down mountainsides crushing Tombstone's waterlines and destroying reservoirs; thus, shutting off Tombstone's main source of water. In response, Governor Jan Brewer marshaled all of the police powers of the State of Arizona to charge Tombstone with repairing

its infrastructure by declaring a State of Emergency specifically for the City. App. 172-173, 505-06, 571-72.

Despite this State of Emergency, for nine months Defendants have been impeding Tombstone's efforts to take reasonable emergency action to repair its century-old Huachuca Mountain water infrastructure. Initially, they allowed mechanized equipment to repair two of Tombstone's twenty-five spring catchments. App. 214-18, 443, 454-55, 472-73, 475-76, 479-81, 491, 497. Of the remaining twenty-three springs, Defendants have denied the use of mechanized equipment and motorized vehicles despite their usual and customary use for maintenance of Tombstone's municipal water system for decades. App. 212-13, 505-06, 514, 613, 617-18, 622-23, 627-29, 633-34. Defendants are requiring Tombstone to use hand tools and non-mechanized equipment to restore twenty-three of its twenty-five springs and related infrastructure. App. 214-17, 505, 514, 480. As of March 1, 2012, these restrictions were extended even to the two springs and related infrastructure previously approved for repairs using mechanized and motorized equipment. App. 514. Along the way, Defendants have played a cynical game of bureaucratic cat and mouse, rendering the exhaustion of administrative remedies futile in the context of this ongoing State of Emergency. App. 140-45, 151-58.

Defendants' conduct has placed the lives and properties of Tombstone

residents—and Arizonans across the state—in jeopardy. Only three springs out of the twenty-five owned by Tombstone are providing the City with water. App. 218. Rather than receiving 400 gallons of mountain spring water per minute, the amount Tombstone can expect seasonally if its municipal water system were fully restored, Defendants' intransigence is rationing the City to no more than between 100 and 150 gallons of mountain spring water per minute. App. 218, 529-30, 638.

When and How Counsel for the Other Parties were Notified and Whether They Have Been Served with the Motion.

Tombstone notified counsel for Defendants of this motion by email on May 14, 2012, and again on May 15, 2012, that this motion would be filed on or before May 21, 2012. In response, Defendants' counsel advised Tombstone via email that they oppose this motion. The Clerk of the Court and the Court's staff attorney were notified by telephone on May 15, 2012 that this motion would be filed on or before May 21, 2012. This Motion will be served upon filing.

Date: May 21, 2012

s/Nicholas C. Dranias
Attorney for Movant

Legal Background of the Appeal

On March 1, 2012, the district court denied Tombstone's first motion for preliminary injunction without prejudice, allowing the City to file an amended complaint and a second preliminary injunction motion by March 30, 2012.[1] Dist.

[1] Approximately three weeks after Tombstone filed its first preliminary injunction motion, the City retained the Goldwater Institute. The Institute immediately filed a

Ct. Dkt. 44. The denial barred Tombstone from filing any reply brief in support of its second motion and also did not allow oral argument.[2] Accordingly, on March 30, 2012, Tombstone filed a First Amended Complaint and a second preliminary injunction motion seeking to stop Defendants' interference with its emergency repair efforts to restore its municipal water system based on the Administrative Procedure Act and the Tenth Amendment.[3] Dist. Ct. Dkt. 47, 48. After Defendants responded, the court entered an order on May 4, 2012, instructing the parties to draft proposed orders containing detailed proposed findings of fact and conclusions of law. Dist. Ct. Dkt. 56. Two days later, on Sunday afternoon, May 6, 2012, the court vacated that order, indicating a short decision would be issued in a "few days." Dist. Ct. Dkt. 57. More than a week later, on May 14, 2012, the court denied Tombstone's second preliminary injunction motion, whereupon this appeal was immediately filed. Dist. Ct. Dkt. 58, 60.

The district court's decision was based primarily on the doctrines of administrative exhaustion and sovereign immunity. Notably, the court did not address Tombstone's argument that pursuing administrative remedies would be

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motion to sever, continue and separately brief the City's Tenth Amendment claim because it was not expressly included in the first motion as a basis for relief.

[2] This prohibition prejudiced Tombstone because Defendants were able to advance misleading representations and erroneous arguments without rebuttal. App. 140-45, 151-58.

[3] Tombstone's Tenth Amendment claim was not considered by the district court except in connection with the second preliminary injunction motion.

futile. But there is no requirement for a State or its political subdivision to exhaust administrative remedies where, as here, doing so is futile because of the inadequacy of such remedies to prevent irreparable harm or where, as here, the conduct of administrative officials, the administrative process or the requirement of pursuing administrative remedies are themselves challenged as unconstitutional. *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773 (1947); *Terrell v. Brewer*, 935 F.2d 1015, 1019 (9th Cir. 1991). Moreover, sovereign immunity cannot bar the requested preliminary injunctive relief under the Tenth Amendment as against the individual Defendants because unconstitutional actions by federal officials are simply not those of the sovereign. *United States v. Yakima Tribal Court*, 806 F.2d 853, 859-60 (9th Cir. 1986). Correspondingly, allowing *timely temporary* injunctive relief against federal officers for unconstitutional conduct does not have the practical effect of evading any sovereign immunity enjoyed by the United States because there is no such sovereign immunity. No case cited by the district court holds otherwise. Indeed, courts have been careful to emphasize that the Quiet Title Act does not provide the sole vehicle for equitably remedying independent constitutional or administrative wrongs by federal officers that may incidentally affect federal property. *See, e.g.*, *Donnelly v. United States*, 850 F.2d 1313, 1317-18 (9th Cir. 1988); *Lee v. United States*, 809 F.2d 1406, 1409 n.2 (9th Cir. 1987); *Patchak v. Salazar*, 632 F.3d 702,

711 (D.C. Cir. 2011); *Kansas v. United States*, 249 F.3d 1213, 1225 (10th Cir. 2001). Accordingly, this interlocutory appeal seeks review of the district court's decision with respect to Tombstone's Tenth Amendment claim.

Impracticality of First Seeking Relief in the District Court under F.R.A.P. 8(a)

In light of the ongoing State of Emergency, it would be impractical to file this motion in the district court because Tombstone cannot risk further delay. Such delay is likely because there is no reason to believe that the district court will grant the requested relief. The court has already denied two preliminary injunction motions brought by Tombstone, even going so far as to deny Tombstone any right of reply or oral argument in support of its second motion. Substantially all legal grounds for the requested relief were presented in the second motion. Moreover, the court premised the denial of the second motion on the doctrines of sovereign immunity and administrative exhaustion. It is unlikely the court would refrain from erroneously applying those doctrines to this motion.

Argument

In the present case, by declaring a State of Emergency for Tombstone's water supply crisis, Governor Jan Brewer exercised "all police power vested in the state by the constitution and laws of this state" to alleviate the peril facing Tombstone from the loss of its municipal water supply. Ariz. Rev. Stat. §§ 26-301(15), 26-303(E); App. 470. It is very clear what this means in practical terms.

Tombstone is empowered to use all of the police powers of the State of Arizona to repair and restore: (1) the pipelines depicted in the surveyed rights of way shown at App. 403, 651; and (2) the water structures depicted in the surveyed parcels and rights of way shown at App. 299, 304, 313, 318, 323, 328, 333, 343, 348, 358, 368, 373, 378, 383, 388, 394, 425-29, 434-38 (with coordinates and dimensions plainly set out in the notices of appropriation shown at App. 297, 302-03, 307-09, 311, 314, 316, 319, 321, 324, 326-27, 331-32, 336-37, 341-42, 346-47, 351-52, 356-57, 362-63, 366-67, 371, 376, 381, 386, 392).

Defendants disingenuously claim they do not know what Tombstone wants. The truth is Tombstone has repeatedly explained to Defendants what it intends to do. The work involves ground displacement by equipment powerful enough to move huge boulders and deep mud; i.e., probing the ground for buried springs, building simple dam-like structures called “catchments” at the springs, building up mounds of dirt around the springs called “flumes” to keep workers safe from flash floods in the coming Monsoons (with the incidental benefit of protecting the completed repair work), and burying pipes to those catchments. In fact, completing repairs to Tombstone’s municipal water system requires nothing more than what Defendants already approved during November 2011 with respect to one of Tombstone’s water sources, namely Miller Spring No. 1. App. 450, 454-55, 491. Defendants cannot in good faith claim ignorance about the work that needs to be

done.

Similarly, Defendants' feigned ignorance cannot be justified by any legitimate question over Tombstone's authority to restore its municipal water system under emergency conditions. The State of Arizona has concurrent police power jurisdiction over federal lands located within its boundaries. *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976). No federal law clearly and unequivocally preempts Tombstone's exercise of such power to restore its municipal water system under these circumstances. To the contrary, a long-standing national policy of comity requires deference to state sovereign interests in developing, owning and maintaining local water rights and infrastructure. *United States v. New Mexico*, 438 U.S. 696, 713-18 (1978).

Furthermore, it is a red herring for Defendants to recount interagency confusion about the issuance of permits for Tombstone's municipal water system as a basis for doubting Tombstone's authority to operate its municipal water system. Those interagency disputes have nothing to do with Tombstone's authority to restore its municipal water system. As admitted by the U.S. Forest Service itself *in 1916*, Tombstone's municipal water system rests upon water rights and pipeline rights of way protected by the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 ("1866 Act"). App. 206, 414 ("The forest service has recognized the existence of a right of way for your reservoir and pipelines across the forest under sections 2339

and 2340 U.S. Revised Statutes.") In fact, the Forest Service specifically told Tombstone's immediate predecessor in interest, the Huachuca Water Company, that "since your rights are recognized it is doubted whether you would care to formally apply for an additional permit." App. 415.

Likewise, it is mere chaff for Defendants to detail the lack of express federal land patents, title or easement grants reflecting Tombstone's rights of way. Securing rights under the 1866 Act requires no federal permit or approval because the Act *automatically* protects rights recognized under local custom or law. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917); *Jennison v. Kirk*, 98 U.S. 453, 456, 460 (1878). Rights protected by the 1866 Act are superior to any conflicting land patent. *California v. United States*, 438 U.S. 645, 656 n.11 (1978).

In view of the foregoing, Defendants have erected procedural barriers to the restoration of Tombstone's municipal water system *not* because of any actual need for further administrative review of the proposed work. Defendants are commandeering Tombstone's municipal water system simply to make the town knuckle under. But the Tenth Amendment protects Tombstone from such abuse during a declared State of Emergency. For this reason, Tombstone moves for an injunction to bar the individual Defendants from interfering with its efforts to

freely and fully restore its municipal water system during this appeal.[4]

I. Applicable Standard for Motion.

"The standard . . . applied by the Ninth Circuit in ruling on motions for stays and injunctions pending appeal . . . is comparable to that used by a district court in evaluating a motion for preliminary injunction." Judge Dorothy Nelson et al, *Federal Ninth Civil Circuit Appellate Practice* § 6:267 (2001). Preliminary injunctions are granted upon the weighing of four factors: (1) whether the plaintiff is likely to succeed on the merits, (2) whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in his favor, and (4) whether an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a modified "sliding scale" approach to preliminary injunctions in which "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). These elements weigh in favor of Tombstone.

[4] Such relief would not render the case moot because the impending Monsoon, as well as periodic wildfires and flooding, ensure that the underlying dispute between the parties is likely to recur unless finally adjudicated.

II. Tombstone is Already Suffering Irreparable Harm.

Irreparable injury includes harm to public health and safety. *United States v. Midway Heights County Water Dist.*, 695 F. Supp. 1072, 1075 (E.D. Cal. 1988); *Taverns for Tots, Inc. v. City of Toledo*, 307 F. Supp. 2d 933, 945 (N.D. Ohio 2004). In *Midway Heights County Water Dist.*, for example, the court ruled that the harm to public health and safety from slight violations of federal water purity standards was sufficient to constitute irreparable harm for preliminary injunctive relief. In *Taverns for Tots, Inc.*, the court ruled that the threat of second-hand smoke caused enough irreparable injury to justify a preliminary injunction.

Here, Defendants' refusal to allow Tombstone to freely and fully restore its municipal water supply is in direct contravention of a declared State of Emergency, which specifically charged Tombstone to make emergency repairs to its water infrastructure. App. 571. Astoundingly, Defendants disregard the threat of arsenic posed by the City's increasingly contaminated well water supply, a threat that could deprive the City of adequate safe drinking water at any time. App. 529-30. Furthermore, Defendants are denying Tombstone the ability to modernize its water distribution system because the cost of doing so without adequate water flowing from the Huachuca Mountains cannot be justified. Defendants do this despite the fact that the City does not have adequate fire suppression capability, and Tombstone's historic downtown nearly burnt down in a fire *just seven months*

before the Monument Fire. App. 561-63. Finally, Defendants are compromising the entire region's wildfire fighting capacity *just as wildfire season begins*. App. 23-28.

In short, Defendants' regulatory commandeering of Tombstone's municipal water system is causing at least as much harm to public health and safety as exposing tavern patrons to second-hand smoke or delivering water that marginally violates federal health and environmental standards. Significantly, before litigation commenced, Defendants conceded the risk to the public, stating:

> Water from the springs is needed for safe drinking water for residents as well as visitors to this tourism based economy, as well as for emergency fire suppression . . . . Health and safety risks exist to the City of Tombstone if repairs are not complete expeditiously.

App. 472; *see also* App. 449, 452, 455, 465, 471, 470. These pre-litigation admissions illustrate that there is nothing speculative about Tombstone's claim that Defendants' interference with the restoration of its municipal water system harms public health and safety, which constitutes irreparable injury as a matter of law.

III. The Equities and Public Interest Favor Tombstone.

Tombstone's interest in protecting public health and safety is a "paramount" public interest, which is not outweighed by any other interest or equity that Defendants might claim. *Quoting Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981). First of all, there is no competent evidence of any environmental interest that could outweigh Tombstone's public health and safety

interest. It appears the Monument Fire destroyed any ecosystem that may have existed. Despite Freedom of Information Act requests served by the Goldwater Institute on all relevant federal agencies, no study has been produced showing any endangered or threatened animals are currently inhabiting the fire and flood ravaged area surrounding Tombstone's municipal water system. App. 40-42, 44. Although Defendants advanced conclusory statements in the lower court about the presence of spotted owl nesting areas in the vicinity of the proposed repair work, voluminous documents originating from the Fish and Wildlife Service show that the sort of repair work contemplated by Tombstone poses no threat to the spotted owl or other endangered or threatened species in the unlikely event they return to the area despite the catastrophic Monument Fire. App. 44-45, 497. And, in any event, the coming Monsoons will wash away any footprint left by the contemplated restoration work. App. 505-06.

Secondly, no public interest under federal law favors imposing a regulatory rigmarole on Tombstone's emergency municipal water system restoration work. A national policy of comity requires deference to state sovereign interests in developing, owning and maintaining local water rights and infrastructure. *New Mexico*, 438 U.S. at 713-18. Viewed against this national policy, no federal law clearly and unequivocally preempts Tombstone's emergency exercise of police powers to restore its municipal water system. Accordingly, federal law should be

construed to accommodate, rather than preempt, Tombstone's exercise of police powers to protect public health and safety interest. *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1985 (2011); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992). For this reason, any public interest federal law serves favors the requested relief.

Significantly, the statutes purportedly authorizing Defendants' regulatory activities, as well as Defendants' own internal guidelines, explicitly recognize the continued viability of Tombstone's rights of way and permit the proposed water structure repair work. The Federal Land and Management Policy Act of 1976 guarantees continued recognition of vested rights under the 1866 Mining Act. 43 U.S.C. § 1761(c)(2)(A). The November 6, 1906, Proclamation of President Theodore Roosevelt establishing the Huachuca Forest Reserve (now known as the Coronado National Forest) declared, "This proclamation will not take effect upon any lands . . . which may be covered by any prior valid claim, so long as the . . . claim exists." 34 Stat. 3255 (1906). The Wilderness Act of 1964 was expressly made "subject" to existing rights. 16 U.S.C. § 1131(c). 16 U.S.C. §1134(a) further guarantees that state and private owners of interests in lands surrounded by a Wilderness Area "shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest." 16 U.S.C. §1134(a); *Oregon*

Chapter of Sierra Club, 172 IBLA 27, 42 (2007). Additionally, §1134(b) requires the Forest Service to permit means of ingress and egress "customarily enjoyed" for valid occupancies located within wilderness areas. Likewise, the Arizona Wilderness Act of 1984, which designated the Miller Peak Wilderness Area on lands surrounding portions of Tombstone's municipal water system, requires administration of the Area was to be conducted "subject to valid existing rights." 98 Stat. 1485, Pub. L. No. 98-406, §101(a)(14)(b). Correspondingly, Forest Service's own guidelines allow motorized and mechanized transportation that was "practiced before the area was designated as Wilderness." 2300 Forest Service Manual, Ch. 20, § 2323.43d, available at http://www.fs.fed.us/im/directives/fsm/2300/2320.doc. Finally, the same guidelines require the Forest Service to "permit maintenance or reconstruction of existing [water] structures . . . [including] reservoirs, ditches and related facilities for the control or use of water that were under valid special use permit or other authority when the area involved was incorporated under the Wilderness Act." *Id*.

Taken together, it is apparent that no public interest would be served by impeding Tombstone's ability to freely and fully restore its municipal water system during a State of Emergency using customary heavy vehicles and equipment. There is certainly no indication that any applicable federal law requires the subordination of public health and safety to some other interest. The equities and

public interest thus clearly favor the requested relief.

III. Tombstone Has a Likelihood of Success on the Merits.

Serious questions going to the merits are raised by Plaintiffs' Tenth Amendment claim. As recently held by a unanimous Supreme Court, "[i]mpermissible interference with state sovereignty is not within the National Government's enumerated powers." *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). Given that the federal government only has enumerated powers, this holding implies that the Property Clause is limited by the principle of state sovereignty. Indeed, the rule of law that the principle of state sovereignty limits even plenary powers of the federal government is underscored by the fact that the federal government's treaty power was at issue in *Bond*. Similarly, *Massachusetts v. Sebelius*, 698 F.Supp.2d 234, 235-46 (E.D. Mass. 2010), recently enforced the Tenth Amendment to strike down the Defense of Marriage Act even though Congress' spending power was at issue. Just as the principle of state sovereignty limits the reach of the treaty and spending powers, so does that principle limit the reach of the Property Clause.

One of the clearest examples of impermissible interference with state sovereignty is federal commandeering of the organs or officials of state government. *New York v. United States*, 505 U.S. 144, 166 (1992). This ban on commandeering is not a constitutional axiom. Rather, it is an implication of the

first principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz v. United States*, 521 U.S. 898, 920 (1997). This first principle applies tautologically to justify the requested injunctive relief.

By overriding a gubernatorial emergency proclamation and commandeering Tombstone's municipal water system, Defendants are *literally* regulating the State of Arizona through its political subdivision. They are *not* regulating individuals. Defendants' conduct is no different in principle than demanding Tombstone secure a federal permit to drive a fire truck or a squad car during a firestorm or a riot. For this reason, Defendants' regulatory commandeering of Tombstone's municipal water system violates the principle of state sovereignty enforced in *Printz*, 521 U.S.at 920. Simply put, from the perspective of state autonomy, there are no material differences between commandeering municipal officials and commandeering sovereign property without which the municipality cannot fulfill its traditional function of protecting public health and safety. Defendants are depriving the State of its structural autonomy *and its reason for being* just as assuredly as if they had directly commanded Tombstone's Mayor to use hand tools to repair the city's water infrastructure himself. This conclusion is reinforced by the revival of *National League of Cities v. Usery*, 426 U.S. 833 (1976).

When enforcing state sovereignty's limitation on claims of federal power,

the Supreme Court has revived *National League of Cities* by effectively overturning *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). As explained in *Alden v. Maine*, contrary to the holding of *Garcia*, the Court is committed to enforcing the principle of state sovereignty that "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" 527 U.S. 706, 714 (1999) (citations omitted). This ruling and others indisputably echo the methodology, rationale and holding of *National League of Cities*, 505 U.S. at 852-54. *See also United States v. Lopez*, 514 U.S. 549, 552 (1995); *United States v. Morrison*, 529 U.S. 598, 611, 617-18 (2000). Such fully-engaged judicial review of federal incursions into the province of state sovereignty has been further buttressed by cases that have repeatedly applied heightened scrutiny to federal actions that have invoked the 14th Amendment's Enforcement Clause to override state sovereignty (where, if anything, the principle of state sovereignty is less secure than here). *See, e.g.*, *Horne v. Flores*, 129 S.Ct. 2579, 2595-96 (2009); *City of Boerne v. Flores*, 521 U.S. 507, 527-36 (1997).

In short, under current precedent, as in *National League of Cities*, the federal judiciary properly patrols the traditional boundaries between state sovereignty and federal power without deferring to Congress. *Brzonkala v. Virginia Polytechnic*

Inst. & State Univ., 169 F.3d 820, 844-47 (4th Cir. 1999), *aff'd*, *Morrison*, 529 U.S. 598. This jurisprudence is utterly inconsistent with the holding of *Garcia* that the defense of state sovereignty must be mounted from within the political process at the federal level—in Congress—not within the court system. 469 U.S. at 554. Consequently, the Supreme Court has by inescapable logical implication overruled *Garcia*, and thereby reinstated *National League of Cities*. *New York*, 505 U.S. at 161-66 (citing *Hodel*, 452 U.S. at 287-88, which applied *National League of Cities*); *Sebelius*, 698 F. Supp. 2d at 249 n.142, 252 n.154 (citing *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997)); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1283, 1299 (June 2000). This conclusion is underscored by the unanimous holding of *Bond*, which for the first time confirmed *citizen standing* to enforce the Tenth Amendment in court—something utterly inconceivable under *Garcia*.

Applying *National League of Cities* leaves no doubt that Defendants' refusal to allow Tombstone to freely and fully repair its municipal water system violates the principle of state sovereignty. This is because such conduct: (1) regulates "states as states," (2) concerns attributes of state sovereignty, and (3) impairs the state's ability to structure integral operations in areas of traditional governmental functions. *National League of Cities*, 426 U.S. at 852-54. First, as discussed above,

Defendants' regulatory interference with Tombstone's repair work during a declared State of Emergency clearly constitutes the regulation of the State, not individuals. Second, Defendants' interference concerns essential attributes of state sovereignty because the Supreme Court has specifically recognized that maintenance of a municipal water system is an essential government function. *Brush v. Commissioner*, 300 U.S. 352, 370-71 (1937). The same is true about fire protection. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 343 (4th Cir. 2000). Third, Defendants' interference with Tombstone's ability to protect public health and safety is a textbook example of impairment of governmental functions traditionally assigned to the States. *National League of Cities*, 426 U.S. at 851. Taken together, Defendants' conduct raises serious questions going to the merits of Tombstone's Tenth Amendment claim.

Conclusion

For the above reasons, while this appeal is pending, the Court should enjoin Defendants, TOM VILSAK, TOM TIDWELL, and CORBIN NEWMAN, and anyone acting at their direction, from in any way interfering with the Tombstone's use of heavy equipment and vehicles identified at App. 517-20 to fully repair and restore (1) the pipelines depicted in the surveyed rights of way shown at App. 403, 651; and (2) the water structures depicted in the surveyed parcels and rights of way shown at App. 299, 304, 313, 318, 323, 328, 333, 343, 348, 358, 368, 373, 378,

383, 388, 394, 325-29, 434-38 (with coordinates and dimensions plainly set out in the notices of appropriation shown at App. 297, 302-03, 307-09, 311, 314, 316, 319, 321, 324, 326-27, 331-32, 336-37, 341-42, 346-47, 351-52, 356-57, 362-63, 366-67, 371, 376, 381, 386, 392), by (c) probing the ground for buried springs; (d) building simple dam-like structures called "catchments" at the springs once located; (e) building up mounds of dirt around the springs called "flumes" to keep workers safe from flash floods in the coming Monsoons; and (f) burying pipes to those catchments.

RESPECTFULLY SUBMITTED on this 21st day of May by:

s/Nicholas C. Dranias
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CERTIFICATE OF SERVICE

THE ATTACHED FILING HAS BEEN ELECTRONICALLY FILED BY ECF and COPIES, including Three Volumes of a supporting appendix, have been served upon the persons identified with email addresses in the following Service List via e-mail this 21st day of May, 2012. Additional copies will be served on all persons identified in the Service List via U.S. Mail, sufficient postage prepaid, on the 22nd of May, 2012.

s/Nicholas C. Dranias

SERVICE LIST

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

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