

November 9, 2012

Mr. Leonard Gradillas
Community Programs Director
U.S. Dept. Agriculture Rural Development
230 N. First Ave., Suite 206
Phoenix, AZ 85003-1706

Mr. Jeff Hooper
U.S. Dept. Agriculture Rural Development
658 N. Bisbee Ave.
Willcox, AZ 85643

Re: Pending Legal Issues Associated with the City of Tombstone Water System

Dear Sirs:

It is my understanding that representatives of the City of Tombstone and their consulting engineer, Gannett Fleming, have recently been in contact with USDA Rural Development representatives requesting various grants and loans for the improvement of the Tombstone water collection and delivery system in the Miller Canyon area of the Huachuca Mountains. We, of course, are not privy to exactly what the Tombstone representatives may be advising you, but we have reviewed the report prepared by Gannett Fleming in August, 2011, and note a number of statements and proposals that are included within that report which are at odds with the positions that both the United States and my clients, Tom and Edith Beatty, have taken in the several cases that are now pending in state and federal court with the City of Tombstone. We have also noted that the Mayor of Tombstone has made various public statements regarding his efforts to convince your agency of the validity of the City's claims to the ownership of certain public and private lands that are in dispute. Those contentions will be the subject of judicial review in the near future.

As you may be aware, the City of Tombstone has sued Mr. and Ms. Beatty, seeking to establish its rights, if any, to the Beatty

property in Miller Canyon, and the Beattys have counterclaimed, to quiet the title to their property. *City of Tombstone v. Beatty's Guest Ranch, et al*, No. CV 201200499, Cochise County Superior Court. The lands at issue include certain areas that Tombstone is seeking to develop. It would not be appropriate at this time to fund any improvements that may be associated with these areas of dispute, including any use of the Beatty property, any portion of the McCoy Springs Group which overlaps with this property, the alleged McCoy reservoir site, or any access or connection to the Marshall Canyon sites through the Beatty property, until all associated legal issues are finally resolved in court. We do not believe that the Court will ultimately uphold the various unprecedented claims that the City's lawyers have made for ownership of these areas, but in any event, federal funds should not be expended on this development until it has been finally established exactly what rights, if any, the City of Tombstone may have in any of this property.

These parties also have filed conflicting claims to the use of the water in the vicinity of the Beatty property and in the Marshall Canyon area, which claims are now pending in the *General Stream Adjudication of All Rights to Use Water in the Gila River System and Source* in the Maricopa County Superior Court. The water produced by approximately 11 of the various springs that the Gannett Fleming Report proposes to develop for the benefit of Tombstone are among the subjects of this litigation. Again, we do not believe that the City's representatives have accurately summarized the City's actual rights to the use of these water sources, but that issue will eventually be resolved in this adjudication. At this point, all that can be said for certain is that the Beattys have a special use permit from the Forest Service to take water from springs in Marshall Canyon while Tombstone has none and has not yet obtained any confirmation of its newly asserted rights through the legal process. No federal funds should be expended to assist in the development of these contested springs until those rights are finally established.

I am sure that you are aware as well that the City of Tombstone is also now in litigation with the Department of Agriculture, U. S. Forest Service, in the federal District Court of Arizona, and on appeal to the Ninth Circuit. *City of Tombstone v. United States of America et al.*, Civil Action No. 11-845-TUC-FRZ, United States District Court for the District of Arizona, and Case No. 12-16172, U.S. Court of Appeals for the Ninth Circuit.. A number of the legal theories raised by the City regarding its purported dominance over the United States, with regard to the ownership and use of federal property located with the Coronado National Forest, are being contested by the Department and the U.S. Attorney's Office. Based upon our review of the pleadings that have been submitted by the United States in that matter, I believe that my clients and the United States have taken similar positions regarding the lack of merit to a number of the assertions that have been made by the City of Tombstone's representatives. The position of the U.S. Forest Service through the U.S. attorney is that Tombstone does not have fee title to the parcels within the Forest on which the

claimed springs are located, and that the City does need permits from Forest Service to proceed with the improvements that are proposed. The federal courts have thus far denied Tombstone's requests to proceed without such authorization. I trust that you are in direct communication with those other federal agencies regarding this matter and that you are fully aware of the positions taken by the federal government on these issues.

Finally, the level of new and increased development that has been proposed by the Gannett Fleming study for construction work within the designated Miller Peak Wilderness Area does not appear to be consistent with the protected status that this area now has. Pursuant to 16 USCS §1133 (d) (4) (1), no water development can occur in this area unless and until such action has been expressly authorized. We are not aware of any such authorization. Should this development be funded by your agency, it would require specific permits for this use of federal lands and significant prior environmental review given the nature of this project in a designated wilderness area and the presence of endangered and threatened species both within the Forest and on Beatty property.

We trust that no action will be taken on any of these proposals for the improvement and development of these contested areas until all of these legal issues are finally resolved, the City of Tombstone's right to proceed has been clearly established, and all viable alternatives have been fully considered.

Thank you for your consideration of all of these important issues. Please do not hesitate to contact me if you have any additional questions or need any additional information regarding the matters that are at issue.

Sincerely

John A. MacKinnon

xc: P. Randall Bays, City Attorney, City of Tombstone