

Goldwater sees hope for Tombstone appeal

By Dana Cole

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TOMBSTONE— On Monday, a federal appeals court denied Tombstone's request for a preliminary injunction that would allow the city to make immediate repairs to its Huachuca Mountains water system without authorization from the U.S. Forest Service.

The U.S. 9th Circuit Court of Appeals concluded that "Tombstone failed to raise serious questions going to the merits of a 10th Amendment challenge" as presented by attorney Nick Dranias of the Goldwater Institute during the hearing's oral arguments on Dec. 4. In short, the three federal-judge panel did not believe the actions of the U.S. Forest Service interferes with the 10th Amendment rights of the sovereignty of the state.

Tombstone's preliminary injunction was seeking to use motorized vehicles and heavy equipment to repair and restore Tombstone's waterline, which was destroyed in the wake of last year's Monument Fire. While city officials contend that Tombstone owns the water rights to the springs that supply its water and point to the documentation to support that contention, the 9th Circuit said the question of who owns the water is a matter that needs to be resolved.

The issues of water and property rights, and Tombstone's access to areas in the Huachuca Mountains with heavy equipment for the purpose of making repairs, challenged a 1984 wilderness area designation by the federal government.

Following the 2011 monsoons that caused extensive damage to the city's pipeline, Gov. Jan Brewer declared a state of emergency to help fund repairs to infrastructure on the mountains feeding water to pipelines maintained by the city. Tombstone rented the necessary earth-moving equipment to make the repairs, but was not able to secure the permits needed from the U.S. Forest Service to allow the equipment into the designated wilderness areas.

While Tombstone officials claim the forest service has denied crews the ability to take heavy equipment into areas where they want to make repairs, Heidi Schewel, spokesperson for the Coronado National Forest, said there is a process that must be followed when wilderness areas are involved.

"We have worked with the City of Tombstone and will continue to work with the city regarding their water system and the repairs," said Schewel. "If there is a request for motorized or mechanized equipment into the wilderness area, we utilize a 'Minimum Requirements Decision Guide.' Under that guide, when any entity requests authorization to take motorized or mechanized equipment on national forest system lands, there is a process that must be used, designed to protect wilderness values," Schewel explained.

When using the guide, the first step is to determine whether the action is really necessary. When monsoons damaged the water line with mudslides and boulders, Schewel said the Forest Service deemed Tombstone's situation an emergency and was able to push the authorization process through in a matter of weeks.

"This is a process that must be used any time any an entity requests authorization to bring mechanized or motorized equipment on national forest system lands across the U.S. It's not an isolated incident," Schewel said. "In this case, we were able to accomplish in weeks what typically takes months because of the urgency."

However, Tombstone Archivist Nancy Sosa, someone who has testified before Congress regarding the water line, said that people are getting swept up in the rhetoric and are not paying enough attention to the situation at hand.

"There are ranchers along the line that we provide water to. You have almost 1,700 people here who will be directly impacted if our water line is not restored to its original capacity. And then consider the 400,000 visitors who come through Tombstone every year. Those people will be impacted. We've been going up into those mountains for years and making repairs to that line without any problem. And now it's suddenly an issue."

Sosa also noted that because the city's water supply comes from springs and is collected in catchments, "It doesn't touch the aquifer and we don't touch the (San Pedro) river." When testifying before Congress, Sosa said, "It took one year to build the pipeline, yet 18 months after the damage, we're still arguing with the federal government about taking mechanized equipment up there to make the repairs that are needed to restore our water supply. All we're asking is that we be allowed to repair the pipeline that we've owned long before the forest service had a presence in that area."

After learning the 9th Circuit Court's decision, Tombstone Mayor Stephen Schmidt said the ruling doesn't necessarily mean the appeal process "stops here." The mayor said that during an upcoming Jan. 8 city council meeting he expects council members will be going into executive session with Dranias to discuss the city's next move.

"We'll listen to his recommendations and decide how to proceed with the appeal process from that point," he said. "As far as I know we can still fight this," Schmidt added. "The Goldwater Institute is looking at our constitutional rights. Does Tombstone have the right to access the water line and make the repairs we believe need to be made? Nick Dranias will have to advise us on which

direction we need to take from here. This has become a very complicated issue.”

Dranias agrees that the case is complex. He says despite the loss, he’s optimistic the case will be heard by the Supreme Court. “The 9th Circuit teed up this 10th Amendment issue for the Supreme Court to decide,” Dranias said of the ruling. “This was a complex appeal in many ways, but the court chose not to reach any other issue other than the 10th Amendment issue. I think it’s actually pretty positive for what our goal was in doing that appeal, which was to get the fastest appeal route to the U.S. Supreme Court possible,” he added.

Dranias said he wanted to get the 10th Amendment issue aired out in front of the Supreme Court with the current justices that serve on the court because he believes “the 10th Amendment theory will be well received, if they decide to take the appeal.”

While he admits it would have been better to win, Dranias says a partial victory on a technicality would have been far worse, as it would have “disabled us from having any practical ability to seek review by the U.S. Supreme Court. By focusing its decision on the 10th Amendment issue, I think the 9th Circuit Court was signaling to the Supreme Court that it wants guidance.”

Former Tombstone Mayor Jack Henderson, said, “I’m terribly disappointed in the 9th Circuit Court’s decision. All we can do now is keep fighting for an appeal process so Tombstone can protect its land and water rights. I’m actually shocked to hear the court’s ruling.”

Henderson also says he hopes the current city council recognizes how vital this issue is to Tombstone and will make “good decisions based on Nick Dranias’ recommendations. We’re fortunate to have the Goldwater Institute behind us, so I hope our current council listens to him.”

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