

## Legal puzzle governs issues between feds, Tombstone

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BISBEE — Last year's Monument Fire burned about 30,500 acres and destroyed or damaged nearly 70 structures, but subsequent summer rains and mudslides caused even more problems.

Huge boulders tumbled down the Huachuca Mountains and crushed waterlines and destroyed reservoirs, shutting off the main source of water for the city of Tombstone in July.

On Nov. 7, Coronado National Forest Supervisor Jim Upchurch authorized Tombstone to repair a portion of its water system at Miller Spring, in the Miller Peak Wilderness. And, on Dec. 22, he authorized the city to complete additional repairs to their water system from the Forest boundary to 1/4 mile above, or west of, Gardner Spring, in the Miller Peak Wilderness.

Because the work was to be conducted in Congressionally designated Wilderness, Minimum Requirement Decision Guides were completed to determine methods to achieve the desired work. Then, Regional Forester, Corbin Newman, delegated authority to the Forest Supervisor to allow mechanized and motorized use within the Wilderness.

"The MRDG identifies, analyzes and selects management actions that are the minimum necessary for wilderness administration. A determination is first made as to whether action is necessary. If so, guidance is provided for determining the minimum level of activity to perform the action while preserving wilderness character," states a news release from the Forest Service.

A letter from the Forest Service to the City of Tombstone dated Feb. 27 refers to work at the Miller Spring area authorized for repair of the spring catchment basin, and it states that it appeared the spring development work had been completed and water was flowing through the city's water distribution system.

"Remaining work at this site includes restoration of the site around the spring including decommissioning the spur road constructed to the spring and grading and water barring on the access road that was developed to the spring site from the Forest boundary," states the letter.

"You indicated in your letter that you needed to do work in Miller Canyon below Miller Spring; but without further detail as to what that work is, I cannot address it at this time. If you need to conduct further work below Miller Spring using mechanized equipment or access, then please submit a work authorization request containing site-specific information for the proposed equipment; work plan; and timeframe so that we can process that request in compliance with all applicable federal laws," it continues.

Regarding the Carr Springs, the Forest Service letter states that repair work appeared to be substantially complete with water flowing in Tombstone's system.

The spring site itself did not appear to have been substantially affected by flooding or fire from the 2011 Monument fire. The only additional work needed for this site is to paint the bright green new pipeline used in between the spring box developments with a color that will better blend in with the surrounding environment.

Tombstone originally filed a motion for preliminary injunction and a complaint regarding this case on Dec. 28 in federal court in Tucson, but the court directed the plaintiffs to re-file the documents, and they did so on March 30.

In the amended complaint for declaratory injunctive relief, the plaintiffs argue that as of March 1, the defendants, named as the U.S. government and Department of Agriculture, including the Forest Service, "will not allow the City of Tombstone free and unimpaired access to its municipal water system in the Huachuca Mountains to maintain their municipal water supply."

"As recently as March 25, 2012, defendants' Forest Service employees even initially refused to allow Tombstone to use a wheelbarrow during its repair work. Defendants currently only allow non-mechanical hand tools to perform rebuilding and repair work on the city's municipal water system in Carr and Miller Canyons. This amounts to a de facto prohibition on Tombstone enjoying and exercising substantially all of its vested rights," states the court document.

The plaintiffs add that "the limited equipment and access offered by defendants do not meet the needs of Tombstone to maintain, repair and restore its municipal water system to full use, even though the access, repairs and equipment sought by Tombstone are fully permissible under the terms of its 1962 SUP (Special Use Permit)."

A memo filed with the preliminary injunction states that “only three springs are currently feeding Tombstone’s municipal water system. Given that repairs and reconstruction could have been completed with heavy equipment and vehicles in a month or less, defendants have prevented Tombstone from enjoying the beneficial use of water from twenty-two of the twenty-five springs it owns for nearly three months, since first impeding the city’s emergency repair work in October 2011.”

The delay in emergency repairs is forcing Tombstone to rely upon potable well water for its water supply, but the city’s well water sources are historically and imminently at risk of arsenic contamination, according to a statement of facts filed with the motion for preliminary injunction.

On March 23, Robin Silver, co-founder and board member of the Center for Biological Diversity, sent a correspondence to four officials with the Department of Agriculture, Forest Service and Coronado National Forest, including Newman and Upchurch, to make them aware of the Forest Service’s “failure to protect designated wilderness and unique riparian resources in Miller and Carr Canyons of the Huachuca Mountains in the Coronado National Forest.”

Silver also pointed out there is a violation of the National Environmental Policy Act by the Department of Agriculture and the Forest Service, and he stated that “No further ground disturbing activity should take place until your NEPA violations are remedied.”

“Tombstone has no water rights to the Huachuca Mountain springs/San Pedro River water. Tombstone has only ‘statements of claim.’ ‘Statements of claim’ are not water rights,” states his correspondence.

Silver told the Herald/Review on Thursday that he has not received any responses concerning this matter. “Usually no one answers, hence the need to frequently litigate,” he said, adding, “Will let you know when we file suit.”

On Thursday, Tom Beatty Jr., whose family owns Beatty Guest Ranch, located in Miller Canyon, told the Herald/Review that Tombstone continues to do work on the water system on the mountain.

“They are covering the collection pool with a tarp/ground cloth, then covering that with dirt to prevent any access by wildlife to their water. There is now just a small seep of water coming from leaks in their pipes below the collection pool. I am sure they will eventually fix those as well so no water is left in the creek during the dry season,” he said.

“They seem to work two to three days a week, usually Monday to Wednesday. We don’t keep real good watch now since they are walking around our property at the moment. But they are pushing to access across our property and claiming to own part of it. Just got a letter in the mail today from their lawyer stating they own part of our property and if we don’t allow them access they will file an Injunction,” he continued.

“Lots of people walk around our property on the forest trail, every day to enjoy a hike. Also, the Forest Service employees and trail crews have no problem with walking around. Tombstone employees refused to follow our rules while on property so are barred for now. We have a strict non-smoking policy and require all our gates to be closed at all times,” Beatty added.

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