

Water repairs may impact local wildlife

Tombstone's effort to repair its water system has had a negative effect on area wildlife, according to conservation activists. (Bob Hermann photograph)

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The City of Tombstone's use of water from the Huachuca Mountains has some people concerned about the impact on wildlife, in an area that is renowned for the viewing of birds.

The Monument Fire last year burned about 30,500 acres and destroyed or damaged nearly 70 structures. Subsequent rains and mudslides crushed waterlines and destroyed reservoirs, shutting off the main source of water for Tombstone last July.

Coronado National Forest Supervisor Jim Upchurch authorized the city to repair a portion of its water system at Miller Spring, in the Miller Peak Wilderness, on Nov. 7, 2011.

On Jan. 24, Kevin Proescholdt, conservation director with Wilderness Watch, wrote a letter to Tom Tidwell, chief of the U.S. Forest Service, to express concerns regarding the use of heavy motorized vehicles in the wilderness area.

"The attack on Miller Spring has now been completed by the City of Tombstone. The city constructed a completely artificial dike within the wilderness that runs 240 feet long, 8 feet high, and 20 feet wide that now encloses the spring as a water collection box. Many large trees were knocked down in the construction, including at least a couple that were roosting trees for the Spotted Owl."

Proescholdt also pointed out that additional excavation work continued, as a result of Upchurch's authorization on Dec. 22 for the city to complete additional repairs to its water system from the forest boundary to 1/4 mile above, or west of, Gardner Spring, in the Miller Peak Wilderness.

Responding to him, Leslie Weldon, deputy chief with the National Forest System, wrote a letter dated Feb. 28 explaining that Tombstone's urgent health and safety concerns required the Forest Service to balance the need to maintain wilderness character with the needs of the city to repair its water facilities. Upchurch authorized the use of motorized equipment to expedite repairs.

"There are five springs currently permitted under a special use authorization to COT (City of Tombstone) for maintenance of a water system in the Huachuca Mountains. Prior to the establishment of the Miller Peak Wilderness, COT utilized motorized and mechanized equipment to conduct repairs and monitoring on portions of their water facilities. Forest Service policy allows for the continued use of motorized and mechanized equipment for operations of a permitted water system where such use was practiced prior to wilderness designation," Weldon's letter states. Proescholdt subsequently wrote a letter dated March 16 to Upchurch stating it appears Tombstone drove its heavy equipment into Miller Spring without authorization, and then the Forest Service scrambled to approve the work without normal National Environmental Policy Act (NEPA) review and without engaging the public.

"We understand that the COT claims water rights or even fee ownership of other springs within the Miller Peak Wilderness in addition to Miller Spring and Gardner Spring. We understand that the COT may try to access these springs as well," states the letter. "Wilderness Watch is gravely concerned that any COT actions at other springs will further damage the wilderness character that the Forest Service is required to preserve under the 1964 Wilderness Act."

As of last week, Proescholdt told the Herald/Review he has not received a full response to the March 16 letter, other than a short reply from Upchurch, saying that his office is working on a response.

The Goldwater Institute's Scharf-Norton Center for Constitutional Litigation is representing the City of Tombstone in a lawsuit in which the plaintiffs argue that the defendants, named as the U.S. government and Department of Agriculture, "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 a portion of the court document. The plaintiffs also pointed out in the court documents filed March 30 that only three springs were currently feeding Tombstone's municipal water system and that the defendants have prevented Tombstone from enjoying the beneficial

use of water from 22 of the 25 springs it owns, given that repairs and reconstruction could have been completed with heavy equipment and vehicles in a month or less.

The defendants filed a response to the lawsuit on April 30 in opposition to Tombstone's renewed motion for preliminary injunction. They argue the motion, ostensibly based on the Administrative Procedure Act and the Tenth Amendment, in fact relies entirely on the unproven assertion that Tombstone holds "vested rights" in various property interests: the very matter at issue in its Quiet Title Act claim. They conclude the court should not sanction Tombstone's renewed attempt to rush its Quiet Title Act claim through the judicial process, threatening irreparable harm to wilderness and protected species.

"The injunction must therefore be denied because the Quiet Title Act does not permit a court to grant a preliminary injunction or to disturb the United States' possession or control of the property at issue. Even if this were not the case, and the court could accept the unproven assertion that Tombstone holds these 'vested rights,' Tombstone nevertheless falls far short of carrying its burden to justify the extraordinary remedy it again demands. Tombstone cannot show irreparable injury where the facts illustrate that Tombstone now seeks to upgrade and improve an unidentified water system, rather than conduct emergency repairs, under the guise of the 2011 Monument Fire emergency," states the response.

"Despite the overabundance of tedious detail in Tombstone's statement of facts, what is most noticeable is what is missing. Tombstone never identifies the specific physical water infrastructure which existed on the ground at the time of the 2011 Monument Fire. Tombstone never establishes how much water it was receiving from the Huachuca Mountain sources at the time. Tombstone never even provides a clear statement on where each claimed spring presently is located on the ground. Rather, Tombstone lumps together all of its 25 claims in an effort to divert attention from the fact that many of these sources (and supposedly associated infrastructure) cannot even be located on the ground, and likely have not been accessed or put to beneficial use for a very long time, if ever," it continues.

Earlier this month, the Goldwater Institute issued a press release stating that the Forest Service is demanding about \$79,000 before it will share public records it has requested under the Freedom of Information Act. With this demand, the Forest Service has deemed the Institute's lawsuit as proof of a "commercial interest" that disqualifies the non-profit Institute from securing a fee waiver under the Freedom of Information Act, according to the press release.

"We just want to know why," states Nick Dranias, the Goldwater Institute's constitutional policy director. "If there is a reason for the Forest Service to threaten the lives and properties of Tombstone residents, the federal government should tell us what it is." Perhaps the Forest Service is willing to risk public health and safety because the Spotted Owl historically nests in the Huachuca Mountains. But the Monument Fire and subsequent floods appear to have destroyed that ecosystem, adds the press release.

In an e-mail to the Herald/Review last week, Heidi Schewel, spokeswoman for the Coronado National Forest, said, "as you know we can't comment on cases that are under litigation." Last month, she provided some documents that describe the process the Forest Service is required to undertake, and its efforts to work with the City of Tombstone within its constraints.

In an interview last week, Tom Beatty Sr., whose family owns Beatty Guest Ranch in Miller Canyon, told the Herald/Review that Tombstone has not worked in Miller Canyon since May 1, but the city has been doing work recently at Clark's Springs to build steps from the road to the springs. He said he thinks the lack of water in the area is mostly caused by Tombstone's pipeline, which takes water and stops the stream flow.

"My concerns are very strong that there is absolutely no water other than what little bit leaks out of a pipe. The wildlife is really suffering because they have to go a half mile between watering holes. Before, they could go along a running stream," he said, adding birds can drink from a trickle, but other animals have a hard time drinking from water that is only 1/8 of an inch deep. "Even on my property, I don't have water in the creek anymore. I have a little bit of a moist area that is very stagnant. I used to have nice running water but I don't have it anymore."

In its court documents, Tombstone has pointed out its well water sources are historically and imminently at risk of arsenic contamination. Beatty said Tombstone can't rely upon the mountain for its water supply because in April and May there is less water there. If he were experiencing such an emergency, he said, he would be doing something else. He suggested the city should drill wells and operate their water system on solar power.