



Written by [Joe Wolverton, II, J.D.](#) on May 21, 2012

Federal Judge Denies Tombstone's Access to Safe Drinking Water

Late last week, U.S. District Court Judge Frank Zapata denied Tombstone, Arizona's motion for an emergency injunction against the government of the United States and the Forest Service that would have given the city the green light to use heavy machinery to repair water pipelines located in "protected areas."

Thanks to Judge Zapata's rejection of their plea, the residents of Tombstone continue to suffer from a lack of clean drinking water and the Obama administration apparently doesn't care.



As [we've reported previously](#), the problem began after the Monument Fire in 2011 ravaged the Huachuca Mountains home to the pipelines that carry the town's water down from the source in the Miller Canyon Wilderness Area.

In July of that year, rains were so heavy that enormous boulders ("some the size of Volkswagens") careered down the mountains destroying the waterlines (some segments are reportedly buried beneath 12 feet of mud) and choking reservoirs, effectively leaving Tombstone high and dry.

So devastating was the effect of the storms that Arizona Governor Jan Brewer declared a state of emergency specifically including Tombstone within the emergency zone. Later, the state legislature appropriated funds to help the town restore its water supply infrastructure damaged by the deluge.

In the months since the record-breaking storms, the federal government has thrown up one roadblock after another hindering Tombstone's attempts to send machinery up the mountain to repair the pipes and clear the debris that is threatening the lives and safety of its nearly 1,600 residents.

So aggressive have been the Obama administration's efforts to impede Tombstone officials from accessing the affected area that plaintiffs in the case aver that the Forest Service has demanded that nothing more sophisticated than a wheelbarrow and hand tools be used by workers hired by the city to haul away the car-sized boulders.

Citing provisions of the Wilderness Act forbidding the use of heavy machinery, the USDA Forest Service is making unreasonable demands on the town of Tombstone and is daily multiplying the risks of irrevocable harm the government's opposition is posing to residents.

The Obama administration's obstinacy is even more inexplicable in light of the fact that the water rights granted to Tombstone by the previous title owners predate the enactment of the [Wilderness Act](#) by about 80 years.

The urgency of the situation cannot be overstated, as "Tombstone draws 50 to 80 percent of its water supply from springs in the Monument Fire burn area," according to a statement from Governor Brewer's office. "Erosion and debris flow caused by summer storms damaged the city's aqueduct and



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water transmission system.”

Tombstone officials have appealed the district court’s decision to the Ninth Circuit Court of Appeals and have declared that they will pursue justice all the way to the Supreme Court, if necessary.

“We are absolutely going to move this to the Supreme Court as soon as we possibly can, using every vehicle at our discretion,” said Nick Dranias, one of the attorneys representing the town of Tombstone. Dranias is the constitutional policy director at the Arizona-based Goldwater Institute.

In an [article published in the Daily Caller](#) chronicling Tombstone’s struggle against the federal government, George Barnes, Tombstone’s city clerk and manager, reported that the historic city was “sliding by” with the water they are able to access from wells and some area springs.

The immediate concern for Barnes and for every one of the residents of Tombstone is that the rainy season is approaching and mudslides could completely obliterate the 130-year-old water supply infrastructure upon which the city depends.

“The problem is, with the monsoon rains approaching a lot of the temporary repairs we have been able to make will be washed away because they are in the flow path, and we were not allowed to do protective burns,” Barnes told the Daily Caller.

Without the freedom to employ heavy machinery, there is no way to prevent the devastation that will accompany the heavy rains and the subsequent runoff. The Obama administration will not relent, however, and insists that the town’s leaders may use nothing more technologically advanced than donkeys and shovels. At one point, the Forest Service even classified a wheelbarrow as “mechanized” and thus a violation of the Wilderness Act. Seriously.

Beyond the government’s effrontery to freedom and disregard for the health and welfare of hundreds of Americans, readers will likely recognize the Tenth Amendment issue, as well.

Dranias draws attention to the states’ rights aspect of the controversy.

“The city of Tombstone’s water supply in the Huachuca Mountains is sovereign property,” he said. “The authority of the city of Tombstone to repair that municipal property is sovereign power because it’s based on a state of emergency that authorizes all police powers in the state behind Tombstone in repairing that municipal property. And so when the federal government impedes that effort and runs the city of Tombstone through an indefinite and vague and seemingly interminable regulatory process, there is no question the federal government is trying to regulate states, not people.”

Pending its appeal of the lower court’s unfavorable ruling, Tombstone has to do something in the interim to provide itself with water and to shore up the supply system that delivers it from its mountainous source.

Accordingly, on June 8 and 9 city leaders will activate the Tombstone Shovel Brigade (shown in photo above), a group originally organized to repair the pipelines destroyed in the Monument Fire. On [the website maintained by the group](#), they explain the hows and whys of their existence:

In the 1980’s, the government made an error in designating the Tombstone “Springs” area, as part of the wilderness, when in fact there had been evidence of man and ownership of the springs, along with deeded property around it since 1881.

Next, the federal government implemented the endangered species act, in trying to protect the Mexican Spotted Owl. The government followed that up by not allowing grazing and logging that



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would have controlled the over-growth in the forest. It was inevitable that fire would come.

Fire arrived in 2011 with the Monument Fire. It incinerated the forest and burned a million animals. It denuded the mountain.

The rains soon followed. Landslides with dead trees, mud and boulders roared down the mountainsides and destroyed the Tombstone Springs. The flooding water left tons and tons of debris behind, moving markers and covering the springs with debris up to fourteen feet deep. Now, the forest service is preventing the repairs.

The “Tombstone Shovel Brigade” is a dedicated group of citizens committed to repairing Tombstone’s water supply.

In the truest spirit of American individualism, citizens of Tombstone are answering the call of duty. “Shovels are arriving every day and we hope to have enough people to occupy them,” Barnes told the Daily Caller. “We remain optimistic. We believe we have firm property rights there; it goes back a long ways.”

Why is the Forest Service determined to destroy Tombstone? The fact that there is no discernible answer to that question is perhaps the most perplexing aspect of the federal government’s posture in this case.

Despite the filing by the Goldwater Institute of a Freedom of Information Act request for relevant documents, the Forest Service has refused to comply with the request unless the Goldwater Institute pays nearly \$80,000. The Forest Service demands the payment of the exorbitant fee because it argues that the Institute has “a commercial interest” in the information sought in the petition thus disqualifying it for a non-profit fee waiver.

What does the Obama administration have to hide? Why would they take such an inveterate stance against a town seeking nothing more than access to safe drinking water?

It appears as if these questions may never be answered and that the underlying issues of state sovereignty will someday be decided by the Supreme Court.

Until then, the Shovel Brigade marches on.



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