

**American Rivers • Arizona Wilderness Coalition • Arizona Wildlife Federation
Center for Biological Diversity • Friends of Arizona Rivers • Maricopa Audubon Society
Sierra Club – Grand Canyon Chapter**

December 15, 2007

Nora Rasure, Supervisor
Coconino National Forest
1824 S. Thompson St.
Flagstaff, AZ 86001

Gene Blankenbaker, Supervisor
Tonto National Forest
2324 E. McDowell Road
Phoenix, AZ 85006

Re: Fossil Creek Emergency Closure Order

Dear Supervisors:

This correspondence responds to your letter of October 16, 2007 and addresses a serious omission from the “stakeholders” meeting held at NAU on November 13, 2007. American Rivers, Arizona Wilderness Coalition, Arizona Wildlife Federation, Center for Biological Diversity, Friends of Arizona Rivers, Maricopa Audubon Society, and Sierra Club – Grand Canyon Chapter concur with this correspondence.

Your letter stated that a closure order was being considered. It also stated that this and other ideas would be discussed at the “stakeholders” meeting. The Red Rock District Ranger leading the meeting was not prepared to discuss this essential protective measure. The Red Rock District Ranger indicated that some criteria must be met prior to the order; however, she could not identify the criteria for a closure. The Ranger further indicated that the circumstances may not warrant a closure order in light of its predicted unpopularity.

There was a general consensus at the stakeholder meeting that that the current conditions are unacceptable and that they must not persist through another high use season. If the efforts of stakeholder groups do not result in the implementation of adequate sanitation measures, including adequate placement and distribution of toilets and refuse, by March 1, 2008, the Forest Service should immediately implement an emergency closure to overnight camping order under 36 CFR § 261.50. This closure should cover Fossil Creek from the springs to the border of the Mazatzal Wilderness, not including upland meadows below the Irving site, and must remain in effect until a special area management plan for Fossil Creek is in place or until such time that measures are implemented that eliminate the need for the order.

A closure can be enacted to protect the public health and safety, property, rare species, etc., all of which are applicable to the situation at Fossil Creek. Closure to overnight camping will help control trash and waste which are increasingly threatening public health and safety, property and rare species.

Under 36 § CFR 261.50 (a), the "...Forest Supervisor may issue orders which close or restrict the use of described areas within the area over which he has jurisdiction. An order may close an area to entry or may restrict the use of an area by applying any or all of the prohibitions authorized in this subpart or any portion thereof." This includes restricting camping and being in the area after sundown or before sunrise (36 CFR §§ 261.58 [e], [l]).

Under 36 CFR § 261.53, special closures may be enacted for the protection of:

- (a) Threatened, endangered, rare, unique, or vanishing species of plants, animals, birds or fish.
- (b) Special biological communities.
- (c) Objects or areas of historical, archeological, geological, or paleontological interest.
- (d) Scientific experiments or investigations.
- (e) Public health or safety.
- (f) Property.

Under 36 CFR § 261.11, the following are prohibited yet ignored to a degree that compromises health and public safety, as well as threatened, endangered, rare and unique species of native fish:

- (a) Depositing in any toilet, toilet vault, or plumbing fixture any substance which could damage or interfere with the operation or maintenance of the fixture.
- (b) Possessing or leaving refuse, debris, or litter in an exposed or unsanitary condition.
- (c) Placing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water.
- (d) Failing to dispose of all garbage, including any paper, can, bottle, sewage, waste water or material, or rubbish either by removal from the site or area, or by depositing it into receptacles or at places provided for such purposes.
- (e) Dumping of any refuse, debris, trash or litter brought as such from private property or from land occupied under permit, except, where a container, dump or similar facility has been provided and is identified as such, to receive trash generated from private lands or lands occupied under permit.

Clearly no further evidence of unacceptable conditions is necessary to implement an immediate closure. The current extent of exposed human waste in close proximity to the stream exceeds any acceptable standard. Stakeholders that continue to invest their energy and resources toward the goal of restoring Fossil Creek should not be expected to continuously clean up this sanitation nightmare. Receptacles for trash and human waste must be brought in to accommodate the needs

of visitors and to protect the creek, human health and safety, and imperiled species. The Center for Biological Diversity and federal agencies have contracted for porta-johns at a location below Irving at different occasions in the past and can provide the Forest Service with contact information for these companies.

Though many of us will continue to participate in the Fossil Creek “stakeholder” group and subgroups, we are deeply concerned that the Forest Service is not allocating funds and personnel in such a way as to meet their responsibilities and legal authorities. These legal authorities and responsibilities should be understood relative to the Forest Service’s broader legal authorities and responsibilities to protect Fossil Creek’s ecological, biological, and quiet-use recreational values.

The Organic Act of 1897 provides that National Forests are designed “to improve and protect the forest” and to “secure[e] favorable conditions of water flows...” 16 U.S.C. § 471. In fact, “[t]he legislative history of the 1897 Organic Act indicates that many congressmen considered watershed protection to be the paramount, if not exclusive, purpose of established forest reserves.” (“Wilkinson & Anderson”).

The Multiple Use and Sustained Yield Act of 1960 (“MUSYA”) expressly states that a multiple use of National Forests includes “watershed ...purposes.” 16 U.S.C. § 528. The National Forest Management Act (“NFMA”), building off MUSYA, “complement[s] and expand[s] the directive of the 1897 Organic Act to protect watersheds.” Wilkinson & Anderson at 209. NFMA also, notably, mandates that the Forest Service “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” 16 U.S.C. § 1604(g)(3)(B).

These Forest Service-specific laws link to the Clean Water Act (“CWA”). The Forest Service is “subject to” and must “comply with” the CWA. 33 U.S.C. § 1313. Importantly, the CWA looks unkindly on ongoing resource degradation, providing a forward-looking objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. To achieve this objective, the CWA authorizes each state to develop water quality standards for the state’s waters. 33 U.S.C. §§ 1311(b)(1)(C), 1313. Where waters fail to meet water quality standards, they are considered ‘impaired waters,’ listed in accord with 33 U.S.C. § 1313(d), and subject to Total Maximum Daily Loads. Where water quality standards are being met, the Forest Service does not have carte blanche authority to allow degradation to the point of impairment but must, instead, comply with anti-degradation protections for water quality. 40 C.F.R. §§ 131.12(a)(1)-(3). As explained by the Environmental Protection Agency, “Anti-degradation implementation is an integral component of a comprehensive approach to protecting and enhancing water quality.” EPA, Water Quality Standards Handbook, 2d. Ed. at 4-1 (Aug. 1994).

The Endangered Species Act (“ESA”) is also relevant, particularly since Fossil Creek has and will be receiving stockings of listed threatened and endangered fish, including Gila topminnow, spikedace and loach minnow. The Forest Service must “conserve endangered species and threatened species” and must ensure that management does not “jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species....” 16 U.S.C. §§ 1531(c) (1), 1536(a)(2). In meeting these requirements, the ESA provides other significant protections to ESA-listed species that must be complied with. *See* 16 U.S.C. §§ 1531 *et seq.*

In summary, immediate relief from these excessive recreational impacts is required. We, the undersigned groups, therefore implore the U.S. Forest Service to issue an emergency order at Fossil Creek for the following:

1. limitation of use of Fossil Creek from the springs to the Mazatzal Wilderness boundary, not including upland meadows below Irving, to day-use only;
2. position porta-johns at key parking areas; and
3. initiate water quality monitoring for fecal coliform.

In addition, increased law enforcement presence will also be required at Fossil Creek. This emergency order should remain in effect until a special area management plan for Fossil Creek is in place or until such measures take effect that would eliminate the need for the order.

The Forest Service, through the Red Rocks District Ranger, has expressed interest in meeting further regarding an emergency closer to overnight camping at Fossil Creek. We welcome such a meeting, but it should not delay implementation of critical protective measures outlined in this correspondence.

We would appreciate a response that outlines the measures the Forest Service intends to implement at least 30 days prior to March 1, the date requested as an implementation deadline. Please contact Ms. Michelle Harrington at (602) 628-9909 or mharrington@biologicaldiversity.org for any further information. Our mailing address is Center for Biological Diversity, P.O. Box 39629, Phoenix, AZ 85069-9629.

Sincerely,



Michelle Harrington, Rivers Conservation Manager
Center for Biological Diversity

On behalf of:

Andrew Fahlund, V.P. for Conservation
American Rivers

Tim Flood, Conservation Director
Friends of Arizona Rivers

Kevin Gaither-Banchoff, President
Arizona Wilderness Coalition

Herb Fibel, President
Maricopa Audubon Society

Don Hoffman, Director
Arizona Wildlife Federation

Don Steuter, Conservation Chair
Sierra Club – Grand Canyon Chapter

Robin Silver, Board Chair
Center for Biological Diversity