

1041 Water Permit Application Hearing for Will-O-Wisp Metropolitan District, Wednesday, Dec. 6<sup>th</sup>, 2006

Tape #1

Walker: Good morning everybody. Today is Wednesday, December 6, 2006. Calling the Park County Board of Commissioners meeting to order and Sue how about if you lead the pledge this morning. Would everyone please rise. Thank you, that brings us to approval of the agenda. Do we have any changes? Etc., etc.

Walker: Brings us to a public hearing 1041 water permit application for Will-O-Wisp Metropolitan District and um our guy stepped out to the hallway. The applicant's not here (laughter) to a date set uncertain.

Mr. Toussaint: Good Morning!

Walker: Nice of you to join us.

I do apologize. We were just meeting with Mr. Wyatt and he was suggesting – first of all, Richard Toussaint, attorney for the Will-O-Wisp Metropolitan District. Uh and ah what else do you like?

Walker: Well nothing right now –we have a few administrative things that we need to go over here before we start anything.

Toussaint: Ok, that's fine, alright.

Walker: But you are here. Would you spell your last name please?

Toussaint: Toussaint.

Walker: Thank you. So before we start our discussions for the record, we have commissioner-elect with us, Doc McKay. We felt that Doc McKay needed to sit here with us on this meeting um, in as much as he may be hearing a portion of this and it would be great for him to do that. So, for the record, commissioner-elect Doc McKay is up here at the table with us and I understand strictly to observe. Is that correct?

McKay: That's correct.

Walker: Thank you. Um, just so we all kind of have an idea of how this meeting is going to be today, the way we should proceed or the procedure that I think would be most efficient, if everybody is in agreement here at the table, if it's the Board's pleasure, the staff would make their first presentation. That'll put a lot of the questions on the table that the applicant is probably already aware of but it'll make them part of the record for your response, so we would expect Tom Eisenman, Lane Wyatt to make a presentation first. After that happens and the Board of Commissioners may have some questions, staff may have some more comments, county attorney's may have more comments, our other water attorney and our 1041 specialist, who I will introduce here in a moment, uh, will have an opportunity at that time to ask any questions. I would expect after all that, that we'll need a recess. So after that happens, I would think a brief recess would be in order. After that, then the applicant would have the opportunity to make a presentation, answer any of the questions that are going to be put out in front of the board here today. We would then have the opportunity, I would hope, time permitting,

you're looking at, is all the Glassman one. Part of the reasons that some of this hasn't been resolved is that Glassman one is not really what is at issue here, it's the Glassman two, so as long as we can identify that point and get to that point, now you're saying, well if there's um, um, if there is ownership, we've seen no evidence of it but it's, it's fairly easy to resolve with regard to the condemnation.

Kahn: I, I just want to make it clear, I'm not saying that there's a dispute as to the ownership of the Glassman Ditch water rights, okay. I think Mr. Johnson got it --- what I'm saying is there appears to me to be the potential for a dispute over this whatever structure and the right to divert water at that point and a potential conflict. And, and but let's not belabor this point -- you've got more evidence and I'm sure the Dunwoody's have something to say. You know, my suggestion is we try to move on because you say you've got more evidence on it and again, I'm sure the Dunwoody's have something to say and may not even get there today.

Williamsen: Okay.

Walker: But I have another quick question for the attorney, Mr. Johnson. Since we're talking about claims of ownership, did you ever get a copy of the letter concerning the Glen Elk Association?

Johnson: Not that I'm aware of, but I may have, I, I'm not ----

Walker: Well, what they're saying is that they have, they're concerned about, um, the application and how it will affect the flow on Elk Creek. They have a water decree from 1972, where they have 4 acre-feet of water rights and a copy of their letter here, along with a copy of the court decrees are here. Mr. Toussaint, are you familiar with this one at all?

Toussaint: Can I look at it?

Walker: I don't think so --- (laughter). Yes, as a matter of fact, why don't you take this and look at this one as well and when the time comes, you'll have to get on to the microphone to discuss that.

Toussaint: Thank you and I have not seen this (can't understand what else was said).

Johnson: If I might just add one more thing, I, I do have more to talk about but I think, in the interest of letting Mr. Mlodzik speak, cause he sat here all day and he's with the State, maybe we should move ahead to him and then I can come up again, with your permission.

Walker: Yes, that'd be fine because ---

Johnson: Then maybe I can look at that as well.

Walker: Take a chance to review that.

Mlodzik: I'm Roger Mlodzik, M-L-O-D-Z-I-K. I'm the water commissioner for Districts 9 and 80. I've been the water commissioner uh, District 9 17 years, assisted in District 80 since '89 and the commissioner there since '94. Uh, as to the location and the state engineer's tabulation of the Glassman Ditch, uh, in-house, we use a program, a computer program, that was designed in-house that determines a point generally within a quarter, quarter from data that is put in by the, the operator of that program. It would then plot a point as to the center of

that quarter, quarter section, so we're looking at the center of a 40-acre section, or it may default to only a center of a quarter section, looking at 160 acres. So it is not a defined point, it's just data from a quarter quarter that's put it in. The computer plots out a location into the center of the quarter quarter and that's what we list as the location. The default on that is most those listings in depth as you dig back through our data default that the listing is from our PLSS Locator Program. That data is just very rough and very crude. It is not field checked, it is not legal, it is not used as a legal data. The legal point of, for the diversions default back to the decrees. The 1913 decree for the original Glassman Ditch and the 1980's, '81 and '83 decree for the Glassman #2 Ditch which is spelled out. That is the legal location, so our tabulation does not represent a legal location. It is just an approximate from a computer program. I have been out to the site. I have GPS'd the site with a GPS system that the State provides, that, that for me to use. It is not a survey instrument, so it does not give me an absolute definite point; it gives me a rough field location for that location of the ditch. That data from the GPS is then put into, again, our PLSS Locator Program and converted to get a location. Again, this is not a surveyed point. That point would generally not be used for court proceedings and it could be used or more specific data could be used, so I am not a surveyor, I do not have survey instruments, I cannot say that the point of the ditch is the absolute point that is described in the decree. But, that said, let me explain our administration of the water rights. Generally, we look for water rights to be within 200 feet of the decreed location, which I believe that this location is, and we look at situations are there other water rights within the decreed location and the physical location that would be injured or that could injure this water right. There are no other water rights there that would interfere with this water right. We look at, is there additional water that would be available at this location, as opposed to the decreed location, and again, I believe we're within 200 feet of the decreed location. We are fine, we are legal with that. There are no additional water flows available to this structure and so as for administration, I have no problem with the physical location of this ditch and I cannot verify that it is definitely within a 200 foot location but it is an irrelevant point as far as my administration and the operation of this ditch.

Walker: So, after all that, you're saying that there are no other water rights being injured.

Mlodzik: Right, with this ditch at its location or the operation of, for the augmentation plan.

Walker: And that they are acting within their decree.

Mlodzik: Right.

Walker: And that was your main concern here today.

Mlodzik: That was the main issue was to explain, yes, that our tabulation is not legal or a survey document. It is just a rough estimate.

Walker: And you are with Denver Water Commission?

Mlodzik: I'm with the State Water Resources.

Walker: State Water Resources.

Mlodzik: I'm the water commissioner for Districts 9 and 80 out of Division 1, the South Platte.

Walker: Okay.

Mlodzik: So that was the main issue I was asked to talk about, uh, issues were covered as far as the operation of the augmentation plan, the flows of the river, the other water rights on the river system. All of that comes into the administration and the priority system. We have other water rights on Elk Creek, uh, they are what we call "semi-junior". The Elk Creek is subject to river calls on the downstream South Platte River. Generally, one metropolitan intake, two would be farms, irrigation demands below Denver. They would generally call out all of the water rights that exist on Elk Creek, as our flows diminish, not only on Elk Creek but on the entire Platte River drainage system. So, yes there are other water rights there. Generally, they would be in priority in the spring-time with the runoff or at periods of high river stream flow from rainfall. As our flows diminish, they are called out from the downstream river system, and at that point, we would be operating the augmentation plan. The exchange system would be releasing water out of Spinney Mountain Reservoir, bringing it on down to Denver or below to meet those river calls. And so the other, the other water rights on Elk Creek would be out of priority, would not be entitled to take water.

Walker: And you're familiar with all those water rights?

Mlodzik: Yes.

Walker: What about the Glen Elk one that I just talked about a little while ago?

Mlodzik: Glen Elk is a junior water right for storage for a pond, I believe. And I would, I would have to go in depth, I believe it's just for storage, I don't believe there's consumptive use for irrigation or other uses. I believe it's just the one.

Walker: Looking at their document, there's a, it's for a storage facility but they also claim to get their water from Elk Creek.

Mlodzik: Uh, the flow for the pond is from Elk Creek. Uh, uh ----

Walker: But it's strictly storage you're saying, not for use, not for consumptive use?

Mlodzik: I would have to review that, but I believe it is strictly for storage. It is not for consumptive, i.e. for a municipal pipeline system to serve the houses, for use for irrigation of lawn or gardens. I believe it is just storage for the pond or recreation.

Walker: Other documentation from the courts are in the back there if you'd care to look at them will quick and ---

Mlodzik: That's what I'm seeing here, strictly for storage. We do have recreation and irrigation, I'm sorry.

Walker: And is it 4-acre feet, is that what I saw on there when I looked at it?

Mlodzik: 4-acre feet.

Walker: And you're saying that, that 4-acre feet from Elk Creek won't be affected by this project? In your expert opinion.

Mlodzik: The, the, this, this water right was first used in 1937. I believe the dates here of the water right 1972, so it defaults to a 1972. Excuse me, 1972 water right, 1972 water right would be in priority generally for a few weeks in the springtime, typically end of May first part of June. With peak runoff flows, may come back into priority for a period in August or September, depending upon what's called the "Monsoon Rains" when, when we have plenty of rainfall and lessen the demand for irrigation on a river system. At that point, generally, we would have high flows in Elk Creek and at that point, the 1983 Elk Creek or Will-O-Wisp water right may also be in priority. It would take a very small amount of water, I would say, estimate that we'd have more than 5 cfs in Elk Creek when this water right would be in priority and both could take water and they would and there would still be plenty of water for all users on Elk Creek at that time with that flow rate.

Walker: That's all I have.

(?): Just real quick. You're missing this, this is the additional water rights.

Walker: Okay, so I was just handed a document by somebody who didn't identify herself, and I'm going to hand this to, since this is the first time I've seen that, um, I'm not sure how relative that might be. Mr. Toussaint, Mr. Toussaint may want to have a look at that as well. I don't want to get, you know, too far off track on this. I did want to address that Glen Elk claim since we were talking about people claiming ownership or rights to the water, and I assume Mr. Johnson had a chance to review the letter and the other attachments with that that I handed to Mr. Toussaint.

Toussaint: Okay, the first case we were talking about was for Glen Elk case #W2549. The decree that was just handed to me is for Glen Elk case #W2535. (some background discussion) The first case dealt with a reservoir, 4-acre foot storage. This case appears to be dealing with wells, ground water tributary to Elk Creek. Just quickly glancing through it, there are several wells listed, most of them appear to be from ground water, ground water that would be tributary to Elk Creek. They are not direct diversions from Elk Creek.

Walker: Now for the purposes of this, could we get some copies made of that document that was just handed to me for the benefit of the applicant, so everyone can have some of those. I'm sorry ---- Copies of both documents. Mr. Johnson, would you step up there for a minute while we're getting those made.

Johnson: Yes.

Walker: Okay, on the water decree, case #CW144 and I see a received April 30, 1993 on here. On page 3, it references contemplated that part of the development there will be watering of a many as 50 head of livestock, including cattle and horses which would be kept in a single corral and stable complex based on the requirement of 10 gallons per day per animal. So the question that's been raised here with this development with the usage of the water, is this 10 gallons per day per animal as part of the water decree still?

Johnson: That decree was actually amended in 1995. And under the amendment, there was a formula that was adopted that, that would deal with what the depletion would be. Remember, the depletion is the difference --- Are you okay with that one?

Walker: Uh huh.

Johnson: What the depletion would be with respect to livestock. And that depletion is for every head of livestock, under the formula, you multiply times .011201 to come up with the total amount of depletion associated with that livestock. I'm not an engineer and I can't tell you if that corresponds to the 10 gallons that was in the original decree or not, but I think the '95 amendment supercedes that.

Walker: Can't you just do the math in your head?

Johnson: I wish I could.

Walker: We've reached kind of an interesting point here. It's, it's a – Board I'm going to ask you the question, it's 10 to 4 and I'm going to ask the Board the question on making a decision on this case. We haven't had even public comment.

I think – Jeff Kahn, special water rights counsel. It may be helpful if maybe we could finish any questions anybody had of Mr. Mlodzik because he may not want to return if there's additional testimony, and I did have a couple of questions of Mr. Mlodzik.

Walker: And you're, you're not enjoying this? You had somebody that you brought with you that's gonna replace you? We should make him stand up and introduce himself.

Dan Garner.

Mlodzik; Dan Garner, deputy water director.

Walker: And Dan Garner may be here for more testimony or?

Mlodzik: No, I brought Dan along to experience uh (laughter) the procedures.

Walker: Well, welcome to the fray, Mr. Garner.

Mlodzik: Hopefully, and in a few years and maybe sooner, he could replace me.

Walker: Alright and as a courtesy here then, we have questions from staff?

Kahn: Jeff Kahn again, special water rights counsel. Mr. Mlodzik have you ever recorded in the last 10 years or any time during your tenure, diversions under the senior Glassman water right?

Mlodzik: I believe I recorded, in error, a diversion in that probably in about '94; my first year as commissioner in District 80. I don't know that that has been corrected. And again, I'm saying I believe I may have reported that in error. But to my knowledge, no water has ever been taken in the Glassman Ditch at this structure.

Kahn: And are you aware of a separate location where the, and I'm sure the Dunwoody's are going to speak to this, but I'll ask you because we're not going to get you back (hopefully for you), where a separate location where the Dunwoody's divert water?

Mlodzik: Okay, I have not been out to the Dunwoody property in recent years. I have been by that area in the past. In talking with Mrs. Dunwoody, she explained a natural spring that is used for irrigation. Natural flow from that spring, sub-irrigating and that water is diverted into a reservoir and may be used from that reservoir for irrigation; but I have not been on-site to see that.

Kahn: And to your understanding, those diversions are not from Elk Creek?

Mlodzik: The diversion from, to the pond would be from Elk Creek.

Kahn: Are not from Elk Creek?

Mlodzik: The diversion from the pond is from Elk Creek. The diversion to their pond is from the actual Elk Creek stream, and that goes into their pond. The diversion from the spring or the natural spring and the natural runoff of that spring, that they get the benefit of sub-irrigation is not from Elk Creek.

Kahn: And the diversion from Elk Creek that goes into their pond? Is that at the point marked on this map called "location map" that is here? Can you tell?

Mlodzik: No, it is much farther downstream.

Kahn: Okay, and do you know what the name of the structure is that they use to divert water into their pond?

Mlodzik: To my knowledge, there is no water decree, there is no structure name for that point of diversion into their pond. In other words, that diversion to their pond is out of compliance.

Kahn: Has no water right associated with it?

Mlodzik: Has no water right at all.

Kahn: Thank you.

Walker: Any one else? Does anyone else here have a question for Mr. Mlodzik? We'd like to invite you back for our next hearing.

Mlodzik: I enjoyed being up hear but I do have many other things to do and many other issues to take care of. Perhaps, getting out and doing some more field work and verification.

Walker: Perhaps on this case.

Mlodzik: Perhaps.

Walker: Thank you. Board, it's going on 4 o'clock and I know that one of our attorney's has to leave for a previous engagement in Denver and also one of our commissioners needs to leave. So what I would ask the Board then, at this point, what your pleasure is. We need to establish a date, I would expect. I don't believe we're finished with this hearing by any stretch of the imagination.