

cc: KKS, KLB, Clints

<b>PETITIONER COURT, PARK COUNTY, COLORADO</b> Court Address: 300 4th Street Fairplay, CO 8044-	
<b>Petitioner:</b> WILL-O-WISP METROPOLITAN PETITIONER  v. <b>Respondents:</b> MAGNESS LAND HOLDINGS LLC, et al.	<b>▲ COURT USE ONLY ▲</b> Case Number: 06CV320
Attorney for Respondent Magness Land Holdings LLC	Div. B                      Ctrm.:
Name:                      Todd W. Miller Address:                    HOLLAND & HART LLP 8390 East Crescent Parkway Suite 400 Greenwood Village, CO 80111-2800 Telephone:                (303) 290-1625 Facsimile:                (303) 290-1606 E-mail:                    tmiller@hollandhart.com Atty.Reg.#:                16306	
<b>MAGNESS LAND HOLDINGS' RESPONSE TO PETITIONER'S MOTION TO AMEND</b>	

Respondent Magness Land Holdings LLC ("MLH") hereby responds to Petitioner's Motion to File Amended Petition in Condemnation ("Motion to Amend"):

**A.     The Court Should Decide First Whether the Existing Petition Was Proper Before the Court Allows Petitioner to Amend the Petition.**

Petitioner is correct that under C.R.S. § 38-1-104 and C.R.C.P. 15(a), trial courts usually allow amendments to condemnation petitions and the joinder of additional parties. And if the Motion to Amend were just a request to add new allegations or new parties, the Motion to Amend would be a straightforward matter. But the Motion to Amend is much more than that. It

effectively seeks to replace the existing condemnation action with a new action. It involves new property interests owned by new parties, a new point of diversion, new engineering, and a new route for the right-of-way. Before the Court allows Petitioner to supplant its existing case with the new case, however, the Court should first determine whether the initial case was proper.

C.R.S. § 38-1-122(1) provides that if a petitioner in condemnation lacks authority to condemn the property interests it is seeking, it shall award the landowner its attorneys' fees. The purpose of the statute is to compensate a property owner who is required to incur costs when the condemning authority does not proceed properly. *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 992 P.2d 1188, *rev'd on other grounds*, 17 P.3d 797 (Colo. 2001). It is not an "all-or-nothing" statute; if the Court decides that Petitioner was authorized to acquire some, but not all, of the property interests it is seeking, it may award the landowner a partial award of fees and costs. *Wilkinson v. Gafney*, 981 P.2d 1121 (Colo. App. 1999)

In its initial Petition, the Petitioner alleged that it owned the Glasman Ditch No. 2 water right, and that the point of diversion for this water right was on Lot 134 in Woodside Park Unit 5, Park County, Colorado ("Lot 134"), which MLH owns. The Petitioner further claimed that because the point of diversion was on Lot 134, it needed a right-of-way across the full length of Lot 134 to move the Glasman Ditch No. 2 water from Elk Creek.

The only support for this contention which Petitioner offered at the May 8 hearing on its request for immediate possession was the testimony of Brian Zick, who explained that in 1995, he discovered a flume and a ditch near Elk Creek on Lot 134. The Petitioner argues that this ditch reflects the historical point of diversion not just for the Glasman Ditch No. 2 right, which was decreed in 1984, but also for the Glasman Ditch water right, which was decreed in 1913, and

which has the same decreed point of diversion. The Petitioner conceded that no water has ever been diverted at the purported historical point of diversion on Lot 134 in or since 1995. The Petitioner also did not offer any evidence that any water was ever diverted at this purported historical point of diversion between 1913 and 1995.<sup>1</sup> And yet, despite the complete absence of any proof of any actual diversion of water at any time on Lot 134, the Petitioner concluded that the historical point of diversion for the Glasman Ditch No. 2 water right is on Lot 134.

The Petitioner concedes that the *decreed* point of diversion for the Glasman Ditch No. 2 right – that is, the location of the point of diversion specified in the 1984 Water Court decree in Case No. 83CW002 (the “83CW002 Decree”) that confirmed the Glasman Ditch No. 2 conditional water right – is not on Lot 134, but is instead on Lot 133, more than 300 feet to the east of what the Petitioner contends is the “historical” point of diversion. The decreed point of diversion for the Glasman Ditch No. 2 is specified in the 83CW002 Decree as “a point whence the *W1/4 Corner of Section 26* bears North 52° 44’ West, 2030 feet.” (Emphasis supplied.) The surveyed location of the decreed point of diversion, using the West 1/4 corner of Section 26 as the bearing point, is on Lot 133. The Petitioner does not challenge this empirical fact.

Instead, the Petitioner hypothesizes that the initial survey of Section 26, conducted in 1873, was somehow in error, and that at some unspecified point in time since then, the survey of Section 26 has been corrected. As a result of this supposed corrective survey, the West 1/4 corner of Section 26 was moved 313 feet to the east, thereby explaining the disparity between the decreed point of diversion and what the Petitioner contends is the historical point of diversion.

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<sup>1</sup> As the Court may recall, Robert Nevadomski testified at the May 8 hearing that he has lived in the Woodside area since the 1970s, and he has never seen water diverted from Elk Creek on Lot 134. He also testified that he witnessed the flume on Lot 134 being installed in 1981 or 1982.

Subsequent to the May 8 hearing, MLH learned that the Petitioner had engaged a land surveyor to pursue Petitioner's theory that the original survey of Section 26 was corrected. MLH also learned that the surveyor's analysis completely debunks the theory.

Attached hereto as Exhibit A is a May 18, 2007 letter from Lee Johnson, the Petitioner's water lawyer, to David Nettles, the Assistant Division Engineer for Colorado Water Division No. 1. The purpose of this letter was to persuade Mr. Nettles to issue a determination that the Division Engineer would administer Glasman Ditch No. 2 on Lot 134.<sup>2</sup> Mr. Johnson attached to his letter a "Confidential Memorandum" dated May 11, 2007 to Richard Toussaint, counsel to the Petitioner, from Richard W. Pals, a registered land surveyor from The Engineering Company. Although it will not be known when Mr. Pals' work was performed until his deposition is conducted, it seems inconceivable, given the amount of work and analysis that is contained in the report, that the information was first generated and made available to the Petitioner only after the May 8 hearing.

Mr. Pals' report completely undermines the Petitioner's hypothesis that a correction in the survey of Section 26 somehow accounts for the disparity in the decreed and supposedly historical points of diversion of Glasman Ditch No. 2. First, Mr. Pals concluded that the surveyed location of the southwest corner of Section 26 has never been moved or corrected:

This series of monument records [which were discussed in the preceding paragraph of the report] establishes the fact that the southwest corner of section 26 is in substantially the same location as the original stone monument set by the General Land Office (GLO) surveyor in 1873.

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<sup>2</sup> Mr. Nettles initially issued such a determination. However, Mr. Nettles subsequently retracted this determination once he was provided with additional information which had not been provided by Mr. Johnson.

Exhibit A at 12. Mr. Pals explained that the surveyor in 1873 would have used a magnetic compass and a chain of a specified length to complete the survey. Mr. Johnson explained in his cover letter the specific process as outlined in the surveyor's notes by which the West 1/4 corner of Section 26 was located:

In order to better understand this issue, some additional historical background information is in order. The original government survey of the boundaries of Township 6 South, Range 72 West of the 6th P.M. occurred in 1871. The 1871 survey merely set the four exterior lines of the Township and Range. In 1873, the federal government went back to survey the individual section lines within this particular Township and Range. At that time, a government survey crew walked the west line of Section 26 with a compass and chain and set the Southwest corner, the West quarter corner and the Northwest corner of said Section. The field notes from the 1873 survey describe the surveyor's activities. A copy of the relevant portion of the field notes is attached. In particular, the surveyor apparently measured 40 chain lengths north from the Southwest Corner and set and described the West quarter corner of Section 26 as follows:

"Set granite stone 18 x 10 x 10 mound of stones for 1/4 Sec. Cr. from which a Pine 16 in diameter bears S 26° W 46 cks."

Exhibit A at 3.

Thus, the surveyor in 1873 started from the southwest corner of the section, a corner that according to Mr. Pals is still in the same place it was in 1873, and using a compass, proceeded north for 40 chain lengths and set the west quarter corner of the section. If the Petitioner were correct in its hypothesis that the 1873 location of the West 1/4 corner of Section 26 was erroneously placed more than 300 feet to the west of its true location, the surveyor's compass would have to have been off of true north by nearly 7 degrees to the west. It seems difficult to believe that a federal surveyor conducting the official survey of this part of the country in 1873 would have been using a compass that missed true north by almost 7 degrees. Moreover, given

that the southwest corner of the section has never moved, the corrective survey hypothesized by the Petitioner would have required a seven degree shift to the east of the entire section, pivoting on the southwest corner. If such a correction were done, presumably a substantial public paper trail of such an adjustment would not have been created. And yet the Petitioner has not been able to provide a single document supporting its theory that the 1873 survey was corrected at some point in time.

Moreover, Mr. Pals' analysis confirms that the compass used by the surveyor in 1873 was accurate. Mr. Pals also concluded that if there was any error in the original setting of the west quarter corner, the error was not to the west of the existing quarter-corner, but to the north:

*There are always variables in the re-establishment of lost original public land survey corners. In this case, the 1873 field notes indicated that the crossing of a spring that bears S20°E at a distance of 1729.2 feet (26.20 chains) on the true north line from the corner of section 26. The west one-quarter corner was set at 2640 feet (40.00 chains). TEC located this spring in the field. The grid bearing established by Merrick [the firm which conducted a survey in 1998] is very close to the due north line that may have been followed by the GLO surveyor in 1873 who was using a magnetic compass adjusted for declination. If the called distance of 910.8 feet beyond the spring crossing (2640 feet minus 1729.2 feet) is run on the north line, the original location of the one-quarter corner would have fallen north of the 1998 one-quarter corner set by Merrick.*

Exhibit A at 14 (emphasis supplied). Thus, Mr. Pals concluded that the due north line apparently used by the GLO surveyor in 1873 was "very close" to the north-south grid bearing established by the 1998 survey. He also concluded that if there was an error in the initial location of the west quarter-corner, the error was to the north, rather than to the west.

It is difficult to imagine that Petitioner did not have the benefit of this information before it went forward with the immediate possession hearing on May 8. In other words, before it

advanced the erroneous historical survey theory at the May 8 hearing, the Petitioner probably knew that its own surveying expert completely undermined the theory. If so, then Petitioner knew that it did not have authority to condemn a right-of-way across all of Lot 134, and MLH is entitled to an award of its fees and costs in having to prepare for and participate in a hearing that was no longer necessary or appropriate once Petitioner was aware of Mr. Pals' conclusions. Accordingly, MLH would ask that the Court conduct a hearing on this issue, which would include testimony by Mr. Pals, before it allows the amendment of the Petition, so that if it determines that the initial Petition was improper, the Court can resolve that issue and enter an appropriate fee award before Petitioner is allowed to proceed with the Amended Petition.

**B. MLH Reserves Its Right to Argue the Legal Viability of the Amended Petition in its Motion to Dismiss the Amended Petition.**

The Colorado Legislature has established special requirements applicable to the condemnation of pipeline rights-of-way. In particular, C.R.S. § 38-1-101.5 opens as follows:

When a court is determining the necessity of taking private land for the installation of a pipeline, the court shall require the pipeline company:

The statute goes on to specify particular requirements that apply to such condemnation proceedings. For example, C.R.S. § 38-1-101.5 (1)(a) requires that the condemnor show that the pipeline right-of-way it is seeking "lies within a route which is the most direct route practicable." Likewise, C.R.S. § 38-1-101.5 (1)(c) requires that the condemnor "consider existing utility rights-of-way before any new routes are take if the land to be condemned is adjacent to existing utility rights-of-way." As MLH will explain in greater detail in its motion to dismiss should the Court allow the requested amendment, if the requirements of C.R.S. § 38-1-101.5 are applicable

to this case. the Petitioner has not satisfied them in the Amended Petition, and therefore it should be dismissed .

The Petitioner argues, however, that C.R.S. § 38-1-101.5 applies only to pipeline companies, and since the Petitioner is not a pipeline company, it is not subject to the statute. Whether the Petitioner may meet some statutory definition of pipeline company is not determinative. The operative language of the statute is whether the court “is determining the necessity of taking private land for the installation of a pipeline.” The reference in the statute to the pipeline company is simply a reference to the entity prosecuting the condemnation for the pipeline right-of-way, and not somehow a limitation only to pipeline condemnations prosecuted only by pipeline companies. This Court will have to determine whether the provisions of C.R.S. § 38-1-101.5 apply to the Petitioner. MLH will present this issue to the Court in its Motion to Dismiss.

### **CONCLUSION**

For the foregoing reasons, MLH respectfully requests that the Court deny the Motion to Amend until it has had the opportunity to determine whether the initial Petition was improper, and if so, what fees and costs should be awarded to MLH.

Dated August 13, 2007

Respectfully submitted,

/s Todd W. Miller  
Todd W. Miller, #16306  
HOLLAND & HART LLP  
**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I certify that on August 13, 2007, I served a copy of the foregoing document to the following by

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## Anne Van Teyens

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