

# Transcript of Ruling; Citizens for a Healthy Community vs. Delta County

DELTA COUNTY, CO - GOVERNMENT - WEDNESDAY, JULY 3, 2019

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Small Claims County Court x District Court Probate Court Juvenile Court Water Court

DELTA County, State of Colorado

Court Address: 501 Palmer, Room 338

Delta, Colorado, 81416

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**CITIZENS FOR A HEALTHY COMMUNITY,**

**Plaintiff, vs.**

**DELTA COUNTY BOARD OF COUNTY COMMISSIONERS and DELTA COUNTY PLANNING DEPARTMENT,**

**Defendants.**

**COURT USE ONLY**

Case Number: **19CV30057**

Div.: Ctrm:

**PARTIAL TRANSCRIPT OF FTR PROCEEDINGS**

The hearing in this matter commenced on June 19, 2019 before the HONORABLE J. STEVEN PATRICK, District Court Judge for the Delta District Court, Seventh Judicial District, State of Colorado.

This is a partial transcript of the digitally recorded hearing held on June 19, 2019, and consists of only the Court's findings and rulings at the conclusion of the hearing.

**APPEARANCES**

**FOR THE PLAINTIFF: CHRISTOPHER MOCHULSKY FOR THE**

**DEFENDANTS: JOHN BAIER**

FOR GUNNISON ENERGY, LLC: KENT HOLSINGER

1 THE COURT: I'm back on the record. I appreciate the  
2 effort and thought and preparation that the parties have presented in  
3 this and I have considered the evidence and arguments. I can't say  
4 that I have read all 334 pages of Exhibit A and that, however, is not  
5 going to (unintelligible). I think that we've talked about the  
6 critical issues with respect to this. The Court had also focused on  
7 City of Golden v. Simpson, ironically the same Simpson we had testify  
8 today, but I have not looked at the NEPA case, the First Circuit case,  
9 written by soon to be - at that time in the First Circuit - but soon  
10 to be Supreme Court Justice Briar. And in that fact pattern, there  
11 was a factor (unintelligible) reduction in how much oil was likely to  
12 be produced (unintelligible) to the two parties and that  
13 (unintelligible) benefits and then to change from 1.7 billion barrels  
14 to 55 million barrels, which if I did the math right is in fact 30,  
15 which is a profound alteration. I found only one case in quick  
16 research, but it's a case Federal Judge King decided in granting a  
17 preliminary injunction to prevent the ill-fated ski development  
18 intended there for that Wolf Creek Pass ski area. That's Colorado  
19 Wild v. United States Forest Service where there was a preliminary  
20 injunction with analysis and (unintelligible) the test and, again, the  
21 reason for the preliminary injunction was the (unintelligible) of  
22 environmental harm results in irreparable injury to the environmental  
23 interests and that's what it quotes in the First Circuit case.  
24 The testimony today largely suggests that this is a  
25 procedural dispute where there is not, from the evidence presented,  
1 much of a risk of an environmental injury. And so I'm struggling with  
2 (unintelligible), which gets us then back to what is the test of  
3 irreparable injury and I did look at the Gillette case which is a  
4 Court of Appeals decision and that has a curious fact pattern, too, in

5 that case. But here, based on the testimony from 10:00 until almost  
6 1:00 of the witness who was primarily controlling this project  
7 suggests detailed and thorough review of the documents. With respect  
8 to the issues raised in the closing with respect to the deficiencies,  
9 my recollection of the testimony with respect to the Health Department  
10 was that it was changed from a letter to an e-mail and there was a  
11 phone conversation. With respect to the issue concerning the Forest  
12 Service decision (unintelligible), that was after the decision and  
13 therefore I don't know how it could be part of the record, by that it  
14 predates the Forest Service decision. With respect to the Colorado  
15 Geological Service, I think, again, testimony of the witness is that  
16 they had the information (unintelligible) standard of practice is if  
17 there were other concerns, they would have been conveyed. The Power  
18 Point in my recollection was explained as being Power Point with  
19 respect to the (unintelligible), not the 3-D project. Which leaves  
20 only the question with respect to whether or not the studies on ground  
21 water remain available and whether the ongoing survey work was made  
22 available because it was not part of the record (unintelligible).  
23 Considering all of those factors and considering all of the time and  
24 effort and the detail contained in the documents and that those being  
25 items that were identified, I am denying the motion for a temporary  
1 restraining order. As I noted before, I have some concern that just  
2 with the briefing schedule this may be moot, or if we have a certified  
3 record or even briefing (unintelligible) short of a period of time as  
4 we have. But I don't know whether counsel want to discuss on (1) how  
5 much time it's going to take to have the certified record or, (2) if  
6 we can shorten that briefing period. I mean, otherwise I think that  
7 this is not intended to be, but it's likely to be, dispositive with  
8 respect to (unintelligible). But Mr. Mochulsky, your thoughts on any  
9 of those options?

10 MR. MOCHULSKY: We would certainly ask to accelerate the  
11 case and I believe Rule 106 allows for that because this case could be  
12 moot. While our concerns are with the process of the application, the  
13 ultimate outcome is what has the uncertainty, which our goal is to  
14 ensure proper process and proper outcome, so we would request  
15 accelerated briefing.

16 THE COURT: Well, I mean, step one is . . . how much time  
17 is the County going to need to have this certified record, because  
18 briefing can't happen until the record?

19 MR. BAIER: Judge, I don't know. I'm thinking here . . . I  
20 want to say 14 days just because I don't know (inaudible). **(Inaudible**

**21 – not speaking into microphone).**

22 THE COURT: Alright, first of all let me start with you.

23 Does 14 days seem reasonable?

24 MR. MOCHULSKY: For the record to be . . .

25 THE COURT: Certified.

1 MR. MOCHULSKY: Yes, it certainly does.

2 THE COURT: (Unintelligible)?

3 MR. HOLSINGER: Yes, Your Honor.

4 THE COURT: Okay. And obviously if it can't be done that  
5 soon, we'll have a status conference and regroup, but, I mean, I think  
6 that's the critical piece. Then how soon can you file your opening  
7 brief?

8 MR. MOCHULSKY: Probably within 7 days after the record  
9 being filed.

10 THE COURT: Okay, and again, this could . . . if you can't,  
11 notify the Court and then . . . I mean, you're on the fast track side

12 of this and I understand that, but I also don't want to create  
13 impossibility.

14 MR. MOCHULSKY: And I also want to talk to my client before  
15 we commit to a certain path to make sure that . . . this could  
16 potentially render . . . 21 days could render this whole thing moot if  
17 Gunnison Energy indicates the project . . . we've heard that it's a 50  
18 to 70 day project. And by the time 21 days passes and then there is  
19 (unintelligible).

20 THE COURT: Fourteen and seven, right. No, I'm saying  
21 that's where we're at (unintelligible).

22 MR. MOCHULSKY: So I would want to discuss all of this with  
23 my client as well before we (unintelligible).

24 THE COURT: Okay, and I understand, and we can have another  
25 status conference if there needs to be further discussion, but I'd  
1 like to have some dates before we leave. Assuming 7 days for the  
2 opening brief, how soon can the responsive briefs be filed?

3 MR. HOLSINGER: Your Honor, we can comply with the rules.  
4 I'd have to look at my calendar and what else is going on and when  
5 that would be and how to find time to work on it, but I'll certainly  
6 try to do better than that. One concern I might mention is given  
7 where we stand today, what happens if the plaintiffs move for a  
8 preliminary injunction and we designate the record from today for that  
9 purpose and rely on briefing, or what kind of issues if we have yet  
10 another surprise from plaintiffs out there?

11 THE COURT: Well, I think if they file a motion for  
12 preliminary injunction, then we'll hold a status conference and see  
13 how that impacts everything. I mean, I'm not trying to hide the ball,  
14 I'm just saying that that's something I assume is part of what he's  
15 discussing and we can see where we are and how we proceed. So I'm  
16 going to need to start writing down these things. So the record in 14

17 days, opening brief in 7, 14 days for a response and 7 for a reply.  
18 So we're at 42 days, which is substantially less than what Rule 106  
19 ordinarily contemplates, but I think those are about as tight as I can  
20 expect people to operate under. And obviously if the County gets the  
21 record certified sooner, that shortens some of that. But given that I  
22 usually grant either 30 or 45 days to prepare a record on the cases  
23 we've had (unintelligible) records, this is already a step.

24 MR. BAIER: And, Judge, this is . . . I mean, the dates or  
25 timeframes to aspire to (unintelligible), but I think the Court has  
1 made also some statements that this is a pretty tight (inaudible) and  
2 I have not looked at my calendar or any (inaudible).

3 THE COURT: Well, and I have multiple trials set in the  
4 next several days or months and a six day vacation and I just set a  
5 dependency and neglect jury trial at 1:30 while you folks weren't in  
6 the room and that's got to take priority, so I've had some significant  
7 time constraints, too, so we are where we are. But I appreciate the  
8 flexibility and I'd appreciate if there's something that comes up that  
9 where any of your commitments time-wise just can't work, we'd have to  
10 talk about it if you can't agree on extensions. Alright, the Court  
11 will be in recess. I appreciate everyone's time.

12

13 (PROCEEDINGS CONCLUDED)

14

15 TRANSCRIBER'S CERTIFICATE

16 I hereby certify that the above and foregoing is a true and  
17 complete partial transcript, as transcribed by me to the best of my  
18 ability, of the digitally recorded proceedings held on June 19, 2019  
19 in the Delta District Court, Seventh Judicial District, County of  
20 Delta, State of Colorado, Action No. 19CV30057 and consists of only  
21 the Court's findings and rulings at the conclusion of the hearing.

22 Dated at Montrose, Colorado, this 2nd day of July, 2019.

23

24 /s/ HENDRIKA WILEY