

United States House of Representatives
Committee on Natural Resources
Subcommittee on National Parks, Forests and Public Lands

Hearing to Receive Testimony on H.R. 2334
(Rocky Mountain National Park Wilderness Act)

November 13, 2007
2:00 p.m.

Statement of Dennis Harmon, General Manager,
of the Water Supply and Storage Company

Good afternoon Chairman Grijalva and members of the Subcommittee. We appreciate the opportunity to provide testimony to the Subcommittee concerning H.R. 2334, which would designate as wilderness portions of Rocky Mountain National Park (“RMNP”) administered by the National Park Service (“NPS”).

Background of WSSC and the Grand River Ditch

The Water Supply and Storage Company (“WSSC”) owns and operates the Grand River Ditch, which is a water supply ditch located in the Never Summer Range in RMNP. The Grand River Ditch provides irrigation water to approximately 40,000 acres of land located in Larimer and Weld Counties in northern Colorado. WSSC owns, operates and maintains eleven reservoirs and seven ditch systems, including the Grand River Ditch. WSSC’s system of ditches, canals and laterals is more than 100 miles in total length and provides approximately 60,000 acre-feet of water annually to 173 shareholders.

The Grand River Ditch is an integral component of the Water Supply and Storage Company system. The Ditch is located in the headwaters of the Colorado River on the West Slope of Colorado (i.e., west of the Continental Divide). The north segment or branch of the Grand River Ditch (sometimes referred to as the North Ditch) is approximately 17 miles long and traverses a variety of creeks. Water from these creeks can either be diverted into the Ditch or can be released so that it continues to flow down these creeks to the Colorado River. A measuring weir and recorder for the Grand River Ditch is located near La Poudre Pass. A shorter branch of the Grand River Ditch (sometimes known as the Specimen Ditch or the South Ditch) also captures various waters and transports them to La Poudre Pass.

At La Poudre Pass, water diverted by the Grand River Ditch crosses to the East Slope of Colorado (i.e., east of the Continental Divide) and flows to Long Draw Reservoir, which is located in Roosevelt National Forest. From Long Draw Reservoir, water is delivered down the Cache La Poudre River to WSSC’s system of canals, ditches and laterals for agricultural purposes. Although a number of WSSC’s shares are owned by municipalities, and water ultimately will be used by them for municipal purposes, water diverted by the Grand River Ditch

is used exclusively to irrigate crops and water livestock at this time. The primary water right for the Grand River Ditch is decreed to divert waters from the Colorado River basin with an adjudication date of August 3, 1906 and an appropriation date of September 1, 1890 in the amount of 524.6 cfs (cubic feet per second of time).

WSSC was incorporated as a Colorado mutual ditch company in 1891. Under Colorado law, the shareholders of a mutual ditch company own pro rata interests in the company's water rights and other facilities; therefore, a mutual ditch company is essentially a water distribution organization owned and operated by its shareholders and is not a profit-generating enterprise.

WSSC holds a right-of-way for the Grand River Ditch under the Irrigation or General Right of Way Act of March 3, 1891 ("1891 Act") codified at 43 U.S.C §§ 946-49. Construction on the Grand River Ditch began in 1890. The federal lands around the Grand River Ditch were included in the Medicine Bow Forest Reserve around the turn of the century, at which time they were administered by the fledging United States Forest Service. The Forest Service and WSSC entered into a stipulation concerning the operation and maintenance of the Grand River Ditch on March 21, 1907, which was required by a 1906 federal "amendatory regulation" applicable to rights-of-way.

RMNP was created in 1915, but did not include most of the land surrounding the Grand River Ditch at that time. In fact, the portions of Medicine Bow Forest Reserve that included the Never Summer Range and the land through which the Grand River Ditch flows were not included in RMNP until 1930. Thus, WSSC and the Grand River Ditch had existed for some 35 years prior to becoming part of RMNP.

The Wilderness Proposal in H.R. 2334

H.R. 2334 proposes to designate significant portions of RMNP, including the area in which the Grand River Ditch is located, for inclusion as part of the National Wilderness Preservation System pursuant to the Wilderness Act of 1964. The bill was introduced by Representatives Udall and Musgrave. A corresponding bill in the Senate (S. 1380) also enjoys bipartisan sponsorship having been introduced by Senators Salazar and Allard.

Two provisions of H.R. 2334 directly affect WSSC:

- Section 4(d)(1) specifically excludes from the boundaries of the wilderness designation: "[t]he Grand River Ditch (including the main canal of the Grand River Ditch and a branch of the main canal known as "Specimen Ditch"), the right-of-way for the Grand River Ditch, land 200 feet on each side of the marginal limits of the Ditch and any associated appurtenances, structures, buildings, camps, and work sites in existence as of June 1, 1998.

- Sections 4(e)(4)(A)-(D) state:
 - (A) Liability – Notwithstanding any other provision of law, or any stipulation or applicable agreement, during any period in which the Water Supply and Storage Company (or any successor in interest to the Water Supply and Storage Company with respect to the Grand River Ditch) operates and maintains the portion of the Grand River Ditch within the Park in compliance with an operations and maintenance agreement between the Water Supply and Storage Company and the National Park Service entered into on XXXXXXXXXXXX, no individual or entity who owns, controls, or operates the Grand River Ditch shall be liable for any response costs or for any damages to, loss of, or injury to the resources of the Park resulting from any cause or event (including, but not limited to, water escaping from any part of the Grand River ditch by overflow or as a result of a breach, failure, or partial failure of any portion of the Grand River Ditch, including the portion of the ditch located outside the Park), unless the damages to, loss of, or injury to the resources are proximately caused by the negligence or an intentional act of the individual or entity.
 - (B) Limitation – Nothing in this section limits or otherwise affects any liability of any individual or entity for damages to, loss of, or injury to any resource of the Park resulting from any cause or event that occurred before the date of enactment of this Act.
 - (C) Existing Activities – Nothing in this Act, including the designation of the Wilderness under this section, shall restrict or otherwise affect any activity (including an activity carried out in response to an emergency or catastrophic event) on, under, or affecting the Wilderness or land excluded under subsection (d)(1) relating to the monitoring, operation, maintenance, repair, replacement, or use of the Grand River Ditch that was authorized or approved by the Secretary as of the date of enactment of this Act.
 - (D) No Effect – Notwithstanding any other provision of any previous or existing law, any stipulation, or any agreement, or interpretation thereof, use of water transported by the Grand River Ditch for a main purpose or main purposes other than irrigation shall not terminate or adversely affect the right-of-way of the Grand River Ditch, and such right-of-way shall not be deemed relinquished, forfeited, or lost, solely because such water is used for a main purpose or main purposes other than irrigation.

Explanation of the Provisions Affecting WSSC

WSSC has worked closely with Representatives Udall and Musgrave and Senators Salazar and Allard to draft language for the legislation that accomplishes the wilderness

objectives of the bill and protects the interests of WSSC and its shareholders. WSSC is pleased to have this opportunity to explain the rationale of these particular sections to the Subcommittee.

Excluding the Grand River Ditch and an area on either side of the Ditch allows WSSC to properly operate and maintain the Ditch including conduct of activities, such as operation of motorized mechanical equipment, otherwise not permitted in wilderness areas. Exclusion of 200 feet on either side of the Ditch is the same margin as the land excluded to either side of RMNP roads.

H.R. 2334 should also not cause any change in land use, land management, or water rights. The GRD diverts water high in the Colorado mountains and transports it some 50 miles downstream to its location of use. At present, all of the water is used for agricultural irrigation; however, a portion of WSSC's stock is owned by Colorado municipalities and GRD water will be used for this purpose in the future. No matter what the end use is, the existence of the GRD in RMNP imposes the same burden on the Park. In other words, there is no change in land use, land management or water rights whether the end use of water is agricultural irrigation or municipal use. Conversion of agricultural water to municipal purposes is commonplace in Colorado, and the GRD is no exception. In a mutual ditch company such as WSSC, ownership of stock represents a pro rata share of ownership in the water rights of the company. Therefore, when a shareholder sells his or her stock, the shareholder benefits, but WSSC derives no revenue from the transaction.

Similarly, WSSC does not anticipate that our day-to-day relationship to the NPS staff at RMNP will change significantly as a result of the wilderness designation in S. 1380. WSSC and the RMNP have worked together on issues related to the Park and to the GRD for upwards of 70 years, and we have no reason to believe that the relationship will be substantially altered in the future.

The liability provisions of Section 4(e)(4)(A)-(D) require additional background information. In 1990, Congress enacted the Park System Resource Protection Act ("PSRPA"), 16 U.S.C. § 19jj. That Act imposes liability for damage caused to any park system resource:

(a) In general. Subject to subsection (c), any person who destroys, causes the loss of, or injures any park system resource is liable to the United States for response costs and damages resulting from such destruction, loss, or injury.

(b) Liability *in rem*. Any instrumentality, including but not limited to a vessel, vehicle, aircraft, or other equipment that destroys, causes the loss of, or injures any park system resource or any marine or aquatic park resource shall be liable *in rem* to the United States for response costs and damages resulting from such destruction, loss, or injury to the same extent as a person is liable under subsection (a).

Thus, the PSRPA purports to create a new standard of strict liability applicable to the Grand River Ditch notwithstanding that the GRD existed before creation of the Medicine Bow Forest Reserve, before RMNP was established and for about 40 years before RMNP included the GRD.

This is not a situation where WSSC applied to either the Forest Service (at the time the property was Forest Reserve) or the NPS (after RMNP was established) to locate a ditch on federal property pursuant to terms and conditions required to protect the federal interest. Over the years, the GRD has become subject to increasing legal regulation, most recently by the enactment of the Park System Resource Protection Act (“PSRPA”).

The 1907 Stipulation between the WSSC and the Forest Service (to which the NPS has succeeded) states that the Company shall “pay the United States for any and all damages sustained by reason or use and occupation of said forest reserve by the Company, its successors and assigns, regardless of the cause and circumstances under which such damages shall occur.” WSSC was required to execute this Stipulation by a federal regulation enacted in 1906, years after construction of the Grand River Ditch had commenced. Even after the Stipulation had been executed, it was essentially ineffective. Neither the Forest Service nor the NPS had ever sought to enforce the liability provision of the 1907 Stipulation set forth above until the NPS commenced an action under the PSRPA in response to a breach of the Ditch in May 2003, which is discussed below.

Imposition of a strict liability standard clearly may have the unintended consequence of severely and adversely affecting agricultural interests in northern Colorado. It is difficult to imagine that either the PSRPA or 1907 Stipulation intended to put farming interests in economic jeopardy, or potentially out of business, by making them liable for millions of dollars in damages for a harm that was not caused by their actions. WSSC certainly does not take lightly the potential for damage to RMNP resources; however, a fair balancing of the affected interests compels the conclusion that neither the PSRPA nor the 1907 Stipulation should impose liability without fault. WSSC agrees that our national parks are certainly worthy of protection; however, we cannot believe that Congress intends punitive consequences to the agricultural community in the event that another breach of the GRD occurs where WSSC is without fault.

Section 4(e)(4)(A) of H.R. 2334 rectifies the fundamental unfairness of a strict liability standard of relief, particularly when it is imposed on WSSC literally 100 years after construction of the Grand River Ditch commenced. Strict liability is an inappropriate standard of liability because it potentially makes WSSC liable for damages caused by events beyond its control such as naturally occurring landslides into the Ditch that, in turn, cause a breach event.¹ WSSC, like other owners of private property potentially affecting federal property interests, should be subject to a negligence standard of liability or, in other words, liability for damages caused by the negligent conduct of WSSC. Negligence is the standard of liability imposed on ditch owners in under Colorado law, which is the reason it was proposed in H.R. 2334.

¹ We are unaware of any case applying the PSRPA’s “Act of God” defense; however, cases decided under other similar statutes have held that the subject natural phenomenon must be “exceptional, inevitable, and irresistible” and must be the “sole” cause of the harm. *See generally Apex Oil Co. v. United States*, 208 F.Supp.2d 642, 650-59 (E.D. La. 2002). The courts have so eviscerated the statutory “Act of God” defense that WSSC believes that its liability should be determined based upon its negligent or intentional conduct and the common law defenses applicable thereto.

Section 4(e)(4)(A) includes an additional safeguard by requiring that the negligence standard of liability will apply only in the event that WSSC is in compliance with an Operating and Maintenance Plan (“O&MP”) to be entered into between it and the NPS. The parties have already exchanged drafts of the O&MP and are attempting to resolve their differences. While some significant differences of opinion are evident in the documents exchanged to date (mostly related to the scope of the O&MP and the extent to which it should incorporate other legal regulations and standards by reference), WSSC continues to proceed on the basis that both parties will apply their best efforts to the negotiations and that a mutually acceptable document can be completed. WSSC, however, wishes to be clear that it does not support the wilderness legislation and does not believe the bill should become law in the absence of Section 4(e)(4)(A) and the negligence standard of liability permitted by it. Successful completion of the O&MP negotiations, therefore, is imperative and should be completed at the earliest possible date.

WSSC believes that Section 4(e)(4)(B) was requested by the NPS to explicitly preserve its legal action against WSSC related to a breach of the Grand River Ditch in May 2003. Litigation related to this breach is pending presently in the U.S. District Court in Colorado. WSSC understands that this case is unaffected by H.R. 2334.

Section 4(e)(4)(C) is similar in the sense of preserving and protecting “existing activities” related to the Grand River Ditch. In particular, this section recognizes and incorporates as an “existing activity” the fact that a significant number of the WSSC’s shares are owned currently by Colorado municipalities and that water diverted by the Grand River Ditch will be used by them for municipal purposes. The inevitability of municipal use of a portion of the Grand River Ditch is clearly an “existing activity” within the scope of Section 4(e)(4)(C). This section is very important to the municipal shareholders in WSSC and is also fundamental to WSSC’s support for the wilderness legislation.

Finally, Section 4(e)(4)(D) is intended to ensure, notwithstanding any case law arguably to the contrary, that the use of water transported in the Grand River Ditch will not be adversely affected, and that the right-of-way for the Ditch shall not be relinquished, forfeited or lost, because water diverted to the Ditch will be used for municipal purposes as opposed to agricultural irrigation. As noted above, the fact that shares of WSSC are owned by various municipalities is well known, and Congress should explicitly ensure that use of the Grand River Ditch water and right-of-way will be preserved at the time they are used for municipal purposes.

Section 4(e)(4)(D) begins “[n]otwithstanding any other provision of *any previous* or existing law” because the 1891 Act under which WSSC’s right-of-way was granted was repealed by the Federal Land Policy Management Act (“FLPMA”), 42 U.S.C. §§ 1701 to 1785, but the 1891 Act remained in effect with respect to rights acquired prior to October 21, 1976, the effective date of FLPMA. *See* 43 U.S.C.A. Sections 1701, 1769.” *Overland Ditch and Reservoir Co. v. United States Forest Service*, No. Civ. A. 96 N 797, 1996 WL 33484927 (D. CO., Dec. 16, 1996) at *9, footnote 2. The reference to “previous law” expressly picks-up this legislative history and expressly preserves the integrity of WSSC’s right-of-way.

Conclusion

The provisions of the H.R. 2334 discussed above directly and significantly affect WSSC and the Grand River Ditch and are critical to WSSC's support of the legislation. Each of these provisions has been discussed in detail and at length with the offices of Representatives Udall and Musgrave and Senators Salazar and Allard, all of whom contributed to the language of these sections prior to introduction of S. 1380 and H.R. 2334.

Throughout its more than 100 years of existence, WSSC has worked diligently to be a good neighbor and property owner in RMNP. We believe that our working relationship with RMNP and the NPS has been good and productive over the years, and we anticipate that relationship will continue in the years to come.

WSSC thanks the Subcommittee for the opportunity to present our views on H.R. 2334, and we would be pleased to respond to any questions.