

PAGOSA DAILY POST

A Dry Look at Dry Gulch, Part One

Bill Hudson | 2/9/09

I haven't seen Fred Schmidt around lately.

Mr. Schmidt was perhaps best known, in recent years, as the President of the San Juan Water Conservancy District (SJWCD), in which capacity he spent several years as the lead negotiator for the SJWCD and Pagosa Area Water and Sanitation District (PAWSD) as they have attempted to purchase \$20 million of land north of Town for a planned 35,000 acre-foot reservoir. Needless to say, when you are negotiating that kind of purchase, you spend a lot of time attending public meetings: PAWSD and SJWCD water district meetings, Town Council meetings, BoCC meetings, Town Tourism Committee (TTC) meetings.

In Mr. Schmidt's case, he also spent a considerable amount of time in the courtroom, defending himself against multiple charges of fraud and mishandling of funds in connection with his personal business dealings.

I regularly attend some of these meetings myself, as a reporter for the *Post*, and I don't recall seeing Mr. Schmidt at a single meeting for perhaps four months or more. The SJWCD has replaced him as its President — choosing the imminently sensible Ernie Amos to take over Fred's gavel — and Mr. Schmidt was recently replaced as the Lodging Association's representative to the TTC. Now I see that his downtown office on Lewis Street is available for lease or purchase.

Fred's unexplained disappearance may be responsible, in part, for a seeming change of direction at SJWCD.

Under Schmidt's leadership, the SJWCD had conjured up an intimate partnership with the Pagosa Area Water and Sanitation Board (PAWSD) to collaborate on planning a reservoir in a large, dry gulch aptly known as Dry Gulch. The two water districts share numerous board members and staff, as noted below, which perhaps makes such collaborations more convenient:

PAWSD

Carrie Weiss, manager

Jack Delange, consultant

Karen Wessels, President

Windsor Chacey, board member

Harold Slavinsky, board member

Bob Huff, board member

Steve Hartvigsen, board member

SJWCD

Ernie Amos, President

Jack Delange, Secretary/Treasurer

Carrie Weiss, board member

Karen Wessels, board member

Windsor Chacey, board member

Harold Slavinski, board member

Pat Ullrich, board member

Fred Schmidt, board member

Mark Garcia, board member

Fred Ebeling, board member

The San Juan Water Conservancy District's primary purpose, according to its website, is “the preservation of the various water rights owned by individuals and entities within its District boundaries and to ensure that there are adequate water supplies to support the current and future growth of the community.”

PAWSD, by contrast, is tasked with providing water service to the Town and much of the surrounding unincorporated areas.

“Due to the magnitude of the [Dry Gulch] reservoir project, including the importance of the project to both the current and future economic well being of the community, both the SJWCD and the PAWSD have been and will continue to work jointly towards completion of Dry Gulch Reservoir,” the SJWCD website states.

PAWSD currently delivers about 2,000 acre-feet of water to county water users, including the Pagosa Golf Course. The proposed Dry Gulch Reservoir was planned to hold 35,000 acre-feet — enough water for maybe 160,000 people at current usage rates.

The SJWCD asked Archuleta County voters in 2004 to approve a bond to help fund the proposed Dry Gulch Reservoir, but the voters turned down the offer. Nevertheless, SJWCD and PAWSD continued to study and plan for the new reservoir — including making an application for significant new water rights out of the nearby San Juan River for the purpose of filling the future reservoir, since Dry Gulch — as one might expect from its name — has very little water of its own. Those water rights were granted in 2006, but the case was appealed to the Colorado Supreme Court, which remanded the case back to Durango Water Court Judge Greg Lyman for additional study.

The Supreme Court found several problems with the Pagosa water districts’ water rights application. First, the court felt the projected planning period — 100 years into the future — was unreasonable and speculative. Second, the Supreme Court wanted the water districts to include water conservation measures in their projections, rather than simply assume that people 50 years from now will continue to use our increasingly scarce water resources as recklessly as they do today.

Third, the Supreme Court wanted better justification for the seemingly exaggerated population projections presented by the water districts’ water engineer, Steve Harris. So far, as a result of both national and regional economic downturns, Harris’ population predictions for Archuleta County have proved to be wildly overstated. Harris himself adjusted his own projections a year ago, but the PAWSD board declined to officially accept his new figures.

Last September, Judge Lyman issued a new new ruling on the water rights issue, granting a lesser amount of water for the Dry Gulch Reservoir. That ruling was also appealed to the Supreme Court, again by fishing organization Trout Unlimited. We have not yet heard the ruling on that appeal. You can read a [summary of Lyman's ruling in this Post article](#) by Glenn Walsh.

SJWCD and PAWSD continued to plow ahead with funding of the proposed Dry Gulch Reservoir, despite the Supreme Court appeal, and both districts instituted impact fees, in part to make up for the voter-rejected bond measure.

Those impact fees became highly controversial and eventually elicited a threatened lawsuit from a group of local developers. I understand that lawsuit may still be pending.

Now both PAWSD and SJWCD appear to be re-thinking the wisdom of impact fees — fees which they are, for

the most part, not collecting anyway, thanks to the crash of the local construction industry.

SJWCD has formally requested the Town of Pagosa Springs to cease collecting impact fees for the Dry Gulch project.

PAWSD might be rolling a new assessment of its own impact fees — which it now claims are “not impact fees” — at a public presentation scheduled for Monday, February 23, aptly entitled “Dry Gulch: A Comprehensive Overview”. The presentation is scheduled to last two hours, from 6 to 8pm at the Vista Clubhouse, and the invitation promises: "Q&A to follow."

A fresh assessment of PAWSD fees is being conducted by Denver firm BBC Research & Consulting, whose representative, Tom Phippen, will be present at the February 23 “comprehensive overview”.

I'd like to take a closer look at the history of those impact fees — and discuss, as dryly as possible, future of Dry Gulch.

A Dry Look at Dry Gulch, Part Two

Bill Hudson | 2/10/09

Back in 2005, the Town of Pagosa Springs was spearheading an exciting new search for money. The decade-old TABOR amendment had essentially frozen certain taxes in Colorado, and by 2005, Colorado governments large and small were scrambling to find new sources of revenue to help them deal with a big problem — growth.

In the rural mountain town of Pagosa Springs, ongoing growth — at one of the highest growth rates in the U.S. — had been a double edged sword. On the one hand, the construction industry was healthy and booming, and that provided jobs for carpenters and heavy equipment operators — who in turn spent their paychecks at City Market and Plaza Liquor and Radio Shack. The money circulated and made the town feel prosperous.

On the other hand, the new homes popping up like mushrooms were putting an increasing strain on government services, especially road maintenance. And another government service had been working overtime as well: Planning.

In this hectic community environment, the Town of Pagosa Springs had gathered with Archuleta County and the two water districts — Pagosa Area Water and Sanitation District (PAWSD) and San Juan Water Conservancy District (SJWCD) to develop a new source of revenue.

Impact fees.

Impact fees were attractive, for one reason, because they appeared to be out of the reach of TABOR. TABOR requires any new taxes to be approved by the voters, and that approval was not easy to come by. But impact fees were not taxes — at least in theory — but were, as the name implies, “fees”.

There is a clear difference between a tax and a fee, in their legal definitions. A tax is a required payment to the government, for which no specific service is provided in return. If I own property in Archuleta County, but I live in Texas all year long, I am still required to pay my property taxes — even though I may not see a direct personal benefit since I don't even live in the county. Another person who lives in Archuleta County may not own property here, but may send their kids to school here — and they thereby benefit from the taxes paid by our absent Texan property owner.

That's how taxes work.

A fee is different. When I am charged a fee, I must receive a direct personal benefit in return for that fee, and the amount of the fee must be reasonably commensurate with the amount of service I receive. When I pay a building permit fee, for example, that fee should legally be paying for the salaries and costs incurred to process my application and to inspect my property during the building process and so on.

If I am charged a "building permit fee" when I am not building anything — then that is, in fact, a tax, not a fee. Along the same lines, if I am charged a "building permit fee" which costs me more than the service I am receiving — because the government is trying to use their excess revenues from building permit fees to fund needed road repairs, for example — then again, the "fee" has actually become a tax.

The idea behind an impact fee is this: I move into Archuleta County, a poor rural community with not the greatest infrastructure, and I build a new house. Because I am now going to put more pressure on that infrastructure by my presence, the state of Colorado has allowed local governments to assess an impact fee on my new house. Theoretically, the impact fee will be used to build new roads and new fire stations — to serve me, the newcomer. I am paying the impact fee, in theory, because *I am the one who will benefit* from the improved infrastructure.

My local government cannot, however, use my impact fees to repair old roads or pay salaries or fund ongoing operations. My impact fees must be used for new capital improvements. Period.

If the government uses my impact fees to repair existing roads, then I have paid a tax — and I've paid a tax that my neighbor, who has lived here for twenty years, did not pay. That's just plain unfair. And it's just plain illegal, and a good reason for a lawsuit.

To make sure their new impact fees were legal — and thereby avoid potential lawsuits — the Town, County and water districts hired an expert consulting firm, Economic and Planning Systems, to carefully construct the new impact fees. EPS was charged with making sure the fees were justified by planned capital projects — projects that would benefit all the people who eventually paid the fees — and that the fees were calculated fairly, so no one paid more than his personal fair share.

One of the projects EPS looked at funding was a new 35,000 acre-foot reservoir, proposed for Dry Gulch and to be built jointly by SJWCD and PAWSD. EPS took the numbers — the cost of the reservoir as estimated by PAWSD consultants, and the number of people who would be served by the reservoir as estimated by PAWSD consultants — and determined that SJWCD could fairly and legally assess a fee of about \$1,100 on each new home.

In other words, each family moving into the PAWSD water district — an area considerably smaller than Archuleta County — could expect a benefit of \$1,100 in new services from the proposed Dry Gulch Reservoir, whenever it was built. People outside the PAWSD district might also benefit from the enhanced community economy as a result of a new reservoir — but they couldn't be charged an impact fee, because their benefits would be indirect, not personal.

The Town of Pagosa Springs offered to collect that \$1,100 fee for SJWCD — in part because SJWCD had no staff or office, and in part because the Town would be collecting its own impact fees for roads, trails, and recreation facilities. In fact, the Town offered to collect impact fees for the Pagosa Fire Protection District and the School District as well.

The new impact fees were to be collected at the time a building permit fee was paid. This made the collection process even simpler — and it allowed SJWCD, the Town, the Fire District and the Schools to potentially collect from all the dozens of already platted but unbuilt lots within the Town — plus from any new subdivisions annexed into the Town.

The original plan was for the County to also collect the same SJWCD impact fees on building permits issued outside the Town but within the PAWSD water district — potentially, from over 6,000 already platted building sites, and from who knows how many new subdivisions to be platted in future years.

But the real estate and construction industries argued that the added fees would have an unexpected impact on development in the county. Property values had already been inflated as a result of the National Recreational Properties Inc. marketing scam, and some people were worried that new impact fees would scare away the second-home owners who were driving the real estate and construction markets.

The County BoCC decided not to collect impact fees for SJWCD. This was a severe blow to the proposed Dry Gulch Reservoir financing model, because nearly all the projected growth that would require a new reservoir — and that might pay for a new reservoir with impact fees — was expected to occur out in the County, not in Town.

PAWSD had some big problems. Its partner in the \$150 million Dry Gulch project, SJWCD, was apparently not going to be able to bring in enough fees to even scratch the surface of a new reservoir. The public had voted down a bond issue for that same project. The County didn't seem to want to cooperate.

Plus, PAWSD was desperate for money to fund a refurbishing of the existing Snowball Pipeline and treatment plant. The PAWSD board thought, "Maybe we can charge some of that repair work to new incoming residents?"

So PAWSD decided to take drastic measures on its own. It put in place an impact fee which was "not an impact fee," in the words of Finance Director Shellie Tressler. That new fee, which hit builders with \$7,200 per new house, sent shockwaves through the real estate and construction industries.

And builders in Town were still paying the original \$1,100 fee to SJWCD — on top of the new PAWSD fee — for the same reservoir project, scheduled for 2035.

A Dry Look at Dry Gulch, Part Three

Bill Hudson | 2/11/09

Mark Weiler, the President of Parelli Natural Horsemanship — one of the largest horse-oriented educational franchises in the world, and the only one headquartered in Pagosa Springs — was a vocal proponent of the new impact fees adopted by the Town Council in May of 2006, noting that the Economic and Planning Systems (EPS) study which established the fee amounts "was based on need, and the cost to provide the services."

"What we are seeing is the evolution of communities realizing the expenses that growth requires. What we are seeing now is that the growth needs to fund the expenses of the [new] infrastructure. In the past, communities subsidized the growth by taxing the current residents at a higher rate than they would be taxed if the development paid its way," Weiler said, in support of the Council's decision to adopt the new fees.

Other members of the community were not so sure impact fees were a good idea, when the Town established impact fees totaling about \$5,000 per new home — with a portion of those fees, \$1,100, earmarked for the proposed Dry Gulch project.

Bart Mitchell, Executive Director of the Archuleta Economic Development Association, was one voice opposing the level set for the new fees at the May 2, 2006 meeting.

“In the general concept, the AEDA Board does support impact fees. But if this [ordinance] goes through, we will in fact have the highest impact fees in all the surrounding counties that we are competing with. If you look at the seven counties in our surrounding area, the next highest level of impact fees is only \$925 and that’s in La Plata County. If you look at the City of Durango, their fees are only \$2135.”

“When I go about trying to bring in companies [to locate in Archuleta County] it is very hard to compete in this arena, in Southwest Colorado. If you start adding in the other utility fees—PAWSD, LPEA—there is a major impact from all of the fees we are placing on business owners here. If this is passed, the County may potentially pass the same impact fees. I’ve got a company I’m working with right now, that is now reconsidering whether they want to bring their average \$43,000 per job into Archuleta County, if these fees pass.”

The County did not, in fact, pass the same fees — but the Pagosa Area Water and Sanitation District (PAWSD) dreamed up its own “not impact fees,” which were nevertheless assessed like impact fees — only on new construction — but lacking the legally required “rational nexus” built in to the EPS-designed fees.

In fact, the way the PAWSD Water Resource Fee (WRF) is collected makes appear to be a tax — not a fee. But PAWSD is not allowed, under the Colorado Taxpayer’s Bill of Rights Amendment (TABOR), to levy new taxes without voter approval. So PAWSD calls their WRF “not an impact fee” — and that fee is assessed on top of another PAWSD fee called the Capital Investment Fee.

Mark Weiler has since been appointed to the Town Council, and has made something of an about-face on the impact fee question. Over the past year, he has been urging the Town Council to allow builders and developers to defer payment of the Town’s impact fees over a ten-year period, rather than requiring a lump-sum payment with the building permit application. The Council approved that arrangement last year.

Weiler has also been urging PAWSD to change their funding model for the Dry Gulch project, by collecting any fees needed for the reservoir from *all* potential users — and by collecting those fees on a long-term monthly basis, rather than in a lump-sum payment. Currently, a home builder must pay about \$10,000 in various fees to PAWSD — or even more, for a large home —before he can stick a shovel in the ground.

If that new home is located in the Town limits, the builder must also pay the Town impact fees.

As noted earlier in this article series, the Town has been collecting the \$1,100 in Dry Gulch impact fees on behalf of the San Juan Water Conservancy District. This happens mainly because water districts are not allowed to collect impact fees; that power is reserved to counties and municipalities.

So we have something of an awkward situation. The Town of Pagosa Springs — which does not deliver water to anyone — has been collecting a \$1,100 impact fee to help fund a proposed \$150 million reservoir in which the Town will have no ownership. They have been handing this money over to the San Juan Water Conservancy District — which also does not deliver water to anyone — because SJWCD is not allowed to collect impact fees. That \$1,100 fee was calculated by professional consultants as the correct and legal amount to fund the SJWCD’s portion of the proposed Dry Gulch Reservoir — but those same calculations were rejected by PAWSD, SJWCD’s partner in the proposed Dry Gulch project.

PAWSD has been collecting a \$7,200 “not an impact fee” since 2007, based on the projected cost of a 35,000 acre-foot reservoir, even though they still do not have the water rights to fill such a reservoir.

Neither PAWSD nor SJWCD have collected anywhere near the funds they thought they would have collected by now, because around the same time their fees were adopted, the Pagosa Springs construction industry began a downward spiral that has seemingly yet to hit bottom.

Last month, the SJWCD board voted to cease accepting the \$1,100 impact fee from the Town of Pagosa Springs. A press release from SJWCD announced that the Conservancy District would focus its energies on some of the lower-priced aspects of the proposed Dry Gulch project, such as funding environmental survey work. The SJWCD asserted the right, however, to begin accepting the impact fees at some point in the future.

This decision probably won't affect the SJWCD's financial condition too seriously. The board had expected to collect only \$30,000 in impact fee revenues during 2008. They in fact collected a mere \$9,000.

It seems unclear how a water conservancy board can expect to help build and operate a \$150 million reservoir on \$9,000 a year in revenue — but we should perhaps remember that SJWCD is able to apply for grants, and that they received a \$1 million grant from the Colorado Water Conservancy Board just two years ago, earmarked for Dry Gulch land purchases.

At any rate, SJWCD seems to be setting its sights somewhat lower as far as helping to fund the proposed reservoir. Whether that decision is based on threatened lawsuits, is unclear.

PAWSD, meanwhile, has so far stuck to their guns and continues to collect its “not an impact fee” on new construction, except that there is very little new construction happening right now. The only thing happening, in fact, are lawsuits which will likely cost PAWSD much of what they will collect in “not impact fees” during 2009.

No one said it was easy to build a massive reservoir without voter approval. Perhaps we will find out more about where PAWSD and SJWCD are headed, when they make their February 23 public presentation of a new funding study by Denver firm BBC Research & Consulting.