

DISTRICT COURT, WATER DIVISION NO. 2, COLORADO Pueblo County Judicial Building, 501 North Elizabeth Street, Suite 116, Pueblo, Colorado 81003	
Concerning the Application for Water Rights of: Phyllis Didleau, Jon A.P. Didleau, and Jon P. Didleaux, in El Paso County.	<b>▲ COURT USE ONLY ▲</b>
	Consolidated Case Nos. 18CW3026 Water Div. No. 2 18CW3057 Water Div. No. 1
<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, AND JUDGMENT AND DECREE OF THE WATER COURT</b>	

The Court, having reviewed the application and pleadings in this matter, hereby enters the following Findings of fact, Conclusions of Law, Ruling of Referee, Judgment and Decree:

#### FINDINGS OF FACT

1. Applicants are Phyllis Didleau and Jon A.P. Didleau, 8250 Forest Heights Circle, Colorado Springs, CO 80908, telephone number (719) 440-1949, and Jon P. Didleaux, 7935 Forest Heights Circle, Colorado Springs, CO 80908, telephone number (719) 337-4415. The term “Applicants” as used herein shall refer to these named applicants or their successors in interest to the water rights confirmed herein, the Property, or the augmentation plan as applicable.
2. The application in this matter was filed on March 30, 2018 in Water Division No. 1, Case No. 18CW3057 and Water Division No. 2, Case No. 18CW3026. The application was published in the resumes for both Water Division Nos. 1 and 2 and in a newspaper of general circulation in El Paso County, as ordered by the Court. Proof of publication has been filed.
3. By order of the Supreme Court dated July 2, 2018 these two cases were consolidated before and assigned to the Water Judge, Water Division No. 2. By order dated April 3, 2018, this matter was referred to the Referee for Water Division No. 2.

4. The time for filing statements of opposition has expired and no statements of opposition were filed.

5. Timely and adequate notice of the application was published as required by law and this Court has jurisdiction over the subject matter of this proceeding and over persons affected hereby, whether they have appeared or not.

6. The land and water that are the subject of this proceeding are not within the boundaries of a designated groundwater basin.

7. Applicants seek to adjudicate the Denver Basin groundwater underlying their property and approval of an augmentation plan. Applicants plan to construct or operate wells on the property to provide service to single-family dwellings on the property, based on an anticipated subdivision of the property resulting in up to three lots. Applicants' property consists of two adjacent lots totaling approximately 33.36 acres in section 9, T.12S., R.65W., 6<sup>th</sup> P.M., El Paso County, more particularly described on Exhibit A attached hereto and incorporated herein by this reference, also known as 12725 Herring Road, Colorado Springs, CO 80908 ("Parcel 1") (approximately 30.86 acres) and 7935 Forest Heights Circle, Colorado Springs, CO 80908 ("Parcel 2") (approximately 2.5 acres), collectively referred to herein as the "Property" A map of the Property's location is attached hereto as Exhibit B and incorporated herein by this reference.

8. There is an existing well constructed into the not nontributary Dawson aquifer and located on Parcel 2, NW1/4SW1/4, Sec. 9, T.12S., R.65W., 6<sup>th</sup> P.M. with Permit No. 293425 ("Didleau Well 1").

9. There are no liens or encumbrances on the Property.

10. On May 30, 2018, the Office of the State Engineer filed Determinations of Facts for the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers underlying the Property, which have been considered.

11. The water in the Dawson and Denver aquifers is not nontributary groundwater as such term is defined in C.R.S. §37-90-103 (10.7) (2017) ("NNT"). The water in the Arapahoe and Laramie-Fox Hills aquifers is nontributary groundwater as that term is defined in C.R.S. §37-90-137 (9) (b) (2017) ("NT").

#### CONCLUSIONS OF LAW, RULING, JUDGMENT AN DECREE

12. Applicants have complied with all legal requirements and met all standards and burdens of proof for the requested relief.

13. The following vested water rights for the Denver Basin aquifers underlying the Property are hereby confirmed in the following amounts:

<u>Aquifer</u>	<u>Saturated Thickness</u>	<u>Specific Yield</u>	<u>Total Amount</u>	<u>Annual Amount<sup>1</sup></u>
Dawson (NNT)	385 feet	20%	2,570 acre-feet <sup>2</sup>	25.7 acre-feet <sup>2</sup>
Denver (NNT)	375 feet	17%	2,130 acre-feet	21.3 acre-feet
Arapahoe (NT)	255 feet	17%	1,450 acre-feet	14.5 acre-feet
Laramie-Fox Hills (NT)	190 feet	15%	951 acre-feet	9.51 acre-feet.

<sup>1</sup> Based on assumed 100 years of pumping.

<sup>2</sup> The total and annual amounts of Dawson aquifer water being available is contingent on Applicant repermitting that well with permit No. 293425-A pursuant to the augmentation plan approved herein. Until that well is repermited, the amounts available pursuant to this decree for all other wells from the Dawson aquifer shall be 2,270 acre-feet and 22.70 acre-feet per year assuming 100 years of pumping.

These amounts conform to the values and amounts in the State Engineer's Determination of Facts referenced above.

14. Subject to the terms and conditions of this decree, the water may be used, reused, and successively used on or off the Property for all beneficial uses including without limitation domestic, commercial, irrigation, greenhouse, industrial, stock water, recreation, wildlife, fire protection, and augmentation uses. Uses shall also be subject to valid well permit requirements.

15. Pursuant to C.R.S. § 37-92-305 (11), this Court shall retain jurisdiction as necessary to provide for the adjustment of the annual amount of withdrawal allowed to conform to actual local aquifer characteristics from adequate information obtained from well drilling or test holes. Any such determination shall be subject to applicable rules and regulations promulgated or adopted pursuant to C.R.S. § 37-90-137 (9) (a), including without limitation Denver Basin Rules and Statewide Nontributary Ground Water Rules.

16. The groundwater may be withdrawn at rates of flow necessary to withdraw the entire amounts available, including withdrawal over a 300-year life of the aquifers as required by El Paso County. The actual pumping rates for each well will vary depending on aquifer characteristics and well capabilities. Except for the limits imposed by the augmentation plan approved herein and any limits imposed on Denver aquifer wells pursuant to separate augmentation plans, the water may be withdrawn in amounts in excess of the average annual amounts described herein so long as the sum of the total volume of water withdrawn from all wells does not exceed the product of the number of years since the date or dates of issuance of the original well permit or permits or the date of entry of this decree by the Water Judge,

whichever comes first, multiplied by the allowed average annual amounts of withdrawal. Subject to the requirements of the augmentation plan approved herein and any other approved augmentation plan, the groundwater may be withdrawn through any number or combination of wells necessary, to be located at any location on the Property including the existing well permitted with Permit No. 293425-A as re-permitted pursuant to the terms of this decree. With the exception of wells constructed into the Dawson aquifer which shall be operated according to the terms and limits of the augmentation plan approved herein and any other approved augmentation plan, all wells permitted pursuant to this decree shall be treated as a well field and the total allowed annual amount of withdrawal may be withdrawn from any combination of such wells in the well field.

17. The nontributary water may be used, reused, and successively used to extinction, on and off the Property, subject to the requirement of C.R.S. § 37-90-137 (9)(b) that no more than 98% of the amount withdrawn annually shall be consumed.

18. The not nontributary water in the Dawson aquifer withdrawn pursuant to this decree may be withdrawn subject to the terms of the augmentation plan described herein or any amended or replacement of that augmentation plan. Pursuant to C.R.S. § 37-90-137 (9) (c.5), judicial approval of a plan for augmentation shall be required prior to the use of the not nontributary water in the Denver aquifer. Pursuant to C.R.S. § 37-90-137 (9) (b) and currently promulgated rules and regulations, no more than 98% of the annual amount of nontributary water withdrawn from the Arapahoe and Laramie-Fox Hills aquifers may be consumed and Applicants may be required to demonstrate to the State Engineer that no more than 98% of such nontributary water will be consumed prior to issuance of a well permit for such water.

19. Pursuant to Rule 11.A. of the Statewide Nontributary Ground Water Rules, all wells withdrawing nontributary ground water must be located on the Property.

20. The State Engineer must issue well permits for the described wells in accordance with C.R.S. §§ 37-90-137 (4) and/or (10) and pursuant to this decree.

21. All wells permitted pursuant to this decree shall require geophysical logging unless otherwise excepted from this condition by the State Engineer.

22. The following plan for augmentation is approved:

A. This plan shall augment the out-of-priority depletions resulting from the pumping of up to three individual wells located on the Property and diverting Dawson aquifer water pursuant to the water rights confirmed above including Didleau Well 1 when re-permitted pursuant to this plan, and any replacement wells. Pumping shall be limited to 0.4 a.f.y. per well over 300 years. For purposes of participation in the augmentation plan, each augmented structure will be limited to domestic uses inside one single-family dwelling

and outdoor uses for irrigation of lawns and gardens, stock water, and fire protection. Each well shall be connected to a nonevaporative septic system including a leach field. Consumption of water for indoor uses is considered to be 10% for this plan. Consumption of water for outdoor uses is considered to be 100% consumptive for this plan. To ensure adequate return flows to augment depletions during pumping, outdoor uses of each of the three wells shall be limited to 50% of actual pumping. Based on these limits, stream depletions are estimated to be 0.04 a.f.y. per well, 0.13 a.f.y. for all three wells combined, and 39.0 a.f. total over 300 years of pumping. Return flows are estimated to be 0.18 a.f.y. per well, .54 a.f.y. for all three wells combined, and 162 a.f. total over 300 years.

B. Maximum stream depletion is estimated to be 0.27 a.f. in year 300. Post-pumping depletions are estimated to be 321.0 a.f. Should pumping be less than the maximum allowed, resulting depletions will be reduced accordingly. Although depletions from the wells are expected to impact Cherry Creek and West Cherry Creek, tributaries to the South Platte River, most of the depletions shall impact Monument Creek, a tributary of the Arkansas River.

C. During pumping of the wells, out-of-priority depletions shall be augmented with return flows resulting from the indoor use of the not nontributary Dawson aquifer water and returned to the system through nonevaporative septic systems including leach fields on each of the subdivided lots. Given the maximum pumping rates and use limitations specified in this plan, return flows will equal or exceed the maximum total stream depletions for all wells during pumping.

E. It is assumed that post-pumping depletions of the wells described above will be injurious and augmentation will be required, Applicants shall reserve or cause to be reserved 327.6 a.f. of the Laramie-Fox Hills aquifer water underlying the Property for the purpose of replacing injurious depletions. Applicants retain the right to use any excess nontributary water for other authorized purposes. Such water is sufficient in quantity to fully replace all post-pumping depletions required to be replaced under this plan. This Court shall retain jurisdiction to adjust the amount of water necessary to replace post-pumping depletions and the amount reserved for that purpose should site-specific data establish that a different amount is needed based on actual pumping. Applicants have the right to replace such post-pumping depletions with any other acceptable source of augmentation water after judicial approval of such or pursuant to a substitute water supply plan approved pursuant to law.

23. Applicants have the right to claim and demonstrate that the impact of post-pumping depletions are wholly de minimus and non-injurious and need not be replaced under law pursuant to C.R.S. § 37-90-137 (9); and the Court retains jurisdiction to the extent necessary to adjudicate such claims.

24. The following terms and conditions shall apply to this augmentation plan:

A. Unless and until Applicants obtain a finding from this Court that the impact of post-pumping depletions are non-injurious or approval of an alternative source of augmentation for the post-pumping depletions, a well constructed to the Laramie-Fox Hills aquifer shall be constructed at the time post-pumping augmentation is required. This Court shall retain jurisdiction for the purpose of ensuring that the well is constructed as required. Applicants successors in interest to the reserved Laramie-Fox Hills aquifer water shall be responsible for ensuring the construction of this well as required and for notifying this Court when the well has been constructed and for ensuring operation of the well as required by this decree.

B. Ownership of the right to the 327.6 a.f. of reserved nontributary Laramie-Fox Hills aquifer water shall be retained by the owners of the Property and may not be conveyed or transferred to anyone but an owner of the Property.

C. The return flows dedicated to augmentation pursuant to this plan shall be used only to replace depletions pursuant to this plan and shall not be used, sold, traded, or assigned in whole or in part for any other purpose.

D. Applicants shall cause to be recorded in the El Paso County real estate records this decree as or alternative covenants that run with the Property providing notice to future owners of the Property of the requirements of this decree, including without limitation the requirement for construction of a well to augment post-pumping depletions.

E. An application to repermit that existing well with Permit # # 293425 pursuant to this augmentation plan shall be submitted to the State Engineer within 90 days of entry of this decree by the water judge.

F. Unless the State Engineer authorizes an exception to the requirement of well logs, within 60 days after completion of any new well authorized pursuant to this augmentation plan or any test hole, Applicants shall provide the State Engineer with copies of well logs.

G. The owner of each lot shall read and record his/her well meter reading on or about April 1<sup>st</sup> and November 1<sup>st</sup> of each year and shall submit his/her meter readings to the Water Commissioner by April 15 and November 15 of each year as requested by the Water Commissioner, to establish a base indoor use for each well.

25. The Court finds this augmentation plan satisfies the requirements of C.R.S. § 37-90-137 (9) (c.5) and § 37-92-305, sufficiently provides for the replacement of actual out-of-priority

depletions to the stream caused by withdrawals from the proposed wells, and prevents material injury to the owners of or persons entitled to use water under vested water rights or decreed conditional water rights. This plan is sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water.

26. The State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

27. The substituted return flows and nontributary Laramie-Fox Hills aquifer water are of a quality and quantity so as to meet the requirements for which the water of the senior appropriators has normally been used and shall be accepted by the senior appropriator in substitution for water derived by the exercise of their decreed rights, pursuant to C.R.S. § 37-92-305 (5).

28. This Court retains jurisdiction for the following purposes:

A. perpetual jurisdiction for the purposes stated above;

B. for a period of 120 days following submission of a final well log as required herein to provide for the adjustment of the annual amount of withdrawal allowed to conform to actual local aquifer characteristics from adequate information obtained from well drilling or test holes. This decree shall control the determination of the quantity of annual withdrawal allowed in any well permits issued pursuant to this decree pursuant to C.R.S. § 37-92-305 (11); and

C. for a period of 5 years after entry of this decree by the water judge for reconsideration of the approval of the augmentation plan on the question of injury to the vested rights of others, pursuant to C.R.S. § 37-92-304 (6).

29. The water rights confirmed herein and augmentation plan approved herein are contemplated by law.

30. The copies of this decree shall be mailed as provided by statute.

Ruling entered this 23<sup>rd</sup> day of August, 2018 by the Water Referee:

*Mardell R. DiDomenico*



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Mardell R. DiDomenico  
Water Referee, Water Division No. 2

THE COURT FINDS THAT NO PROTEST WAS FILED IN THIS MATTER. THE FOREGOING RULING IS CONFIRMED AND APPROVED AND IS MADE THE JUDGMENT AND DECREE OF THIS COURT.

Dated: September 14, 2018.

**BY THE COURT:**



*Larry C. Schwartz*

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**LARRY C. SCHWARTZ,  
WATER JUDGE  
WATER DIVISION 2**

EXHIBIT "A"

PARCEL 1:

Tract of land in Section 9, Township 12 South, Range 65 West, County of El Paso, State of Colorado, described as follows: Commencing at the West corner of East/West center line of subdivision Section 9;

Thence Easterly 1419.94 feet for point of beginning;

Thence continuing on same Easterly course 540.0 feet m/l to tract described at Book 2318, Page 387, Southerly along the West boundary of subdivision tract 430.0 feet, Easterly along South line of same tract 505.40 feet;

Thence Southerly 60.0 feet m/l to tract described in Book 721, Page 970;

Thence Westerly along North line 460.74 feet, Southerly along West line of same subdivision tract 829.87 feet, Westerly at R/A 1969.86 feet to a point on the East line of Herring Road;

Thence Northerly along that East line 320.0 feet to the South line of tract described in Book 2371, Page 388;

Thence Easterly on subdivision South line 434.0 feet, Northerly on East line of same subdivision tract 230.0 feet to Southwest corner of tract described in Book 1951, Page 432, Easterly on South line of said tract 381.0 feet, Northerly on East line of same tract 286.0 feet, Easterly at R/A 67.43 feet, Northerly at r/a 60 feet to Southeast corner of tract described in Book 2215, Page 559, Easterly at r/a 506.51 feet m/l;

Thence Northerly 430.0 feet to point of beginning, except tract described in Book 2645, Page 207.

PARCEL 2:

Tract in Northwest quarter of the Southwest quarter of Section 9, Township 12 South, Range 65 West, County of El Paso, State of Colorado, described as follows:

Commencing at the Northwest corner of said Northwest quarter of the Southwest quarter; Thence Southerly on Westerly line 430.0 feet, angling left  $90^{\circ} 13'$  Easterly 30.0 feet for point of beginning;

Thence continuing Easterly on same course 435.0 feet, angling right Southerly 60.0 feet, angling right 434.0 feet;

Thence angling right Northerly 60.0 feet to point of beginning.

