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DISTRICT COURT, WATER DIVISION 2, COLORADO	<small>WATER RESOURCES STATE INSURER COL 2</small>
320 West 10 th Street, No. 203 Pueblo, CO 81003	FILED IN THE OFFICE OF THE CLERK, DISTRICT COURT WATER DIV. NO. 2 STATE OF COLORADO
CONCERNING THE APPLICATION FOR GROUND WATER RIGHTS OF:	JUN 17 2005
THE DAVID A. WISMER AND MARY ANNE WISMER TRUST AND STATE BOARD OF LAND COMMISSIONERS, Co-Applicants,	CLERK
IN EL PASO COUNTY.	▲ COURT USE ONLY ▲
Attorneys: Lusanna J. Ro, No. 28806 Office of the Colorado Attorney General 1525 Sherman Street, 5 th Floor Denver, Colorado 80203 Tele: 303-866-6002 ATTORNEYS FOR CO-APPLICANT STATE BOARD OF LAND COMMISSIONERS and Robert E. Schween, No. 12923 Robert E. Schween, P.C. 8231 South Winnipeg Circle Aurora, Colorado 80016 Tele: 303-690-8451 ATTORNEYS FOR CO-APPLICANT DAVID A. WISMER AND MARY ANNE WISMER TRUST	Case Number: 2004-CW-098
FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, JUDGMENT AND DECREE OF THE WATER COURT	

THIS MATTER has come before the Court upon the application of the David A. Wismer and Mary Anne Wismer Trust ("Trust") and Intervenor and joined Co-Applicant State Board of Land Commissioners ("SBLC") for a determination of all ground water rights in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers underlying certain property in El Paso County. Such property, a section of land containing 640 acres, more or less, described hereinbelow and in the application, is owned by Co-Applicant Trust, but ownership and use of the underlying ground water was retained by Co-Applicant SBLC in its patent of the land to Co-Applicant Trust for a period of 50 years (until February 27, 2048), after which such rights in the underlying ground water are to be conveyed to the Trust.

By agreement of the Co-Applicants, the underlying ground water is to be adjudicated herein by both Co-Applicants. Accordingly, having considered the evidence in this matter, the Court now enters this ruling and decree, as follows:

FINDINGS OF FACT

1. **Name and Address and Telephone Nos. of Applicants:**

State Board of Land Commissioners
1313 Sherman Street, Suite 621
Denver, Colorado 80203
Telephone: 303-866-3454

The David A. Wismer
and Mary Anne Wismer Trust
15555 Highway 83
Colorado Springs, Colorado 80921
Telephone: 719-495-8665

2. **History of the Case:**

A. An Application for a determination of ground water rights underlying Property subject to this ruling and decree was filed in the Water Court for Water Division 2 on November 19, 2004, by the Co-Applicant Trust. A timely statement of opposition and motion to intervene was filed by the SBLC. Co-Applicant Trust consented to the joinder of the SBLC as a Co-Applicant in this case. By Order of the Court dated February 17, 2005, intervention was granted and the SBLC was joined as a Co-Applicant. No other statements of opposition or motions to intervene in this matter have been filed, and the time period for filing same has expired.

B. The Office of the State Engineer issued its Determination of Facts in this matter on January 25, 2005. All findings of fact made in this ruling and decree are consistent with the findings of fact in such Determination of Facts.

C. The overlying property which is the subject of this application is 640 acres, more or less, consisting of all of Section 36, Township 11 South, Range 66 West of the 6th P.M., in El Paso County, as shown on the General Location Map, Exhibit A hereto ("Property"), and as described in the Property Legal Description, Exhibit B hereto.

3. **Purpose of the Application:** The purpose for filing the original application in this matter was to adjudicate the Denver Basin aquifer ground water rights underlying the subject parcel ("Property"). No augmentation plan for the use of not-nontributary ground water was requested.

4. **Subject Matter Jurisdiction:** Timely and adequate notice of the pendency of these proceedings has been given in Water Division 2 in the manner required by law. The Water Court has jurisdiction over the subject matter of these proceedings and over all who have standing to appear as parties, whether they have appeared or not.

5. Aquifers and Location of Ground Water:

A. Co-Applicants seek a decree for rights to all ground water recoverable from the not-nontributary Dawson and Denver aquifers and the nontributary Arapahoe and Laramie-Fox Hills aquifers underlying the Property in El Paso County, Colorado. The Property which overlies the subject ground water consists of 640 acres, more or less, as described in Exhibit B hereto.

B. Co-Applicant SBLC is the owner of all ground water rights underlying the Property and has the right to withdraw such ground water under Colorado law. Section 37-90-137(4), C.R.S. Co-Applicant Trust is the owner of the overlying land and successor in interest by patent of such rights to such ground water at the expiration of the SBLC's 50-year ownership interest. See Patent No. 8167, attached as Exhibit C hereto. No part of such lands lies within a designated ground water basin.

6. Specific Wells Claimed and Well Permits:

A. The Property is subject to a Conservation Easement. The Conservation Easement acknowledges that the ground water interests (other than production from exempt wells) on the Property have been reserved by the SBLC for a period of fifty (50) years beginning on February 27, 1998, and neither the Trust nor the Grantee of the Conservation Easement have the right or ability to prohibit the development of such ground water interests. Further, the Conservation Easement and the SBLC acknowledge that after February 27, 2048, SBLC's reservation expires and all interests in such ground water are to be conveyed to the Trust.

B. The specific location for the initial well or wells to be constructed under this ruling and decree has not been determined at this time. Co-Applicants have the legal right, nevertheless, to construct and complete such well(s) into each aquifer anywhere on the overlying property as necessary to obtain the full average annual amount from each aquifer pursuant to the terms and conditions of this ruling and decree, and in accordance with § 37-90-137(10), C.R.S.

C. Co-Applicants or their successor(s) shall request a well permit from the Division of Water Resources to construct each such well to be located on the Property described herein at such time as Co-Applicants foresee the need for such well. Such well permit shall be granted pursuant to the terms and conditions of this ruling and decree.

7. Average Annual Amounts of Withdrawal Available:

A. Pursuant to the Denver Basin Rules, the ground water in the Arapahoe and Laramie-Fox Hills aquifer underlying the Property, as described herein, is classified as nontributary ground water, as defined in § 37-90-103(10.5), C.R.S. Accordingly, the developer and user of such ground water is required to relinquish two percent (2%) of withdrawals of such ground water to the stream system.

B. The ground water contained in the Dawson and Denver aquifers at this location is classified not-nontributary as defined in § 37-90-103(10.7), C.R.S. Thus, withdrawals of such ground water will require replacement to the stream system of the actual amounts of modeled stream depletions, or four percent of the amount of such withdrawals (as will be the case for Denver aquifer withdrawals from locations more than one mile from the point of contact between the aquifer and the stream system) caused by such pumping, pursuant to a judicially approved plan for augmentation. No such augmentation plan is adjudicated by this ruling and decree.

C. The average annual amounts available in acre-feet for withdrawal from each of the underlying aquifers are as follows:

<u>Aquifer</u>	<u>Acres</u>	<u>Sat. Sand Thickness</u>	<u>Specific Yield</u>	<u>Avg. Ann. Amounts</u>
Dawson	640	410	20 %	515 AF *
Denver	640	530	17 %	577 AF
Arapahoe	640	220	17 %	239 AF
Laramie- Fox Hills	640	190	15 %	182 AF

* Ten (10) acre-feet per year from the Dawson aquifer were left unadjudicated so that such amount would be available for allocation to exempt wells on the Property. The Agreement to Exchange Real Property between the SBLC and the Trust, dated December 18, 1996, acknowledges that under the terms of the Conservation Easement, the Trust retains the right to apply for and obtain exempt water wells.

D. The above values and amounts listed for the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers are consistent with the Office of the State Engineer Determinations of Facts, issued on January 25, 2005, in this case.

8. Estimated Average Pumping Rates and Well Depths:

A. The following are the estimated average pumping rates and well depths by aquifer:

<u>Aquifer</u>	<u>Rate of Flow</u>	<u>Depth</u>
Dawson	15 gpm	920 feet
Denver	50 gpm	1820 feet
Arapahoe	250 gpm	2380 feet
Laramie-Fox Hills	100 gpm	3030 feet

B. The above estimated average rates of withdrawal are not to be construed as maximum production rates, which are to be specified on the well permit.

C. Well depths indicated above are those shown in the State Engineer's Determinations of Fact, but such depths may vary somewhat from those depths shown above based on surface topography at the specific well location.

9. **Final Average Annual Amounts of Withdrawal:**

A. Final determinations of the applicable average saturated sand thicknesses and resulting average annual amounts available to Co-Applicants from each aquifer will be made pursuant to the retained jurisdiction of this Court, as described in Paragraph 23 of this ruling and decree. In the event this ruling and decree is not reopened for a further quantitative determination, the findings herein are final and controlling.

B. The allowed annual amount of ground water which may be withdrawn from such aquifers through the wells initially constructed and any additional wells, pursuant to § 37-90-137(10), C.R.S., may exceed the average annual amount of withdrawal, as long as the total volume of water actually withdrawn through such wells and any additional wells therefor subsequent to the date of this decree does not exceed the product of the number of years since the date of the issuance of the well permits or the date of this decree, whichever is earliest in time, multiplied by the average annual amount of withdrawal, as specified above or as subsequently determined pursuant to the retained jurisdiction of the Court.

10. **Limitations on Consumption of Nontributary Ground Water:**

A. The ground water to be withdrawn from the Arapahoe and Laramie-Fox Hills aquifers under this ruling and decree is "nontributary ground water" as defined in § 37-90-103(10.5), C.R.S., and in the Denver Basin Rules, 2 CCR 402-6, the withdrawal of which will not, within 100 years, deplete the flow of a natural stream, including a natural stream as defined in §§ 37-82-101(2) and 37-92-102(1)(b), C.R.S., at an annual rate greater than 1/10 of 1% of the annual rate of withdrawal.

B. Co-Applicants may not consume more than 98% of the annual quantity of water withdrawn from such nontributary aquifer. The relinquishment of 2% of the annual amount of water withdrawn to the stream system, as required by the Denver Basin Rules, may be satisfied by any method selected by the Co-Applicants and satisfactory to the State Engineer, so long as Co-Applicants can demonstrate that an amount equal to 2% of such withdrawals (by volume) has been relinquished to the stream system.

C. The vested water rights of others will not be materially injured by such withdrawals as described hereby, so long as such withdrawals are made pursuant to the terms of this ruling and decree. Withdrawals hereunder are allowed on the basis of an aquifer life of 100 years, assuming no substantial artificial recharge within 100 years.

D. No material injury to vested water rights of others will result from the issuance of permits for wells or the exercise of the rights and limitations specified in this decree.

11. **Condition Precedent to Use of Not-Nontributary Ground Water:**

A. Ground water in the Dawson and Denver aquifers at this location has been determined to be not-nontributary, as that term is defined at § 37-90-103(10.7), C.R.S.

B. Pursuant to § 37-90-137(9)(c), C.R.S., such not-nontributary ground water may not be withdrawn and used until a judicially approved plan of augmentation has been obtained providing adequate replacement for stream depletions, as applicable, caused by such withdrawals. No such plan is adjudicated in this ruling and decree.

12. **Well Locations, Additional Wells, Well Fields and Adjustment of Well Permits:**

A. **Well Locations:** Co-Applicants propose to construct their wells as required by demands over time. Wells may be drilled and constructed pursuant to this ruling and decree at any location on the overlying land area described herein, pursuant to well permits to be issued in accordance with § 37-90-137(10), C.R.S.

B. **Additional Wells:** In addition to the initial well(s) to be permitted and constructed pursuant to this ruling and decree, Co-Applicants may construct additional and replacement wells in order to maintain levels of production, to meet water systems demands, or to recover the entire amount of ground water in the subject aquifers underlying the subject property, as described herein. As additional wells are planned or needed, applications shall be filed in accordance with § 37-90-137(10), C.R.S.

C. **Well Fields:** Two or more wells constructed into the same aquifer shall be considered a well field. In producing water from such well field, Co-Applicants or their successor(s) may withdraw the entire amount which may be produced hereunder from the particular aquifer through any combination of wells within the well field for that particular aquifer.

D. **Adjustment of Well Permits:** In the event that the allowed average annual amounts decreed herein are adjusted pursuant to the retained jurisdiction of the Court, the well permittee shall obtain new well permits prior to withdrawing such adjusted average annual amounts. New permits for any wells herein shall likewise reflect any such adjustment of the average annual amounts decreed herein.

13. **Proposed Uses of Water:** The water withdrawn pursuant to this ruling and decree may be used, reused, and successively used and after use, leased, sold, or otherwise disposed of for domestic, commercial, irrigation, stock watering, recreational, fish and wildlife, fire protection, and any other beneficial purpose, to be used on or off the land described in Paragraph 4. This water will be produced for immediate application to said uses, for storage and subsequent application to said uses, for exchange purposes, for replacement of depletions resulting from the use of water from other sources, and for augmentation purposes.

14. **Conditions:** For each well constructed pursuant to this decree, the well permittee shall comply with the following conditions:

A. A totalizing flow meter shall be installed on each well discharge prior to withdrawing any water from the well. Co-Applicants or their successor(s) shall keep accurate records of all withdrawals by the proposed wells, make any calculations necessary, and submit such records to the Water Division 2 Engineer on an annual basis or as otherwise requested by the Division Engineer.

B. The entire length of the open bore hole shall be geophysically surveyed prior to casing and copies of the geophysical log submitted to the Division of Water Resources. Co-Applicants may provide a geophysical log from an adjacent well or test hole, pursuant to Rule 9A of the Statewide Rules and acceptable to the State Engineer, which fully penetrates the aquifer, in satisfaction of the above requirement.

C. The ground water production shall be limited to the specific aquifer for which the well was permitted. Plain, unperforated casing must be installed and properly grouted to prevent withdrawal from or intermingling of water from zones other than those for which the well was designed.

D. Each well shall be permanently identified by its permit number, this Water Court Case Number, and the name of the producing aquifer on the above-ground portion of the well casing or on the pumphouse.

CONCLUSIONS OF LAW

15. The Water Court has jurisdiction over this proceeding pursuant to § 37-90-137(6), C.R.S. This Court concludes as a matter of law that the application herein is one contemplated by law. Sections 37-90-137(4) and (9), C.R.S. The application for a decree confirming Co-Applicants' right to withdraw and use all ground water from the named nontributary aquifers beneath the property as described herein pursuant to § 37-90-137(4), C.R.S., should be granted, subject to the provisions of this decree.

16. The nature and extent of the rights to nontributary and not-nontributary ground water determined herein are defined by §§ 37-90-137(4) and (9), C.R.S. The withdrawal of the ground water decreed herein in accordance with the terms of this decree will not result in material injury to vested water rights of others. The not-nontributary Dawson and Denver aquifer ground water decreed hereby may be withdrawn only pursuant to a subsequent judicially approved augmentation plan.

17. Return flows from domestic and irrigation uses, as contemplated herein, are an acceptable source for replacement of stream depletions, so long as the quantity of such projected return flows meets or exceeds the modeled actual stream depletions.

18. The rights to nontributary and not-nontributary ground water determined herein shall not be administered in accordance with priority of appropriation. Such rights are not "conditional water rights" as defined by § 37-92-103(6), C.R.S. The provisions of § 37-92-301(4), C.R.S., requiring findings of reasonable diligence are not applicable to the ground water rights determined herein. The determination of ground water rights herein need not include a date of initiation of the withdrawal project. See § 37-92-305(11), C.R.S.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

19. The Findings of Fact and Conclusions of Law set forth above are hereby incorporated into the terms of this Decree as if same were fully set forth herein.

20. The ground water subject to this ruling and decree is adjudicated in the name of the State Board of Land Commissioners until February 27, 2048, and thereafter in the name of Co-Applicant Trust.

21. Full and adequate notice in the application in this matter was given, and the Court has jurisdiction over the subject matter and over the parties, whether they have appeared or not. For the purposes of jurisdiction over this matter, § 37-92-302(2), C.R.S., does not require that the application be supplemented with a well permit or evidence of a well permit denial.

22. **Right to Withdraw Nontributary Ground Water:**

A. The Co-Applicants may withdraw the nontributary ground water subject to this decree through wells to be permitted by the State Engineer's Office at any location on the overlying land, or through any duly authorized additional or replacement wells thereto, and in the amounts and at the estimated average rates of flow specified therefor, subject to the limitations herein and the retained jurisdiction of this Court. Rights to use ground water from the wells described in § 37-90-134(4), C.R.S., pursuant to all such determinations shall be deemed to be vested property rights. See § 37-92-305(11), C.R.S.

B. Ground water withdrawals pursuant to this ruling and decree may be made in the quantities decreed herein and may be used for all beneficial purposes listed hereinabove.

23. **Retained Jurisdiction as to Ground Water Adjudication:**

A. The Court retains jurisdiction as necessary to adjust the average annual amounts of nontributary and not nontributary ground water available under the Property to conform to actual local aquifer characteristics as determined from adequate information obtained from wells, pursuant to § 37-92-305(11), C.R.S. Within 60 days after completion of any well decreed herein, or any test hole(s), Co-Applicants or any successor(s) in interest to these water rights shall serve copies of such log(s) upon the State Engineer.

B. Within five years from the date this decree is entered and at such time as adequate data are available, any person including the State Engineer may invoke the Court's retained jurisdiction to make a Final Determination of Water Right. Within four months of notice that the retained jurisdiction for such purpose has been invoked, the State Engineer shall use the information available to him to make a final determination of water rights finding. The State Engineer shall submit such finding to the Water Court and to the Co-Applicants.

C. If no protest to such finding is made within 60 days, the Final Determination of Water Rights shall be incorporated into the decree by the Water Court. In the event of a protest, or in the event the State Engineer makes no determination within four months, such final determination shall be made by the Water Court after notice and hearing.

D. In the interim, the Court retains jurisdiction over this matter pursuant to the directive found at § 37-92-305(11), C.R.S.

24. Upon entry of this decree of the Water Court, Co-Applicants shall have the decree recorded in the real property records of El Paso County.

RULING ENTERED this 24th day of May, 2005.

Mardell R. DiDomenico
Mardell R. DiDomenico
Water Referee
Water Division 2, Colorado

THE COURT DOTH FIND THAT NO PROTEST TO THE RULING OF THE REFEREE HAS BEEN FILED.

THE FOREGOING RULING IS THEREFORE CONFIRMED AND APPROVED AND IS HEREBY MADE THE JUDGMENT AND DECREE OF THIS WATER COURT.

Date: 6/17/05

BY THE COURT:

C. Dennis Maes
Honorable C. Dennis Maes
Water Judge
Water Division 2, Colorado

APPROVED AS TO FORM AND CONTENT:

OFFICE OF THE ATTORNEY GENERAL

By: 
Lusanna J. Ro, No. 28806

ATTORNEYS FOR CO-APPLICANT STATE BOARD
OF LAND COMMISSIONERS

ROBERT E. SCHWEEN, P.C.

By: 
Robert E. Schween, No. 12923

ATTORNEY FOR CO-APPLICANT DAVID A. WISMER
AND MARY ANNE WISMER TRUST

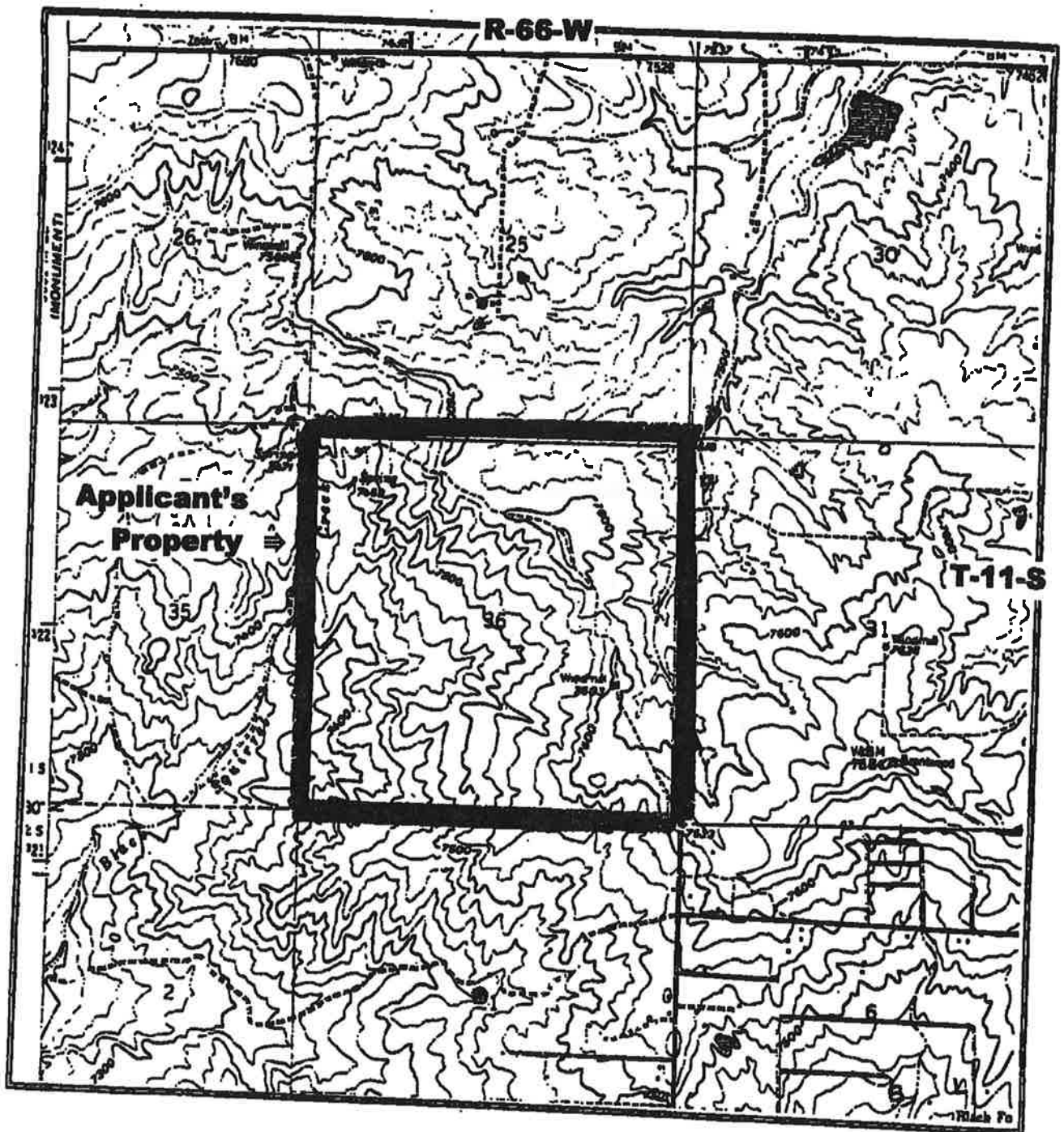
Case No. 04-CW-098, Water Division 2

TABLE OF EXHIBITS

Exhibit A	General Location Map.
Exhibit B	Property Legal Description.
Exhibit C	Patent No. 8167.

c: Wismer-04CW098.RUL

Ci State/Dunsmuir Engineers
R. Schween
d. Ro
620-05
nd



● TOPOGRAPHIC MAP ●
(Contour Intervals - 20 Feet)

FROM USGS BLACK FOREST QUADRANGLE MAP
REVISED 1969 AND 1975

EXHIBIT A
General Location Map

Application of David A. Wismer and Mary Anne Wismer Trust

LEGAL DESCRIPTION OF THE PROPERTY

**IN TOWNSHIP ELEVEN SOUTH (T11S), RANGE SIXTY-SIX WEST (R66W),
OF THE SIXTH PRINCIPAL MERIDIAN (6TH PM)**

Section Thirty-six (36): All

**Containing Six Hundred Forty and No/One Hundredths (640.00)
acres, more or less, according to U.S. government survey.**

EXHIBIT B



PATENT NO. 8167

This patent is made this 27 day of February, 1976, by the STATE OF COLORADO, acting by and through the STATE BOARD OF LAND COMMISSIONERS ("BOARD") to DAVID A. WISMER and MARY ANNE WISMER as co-trustees for benefit of the DAVID A. WISMER and MARY ANNE WISMER TRUST dated APRIL 9, 1980 and restated MARCH 31, 1986, ("WISMER") whose address is 15555 Highway 83, Colorado Springs, Colorado, 80921;

WHEREAS, pursuant to an Exchange Agreement (Agreement) and to Board Order No. 96-290 dated July 30 & 31, 1996, the Board and Wismer agreed to exchange Real Property; and

WHEREAS, the Replacement Property to be conveyed to the Board pursuant to the Agreement will be of equal or greater value to the lands to be conveyed by the BOARD, pursuant to the terms of the Agreement; and

WHEREAS, the Board has determined that this action is in the best interests of the trusts it administers;

NOW THEREFORE, in consideration of the lands being conveyed to the Board and other consideration described in the Agreement, the BOARD OF LAND COMMISSIONERS hereby grants, conveys, deeds and relinquishes to Wismer, as co-trustees for benefit of the DAVID A. WISMER and MARY ANNE WISMER TRUST dated APRIL 9, 1980 and restated MARCH 31, 1986, its successors and assigns forever, the following described School lands in EL PASO County, State of Colorado, ("State Property") to wit:

SCHOOL TRUST LANDS

**TOWNSHIP ELEVEN SOUTH (T11S), RANGE SIXTY-SIX WEST (R66W),
OF THE SIXTH PRINCIPAL MERIDIAN (6TH PM)**

Section Thirty-six (36):

All

Containing Six Hundred Forty and No/one-hundredths (640.00) acres, more or less, according to U.S. government survey.

RESERVING, however, to the State of Colorado, all rights to any and all minerals, ore and metals of any kind and character, and all coal, asphaltum, oil, gas or other like substance in or under said land and geothermal resources, the right of ingress and egress for the purpose of mining, together with enough of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances. Also, reserving to the Board, for a period of fifty (50) years, all water underlying the State Property from the Dawson-Arkose, Denver, Arapahoe, Laramie-Fox Hills and Dakota aquifers and rights of ingress and egress for the purpose of exploring the same together with enough of the surface as may be necessary for the proper and convenient working of such water, and the Board shall convey to Wismer such water rights in perpetuity thereafter.

Subject to any and all covenants, restrictions, easements or rights-of-way whether or not of record and shall further be subject the Conservation Easement pursuant to the Agreement.

TO HAVE AND TO HOLD, the hereinabove described lands together with any and all rights, appurtenances and privileges thereto to **DAVID A. WISMER** and **MARY ANNE WISMER** as co-trustees for benefit of the **DAVID A. WISMER** and **MARY ANNE WISMER TRUST** dated **APRIL 9, 1980** and restated **MARCH 31, 1986**, its successors and assigns forever.


IN WITNESS WHEREOF, I, ROY ROMER, Governor of the
STATE of COLORADO has caused this patent to be executed
by its duly authorized officers and its seal hereunto affixed this
31st day of December, 1996.



Roy Romer

STATE SEAL

ATTEST:



Secretary of State

(LAND BOARD SEAL)

STATE OF COLORADO
ACTING BY AND THROUGH THE
STATE BOARD OF LAND COMMISSIONERS


Maxine F Stewart, President


Robert R. Mailander, Register


John S. Wilkes III, Engineer

State of Colorado)
City and) ss.
County of Denver)

Patent 8167 was acknowledged before me this 17th day of December 1996, by
Maxine F Stewart as President, Robert R. Mailander as Register, and John S. Wilkes III
as Engineer of the COLORADO STATE BOARD OF LAND COMMISSIONERS.

WITNESS my hand and official seal


William J. Kulp, II
NOTARY PUBLIC

My Commission Expires: AUGUST 6, 1999