

DISTRICT COURT, WATER DIVISION 1,
COLORADO

Court Address:
P.O. Box 2038
Greeley, CO 80632

DATE FILED: June 22, 2018 7:43 AM
CASE NUMBER: 2018CW3004

CONCERNING THE APPLICATION FOR WATER
RIGHTS OF:

SCOTT AND SUSAN MIKULECKY,

IN EL PASO COUNTY.

σ COURT USE ONLY σ

Case Number: 2018CW3004

**FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, AND
JUDGMENT AND DECREE OF THE WATER COURT**

A claim for nontributary and not nontributary groundwater and approval of plan for augmentation was filed in this matter on January 17, 2018. All matters contained in the application having been reviewed, testimony having been taken where such testimony is necessary, and such corrections made as are indicated by the evidence presented herein, the following is hereby the Ruling of the Referee:

FINDINGS OF FACT

1. Name, address and telephone number of Applicants:

Scott and Susan Mikulecky
3980 Walker Road
Colorado Springs, CO 80908
(719) 330-2022

2. Opposers: No statements of opposition were filed and the time for filing such statements has expired.

3. Subject matter jurisdiction: Timely and adequate notice of the application was published as required by statute, and the Court has jurisdiction over the subject matter of this proceeding and over the parties affected hereby, whether they have appeared or not.

GROUNDWATER RIGHTS

4. Aquifers and location of groundwater: Applicants seek a decree for rights to all groundwater in the not nontributary Dawson and nontributary Denver, Arapahoe and Laramie-Fox Hills aquifers underlying 40 acres being the NE1/4SW1/4 of Section 11, T11S, R66W of the 6th P.M., El Paso County, as shown on Attachment A hereto ("Subject Property"). Applicants are the owners of the Subject Property.

5. Well locations, pumping rates and annual amounts: The groundwater may be withdrawn at rates of flow necessary to withdraw the annual amounts decreed herein. The groundwater will be withdrawn through any number of wells necessary, to be located at any location on the Subject Property. Applicants waive any 600 foot spacing rule for wells located on the Subject Property, but must satisfy Section 37-90-137(4), C.R.S. for wells owned by others on adjacent properties. The following average annual amounts are available for withdrawal subject to the Court's retained jurisdiction in this matter:

<u>Aquifer</u>	<u>Saturated Thickness</u>	<u>Annual Amount</u>
Dawson	420 feet	29.6 acre-feet (NNT)*
Denver	535 feet	36.4 acre-feet (NT)
Arapahoe	260 feet	17.7 acre-feet (NT)
Laramie-Fox Hills	210 feet	12.6 acre-feet (NT)

*Annual amount reduced by 4 acre-feet annually for Well Permit No. 174104.

The amounts conform to the values and amounts referenced in the State Engineer's Determination of Facts dated March 9, 2018.

6. Decreed Uses: The water will be used, reused, and successively used for domestic, commercial, irrigation, livestock watering, fire protection, and augmentation purposes, including storage, both on and off the Subject Property.

7. Final average annual amounts of withdrawal:

A. Final determination of the applicable average saturated sand thicknesses and resulting average annual amounts available to Applicants will be made pursuant to the retained jurisdiction of this Court, as described in paragraph 24 below. The Court shall use the acre-foot amounts in paragraph 5 herein in the interim period, until a final determination of water rights is made.

B. The allowed annual amount of groundwater which may be withdrawn through the wells specified above and any additional wells, pursuant to Section 37-90-137(10), C.R.S., may exceed the average annual amount of withdrawal, as long as the total volume of water 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 any 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 determined pursuant to the retained jurisdiction of the Court. However, amounts set forth in well permits will not be exceeded.

8. Source of groundwater and limitations on consumption:

A. The groundwater to be withdrawn from the Denver, Arapahoe and Laramie-Fox Hills aquifers is "nontributary groundwater" as defined in Section 37-90-103(10.5), C.R.S., and in the Denver Basin Rules, the withdrawal of which will not, within 100 years of continuous withdrawal, deplete the flow of a natural stream, including a natural stream as defined in Section 37-82-101(2) and Section 37-92-102(1)(b), C.R.S., at an annual rate greater than 1/10 of 1% of the annual rate of withdrawal. The groundwater to be withdrawn from the Dawson aquifer is "not nontributary" as defined in Sections 37-90-103(10.7) and 37-90-137(9)(c.5), C.R.S., and part of the Dawson aquifer groundwater decreed herein may be withdrawn pursuant to the augmentation plan decreed herein.

B. Applicants may not consume more than 98% of the annual quantity of water withdrawn from the nontributary aquifers. The relinquishment of 2% of the annual amount of water withdrawn to the stream system, as required by the Denver Basin Rules effective January 1, 1986, may be satisfied by any method selected by the Applicants and satisfactory to the State Engineer, so long as Applicants can demonstrate that an amount equal to 2% of such withdrawals (by volume) has been relinquished to the stream system.

C. There is unappropriated groundwater available for withdrawal from the subject aquifers beneath the Subject Property, and the vested water rights of others will not be materially injured by such withdrawals as described herein. Withdrawals hereunder are allowed on the basis of an aquifer life of 100 years, assuming no substantial artificial recharge within 100 years. No material injury to vested water rights of others will result from the issuance of permits for wells which will withdraw not nontributary and nontributary groundwater or the exercise of the rights and limitations specified in this decree.

9. Additional wells and well fields:

A. Applicants may construct additional and replacement wells in order to maintain levels of production, to meet water supply demands or to recover the entire amount of groundwater in the subject aquifers underlying the Subject Property. As additional wells are planned, applications shall be filed in accordance with Section 37-90-137(10), C.R.S.

B. Two or more wells constructed into a given aquifer shall be considered a well field. In effecting production of water from such well field, Applicants may produce the entire amount which may be produced from any given aquifer through any combination of wells within the well field.

C. In considering applications for permits for wells or additional wells to withdraw the groundwater which is the subject of this decree, the State Engineer shall be bound by this decree and shall issue said permits in accordance with provisions of Section 37-90-137(10), C.R.S.

D. In the event that the allowed average annual amounts decreed herein are adjusted pursuant to the retained jurisdiction of the Court, Applicants shall obtain permits to reflect such adjusted average annual amounts. Subsequent permits for any wells herein shall likewise reflect any such adjustment of the average annual amounts decreed herein.

10. Conditions:

For each well constructed pursuant to this decree, Applicants shall comply with the following conditions:

A. A totalizing flow meter shall be installed on the well discharge pipe prior to withdrawing any water therefrom, and shall be maintained and operational at all times for the life of the well. Applicants shall keep accurate records of all withdrawals by the well, make any calculations necessary, and submit such records to the Water Division 1 Engineer upon request.

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. 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. Groundwater production shall be limited to the subject aquifers. 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 pump house.

PLAN FOR AUGMENTATION

11. Plan for augmentation:

A. Water to be augmented: 2.25 acre-feet per year for 300 years of not nontributary Dawson aquifer groundwater decreed herein.

B. Water to be used for augmentation: Return flows associated with use of the not nontributary Dawson aquifer and return flows or direct discharge of nontributary groundwater decreed herein.

C. The Dawson aquifer water will be used for 300 years for use through three individual wells, including Well Permit No. 174104 which will be re-permitted as a non-exempt well pursuant to this decree, if required. Each well will use 0.75 acre-feet per year for in house use (0.35 acre-feet), irrigation of 6000 square feet of lawn, garden, and trees (0.35 acre-feet), and stockwatering of up to 4 large domestic animals (0.05 acre-feet). Conservatively, water use in

single family dwellings will equal at least 0.2 acre-feet of water annually for in house uses, and that use of non-evaporative septic systems typically results in consumption of approximately 10% of such use, resulting in return flows of at least 0.18 acre-feet annually from in house use through each well. Various components of this plan for augmentation are predicated on these estimations, and Applicants shall be required to use a non-evaporative septic system to treat and dispose of water used for in house use.

D. Replacement during pumping: During pumping of the Dawson aquifer groundwater, Applicants will replace actual depletions to the affected stream system pursuant to Section 37-90-137(9)(c.5), C.R.S. In the 300th year, the total depletion is approximately 20.8% of the amount withdrawn or 0.156 acre-feet for each well. Return flow associated with in house use on each lot (0.18 acre-feet per year) is sufficient to replace actual depletions associated with pumping of 0.75 acre-feet per year per well for 300 years. Such return flows accrue to the South Platte River system via Cherry Creek. Because return flows from all uses are estimated rather than measured, Applicants agree that such return flows shall be used only to replace depletions under this plan for augmentation and will not be sold, leased, traded, or assigned in whole or in part for any other purpose.

E. Post-pumping Depletion Augmentation: Assuming maximum pumping of 2.25 acre-feet per year for 300 years from the Dawson aquifer, the maximum total depletion to the affected stream systems is also 20.8% of the annual amount withdrawn in the 305th year. Applicants will reserve 2.25 acre-feet per year and 675 acre-feet total of the nontributary Laramie-Fox Hills aquifer groundwater decreed herein for use in this plan, but reserves the right to substitute the use of other nontributary groundwater, including return flows, either underlying the Subject Property, or from another location which is legally available for such purpose, for replacement of post-pumping depletions at such time that post-pumping depletions may begin. The Court retains continuing jurisdiction in this matter to determine if the supply is adequate.

F. Applicants will begin making post pumping replacements when: the total amount of Dawson aquifer groundwater allowed to be withdrawn (675 acre-feet total) has been withdrawn from the wells; the Applicants or successors in interest have acknowledged in writing that all withdrawals for beneficial use of the groundwater has permanently ceased; or for a period of 10 consecutive years that no groundwater has been withdrawn. At the time that post pumping depletions begin as described in this paragraph, Applicants or successors in interest will be required to construct a well and pump groundwater to replace post pumping depletions, subject to the terms and conditions of paragraph 11.E. This condition constitutes a covenant running with the land.

G. Applicants will replace post-pumping depletions for the shortest of the following periods: the period provided by Section 37-90-137(9)(c.5), C.R.S.; the expressed period specified by the Colorado Legislature, should it specify one and providing the Applicants obtain Water Court approval for such modification; the period determined by the State Engineer, should he or she choose to set such a period and have jurisdiction to do so; the period established through rulings of the Colorado Supreme Court on relevant cases, or until Applicants petition the Water Court and the State Engineer's Office and proves that they have complied with any statutory requirement.

12. Failure of Applicants or successors in interest to comply with the terms of the decree may result in an order of the Division Engineer's office to curtail or eliminate pumping of the wells. This decree shall be recorded in the real property records of El Paso County so that a title examination of the property, or any part thereof, shall reveal to all future purchasers the existence of this decree.

13. Administration of plan for augmentation:

A. Applicants shall report to the Division Engineer for Water Division 1 upon request, a summary of the annual withdrawals on an accounting form acceptable to the Division Engineer.

B. All withdrawals which are the subject of this decree will be metered.

C. Pursuant to Section 37-92-305(8), C.R.S., 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.

D. The Applicants or successors in interest at the direction of the Division Engineer shall make all post-pumping replacements to the South Platte River stream system via Cherry Creek pursuant to the amounts to be calculated using the percentage referenced on the depletion curve attached hereto on Attachment B.

14. Retained jurisdiction for plan for augmentation:

A. Pursuant to Section 37-92-304(6), C.R.S., the Court retains continuing jurisdiction over the plan for augmentation decreed herein for reconsideration of the question whether the provisions of this decree are necessary and/or sufficient to prevent injury to vested water rights of others. The Court also has jurisdiction for the purposes of determining compliance with the terms of the augmentation plan.

B. Any person seeking to invoke the retained jurisdiction of the Court shall file a verified petition with the Court. The petition to invoke retained jurisdiction or to modify the Decree shall set forth with particularity the factual basis and the requested decretal language to effect the petition. The party lodging the petition shall have the burden of going forward to establish prima facie facts alleged in the petition. If the Court finds those facts to be established, Applicants shall thereupon have the burden of proof to show: (1) that any modification sought by Applicants will avoid injury to other appropriators, or (2) that any modification sought by Objector is not required to avoid injury to other appropriators, or (3) that any term or condition proposed by Applicants in response to the Objector's petition does avoid injury to other appropriators.

C. The Court retains jurisdiction for the purpose of determining whether the continued reservation of the nontributary water for use on the Subject Property is required. After notice to the State Engineer's Office, if Applicants can demonstrate to the Court that post-

pumping depletions need no longer be replaced, the Court may remove the requirement that the nontributary water must be reserved.

CONCLUSIONS OF LAW

15. The Water Court has jurisdiction over this proceeding pursuant to Section 37-90-137(6), C.R.S. This Court concludes as a matter of law that the application herein is one contemplated by law. Section 37-90-137(4), C.R.S. The application for a decree confirming Applicants' right to withdraw and use all unappropriated groundwater from the nontributary aquifers beneath the Subject Property as described herein pursuant to Section 37-90-137(4), C.R.S., should be granted, subject to the provisions of this decree. The application for a decree confirming Applicants' right to withdraw and use groundwater decreed herein from the Dawson aquifer should be granted pursuant to Section 37-90-137(4) and (9)(c.5), C.R.S., subject to the provisions of this decree. The withdrawal of up to 2.25 acre-feet per year for 300 years and no more than 675 acre-feet total of the Dawson aquifer groundwater and in accordance with the terms of this decree will not result in material injury to vested water rights of others. The remaining decreed amount of Dawson aquifer groundwater will not be withdrawn unless it is included in a separate plan for augmentation.

16. This plan for augmentation satisfies the requirements of Section 37-90-137(9)(c.5), C.R.S., for replacement of required depletions to the affected stream systems for withdrawals of the Dawson aquifer groundwater.

JUDGMENT AND DECREE

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

17. Full and adequate notice of the application was given, and the Court has jurisdiction over the subject matter and over the parties whether they have appeared or not.

18. Applicants may withdraw the subject groundwater herein through wells to be located anywhere on the Subject Property in the average annual amounts and at the estimated average rates of flow specified herein, subject to the limitations herein and the retained jurisdiction by this Court.

19. Applicants may withdraw up to 2.25 acre-feet per year for 300 years and no more than 675 acre-feet total of the Dawson aquifer groundwater under the plan for augmentation decreed herein pursuant to Section 37-90-137(9)(c.5), C.R.S.

20. Applicants have complied with all requirements and met all standards and burdens of proof, including but not limited to Sections 37-90-137(9)(c.5), 37-92-103(9), 37-92-302, 37-92-304(6), 37-92-305(1), (2), (3), (4), (6), (8), (9), C.R.S., to adjudicate the plan for augmentation and is entitled to a decree confirming and approving the plan for augmentation as described in the findings of fact.

21. Pursuant to Section 37-92-305(5), C.R.S., the replacement water herein shall be of a quality so as to meet the requirements for which the water of the senior appropriator has normally used.

22. The plan for augmentation as described in the findings of fact is hereby approved, confirmed, and adjudicated, including and subject to the terms and conditions specified herein.

23. No owners of or person entitled to use water under a vested water right or decreed conditional water right will be injured or injuriously affected by the operation of the plan for augmentation as decreed herein.

24. Retained Jurisdiction:

A. The Court retains jurisdiction as necessary to adjust the average annual amounts of groundwater available under the Subject Property to conform to actual local aquifer characteristics as determined from adequate information obtained from wells, pursuant to Section 37-92-305(11), C.R.S. Within 60 days after completion of any well decreed herein or any test hole(s), Applicants or any successor in interest to these water rights shall serve copies of such log(s) upon the State Engineer.

B. At such time as adequate data is 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 findings. The State Engineer shall submit such finding to the Water Court and the 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.

25. Continuing Jurisdiction:

Pursuant to Section 37-92-304(6), C.R.S., the Court retains continuing jurisdiction over the plan for augmentation decreed herein for reconsideration of the question of whether the provisions of this decree are necessary and/or sufficient to prevent injury to vested water rights of others. The Court also retains continuing jurisdiction for the purpose of determining compliance with the terms of the augmentation plan.

26. The groundwater rights decreed herein are vested property rights decreed to the Applicants and shall be owned by the Applicants until such time as the Applicants expressly conveys all the groundwater underlying the Subject Property, or a portion of the groundwater to another entity through a deed that identifies this case number, the specific aquifer, and the annual volume (based on a 100 year aquifer life) or a total volume of groundwater being conveyed. If any deed for the Subject Property is silent to the conveyance of the water rights decreed herein, it

is assumed that the water rights have been conveyed with the Subject Property, unless all or part of the water rights have been specifically reserved by the Grantor in that deed.

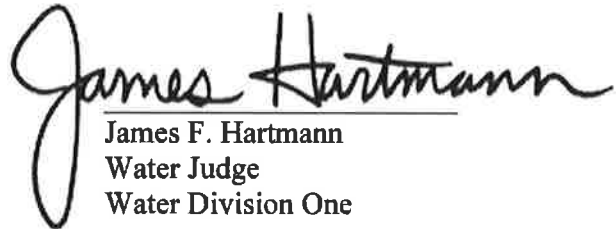
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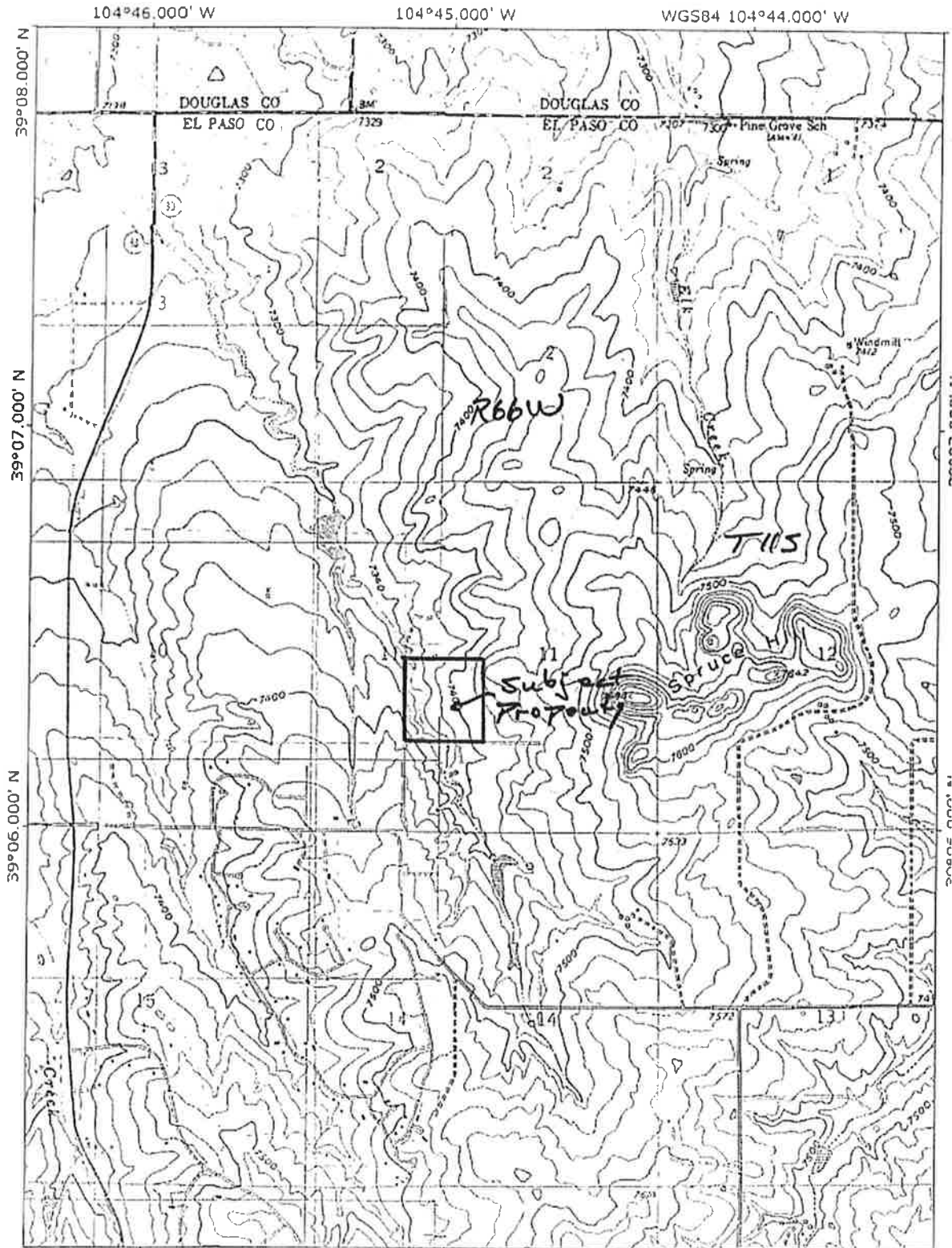
John S. Cowan
Water Referee
Water Division One

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.

Date: June 22, 2018

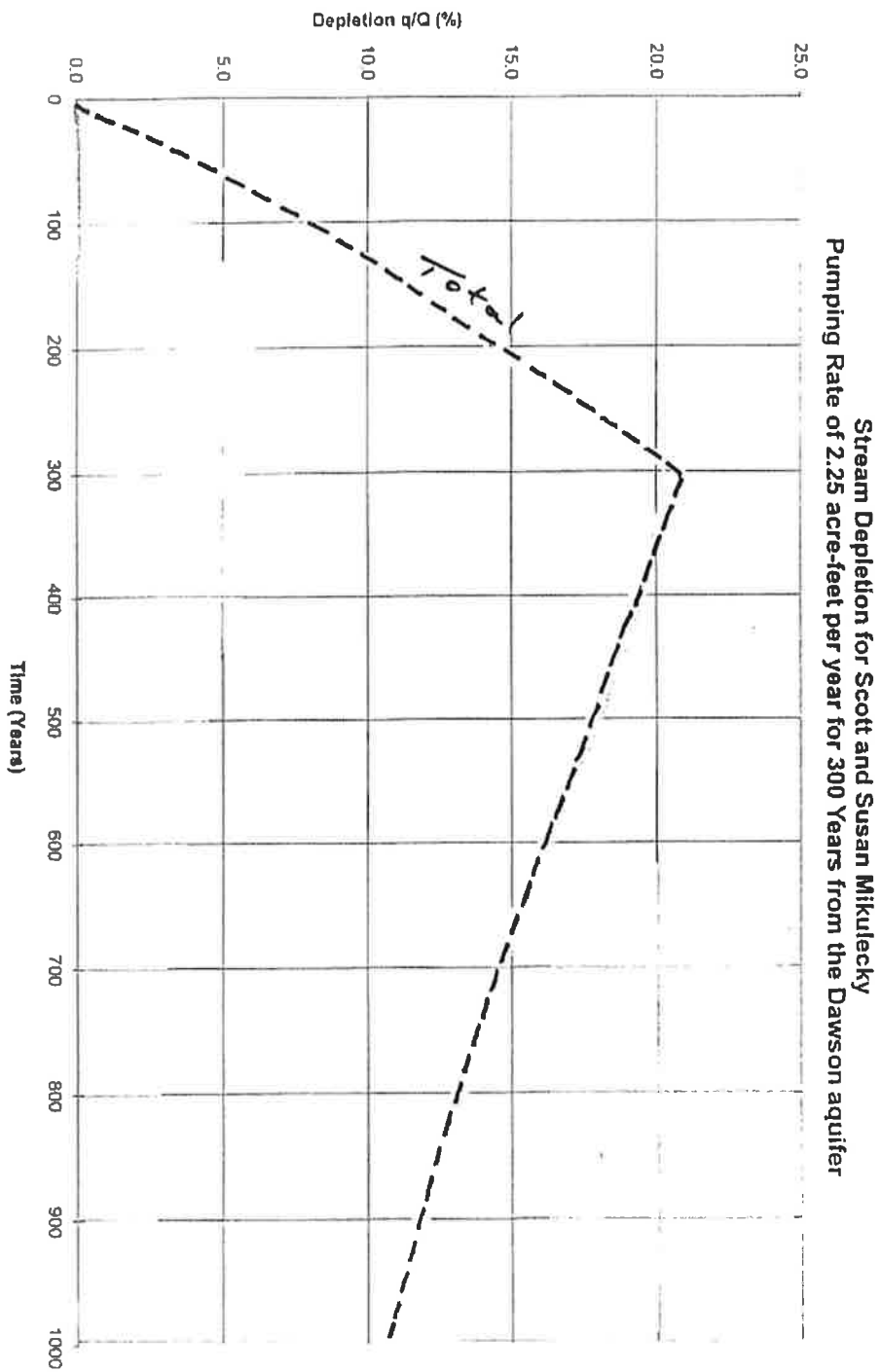


James F. Hartmann
Water Judge
Water Division One



Mikulecky
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ATTACHMENT A



Mikulecky
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ATTACHMENT B