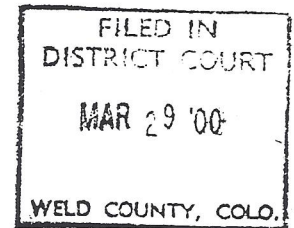


DISTRICT COURT, WATER DIVISION 1, COLORADO

Case No. 99CW065



---

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

---

CONCERNING THE APPLICATION FOR WATER RIGHTS OF DAVID AND  
ALYCE MCELHOES,

IN EL PASO COUNTY.

---

This claim for approval of plan for augmentation, having been filed in April, 1999, and all matters contained in the application having been reviewed, and 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:

David and Alyce McElhoes  
16615 Dancing Wolf Way  
Colorado Springs, Colorado 80908  
(719) 495-9840

2. Objections: 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.

4. Approval of plan for augmentation:

A. Water to be augmented: 5.26 acre-feet per year and 1580 acre-feet total of not nontributary Denver aquifer groundwater to be withdrawn over a 300 year period, as decreed in Case No. 94CW198, District Court, Water Division 1, underlying and associated with an approximately 40.27 acre parcel of land located in the S1/2SE1/4 of Section 22, T11S, R66W of the 6th P.M., as more particularly

described and shown on Attachment A hereto (Subject Property). The Denver aquifer water which is the subject of this augmentation plan may also be withdrawn through a well which is the subject of Well Permit No. 204982, which will be cancelled upon application and issuance of a new well permit changing the character of the wells to fee status by the Office of the State, at such time as Applicants are ready to operate the well under the augmentation plan and for the new and additional uses described below.

B. Water to be used for augmentation: Return flows associated with use of the not nontributary Denver and return flows or direct discharge of nontributary Arapahoe aquifer groundwater decreed in Case No. 94CW198, District Court, Water Division 1. Applicants are the successors in interest to the groundwater decreed as the Shank's water in Case No. 94CW198. The decreed amounts of nontributary groundwater associated with the Subject Property are as follows:

| <u>Aquifer</u>    | <u>Saturated<br/>Thickness</u> | <u>Annual<br/>Amount</u> |
|-------------------|--------------------------------|--------------------------|
| Arapahoe          | 233 feet                       | 16.0 acre-feet           |
| Laramie-Fox Hills | 196 feet                       | 11.8 acre-feet           |

In Case No. 94CW198, an augmentation plan was decreed to allow 12 acre-feet per year of Dawson aquifer water decreed and underlying the Subject Property. Pursuant to that augmentation plan, all of the Laramie-Fox Hills and 0.2 acre-feet per year of the Arapahoe aquifer water associated with the Subject Property was reserved for use in that augmentation plan. Therefore, there is 15.8 acre-feet per year of decreed nontributary Arapahoe aquifer water available for use in this augmentation plan.

C. Development and Consumptive Use: The subject Denver aquifer ground water will be used for inhouse use in three houses (0.9 acre-feet), irrigation (1.8 acre-feet/limited to irrigation of 30,000 square-feet), filling of a swimming pool (0.26 acre-feet), and commercial use 2.3 acre-feet per year. The amount of water available for commercial use is sufficient to provide for approximately 25,000 square feet of commercial space, based on an estimated demand of 80 gallons of water per day per 1000 square feet of commercial space. Sewage treatment will be provided by non-evaporative septic systems. Before any other type of sewage treatment is proposed in the future, including incorporation of the lots or commercial buildings into a central sewage collection and treatment system, Applicants, or their successors and assigns, will amend this decree prior to such change and thereby provide notice of the proposed change to other water users by publication procedures required by then existing law. Consumptive use from in-house and commercial use is estimated to be 10% of that use, and from irrigation use will be approximately 90% of that use. Water associated with filling of a swimming pool is considered to be totally consumed.



D. Replacement during pumping: During pumping of the Denver aquifer ground water for 300 years, Applicants will replace an amount equal to 4% of the amount withdrawn pursuant to Section 37-90-137(9)(c), C.R.S. (The actual depletion in the 100th year of pumping is approximately 0.27% of the amount withdrawn or 0.014 acre-feet. The actual depletion in the 300th year of pumping is approximately 2.2% of the amount withdrawn or 0.116 acre-feet). Return flows from the above uses are estimated to be 3.06 acre-feet per year from use on the Subject Property, and said return flows accrue to the South Platte River system and are sufficient to replace an amount equal to 4% of the annual amount withdrawn to all affected stream systems caused by pumping of up to 5.26 acre-feet per year from the Denver aquifer while the water is being pumped. 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, traded, or assigned in whole or in part for any other purpose.

E. Post-pumping Depletion Augmentation: Assuming maximum pumping of 5.26 acre-feet per year from the Denver aquifer over a 300 year period, the maximum total depletion to the affected stream systems from pumping of the Denver aquifer will be 2.38% or 0.125 acre-feet in the 438th year. Applicants shall replace all post-pumping depletions to the South Platte River system. It is Applicants' position that depletions which occur after pumping ceases are not injurious. The Office of the State Engineer does not agree with this position. Nevertheless, in order to reach settlement with that party, Applicants will reserve 5.26 acre-feet per year and 1580 acre-feet total of nontributary Arapahoe aquifer water as decreed in Case No. 94CW198 for use in this plan. The Court retains continuing jurisdiction in this matter to determine if the supply is adequate.

5. Applicants shall pay the cost imposed by operation of this augmentation plan until such time as Applicants shall create a Property Owner's Association which shall be responsible for augmentation requirements for any residential lots served by the augmentation plan and which all purchasers of the subject lots shall be required to join. Applicants shall be responsible for augmentation requirements for the commercial use. For the residential lots, Applicants shall assign to the Property Owner's Association, Applicants' interest and rights and responsibilities in and under this plan for augmentation; Applicants shall also assign to the Property Owner's Association an appropriate amount of the nontributary Arapahoe aquifer water decreed in Case No. 94CW198, for use in this plan for augmentation. Failure of either the Applicants or the Property Owner's Association 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 owners 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.

6. Administration of plan for augmentation:

A. Applicants or the Homeowner's Association shall report to the Division Engineer for Water Division 1 upon request, a summary of the annual metered withdrawals of the subject wells on an accounting form acceptable to the Division Engineer. This annual report shall also describe the use of the water.

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 at the direction of the Division Engineer, shall make post-pumping replacements to the South Platte River stream system pursuant to the amounts referenced on the depletion curve attached hereto on Attachment B.

7. 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 Arapahoe aquifer 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

8. 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. Sections 37-90-137(4) and (9)(c). The withdrawal of up to 5.26 acre-feet per year and no more than 1580 acre-feet total of the Denver aquifer in accordance with the terms of this decree will not result in material injury to vested water rights of others subject to the provisions of this decree.

9. This plan for augmentation satisfies the requirements of Section 37-90-137(9)(c), C.R.S., for replacement of an amount equal to 4% of the annual amount withdrawn for withdrawals of the Denver aquifer water herein.

### 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.

10. 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.

11. Applicants may withdraw up to 5.26 acre-feet per year and no more than 1580 acre-feet total of not nontributary ground water from the Denver aquifer under the plan for augmentation decreed herein pursuant to Section 37-90-137(9)(c), C.R.S.

12. 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), 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 their plan for augmentation and are therefor entitled to a decree confirming and approving their plan for augmentation as described in the findings of fact.

13. 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.

14. The proposed 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.

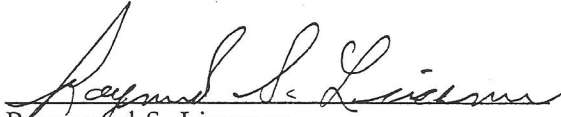
15. No owners of or person entitled to use water under a vested water right or decreed conditional water right will be injured or injuriously affected by the operation of the plan for augmentation as decreed herein.

16. In considering applications for permits for 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 terms of this decree.

17. Continuing Jurisdiction:

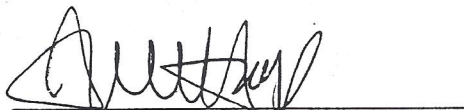
Pursuant to Section 37-92-304(6), C.R.S., the Court retains continuing jurisdiction over the plan for augmentation decreed herein for reconsideration of the question of whether the provisions of this decree are necessary and/or sufficient to prevent injury to vested water rights of others. The Court also retains continuing jurisdiction for the purpose of determining compliance with the terms of the augmentation plan or for the purpose of amending this decree to provide for a different type of wastewater treatment, pursuant to paragraph 4.C above.

RULING ENTERED this 29 day of March, 2000.

  
Raymond S. Liesman  
Water Referee  
Water Division 1

THE COURT DOTH FIND THAT NO PROTEST TO THE RULING OF THE REFEREE HAS BEEN FILED. THE FOREGOING RULING IS CONFIRMED AND APPROVED AND IS HEREBY MADE THE JUDGMENT AND DECREE OF THIS COURT.

Date: APR 20 2000

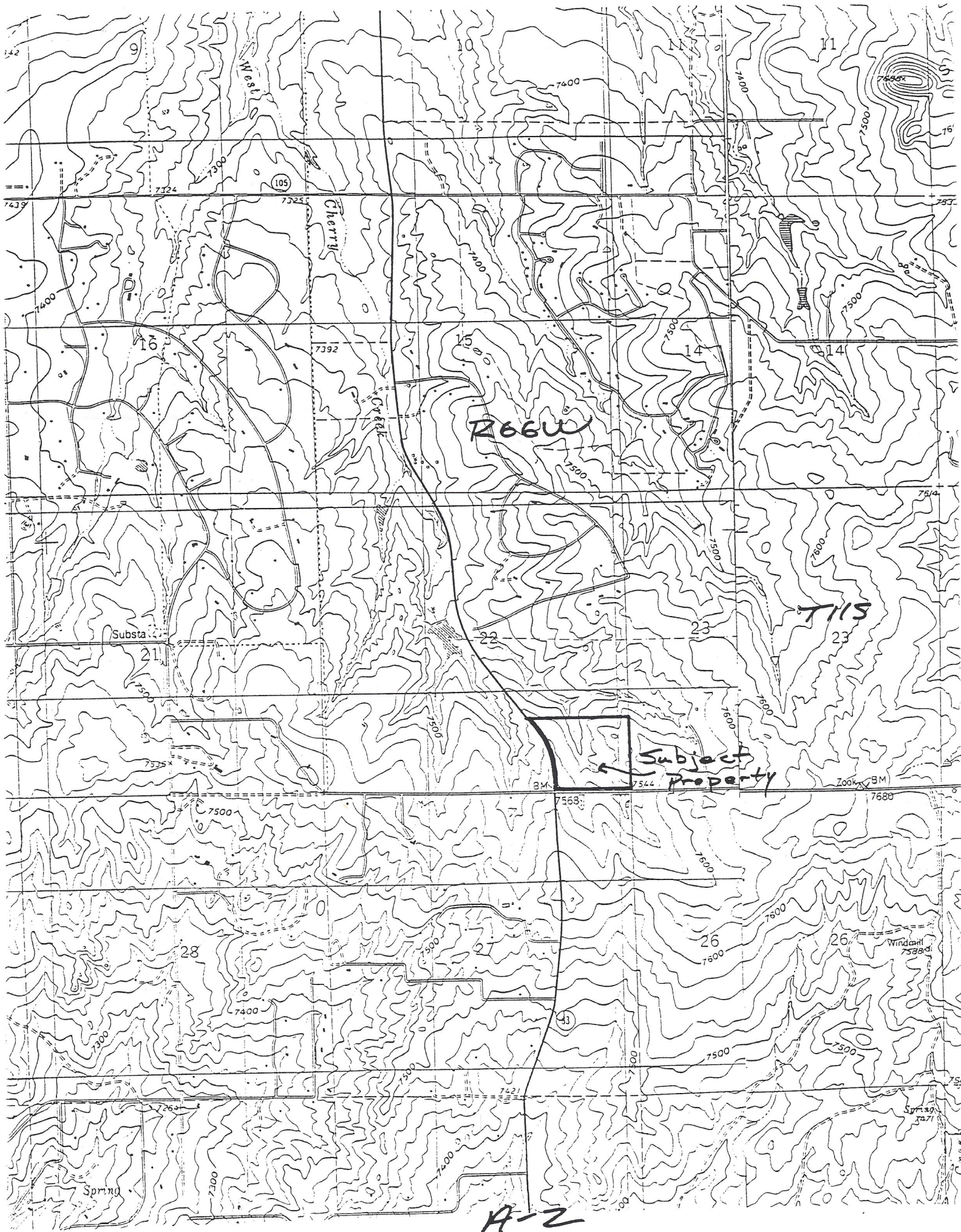
  
Jonathan W. Hays  
Water Judge  
Water Division 1

*Attachment A*

A TRACT OF LAND BEING PORTIONS OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER AND THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 22, TOWNSHIP 11 SOUTH, RANGE 68 WEST OF THE 6TH P.M., LYING EASTERLY OF THE EASTERLY RIGHT OF WAY LINE OF COLORADO STATE HIGHWAY NO. 83, SITUATE IN EL PASO COUNTY, COLORADO, AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 22; THENCE S88°51'12"E ON THE NORTH LINE OF SAID SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER A DISTANCE OF 1316.28 FEET TO THE NORTHEAST CORNER OF SAID SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER; THENCE S00°03'35"W ON THE EAST LINE OF SAID SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER A DISTANCE OF 1293.68 FEET TO A POINT ON THE NORTH RIGHT OF WAY LINE OF HOOGEN ROAD, A COUNTY ROAD; THENCE N88°54'13"W ON SAID NORTH RIGHT OF WAY LINE A DISTANCE OF 1149.52 FEET TO A POINT ON THE EASTERLY RIGHT OF WAY LINE OF COLORADO STATE HIGHWAY NO. 83; THE FOLLOWING SIX (6) COURSES ARE ON SAID EASTERLY RIGHT OF WAY LINE: 1.) THENCE N43°56'30"W A DISTANCE OF 135.06 FEET; 2.) THENCE N2°08'30"W A DISTANCE OF 90.90 FEET; 3.) THENCE N3°49'30"W A DISTANCE OF 254.32 FEET; 4.) THENCE ON A CURVE TO THE LEFT HAVING A RADIUS OF 1482.50 FEET THROUGH A CENTRAL ANGLE OF 25°57'03" AN ARC DISTANCE OF 671.47 FEET, THE LONG CHORD OF WHICH BEARS N20°07'00"W-885.74 FEET; 5.) THENCE N38°24'30"W A DISTANCE OF 254.32 FEET; 6.) THENCE N38°05'25"W A DISTANCE OF 42.52 FEET TO A POINT ON THE NORTH LINE OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER; THENCE S88°51'12"E ON SAID NORTH LINE OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER A DISTANCE OF 354.96 FEET TO THE POINT OF BEGINNING: THE HEREIN DESCRIBED TRACT CONTAINING 40.2728 ACRES, MORE OR LESS.







# Attachment

$q/Q$  (% of pumping)

