

DISTRICT COURT, WATER DIVISION 1, COLORADO Weld County Courthouse P.O. Box 2038 Greeley, CO 80632	DATE FILED: February 3, 2023 2:24 PM CASE NUMBER: 2022CW3094 ▲ COURT USE ONLY ▲
APPLICATION FOR PLAN FOR AUGMENTATION OF THOMAS D. KIRK, JR., Applicant, IN EL PASO COUNTY	Case Number: 2022CW3094
FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, AND JUDGMENT AND DECREE	

A claim for a plan for augmentation was filed in this case on July 29, 2022. All matters contained in the application having been reviewed, such testimony having been taken and evidence presented as was necessary, and being otherwise fully advised in the premises, it is hereby the Findings of Fact, Conclusions of Law, Ruling of the Referee, and Judgment and Decree, as follows:

FINDINGS OF FACT

1. Name and address of Applicant:

Thomas D. Kirk, Jr.
19205 Mariah Trail
Colorado Springs, CO 80908

2. Statements of Opposition: No statements of opposition were filed and the time for filing of 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. Consultation: The Water Referee consulted with the Division Engineer, as required by C.R.S. § 37-92-302(4), on the application, on October 17, 2022, and the Division Engineer filed its summary of consultation on October 31, 2022.

GROUNDWATER RIGHTS

5. Subject Property: 35 acres being a portion of Lot 1, Section 7, Township 11 South, Range 65 West of the 6th P.M., also known as 19205 Mariah Trail, Colorado Springs, El Paso County, State of Colorado, as shown on **Exhibit A** (“Subject Property”).

6. Prior Decree Information: The groundwater underlying the Subject Property was decreed in Case No. 2006CW189, District Court, Water Division 1 on May 2, 2008, (the “06CW189 Decree”). The groundwater was conveyed to the Applicant via the quitclaim deeds recorded at Reception No. 221168131 on September 7, 2021, at the El Paso County Clerk and Recorder’s Office. The volumes below are based on a 300-year aquifer life:

Aquifer	Annual Amount (acre-feet)	Total Amount (acre-feet)
Dawson (NNT)*	7.01	2,103
Denver (NT)	9.34	2,802
Arapahoe (NT)	5.21	1,563
Laramie-Fox Hills (NT)**	3.56	1,068

* The total amount of Dawson Aquifer groundwater is 10.37 acre-feet per year. 3.36 acre-feet per year (10.08 acre-feet per year for a 100-year withdrawal period) of Dawson Aquifer groundwater is reserved for use in the augmentation plan specified in the 06CW189 Decree.

** All Laramie-Fox Hills Aquifer groundwater is reserved for use in the augmentation plan specified in the 06CW189 Decree.

7. 06CW189 Decreed Uses: The water withdrawn from the subject aquifers will be used, reused, successively used, for domestic, industrial, commercial, irrigation, livestock watering, fire protection, recreational, fish and wildlife, and for exchange and augmentation purposes, including storage, both on and off the Subject Property.

PLAN FOR AUGMENTATION

8. Plan for Augmentation:

8.1 Groundwater to be Augmented: Up to 3.75 acre-feet per year for 300 years of not-nontributary Dawson Aquifer groundwater.

8.2 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.

8.3 The Dawson Aquifer groundwater will be used on up to six (6) lots, in up to six (6) individual wells (0.625 acre-feet per well), for in-house use in one single-family residence (0.3 acre-feet per year per well; 1.8 acre-feet per year total), irrigation, including lawn, garden, and trees of up to 6,000 square-feet per lot (0.3 acre-feet per well; 1.8 acre-feet per year total), stockwatering for up to 2 large domestic animals (0.025 acre-feet per well; 0.15 acre-feet per year total) and fire protection, through one or more wells on the Subject Property. Conservatively, water use in single-family dwellings will equal at least 0.2 acre-feet of water annually for in-house uses, and the 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 per year from each single-family residence, and 1.08 acre-feet per year at full build-out. Various components of this plan for augmentation are predicated on these estimations, and Applicant shall be required to use a non-evaporative septic system to treat and dispose of water used for in-house use.

- 8.4 Replacement During Pumping: During pumping of the Dawson Aquifer groundwater, Applicant will replace actual depletions to the affected stream system pursuant to C.R.S. § 37-90-137(9)(c.5). In the 300th year, the total depletion is 22.29% of the amount withdrawn or 0.836 acre-feet total. Return flow from in-house use of the Dawson Aquifer groundwater for each residence is at least 0.18 acre-feet per year, and 1.08 acre-feet per year at full build-out, as described above, and such return flow is sufficient to replace actual depletions for pumping of the entire 3.75 acre-feet per year for 300 years. Return flows accrue to the South Platte River system via Cherry Creek. Because return flows from all uses are estimated rather than measured, Applicant agrees 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. If for any reason, sufficient return flows are not available to replace the actual depletions shown on **Exhibit B**, the Applicant, or successors in interest, are required to pump water directly into the stream in the amount that has not been replaced by return flows. If such water is withdrawn from the Dawson Aquifer well(s) operated under the augmentation plan the amount of water being pumped from the well(s) for other purposes must be reduced so that the allowed annual withdrawal from the well(s) is not exceeded. Such replacement must be made prior to the irrigation season for the following year.
- 8.5 Post-pumping Depletion Augmentation: Assuming maximum pumping of 3.75 acre-feet per year for 300 years from the Dawson Aquifer, the maximum total depletion to the affected stream systems is approximately 22.29% of the annual amount withdrawn or 0.836 acre-feet in the 300th year. Applicant will reserve 3.75 acre-feet per year, 1,125 acre-feet total, of the nontributary Arapahoe Aquifer groundwater decreed in the 06CW189 Decree, owned by Applicant, 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.
- 8.6 Applicant will begin making post pumping replacements when (1) the Applicant or successors in interest have acknowledged in writing that all withdrawals for beneficial use of the Dawson Aquifer groundwater has permanently ceased, or (2) for a period of 10 consecutive years that no Dawson Aquifer groundwater has

been withdrawn. Until such time as the post-pumping depletions begin the Applicant must continue to replace during pumping depletions to the stream using return flows, by pumping water directly to the stream to replace such depletions or using another replacement source approved by the Division Engineer. At the time that post pumping depletions begin as described in this paragraph, Applicant 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 8.5. This condition constitutes a covenant running with the land.

- 8.7 Applicant will replace post-pumping depletions for the shortest of the following periods: (1) The period provided by C.R.S. § 37-90-137(9)(c.5), or (2) the expressed period specified by the Colorado Legislature, should it specify one and providing the Applicant obtain Water Court approval for such modification, or (3) the period determined by the State Engineer, should they choose to set such a period and have jurisdiction to do so, or (4) the period established through rulings of the Colorado Supreme Court on relevant cases, or (5) until Applicant petition the Water Court and the State Engineer's Office and prove that they have complied with any statutory requirement.
9. Failure of Applicant and/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 well. 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.
10. Administration of Plan for Augmentation:
 - 10.1 Applicant shall report to the Division Engineer for Water Division 1 upon request, a summary of the amount of water pumped by each Denver Basin well, the annual depletion, the amount of replacement water provided by each replacement source, the net impact on the stream and any other information required by the Division Engineer to properly administer the decree on an accounting form acceptable to the Division Engineer.
 - 10.2 All withdrawals which are the subject of this decree will be metered.
 - 10.3 Pursuant to C.R.S. § 37-92-305(8), 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.
 - 10.4 The Applicant, or successors in interest, at the direction of the Division Engineer shall make post-pumping replacements to the South Platte River stream system via Cherry Creek, or its tributaries, pursuant to the amounts referenced on the depletion curve attached on **Exhibit B**.

Retained Jurisdiction for Plan for Augmentation:

- 10.5 Pursuant to C.R.S. § 37-92-304(6), 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.
- 10.6 Any party 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 this 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, Applicant shall thereupon have the burden of proof to show: (1) that any modification sought by Applicant 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 Applicant in response to the objector's petition does avoid injury to other appropriators.
- 10.7 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 Applicant 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

11. 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.
12. Applicant has complied with all requirements and met all standards and burdens of proof, including but not limited to C.R.S. §§ 37-90-137(9)(c.5), 37-92-103(9), 37-92-302, 37-92-304(6), 37-92-305(3), (4), (6), (8), to adjudicate the plan for augmentation and are entitled to a decree confirming and approving the plan for augmentation as described in the Findings of Fact.
13. The Water Court has jurisdiction over this proceeding pursuant to C.R.S. § 37-90-137(6). This Court concludes as a matter of law that the application herein is one contemplated by law pursuant to C.R.S. § 37-90-137(4). The application for a decree confirming Applicant's right to withdraw and use groundwater decreed herein from the Dawson Aquifer should be granted pursuant to C.R.S. §§ 37-90-137(4) and (9)(c.5), subject to the provisions of this decree. The withdrawal of up to 3.75 acre-feet per year and 1,125 acre-feet total of the Dawson Aquifer groundwater, and in accordance with the terms of this

decree and the 06CW189 Decree, will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. The remaining amount of Dawson Aquifer groundwater decreed in Case No. 06CW189 and herein will not be withdrawn and used until it is included in a separate plan for augmentation.

JUDGMENT AND DECREE

14. 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.
15. Applicant and/or successors may withdraw the subject groundwater herein through wells to be permitted by the State Engineer's Office 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.
16. Applicant may withdraw an average annual amount of 3.75 acre-feet per year and not more than 1,125 acre-feet total of the Dawson Aquifer groundwater under the plan for augmentation decreed herein pursuant to § 37-90-137(9)(c.5), C.R.S.
17. The groundwater rights described in the Findings of Fact are hereby approved, confirmed and adjudicated, including and subject to the terms and conditions specified herein and in the 06CW189 Decree. No owners of or persons entitled to use water under a vested water right or decreed conditional water right will be injured or injuriously affected by the pumping of Applicant's groundwater resources as decreed herein.
18. Pursuant to C.R.S. § 37-92-305(5), 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.
19. 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.
20. 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.
21. **Retained Jurisdiction:**
 - 21.1 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 C.R.S. § 37-92-305(11). Within 60 days after completion of

any well decreed herein or any test hole(s), Applicant or any successor in interest to these water rights shall serve copies of such log(s) upon the State Engineer.

- 21.2 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 Applicant.
- 21.3 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.
- 21.4 Except as otherwise provided in Paragraphs 23.1-23.3, above, pursuant to C.R.S. § 37-92-304(6), the plan for augmentation decreed herein shall be subject to the reconsideration of this Court on the question of material injury to vested water rights of other, for a period of five (5) years. Any person, within such period, may petition the Court to invoke its retained jurisdiction. Any person seeking to invoke the Court's retained jurisdiction shall file a verified petition with the Court setting forth with particularity the factual basis for requesting that the Court reconsider injury to petitioner's vested water rights associated with the operation of this decree, together with proposed decretal language to effect the petition. The party filing the petition shall have the burden of proof of going forward to establish a prima facie case based on the facts alleged in the petition. If the Court finds those facts are established, Applicant shall thereupon have the burden of proof to show: (i) that the petitioner is not injured, or (ii) that any modification sought by the petitioner is not required to avoid injury to the petitioner, or (iii) that any term or condition proposed by Applicant in response to the petition does avoid injury to the petitioner. The Division of Water Resources as a petitioner shall be entitled to assert injury to the vested water rights of others. If no such petition is filed within such period and the retained jurisdiction period is not extended by the Court in accordance with the provisions of the statute, this matter shall become final under its own terms.
22. Continuing Jurisdiction: Pursuant to C.R.S. § 37-92-304(6), the Court retains continuing jurisdiction over the plan for augmentation decreed herein for reconsideration by the water judge on the question of injury to the vested rights of others for such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury.

23. The groundwater rights decreed herein are vested property rights appurtenant to the Subject Property and shall remain appurtenant unless expressly severed by conveyance to someone other than the property owner. 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 as an appurtenance to the Subject Property, unless all or part of the water rights have been previously severed.

Date: January 4, 2023



John S. Cowan
Water Referee
Water Division One

The Court finds that no protest was filed in this matter. The foregoing is confirmed and is made the judgment and decree of this Court.

Date: February 3, 2023



Todd L. Taylor
Water Judge
Water Division One

**Exhibit A - Application of Kirk
Map and Legal Description of 19205 Mariah Trail**

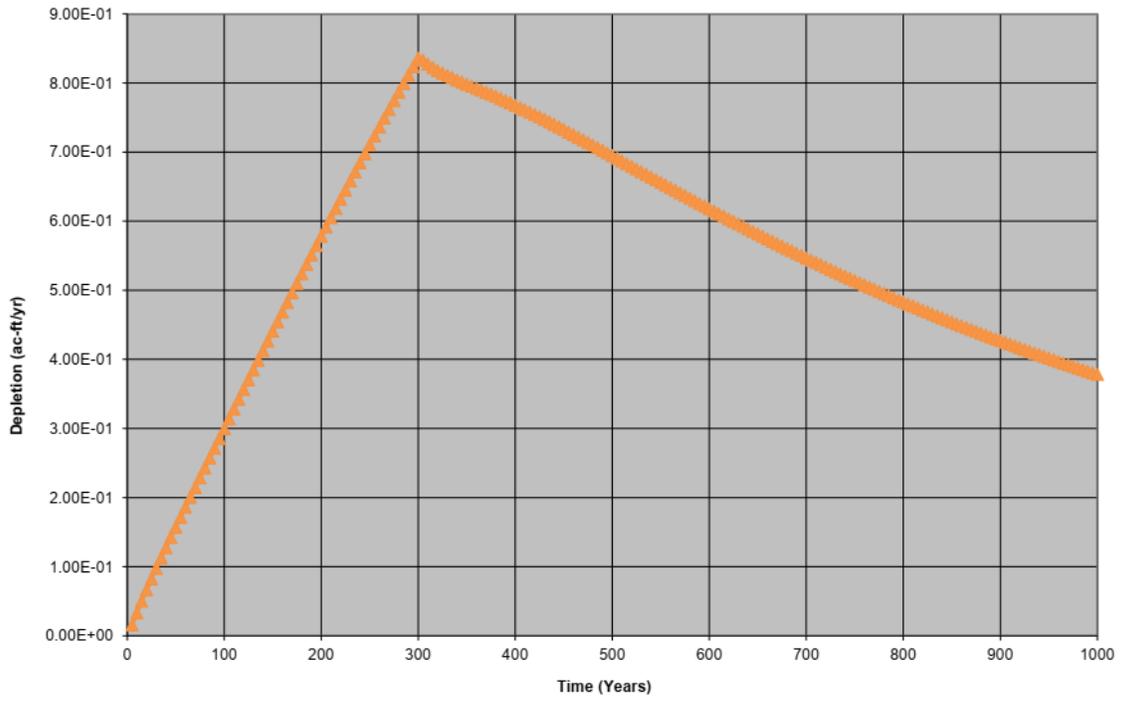


A portion of Lot 1, Section 7, Township 11 South, Range 65 West of the 6th pm, County of El Paso, State of Colorado and also a part of a parcel recorded at Reception No. 213051986, records of El Paso County;

More particularly described as follows:

**Beginning at the Northwest Corner of said Lot 1 from which the North 1/4 Corner of said Section 7 Bears N 89 degrees 57'46" E a distance of 3011.05 Feet;
Thence N 89degrees 57'46"E on the North Line of said Lot 1 a distance of 1488.29 Feet;
Thence S 15degrees 11'17" W a distance of 501.94 Feet;
Thence S 40degrees 55'52" W a distance of 1114.98 Feet to a point on the South Line of said Lot 1;
Thence S 89degrees 53'43" W on the South Line of said Lot 1 a distance of 627.21 feet to the Southwest Corner of said Lot 1;
Thence N 00degrees 02'20"E on the West Line of said Lot 1 a distance of 1326.99 to the Point of Beginning;
Containing 1,524,595 square feet or 35 acres more or less.**

Stream Depletion from Pumping in SEC 7 T11S R65W



Kirk
22CW3094

EXHIBIT B