

DISTRICT COURT, WATER DIVISION 1 WELD COUNTY, COLORADO Weld County Courthouse P.O. Box 2038 Greeley, Colorado 80632	
Concerning the Application for Water Rights of: KENNETH I. RUSHING and CAROL A. RUSHING REVOCABLE TRUST UNDER INSTRUMENT DATED MARCH 13, 1998 In the South Platte River and its tributaries In El Paso County	COURT USE ONLY
	Consolidated Case Nos. 06CW100 and 06CW20 <i>(CW 1) (CW 2)</i>
AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE	

I. Jurisdictional Facts.

1. The Applicant for adjudication of the water in the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers underlying certain land in El Paso County, and for approval of a plan for augmentation, is the Kenneth I. Rushing and Carol A. Rushing Revocable Trust under Instrument Dated March 13, 1998, 16865 Bar X Road, Colorado Springs, CO 80908, phone number 719-495-1715.

2. The applications in this case were filed on April 27, 2006 in Water Divisions 1 and 2, and were allowed to be amended by order of the referee dated May 12, 2006 in Water Division 1 and by order of the referee dated May 16, 2006 in Water Division 2.

3. The applications and their amendments were published in the resumes for Water Divisions 1 and 2 and in a newspaper of general circulation in El Paso County, as required by law. The publication costs have been paid. Pursuant to C.R.S. 37-92-302(2)(b), notice of this application was given to two co-owners, David H. Shute and Jennifer C. Shute. The Applicant has subsequently acquired Mr. and Mrs. Shutes' interest in the property.

4. A statement of opposition was timely filed by Colorado Springs Utilities, an enterprise of the City of Colorado Springs. No other statements of opposition were filed and the time for filing statements of opposition has expired. No motions to intervene have been filed.

5. Pursuant to Applicant's Motion, these cases were consolidated in Water Division 1 by order of the Chief Justice of the Colorado Supreme Court dated September 15, 2006. The Chief Justice's Order had the effect of re-referring this case to the Water Judge, who referred the application to the Water Referee on October 11, 2006. The referee originally entered a ruling in this case on February 22, 2007, which ruling was subsequently amended at the request of the State Engineer.

6. The land and water involved herein are not within the boundaries of a designated ground water basin.

II. Denver Basin Water Rights.

7. The property beneath which the water is sought to be adjudicated ("Property") consists of 39.77 acres owned by Applicant, consisting generally of the SE1/4 SE1/4 Section 12, T. 11 S., R. 66 W., 6th P.M. A map showing its location is attached as Figure 1. The Property is located in the Cherry Creek drainage.

8. The amount of water underlying the Property and which is available for appropriation is set forth on Table 1. The figures on Table 1 are based on the State Engineer's Determinations of Facts dated June 30, 2006. Pursuant to C.R.S. § 37-92-305(11), the Court will retain jurisdiction to finally determine the amount of water available for appropriation based on site-specific data when it becomes available, and to adjust upward or downward as appropriate the amount available for withdrawal from each aquifer. The Applicant need not refile, republish, or otherwise amend this decree to request or obtain such adjustment.

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Table 1

Aquifer	Acreage	Specific Yield	Saturated Thickness (feet)	Total Storage (AF)	Ave. Annual Diversion (AF)
Dawson	39.77	.20	460	3659	36.6
Denver	39.77	.17	500	3380	33.8
Arapahoe	39.77	.17	260	1758	17.6
Laramie-Fox Hills	39.77	.15	210	1,253	12.5

9. The Denver Basin Rules, 2 CCR 402-6, indicate that the approximate depth to the top of the saturated portion of the Dawson aquifer, and the approximate depths to the tops and the bottoms of the remaining aquifers, are as follows:

Dawson: base at 1,070 feet
 Denver: 1,110 feet to 1,950 feet
 Arapahoe: 1,990 feet to 2,490 feet
 Laramie-Fox Hills: 2,870 feet to 3,150 feet

10. Water in the Dawson aquifer in this location is not nontributary, and judicial approval of a plan for augmentation to replace stream depletions to the extent necessary to prevent injury to other vested and decreed conditional water rights is a prerequisite to pumping water from that aquifer. Water in the Denver, Arapahoe and Laramie-Fox Hills aquifers in this location is nontributary; two percent of the amount of water pumped from each such aquifer annually may not be consumed.

11. Applicant will withdraw water from the Dawson aquifer from seven wells, consistent with the plan for augmentation decreed herein. Applicant will withdraw water from one well in each of the Denver, Arapahoe and Laramie-Fox Hills aquifers, plus any additional wells required in order for Applicant to withdraw the full decreed amounts. Such wells may be constructed at any location on the Property; provided, however, that no wells may be located within 50 feet of the property boundary nor within 600 feet of another well in the same aquifer off the property unless approval is obtained for such a location pursuant to C.R.S. § 37-90-137(2)(b). Applicant waives the 600 foot spacing requirement for all wells located on the Property.

12. These water rights are decreed for commercial, indoor residential, stock water, irrigation and other landscape uses such as fountains and decorative ponds, swimming pools and hot tubs, fire fighting, dust suppression and augmentation purposes.

III. Plan for Augmentation

13. Water Demand. Applicant proposes to subdivide the Property into seven lots for single family residences. Applicant projects that water for indoor uses will be 0.30 acre foot annually for each house, which may include incidental commercial uses such as a home office or a home-based business, landscape irrigation will require application of 0.04 acre foot annually per 1,000 square feet (1.75 acre feet per acre), and livestock watering will require 0.011 acre foot per horse per year (10 gallons per horse per day). Each hot tub is anticipated to use approximately 0.004 acre foot (1,400 gallons) annually, based on two fillings annually, and an average-sized swimming pool is anticipated to use approximately 0.025 acre foot (8,000 gallons) annually. Each Dawson aquifer well shall be limited to diversions of 1.0 acre foot (325,851 gallons) annually.

14. Water Consumption. Disposal of water used indoors for the single family dwellings shall be by non-evaporative septic tanks and leach fields ("septic systems"). Consumption of water used for indoor uses and so disposed of is no more than 10 percent of diversions. Because Applicant does not rely on return flows from any other water uses for replacement of depletions during pumping, their respective water consumption is not relevant.

15. Replacement during pumping. Stream depletions from pumping the Dawson aquifer wells will occur to tributaries of the South Platte and Arkansas Rivers. Applicant does not have the physical ability to replace these depletions to the Arkansas River, but shall instead replace all depletions to Cherry Creek, the drainage in which the Property is located. Based on assumed pumping of 7.0 acre feet annually for a 300 year period, the State Engineer's "DA02" computer model predicts that stream depletions will reach a maximum of 22.55 percent of pumping in the 300th year, resulting in 1.58 acre feet of total stream depletions that year. Septic system return flows from the Property will be used to replace such depletions. Annual septic return flows from seven single family dwellings will equal 1.89 acre feet annually, which exceeds the maximum amount of annual depletions which will occur at any time during the modeled 300 year pumping period.

16. Replacement of post-pumping depletions.

A. Applicant shall replace post-pumping depletions for the shortest of the following periods: the period provided by the Colorado Legislature, should it eventually specify one and if the Applicant obtains water court approval for such modification; the period determined by the State Engineer, should the State

Engineer lawfully establish such a period; the period established through rulings of the Colorado Supreme Court in relevant cases; or until Applicant petitions the water court and after notice to parties in the case proves that it has complied with all statutory requirements. The Court finds that the provisions of this paragraph are adequate to comply with existing law and to prevent injury to others.

B. Replacement of post-pumping depletions shall commence whenever one of the following events has occurred: when 2,100 acre feet of water have been pumped from any combination of the seven Dawson aquifer wells; when the Applicant's successors in interest acknowledge in writing that all withdrawals for beneficial use from the Dawson aquifer wells have permanently ceased; when a period of ten consecutive years has occurred wherein no withdrawals of ground water have occurred through the Dawson aquifer wells; or when timed return flows become less than ongoing depletions.

C. The State Engineer's "DA02" computer model predicts that based on assumed pumping of 7.0 acre feet annually, and cessation of pumping in 300 years, post-pumping depletions will reach a maximum of 22.57 percent of pumping in the 310th year, and will gradually decline thereafter. However, constant pumping for 300 years is quite unlikely to occur. To determine the post-pumping replacement obligation, at the time the obligation to replace such depletions commences pursuant to paragraph 16.B above, Applicant's successors shall at that time cause an analysis to be conducted, using the best information and computer modeling available at that time, to calculate the timing and the amount of post-pumping depletions. Such new calculation of timing and amount shall be subject to approval by the State and Division Engineers. That analysis shall then be used to determine the amount of water to be replaced to Cherry Creek. Applicant's successors in interest shall be required to construct a Denver aquifer well pursuant to this plan for augmentation unless a different source of water is approved by the Court (by an amendment to this decree) for replacement of post-pumping depletions, or unless the obligation is terminated pursuant to paragraph 16.A. above.

D. Reservation of Denver aquifer water. Applicant owns the right to withdraw approximately 3,380 acre feet of water in the Denver aquifer which can be used to replace post-pumping depletions. Applicant shall reserve and dedicate to this plan for augmentation 1,910 acre feet of such Denver aquifer water for the purpose of replacing post-pumping depletions caused by pumping 2,100 acre feet of water. This reservation is adequate to replace post-pumping depletions because approximately 250 acre feet of depletions occur and are replaced during the 300 year pumping period, as shown on the attached Table 2. If at some time replacement of post-pumping depletions is no longer required pursuant to paragraph 16.A. above, or if Applicant receives judicial approval to use a different water source for replacement of post-pumping depletions, said reservation will

become null and void.

E. Possible amendment of decree. At the projected rate of pumping for use on the Property, at the end of 300 years there will still be a substantial quantity of water legally available for withdrawal from the Dawson aquifer underlying the subdivision, and there will be a substantial quantity of water in the Denver aquifer, the use of which has not been reserved for the replacement of depletions caused by 300 years of pumping from the Dawson aquifer. Nothing in this paragraph 16 regarding replacement of post-pumping depletions is intended to preclude Applicant from seeking to amend this plan for augmentation to provide for continued pumping from the Dawson aquifer, or using additional water in the Denver aquifer for the replacement of the additional depletions caused thereby. Any such amendment shall require judicial approval after notice as required by law.

17. Based on indoor uses of 0.30 acre foot annually for each of seven single family dwellings, septic return flows of 90 percent, and total pumping of no more than 7.0 acre feet annually, return flows from septic systems from seven houses will always exceed gross stream depletions in the same year. Accordingly, so long as there are at least seven single family dwellings on the Property, it is only necessary to restrict total diversions to 7.0 acre feet annually, and not to otherwise restrict the types or places of use of water from the Dawson aquifer.

18. Applicant shall create restrictive covenants upon and running with the Property, which shall obligate the owners of the seven lots to be subdivided from the Property to limit pumping of the Dawson aquifer well to no more than 1.0 acre foot (325,851 gallons) annually per lot, to use non-evaporative septic systems for wastewater disposal, and to carry out all requirements of this decree, including the possible construction of a Denver aquifer well for the replacement of post-pumping depletions. Said covenants shall indicate clearly that failure of the property owner to comply with the terms of this decree may result in an order of the Division Engineer's office to curtail or eliminate pumping of the non-complying owner's Dawson aquifer well. This decree and the restrictive covenants shall be recorded in the El Paso County records, so that a title examination of the Property, or any part thereof, shall reveal to all future purchasers of the lots to be created the existence of the decree and restrictive covenants. Said covenants shall be amended as necessary to conform to the provisions of any amendment to this augmentation plan.

19. All septic system return flows are dedicated to this plan for augmentation, and shall not be sold, leased or otherwise used for any other purpose.

20. As reasonably required by the Division Engineer, but no less than annually, Applicant shall complete and submit an accounting form that shows groundwater withdrawals. The accounting form must be acceptable to the Division Engineer, and may

be changed from time to time if necessary. An accounting form acceptable to the Division Engineer at the present time is attached to this Ruling as Exhibit A. The well meters shall be read on October 31 of each year, or as close thereto as practicable, and the completed accounting form shall be submitted to the Division Engineer and Colorado Springs Utilities by November 30 of the same year.

21. Colorado Springs owns senior water rights in the Arkansas River drainage that could be impacted by the operation of this decree wherein the maximum modeled annual depletion of 0.49 acre foot to Monument Creek and its tributaries will not be replaced to the Arkansas River drainage, but will instead be replaced to the South Platte River system. Colorado Springs reserves the right to claim that the cumulative negative impacts of this and other similar decrees constitute injury to its senior Arkansas River system water rights. In the interest of settlement only, Colorado Springs consents to the entry of this decree. However, by doing so, Colorado Springs does not waive its right to claim injury and to seek relief in the future pursuant to the provisions of paragraphs 37 and 38 hereof.

22. The Court finds that under the terms and conditions herein the requirements of C.R.S. § 37-90-137(9)(c) have been met. 23. The Court has considered the depletions from Applicant's proposed use of water, in quantity and in time, the amount and timing of augmentation water to be provided, and whether injury would be caused to any owner of or persons entitled to use water under a vested water right or a decreed conditional water right. The Court concludes that under this plan for augmentation, no such injury will occur.

CONCLUSIONS OF LAW

24. The Court has jurisdiction over the subject matter of this action and over all persons who could have appeared herein, whether or not they did so appear.

25. All conditions precedent to the granting of this decree have been completed.

26. The plan for augmenting depletions caused by pumping the not nontributary Dawson aquifer is required by C.R.S. § 37-90-137(9), and is subject to the requirement of C.R.S. §§ 37-92-305(3) and 305(8) that no injury will occur to the owners of or persons entitled to use water under an absolute water right or decreed conditional water right as a result of implementing such plan for augmentation.

27. Applicant has complied with all the conditions of C.R.S. §§ 37-92-302(2)(b), 37-92-305(8) and all other relevant statutes.

28. Applicant has maintained dominion and control over its septic system return flows by determining the quantity of such return flows, as set forth above, and thus has the legal ability to use said return flows in this plan for augmentation. See, Public Service Co.

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v. Willows Water District, 856 P.2d 829 (Colo. 1993).

JUDGMENT AND DECREE

29. The foregoing findings of fact and conclusions of law are hereby incorporated into this judgment and decree.

30. The application for adjudication of water rights from the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers underlying the Property is approved as set forth above. The Court retains jurisdiction over this decree to finally adjudicate the amount of water available for withdrawal from each aquifer, based on site specific information from well logs when they become available.

31. Pursuant to 2 CCR 402-7, Rule 8.A., in any year, for that portion of the Denver aquifer water rights that is not reserved for replacement of post-pumping depletions, and for all of the water decreed to be available for withdrawal from the Arapahoe and Laramie Fox Hills aquifers, Applicant may withdraw the subject water in those aquifers from any combination of the wells applied for in the same aquifer as long as the total amount of water withdrawn in that year does not exceed the product of the total number of years after the date of determination of the right to ground water by the Court, multiplied by the allowed average annual amount of withdrawals for that aquifer. However, this "banking" provision shall not apply to any portion of the Dawson aquifer water, nor to that portion of the Denver aquifer water that has been reserved for the replacement of post-pumping depletions in this case.32. The wells must be constructed pursuant to applicable regulations of the Division of Water Resources. Each well must be equipped with a properly installed and maintained totalizing flow meter. Applicant must submit diversion records to the Division Engineer or his representative on an annual basis or as otherwise requested by the Division Engineer. All wells shall be cased so as to prevent withdrawal of water from more than one aquifer. For each Dawson aquifer well, plain casing shall be installed and grouted through all unconsolidated materials and shall extend a minimum of ten feet into the bedrock formation to prevent production through other zones. Pursuant to 2 CCR 402-7, Rule 9.A., geophysical logs will be required for all wells approved herein unless there is an existing geophysical log from that aquifer located within 1,320 feet of the proposed well that is acceptable to the State Engineer, and is representative of aquifer conditions at the location of the proposed well.

33. Upon receipt of properly completed well permit applications, accompanied by the appropriate fees, the State Engineer shall issue well permits for the wells approved pursuant to this decree, in accordance with C.R.S. §§ 37-90-137(4) and/or (10) and in accordance with the decree entered herein.

34. The water rights so decreed are absolute water rights, and no applications for findings of diligence are required. The said water rights are decreed for all beneficial uses

except municipal uses.

35. No more than 98% of the water diverted from the nontributary Denver, Arapahoe and Laramie-Fox Hills aquifers shall be consumed.

36. The application for approval of a plan for augmentation to replace depletions caused by pumping water from the not nontributary Dawson aquifer is approved as set forth above in the findings of fact in this decree. No more than 1.0 acre foot may be pumped annually from each not nontributary Dawson aquifer well absent approval of an amendment to this plan for augmentation or approval of a new plan for augmentation replacing injurious depletions resulting from such additional pumping. The State Engineer shall curtail all out-of-priority diversions, the depletions from which are not replaced so as to prevent injury to vested water rights or decreed conditional water rights.

37. The Court shall retain jurisdiction for so long as Applicant is required to replace depletions to Cherry Creek, to determine whether the replacement of depletions to Cherry Creek rather than to the Arkansas River system is causing material injury to water rights tributary to that stream system. Any person may invoke the Court's retained jurisdiction at any time Applicant is causing depletions (including ongoing post-pumping depletions) to the Arkansas River system and is aggregating such depletions and replacing them to Cherry Creek. The person invoking the Court's retained jurisdiction shall have the burden of establishing a *prima facie* case that Applicant's failure to replace depletions to the Arkansas River system is causing injury to water rights owned by the person invoking the Court's retained jurisdiction, except that the State and Division Engineers may invoke the Court's retained jurisdiction by establishing a *prima facie* case that injury is occurring to any vested or conditionally decreed water rights. Applicant shall retain the ultimate burden of proving that no injury is occurring, or shall propose terms and conditions that prevent such injury. Among any other remedies it may impose, the Court may require that Applicant replace depletions to Cherry Creek or the Arkansas River system, or both.

38. Pursuant to C.R.S. § 37-92-304(6), the Court also retains 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 the vested water rights of others. The Court also retains jurisdiction for the purposes of determining compliance with the terms of the augmentation plan. Any person seeking to invoke the retained jurisdiction of the Court pursuant to this paragraph 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 upon which the requested reconsideration is premised, together with proposed decree language to effect the petition. The person 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 the person filing the petition is

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 Filing Date: Apr 16 2007 11:13AM MDT
 Filing ID: 14494763

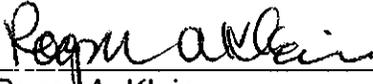
not required to avoid injury to other appropriators, or (3) that any term or condition proposed by Applicant in response to the petition does avoid injury to other appropriators. Any material changes to the decree that are not within the Court's retained jurisdiction may be made only as allowed by law, which may require the filing of an application and publication of notice requesting such change.

Dated this 20th day of March, 2007.


 John Cowan
 Water Referee
 Water Division 1

NO PROTEST WAS FILED IN THIS MATTER. THE FOREGOING REFEREE'S RULING IS HEREBY CONFIRMED AND APPROVED, AND IS MADE THE JUDGMENT AND DECREE OF THE WATER COURT.

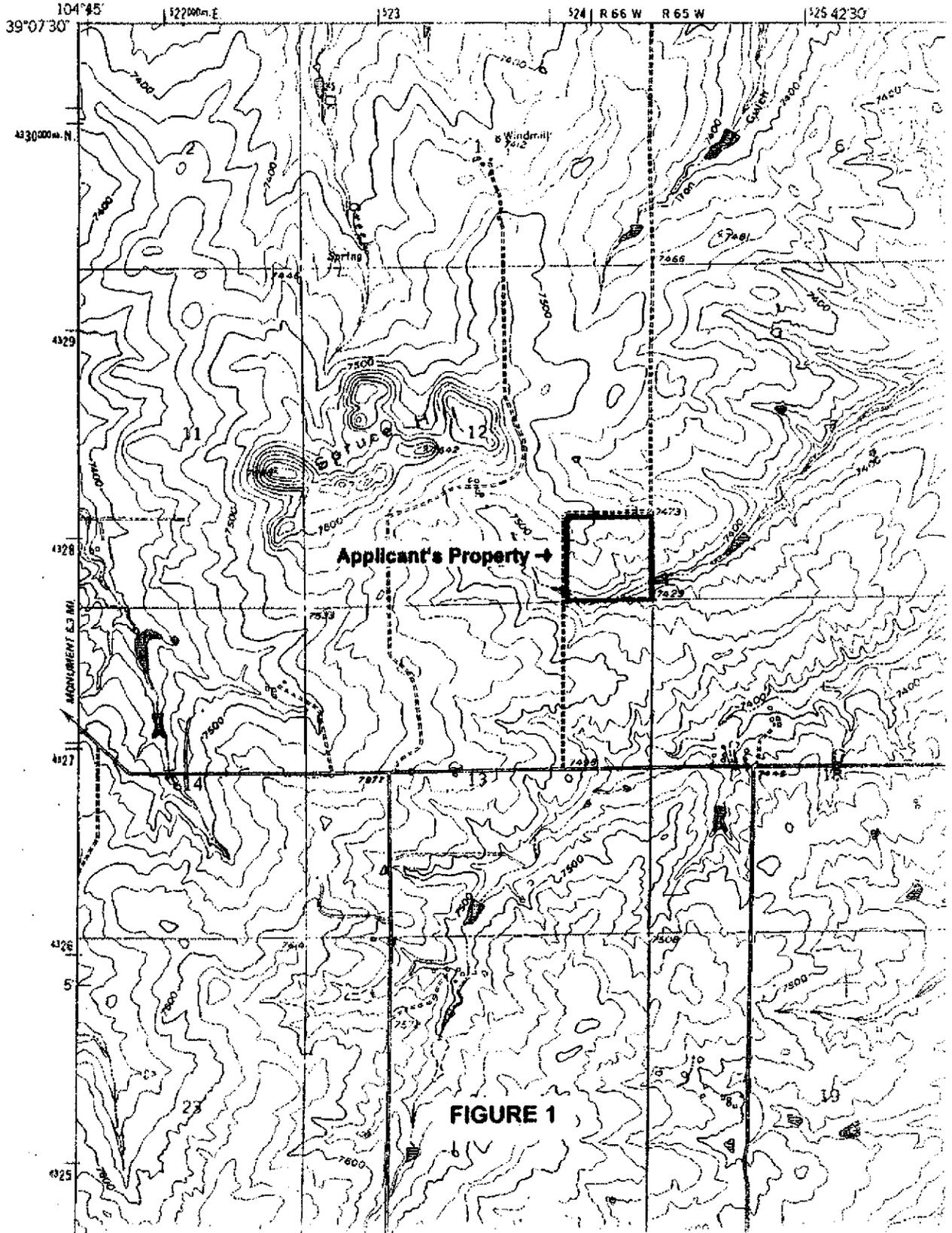
Dated: APR 16 2007.


 Roger A. Klein
 Water Court Judge
 Water Division 1

5262 (11) ME
(GREENLAND)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

T. 11 S., R. 65 W., 6th P.M.



ACCOUNTING FORM

Exhibit A to Decree
 Case No. 06CW100, Water Division 1
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Year: _____

Lot Number	Owner Name	Well Permit No.	Reading on previous Oct. 31	Reading on this October 31	Amount Pumped
1					
2					
3					
4					
5					
6					
7					
TOTALS					

Note: Readings should be taken as close as practicable to October 31 of each year. The Homeowners Association is responsible for completing and submitting this form to the Water Commissioner and the City of Colorado Springs Utilities in November of each year.

Maximum annual pumping for each Dawson aquifer well is limited to 1.0 acre foot (325,851 gallons).

TABLE 2

Depletions during pumping based on 7.0 AF/yr

Years	Depletions as % of pumping	Depletions (Acre feet)
10	0.64	0.45
20	1.47	1.03
30	2.32	1.62
40	3.17	2.22
50	4.00	2.80
60	4.82	3.37
70	5.62	3.93
80	6.41	4.49
90	7.20	5.04
100	7.99	5.59
110	8.77	6.14
120	9.54	6.68
130	10.31	7.22
140	11.08	7.76
150	11.84	8.29
160	12.60	8.82
170	13.35	9.49
180	14.10	9.87
190	14.84	10.39
200	15.58	10.90
210	16.31	11.42
220	16.03	11.92
230	17.74	12.42
240	18.45	12.92
250	19.15	13.41
260	19.85	13.90
270	20.53	14.37
280	21.21	14.85
290	21.89	15.32
300	22.55	15.79
		252.42