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DISTRICT COURT, WATER DIVISION 2 PUEBLO COUNTY, COLORADO Pueblo County Judicial Bldg., 320 W. 10 <sup>th</sup> Street, Pueblo, Colorado 81003	FILED IN THE OFFICE OF THE CLERK, DISTRICT COURT WATER DIV. NO. 2 STATE OF COLORADO  MAY 05 2003  CLERK  ▲ COURT USE ONLY ▲
Concerning the Application for Water Rights of:  <b>DELROY L. JOHNSON and JANET M. JOHNSON</b>  In El Paso County	
	Case No. 02CW119 (Water Div. 2) Case No. 02CW184 (Water Div. 1)
<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE</b>	

**FINDINGS OF FACT**

**I. Jurisdictional Facts.**

1. The applicants 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, are Delroy L. Johnson and Janet M. Johnson, whose address is 14502 Colo. Hwy. 83, Colorado Springs, CO 80921. Their telephone number is 719-495-3692.

2. The applications in this case were filed on August 28, 2002 in Water Division 2 and on August 30, 2002 in Water Division 1.

3. The application was 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.

4. A statement of opposition was timely filed by the City of Colorado Springs, which has

consented to entry of this decree. No other statements of opposition were filed, and the time for filing of 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 2 by order of the Chief Justice of the Colorado Supreme Court dated December 10, 2002.

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 28.62 acres owned by Applicants in the S1/2 SW1/4 Section 34, T. 11 S., R. 66 W., 6<sup>th</sup> P.M., El Paso County, Colorado. The legal description of the Property is attached as Exhibit A to this decree. The Property is located in the Monument Creek drainage, as shown on Figure 1 attached hereto.

8. Pursuant to the notice provisions of C.R.S. §37-90-137(4)(b.5)(I), Applicants gave notice of the application to the Bank of America, the only entity having a lien on the Property.

9. The amount of water underlying the Property and which is available for appropriation is set forth on Table A. The figures on Table A are based on the State Engineer's Determination of Facts dated October 22, 2002. Pursuant to §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.

**Table I**

Aquifer	Acreage	Specific Yield	Saturated Thickness (feet)	Total Storage (AF)	Annual Diversion (AF)
Dawson	28.62	.20	275	1,570	15.70
Denver	28.62	.17	520	2,530	25.30
Arapahoe	28.62	.17	225	1,100	11.00
Laramie-Fox Hills	28.62	.15	190	816	8.16

10. Water in the Dawson aquifer in this location is not nontributary. The Dawson aquifer in this location is less than one mile from any point of contact with any natural surface stream, including its alluvium; accordingly, a decreed plan for augmentation replacing all actual injurious stream depletions is a prerequisite to pumping water from this aquifer. The water in the Denver and Arapahoe aquifers in this location is also not nontributary. The Denver and Arapahoe aquifers are located more than one mile from any point of contact with any natural surface stream, including its alluvium; accordingly, a decreed plan for augmentation replacing four percent of the water pumped on an annual basis, and replacing actual, injurious post-pumping depletions, is a prerequisite to pumping water from these aquifers. The Laramie-Fox Hills aquifer is nontributary in this location; two percent of the water pumped therefrom must be relinquished to the stream system.

11. The above water will be withdrawn through the following structures: water in the Dawson aquifer will be withdrawn through the well currently bearing permit no. 179281, Well DA-2, Well DA-3, Well DA-4 and Well DA-5; water in the Denver aquifer will be withdrawn through Well DEN-1, water in the Arapahoe aquifer will be withdrawn through Well A-1, and water in the

Laramie-Fox Hills aquifer will be withdrawn through Well LFH-1, and any replacements and additional wells which may be necessary to withdraw the entire decreed amount from each aquifer. Within four weeks of the date of entry of this decree, the Applicant will cancel permit No. 179281 and re-permit the well pursuant to the terms and conditions of this plan for augmentation. Applicant waives the 600 foot spacing requirement for well permit no. 179281, Well DA-2, Well DA-3, Well DA-4 and Well DA-5. The five Dawson aquifer wells shall be limited to 15 gpm each and not more than 15.7 acre feet annually, in combination with one another, absolute. Well DEN-1 shall be limited to 100 gpm and 25.3 acre feet annually, absolute. Well A-1 shall be limited to 100 gpm and 11.0 acre feet annually, absolute. Well LFH-1 shall be limited to 150 gpm and 8.16 acre feet, absolute. Decreed uses are all beneficial uses, including augmentation and exchange.

### **III. Plan for Augmentation.**

12. Water Demand. Applicant may subdivide the Property into as many as five residential lots. Applicant anticipates that residential lots would use water for indoor uses, for landscape irrigation and for livestock water. Applicant projects that water for indoor uses will be 0.27 acre feet annually for each house, landscape irrigation will require application of 0.046 acre feet annually per 1,000 square feet (2.0 acre feet per acre), and livestock watering will require 0.011 acre feet per horse per year (10 gallons per horse per day). By way of example only, 1.0 acre foot annually would be adequate for one single-family dwelling, 15,000 square feet of landscape irrigation, and three horses.

13. Amount of water per Dawson aquifer well. There shall be one Dawson aquifer well per lot, and each well must provide water to a house on the same lot. The number of acre feet of water each Dawson aquifer well shall be allowed to divert on an annual basis shall be calculated by dividing the number of lots into the number 3.0, but in no event to exceed 1.0 acre feet per well

per year. Unless and until the Property is subdivided, the existing Dawson aquifer well, permit no. 179281, shall be allowed to pump 1.0 acre foot annually. However, if subdivision of the Property occurs more than fifteen years after entry of this decree, and if five lots are sought to be obtained, the maximum amount of allowable withdrawal for each Dawson aquifer well shall be calculated by subtracting the existing Dawson aquifer well's cumulative withdrawals, in acre feet, from the number 900, and dividing the resulting number by 1500. For example, if at the time of subdivision, 50 acre feet had been pumped from the existing Dawson aquifer well, the maximum annual amount for withdrawal would be  $[(900 - 50) / 1500 = ] 0.567$  acre feet per well.

14. Water Consumption. Disposal of water used indoors for the single family dwellings shall be by nonevaporative septic tanks and leach fields ("septic systems"). Consumption of water used for indoor uses and so disposed of is stipulated to be no more than 10 percent of diversions in this case. Water used by livestock is considered to be totally consumed. Water applied for landscape irrigation is stipulated to be no more than 85 percent consumptive in this case.

15. Replacement of depletions during pumping. Applicant does not have the physical ability to replace stream depletions to the South Platte River, but shall instead replace all depletions, regardless where they occur, to the Black Squirrel Creek drainage, which is tributary to Monument Creek, Fountain Creek and the Arkansas River. The State Engineer's "DA02" computer model indicates that during pumping total depletions to the South Platte and Arkansas Rivers and their tributaries will increase to a maximum of 22.94 percent of pumping in the 300<sup>th</sup> year. Based on pumping of 3.0 acre feet annually, maximum stream depletions during the pumping period would be 0.69 acre feet annually. Septic system return flows from even only three single family homes will equal 0.73 acre feet annually, and will be used to replace such depletions. If fewer than three lots are created, the lower total pumping amounts contained in ¶ 13 (one acre foot

annually per well for each of one or two wells) will ensure that septic system return flows are adequate to replace stream depletions.

16. Replacement of post-pumping depletions.

A. Applicant agrees to replace depletions which occur after the cessation of pumping 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 on 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. Based on assumed pumping of 3.0 acre feet annually, the State Engineer's "DA02" computer model predicts that combined post-pumping depletions in the South Platte and Arkansas Rivers will reach a maximum of 23.03 percent of pumping in the 310<sup>th</sup> year after pumping begins, and will decline gradually thereafter. Applicant's post-pumping replacement obligation will be determined by multiplying the average annual Dawson pumping by the appropriate stream depletion factor according to the total depletion percentages shown on Table III. Annually, that amount of water shall then be pumped from the Laramie-Fox Hills aquifer decreed herein, or from such other source of water as receives judicial approval after notice, into Black Squirrel Creek, Monument Creek or another of Monument Creek's tributaries. Applicant's successors in interest shall be required to construct a Laramie-Fox Hills aquifer well pursuant to this plan for augmentation unless a

different source of water is approved by the Court for replacement of post-pumping depletions, or unless the obligation is terminated pursuant to ¶ 16.A. above.

C. Reservation of Laramie-Fox Hills aquifer water. Applicant shall reserve and dedicate to this plan for augmentation all 816 acre feet of its Laramie-Fox Hills aquifer water decreed herein for the purpose of replacing to Black Squirrel Creek, Monument Creek or another of Monument Creek's tributaries all post-pumping depletions, including post-pumping depletions to streams other than Black Squirrel Creek, Monument Creek or another of Monument Creek's tributaries. If at some time replacement of post-pumping depletions is no longer required pursuant to ¶ 16.A. above, or if Applicant receives judicial approval to use a different water source for augmentation purposes, said reservation will become null and void at such time as the obligation to use the Laramie-Fox Hills aquifer water to replace post-pumping depletions terminates.

17. Prior to implementation of this decree, Applicant shall create and record restrictive covenants requiring Applicant to limit annual pumping from the Dawson aquifer to 3.0 acre feet annually, to use nonevaporative septic systems for wastewater disposal, and which inform subsequent purchasers of the possible requirement to replace post-pumping depletions. Said covenants shall indicate clearly that failure of the property owners to comply with the terms of this decree, including the possible obligation to construct a Laramie-Fox Hills aquifer well in the future to replace post-pumping stream depletions, may result in an order of the Division Engineer's office to curtail or eliminate pumping of the Dawson aquifer wells. 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. Any proposed change in the method of wastewater treatment and disposal shall require notice in the water resume and publication in a newspaper of general circulation in El Paso County.

18. As previously indicated, the amount of water each Dawson aquifer well shall be allowed to divert on an annual basis shall be calculated by dividing the number of lots into the number 3.0, but in no event to exceed 1.0 acre feet per well per year. Each well shall be the source of supply for a residence on the same lot. This requirement ensures that during pumping, return flows from septic systems alone will always equal or exceed stream depletions in the same year. It is not necessary to otherwise restrict the type of use to which the Dawson aquifer water pumped pursuant to this plan for augmentation is put.

19. As reasonably required by the Division Engineer, but no less than annually, Applicant shall complete and submit an accounting form which shows groundwater withdrawals, stream depletions, return flows, and net stream depletions. The accounting form must be acceptable to the Division Engineer, and may be changed from time to time if necessary. An accounting form which is acceptable to the Division Engineer at the present time is attached to this Ruling as Exhibit B.

20. The Court finds that under the terms and conditions herein the requirements of C.R.S. §37-90-137(9)(c) have been met, and that no injury will be caused to the owner of or anyone entitled to use water under a vested water right or decreed conditional water right.

#### **CONCLUSIONS OF LAW**

21. 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.

22. All conditions precedent to the granting of this decree have been complied with,

including but not limited to the notice requirement of C.R.S. §37-90-137(4)(b.5)(I).

23. 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. Applicant has proved that no such injury will occur.

### **JUDGMENT AND DECREE**

24. The forgoing findings of fact and conclusions of law are hereby incorporated into this judgment and decree.

25. 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 it becomes available.

26. In any year, Applicant may withdraw the subject water in any given aquifer 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.

27. The wells must be constructed pursuant to applicable regulations of the Division of Water Resources. Each well must be equipped with a totalizing flow meter and 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. All wells decreed herein shall be geophysically logged, and

a copy of such log shall be submitted to the State Engineer pursuant to 2 CCR 402-7, Rule 9.

28. Prior to construction of any well on the Property, Applicant shall apply for a well permit, accompanied by the requisite fee, and the State Engineer shall issue such well permit, pursuant to C.R.S. 37-90-137(4) and the terms and conditions of this decree. Should Applicant fail to construct and/or file a statement of beneficial use for any well prior to the expiration of the well permit, Applicant may reapply to the State Engineer for a new well permit and the State Engineer shall issue a new well permit upon terms and conditions no more burdensome than those contained in the expired permit.

29. Within four weeks of entry of a decree in this case, Applicant shall submit to the State Engineer the applicable fee and an application for a new well permit for existing well permit no. 179281, consistent with the terms and conditions of this decree and applicable statutes and regulations.

30. The water rights so decreed are absolute water rights, and no applications for findings of diligence are required.

31. Absent approval of an amendment to this plan for augmentation or approval of a new plan for augmentation replacing injurious depletions, annual pumping from the Dawson aquifer shall be limited to a maximum of 3.0 acre feet annually; per well limits shall be determined pursuant to the provisions of ¶ 13. Applicant shall not consume more than 98% of the water diverted from the nontributary Laramie-Fox Hills aquifer.

32. The application for approval of a plan for augmentation to replace depletions caused by pumping the not nontributary Dawson aquifer is approved as set forth above in the findings of fact in this decree. The State or Division Engineer shall curtail the pumping of more water than is provided for in ¶ 13 without prior modification of this plan for augmentation or approval of an

additional plan for augmentation which replaces depletions attributable to such pumping. The State Engineer shall also curtail all out-of-priority diversions, the depletions from which are not replaced as to prevent injury to vested water rights or decreed conditional water rights.

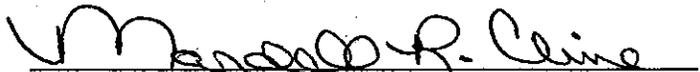
33. Cumulative pumping from the Dawson aquifer pursuant to this plan for augmentation shall not exceed 900 acre feet. Nothing herein is intended to preclude Applicant from utilizing the remaining water in the Dawson aquifer underlying the Property in any way permitted by law.

34. The Court shall retain jurisdiction for so long as Applicant is required to replace depletions to the Monument Creek system, to determine whether the replacement of depletions to the Arkansas River system instead of the South Platte River system is causing material injury to water rights tributary to the South Platte River. Any person may invoke the Court's retained jurisdiction at any time Applicant is causing depletions (including ongoing post-pumping depletions) to the South Platte River system, and is instead replacing such depletions to the Arkansas River system. 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 South Platte 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 which prevent such injury. Among any other remedies it may impose, the Court may require that Applicant replace depletions to the South Platte River system.

35. 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 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 decretal 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 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.

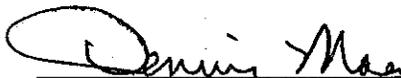
Dated this 9th day of April, 2003.



Mardell R. Cline  
Water Referee  
Water Division 2

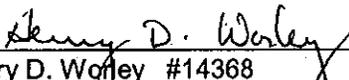
**NO PROTEST WAS FILED IN THE THIS MATTER. THE FOREGOING RULING IS CONFIRMED AND APPROVED, AND IS MADE THE JUDGMENT AND DECREE OF THIS COURT.**

Dated this 5<sup>th</sup> day of May, 2003.

  
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Dennis Maes  
Water Judge  
Water Division 2

**APPROVED AS TO FORM:**

**MacDougall, Woldridge & Worley, P.C.**

  
\_\_\_\_\_  
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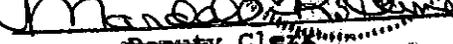
  
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Attorneys for Opposer,  
the City of Colorado Springs

DISTRICT COURT  
WATER DIVISION NO. 2  
STATE OF COLORADO

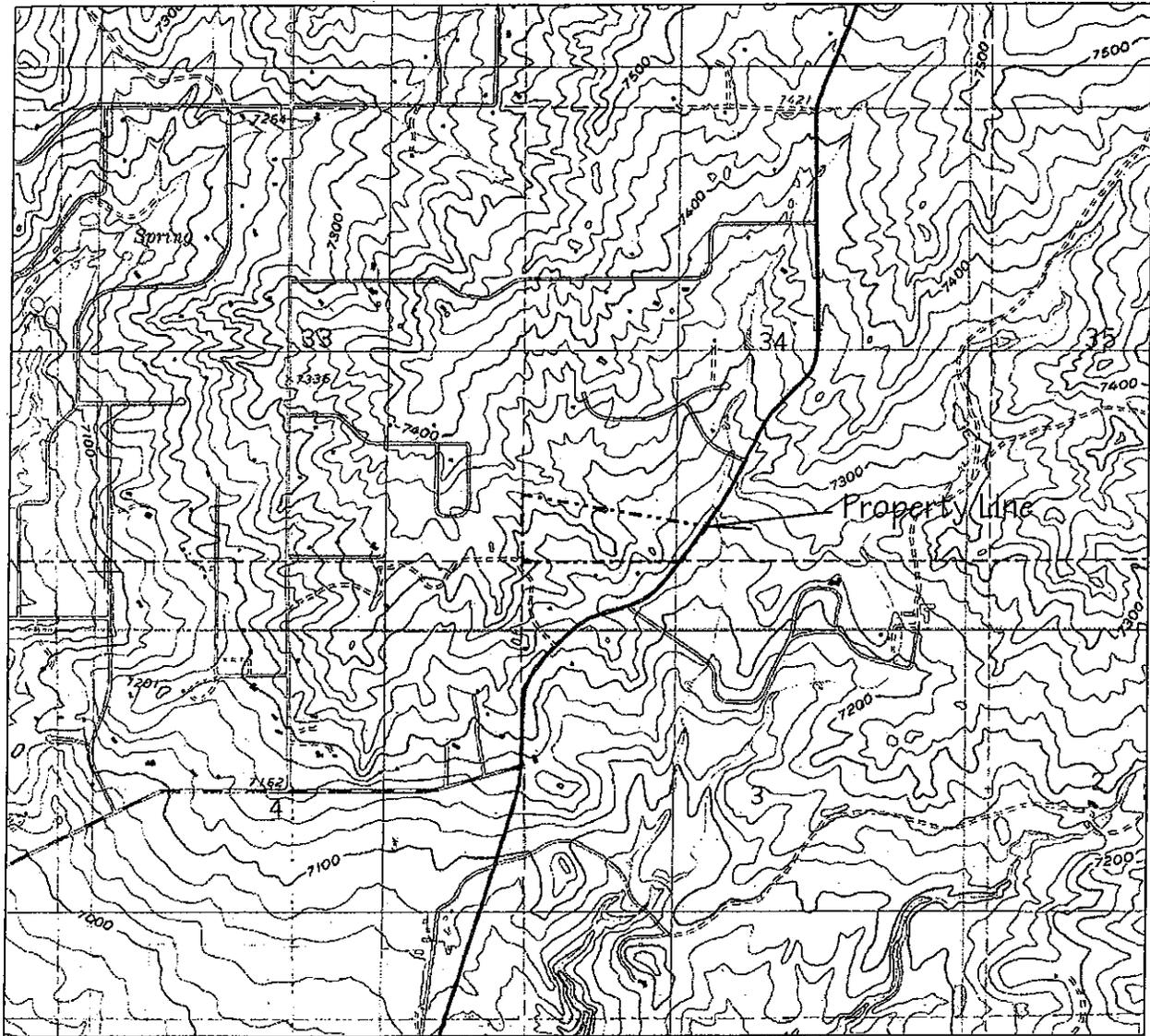
Certified to be a full and  
correct copy of original on 5/9/03

Dated: May 9, 2003  
MARDELL R. CLINE, CLERK

By:   
\_\_\_\_\_  
Deputy Clerk

R 66 W

T 11 S  
T 12 S



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Scale 1" = 2000'

Location Map

Wm Curtis Wells & Co.  
consulting ground water geologists

Figure 1

**EXHIBIT A**  
**Legal Description**

That portion of the South Half of the Southwest Quarter of Section 34 in Township 11 South, Range 66 West of the 6<sup>th</sup> P.M., described as follows: Beginning at the Southwest corner of said Section 34; thence North on the Westerly line of said Section 34 a distance of 794.00 feet; thence South 81 degrees 31 minutes 54 seconds East 2097.57 feet to intersect the Westerly right of way line of Highway No. 83 as described in deed recorded in Book 2031 at Page 369 under Reception No. 364427; thence Southwesterly on said Westerly right of way line 594.50 feet, more or less, to intersect the South line of said Section 34; thence West on said South line 1736.96 feet, more or less, to the point of beginning, County of El Paso, State of Colorado.

**TABLE III**

**Dawson Stream Depletion Factors  
Johnson Property  
(as % of pumping)**

YRS	Arkansas River	South Platte River	YRS	Arkansas River	South Platte River
10	0.50	0.09	310	12.34	10.69
20	1.05	0.28	320	12.08	10.88
30	1.60	0.54	330	11.80	11.01
40	2.13	0.84	340	11.54	11.09
50	2.65	1.18	350	11.29	11.12
60	3.17	1.52	360	11.03	11.15
70	3.67	1.88	370	10.78	11.16
80	4.16	2.25	380	10.53	11.17
90	4.65	2.61	390	10.31	11.15
100	5.11	3.00	400	10.08	11.15
110	5.57	3.38	410	9.86	11.14
120	6.02	3.77	420	9.65	11.12
130	6.47	4.14	430	9.43	11.11
140	6.88	4.55	440	9.22	11.09
150	7.31	4.93	450	9.02	11.06
160	7.74	5.27	460	8.82	11.03
170	8.12	5.65	470	8.63	11.00
180	8.51	6.01	480	8.45	10.95
190	8.91	6.36	490	8.25	10.92
200	9.29	6.72	500	8.08	10.86
210	9.63	7.11	510	7.90	10.82
220	9.99	7.47	520	7.75	10.75
230	10.33	7.84	530	7.56	10.71
240	10.67	8.21	540	7.40	10.66
250	11.01	8.57	550	7.24	10.60
260	11.33	8.94	560	7.09	10.53
270	11.65	9.30	570	6.94	10.47
280	11.93	9.69	580	6.78	10.41
290	12.26	10.03	590	6.64	10.34
300	12.55	10.39	600	6.51	10.27