



DISTRICT COURT, WATER DIVISION 2, COLORADO

Case No. 99CW79 (C/R 98CW58)

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

CONCERNING THE APPLICATION FOR WATER RIGHTS OF  
FRANK A. LEE and NEW BREED RANCH, INC.

FILED IN THE OFFICE OF THE CLERK,  
DISTRICT COURT WATER DIV. NO. 2  
STATE OF COLORADO

NOV 15 1999

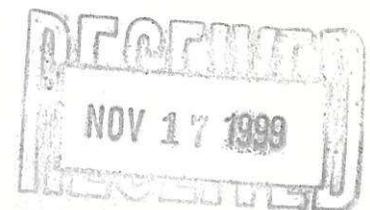
In El Paso County.

MARDELL TRIVISONNO  
CLERK

The Court, having considered all matters contained in the application, documents, stipulations, and other filed pleadings, and having taken testimony and evidence as necessary and appropriate, makes the following Findings of Fact, Conclusions of Law, and Decree:

FINDINGS OF FACT

1. The application in this case was filed on June 22, 1999 by Frank A. Lee and New Breed Ranch, Inc., whose addresses are 3250 Shoup Road, Colorado Springs, CO 80908. Their shared phone number is 719-495-3183.
2. The application was published in the resume for Water Division 2 and in a newspaper of general circulation in El Paso County, as required by law.
3. No statements of opposition were filed, and the time for filing statements of opposition has expired. No motions to intervene have been filed.
4. Pursuant to Applicant's Motion, the case was re-referred to the Water Judge, Water Division 2 by order dated June 30, 1999.
5. The land and water involved herein are not within the boundaries of a designated ground water basin.
6. The court has jurisdiction over the subject matter of this proceeding and over all persons



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who might be affected by the granting of this decree, whether or not they have appeared herein.

7. In Case No. 98CW58, Water Division 2, Colorado, these Applicants obtained a decree adjudicating the water in the Denver, Arapahoe and Laramie-Fox Hills aquifers underlying 460.3 acres of Applicants' land (the "Property", as depicted on Exhibit A and described on Exhibit B hereto), adjudicating the water in the Dawson aquifer underlying 450.3 acres of Applicants' land, and approving a plan for augmentation to replace stream depletions caused by pumping water from the Denver aquifer to provide water to up to 83 lots. In this case, Applicants do not seek any changes to the adjudication of the water in the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers, but seek to amend the plan for augmentation to augment stream depletions caused by providing water from the Denver Basin aquifers underlying the Property to up to 94 lots.

8. Water Use by Individual Lots. Applicants propose to subdivide the Property into up to 94 residential lots. The water needs of each lot shall be provided from Wells D-1 through D-94 in the not nontributary Denver aquifer. A breakdown of water demand and consumption by the allowed uses is as follows:

A. Pond or pool evaporation. Net evaporation from decorative ponds or swimming pools will equal 28.2 inches annually, or 0.054 acre feet per 1,000 square feet. This use is totally consumptive.

B. Livestock watering. Each horse or horse equivalent will consume 10 gallons per day, or 0.011 acre feet annually. Such use is totally consumptive.

C. Landscape irrigation. Landscape irrigation will require annual applications of 2.0 acre feet per acre, or 0.046 acre feet per 1,000 square feet. Return flows will equal 15% of diversions.

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D. Indoor uses. Diversions for indoor uses will average 0.27 acre feet per house. Wastewater disposal will be through use of non-evaporative septic systems. Return flows will equal 90% of diversions.

→ 9. No lot will contain more than one house. Annual water usage per lot shall be limited to 0.27 acre feet for indoor uses plus the sum of  $(A \times 0.054) + (B \times 0.011) + (C \times 0.046) \leq 0.19$ , where A equals the number of 1,000 square feet of pond or swimming pool surface area, B equals the number of horses and C equals the number of 1,000 square feet of irrigated landscape. Each lot shall be limited to pumping of 0.46 acre feet (150,000 gallons) annually. *110 gal/Day*

✓ 10. Replacement of depletions during pumping. The Denver aquifer underlying the Property is more than one mile from a point of contact with any natural stream; hence, during pumping Applicants are required to replace 4% of annual pumping. Based on an assumed annual pumping rate of 43.2 acre feet, required annual replacements to Monument Creek are 1.7 acre feet. Applicants' septic and irrigation return flows will be used to replace such depletions. Assuming a "worst case" scenario in which water use from all 94 lots is totally consumptive, except for indoor uses, annual septic return flows will equal 22.8 acre feet annually, greatly exceeding the replacement requirement. Applicants hereby dedicate any and all septic system and landscape irrigation return flows to this plan for augmentation.

★ 11. Replacement of post-pumping depletions.

A. Applicants agree to replace depletions for the shortest of the following periods: the period provided by the Colorado Legislature, should it eventually specify one and if the Applicants obtain water court approval for such modification; the period determined by the State Engineer, should the State Engineer lawfully establish such a period; the period

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established through rulings of the Colorado Supreme Court on relevant cases; or until Applicants petition 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. Post-pumping depletions, as a percentage of average annual pumping, have been computed based on assumed annual pumping of 40.0 acre feet over a 300 year pumping period, using the State Engineer's "DE10" computer model. Applicant's annual replacement obligation will be determined by multiplying average annual Denver aquifer pumping through the end of pumping, whenever that occurs, by the appropriate stream depletions factor for Monument Creek shown on Table I attached hereto. That amount of water shall then be pumped from the Laramie-Fox Hills aquifer decreed herein or such other source of water as receives judicial approval after notice, into the Monument Creek system. 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. If at some time replacement of post-pumping depletions is no longer required pursuant to ¶16.A. above, at that time the reservation and dedication of the Laramie-Fox Hills water for replacement of post-pumping depletions will terminate.

12. In order to ensure that septic return flows return to the Monument Creek drainage, at the time the first house is constructed on the Property Applicants shall, in consultation with the State or Division Engineer's staff, install a piezometer drilled through the overburden soils at some point

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reasonably near the septic system of such house for the purpose of measuring water levels. Once each quarter the piezometer will be monitored for the presence of overburden deposit ground water. If within five years from installation of the piezometer these observations demonstrate that the soil is continuously saturated over four consecutive quarters, it shall be taken as conclusively proved that septic system return flows accrue to the Monument Creek drainage. If during the five year period the monitoring does not demonstrate the existence of saturated soil over four consecutive quarters, then any person may invoke the court's retained jurisdiction for reconsideration of the issue of injury, based on the issue whether septic return flows are replacing stream depletions to the Monument Creek drainage.

13. Prior to or upon subdivision of the Property, Applicants shall create a property owner's association, which all owners of lots in the Property shall be required to join. The by-laws of the property owner's association shall provide that the association will own and/or operate, as applicable, this plan for augmentation and the Laramie-Fox Hills water for the benefit of the lots on the Property. Applicants shall create restrictive covenants upon and running with the Property, which shall obligate the individual purchasers and the property owner's association to carry out all requirements of this decree, including the possible replacement of post-pumping depletions. Said covenants shall indicate clearly that failure of either the property owners or the property owners association 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 Wells D-1 through DA-94. 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

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purchasers the existence of the decree and restrictive covenants.

*Declarant*  
14. Applicants shall convey to the property owner's association <sup>(FIBRA)</sup> the plan for augmentation decreed herein for the replacement of depletions associated with pumping of 12,960 acre feet of Denver aquifer water. Applicants shall also convey to the property owner's association all of the Laramie-Fox Hills water decreed herein. When Applicants convey individual lots on the Property, the deed shall also convey the right to pump 138 acre feet of Denver aquifer water underlying the lot to the purchaser. <sup>end</sup> Presentation to the State Engineer of a deed to a lot in the Property, accompanied by a properly completed well permit application and the applicable fee, shall entitle the lot owner to a Denver aquifer well permit for such lot, to be operated consistent with the terms of this decree and applicable statutes.

15. Any use of Denver aquifer water decreed herein on land other than the Property described herein is not permitted by this plan for augmentation, and shall require either a decreed amendment to this plan for augmentation, or a separately decreed plan for augmentation, as a prerequisite to pumping of that water.

16. Applicants will record against the Property restrictive covenants running with the land adequate to insure that use of the wells on the Property is limited to the uses decreed herein, and that wastewater disposal shall be through the use of nonevaporative septic systems, absent an amendment to this plan for augmentation. The restrictive covenants shall be amended as necessary to conform to the provisions of any amendment to this augmentation plan, or any subsequent or replacement augmentation plan which governs use of all or any portion of the 12,960 acre feet of Denver aquifer water covered by this plan for augmentation.

17. The Court finds that under the terms and conditions herein the requirements of C.R.S. §37-

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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 or decreed conditional water right.

#### CONCLUSIONS OF LAW

18. 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.

19. Applicant has complied with all conditions precedent to the granting of this decree.

20. The plan for augmenting depletions caused by pumping the not nontributary Denver 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.

21. Applicant has maintained dominion and control over its septic system return flows by determining the quantity of such return flows, as set forth in part III above, and thus has the legal ability to use said return flows in this plan for augmentation. See, Public Service Co. v. Willows Water District, 856 P.2d 829 (Colo. 1993).

#### JUDGMENT AND DECREE

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

23. The plan for augmentation decreed herein supersedes in its entirety the plan for augmentation decreed in Case No. 98CW58; however, the decree in Case No. 98CW58 adjudicating the water in the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers is unchanged by this decree.

24. Prior to constructing any well decreed herein, Applicants or their successors shall file a well permit application and, if a successor, a copy of the deed to their lot with the State Engineer. The State Engineer shall issue well permits in accord with the decree entered herein and applicable statutes. Should Applicants fail to construct any well prior to the expiration of the well permit Applicants may reapply to the State Engineer for a new well permit and the State Engineer shall issue a new well permit with terms and conditions no more burdensome than those contained herein.

25. The application for approval of a plan for augmentation to replace depletions caused by pumping the not nontributary Denver aquifer is approved as set forth above in the findings of fact in this decree. No more than 43.2 acre feet of water may be pumped each year from the Denver aquifer absent approval of an amendment to this plan for augmentation or approval of a new plan for augmentation replacing injurious depletions resulting from such pumping. The State Engineer shall curtail the pumping of more than 43.2 acre feet annually from the Denver aquifer absent compliance with the foregoing sentence. The State Engineer shall also curtail diversions from the Denver aquifer pursuant to this plan for augmentation, the depletions from which are not so replaced as to prevent injury to vested water rights or decreed conditional water rights.

26. As reasonably required by the Division Engineer, but no less than annually, Applicants 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 C.

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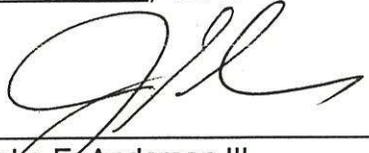
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27. Pursuant to C.R.S. § 37-92-304 (6), the Court retains continuing jurisdiction over the plans for augmentation decreed herein for reconsideration of the question whether the provisions of this decree are necessary and/or sufficient to prevent injury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

28. 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 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, 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 the person filing the petition is not required to avoid injury to other appropriators, or (3) that any term or condition proposed by Applicants in response to the petition does avoid injury to other appropriators.

Dated this 15<sup>th</sup> day of November, 1999.

  
John E. Anderson III  
District Court Judge  
Water Division 2

DISTRICT COURT  
WATER DIVISION NO. 2  
STATE OF COLORADO

Certified to be a true and correct copy of the original on file.

Dated: 11/23/99  
  
MARDELIA R. TRIVISOLINO, CLERK

By:   
Deputy Clerk

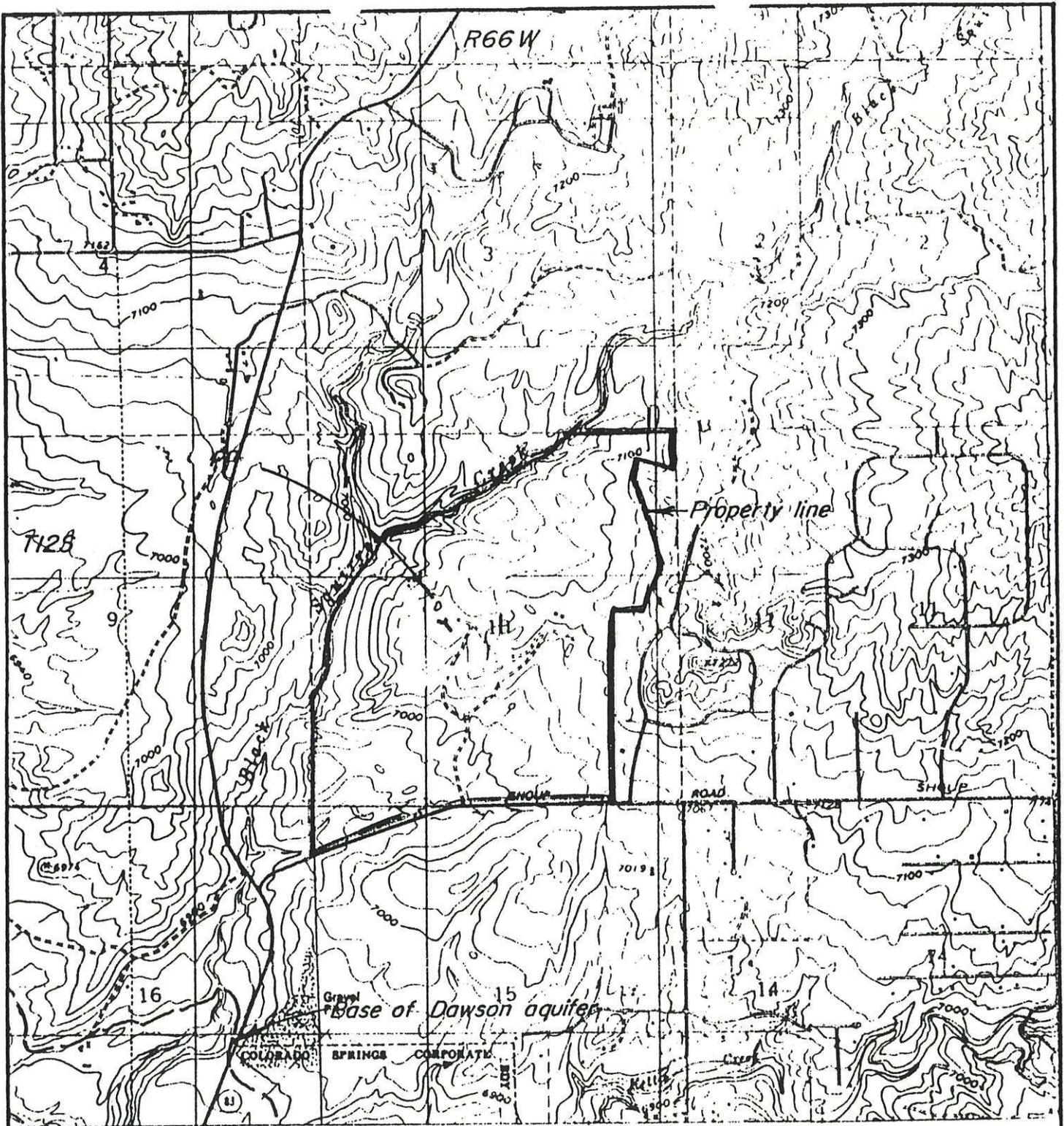
AF = acre ft

TABLE I  
DENVER AQUIFER AUGMENTATION ANALYSIS  
LEE PROPERTY

Years	Withdrawal (af/yr)	Monument Creek				Net Depletion (af/yr)
		Stream Depletion Factors	Depletion (af/yr)	Return Flows (af/yr)	NT Pumping (af/yr)	
10	40	4.00	1.6	21.8		0.0
20	40	4.00	1.6	21.8		0.0
30	40	4.00	1.6	21.8		0.0
40	40	4.00	1.6	21.8		0.0
50	40	4.00	1.6	21.8		0.0
60	40	4.00	1.6	21.8		0.0
70	40	4.00	1.6	21.8		0.0
80	40	4.00	1.6	21.8		0.0
90	40	4.00	1.6	21.8		0.0
100	40	4.00	1.6	21.8		0.0
110	40	4.00	1.6	21.8		0.0
120	40	4.00	1.6	21.8		0.0
130	40	4.00	1.6	21.8		0.0
140	40	4.00	1.6	21.8		0.0
150	40	4.00	1.6	21.8		0.0
160	40	4.00	1.6	21.8		0.0
170	40	4.00	1.6	21.8		0.0
180	40	4.00	1.6	21.8		0.0
190	40	4.00	1.6	21.8		0.0
200	40	4.00	1.6	21.8		0.0
210	40	4.00	1.6	21.8		0.0
220	40	4.00	1.6	21.8		0.0
230	40	4.00	1.6	21.8		0.0
240	40	4.00	1.6	21.8		0.0
250	40	4.00	1.6	21.8		0.0
260	40	4.00	1.6	21.8		0.0
270	40	4.00	1.6	21.8		0.0
280	40	4.00	1.6	21.8		0.0
290	40	4.00	1.6	21.8		0.0
300	40	4.00	1.6	21.8		0.0
310		13.19	5.3		5.3	0.0
320		13.51	5.4		5.4	0.0
330		13.77	5.5		5.5	0.0
340		13.94	5.6		5.6	0.0
350		14.06	5.6		5.6	0.0
360		14.10	5.6		5.6	0.0
370		14.10	5.6		5.6	0.0
380		14.07	5.6		5.6	0.0
390		13.99	5.6		5.6	0.0
400		13.89	5.6		5.6	0.0
410		13.77	5.5		5.5	0.0
420		13.63	5.5		5.5	0.0
430		13.47	5.4		5.4	0.0
440		13.31	5.3		5.3	0.0
450		13.13	5.3		5.3	0.0
460		12.95	5.2		5.2	0.0
470		12.76	5.1		5.1	0.0
480		12.56	5.0		5.0	0.0
490		12.37	4.9		4.9	0.0
500		12.17	4.9		4.9	0.0
510		11.97	4.8		4.8	0.0
520		11.77	4.7		4.7	0.0
530		11.58	4.6		4.6	0.0
540		11.39	4.6		4.6	0.0
550		11.19	4.5		4.5	0.0
560		11.00	4.4		4.4	0.0
570		10.81	4.3		4.3	0.0
580		10.62	4.2		4.2	0.0
590		10.43	4.2		4.2	0.0
600		10.25	4.1		4.1	0.0

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TABLE I



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LOCATION MAP

EXHIBIT A

WELLS & CO.  
 ground water geologists

Scale 1" = 2000'

**EXHIBIT B**

Real Property situated in the County of El Paso and State of Colorado, to wit:

That portion of Section 10 and of the Northwest quarter of Section 15 in Township 12 South, Range 66 West of the 6<sup>th</sup> P.M., described as follows: Beginning at the Northeast corner of the West half of the Southeast quarter of said Section 10; thence Southerly on the Easterly line thereof to its intersection with the Northerly line of Shoup Road as described in deed recorded in Book 602 Page 283 of the records of El Paso County, Colorado; thence Westerly on the Northerly line of Shoup Road to its intersection with the West line of the Northwest quarter of said Section 15; thence North on said West line to the Northwest corner of said Section 15; thence North 1°10'40" West 1924.90 feet, more or less, on the West line of said Section 10 to a point thereon South 1°10'40" East 723 feet from the Northwest corner of the Southwest quarter of said Section 10; thence North 39°50' East 270.56 feet; thence North 23°19' West 189.70 feet; thence North 12°38' East 583.11 feet; thence North 47°02' East 226.04 feet; thence North 35°40' East 208.67 feet; thence North 42°00' East 243.40 feet; thence North 51°47' East 231.32 feet; thence North 7°24' East 439.18 feet; thence North 75°32' East 455.49 feet; thence North 66°00' East 230.54 feet; thence North 76°30' East 344.84 feet; thence North 31°33' East 228.28 feet; thence North 71°48' East 370.24 feet; thence North 55°47' East 858.58 feet; thence North 77°02' East 230.75 feet; thence North 40°28' East 248.57 feet to intersect the North line of said Section 10; thence South 89°56' East 1720.42 feet on said North line to the Northeast corner of said Section 10; thence South 00°50' East 726.30 feet on the East line of said Section 10; thence North 68°30' West 696.70 feet; thence South 6°08' West 463.48 feet; thence South 16°32' East 1054.34 feet to intersect the Northwesterly line of the tract described in deed recorded in Book 847 at Page 440 of the records of El Paso County, Colorado; thence Southwesterly on said Northwesterly line 145.57 feet to an angle point thereon; thence Southwesterly on the Westerly line of said tract 624 feet to the South line of the Northeast quarter of said Section 10; thence West on said South line 646.15 feet; more or less, to the point of beginning, El Paso County, Colorado, also known as 3250 Shoup Road.

**EXHIBIT B**

Lee Property  
 Case 98-CW-59  
 Augmentation Plan Accounting  
 Through Cessation of Pumping

A. Total Withdrawal [ last year line C.]

B. Total Denver Withdrawal [ Table I B(col. 7)]

C. Total Withdrawal Since Pumping Began [A+B]

D. Years Since Pumping Began [Current Year-1999]

E. Stream Depletion [B.\*0.4]

F. Return Flows [Table I C.]

G. Net Depletion [F-E]

Year	

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Monument Creek
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