

<b>DISTRICT COURT, WATER DIVISION NO. 1          WELD COUNTY, COLORADO</b> Weld County Courthouse, 901 9 <sup>th</sup> Ave., P.O. Box 2038, Greeley, Colorado 80632 (P.O. - 80632)	FILED Document – District Court 2011CW45 CO Weld County District Court 19th JD Filing Date: Sep 8 2011 2:41PM MDT Filing ID: 39719790  <b>COURT USE ONLY</b>
<b>Concerning the Application for Water Rights of:</b>  <b>GARY L. BRINKMAN and BRENDA L. BRINKMAN</b>  In the South Platte River and its tributaries In El Paso County	
<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE</b>	

**FINDINGS OF FACT**

**I. Jurisdictional Facts.**

1. The Applicants in this case are Gary L. Brinkman and Brenda L. Brinkman / 4507 Silver Nell Drive, Colorado Springs, CO 80908. Their phone number is 719.471.0294 and their email address is [garvandbrenda54@yahoo.com](mailto:garvandbrenda54@yahoo.com).
2. The application was filed in Water Divisions 1 and 2 on March 29, 2011. 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.
3. There are two liens or encumbrance of record against the Property. The lienors were notified of this application pursuant to C.R.S. 37-92-302(2)(b).
4. A timely statement of opposition was filed by the City of Colorado Springs-Colorado Springs Utilities. The time for filing of statements of opposition has expired. No motions to intervene have been filed.
5. The Applicants filed a motion to consolidate the Water Division 1 and 2 applications in Water Division 1. That motion was granted on June 30, 2011, and the application was again referred to the referee.
6. The land and water involved herein are not within a designated ground water basin.

**II. Denver Basin Water Rights.**

7. The land beneath which the water is sought to be adjudicated consists of Applicants' 40.0 acre property described as the SW1/4 NE1/4 NE1/4, the NW1/4 SE1/4 NE1/4, and the E1/2 SW1/4 NE1/4 Section 23, T. 11 S., R. 66 W., 6<sup>th</sup> P.M. (the "Property"). A map showing the approximate property boundaries is attached as Exhibit A. It is noted that although the Applicants' deed indicates that El Paso County reserves a right of way for road purposes along the section lines, the Property is not adjacent to any

section lines.

8. The State Engineer's Determinations of Facts for the Property are dated May 16, 2011. The State Engineer's figures for saturated thicknesses and specific yields for the Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers indicate that the amounts of water shown on Table 1 are initially available for appropriation.

TABLE 1

Aquifer	Acreage	Specific Yield	Saturated Thickness (ft)	Total Storage (AF)	Ave. Annual Diversion (AF) <sup>1</sup>
Dawson	40	.20	620	4,960	49.6
Denver	40	.17	545	3,706	37.1
Arapahoe	40	.17	240	1,632	16.3
Laramie-Fox Hills	40	.15	200	1,200	12.0

9. The approximate depth of each aquifer below the ground surface is as follows:

Dawson aquifer: near surface - 1,145 feet  
Denver aquifer: 1,145 - 1,985 feet  
Arapahoe aquifer: 2,035 - 2,530 feet  
Laramie-Fox Hills aquifer: 2,910 - 3,210 feet

The Dawson aquifer is not nontributary and is located less than one mile from any surface stream, including its alluvium. Water in the Denver, Arapahoe, and Laramie-Fox Hills aquifers underlying the Property is nontributary.

10. Applicants will withdraw water from up to 15 wells in the Dawson aquifer and one well in each other aquifer. One Dawson aquifer well, permit no. 238092, is located on the Property and is used by Applicants. After subdivision of the Property, permit 238092 will be re-permitted and operated pursuant to the plan for augmentation decreed herein. All 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. Applicants waive the 600 foot spacing requirement for all wells located on the Property.

11. Subject to the terms, conditions and limitations of this decree, and the issuance by the State Engineer of a well permit that authorizes the specific use or uses, the water rights are decreed for all beneficial uses except municipal uses.

<sup>1</sup> Based on a 100 year aquifer life.

### III. Plan for Augmentation.

12. This plan for augmentation is designed to meet all statutory requirements for the replacement of depletions associated with the pumping of up to 15 Dawson aquifer wells on the Property. Applicants or their successors may in the future decide to subdivide the Property into up to 15 lots, and to use the existing Dawson aquifer well on one lot and one additional Dawson aquifer well on each additional lot, to supply water for indoor uses in a single family dwelling on each lot, for commercial uses (drinking and sanitation purposes), for a stand-alone office or guest cottage, for a hot tub/spa and/or swimming pool, for stock water, and for landscape irrigation. Annual diversions from the existing Dawson aquifer well shall be limited to 1.0 acre foot (325,851 gallons) annually. If the Property is subdivided into 13 or fewer lots, each Dawson aquifer well shall be limited to pumping a total of 1.0 acre feet per year. If 14 or 15 lots are created, the well associated with current permit 238092 will continue to be allowed to pump 1.0 acre feet per year, but annual Dawson aquifer pumping on the remaining lots shall be reduced to 0.97 acre feet for the remaining wells in a 14 lot subdivision, and to 0.9 acre foot annually for the remaining wells in a 15 lot subdivision. Dawson aquifer pumping under this plan for augmentation will be limited to a maximum of 13.6 acre feet annually, and 4,081 acre feet total, and may be further limited pursuant to the provisions of paragraph 15.B.

13. Applicants estimate that water for indoor uses will be 0.30 acre feet annually for each house. Disposal of water used indoors for the single family dwellings shall be by nonevaporative septic tanks and leach fields. Consumption of water used for indoor uses and so disposed of will be no more than 10 percent of diversions, creating annual septic system return flows of approximately 0.27 acre foot per dwelling. Because stream depletions which occur during the 300 year pumping period will all be replaced by septic system return flows, as described in the following paragraph, and provided that well pumping is limited in accordance with the terms and conditions of this decree, Applicants use of the remainder of the allowed annual pumping amounts from the Dawson aquifer wells does not need to be restricted as to type or place of use in order to prevent injury to the owners of or persons entitled to divert water under vested or conditionally decreed water rights.

14. Replacement of depletions during pumping. Applicants shall replace all depletions which occur both during and after cessation of pumping to the South Platte River or its tributaries ("South Platte system"). Based on assumed constant annual pumping of 13.6 acre feet annually over a 300 year pumping period, the State Engineer's computer model indicates that in the 300<sup>th</sup> year of pumping, annual stream depletions caused by pumping the Dawson aquifer will reach a maximum of 22.24 percent of pumping, or 3.02 acre feet. Such depletions shall be replaced with septic system return flows. Septic system return flows will always equal or exceed the depletions during the anticipated 300 year pumping period.

15. Replacement of post-pumping depletions.

A. Duration of replacements. Unless modified by the Court under its retained jurisdiction, Applicants shall replace the actual depletions caused by pumping the Dawson aquifer well that impact the stream system after pumping ceases. The Court finds that this requirement is adequate to comply with existing law and to prevent injury to others.

B. Amount of replacements. To determine the post-pumping replacement obligation, after the earliest of the three following events have occurred, 300 years of pumping from the year of entry of this decree (whether or not 4,081 acre feet have been pumped), or if ten consecutive years have passed with no pumping from any of the Dawson aquifer wells, or when Applicants or their successors acknowledge in writing that all withdrawals for beneficial use from the Dawson aquifer

wells have permanently ceased, then Applicants or their successors shall at that time cause a depletion analysis to be conducted, using the best information and computer model available at that time, to calculate the amount and timing of post-pumping depletions which must be replaced, based on actual withdrawals over the applicable pumping period. That amount of water shall then be pumped at the appropriate times from the Denver aquifer as decreed herein, or from such other source of water as receives judicial approval after notice, and delivered to the South Platte River system in a manner that will adequately replace all depletions from pumping of the Dawson aquifer wells listed in this decree or any replacement or additional wells constructed on the Property. Applicants' successors in interest shall be required by the terms of this decree to construct a Denver 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 replacement obligation is modified or terminated pursuant to ¶ 15.A. above.

C. Reservation of Denver aquifer water. Applicants shall reserve and dedicate to this plan for augmentation all 3,706 acre feet of their Denver aquifer water decreed herein for the purpose of replacing to the South Platte River system all post-pumping depletions. Taking into account the two percent relinquishment requirement amount for nontributary water, and the fact that depletions of approximately 449 acre feet will occur during the projected 300 year pumping period, this amount is adequate to replace post-pumping depletions of approximately 3,632 acre feet under the maximum pumping scenario of 13.6 acre feet annually, as described in paragraph 14 above. If at some time the court determines that replacement of post-pumping depletions is no longer required pursuant to paragraph 15.A. above, or if Applicants receive judicial approval to use a different water source for augmentation purposes, Applicants may petition the Court under retained jurisdiction to modify or terminate the reservation. Unless and until the reservation is modified by the Court, the reserved Denver aquifer water shall be appurtenant to the Property and its use shall be limited as described herein.

D. No limitation on amendments to augmentation plan in future. Based on the maximum allowable Dawson aquifer pumping of 13.6 acre feet annually, at the end of 300 years of pumping there will still be water remaining in the Dawson aquifer underlying the Property. Though all of the water decreed herein in the Denver aquifer will be needed to replace post-pumping depletions under this plan, Applicants' successors may at that time own other water rights in the Arapahoe or Laramie-Fox Hills aquifers, or both, and other sources of augmentation water presumably will be available. Nothing herein is intended to preclude Applicants' successors from amending this plan for augmentation or seeking a new one, after appropriate notice and all other legal requisites at that time, to pump the remaining Dawson aquifer water, and to arrange to replace post-pumping depletions with some or all of the Arapahoe or Laramie-Fox Hills aquifer water which was not reserved herein for that purpose, or any other suitable source of augmentation water.

16. All septic and irrigation return flows are dedicated to this plan for augmentation, and shall not be sold, leased or otherwise used for any other purpose. Such return flows are necessary to provide an adequate source of water to replace stream depletions during the pumping period under the plan for augmentation as decreed. Accordingly, the Dawson aquifer ground water described in the plan for augmentation may be withdrawn and used so long as: (1) a Dawson aquifer well provides water to each single family dwelling on the Property for indoor residential use (to ensure maintenance of septic system return flows); (2) the Dawson aquifer well withdrawals are limited as described in paragraph 12; (3) the State Engineer has approved the uses to be made and such uses are not inconsistent with this decree and the plan for augmentation approved herein, or any modified decree and plan; and (4) replacement of post-pumping depletions is made in accordance with the requirements of this decree or any modified decree.

17. Prior to implementation of this decree, Applicants shall create and record restrictive covenants requiring Applicants and their successors to use a nonevaporative septic system for wastewater disposal, and which inform subsequent purchasers of the requirements of this decree and plan for augmentation, including the requirement to construct a Denver aquifer well or take other measures as necessary to replace 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 from the State Engineer's office to curtail pumping of one or more 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 will reveal to all future purchasers of 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 water court approval after notice in the water resume and publication in a newspaper of general circulation in El Paso County.

18. As reasonably required by the Division Engineer, but no less frequently than annually, Applicants shall determine the prior year's pumping amounts and report those pumping amounts to the Division Engineer. If annual reporting is required, the measurement shall be taken on October 31 of each year, or as close thereto as practicable, and the report shall be sent to the Division Engineer no later than November 30 of the same year.

19. 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

20. The foregoing Findings of Fact are incorporated herein as part of these Conclusions of Law.

21. Applicants' application in this case is contemplated and authorized by law. See C.R.S. § 37-90-137(9)(c).

22. The Water Court has exclusive subject matter jurisdiction over this case pursuant to C.R.S. § 37-92-203 (1), and has personal jurisdiction over every person who could have appeared herein through publication of adequate notice. *In re Water Rights of Columbine Associates*, 993 P.2d 483 (Colo. 2000).

22. All conditions precedent to the granting of this decree have been performed.

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. Applicants have complied with all the conditions of C.R.S. §37-92-305(3), (8) and all other relevant statutes.

24. Applicants can maintain dominion and control over the septic system return flows by determining the quantity of such return flows, as set forth above, and thus have 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

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

26. Adjudication of Denver Basin water rights.

A. Applicants are awarded a vested right to the ground water from the Dawson aquifer underlying the Property, in the annual amount of 4,960 acre feet, subject to modification by the Court under its retained jurisdiction. Subject to the augmentation requirements and 300 year pumping limitation set forth in this decree, Applicants have the right to withdraw and use 4,081 acre feet of the Dawson aquifer water. The remaining Dawson aquifer water is not included in the augmentation plan approved in this decree and shall not be withdrawn for any purposes unless and until this decree is amended to allow such withdrawal and use, or a separate plan for augmentation authorizing the water's withdrawal and use has been decreed.

B. Applicants are awarded a vested right to the ground water from the Denver aquifer underlying the Property, in the annual amount of 3,706 acre feet, subject to modification by the Court under its retained jurisdiction. As a term and condition of this decree, Applicants have reserved all of the Denver aquifer ground water decreed herein for the purpose of replacing depletions pursuant to the approved plan for augmentation. Subject to the 98 percent consumption limitation contained in C.R.S. § 37-90-137 (9)(b) and Rule 8, 2 CCR 402-6, the Denver aquifer ground water so reserved may only be used for augmentation and replacement purposes unless and until the Court has modified the reservation herein under its retained jurisdiction. If a modification is made, use of the water for the additional uses authorized in this decree may be made as allowed by the Court.

C. Applicants are awarded a vested right to the ground water from the Arapahoe aquifer underlying the Property, in the annual amount of 1,632 acre feet, subject to modification by the Court under its retained jurisdiction. At least two percent of the Arapahoe aquifer water shall not be consumed by Applicants, but instead must be returned to the South Platte River system. Such relinquishment may occur after a first use which consumes no more than 98 percent of the water pumped.

D. Applicants are awarded a vested right to the ground water from the Laramie-Fox Hills aquifer underlying the Property, in the annual amount of 1,200 acre feet, subject to modification by the Court under its retained jurisdiction. At least two percent of the water pumped from the Laramie-Fox Hills aquifer may not be consumed by Applicants, but instead must be returned to the Monument Creek drainage. Such relinquishment may occur after a first use which consumes no more than 98 percent of the water pumped.

E. The water rights so decreed are vested water rights, and no applications for findings of diligence are required. 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 Applicants need not refile, republish, or otherwise amend this decree to request or obtain such adjustment.

27. The plan for augmentation described herein is approved. Depletions caused by pumping

water from the Dawson aquifer shall be replaced as provided and decreed herein. Annual withdrawals from the Dawson aquifer shall not exceed 13.6 acre feet annually, or 4,081 acre feet total, under this plan for augmentation. The State or Division Engineer shall curtail the pumping of more than these amounts from the Dawson aquifer wells absent prior modification of this plan for augmentation by amendment of this decree or court approval of an additional plan for augmentation which replaces depletions attributable to such additional pumping. The State Engineer shall also curtail all diversions, the depletions from which are not replaced in a manner to prevent injury to vested water rights or decreed conditional water rights. To ensure that depletions during the pumping period are being replaced, pumping and use of a Dawson aquifer well for any beneficial uses other than indoor residential use shall not be allowed unless ground water is also being pumped and used for indoor residential uses.

28. Because the Dawson aquifer water may be pumped only pursuant to a court-approved plan for augmentation, and because all of the water in the Denver aquifer is reserved for use as an augmentation supply for the replacement of post-pumping depletions in the plan for augmentation approved herein, the "water banking" provision of 2 CCR 402-7, Rule 8.A, does not apply to those water rights. However, in regard to the Arapahoe and Laramie-Fox Hills aquifers, the allowed annual amount of withdrawal may exceed the allowed average annual amount of withdrawal as long as the total volume of water withdrawn from the well or wells does not exceed the product of the number of years since the date of issuance of this decree, multiplied by the allowed average annual amount of withdrawal (16.3 acre feet annually for the unreserved Arapahoe aquifer water, and 12.0 acre feet annually for the Laramie-Fox Hills aquifer water).

29. Within 60 days after entry of this decree, Applicants shall apply for a new well permit for the existing Dawson aquifer well permit no. 238092, which must be consistent with the provisions of this decree. The State Engineer shall issue a new permit for such well, or for any other well applied for on the Property, consistent with the terms of this decree and all applicable statutes and rules, provided that the State Engineer shall identify the specific uses which can be made of the ground water to be withdrawn, and shall not be required to issue a permit for any proposed use, which use the State Engineer determines to be speculative at the time of the application, or which would be inconsistent with the requirements of this decree and the plan for augmentation approved herein, or any modified decree and plan. If the average allowed annual amounts decreed herein are adjusted by the Court, Applicants shall obtain, as necessary, new well permits to reflect the adjusted amounts.

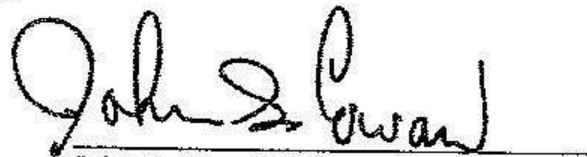
30. All new wells on the Property must be constructed pursuant to applicable Colorado laws and regulations of the Division of Water Resources. Each well must be equipped with a totalizing flow meter. All wells shall be cased so as to prevent withdrawal of water from more than one aquifer. The State Engineer may require new wells to be geophysically logged.

31. Pursuant to C.R.S. § 37-92-304(6), the Court retains jurisdiction over the plan for augmentation decreed herein for a period of five years from the date of entry of this decree 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.

32. The Court shall retain jurisdiction for so long as Applicants are required to replace depletions to the South Platte River system, to determine whether the replacement of all depletions to the South Platte River system, and none to the Arkansas River system, is causing material injury to water rights tributary to the Arkansas River. Any person may invoke the Court's retained jurisdiction at any time Applicants are causing depletions (including ongoing post-pumping depletions) to the Arkansas River system, and are replacing such depletions to the South Platte River system. The person invoking the Court's retained jurisdiction shall have the burden of establishing a *prima facie* case that Applicants' 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. Applicants 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 Applicants replace depletions to the Arkansas River system.

33. The Court also retains jurisdiction for the purposes of determining compliance with the terms of the augmentation plan, and to reconsider the post-pumping depletion replacement obligation for the Dawson aquifer withdrawals and the reservation of the Denver aquifer ground water. 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, 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: August 17, 2011

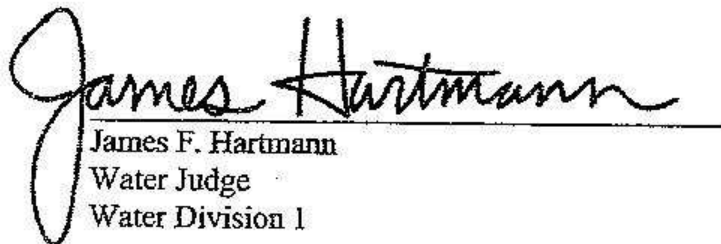


John S. Cowan  
Water Referee  
Water Division No. 1

This document was e-filed pursuant to C.R.C.P. 121 §1-16. A printable version of the electronically signed document is available in the court's electronic file.

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

Dated: September 8, 2011



James F. Hartmann  
Water Judge  
Water Division 1



