

ROBERT C. "BOB" BALINK El Paso County, CO
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DISTRICT COURT, WATER DIVISION NO. 2 PUEBLO COUNTY, COLORADO Pueblo County Judicial Bldg., 320 W. 10 th Street, Pueblo, Colorado 81003	FILED IN THE OFFICE OF THE CLERK, DISTRICT COURT WATER DIV. NO. 2 STATE OF COLORADO JUN 17 2005 CLERK COURT USE ONLY
Concerning the Application for Water Rights of: HARRY J. STUDER In the Arkansas River or its tributaries In El Paso County	
	Consolidated Case Nos. 04CW61 and 04CW189
FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE	

FINDINGS OF FACT

I. Jurisdictional Facts.

1. The applicant in this case is Harry J. Studer, 2715 West 119th Avenue, Westminster, CO 80234; his phone number is 303-650-9582.
2. The application in this case was filed on July 29th, 2004 in Water Divisions 1 and 2. The application was published in the resumes for Water Division 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 no liens or encumbrances of record against the property, which is the subject of this application. Thus, the notice requirements of C.R.S. § 37-92-302(b) are inapplicable.
4. A timely Statement of Opposition was 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. Upon the Applicant's motion, the applications were consolidated in Water Division

2 by order of the Supreme Court dated February 8, 2005.

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 land beneath which the water is sought to be adjudicated ("Property") consists of 15.28 acres owned by Applicant. The Property is located in the NE1/4 Section 33, T. 11 S., R. 66 W., 6th P.M.; the legal description of the Property is attached as Exhibit A. A location map showing the location of the Property is attached hereto as Figure 1.

8. The amount of water underlying the Property which is initially determined to be available for appropriation, as shown on Table I below, is taken from the State Engineer's Determination of Facts reports dated September 16, 2004. The Court will retain jurisdiction pursuant to § 37-92-305(11) to finally determine the amount of water available for appropriation from all the aquifers, based on site-specific data when they become 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

<u>Aquifer</u>	<u>Acreage</u>	<u>Specific Yield</u>	<u>Saturated Thickness (ft)</u>	<u>Total Storage (AF)</u>	<u>Annual Diversion (AF)</u>
Dawson	15.28	.20	310	947	9.47
Denver	15.28	.17	530	1,380	13.80
Arapahoe	15.28	.17	225	584	5.84
Laramie- FH	15.28	.15	190	435	4.35

9. The base of the Dawson aquifer is approximately 750 feet beneath the ground surface. The water in the Dawson aquifer in this location is not nontributary; judicial approval of a plan for augmentation which replaces actual depletions to the extent necessary to prevent injury is

required to pump this water. The bases of the Denver and Arapahoe aquifers are approximately 1,530 feet and 2,130 feet, respectively, beneath the ground surface. The Denver and Arapahoe aquifers in this location are not nontributary and are located more than one mile from any natural surface stream, including its alluvium; judicial approval of a plan for augmentation which replaces to the surface stream system four percent of the water pumped on an annual basis is a prerequisite to the withdrawal of water from the Denver and Arapahoe aquifers. Water in the Laramie-Fox Hills aquifer, the base of which is estimated to be located 2,880 feet below the surface, is nontributary. No more than 98 percent of the water withdrawn from the Laramie-Fox Hills aquifer may be consumed.

10. Applicant will withdraw water from the Dawson aquifer from three wells, one of which is currently constructed and permitted as exempt well 141281. After entry of this decree, it will be re-permitted as a fee well and operated pursuant to 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 his full decreed amounts. Such wells may be constructed at any location on the Property, provided, however, that no wells may be located within 100 feet of the property boundary nor within 600 feet of another well in the same aquifer unless permission 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.

11. The water rights decreed herein are decreed for indoor residential and commercial uses, swimming pools and hot tubs, landscaping including irrigation and water "amenities" such as decorative pools and fountains, livestock water, fire protection and augmentation.

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 three Dawson aquifer wells on the

Property. Applicant's present intention is to subdivide the Property into three lots, and to have one Dawson aquifer well on each lot. Annual diversions from each of the Dawson aquifer wells shall not exceed 0.53 acre foot (172,700 gallons) annually. 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 foot annually per 1,000 square feet (2.0 acre feet per acre), and livestock watering will require 0.011 acre foot per horse per year (10 gallons per head per day).

13. Water Consumption. Disposal of water used indoors for the single family dwellings or commercial uses 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. Water used for residential landscape irrigation will be no more than 85 percent consumptive. Water used for livestock watering is totally consumed.

14. Replacement of depletions during pumping. Applicant shall replace all depletions to the Arkansas River or its tributaries (Arkansas River system). Based on assumed constant annual pumping over a 300 year pumping period, the State Engineer's "DA02" computer model indicates that during pumping, the rate of depletions will reach a maximum of 22.73 percent of pumping in the 300th year. If it is assumed that the maximum allowable amount of annual pumping under this augmentation plan, 1.59 acre feet annually, is achieved each year, depletions in the 300th year will equal 0.36 acre foot. Applicant's septic system return flows will be used to replace such depletions. Annual septic return flows from three single family dwellings, based on use of 0.27 acre foot annually in each house, will equal 0.73 acre foot annually, which exceeds annual depletions during each year of the entire pumping period.

15. Replacement of post-pumping depletions.

A. Applicant agrees 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 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 all parties in this case proves that he 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 477 acre feet of water have been pumped from any combination of the three 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; or when a period of ten consecutive years have occurred wherein no withdrawals of groundwater have occurred through the Dawson aquifer wells. When any one of those events has occurred, Applicant's 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. That amount of water shall then be pumped at the appropriate times from the Laramie-Fox Hills aquifer as decreed herein, or from such other source of water as receives judicial approval after notice, and delivered to the Arkansas 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 Dawson aquifer wells constructed on the Property. Applicant's successors in interest shall be required by the terms of this decree 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 ¶ 15.A. above.

C. Reservation of Laramie-Fox Hills aquifer water. Applicant shall reserve and dedicate to this plan for augmentation all 435 acre feet of its Laramie-Fox Hills aquifer water decreed herein for the purpose of replacing to the Arkansas River system all post-pumping depletions. If at some time replacement of post-pumping depletions is no longer required pursuant to ¶ 15.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.

Dedication of 435 acre feet of Laramie-Fox Hills aquifer water is adequate to replace depletions caused by pumping 477 acre feet of Dawson aquifer water. Based on assumed pumping of 1.59 acre feet annually from the Dawson aquifer, or 477 acre feet total, it is determined that 57 acre feet of depletions will occur during the pumping period, resulting in 420 acre feet of post-pumping depletions. Consumption of nontributary Laramie-Fox Hills aquifer water is limited to 98 percent of diversions. Multiplication of the 435 acre foot figure by 0.98 yields a product of 426 acre feet, which is more than the 420 acre feet of post-pumping depletions.

16. As demonstrated in the preceding paragraphs, based on total pumping of 1.59 acre feet annually and septic return flows of 90% from three residences, return flows from septic systems

alone will always equal or exceed the required augmentation requirement during pumping. Accordingly, so long as there are three single family dwellings on the Property, it is only necessary to restrict annual diversions from each of the three wells Dawson aquifer wells to no more than 0.53 acre foot annually, and not to otherwise restrict the types of water uses from these wells. However, any use of water for purposes other than those decreed herein shall require a court-approved change of water rights.

17. Applicant shall create restrictive covenants upon and running with the Property, which shall obligate the owners of the three lots to be subdivided from the Property to limit pumping of each Denver aquifer well to 0.53 acre foot (172,700 gallons) annually, to use nonevaporative septic systems for wastewater disposal, and to carry out all requirements of this decree, including the possible construction of a Laramie-Fox Hills aquifer well, if necessary for the replacement of post-pumping depletions. Said covenants shall indicate clearly that failure of any property owner to comply with the terms of this decree may result in an order of the Division Engineer's office to curtail pumping of that person'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 this decree, the restrictive covenants, and the well construction obligation associated with this plan for augmentation. Said covenants shall be amended as necessary to conform to the provisions of any amendment to this augmentation plan.

18. 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.

19. Each well is required to be equipped with a properly installed totalizing flow meter. Each well owner shall measure his annual ground water withdrawals on October 31 of each year, or

as close thereto as practicable, and shall submit that information to the homeowners association to be established by Applicant. The homeowners association shall be responsible for reporting annual pumping amounts for each well to the Water Commissioner in November of each year. A form that has been approved by the Division Engineer is attached as Exhibit B. If any individual well owner fails to read his meter and report the reading to the homeowners association, an authorized representative of the homeowners association shall have the authority to go onto the individual's land for the sole purpose of reading the meter. The Division Engineer has the discretion to require reporting of diversion records more frequently than annually.

20. Subsequent to the issuance of the Division Engineer's Consultation Report, the Division Engineer agreed with Applicant that annual diversions from each Dawson aquifer well should be limited to 0.53 acre foot rather than 0.47 acre foot. This decree satisfies all of the Division Engineer's other concerns as set forth in the Consultation Report.

21. 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.

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.

CONCLUSIONS OF LAW

23. 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.

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

25. 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 requirements 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 complied with all the conditions of C.R.S. § 37-92-305(8) and all other relevant statutes.

26. Applicant has maintained dominion and control over their 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. v. Willows Water District, 856 P.2d 829 (Colo. 1993).

JUDGMENT AND DECREE

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

28. 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.

29. The "water banking" provisions in Rule 8.A., 2 CCR 401-7 (Statewide Nontributary Ground Water Rules) shall not apply to this case; except that if at any time Applicant is no longer required to reserve the Laramie-Fox Hills aquifer water for augmenting depletions caused by pumping the Dawson aquifer water decreed herein, then the allowed annual amount of withdrawal from the Laramie-Fox Hills aquifer may exceed the allowed average annual amount of withdrawal as

long as the total volume of water withdrawn from that aquifer does not exceed the product of the number of years since the entry of this decree by the water court, multiplied by the allowed average annual amount of withdrawal.

30. The wells must be constructed pursuant to applicable regulations of the Division of Water Resources. Each well must be equipped with a properly equipped and maintained totalizing flow meter. Applicant must submit diversion records to the Division Engineer or his representative as established in ¶ 19. All wells shall be cased so as to prevent withdrawal of water from more than one aquifer. At least one well in each aquifer 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. Within 90 days after entry of this decree, Applicant shall file with the State Engineer a well permit application for the existing exempt Dawson aquifer well. The State Engineer shall cancel well permit 141281 for the existing exempt Dawson aquifer well, and shall issue a new well permit for that well, and for any other wells sought to be permitted pursuant to the decree in this case, in accordance with C.R.S. § 37-90-137(4) and/or (10) and in accordance with the decree entered herein. 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 with the terms and conditions no more burdensome than those contained herein.

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

32. 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. Annual water usage from each of the three Dawson aquifer wells

shall not exceed 0.53 acre foot (172,700 gallons) annually. The State or Division Engineer shall curtail the pumping of more than that amount from the Dawson aquifer 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 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. Pursuant to C.R.S. § 37-92-304(6), the Court 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 shall retain jurisdiction for so long as Applicant is required to replace depletions to the Arkansas River 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 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 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.

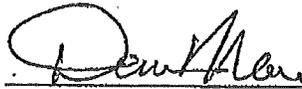
34. The Court also retains jurisdiction for the purposes of determining compliance with the terms of the augmentation plan. Any person seeking to invoke the retained jurisdiction of the Court pursuant to this paragraph shall file a verified petition with the Court. The petition to invoke retained jurisdiction 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 24th day of May 2005.


Mardell R. DiDomenico
Water Referee, Water Division 2

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 this 17 day of June 2005.



Dennis Maes
Water Judge, Water Division 2

DISTRICT COURT
WATER DIVISION NO. 2
STATE OF COLORADO

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

Dated: June 27, 2005

APPROVED AS TO FORM:

MacDougall, Woldridge & Worley, P.C.

Anderson, Dude & Lebel, P.C.

DiDomenico
CLERK

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