

<b>DISTRICT COURT, WATER DIVISION 1, CO</b>	
Court Address: 901 9 <sup>th</sup> Avenue, P.O. Box 2038 Greeley, CO 80632 Phone Number: (970) 475-2540	DATE FILED: March 9, 2023 10:55 AM CASE NUMBER: 2021CW3202
<b>CONCERNING THE APPLICATION FOR WATER RIGHTS OF:</b>	<b>▲ COURT USE ONLY ▲</b>
<b>MARK E. MCDONALD AND AMANDA M. ENLOE</b>	Case No.: 21CW3202
<b>IN EL PASO COUNTY</b>	
<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF REFEREE AND DECREE</b>	

THIS MATTER comes before the Water Referee on the Application filed by Mark E. McDonald and Amanda M. Enloe on November 29, 2021. Having reviewed said application and other pleadings on file, and being fully advised on this matter, the Water Referee makes the following findings and orders:

### FINDINGS OF FACT

1. The Applicants this case are Mark E. McDonald and Amanda M. Enloe whose address is 5775 Mountain Shadow View, Colorado Springs, CO 80908 ("Applicants"). Applicants are the owners of the land totaling approximately 36 acres on which the structures sought to be adjudicated herein are and will be located, and are the owners of the place of use where the water will be put to beneficial use.

2. The Applicants filed this Application with the Water Courts for both Water Division 1 and Water Division 2 on November 29, 2021. The Application was referred to the Water Referees in both Divisions 1 and 2 on or about November 30, 2021.

3. The time for filing statements of opposition to the Application expired on the last day of January 2022. A Statement of Opposition was timely filed by Cherokee Metropolitan District on January 12, 2022 in Water Division 2.

4. On November 30, 2021, Applicant filed a motion requesting that publication be made only in El Paso County by Water Division 1. On that same day, the Water Court, Division 2 ordered that publication occur only within El Paso County.

5. The Clerk of this Court has caused publication of the Application filed in this matter as provided by statute and the publication costs have been paid. On December

Mark McDonald, et al.  
21CW3202  
Page 2 of 17

21, 2021, proof of publication in *The Transcript* was filed with the Division 1 Water Court. All notices of the application have been given in the manner required by law.

6. In accordance with the notice requirements of C.R.S. § 37-92-302, lienholders of the Applicants' property were sent a Letter of Notice dated December 13, 2021. A Certificate of Notice was filed with the Court on December 27, 2021.

7. A Motion for Consolidation of the Division 1 and Division 2 cases into Water Division 1 was filed with the Colorado Supreme Court on February 3, 2022. The Panel on Consolidated Multidistrict Litigation certified the Motion for Consolidation to the Chief Justice on February 14, 2022. Chief Justice, Brian D. Boatright, granted the Motion for Consolidation by Order dated March 17, 2022.

8. On October 24, 2022, a stipulation between the Applicants and Cherokee Metropolitan District was filed with the Division 1 Water Court. By Order dated October 24, 2022, the Division 1 Water Court approved such stipulation.

9. Pursuant to C.R.S. §37-92-302(2), the Office of the State Engineer has filed Determination of Facts for each aquifer with this Court on January 27, 2022.

10. Pursuant to C.R.S. §37-92-302(4), the office of the Division Engineer for Water Division No. 1 filed its Summary of Consultation Report dated February 28, 2022, and a Response to Consultation Report was filed on May 31, 2022. The Water Referee has considered the Summary of Consultation Report and the Response in the entry of this Ruling.

11. The Water Court has jurisdiction over the subject matter of these proceedings and over all who have standing to appear as parties whether they have appeared or not. The land and water rights involved in this case are not within a designated groundwater basin.

## GROUNDWATER RIGHTS

12. The Applicants requested the adjudication of underground water rights for the McDonald Wells Nos. 1 through 3, as constructed and as may be constructed to the Dawson aquifer, and additional or replacement wells associated therewith, for withdrawal of Applicants' full entitlements of supply under the plan for augmentation decreed herein. The following findings are made with respect to such underground water rights:

13. The land overlying the groundwater subject to the adjudication in this case is owned by the Applicants and consists of approximately 36 acres located in the E½ SE¼ of Section 24, Township 11 South, Range 66 West of the 6<sup>th</sup> P.M., and more particularly described as 5775 Mountain Shadow View, Colorado Springs, CO 80908, El Paso County, Colorado and depicted on the attached **Exhibit A** map ("Applicants'

Property"). Applicants intend to subdivide the Applicants' Property into up to three (3) lots. All groundwater adjudicated herein shall be withdrawn from the overlying land.

14. **McDonald Wells Nos. 1 through 3:** The McDonald Wells Nos. 1 through 3 are and will be located on the Applicants' Property. The McDonald Well Nos. 2 and 3 may only be constructed within the two portions of Applicant's Property depicted as Proposed Well Parcel Locations on the attached **Exhibit A**. The McDonald Well No. 1 is currently permitted and constructed as an exempt well pursuant to C.R.S. §37-92-602 under Well Permit No. 209839 which must be re-permitted upon entry of this decree. Applicants are awarded the vested right to use the McDonald Wells Nos. 1 through 3, along with any necessary replacement wells associated with such structures located as shown on **Exhibit A**, for the extraction and use of groundwater from the not-nontributary Dawson aquifer pursuant to the Plan for Augmentation decreed herein. All wells will be located on the subject property. Upon entry of this decree and submittal by the Applicants of complete well permit applications and filing fees, the State Engineer shall be bound by this decree in issuing new well permits for the McDonald Wells Nos. 1 through 3, pursuant to C.R.S. §37-90-137(4), consistent with and references to the Plan for Augmentation decreed herein.

15. Of the statutorily described Denver Basin aquifers, the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers all exist beneath the Applicants' Property. The Dawson aquifer underlying the Applicants' Property contains not-nontributary water as defined in §37-90-103(10.7), while the water of the Denver, Arapahoe, and Laramie-Fox Hills aquifers underlying the Applicants' Property is nontributary as defined in §37-90-103(10.5). The quantity of water in the Denver Basin aquifers exclusive of artificial recharge underlying the Applicants' Property is as follows:

AQUIFER	Net Sand (Feet)	Annual Average Withdrawal 100 Years (Acre Feet)	Annual Average Withdrawal 300 Years (Acre Feet)	Total Withdrawal (Acre Feet)
Dawson (NNT)	490	35.3	11.76	3,530 <sup>1</sup>
Denver (NT)	520	31.8	10.6	3,180
Arapahoe (NT)	235	14.4	4.8	1,440
Laramie-Fox Hills (NT)	200	10.8	3.6	1,080

16. Pursuant to C.R.S. §37-90-137(9)(c.5)(I), the augmentation requirements for wells in the Dawson aquifer require the replacement to the effected stream systems of actual stream depletions on an annual basis, to the extent necessary to prevent injurious effect, based upon actual aquifer conditions. Applicants shall not be entitled to construct a well or use water from the not-nontributary Dawson aquifer except pursuant

<sup>1</sup> This amount requires the existing well with Permit No. 209839 to be cancelled and re-permitted as a non-exempt well in accordance with the augmentation plan decreed herein.

Mark McDonald, et al.  
21CW3202  
Page 4 of 17

to an approved augmentation plan in accordance with C.R.S. §37-90-137(9)(c.5), including as decreed herein as concerns the Dawson aquifer.

17. Applicants shall be entitled to withdraw all legally available groundwater in the Denver Basin aquifers underlying Applicants' Property, subject to Paragraphs 21 and 42 herein. Said amounts can be withdrawn over the 300-year life of the aquifers as set forth in El Paso County, Colorado Land Development Code §8.4.7(C)(1) which requirements also satisfy the 100-year life for the aquifers as set forth in C.R.S. §37-90-137(4), or withdrawn over a longer period of time based upon local governmental regulations or Applicants' water needs, provided that withdrawals during such longer period are in compliance with the augmentation requirements of this decree. The average annual amounts of ground water available for withdrawal from the underlying Denver Basin aquifers, based upon both the 100-year and 300-year aquifer life is determined and set forth above, based upon the January 27, 2022 Office of the State Engineer Determination of Facts.

18. Subject to the terms and conditions in the plan for augmentation decreed herein and final approval by the State Engineer's Office pursuant to the issuance of well permits in accordance with C.R.S. §§37-90-137(4) or 37-90-137(10), the Applicants shall have the right to use the ground water for beneficial uses upon the Applicants' Property consisting of domestic, irrigation, domestic animal and stock watering, equestrian facilities, agricultural, commercial, fire protection, recreation, and also for storage and augmentation associated with such uses. The amount of groundwater decreed for such uses upon the Applicants' Property is reasonable as such uses are to be made for the long-term use and enjoyment of the Applicants' Property and is to establish and provide for adequate water reserves. The nontributary groundwater, excepting such water reserved for post pumping depletions in the Plan for Augmentation decreed herein, may be used, reused, and successively used to extinction, both on and off the Applicants' Property subject, however, to the relinquishment of the right to consume two percent of such nontributary water withdrawn. Applicants may use such water by immediate application or by storage and subsequent application to the beneficial uses and purposes stated herein. Provided however, as set forth above, Applicants shall only be entitled to construct wells or use water from the not-nontributary Dawson aquifer pursuant to a decreed augmentation plan entered by the Court, including the plan for augmentation decreed herein.

19. Withdrawals of groundwater available from the nontributary aquifers beneath the Applicants' Property in the amounts determined in accordance with the provisions of this decree will not result in material injury to any other vested water rights or to any other owners or users of water.

### **PLAN FOR AUGMENTATION**

20. The structures to be augmented are the McDonald Wells Nos. 1 through 3

Mark McDonald, et al.  
21CW3202  
Page 5 of 17

as constructed and to be constructed to the not-nontributary Dawson aquifer underlying the Applicants' Property, along with any additional or replacement wells associated therewith.

21. Pursuant to C.R.S. §37-90-137(9)(c.5), the augmentation obligation for the McDonald Wells Nos. 1 through 3, and any additional or replacement wells constructed to the Dawson aquifer requires the replacement of actual stream depletions to the extent necessary to prevent any injurious effect. The water rights to be used for augmentation during pumping are the septic return flows of the not-nontributary McDonald Wells Nos. 1 through 3 to be pumped as set forth in this plan for augmentation. The water rights to be used for augmentation after pumping are a reserved portion of Applicants' nontributary water rights in the Arapahoe and Laramie-Fox Hills aquifers. Applicants shall provide for the augmentation of stream depletions caused by pumping the McDonald Wells Nos. 1 through 3 as approved herein. Water use criteria as follows:

A. Operations: The McDonald Wells Nos. 2 and 3 may each pump a maximum of 1.0 acre-feet per year per lot, and the McDonald Well No. 1 may pump a maximum of up to 3.8 acre-feet per year, for a maximum total of 5.8 acre-feet being withdrawn from the Dawson aquifer annually, on full build out.

i. McDonald Well No. 1. The McDonald Well No. 1 will initially pump up to 1.5 acre-feet annually for in-house uses inside a single-family dwelling and guest house (0.30 acre-feet of water annually), and for irrigation of lawn, garden, pasture, and greenhouse, and the watering of domestic animals and livestock on the lot. Upon completion of construction of the commercial equestrian facility, the McDonald Well No. 1 will pump an additional 2.3 acre-feet (for a total of 3.8 acre-feet) annually, of which 1.0 acre-feet will be dedicated for use within a commercial equestrian facility for washing, cleaning, animal bathing, dust control, and other sanitary needs for the facility. The remaining additional 1.3 acre-feet will be used for other permitted uses as described in Paragraph 18, including irrigation of pasture and stock watering.

ii. McDonald Wells Nos. 2 and 3. The McDonald Wells Nos. 2 and 3 may each pump 1.0 acre-feet annually, or a combined total of 2.0 annual acre-feet, for in-house use inside a single-family dwelling and guest house of 0.30 acre-feet of water per year per lot, with the additional 0.70 acre-feet per year per lot available for irrigation of lawn, garden, and greenhouse, and the watering of up to four horses and eight chickens or equivalent livestock and poultry on each lot. The McDonald Wells Nos. 2 and 3 may only be constructed on the two portions of Applicants' Property depicted as Proposed Well Locations on the attached **Exhibit A**.

B. Depletions: Maximum stream depletions over the 300-year pumping period for the Dawson aquifer will amount to approximately 22.4% of pumping. Prior to completion of the equestrian facility construction, maximum annual depletions for total pumping from the McDonald Wells Nos. 1 through 3 will amount to 0.784 acre-feet in year 300 (being 22.4% of 3.5 annual acre-feet). Following construction of the commercial

Mark McDonald, et al.  
21CW3202  
Page 6 of 17

equestrian facility, maximum annual depletions for total pumping from the McDonald Wells Nos. 1 through 3 are 1.29 acre-feet in year 300 (being 22.4% of 5.8 annual acre-feet).

C. Augmentation of Depletions During Pumping Life of Wells: Pursuant to C.R.S. §37-90-137(9)(c.5), Applicants are required to replace actual stream depletions attributable to pumping of the three not-nontributary Dawson aquifer wells. Depletions during pumping will be effectively replaced by residential and commercial return flows from non-evaporative septic systems, both before and after completion of the commercial equestrian facility. The annual consumptive use for non-evaporative septic systems is 10% per year per residence. At the household use rate of 0.30 acre-feet per lot per year, total of 0.9 acre-feet, 0.81 acre-feet is replaced to the stream system per year, utilizing residential non-evaporative septic systems. The annual consumptive use of the equestrian facility utilizing a non-evaporative septic system is 50% per year. At an annual use rate of 1.0 acre-foot for the equestrian facility, 0.50 acre-feet is replaced to the stream system per year, resulting in total replacements from all non-evaporative septic systems of 1.31 acre-feet annually, adequately replacing maximum depletions of 1.29 acre-feet from pumping a combined total of 5.8 acre-feet from the McDonald Wells Nos. 1 through 3. Thus, during pumping, stream depletions will be adequately augmented. Applicants shall separately measure the equestrian facility uses and the Applicants may be reasonably required to demonstrate periodically to the Division Engineer that 50% of the water used for the equestrian facility is returning to the stream system. Return flows from the uses of the water that are estimated rather than measured may be used only to replace depletions under this plan for augmentation, and may not be used, sold, traded, or assigned in whole or in part for any other purpose.

D. Augmentation of Post Pumping Depletions: This plan for augmentation shall have a pumping period of 300 years. For the replacement of any injurious post-pumping depletions which may be associated with the use of the McDonald Wells Nos. 1 through 3, Applicants will reserve up to 696 acre-feet of the nontributary Arapahoe aquifer, and the entirety of the Laramie Fox Hills aquifer (1,080 acre-feet), accounting for actual stream depletions replaced during the plan pumping period, as necessary to replace injurious post pumping depletions. The amount of nontributary groundwater reserved may be reduced through this Court's retained jurisdiction as described in this decree. If the Court, by order, reduces the Applicants' obligation to account for and replace such post-pumping depletions for any reason, it may also reduce the amount of Arapahoe and Laramie-Fox Hills groundwater reserved for such purposes, as described herein. Applicants also reserve the right to substitute other legally available augmentation sources for such post pumping depletions upon further approval of the Court under its retained jurisdiction. Even though this reservation is made, under the Court's retained jurisdiction, Applicants reserve the right in the future to prove that post pumping depletions will be noninjurious. Pursuant to C.R.S. §37-90-137(9)(b), no more than 98% of water withdrawn annually from a nontributary aquifer shall be consumed. The reservation of 696 acre-feet from the Arapahoe aquifer and 1,080 acre-feet from the Laramie-Fox Hills aquifer results in approximately 1740.48 acre-feet of available post-

Mark McDonald, et al.  
21CW3202  
Page 7 of 17

pumping augmentation water, which will be sufficient to replace post-pumping depletions based on total pumping of 5.8 annual acre-feet from the Dawson aquifer annually. Upon entry of a decree in this case, the Applicants will be entitled to apply for well permits for the McDonald Wells Nos. 1 through 3 for the uses described herein and in accordance with this decree and otherwise in compliance with C.R.S. §37-90-137. The State Engineer shall be bound by this decree and C.R.S. §37-90-137(4) in issuing new well permits for the McDonald Wells Nos. 1 through 3.

22. Because depletions occur to both the South Platte and Arkansas River systems under the State's groundwater flow model, the Application in this case was filed in both Water Divisions 1 and 2. The return flows set forth above as the augmentation source during the pumping period will accrue to only the South Platte River system where most of the depletions will occur and where the Applicants' Property is located. Under this augmentation plan, the total amount of depletions will be replaced to the South Platte River system as set forth herein and shown on **Exhibit B**, and the Court finds that those replacements are sufficient under this augmentation plan subject to Paragraphs 40-44 herein. Applicant must provide accounting as required by the State Engineer or Division Engineer. Such accounting must include the amount of water pumped by each Denver Basin well, the annual depletion, the amount of replacement water provided by each replacement source, the net impact on the stream and any other information reasonably required by the Division Engineer to properly administer the decree.

23. A certified copy of this decree shall be recorded in the real estate records of El Paso County and shall constitute a covenant running with Applicants' Property, benefitting and burdening said land, requiring Applicants to construct a well(s) to the nontributary Arapahoe and Laramie-Fox Hills aquifers, and requiring Applicants to pump water to replace any injurious post-pumping depletions under this decree. Subject to the requirements of this decree, in order to determine the amount and timing of post-pumping replacement obligations, if any, under this augmentation plan, Applicants or their successors shall use information commonly used by the Colorado Division of Water Resources for augmentation plans of this type at the time. Pursuant to this covenant, the water from the nontributary Arapahoe and Laramie-Fox Hills aquifers reserved herein may not be severed in ownership from the overlying subject property. This covenant shall be for the benefit of, and enforceable by, third parties owning vested water rights who would be materially injured by the failure to provide for the replacement of post-pumping depletions under the decree, and shall be specifically enforceable by such third parties against the owner of the Applicants' Property.

24. Applicants' real property covenants for Applicants' Property shall also include a requirement that any Dawson aquifer well(s) shall be drilled and completed as close as reasonably possible to the bottom of the Dawson aquifer. Applicants shall provide copies of said covenants to the Division Engineer for Water Division No. 1 prior to initiation of the plan for augmentation decreed herein, and shall also furnish copies to the Opposer upon such a request.

Mark McDonald, et al.

21CW3202

Page 8 of 17

25. Applicants or their successors shall be required to initiate pumping from the Arapahoe or Laramie-Fox Hills aquifers for the replacement of post-pumping depletions when either: (i) the absolute total amount of water available from the Dawson aquifer allowed to be withdrawn under the plan for augmentation decreed herein (1,740 acre-feet) has been pumped; (ii) the Applicant or its successors in interest have acknowledged in writing that all withdrawals for beneficial use through the McDonald Well Nos. 1 through 3 have permanently ceased, or (iii) a period of 10 consecutive years where either no withdrawals of groundwater has occurred. Until such time as the post pumping depletions begin the Applicant or their successors must continue to replace during pumping depletions to the stream system using return flows, by pumping water directly to the stream system to replace such depletions or using another approved replacement source.

26. Unless modified by the Court under its retained jurisdiction, Applicants and their successors shall be responsible for accounting and replacement of post-pumping depletions as set forth herein. Should Applicants' obligation hereunder to account for and replace such post-pumping stream depletions be reduced or abrogated for any reason, Applicant may petition the Court to also modify or terminate the reservation of the Arapahoe and Laramie-Fox Hills aquifers groundwater.

27. The term of this augmentation plan is for a period of 300 years, however, the length of the plan for a particular well or wells may be extended beyond such time provided the total plan pumping allocated to such well or wells has not actually been pumped, all terms in this paragraph are met, and the amendment to the augmentation plan decreed herein is approved by the Court. Should the actual operation of this augmentation plan depart from the planned diversions described in Paragraph 21 such that the planned annual diversions have not been pumped, the Applicants may prepare and submit a revised model of stream depletions caused by the actual pumping or intended schedule. This analysis must utilize depletion modeling acceptable to the State Engineer, and to this Court, and must represent the water use under the plan for the entire term of the plan to date. The analysis must show that return flows have equaled or exceeded actual stream depletions throughout the pumping period and that reserved nontributary water remains sufficient to replace post-pumping depletions. If the revised depletion modeling is acceptable to the State Engineer, this Court may approve the amendment to this plan for the extension of this augmentation plan past the 300-year minimum.

28. Consideration has been given to the depletions from Applicants' use and proposed uses of water, in quantity, time and location, together with the amount and timing of augmentation water which will be provided by the Applicants, and the existence, if any, injury to any owner of or person entitled to use water under a vested water right.

29. It is determined that the timing, quantity and location of replacement water under the protective terms in this decree are sufficient to protect the vested rights of other water users and eliminate material injury thereto. The replacement water shall be of a quantity and quality so as to meet the requirements for which the water of senior



Mark McDonald, et al.  
21CW3202  
Page 9 of 17

appropriators has normally been used, and provided of such quality, such replacement water shall be accepted by the senior appropriators for substitution for water derived by the exercise of the McDonald Well Nos. 1 through 3. As a result of the operation of this plan for augmentation, the depletions from the McDonald Well Nos. 1 through 3 and any additional or replacement wells associated therewith will not result in material injury to the vested water rights of others.

### CONCLUSIONS OF LAW

30. The application for Adjudication of Denver Basin Groundwater and Plan for Augmentation was filed with the Water Clerk for Water Divisions 1 and 2, pursuant to C.R.S. §§37-92-302(1)(a) and 37-90-137(9)(c.5). These cases were properly consolidated before Water Division 1.

31. The Applicants' request for adjudication of these water rights is contemplated and authorized by law, and this Court and the Water Referee have exclusive jurisdiction over these proceedings pursuant C.R.S. §§37-92-302(1)(a), 37-92-203, and 37-92-305.

32. Subject to the terms of this decree, the Applicants are entitled to the sole right to withdraw all the legally available water in the Denver Basin aquifers underlying the Applicants' Property, and the right to use that water to the exclusion of all others.

33. The Applicants have complied with C.R.S. §37-90-137(4), and the groundwater is legally available for withdrawal by the requested nontributary well(s), and legally available for withdrawal by the requested not-nontributary well(s) upon the entry of this decree approving an augmentation plan pursuant to C.R.S. §37-90-137(9)(c.5). Applicants are entitled to a decree from this Court confirming its rights to withdraw groundwater pursuant to C.R.S. §37-90-137(4).

34. The Denver Basin water rights applied for in this case are not conditional water rights, but are vested water rights determined pursuant to C.R.S. §37-90-137(4). No applications for diligence are required. The claims for nontributary and not-nontributary groundwater meet the requirements of Colorado Law.

35. The determination and quantification of the nontributary and not-nontributary groundwater rights in the Denver Basin aquifers as set forth herein is contemplated and authorized by law pursuant to C.R.S. §§37-90-137, and 37-92-302 through 37-92-305.

36. The Applicants' request for Adjudication of Denver Basin Groundwater Rights and Plan for Augmentation is contemplated and authorized by law. If administered in accordance with this decree, this revised plan for augmentation will permit the uninterrupted diversions from the McDonald Wells Nos. 1 through 3 without adversely affecting any other vested water rights in the Arkansas River and South Platte River or its

Mark McDonald, et al.  
21CW3202  
Page 10 of 17

tributaries and when curtailment would otherwise be required to meet a valid senior call for water pursuant to C.R.S. §§37-92-305(3),(5), and (8).

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

37. All of the foregoing Findings of Fact and Conclusions of Law are incorporated herein by reference and are considered to be a part of this decretal portion as though set forth in full.

38. The Plan for Augmentation proposed by the Applicants is approved, subject to the terms of this decree.

A. Applicants are awarded a vested right to the entire 3,530 acre-feet of groundwater from the not-nontributary Dawson aquifer underlying Applicants' Property, as quantified in Paragraph 15 or as modified by the Court under its retained jurisdiction. Of the total 3,530 acre-feet, 1,740 acre-feet may be pumped pursuant to the plan for augmentation decreed herein.

B. Applicants are awarded a vested right to 3,180 acre-feet of groundwater from the nontributary Denver aquifer underlying Applicants' Property, as quantified in Paragraph 15 or as modified by the Court under its retained jurisdiction. Subject to the provisions of Rule 8 of the Denver Basin Rules, 2 CCR 402-6, limiting consumption to ninety-eight percent of the amount withdrawn, and the other terms and conditions of this decree, Applicants' Denver aquifer groundwater may be utilized for all purposes described in Paragraph 18.

C. Applicants are awarded a vested right to 1,440 acre-feet of groundwater from the nontributary Arapahoe aquifer underlying Applicants' Property, as quantified in Paragraph 15 or as modified by the Court under its retained jurisdiction. Subject to the provisions of Rule 8 of the Denver Basin Rules, 2 CCR 402-6, limiting consumption to ninety-eight percent of the amount withdrawn, and the other terms and conditions of this decree, Applicants' Arapahoe aquifer groundwater may be utilized for all purposes described in Paragraph 18, although a portion has been reserved for use in the plan for augmentation decreed herein consistent with Paragraph 21.D., above.

D. Applicants are awarded a vested right to 1,080 acre-feet of groundwater from the nontributary Laramie-Fox Hills aquifer underlying Applicants' Property, as quantified in Paragraph 15 or as modified by the Court under its retained jurisdiction. Subject to the provisions of Rule 8 of the Denver Basin Rules, 2 CCR 402-6, limiting consumption to ninety-eight percent of the amount withdrawn, and the other terms and conditions of this decree, Applicants' Laramie-Fox Hills aquifer groundwater may be utilized for all purposes described in Paragraph 18, although a portion has been reserved for use in the plan for augmentation decreed herein consistent with Paragraph 21.D., above.

Mark McDonald, et al.  
21CW3202  
Page 11 of 17

39. The Applicants have furnished acceptable proof as to all claims and, therefore, the Plan for Augmentation Application, as requested by the Applicants, is granted and approved in accordance with the terms and conditions of this decree. Approval of this Application will not result in any material injury to senior vested water rights.

40. The Applicants shall comply with C.R.S. §37-90-137(9)(b), requiring the relinquishment of the right to consume two percent (2%) of the amount of the nontributary groundwater withdrawn. Ninety-eight percent (98%) of the nontributary groundwater withdrawn may therefore be consumed. No plan for augmentation shall be required to provide for such relinquishment.

41. The McDonald Wells Nos. 1 through 3, and any replacement or additional wells, shall be operated such that combined pumping from all wells does not exceed the annual (5.8 acre-feet) and total (1,740 acre-feet) pumping limits for the Dawson aquifer as decreed herein, and is in accordance with the requirements of the plan for augmentation described herein. The State Engineer, the Division Engineer, and/or the Water Commissioner shall not curtail the diversion and use of water by the McDonald Wells Nos. 1 through 3 or any additional and replacement wells so long as the return flows from the annual diversions associated with the McDonald Wells Nos. 1 through 3 and such other wells accrue to the stream system and the wells operate pursuant to the conditions contained herein. To the extent that Applicants or one of their successors or assigns is ever unable to provide the replacement water required, then the McDonald Wells Nos. 1 through 3 and any additional or replacement wells shall not be entitled to operate under the protection of this plan, and shall be subject to administration and curtailment in accordance with the laws, rules, and regulations of the State of Colorado. Pursuant to C.R.S. §37-92-305(8), the State Engineer shall curtail all out-of-priority diversions which are not so replaced as to prevent injury to vested water rights. In order for this plan for augmentation to operate, return flows from the septic systems discussed herein shall at all times during pumping be in an amount sufficient to replace the amount of stream depletions. Applicants shall be required to have any wells pumping on the Applicants' Property providing water for in-house uses and generating septic system returns prior to pumping the wells for any of the other uses identified in Paragraphs 18 or 21.A prior to construction of the equestrian facility. After the equestrian facility is constructed, the Applicants shall be required to have any wells pumping on the Applicants' Property providing water for both in-house and commercial uses prior to pumping the wells for any of the other uses identified in Paragraphs 18 or 21.A. If depletion modeling has not been revised pursuant to Paragraph 27 above, the return flows from water use in equestrian facility must begin at such a time so that depletions shown on **Exhibit B** are adequately replaced. If for any reason, sufficient return flows are not available to replace the actual depletions as shown on **Exhibit B**, the Applicant must be required to pump water directly into the stream system in the amount that has not been replaced by return flows. If such water is withdrawn from the Dawson aquifer well(s) operated under the augmentation plan the amount of water being pumped from the well(s)

Mark McDonald, et al.  
21CW3202  
Page 12 of 17

for other purposes must be reduced so that the allowed annual withdrawal from the well(s) is not exceeded. Such replacement must be made prior to the irrigation season for the following year.

42. The Court retains jurisdiction over this matter to make adjustments in the allowed average annual amount of withdrawal from the Denver Basin aquifers, either upwards or downwards, to conform to actual local aquifer characteristics, and that the Applicants need not refile, republish, or otherwise amend this application to request such adjustments. The Court further retains jurisdiction should the Applicants later seek to amend this decree by seeking to prove that post-pumping depletions are noninjurious, that the extent of replacement for post-pumping depletions is less than the amount of water reserved herein, and other post-pumping matters addressed in Paragraph 21.D.

A. At such time as adequate data may be available, Applicants or the State Engineer may invoke the Court's retained jurisdiction as provided in this Paragraph 42 for purposes of making a final determination of water rights as to the quantities of water available and allowed average annual withdrawals from any of the Denver Basin aquifers quantified and adjudicated herein. Any person seeking to invoke the Court's retained jurisdiction for such purpose shall file a verified petition with the Court setting forth with particularity the factual basis for such final determination of Denver Basin water rights under this decree, together with the proposed decretal language to effect the petition. Within four months of the filing of such verified petition, the State Engineer's Office shall utilize such information as available to make a final determination of water rights finding, and shall provide such information to the Court, Applicants, and the petitioning party.

B. If no protest is filed with the Court to such findings by the State Engineer's Office within sixty (60) days, this Court shall incorporate by entry of an Amended Decree such "final determination of water rights", and the provisions of this Paragraph 42 concerning adjustments to the Denver Basin ground water rights based upon local aquifer conditions shall no longer be applicable. In the event of a protest being timely filed, or should the State Engineer's Office make no timely determination as provided in Paragraph 42.A., above, the "final determination of water rights" sought in the petition may be made by the Water Court after notice to all parties and following a full and fair hearing, including entry of an Amended Decree, if applicable in the Court's reasonable discretion.

43. Pursuant to C.R.S. §37-92-304(6), the Court shall retain continuing jurisdiction over the plan for augmentation decreed herein for reconsideration of the question of whether the provisions of this decree are necessary and/or sufficient to prevent injury to vested water rights of others, as pertains to the use of Denver Basin groundwater supplies adjudicated herein for augmentation purposes. The court also retains continuing jurisdiction for the purpose of determining compliance with the terms of the augmentation plan, including the requirement to construct a well in the Arapahoe and the Laramie-Fox Hills aquifers as described in Paragraph 25. The Court further retains jurisdiction should the Applicants later seek to amend this decree by seeking to

Mark McDonald, et al.  
21CW3202  
Page 13 of 17

prove that post-pumping depletions are noninjurious, that the extent of replacement for post-pumping depletions is less than the amount of water reserved herein, and other post-pumping matters addressed in Paragraph 21.D. The Court's retained jurisdiction may be invoked using the process set forth in Paragraph 42.

44. As pertains to the Denver Basin groundwater supplies, the Court shall retain continuing jurisdiction for so long as Applicants are required to replace depletions to the South Platte River system, to determine whether the replacement of depletions to the South Platte River system instead of the Arkansas River system is causing injury to water rights tributary to the Arkansas River system.

45. Any person seeking to invoke the Court's retained jurisdiction shall file a verified petition with the Court setting forth with particularity the factual basis for the alleged injury and to request that the Court reconsider injury to petitioners' vested water rights associated with the above replacement of depletions under this decree, together with the proposed decretal language to effect the petition. The party filing the petition shall have the burden of proof going forward to establish a prima facie case based on the facts alleged in the petition and that Applicants' failure to replace depletions to the Arkansas River system is causing injury to water rights owned by that party invoking the Court's retained jurisdiction, except that the State and Division Engineer 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 in the Arkansas River system due to the location of Applicants' replacement water. If the Court finds that those facts are established, the Applicants shall thereupon have the burden of proof to show (i) that petitioner is not injured, or (ii) that any modification sought by the petitioner is not required to avoid injury to the petitioner, or (iii) that any term or condition proposed by Applicants in response to the petition does avoid injury to the petitioner. The Division of Water Resources as a petitioner shall be entitled to assert injury to the vested water rights of others.

A. Opposer Cherokee Metropolitan District owns water rights that may be injured by the operation of this decree to the extent that depletions accruing to the Arkansas River system are not replaced to that system. Cherokee reserves the right to claim, under Paragraphs 42 through 45 above, that the cumulative impacts of this decree which do not require replacement to the Arkansas River basin has caused injury to its water rights.

46. Except as otherwise specifically provided in Paragraphs 42-45, above, pursuant to the provisions of C.R.S. §37-92-304(6), this plan for augmentation decreed herein shall be subject to the reconsideration of this Court on the question of injury to vested water rights for a period of five years from the date of entry of decree. Any person, within such period, may petition the Court to invoke its retained jurisdiction. Any person seeking to invoke the Court's retained jurisdiction shall file a verified petition with the Court setting forth with particularity the factual basis for requesting that the Court reconsider injury to petitioner's vested water rights associated with the operation of this decree,

Mark McDonald, et al.

21CW3202

Page 14 of 17

together with proposed decretal language to effect the petition. The party filing the petition shall have the burden of proof of going forward to establish a prima facie case based on the facts alleged in the petition. If the Court finds those facts are established, Applicants shall thereupon have the burden of proof to show: (i) that the petitioner is not injured, or (ii) that any modification sought by the petitioner is not required to avoid injury to the petitioner, or (iii) that any term or condition proposed by Applicants in response to the petition does avoid injury to the petitioner. The Division of Water Resources as a petitioner shall be entitled to assert injury to the vested water rights of others. If no such petition is filed within such period and the retained jurisdiction period is not extended by the Court in accordance with the provisions of the statute, this matter shall become final on the question of injury to vested water rights of others under its own terms, although the Court retains continuing jurisdiction as specifically provided in Paragraphs 42-45.

47. Pursuant to C.R.S. §37-92-502(5)(a), the Applicants shall install and maintain such water measurement devices and recording devices as are deemed necessary by the State Engineer or Division Engineers, and the same shall be installed and operated in accordance with instructions from said entities. Applicants are to install and maintain a totalizing flow meter on each of the McDonald Wells Nos. 1 through 3, or any additional or replacement wells associated therewith, and are required to include geophysical logging on each well. Applicants shall read and record their well meter readings on April 1<sup>st</sup> and November 1<sup>st</sup> of each year and shall submit their meter readings to the Water Commissioner by April 15<sup>th</sup> and November 15<sup>th</sup> of each year or more frequently as requested by the Water Commissioner.

48. The State Engineer, the Division Engineer, and/or the Water Commissioner shall not curtail the diversion and use of water covered by the McDonald Wells Nos. 1 through 3 so long as the return flows from the annual diversions associated with the McDonald Wells Nos. 1 through 3 accrue to the stream system and the wells operate pursuant to the conditions contained herein. To the extent that Applicants or one of their successors or assigns is ever unable to provide the replacement water required, then the McDonald Wells Nos. 1 through 3 shall not be entitled to operate under the protection of this plan, and shall be subject to administration and curtailment in accordance with the laws, rules, and regulation of the State of Colorado. Pursuant to C.R.S. §37-92-305(8), the State Engineer shall curtail all out-of-priority diversions which are not so replaced as to prevent injury to vested water rights. In order for this plan for augmentation to operate, return flows from the septic systems discussed herein, as appropriate, shall at all times during pumping be in an amount sufficient to replace the amount of stream depletions.

49. The vested water rights, water right structures, and plan for augmentation decreed herein shall be subject to all applicable administrative rules and regulations, as currently in place or as may in the future be promulgated, of the offices of Colorado State and Division Engineers for administration of such water rights, to the extent such rules and regulations are uniformly applicable to other similarly situated water rights and water users. McDonald Well No. 1 shall be permitted as a non-exempt structure under the plan for augmentation decreed herein. The State Engineer shall identify in any permits issued

Mark McDonald, et al.  
21CW3202  
Page 15 of 17

pursuant to this decree the specific uses which can be made of the groundwater to be withdrawn, and, to the extent the well permit application requests a use that has not been specifically identified in this decree, shall not issue a permit for any proposed use, which use the State Engineer determines to be speculative at the time of the well permit application or which would be inconsistent with the requirements of this decree, any separately decreed plan for augmentation, or any modified decree and augmentation plan.

50. The entire length of open bore holes shall be geophysically surveyed prior to casing and copies of the geophysical log submitted to the Division of Water Resources. Applicants may provide a geophysical log from an adjacent well or test hole, pursuant to Rule 9A of the Statewide Rules and acceptable to the State Engineer, which fully penetrates the aquifer, in satisfaction of the above requirement.

51. Wells constructed to withdraw the decreed groundwater may only withdraw groundwater from a single aquifer. A site-specific evaluation must be conducted with each well permit to identify the correct aquifer interval due to the varied elevations of the aquifers and surface topography.

52. Each well should be equipped with a properly installed and maintained totalizing flow meter, and the applicant may be required to submit diversion records to the division engineer or his representative on an annual basis or as otherwise requested by the division engineer.

53. The McDonald Wells Nos. 1 through 3, and any additional or replacement wells associated with such structures, shall be constructed in accordance with minimum well-spacing requirements promulgated by the State Engineer for wells in the Denver Basin aquifers, and shall be constructed within 600 feet of the locations identified on the attached **Exhibit A** map.

54. This Ruling of Referee, when entered as a decree of the Water Court, shall be recorded in the real property records of El Paso County, Colorado. Copies of this ruling shall be mailed as provided by statute.

Dated: February 14, 2023

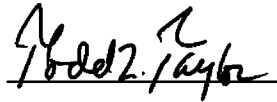


John Cowan  
Water Referee  
Water Division One

Mark McDonald, et al.  
21CW3202  
Page 16 of 17

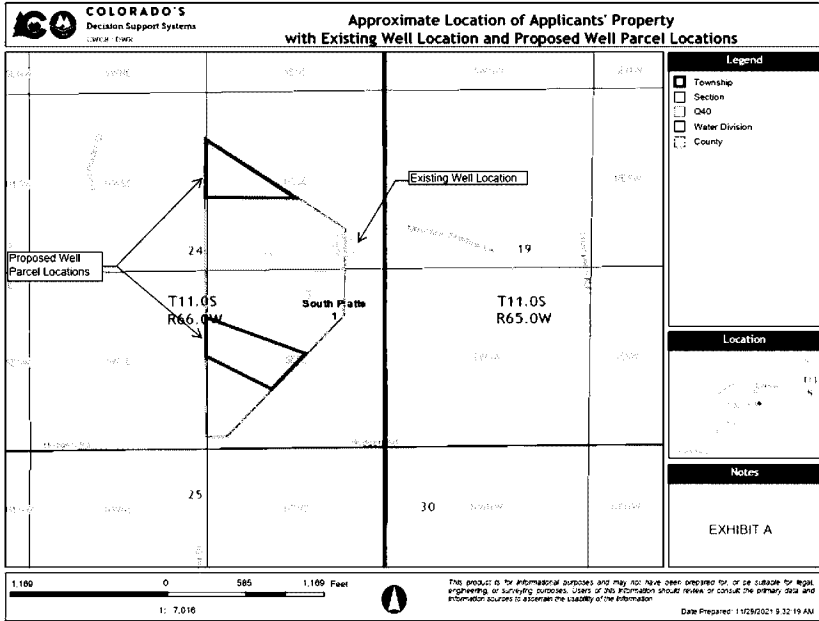
The Court finds that no protest was filed in this matter. The foregoing ruling is confirmed and approved and is made the judgment and decree of this Court.

Dated: March 9, 2023

A handwritten signature in black ink, appearing to read "Todd L. Taylor", written over a horizontal line.

Todd L. Taylor  
Water Judge  
Water Division One





Mark McDonald, et al.  
21CW3202

EXHIBIT A