

DISTRICT COURT, WATER DIVISION NO. 2,
COLORADO
501 N. Elizabeth Street, Suite 116
Pueblo, CO 81003
(719) 404-8832

CONCERNING THE APPLICATION FOR WATER
RIGHTS OF ACADEMY WATER AND SANITATION
DISTRICT

IN EL PASO COUNTY

DATE FILED: February 23, 2016 12:31 PM
CASE NUMBER: 2015CW3049

▲ COURT USE ONLY ▲

Case Number: 15CW3049

**FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING AND DECREE OF THE
COURT**

This matter has come before the Court upon the application of Academy Water and Sanitation District ("Applicant" or "District") (1) to amend the location of replacement water delivery in its decreed augmentation plan and (2) for an appropriative right of substitution and exchange. Having made such investigations as are necessary to determine whether or not the statements in the application are true, and being fully advised with respect to the subject matter of the application, the Referee enters the following findings of fact, conclusions of law, and ruling of the Court:

FINDINGS OF FACT

1. The application was filed with the Water Clerk for Water Division No. 2 on September 30, 2015. It was referred to the water court referee pursuant to C.R.S. § 37-92-203(7).
2. The name, mailing address, e-mail address, and telephone number of Applicant are:

Academy Water and Sanitation District ("District")
c/o Manager
1755 Spring Valley Drive
Colorado Springs, CO 80921
(719) 481-9869
manager@awsd.co

3. Timely and adequate notice of the application was given in the manner required by law. None of the land or water rights involved in the application are located in a designated groundwater basin. The Court has jurisdiction over the subject matter of this proceeding and over all persons who have standing to appear as parties, whether they have appeared or not.
4. No statements of opposition were filed. No person or entity has sought to intervene. The time for filing statements of opposition and motions to intervene has expired.
5. The Division Engineer filed a summary of consultation dated November 13, 2015. The Court has duly considered the summary of consultation pursuant to C.R.S. § 37-92-302(4).
6. Description of application: The District provides water and sewer service in an area encompassing approximately 315 acres on the western edge of the Black Forest area north of Colorado Springs, northeast of the United States Air Force Academy, and east of I-25. The District operates a central water system that obtains its supply from permitted and augmented wells, two of which pump from the alluvium of Smith Creek, and one of which pumps from the Dawson and Denver aquifers tributary to Smith Creek. The District also operates a central sewage collection system and treatment plant which discharges to Smith Creek. The discharge from the treatment plant consists of wastewater return flows ("Existing Wastewater Return Flows") resulting from use of the District's wells. The location of the discharge is in the reach of Smith Creek where depletions from the District's well pumping accrue.

The District has determined that its existing wastewater treatment facility will not be able to meet future water quality regulatory requirements. To address this problem, the District has reached a December 8, 2015 intergovernmental agreement ("IGA") with Donala Water and Sanitation District ("Donala"). Pursuant to the IGA, the District will connect to Donala's wastewater collection and conveyance system, and Donala will treat the District's wastewater at the Upper Monument Creek Regional Wastewater Treatment Facility ("UMCR WWTF"), thereby causing the District's wastewater return flows to be discharged to Monument Creek at a point upstream from its confluence with Smith Creek. This decree incorporates the proposed new location of replacement water delivery into the District's existing augmentation plan. The locations of the UMCR WWTF, the existing wastewater treatment facility, and the three wells are depicted on the attached Location Map which is incorporated herein by this reference.

7. Description of the District's existing augmentation plan:

- A. Decree information: The augmentation plan (“98CW110 Augmentation Plan”) was approved by the District Court, Water Division No. 2, in a decree entered on January 5, 2007, in Case No. 98CW110 (“98CW110 Decree”).
- B. Names of augmented structures: Well No. 1R (also known and referred to herein as Well No. 1) (Permit No. 68062-F, formerly Permit No. 6790-F-R); Well No. 2R (also known as Well No. 2-F-R, and referred to herein as Well No. 2) (Permit No. 10532-F-R); and Well No. 3 (Permit No. 6892-F).
- C. Other decrees for augmented structures: The original decree for Well Nos. 1 through 3 was entered in Case No. W-143 by the District Court, Water Division No. 2, on June 22, 1971. Pursuant to the decree entered by the same Court in Case No. 81CW124, the decreed location of Well No. 2 was changed to conform to its actual location. Subsequent diligence decrees were entered by the same Court in Case No. W-143-(73) on May 16, 1975; Case No. 79CW72 on December 23, 1981, *nunc pro tunc*, November 18, 1981; Case No. 85CW106 on September 5, 1986; Case No. 89CW73 on April 4, 1990; Case No. 96CW45 on October 30, 1996; Case No. 02CW152 on June 5, 2007; and Case No. 13CW3019 on November 22, 2013.
- D. Location:
- (1) Well No. 1: The presently permitted, actual location of Well No. 1 is in the southwest quarter of the northwest quarter of section 33, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado, approximately 1,410 feet from the north section line and 950 feet from the west section line. The decreed location (per Case No. W-143) is described as being in the northwest quarter of the northwest quarter of Section 33, Township 11 South, Range 66 West, 6th Principal Meridian, El Paso County, Colorado, beginning at the southwest corner of Lot 2, Block 2, Filing No. 2 of Pleasant View Estates, El Paso County, Colorado, thence 244 feet east, thence 577 feet south.
 - (2) Well No. 2: The presently permitted, actual location of Well No. 2 is in the southeast quarter of the northeast quarter of section 32, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado, approximately 1,770 feet from the north section line and 220 feet from the east section line. The decreed location (per Case No. 81CW124) is described as being in that portion of the northeast quarter of Section 32 and the northwest quarter of section 33, all in Township 11 South, Range 66 West, 6th Principal Meridian, in El Paso County, Colorado, beginning at the northeasterly corner of Lot 1, Block 4, Filing No. 2 of Pleasant

View Estates, El Paso County, Colorado, thence north 35 degrees, 28 minutes, 35 seconds, east, on Spring Valley Drive R.O.W. line 70.00 feet; thence south 54 degrees, 31 minutes, 25 seconds, east, 80.00 feet, thence south 35 degrees, 28 minutes, 35 seconds, west, 70.00 feet; thence south 71 degrees, 27 minutes, 02 seconds, west, 69.55 feet to a point on the easterly line of said Lot 1, Block 4, Pleasant View Estates, Filing No. 2; thence north 00 degrees, 39 minutes, 39 seconds, east, 68.56 feet to the point of beginning.

- (3) Well No. 3: The decree in W-143 describes the location of Well No. 3 as being in the northeast quarter of the northwest quarter of section 33, Township 11 South, Range 66 West, 6th Principal Meridian, in El Paso County, Colorado, beginning at the southwest corner of Lot 3, Block 2, Filing No. 1 of Pleasant View Estates, El Paso County, Colorado, thence west 189 feet, thence south 18 feet. The actual location of Well No. 3 is in the northwest quarter of the northwest quarter of section 33, Township 11 South, Range 66 West, 6th Principal Meridian, in El Paso County, Colorado, within 200 feet of said point beginning at the southwest corner of Lot 3, Block 2, Filing No. 1 of Pleasant View Estates, El Paso County, Colorado, thence west 189 feet, thence south 18 feet.

E. Amount:

- (1) Well No. 1: 50 gallons per minute ("gpm")/0.11 cubic feet per second ("cfs"), conditional, pursuant to the decree in Case No. W-143. Up to 100 gpm pursuant to Permit No. 68062-F and the 98CW110 Decree.
- (2) Well No. 2: 200 gpm/0.45 cfs, conditional, pursuant to the decree in Case No. W-143.
- (3) Well No. 3: 200 gpm/0.45 cfs, absolute, pursuant to the decree in Case No. W-143.
- (4) As clarified by this Court's decree in Case No. 13CW3019, the 98CW110 Decree incorrectly referred to Well No. 1's 50 gpm amount as being "absolute" and to Well No. 3's amount as being "conditional."

F. Source:

- (1) The source for all three wells is described in the decree in Case No. W-143 as "[g]roundwater from the underground aquifer in the drainage area

of Smith Creek which is tributary to Fountain Creek, which is tributary to the Arkansas River.” The sources are also described as follows:

- (2) Well Nos. 1 and 3: alluvium of Smith Creek, tributary to Monument Creek, tributary to Fountain Creek, tributary to the Arkansas River;
- (3) Well No. 2: ground water from the Dawson and Denver aquifers, tributary to Smith Creek, tributary to Monument Creek, tributary to Fountain Creek, tributary to the Arkansas River.

G. Appropriation dates:

- (1) Well No. 1: February 25, 1965;
- (2) Well No. 2: January 31, 1966;
- (3) Well No. 3: April 2, 1965.

H. Uses: municipal, domestic, fire protection, and augmentation pursuant to the terms and conditions of the W-143 and 98CW110 Decrees.

I. Augmentation source: The augmentation source is wastewater return flows resulting from use of the District’s wells as described in sections 8.B. and 8.C. of the 98CW110 Decree.

J. Statement of plan for augmentation: Pursuant to the 98CW110 Augmentation Plan, the District takes credit for its Existing Wastewater Return Flows as an offset against its well pumping depletions, and balances pumping of its two alluvial wells (Well Nos. 1 and 3) with the pumping of its deep, Dawson/Denver aquifer well (Well No. 2) in such a manner as to generate a stream accretion or a zero depletion net effect. The plan for augmentation is described in detail in sections 8.C. and 8.D. of the 98CW110 Decree.

8. Description of new location of delivery of replacement water: The District seeks the right to change the location where replacement water is delivered in the 98CW110 Augmentation Plan. Instead of the location on Smith Creek, where Existing Wastewater Return Flows are discharged, replacement water (“Future Wastewater Return Flows”) will be delivered at the UMCR WWTF’s point of discharge to Monument Creek, which point is in the southeast quarter of the southeast quarter of Section 35, Township 11 South, Range 67 West, 6th P.M., El Paso County, Colorado, and is depicted on the Location Map. The source of replacement water remains wastewater return flows resulting from use of the District’s wells, and the District will continue to own and

exercise dominion and control over such wastewater return flows. The 98CW110 Augmentation Plan with such changed location where replacement water is delivered is referred to herein as the "Modified 98CW110 Augmentation Plan." Except as modified herein, the terms and conditions of the 98CW110 Decree shall apply to the Modified 98CW110 Augmentation Plan.

9. The UMCR WWTF's point of discharge to Monument Creek is 2.1 miles above the confluence with Smith Creek. In order to continue balancing pumping of its two alluvial wells (Well Nos. 1 and 3) with the pumping of its deep, Dawson/Denver aquifer well (Well No. 2) and to take credit for its Future Wastewater Return Flows as an offset against the depletions from such pumping, the District shall account for losses resulting from transit of the Future Wastewater Return Flows from the UMCR WWTF discharge point to the confluence of Monument Creek with Smith Creek. To determine approximate transit losses, the District shall use a method consistent with the Fountain Creek Transit Loss Accounting Program as modified from time to time or a substitute model acceptable to the Division Engineer or approved by this Court. The District shall not obtain credit for its Future Wastewater Return Flows until the Division Engineer has approved the District's proposed method for determining transit losses.
10. Appropriative right of substitution and exchange: Since depletions from pumping the District's wells accrue to Smith Creek above its confluence with Monument Creek, the Modified 98CW110 Augmentation Plan involves a de facto exchange, and thus the District claims an appropriative right of substitution and exchange pursuant to Sections 37-80-120 and 37-92-302(1)(a), C.R.S. The reach of the exchange is on Smith Creek from its confluence with Monument Creek which is depicted on the Location Map and is in the southwest quarter of the northeast quarter of Section 12, Township 12 South, Range 67 West, 6th P.M., El Paso County, Colorado, to the most upstream point of the reach on Smith Creek where depletions from pumping Well No. 3 accrue, which point is depicted on the Location Map and is in the northwest quarter of the northwest quarter of Section 33, Township 11 South, Range 66 West, 6th P.M., El Paso County, Colorado. The date of appropriation of the substitution and exchange is September 30, 2015. The appropriation was initiated by the District's formation of the intent to appropriate followed by actions to further and give notice of the appropriation including, but not limited to, the filing of this application. The maximum rate of exchange is 0.2 cfs. The sources of substitute supply for the exchange are Future Wastewater Return Flows as described herein. The use is augmentation and replacement of the District's well pumping depletions.
11. Whenever the calling senior water right is located below the confluence of Monument Creek and Smith Creek, the Modified 98CW110 Augmentation Plan may be operated to respond to the call, and it shall not be necessary to exercise the District's appropriative right of substitution and exchange, though the District may exercise it under such

circumstances should it so choose in order to make the right absolute. There are no water rights in the exchange reach senior to the District's appropriative right of substitution and exchange.

12. Continued operations under 98CW110 Decree: The new location where replacement water will be delivered will not be implemented until the Future Wastewater Return Flows begin to be treated at the UMCR WWTF. The District may continue operating with its Existing Wastewater Return Flows under the 98CW110 Decree as necessary until treatment of the Future Wastewater Return Flows has been fully implemented and/or established at the UMCR WWTF.
13. As stated in section 7.D.(3), above, the actual location of Well No. 3 is in the northwest quarter of the northwest quarter, rather than the northeast quarter of the northwest quarter, of section 33, Township 11 South, Range 66 West, 6th Principal Meridian, in El Paso County, Colorado. C.R.S. § 37-92-305(3.6)(b)(II) provides that a "water right is deemed to be diverted at its decreed location and is not erroneously described if: . . . [w]ith respect to a groundwater diversion, the physical location of the point of diversion is within two hundred feet of the decreed location, unless the decree specifies a lesser distance for acceptable variation in location." The Court finds that Well No. 3 is within two hundred feet of the location described by the metes and bounds language in the W-143 decree, and therefore that the water right for Well No. 3 is deemed to be diverted at its decreed location and is not erroneously described. C.R.S. § 37-92-305(3.6). The Court finds further that Applicant gave adequate notice of the location of Well No. 3, that no material injury results from the difference in the actual quarter-quarter location and the quarter-quarter location described in the application and in the decrees in W-143 and 98CW110, and that no re-publication is required with respect to the actual quarter-quarter location. *City of Black Hawk v. City of Central*, 97 P.3d 951, 959-961 (Colo. 2004).

CONCLUSIONS OF LAW

14. The Court has exclusive jurisdiction over the subject matter of this proceeding pursuant to C.R.S. § 37-92-203, and over all persons and entities affected hereby, whether they have appeared or not.
15. Full and adequate notice of the claims adjudicated herein has been given in the manner required by law.
16. The application to amend the location where replacement water is delivered in the District's 98CW110 Augmentation Plan is in accordance with law and should be granted subject to the terms and conditions of this decree. The amendment of such location of replacement water delivery will not injuriously affect the owner of or persons entitled to

use water under a vested water right or a decreed conditional water right, if such amendment is operated in accordance with the terms and conditions of this decree.

17. The application for approval of the appropriative right of substitution and exchange described herein is in accordance with law and should be granted subject to the terms and conditions of this decree. Exercise of such appropriative right of substitution and exchange will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right, if such right of substitution and exchange is operated in accordance with the terms and conditions of this decree.
18. The District has demonstrated that it needs and that it can and will divert the waters that are the subject of the conditional exchange right described herein; that it can and will put such waters to beneficial use; and that it can and will complete the project with diligence and within a reasonable time as required by C.R.S. § 37-92-305(9)(b).
19. The District has demonstrated that it has maintained dominion and control over its wastewater return flows, through its continued intent to recapture them and its ability to distinguish them from other water in the stream. *Pub. Serv. Co. of Colo. v. Willows Water Dist.*, 856 P.2d 829, 833-35 (Colo. 1993). Dominion over water shall not be lost to the owner or user thereof by reason of use of a natural watercourse in the process of carrying such water to the place of its use or successive use. C.R.S. § 37-82-106(2).
20. The District has complied with all requirements and met all standards and burdens of proof, including but not limited to those described in Sections 37-80-120, 37-92-302, 37-92-304, and 37-92-305, C.R.S., and is therefore entitled to a decree approving the claims described herein.

RULING OF THE REFEREE AND DECREE OF THE COURT

21. The foregoing findings of fact and conclusions of law are incorporated by this reference and modified as necessary to constitute the ruling of the referee.
22. The Court hereby approves the amendment of the location where replacement water is delivered in the District's 98CW110 Augmentation Plan, subject to the terms and conditions of this decree.
23. The Court hereby approves the appropriative right of substitution and exchange claimed by the District, subject to the terms and conditions of this decree.
24. The terms and conditions of this decree are adequate to assure that operation of the Modified 98CW110 Augmentation Plan and exercise of the subject appropriative right of

substitution and exchange will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right.

25. To the extent not already in place, Applicant shall install and properly maintain adequate measuring devices acceptable to the State and/or Division Engineer as required for administration of the water rights decreed herein.
26. Applicant shall account for water diversions and deliveries pursuant to this decree on forms approved by the State and/or Division Engineer and shall provide such accounting forms to the State and/or Division Engineer as reasonably required.
27. Pursuant to C.R.S. § 37-92-305(8), the State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.
28. Pursuant to C.R.S. § 37-92-304(6), the Court retains jurisdiction over the amended portion of the plan for augmentation approved herein and over the appropriative right of substitution and exchange decreed herein for a period of two years after Future Wastewater Return Flows are first delivered at the UMCR WWTF's point of discharge to Monument Creek. The retained jurisdiction is for reconsideration of the question of whether the provisions of this decree are necessary or sufficient to prevent material injury to the vested water rights or decreed conditional water rights of others. Any person, within the two-year period, may petition the Court to invoke its retained jurisdiction. Any such petition shall state with particularity the factual basis for requesting that the Court reevaluate injury to vested water rights associated with the operation of this decree. Unless otherwise stated herein, the party lodging the petition shall have the burden of going forward to establish the 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 that (1) any modification sought by Applicant will avoid injury to other water rights; (2) any modification sought by the party lodging the petition is not required to avoid injury to other water rights; or (3) any term or condition proposed by Applicant in response to any petition does avoid injury to other water rights. Such petition shall be filed with the Court under the above caption and case number and shall be served on counsel of record for all parties who appeared herein. Any responses to the petition shall be filed with the Court within sixty-three (63) days of service of the petition. If no such petition is lodged within the two-year period, and if the retained jurisdiction period is not extended by the Court in accordance with the provisions of the statute, this decree shall become final under its own terms.
29. The priority granted herein for the appropriative right of substitution and exchange is based on the appropriation date confirmed herein and also on the filing of the application in this case in the year of 2015. Said priority shall be administered as having been filed

in 2015, and shall be junior to all water rights granted pursuant to applications filed in previous years. As between all water rights applied for in the same calendar year, priorities shall be determined by historical dates of appropriation and shall not be affected by the date of entry of decree.

30. The conditional appropriative right of substitution and exchange decreed herein is continued in full force and effect through February 28, 2022. If Applicant desires to maintain such conditional water right, an application for finding of reasonable diligence shall be filed on or before the last day of February 2022, or a showing made on or before such date that such conditional water right has become absolute by reason of the completion of the appropriation.

Dated this 1st day of February, 2016.



Mardell R. DiDomenico

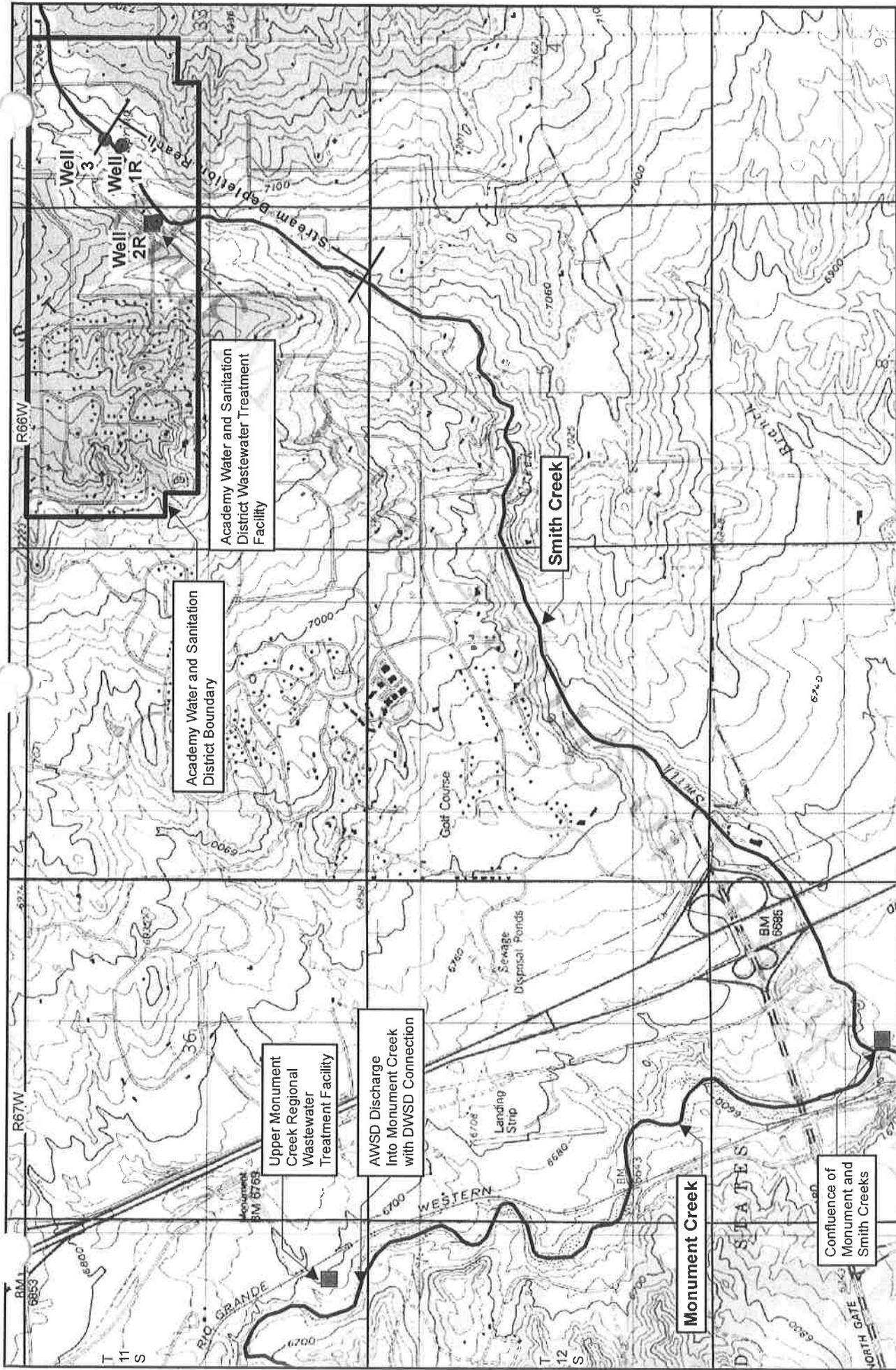
Mardell R. DiDomenico
Water Referee
Water Division No. 2

THE COURT DOTH FIND: NO PROTEST WAS FILED IN THIS MATTER. THE FOREGOING RULING IS CONFIRMED AND APPROVED AND IS HEREBY MADE THE JUDGMENT AND DECREE OF THIS COURT.

DATED: February 23, 2016.

BY THE COURT:

Larry C. Schwartz
LARRY C. SCHWARTZ, WATER JUDGE
WATER DIVISION 2



Academy Water and Sanitation District
Location Map
 HRS Water Consultants, Inc.
 September, 2015
 Job No. 94001-01
 Drawn By: MAS
 Location_Map.mxd

