

<p>DISTRICT COURT, WATER DIVISION 1, COLORADO</p> <p>Water Division 1 P.O. Box 2038 Greeley, CO 80632</p> <hr/> <p><b>BART AND MICHELLE ATKINSON AND PAUL THOMPSON, Applicants,</b></p> <p><b>IN EL PASO COUNTY.</b></p>	<p>EFILED Document – District Court 2008CW257 CO Weld County District Court 19th JD Filing Date: Oct 27 2010 4:43PM MDT Filing ID: 34055867</p> <p><b>COURT USE ONLY</b></p> <p>Case Number 08CW257 Division 12</p>
<p align="center"><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, JUDGMENT AND DECREE</b></p>	

This claim for approval of plan for augmentation was filed on November 26, 2008, and amended on February 27, 2009. All matters contained in the application having been reviewed, testimony having been taken where such testimony is necessary, and such corrections made as are indicated by the evidence presented herein, the following is hereby the Judgment and Decree of the Court:

FINDINGS OF FACT

1. Names and Addresses of Applicants:

Bart and Michelle Atkinson  
1632 Lyons Down Lane  
Monument, CO 80132

Paul Thompson  
19124 Baskerville Way  
Monument, CO 80132

2. Objections: A statement of opposition was filed by the City of Colorado Springs. No other statements of opposition were filed and the time for filing such statements has expired.

3. Subject matter jurisdiction: Timely and adequate notice of the application was published as required by statute, and the Court has jurisdiction over the subject matter of this proceeding and over the parties affected hereby, whether they have appeared or not.

4. Approval of plan for augmentation:

A. Groundwater to be augmented: Applicants Bart and Michelle Atkinson are owners of Lot 1, Kings Deer Highlands Subdivision Filing 4, which is generally located in the NW1/4SE1/4 and SW1/4NE1/4 of Section 5, T11S, R66W, and Applicant Paul Thompson is the owner of Lot 5, Kings Deer Highlands Subdivision Filing 6, which is generally located in the NE1/4 of the NW1/4 of Section 9, T11S, R66W, all as shown on Attachment A hereto. Lot 1 and 5 are each served by a not nontributary Dawson aquifer well as permitted in Well Permit No. 64262-F and 62334-F, respectively, for an annual withdrawal of 0.419 acre-feet per year and 419 acre-feet total pursuant to a decree in Consolidated Case Nos. 94CW49(A) and (B), Water Division 2, and 94CW144(A) and (B), District Court, Water Division 1. By this decree, an additional annual amount of 1 acre-foot and 100 acre-feet total of not nontributary Dawson aquifer groundwater may be withdrawn through each well pursuant to the original and corresponding decree, and additional terms and conditions herein. The one acre-foot per year to be withdrawn through each of the wells is also decreed in the case numbers described above. Applicants are owners of the additional one acre-foot per year of Dawson aquifer groundwater and an additional one acre-foot per year of nontributary Denver aquifer groundwater for use in this plan.

B. Water to be used for augmentation: Return flows from the use of not nontributary Dawson aquifer water and return flows and direct discharge of nontributary Denver aquifer groundwater as decreed Case No. 85CW230, District Court, Water Division 1.

C. Statement of Plan for Augmentation: The purpose of this augmentation plan is to supplement withdrawals from the not nontributary Dawson aquifer wells described above. In Consolidated Case Nos. 94CW49(A) and (B), Water Division 2, and 94CW144(A) and (B), District Court, Water Division 1, the augmentation plan approves the withdrawal 0.419 acre-feet per year for 300 years (0.27 for in-house use and 0.149 acre-feet for irrigation of 3000 square-feet of irrigated area). The additional 1 acre-foot per well will provide an additional 0.1 acre-foot for in-house use and 0.9 acre-feet for irrigation use of an additional 15,000 square feet of irrigated area, to supplement the 0.419 acre-feet per year approved in the prior augmentation plan. Some of the water will also be used in water features on the lots. Under this decree, Permit Nos. 64262-F and 62334-F shall be re-permitted to withdraw 1.419 acre-feet per year and 1419 acre-feet total, minus the total amount already withdrawn through said wells under the original augmentation plan. The lots utilize non-evaporative septic systems. Return flow from in-house use is approximately 90% of water used. The enlarged amounts to be withdrawn will be operated in combination with the augmentation plan previously approved and described above, except as provided for herein.

D. Replacement of Depletions During Pumping: As described in Consolidated Case Nos. 94CW49(A) and (B), Water Division 2, and 94CW144(A) and (B), District Court, Water Division 1, the total actual depletion caused by pumping of the total 1.419 acre-feet per year through the well located on Lot 1, Kings Deer Highlands Subdivision Filing 4, and the well located on Lot 5, Kings Deer Highlands Subdivision Filing 6, is 9.45% or 0.134 acre-feet in the 100<sup>th</sup> year of pumping, of which approximately 7.18% is to the South Platte River stream systems and 2.27% is to the Arkansas River stream systems. During pumping of the Dawson aquifer groundwater through each well described above for 100 years, annual septic return flow from

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each lot (based on 0.37 acre-feet of in-house use) is approximately 90% of said use or 0.33 acre-feet annually. Said return flow is in excess of the combined maximum annual depletion to the South Platte River and Arkansas River stream systems during pumping for 100 years, and such return flows are sufficient to replace actual depletions caused by pumping of the wells pursuant to Section 37-90-137(9)(c), C.R.S. Applicants do not have the physical ability to replace depletions to the Monument Creek stream system, but shall instead replace all such depletions to the Cherry Creek stream system.

E. Replacement of Post-pumping Depletions: Applicants agree to replace post-pumping depletions for the shortest of the following periods: the period provided by the Colorado Legislature, should it eventually specify one and if the Applicants obtain water court approval for such modification; the period determined by the State Engineer, should the State Engineer lawfully establish such a period; the period established through rulings of the Colorado Supreme Court on relevant cases; or until Applicants petition the water court and after notice to parties in the case and proves that it has complied with all statutory requirements. The court finds that the provisions of this paragraph are adequate to comply with existing law and to prevent injury to others. Post-pumping replacements for the first 0.419 acre foot per year and 125.7 acre feet over 300 years for each of Well Permit Nos. 64262-F and 62334-F, shall be made by the Kings Deer Homeowners Association, Inc. ("HOA"), as provided in the decree described in paragraph 4.D. above. For each well which is a subject of this plan for augmentation, Applicants shall reserve 100 acre feet of nontributary Denver aquifer groundwater decreed in Case No. 85CW230, District Court, Water Division 1, for the purpose of replacing to Cherry Creek all post-pumping depletions which exceed those to be replaced by the HOA. Nothing herein is intended to preclude Applicants, or their successors, from entering into an agreement with the HOA, wherein the HOA agrees to assume the obligation of replacing all post-pumping depletions associated with pumping the additional 100 acre feet over 100 years from each of Well Permit Nos. 64262-F and 62334-F pursuant to this decree. However, unless and until a binding agreement to that effect is filed with the court, the Applicants' successors shall remain responsible for replacing post-pumping depletions associated with the additional amounts pumped pursuant to this augmentation plan. After 100 years of pumping under this plan, the two wells currently permitted as Permit Nos. 64262-F and 62334-F shall be re-permitted to once again pump 0.419 acre feet annually for the remainder of their 300 years of permissible pumping. The Court retains continuing jurisdiction in this matter to determine of the supply of water to replace post-pumping depletions is adequate.

5. Failure of either the Applicants or successors and assigns to comply with the terms of the decree may result in an order of the Division Engineer's office to curtail or eliminate pumping of the well or wells. This decree shall be recorded in the real property records of El Paso County so that a title examination of the property, or any part thereof, shall reveal to all future purchasers the existence of this decree.

6. Administration of plan for augmentation:

A. By December 31<sup>st</sup> of each year, Applicants shall provide to the Division Engineer for Water Division 1 the annual amount withdrawn from the well on their lot for the previous year of pumping. The Applicants shall report their annual pumping to the King's Deer

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Homeowners Association, so the HOA will know and can fulfill its obligation to report to the Division Engineer how much water was pumped pursuant to Consolidated Case Nos. 94CW49 and 94CW144. The HOA will maintain all responsibility for accounting for and augmenting the first 0.419 acre-foot of annual pumping pursuant to Consolidated Case Nos. 94CW49 and 94CW144. Annual reporting to the HOA is the responsibility of the Applicants or successors and assigns and is subject to the terms and conditions of such reporting as described in the covenants for the subdivisions.

B. All withdrawals which are the subject of this decree shall be metered.

C. Pursuant to Section 37-92-305(8), C.R.S., 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.

7. Retained jurisdiction for plan for augmentation:

A. Pursuant to Section 37-92-304(6), C.R.S., the Court retains continuing 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 vested water rights of others. The Court also has jurisdiction for the purposes of determining compliance with the terms of the augmentation plan. Objector City of Colorado Springs owns senior water rights on Monument Creek that may be negatively impacted by the operation of this decree wherein depletions to Monument Creek will not be replaced to Monument Creek, but rather will be replaced to the Cherry Creek stream system. In addition, Colorado Springs reserves the right to claim that the cumulative negative impacts of this and other similar decrees constitutes injury to its senior Monument Creek rights. In the interest of settlement only, Colorado Springs consents to the entry of this decree. However, by doing so, Colorado Springs does not waive its right to claim injury and to seek relief in the future according to this paragraph.

B. Any person seeking to invoke the retained jurisdiction of the Court shall file a verified petition with the Court. The petition to invoke retained jurisdiction or to modify the Decree shall set forth with particularity the factual basis and the requested decretal language to effect the petition. The party lodging the petition shall have the burden of going forward to establish prima facie facts alleged in the petition. If the Court finds those facts to be established, Applicants shall thereupon have the burden of proof to show: (1) that any modification sought by Applicants will avoid injury to other appropriators, or (2) that any modification sought by Objector is not required to avoid injury to other appropriators, or (3) that any term or condition proposed by Applicants in response to the Objector's petition does avoid injury to other appropriators.

C. The Court retains jurisdiction for the purpose of determining whether the continued reservation of the nontributary water for use on the property is required. After notice to the State Engineer's Office, if Applicants can demonstrate to the Court that post-pumping depletions need no longer be replaced, the Court may remove the requirement that the nontributary water must be reserved.

## CONCLUSIONS OF LAW

8. The Water Court has jurisdiction over this proceeding pursuant to Section 37-90-137(6), C.R.S. This Court concludes as a matter of law that the application herein is one contemplated by law. Sections 37-90-137(4) and (9)(c). The withdrawal of the Dawson aquifer water in accordance with the terms of this decree will not result in material injury to vested water rights of others subject to the provisions of this decree.

9. This plan for augmentation satisfies the requirements of Section 37-90-137(9)(c), C.R.S., for replacement of actual depletions to the affected stream systems for withdrawals of the Dawson aquifer water.

10. Full and adequate notice of the application was given, and the Court has jurisdiction over the subject matter and over the parties whether they have appeared or not.

## JUDGMENT AND DECREE

The Findings of Fact and Conclusions of Law set forth above are hereby incorporated into the terms of this Judgment and Decree as if the same were fully set forth herein.

11. Applicants may withdraw the Dawson aquifer water under the plan for augmentation decreed herein pursuant to Section 37-90-137(9)(c), C.R.S.

12. Applicants have complied with all requirements and met all standards and burdens of proof, including but not limited to Sections 37-90-137(9)(c), 37-92-103(9), 37-92-302, 37-92-304(6), 37-92-305(1), (2), (3), (4), (6), (8), (9), C.R.S., to adjudicate this plan for augmentation and is therefor entitled to a decree confirming and approving this plan for augmentation as described in the findings of fact.

13. Pursuant to Section 37-92-305(5), C.R.S., the replacement water herein shall be of a quality so as to meet the requirements for which the water of the senior appropriator has normally used.

14. The proposed plan for augmentation as described in the findings of fact is hereby approved, confirmed, and adjudicated, including and subject to the terms and conditions specified herein.

15. No owners of or person entitled to use water under a vested water right or decreed conditional water right will be injured or injuriously affected by the operation of the plan for augmentation as decreed herein.

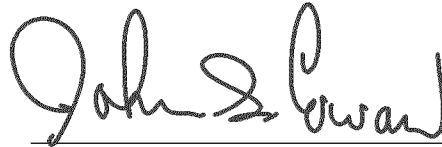
16. In considering applications for permits for wells to withdraw the groundwater which is the subject of this decree, the State Engineer shall be bound by this decree and shall issue said permits in accordance with terms of this decree.

17. Continuing Jurisdiction:

Pursuant to Section 37-92-304(6), C.R.S., the Court retains 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. The Court also retains continuing jurisdiction for the purpose of determining compliance with the terms of the augmentation plan.

18. After the Water Referee signed the Ruling on September 30, 2010, paragraph 4.A was amended to indicate that Lot 5, Kings Deer Highlands Subdivision Filing 6, is generally located in the NE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 9, T11S, R66W. Paragraph 4.D was amended to indicate that the annual septic return flow from each lot (based on 0.37 acre-feet of in-house use) is approximately 90% of said use or 0.33 acre-feet annually. The Water Referee finds that these amendments do not require that the protest period should be reopened.

Dated: October 21, 2010



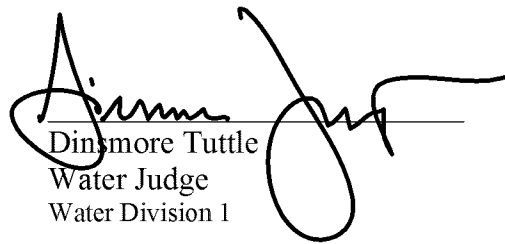
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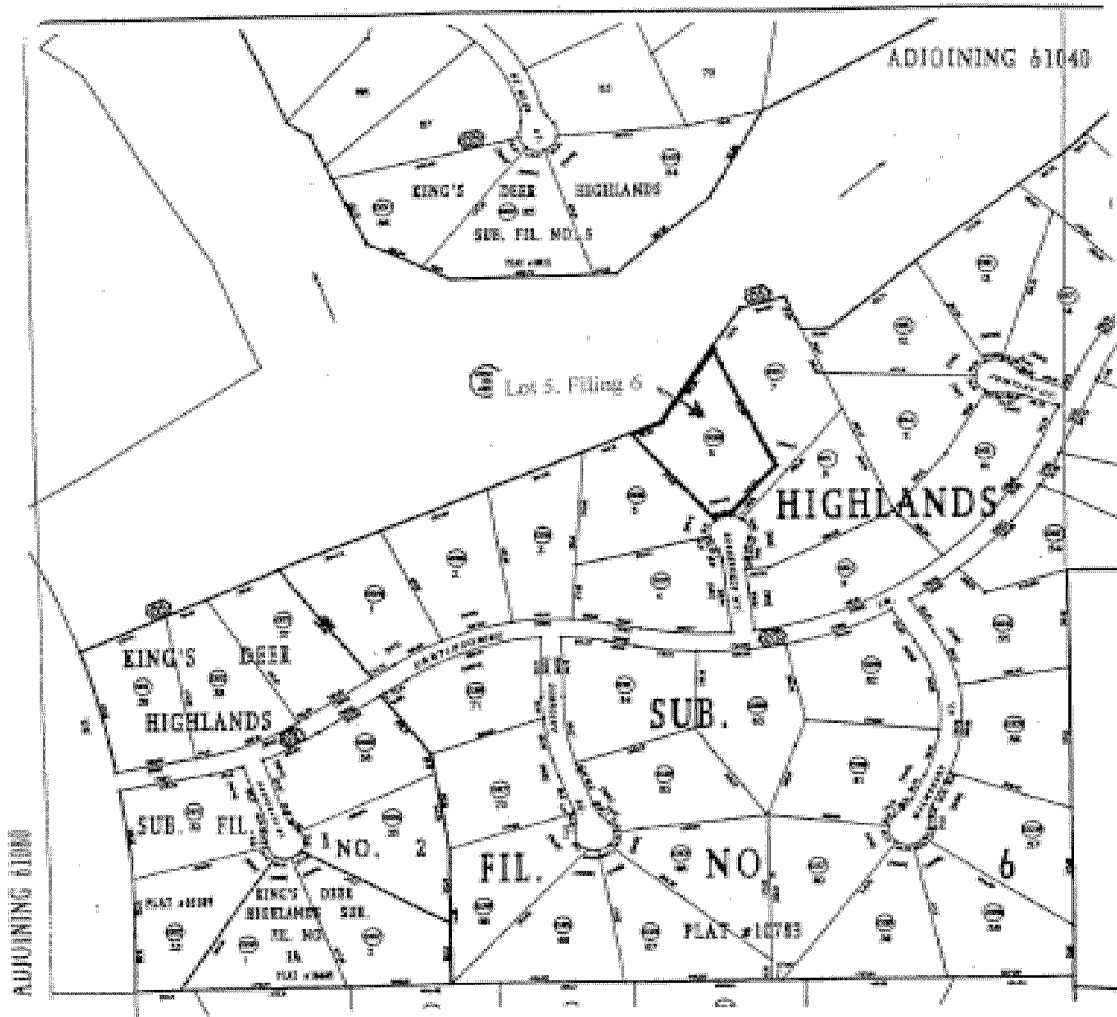
John S. Cowan  
Water Referee  
Water Division 1

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THE COURT FINDS THAT NO PROTEST WAS FILED IN THIS MATTER;  
THEREFORE, THE FOREGOING RULING IS CONFIRMED AND APPROVED, AND IS  
HEREBY MADE THE JUDGMENT AND DECREE OF THIS COURT.

Dated: 10.27.10

  
Dinsmore Tuttle  
Water Judge  
Water Division 1

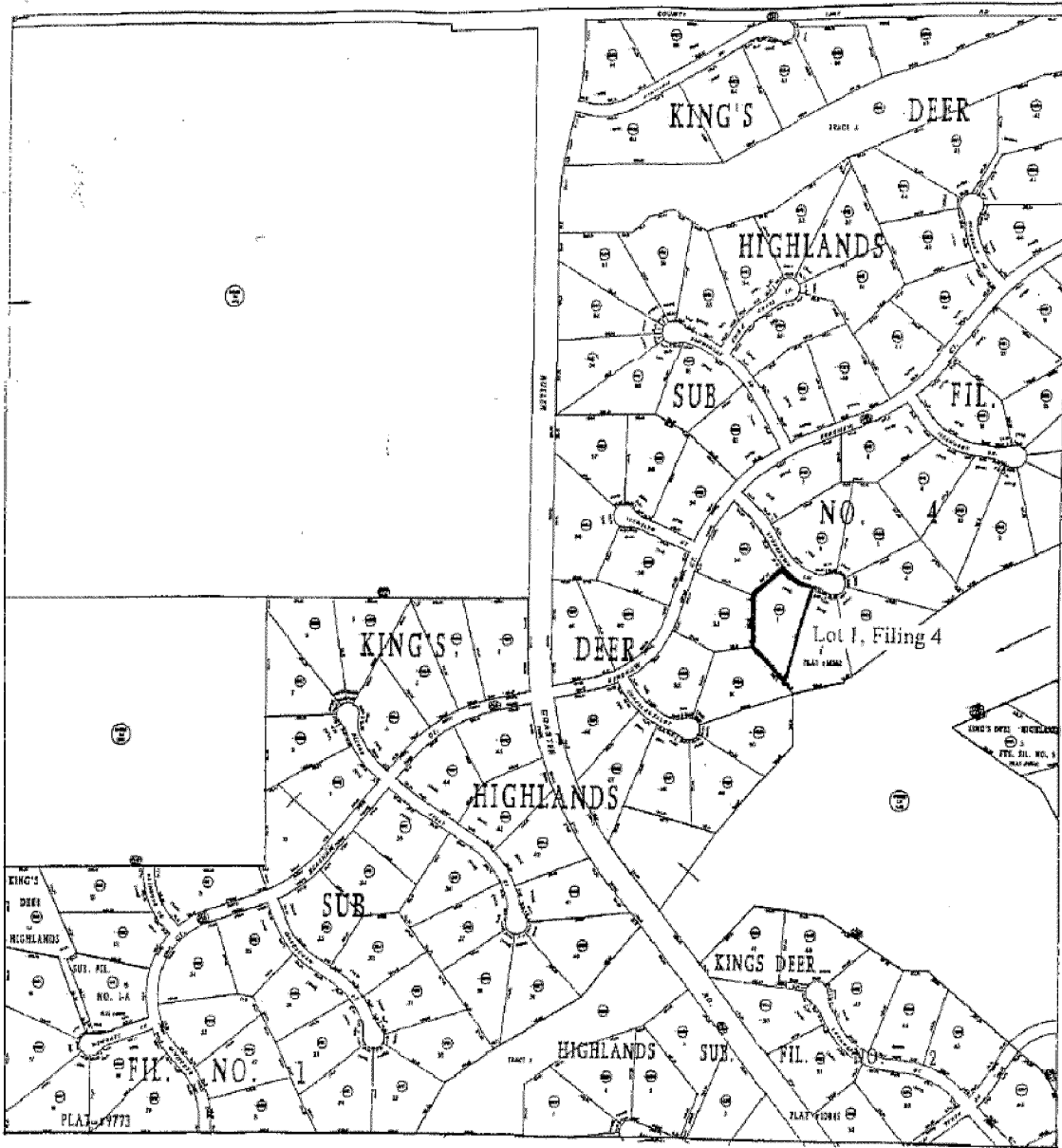


NW1/4 Section 9, T11S, R66W

ATTACHMENT A, page 1/2



08CW257 Attachment A-2



Section 5, T11S, R65W

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