

429 01

AUG 22 1989
11:46 AM

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO

287333

Case No. 88 CW 018

Reception No
Elbert County Recorder

By *Lucy M. Boyd*

FINDINGS OF FACT. CONCLUSIONS OF LAW AND DECREE OF THE
WATER COURT

CONCERNING THE APPLICATION OF L. E. FRICKEY AND GENE R. TAYLOR
IN ELBERT COUNTY

THIS MATTER has come before the District Court in and for Water Division No. 1 by Application for Adjudication of an Under-ground Water Right from the Nontributary Lower Dawson aquifer and for approval of Plan for Augmentation for Upper Dawson wells. The application was filed by L. E. Frickey and Gene R. Taylor on February 1, 1988. The Court has considered all matters contained in the application and the other pleadings and documents filed in this case, including the Division Engineer's Summary of Consultation and the State Engineer's Determination of Facts. The following are the Findings of Fact, Conclusions of Law, and Decree.

I. FINDINGS OF FACT

1. An Application, properly verified, was filed in this case on February 1, 1988, by L. E. Frickey and Gene R. Taylor, P.O. Box 28, Franktown, Colorado 80116.

2. The application was published in the Water Court Resume for Water Division No. 1 and in a newspaper of general circulation in Elbert County in accordance with C.R.S. 37-92-302. All persons affected by the application, whether appearing or not, are parties hereto and are bound by this decree. All notices required by law have been duly given and the Court has jurisdiction over the subject matter of this proceeding. A Statement of Opposition to the application was filed by (R. A. Nielsen Construction Co.) The time for filing statements of opposition has expired.

3. The Division Engineer has submitted his written consultation on the application in accordance with C.R.S. 37-92-302(4) and the Court has considered the same as required by law. A ruling by the Referee was entered on December 12, 1988, and a protest to that ruling was timely filed by the State Engineer.

4. The Applicants have retained the right to appropriate Lower Dawson water underlying a parcel of property legally described as follows:

West half of the East half of Section 8,
Township 8 South, Range 64 West of the 6th
P.M., Elbert County, Colorado, except for

Lots 9, 21, 22, 23, 29, 33, 34, 36 and 52, as shown on the Plat of said subdivision as same is recorded in Plat Book 9 at Page 81 in Elbert County, Colorado. The land for which water rights in the Lower Dawson have been retained constitutes approximately 133.3 acres.

5. The application requests a determination of Applicant's right to withdraw all of the nontributary water from the Lower Dawson formation underlying the said 133.3 acres. The application also requests approval of a plan for augmentation for 55 Upper Dawson wells.

Includes Lots 9, 21, 22, 23, 29, 33, 34, 36 & 52

6. The State Engineer has issued, within four months from the date of the filing of the application, a determination as to the facts of the application, in accordance with C.R.S. 37-92-302 (2) (1986 Cum. Supp.). These findings are presumed to be valid, subject to rebuttal by any party. Id. The State Engineer's determination of facts is summarized as follows:

<u>Aquifer</u>	<u>Nature of Ground Water</u>	<u>Average Specific Yield (%)</u>	<u>Average Saturated ss/siltstone Thickness (ft)</u>	<u>Average Annual Water Available Aft</u>
Lower Dawson	Non-Tributary	20	100	26.7

7. The State Engineer's determination of the average annual amount of water available for withdrawal by the Applicant is based on the criteria prescribed in C.R.S. 37-90-137(4) (1986 Cum. Supp.), and represents an estimate of the available non-tributary ground-water underlying the Property in the Lower Dawson Aquifer, based on an aquifer life of 100 years. (C.R.S. 37-90-137(4) (b)).

8. The ground water underlying the Property in the Lower Dawson formation is non-tributary ground water as defined in C.R.S. 37-90-103(10.5) (1986 Cum. Supp.), the withdrawal of which will not within one hundred (100) years deplete the flow of a natural stream, including a natural stream as defined in C.R.S. 37-92-101(2) and 37-92-102(1) (b), at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal.

9. The ground water underlying the Property is outside of any designated ground water basins.

10. The applicants seek adjudication only of the Lower Dawson aquifer underlying the lands retained by them. Lower Dawson wells have been constructed and are in use on Lots 9, 23 and 29 of Forest Park Subdivision and the water allocable to those lots has been

deleted by Applicants' engineer in her computations. Each lot owner will own and make application for their individual Upper Dawson well augmented by this plan. Other lots have also been sold and the water underlying those lots has also been deleted. ✓

11. Wells to be constructed in the Upper Dawson Aquifer and which are to be augmented by this Plan of Augmentation have been analyzed by Applicants' engineers. The engineering studies disclose that the Upper Dawson Aquifer underlying the 136.7 acres contains sufficient available water and more than adequately provides the water requirements of this subdivision. The criteria that was applied was a 20 percent specific yield with a 100 year life of the aquifer and 100 foot saturated thickness would indicate that 31.34 acre-feet of the water would be available annually to the development. The annual water usage per lot is estimated to be:

In-house use	.20 Acre-feet
Lawn irrigation (1500 sq ² at 2.3 acre-feet/acre)	.13 Acre-feet
Garden irrigation (150 sq ²)	.01 Acre-feet
Horse watering (2 head at at 12 g.d.p.)	.02 Acre-feet
Total	.46 Acre-feet

For the 15 lots for which wells are sought, the total usage would be 25.3 acre-feet per year on an annual basis.

12. The appropriation of the subject underground water rights were initiated on or before February 1, 1988, by the formation of an intent to make the subject appropriation, the preparation of an engineering report, a site inspection, and the filing of this Application.

13. The water withdrawn pursuant to the claimed nontributary underground water rights is to be used for augmentation of individual Upper Dawson wells, and may also be used to supply water to individual homes on the property and to any multi-family or commercial lots which may be developed at a later date on the property. Prior to utilization in any multi-family or commercial lot development, the Applicants must either apply to this Court to amend the plan of augmentation or file an application for another plan of augmentation to offset the depletions caused by either multi-family or commercial lot development. *Property is defined as not including lots*

Augmentation water will be provided by pumping from the Lower Dawson well from approximately April 1st through October 31st of each year. Water will be metered and will be discharged into a recharge pit which will be constructed on Lot 56 in the southeast corner of the development. Maximum pumping will average 13,110 gpd or 9.1 gpm during this period of time; however, higher rates of pumping may be used. Pumping will be terminated for the year when the required amount of augmentation water has been provided. Water from the recharge pit is assumed to follow natural water paths to natural stream courses and the pit shall be constructed under the supervision of a registered engineer and shall be in hydrologic contact with the groundwater underlying the property. Any well permit issued pursuant to this plan of augmentation shall

be subject to the provisions of Senate Bill 5 and shall comply with the statutory and regulatory requirements for withdrawal of water as determined by the State Engineer.

14. In order that no injury occur to the owners of other water rights, the Applicants will construct the recharge pit within the boundaries of the development and the replacement water pumped from the Lower Dawson well will provide recharge for the benefit of the development and will coincide with the development's depletions.

15. There are no cylinders of appropriation of any well or wells meeting the requirements of C.R.S. 37-90-137(5) (1986 Cum. Supp.) which overlap the Property boundaries.

II. CONCLUSIONS OF LAW

16. The Applicants' request for a determination of the right to withdraw nontributary groundwater is one contemplated by law (C.R.S. 37-90-137(4), (5) (1986 Cum. Supp.)). The Court has subject matter jurisdiction over these proceedings and over all who may be affected thereby, whether they have chosen to appear or not. (C.R.S. 37-92-203(1) and 37-92-302(3) (1986 Cum. Supp.)).

17. The Applicants have sustained their burden of proving that there is water available for withdrawal through the subject wells, which has been substantiated by hydrological and geological fact, in the amounts and on the terms and conditions stated in this Ruling, and that such withdrawals will not materially injure the vested water rights of others. (C.R.S. 37-90-137(2)).

18. The Applicants have properly initiated their appropriation of a water right for Forest Park Well No. 1. The right to withdraw the decreed quantity through this well shall be deemed final upon the perfection of the appropriation. Findings of reasonable diligence are not required with respect to the right to withdraw nontributary groundwater. (C.R.S. 37-92-305(1)).

19. The Applicants have sustained their burden of proof and the plan of augmentation proposed by the Applicants, with the terms and conditions stated below, will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. (C.R.S. 37-92-305(3)).

III. RULING

IT IS THEREFORE THE RULING OF THIS COURT that the foregoing Findings of Fact and Conclusions of Law are incorporated herein and the Application is hereby granted, as set forth in this Ruling:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

20. Each of the foregoing Findings of Fact and Conclusions of Law are incorporated herein by reference and are to be considered

as part of the decreed portion of this decree as though set forth in full.

21. The above-described plan for augmentation is approved subject to the terms and conditions set forth herein.

22. The Applicants will assume responsibility for the operation and internal enforcement and regulation of this plan. Applicants may transfer such responsibility to a homeowners association, water district or other person or entity but shall promptly notify the Division Engineer, this Court and the State Engineer's Office of any such transfer. Restrictive covenants shall be created by the Applicants and recorded against the property affected by this plan. Such covenants shall provide for compliance with this judgment and decree, including the provisions for curtailment of water usage if the augmentation water available hereunder is less than the development's consumptive uses. The Applicants, homeowners association, water district or other person or entity responsible for operation of this plan shall also have the power to and be responsible for enforcing any curtailment of water usage within the development required hereunder. In the event the homeowners association or the entity charged with supervision ceases to function then notice of same shall be given to opposer's attorney, Karl F. Kumli, III, P.O. Box 2279, Boulder, Colorado 80306, and to the Office of the State Engineer.

23. The State Engineer shall (a) administer the plan for augmentation as set forth herein; (b) not curtail the diversions of any of the wells so long as the depletions from such diversions are augmented as set forth in this plan; (c) issue well permits for the wells subject to the terms and conditions of this decree; and (d) curtail diversions from the wells at any time consumptive uses of the development exceed the amount of augmentation water available under this plan. The State Engineer may withhold issuance of well permits for the development until the recharge pit required to be constructed by Applicants have been constructed and is operational.

24. The Applicants, L. E. Frickey and Gene R. Taylor, are hereby granted a decree for Forest Park Well No. 1, which is to be constructed in Section 8, Township 8 South, Range 64 West of the 6th P.M., Elbert County, Colorado, at a point approximately 2,050 feet from the South section line and 2165 feet from the East section line. The depth of the well shall be approximately 760 feet to full penetration of the Lower Dawson aquifer. Pumping rate shall be 30 g.p.m. The Applicants may exceed this pumping rate in order to produce 26.7 acre feet from the Lower Dawson formation subject to adjustment to actual aquifer conditions. Applicants are entitled to withdraw all of the available nontributary water out of the Lower Dawson formation underlying the property based on an aquifer life of 100 years (C.R.S. 37-90-137(4)(b), (1986 Cum. Supp.)). The waters of the Lower Dawson aquifer underlying the 133.3 acres owned by the Applicants and which have been retained by the Applicants are hereby adjudicated to be

nontributary waters. The 133.3 acres retained appear on the plat as lots in Forest Park Subdivision and comprise all subdivided lands, except for Lots 9, 11, 12, 23, 29, 33, 34, 36 and 52. Applicants may withdraw the total amount of groundwater available from the proposed well.

25. Augmentation water will be provided from the Lower Dawson aquifer by extraction of same through the well hereby conditionally decreed. These waters will be discharged into a recharge pit to be constructed under the supervision of a qualified engineer on Lot 56 as same appears on the plat of said subdivision in an annual amount equal to the consumptive use of all Upper Dawson wells in the Forest Park Subdivision.

(a) Consumptive use is determined to be .03 acre-feet per year per household for in-house use, 1.95 acre-feet per acre for irrigation (.85 consumptive use factor, applied water 2.3 acre-feet per acre), and 12 gpd for purposes of watering no more than two horses per lot. The total consumptive use will be determined on an annual basis from information provided by the Homeowners Association in its report to be made to the Division Engineer annually. The report shall document for the period of November 1st through October 31st of each year the number of households, the total land area irrigated and the number of horses located on the lots within the subdivision covered by this plan. Should the Homeowners Association fail or neglect to provide this information to the Division Engineer on or before September 1st of any year following the approval of this plan, then the Division Engineer may estimate the subdivision's consumptive use by assuming .18 acre-feet per year for each well permit which has been issued for in-house consumptive use of .03 acre-feet per permit, irrigation of 2500 square feet of lawn and 250 square feet of garden per permit, and horse watering for two animals per permit.

26. A cumulative flow meter shall be installed on the Lower Dawson well to be used for the measurement of discharge into the recharge pit. This meter shall be read prior to the commencement of pumping in each calendar year and a final reading shall also be taken at the end of the pumping period in each calendar year. This datum will be submitted to the Division Engineer in addition to the other reporting requirements set forth above. The pumping period for the Lower Dawson well is anticipated to be from April 1st through October 31st of each year. In the event the Division Engineer has not received the information concerning the metered usage by December 31st of any year, he may use the data supplied by his personnel in determining the amount of water which has been recharged or the amounts which need to be diverted into the recharge pit to equal the depletions occasioned by the several uses within the subdivision.

27. The recharge pit shall be inspected at least once during the initial year of operation and at least once every five years thereafter. The inspection will be conducted by a professional

engineer registered in the State of Colorado and said engineer shall be employed by the Applicants or the Homeowners Association for this purpose. Said engineer shall submit a certification to the Division Engineer indicating whether the pit is operating satisfactorily and outlining any problems which are observed in operation after each of these required inspections. Indicated problems shall be addressed and corrected within thirty (30) days. Applicants, their transferees or assignees shall provide, in addition to depletion replacements, to the discharge pit the amount of water equal to two percent of the total water withdrawn from the Lower Dawson well to satisfy the requirements of C.R.S. 37-90-137(9) (b).

28. Applicants are hereby decreed the right to use the water withdrawn pursuant to the claimed underground water right for the augmentation of individual Upper Dawson wells to be constructed on the privately owned lots which will supply water to individual homes. Further, Applicants are hereby decreed the right to use this water for exchange, for replacement of depletions and for all other augmentation purposes. Applicants, their successors, assigns, transferees, lessees and contractees, subject to the requirements of C.R.S. 37-90-137(9) (b) may also use, reuse and successively use, lease, sell or otherwise dispose of said groundwater until extinction as provided in C.R.S. 37-82-106(2) (1986 Cum. Supp.). Applicants shall not lose dominion over such water by reason of Applicants' use of natural systems to carry such water to the place of its use, reuse or successive use.

29. As provided in C.R.S. 37-92-305(11) (1986 Cum. Supp.), Forest Park Well No. 1 will withdraw nontributary groundwater from the Lower Dawson aquifer and shall not be administered in accordance with priority of appropriation, and shall not require subsequent showings or findings of reasonable diligence.

30. The State Engineer, upon receipt of application by Applicants or their successors, shall issue a well permit for the above-described well, for the amounts and on the terms and conditions contained in this ruling. Further, the State Engineer shall grant and issue well permits, upon application, as are necessary for any additional wells required in order to maintain production levels in the Lower Dawson formation as provided in C.R.S. 37-90-137(10) (1986 Cum. Supp.). The well for which a permit is issued may be drilled within 200 feet of the location specified on the permit without the need to apply for a new or amended permit.

31. The State Engineer, also, upon application shall issue well permits for domestic wells, including irrigation of 2,500 square feet of lawn and 250 square feet of garden and for the watering of two horses per permit, for each and every lot covered by this plan of augmentation. Said permit shall allow extraction from the Upper Dawson aquifer of water so long as the plan, approved herein, is in operation. Said permit shall also be restricted by

the provisions of Senate Bill 5 and the regulations adopted by the State Engineer as the same pertain to Upper Dawson wells.

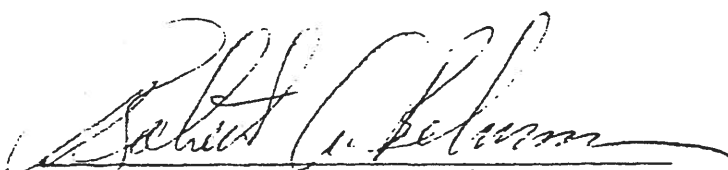
32. Pursuant to C.R.S. 37-92-305(11), the Applicants' right to withdraw nontributary groundwater is a vested property right.

33. Applicants may withdraw groundwater from the Lower Dawson aquifer in excess of the annual decreed amount, so long as the average annual withdrawal of water does not exceed the product of the total number of years since the date of issuance of the well permit or the date of this ruling, whichever occurs first, multiplied by the allowed average annual amount of withdrawal.

34. The Applicants shall include on each and every deed transferring the property or portions of the property the following or similar language: "This lot or property is subject to certain requirements and restrictions concerning utilization of underground water and the issuance of Upper Dawson aquifer well permits. These restrictions and requirements are contained in the judgment and decree entered in Case No. 83CW018, District Court, Water Division 1, State of Colorado, and any well permit issued by the Division of Water Resources, State of Colorado are subject to the provisions of said decree which contain certain requirements which include monitoring of water usage. The conditions, requirements and restrictions concerning water usage are also set forth in the Articles and By-Laws of the Homeowners Association and the recorded covenants affecting the property." Pursuant to C.R.S. 37-92-304(6), this plan for augmentation shall be subject to continuing jurisdiction and reconsideration by the Water Judge on the question of injury to the vested rights of others for a period of five years following the filing of a statement of beneficial use for the last of the 55 wells contemplated to be covered by the plan for augmentation or the filing of a statement of beneficial use on the last well on which a permit shall be issued in said subdivision.

35. This judgment and decree shall be filed with the Water Clerk and a copy filed with the State Engineer and Division Engineer for Division 1, State of Colorado, as well as recorded in the records of Elbert County, Colorado.

DATED this _____ day of JUN 14 1989, 1989.



Robert Behrman, Water Judge,
Water Division No. 1

NOT ORIGINAL
SIGNATURE

AUG 22 1989 *Ja*