

2003 DEC 26 AM 11:51

DISTRICT COURT, WATER DIVISION 1,
COLORADO

Court Address:
901 9th Street
Greeley, CO 80632

**RICHARD L. AND MELONIE S. BRASIER AND
EDMOND B. CABOT, Applicants,**

IN DOUGLAS COUNTY.

Attorneys:
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σ COURT USE ONLY σ

Case Number: 2003CW171

**FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE,
JUDGMENT AND DECREE,**

**IN THE NONTRIBUTARY LOWER DAWSON, DENVER, ARAPAHOE, AND
LARAMIE-FOX HILLS AND THE NOT NONTRIBUTARY UPPER DAWSON
AQUIFERS**

This claim for nontributary and not nontributary ground water and approval of plan for augmentation, having been filed in March, 2003, and all matters contained in the application having been reviewed, and 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 Ruling of the Referee:

FINDINGS OF FACT

1. Names and addresses of Applicants:

Richard and Melonie Brasier
10698 E. Deerfield Road
Franktown, CO 80116

Edmund Cabot
10564 E. Flintwood Ave.
Franktown, CO 80116

2. Objection: No 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.

APPROVAL OF GROUND WATER RIGHTS

4. Aquifers and location of ground water: Applicants seek a decree for rights to all groundwater recoverable from the not nontributary Upper Dawson and nontributary Lower Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers underlying approximately 212 acres of land located in the SE1/4 of Section 8 and the NE1/4 of Section 17, T8S, R65W of the 6th P.M., as more particularly described and shown on Attachment A hereto ("Subject Property"). Applicants Richard and Melonie Brasier are the owners of 28.6 acres of the Subject Property and Edmond Cabot is the owner of 183.4 acres of the Subject Property as shown on Attachment A, and Applicants are the owners of a pro-rata interest in the amounts of groundwater decreed herein and underlying their respective properties. The Subject Property is not located within the boundaries of a designated ground water

5. Well locations, pumping rates and annual amounts: The ground water may be withdrawn at rates of flow necessary to efficiently withdraw the amounts decreed herein. The ground water will be withdrawn through any number of wells necessary, to be located at any location on the Subject Property. The Upper Dawson aquifer water decreed herein may also be withdrawn through an existing well located on the Subject Property which is the subject of Well Permit No. 85896, which will be cancelled upon application and issuance of a new well permit changing the character of that well to fee status by the Office of the State Engineer, if necessary. Applicants hereby waive any 600 foot spacing rule for wells located on the Subject Property, but must satisfy Section 37-90-137(4), C.R.S. for wells owned by others on adjacent properties. The following average annual amounts are available for withdrawal subject to the Court's retained jurisdiction in this matter:

<u>Aquifer</u>	<u>Saturated Thickness</u>	<u>Annual Amount</u>
Upper Dawson	175 feet	49.2 acre-feet(NNT)*
Lower Dawson	100 feet	42.4 acre-feet(NT)
Denver	185 feet	66.7 acre-feet(NT)
Arapahoe	260 feet	93.7 acre-feet(NT)
Laramie-Fox Hills	210 feet	66.8 acre-feet(NT)

*Amount reduced for existing Well Permit No. 85896 and by 24 acre-feet annually from the amount available as referenced in the Determination of Facts for the Upper Dawson aquifer which water will be available for any uses which are legally available at the time

well permit applications are filed. Said 24 acre-feet (2400 acre-feet total) may also be available to be withdrawn through 6 wells to be located on the Subject Property (11.3 acre-feet per surface acre).

The amounts conform with the values and amounts referenced in the State Engineer's Determination of Facts dated August 15, 2003.

6. Proposed use: The water withdrawn from the subject aquifers will be used, reused, successively used, leased, sold, or otherwise disposed of for the following beneficial purposes: domestic, industrial, commercial, irrigation, stock watering, recreational, fire protection, and fish and wildlife, both on and off the Subject Property. Said water will be produced for immediate application to said uses, for storage and subsequent application to said uses, for exchange purposes, for replacement of depletions resulting from the use of water from other sources, and for augmentation purposes.

7. Final average annual amounts of withdrawal:

A. Final determination of the applicable average saturated sand thicknesses and resulting average annual amounts available to Applicants will be made pursuant to the retained jurisdiction of this Court, as described in paragraph 24 below. The Court shall use the acre-foot amounts in paragraph 5 herein in the interim period, until a final determination of water rights is made.

B. The allowed annual amount of ground water which may be withdrawn through the wells specified above and any additional wells, pursuant to Section 37-90-137(10), C.R.S., may exceed the average annual amount of withdrawal, as long as the total volume of water withdrawn through such wells and any additional wells therefor subsequent to the date of this decree does not exceed the product of the number of years since the date of the issuance of any well permits or the date of this decree, whichever is earliest in time, multiplied by the average annual amount of withdrawal, as specified above or as determined pursuant to the retained jurisdiction of the Court. However, amounts set forth in well permits will not be exceeded.

8. Source of ground water and limitations on consumption:

A. The ground water to be withdrawn from the Lower Dawson, Denver, Arapahoe and Laramie-Fox Hills aquifers is "nontributary ground water" as defined in Section 37-90-103(10.5), C.R.S., and in the Denver Basin Rules, the withdrawal of which will not, within 100 years, deplete the flow of a natural stream, including a natural stream as defined in Section 37-82-101(2) and Section 37-92-102(1)(b), C.R.S., at an annual rate greater than 1/10 of 1% of the annual rate of withdrawal. The ground water to be withdrawn from the Upper Dawson aquifer is "not nontributary" as defined in Sections 37-90-103(10.7) and 37-90-137(9)(c), C.R.S., and part of the Upper Dawson aquifer

groundwater decreed herein may be withdrawn pursuant to the augmentation plan decreed herein.

B. Applicants may not consume more than 98% of the annual quantity of water withdrawn from the nontributary aquifers. The relinquishment of 2% of the annual amount of water withdrawn to the stream system, as required by the Denver Basin Rules effective January 1, 1986, may be satisfied by any method selected by the Applicants and satisfactory to the State Engineer, so long as Applicants can demonstrate that an amount equal to 2% of such withdrawals (by volume) has been relinquished to the stream system.

C. There is unappropriated groundwater available for withdrawal from the subject aquifers beneath the Subject Property, and the vested water rights of others will not be materially injured by such withdrawals as described herein. Withdrawals hereunder are allowed on the basis of an aquifer life of 100 years, assuming no substantial artificial recharge within 100 years. No material injury to vested water rights of others will result from the issuance of permits for wells which will withdraw not nontributary and nontributary ground water or the exercise of the rights and limitations specified in this decree.

9. Additional wells and well fields:

A. Applicants may construct additional and replacement wells in order to maintain levels of production, to meet water supply demands or to recover the entire amount of groundwater in the subject aquifers underlying the Subject Property. As additional wells are planned, applications shall be filed in accordance with Section 37-90-137(10), C.R.S.

B. Two or more wells constructed into a given aquifer shall be considered a well field. In effecting production of water from such well field, Applicants may produce the entire amount which may be produced from any given aquifer through any combination of wells within the well field.

C. In considering applications for permits for wells or additional 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 provisions of Section 37-90-137(10), C.R.S.

D. In the event that the allowed average annual amounts decreed herein are adjusted pursuant to the retained jurisdiction of the Court, Applicants shall obtain permits to reflect such adjusted average annual amounts. Subsequent permits for any wells herein shall likewise reflect any such adjustment of the average annual amounts decreed herein.

E. The water in the Upper Dawson aquifer is not nontributary and up to 24

acre-feet per year and no more than 2400 acre-feet total of water from the Upper Dawson aquifer may be withdrawn pursuant to the augmentation plan decreed herein.

APPROVAL OF PLAN FOR AUGMENTATION

10. Approval of plan for augmentation:

A. Water to be augmented: Up to 24 acre-feet per year of not nontributary Upper Dawson aquifer groundwater as decreed herein.

B. Water to be used for augmentation: Return flows associated with use of the not nontributary Upper Dawson and return flows or direct discharge of nontributary ground water decreed herein.

C. Development and Consumptive Use: The subject Upper Dawson aquifer ground water will be used to serve up to 24 residential lots through individual wells which will withdraw at rates of flow of 15 gpm. The wells will be limited to an annual amount of 1 acre-foot per year for in-house use in one single family residence (0.4 acre-feet), irrigation (0.55 acre-feet/limited to irrigation of 9500 square-feet of home lawn and garden), and stockwatering of four large domestic animals (0.05 acre-feet). Sewage treatment will be provided by non-evaporative septic systems. Before any other type of sewage treatment is proposed in the future, including incorporation of the Subject Property into a central sewage collection and treatment system, Applicants, or their successors and assigns, will amend this decree prior to such change and thereby provide notice of the proposed change to other water users by publication procedures required by then existing law. Consumptive use from in-house use is estimated to be 10% of that use and consumptive use from irrigation use will be approximately 90% of that use. Stockwatering use is 100% consumed.

D. Replacement during pumping: During pumping of the Upper Dawson ground water for 100 years, Applicants will replace depletions to the affected stream system in an amount of water equal to the actual depletions pursuant to Section 37-90-137(9)(c), C.R.S. In the 100th year, the total depletion to the South Platte River system from withdrawals from the Upper Dawson aquifer is approximately 6.9% of the amount withdrawn or 1.65 acre-feet. Based on the uses described above, Applicants estimate that approximately 9.96 acre-feet per year will return to the South Platte River stream system. Such return flows accrue to the South Platte River system via Cherry Creek, and those return flows are sufficient to replace actual depletions caused by pumping of up to 24 acre-feet per year for 100 years from the Upper Dawson aquifer while the well is being pumped. Because return flows from all uses are estimated rather than measured, Applicants agree that such return flows shall be used only to replace depletions under this plan for augmentation and will not be sold, traded, or assigned in whole or in part for any other purpose.

E. Post-pumping Depletion Augmentation: Assuming maximum pumping of 24 acre-feet per year for 100 years from the Upper Dawson aquifer, the maximum depletion to the South Platte River stream system from pumping of the Upper Dawson aquifer will be 9.3% or 2.23 acre-feet in the 180th year. Applicants will reserve 24 acre-feet per year and 2400 acre-feet total of the nontributary Laramie-Fox Hills water decreed herein for use in this plan. The Court retains continuing jurisdiction in this matter to determine if the supply is adequate.

F. Applicants shall replace post-pumping depletions for the shortest of the following periods: the period provided by Section 37-90-137(9)(c), C.R.S.; the expressed period specified by the Colorado Legislature, should it specify one and providing the Applicants obtain Water Court approval for such modification; the period determined by the State Engineer, should he choose to set such a period and have jurisdiction to do so; 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 the State Engineer's Office and proves that they have complied with any statutory requirement.

11. Applicants shall pay the cost imposed by operation of this augmentation plan and shall be responsible for all interest, rights and responsibilities in and under this plan for augmentation. Applicants shall reserve 24 per year and 2400 acre-feet total of the nontributary Arapahoe aquifer water and all of the nontributary Laramie-Fox Hills aquifer water decreed herein. Failure of Applicants 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. This decree shall be recorded in the real property records of Douglas County so that a title examination of the property, or any part thereof, shall reveal to all future purchasers the existence of this decree.

12. Administration of plan for augmentation:

A. Applicants shall report to the Division Engineer for Water Division 1 upon request, a summary of the annual withdrawals of the subject well on an accounting form acceptable to the Division Engineer.

B. All withdrawals which are the subject of this decree will 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.

D. The Applicants at the direction of the Division Engineer, shall make post-pumping replacements to the South Platte River stream system via Cherry Creek pursuant to the amounts referenced on the depletion curve attached hereto on Attachment B.

13. 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.

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 Subject 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

14. 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. Section 37-90-137(4), C.R.S. The application for a decree confirming Applicants' right to withdraw and use all unappropriated ground water from the nontributary aquifers beneath the property as described herein pursuant to Section 37-90-137(4), C.R.S., should be granted, subject to the provisions of this decree. The application for a decree confirming Applicants' right to withdraw and use part of the ground water decreed herein from the Upper Dawson aquifer should be granted pursuant to Section 37-90-137(4) and (9)(c), C.R.S., subject to the provisions of this decree. The withdrawal of up to 24 acre-feet per year for 100 years and no more than 2400 acre-feet total of the Upper Dawson aquifer in accordance with the terms of this decree will not result in material injury to vested water rights of others.

15. 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 Upper Dawson aquifer water.

16. The rights to ground water determined herein shall not be administered in accordance with priority of appropriation. Such rights are not "conditional water rights" as defined by Section 37-92-103(6), C.R.S., and findings of reasonable diligence are not applicable to the ground water rights determined herein. The determination of ground water rights herein need not include a date of initiation of the withdrawal project. See Section 37-92-305(11), C.R.S.

JUDGMENT AND DECREE

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

17. 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.

18. The Applicants may withdraw the subject ground water herein through wells to be located anywhere on the Subject Property, including the existing well pursuant to paragraph 5 above, in the average annual amounts and at the estimated average rates of flow specified herein, subject to the limitations herein and the retained jurisdiction by this Court.

19. Applicants may withdraw up to 24 acre-feet per year and no more than 2400 acre-feet total of not nontributary ground water from the Upper Dawson aquifer under the plan for augmentation decreed herein pursuant to Section 37-90-137(9)(c), C.R.S. Applicants will not withdraw the remaining amount of decreed Upper Dawson aquifer groundwater until withdrawal of that water has been approved by the court in a separate plan for augmentation.

20. 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 their plan for augmentation and are therefor entitled to a decree confirming and approving their plan for augmentation as described in the findings of fact.

21. 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.

22. 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.

23. 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.

24. Retained Jurisdiction:

A. The Court retains jurisdiction as necessary to adjust the average annual amounts of ground water available under the property to conform to actual local aquifer characteristics as determined from adequate information obtained from wells, pursuant to Section 37-92-305(11), C.R.S. Within 60 days after completion of any well decreed herein or any test hole(s), Applicants or any successor in interest to these water rights shall serve copies of such log(s) upon the State Engineer.

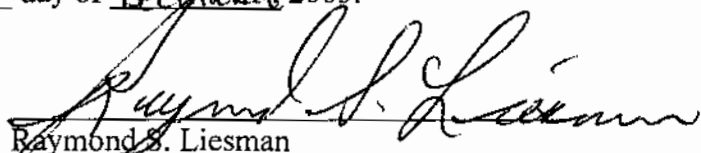
B. At such time as adequate data is available, any person, including the State Engineer, may invoke the Court's retained jurisdiction to make a Final Determination of Water Right. Within four months of notice that the retained jurisdiction for such purpose has been invoked, the State Engineer shall use the information available to him to make a final determination of water rights findings. The State Engineer shall submit such finding to the Water Court and the Applicants.

C. If no protest to such finding is made within 60 days, the Final Determination of Water Rights shall be incorporated into the decree by the Water Court. In the event of a protest, or in the event the State Engineer makes no determination within four months, such final determination shall be made by the Water Court after notice and hearing.

25. Continuing Jurisdiction:

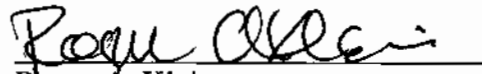
Pursuant to Section 37-92-304(6), C.R.S., the Court retains continuing jurisdiction over the plan for augmentation decreed herein for reconsideration of the question of whether the provisions of this decree are necessary and/or sufficient to prevent injury to vested water rights of others. The Court also retains continuing jurisdiction for the purpose of determining compliance with the terms of the augmentation plan.

RULING ENTERED this 26th day of December, 2003.


Raymond S. Liesman
Water Referee
Water Division 1

THE COURT DOTH FIND THAT NO PROTEST TO THE RULING OF THE REFEREE HAS BEEN FILED. THE FOREGOING RULING IS CONFIRMED AND APPROVED AND IS HEREBY MADE THE JUDGMENT AND DECREE OF THIS COURT.

Date: JAN 22 2004



Roger A. Klein
Water Judge
Water Division 1



Mockburn

GRANT

BOUC
ELB

Attachment A

0301171

R65W

T8S

Brasier
28.6 acres

Cabot
183.4 acres

Deerfield

Hollow

BOUGLAS CO
ELBERT CO

Russellville
Site of Gold Discovered by Russell

Guich



A tract of land situated in Sections 8 and 17, Township 8 South, Range 65 West of the 6th Principal Meridian, Douglas County, Colorado, more particularly described as follows:

Commencing at the Southeast corner of said Section 8;
 Thence S 1°19'07"W along the East line of said Section 17 a distance of 126.16 feet;
 Thence N 87°54'11"W a distance of 1338.91 feet to the true point of beginning;
 Thence N 87°54'11"W a distance of 600.22 feet;
 Thence N 1°27'49"E a distance of 2754.70 feet to the North line of the Southeast $\frac{1}{4}$ of said Section 8;
 Thence S 87°46'19"E along said North line a distance of 170.81 feet to the Southwest corner of Lot 77, Dearfield - Unit 1;
 Thence Southwesterly along the arc of a curve to the right a distance of 68.96 feet, said curve has a radius of 485.58 feet and a central angle of 8°08'12" with a chord that bears S 62°20'05"W a distance of 68.89 feet;
 Thence S 7°45'29"E a distance of 158.37 feet;
 Thence S 16°13'56"W a distance of 225.79 feet;
 Thence S 26°19'19"E a distance of 345.37 feet;
 Thence N 80°41'56"E a distance of 296.00 feet;
 Thence S 3°29'36"W a distance of 961.32 feet;
 Thence S 87°54'11"E a distance of 102.00 feet;
 Thence S 1°21'45"W a distance of 1138.87 feet to the point of beginning;

A tract of land situated in the Southeast $\frac{1}{4}$ of Section 8, Township 8 South, Range 65 West of the 6th Principal Meridian, Douglas County, Colorado, more particularly described as follows:

Commencing at the Southeast corner of said Section 8;
 thence N 0°35'56" E along the East line of said Southeast $\frac{1}{4}$ a distance of 1012.71 feet to the true point of beginning;
 thence N 0°35'56"E along said East line a distance of 1071.57 feet;
 thence N 88°32'08"W a distance of 1400.88 feet;
 thence S 2°43'47"W a distance of 1075.01 feet;
 thence S 88°40'00"E a distance of 1440.81 feet to the point of beginning;

A tract of land situated in the Southeast 1/4 of Section 8 and in the Northeast 1/4 of Section 17, Township 8 South, Range 65 West of the 6th Principal Meridian, Douglas County, Colorado, more particularly described as follows:

Beginning at the Southeast corner of said Section 8 and considering the South line of said Section 8 to bear N 88°40'00"W with all bearings contained herein relative thereto; thence N 0°35'56"E along the East line of said Southeast 1/4 a distance of 1012.71 feet; thence N 88°40'00"W a distance of 1338.81 feet; thence S 0°35'56"W a distance of 1138.87 feet to a point on a line that is 126.16 feet South of and parallel to the South line of said Southeast 1/4 of Section 8; thence S 88°40'00"E along said parallel line a distance of 1338.91 feet to the East line of the Northeast 1/4 of said Section 17; thence N 0°33'18"E along said East line a distance of 126.16 feet to the point of beginning;

A tract of land situated in the Northeast 1/4 of Section 17, Township 8 South, Range 65 West of the 6th Principal Meridian, Douglas County, Colorado, more particularly described as follows:

Commencing at the Northeast corner of said Section 17 and considering the North line of said Northeast 1/4 to bear N 88°40'00"W with all bearings contained herein relative thereto; thence S 0°33'18"W along the East line of said Northeast 1/4 a distance of 126.16 feet to the true point of beginning; thence N 88°40'00"W parallel to the North line of said Northeast 1/4 a distance of 1939.13 feet; thence N 0°42'00"E a distance of 66.16 feet to a point on a line that is 60.00 feet South of and parallel to the North line of said Northeast 1/4; thence N 88°40'00"W along said parallel line a distance of 693.34 feet to a point on the East line of the 50.00 foot gas line easement as described in Book 175 at Page 176 of the Douglas County records; thence S 4°05'15"E along said East line a distance of 1223.51 feet; thence S 5°34'45"W along said East line a distance of 639.78 feet; thence N 90°00'00"E a distance of 2589.18 feet to the East line of said Northeast 1/4; thence N 0°33'18"E along said East line a distance of 1729.82 feet, to the point of beginning.

A tract of land located in the NE1/4 of Section 17 and the SE1/4 of Section 8, T8S, R65W of the 6th P.M., described as beginning at a point approximately 1855 feet south and 2589 feet west of the northeast corner of said Section 17; thence west approximately 67 feet; thence north approximately 1855 feet to a point on the north line of Section 17; thence east along said north line approximately 720 feet; thence north approximately 2627 feet; thence east approximately 51 feet; thence south approximately 2628 feet to a point on the north line of Section 17; thence continuing south approximately 50 feet; thence west approximately 693 feet; thence S 4° E, approximately 1223 feet; thence S 5° W, approximately 639 feet to the point of beginning.

Attachment B

Stream Depletion - Case No. 2003CW171, Div. 1
Upper Dawson Aquifer - Model No. DA1

