

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO

Case No. 90CW179

FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE AND
DECREE OF THE WATER COURT

CONCERNING THE APPLICATION FOR WATER RIGHTS OF SPRUCE MOUNTAIN ASSOCIATES, a Michigan Partnership, AND BRIDGE BUILDERS, INC., a Colorado corporation,

IN DOUGLAS COUNTY.

THIS MATTER, having come before the Water Judge upon the application of Spruce Mountain Associates and Bridge Builders, Inc., for approval of plan for augmentation. The Water Judge, having **considered the** pleadings, the stipulations of the parties, and the evidence presented, and being fully advised in the premises, it is hereby the Judgment and Decree of the Court.

FINDINGS OF FACT

1. Name and address of Applicant.

Spruce Mountain Associates and Bridge Builders, Inc.
c/o Richard P. Kughn
Kughn Enterprises
22482 Orchard Lake Road
Farmington, MI 48336

Applicants shall be referred to hereinafter singularly as
"Applicant."

2. History of Case. The Applicant is represented by Wayne J. Fowler and by **Friedlob** Sanderson Raskin Paulson & Tourtillott, LLC (William B. Tourtillott, Jr.) The applications for underground water rights were filed in Cases No. **86CW056** (Denver Basin Aquifers) and **86CW057** in Water Division No. 1 on February 28, 1986. Findings of Fact, Rulings of the Referee and Decree of the Water Court in Case No. **86CW056** and in Case No. **86CW057** were entered on November 30, **1988**. The Applicant filed Case No. **90CW179** on December 14, 1990 to obtain judicial approval of a plan for augmentation which provides for replacement of stream depletions to the extent necessary to prevent injurious effect to the affected stream prior

to withdrawal of groundwater from the Dawson Aquifer. In **Case** No. 90CW179 in Water Division No. 1, statements of opposition were filed by Centennial Water and Sanitation **District**, Perry Park Water and Sanitation District, Ferris Hamilton Family Trust, Town of Castle Rock and the State of Colorado, represented by the State Engineer. The objectors have stipulated to the entry of this Decree. No other statements of opposition have been filed and the time for filing such statements has expired.

A. Summary of Decree in Water Case No- 86CW056

- (1) Three aquifers, namely Denver, Arapahoe and Laramie-Fox Hills were determined to be nontributary.
- (2) **Tabulation** by aquifer:

Aquifer	No. of Wells.	Rate of Flow (cfs)	Average Annual Amount (AF)
Denver	15	0.33	1,918
Arapahoe	10	0.45	1,754
Laramie-Fox Hills	6	0.22	684
		Total	4,356

- (3) The wells were decreed as a municipal water system providing for additional wells and replacement wells with two or more wells constructed into the same nontributary aquifer considered as a well field.

Handwritten calculation:
 1754
 684

 4356
 3

- (4) The water withdrawn from any well may be used, reused and successively used and otherwise disposed of for all municipal purposes including domestic, industrial, commercial, irrigation, stock watering, recreational, fish and wildlife, fire protection and sanitary purposes, subject to the 2% relinquishment of the annual amount of water withdrawn to **the** stream system as required by the Denver Basin Rules effective January 1, 1986. This 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.

B. Summary of Decree in Water Case No. 86CW057

(1) The not nontributary Dawson Aquifer was quantified. No wells shall be constructed without obtaining approval of an augmentation plan.

(2) Tabulation of the Dawson Aquifer:

Aquifer	No. of Wells	Rate of Flow (cfs)	Average Annual Amount (AF)
Dawson	5	To be determined	1,584

(3) The wells were decreed as a municipal water system, providing for additional wells and replacement wells with two or more wells constructed into the not nontributary Dawson aquifer considered as a well fie —

(4) **Conditioned** upon the replacement requirements **being** satisfied by a judicially approved augmentation plan to be adjudicated separately, Applicant is entitled as a matter of law to use the groundwater withdrawn from any well herein and to reuse, and successively use, and otherwise dispose of such water for all municipal purposes including domestic, industrial, commercial, irrigation, stock **watering**, recreational, fish and wildlife; fire protection and sanitary purposes. This 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 this groundwater or of water from other sources, and for augmentation purposes. Moreover, **Applicant** may use return flows of this groundwater to replace depletions under a plan for augmentation approved in compliance with applicable law.

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 PLAN FOR AUGMENTATION

4. Description of Plan for Augmentation.

A. Structures to be augmented: 173 individual wells withdrawing up to 259.5 acre feet per year in the not nontributary Dawson Aquifer decreed in Case No, **86CW057**.

B. Use: The subject Dawson Aquifer groundwater may be used for domestic and irrigation purposes to serve up to 173 residential lots on the subject property described as approximately 2,400 acres of lands known as Spruce Mountain Ranch located in Sections 15, 16, 20, 21, 22, 27, 28, 29 and 33, Township 10 South, Range 67 West of the 6th P.M. in Douglas County, Colorado, which is not subdivided into 35 acre tracts, but is being developed as a cluster development under the Rural Land Use Process. Each of the 173 lots will be served by an individual Dawson Aquifer well which will **withdraw** at rates of flow of 15 **gpm** and be limited to approximately 1.5 acre-feet annually.

C. Water rights to be used for augmentation:

(1) Applicant will replace depletions occurring to Plum Creek and its tributaries and to the South Platte River from the nontributary Denver Aquifer decreed in Case No. **86CW056** directly to Cook Creek, a tributary of East Plum Creek utilizing one or more of the following wells and structures:

(a) Legal description of the structures:

(i) Well D-6 is to be located in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of **Section 16**, Township 10 South, Range 67 West of the 6th P.M., 1000 feet South of the North section line and 1400 feet East of the West section line of said section.

(ii) Well D-9 is to be located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 10 South, Range 67 West of the 6th

P.M., 3500 feet South of the North section line and 1300 feet East of the West section line of said section.

- (iii) A well to be located in Section 20, Township 10 South, Range 67 West of the 6th P.M. near the Fire Station on Perry Park Road.
 - (iv) One 30,000 fire storage tank to be located in the **SW⁴NE⁴**, Section 21, Township 10 South, Range 67 West of the 6th P.M.
- (b) Water will be discharged from the nontributary Denver aquifer wells at a rate or rates necessary to satisfy **Applicant's** augmentation requirements pursuant to this Decree.
- (2) Should the Denver Aquifer source of water fail for any reason, Applicant may use a like quantity of its nontributary Laramie-Fox Hills Aquifer water decreed in Case No. **86CW056** or any other legally available augmentation supply that is in sufficient quantity, quality, time and place ~~to~~ meet the requirements of this Decree. Applicant shall give notice to the Court, State Engineer and the parties herein identifying the use of Laramie-Fox Hills or such other legally available augmentation supply, its nature, quantity, quality and method of delivery. The parties receiving such notice shall have 60 days to file objections with the Court to such proposed other legally available augmentation supply. If the augmentation supply is other than the Denver Aquifer groundwater decreed in Water Case No. **86CW056**, Applicant shall file an application with the Court and publish it pursuant to law. The Court retains jurisdiction in this matter to determine if the supply **is** adequate.
- (3) Applicant and its successors or assigns shall dedicate to this augmentation plan and shall reserve in any deeds of the property, 25,950 acre-feet of the total amount of water contained within the nontributary Denver and Laramie-Fox Hills Aquifers for **use in this**

augmentation plan as required; and shall convey by recorded deed the reserved nontributary Denver Aquifer water described above to the Property Owners Association to be created in connection with subdivision of the property pursuant to paragraph 7 below. The reservations and dedications referred to in this paragraph may only be changed by providing notice and obtaining a subsequent decree of this Court and recording such subsequent decree in the Douglas County real property records.

D. Augmentation wells: By January 1 of the year following the construction of the first Dawson well, Applicant shall construct, equip and complete a Denver well to replace, to the stream, depletions resulting from the pumping of Dawson wells. At such time as the depletions from the Dawson wells exceed the quantity of water replaced to the stream from a Denver well, Applicant shall complete such additional augmentation wells as are necessary to replace the depletions from the Dawson wells.

E. Replacement during pumping: During 190 years of pumping, Applicant will replace depletions to Plum Creek as a tributary to the South Platte River in an amount of water equal to the calculated depletions. The 173 homes on Spruce Mountain Ranch will each be granted 1.5 acre-feet of water per year. Maximum withdrawal from the Dawson Aquifer at project buildout will be 259.5 acre-feet per year. Depletions shall be determined as follows:

The depletion owed to the stream in any given year is calculated from a Unit Depletion Curve. The Unit Depletion Curve was assembled by operating the Denver Basin Model for 1 year, and projecting depletions during the year of pumping and for each of 400 years after pumping had ceased. Depletions in any year may be calculated by multiplying the pumping in that year "Qn" by the Unit Depletion Factor for year n "D1," and adding this to the accrued residual depletions from prior years pumping. For example: Depletions due the stream in Year 1 are the product of the quantity pumped in Year 1 "Q1" and the Unit Depletion Value for Year 1 "D1." Depletions for Year 2 equal the sum: Q1 times D2 plus Q2 times D1. Year 3 depletions equal Q3*D1+Q2*D2+Q1*D3. In generic format this equation can be expressed as:

Depletion in Year n=
 $Q_n * D_1 + Q_{n-1} * D_2 + Q_{n-2} * D_3 + \dots + Q_1 * D_n.$

Where: n=the number of years since pumping was initiated

Q=the amount pumped in the designated year
D=the Unit Depletion Factor for the designated year

The numerical series is increased by one term for each year of pumping as the sum of the products of the amount pumped and the unit depletion factors are calculated. If pumping were reduced or eliminated prior to 100 years, this procedure will calculate "post-pumping depletions" starting in the year in which the pumping was reduced or terminated. The Unit Depletion Values for 400 years are presented in Exhibit 1 and said values may be extended beyond 400 years pursuant to the Court's retained jurisdiction. If we assume the well field pumps for 100 years at an average annual flow rate of 259.5 ac.ft./yr, the depletion owed to the stream in 100 years will be 32 ac.ft/yr. This is approximately 12% of the amount pumped in the 100th year, and is essentially the same depletion as predicted by the Denver Basin Model when pumped under identical conditions.

Some portion of the water used is anticipated to return to the Bawson Aquifer, or local shallow aquifers in connection with East Plum Creek or its tributaries. This decree does not adjudicate any claim or credit for return flows resulting from pumping the Lower Dawson Aquifer. Prior to obtaining credit for any claimed return flows to the Dawson Aquifer or Plum Creek tributaries, the Applicant shall establish, to the satisfaction of the parties in this case and subject to the Court's retained jurisdiction, the timing and amount of such return flows reaching the Dawson Aquifer or East Plum Creek.

At maximum pumping of 259.5 acre-feet per year from the Dawson Aquifer for one hundred years, the maximum depletion to South Platte River system from pumping of the wells will be approximately 32 acre-feet in the 100th year. Modeled depletions to stream systems other than Plum Creek are de minimus. Applicant has added those de minimus depletions to the quantity of water it is replacing to the South Platte River system. Year to year depletions shall be calculated according to the State Engineer's model and the Unit Depletion Curve attached as Exhibit 1. Until

the annual depletions reach 10 acre-feet per year, **Applicant** shall replace its depletions to Cook Creek at a rate of flow and pumping schedule which adequately replaces the depletion and prevents injury to downstream water users. After the annual depletions reach 10 acre-feet, Applicant shall replace monthly its depletions to Cook Creek at a rate of one-twelfth (1/12) of the annual depletions.

F. **Post-Pumping Depletion Augmentation:** It is the Applicant's position that depletions which occur after pumping ceases are not injurious, pursuant to Danielson v. Castle Meadows, 791 P.2d 1106 (Colo. 1990), State Engineer v. Castle Meadows, 856 P.2d 496 (Colo. 1993), and State Engineer v. Yale Investment, Inc., 886 P.2d 689 (Colo. 1994). Nonetheless, **Applicant** shall designate 24,177 acre-feet of the water reserved from the water dedicated in paragraph 4.C.(3) of this Decree to provide augmentation water to replace post-pumping depletions after pumping ceases. The Court retains continuing jurisdiction in this matter to determine the adequacy of the replacement plan.

G. Applicant shall replace post-pumping depletions on Cook Creek at or above a point of **return** located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 16 Township 10 South, Range 67 West for the shortest of the following periods: the period provided by § 37-90-137(9)(c), C.R.S.; the expressed period specified by the Colorado Legislature, should it specify one and providing the Applicant 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 Applicant petitions the water court and after notice to parties in the case and proves that he has complied with the appropriate requirement.

5. Administration of Plan for Augmentation.

A. Reports. Applicant shall report to the **Division Engineers** for both Water Division No. 1 and Water Division No. 2, no later than January 30 of each year on an accounting form acceptable to the Division Engineer for Water Division No. 1. The annual reporting shall include the number of wells operating in the development and the quantities of **water pumped**. The reporting shall also include a calculation of depletion for the year, and metered

records of the water returned to the stream to mitigate depletions in the prior year. If the Applicant succeeds in proving claimed return flow credits to the Dawson Aquifer or Plum Creek' tributaries, then the report shall also include a tabulation of the areas irrigated on each lot, and the number of installed septic systems.

- B. Meters. All well withdrawals from structures described in this Decree will be metered and collected by the Property Owners Association, which will summarize and forward the data to the **Division Engineer for Water Division No. 1** and the Water Commissioner by the 30th of January of each year.
 - C. Calculation and Timing of Replacements. The **Applicant agrees** to make the replacements required hereunder when required by the Division Engineer for Water Division No. 1. Replacement requirements shall be determined from **Exhibit 1**. After the annual depletions reach 10 acre-feet, Applicant shall replace monthly its depletions to Cook Creek at a rate of one-twelfth (1/12) of the annual depletions.
 - D. Curtailment. Pursuant to **§ 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.
6. Applicant and its Successors in interest shall pay the cost imposed by operation of this augmentation plan, so long as an **obligation** for augmentation of **depletions** exists, **subject to** the terms of this Decree.
7. Property Owners Association. Upon approval of the subdivision of the subject property, Applicant shall create a Property Owners Association for Spruce Mountain Estates, Unit 2 and for Spruce Mountain Ranch RSP, which all purchasers of lots in said subdivisions shall be required to join. Applicant shall assign to the Property Owners Associations Applicant's interest and rights and responsibilities in and under this plan for augmentation; Applicant shall also convey to the Property Owners Association(s) the total amount of 25,950 acre-feet contained within the Denver Aquifer water as decreed in Case No. 86CW056 or such other augmentation supply as may be obtained pursuant to paragraph 4.C.(2) **and (3)**. **Applicant shall also create** restrictive covenants upon and running with the property, which shall obligate the

individual purchasers and the Property Owners Associations to carry out the requirements of this Decree. This Decree and the restrictive covenants shall be recorded in the real property records of Douglas County so that a title examination of the property, or any part hereof, shall reveal to all future purchasers the existence of this Decree and the restrictive covenants.

CONCLUSIONS OF LAW

8. The Water Court has jurisdiction over this proceeding pursuant to § 37-90-137(9)(c), C.R.S. This Court concludes as a matter of law that the application herein is one contemplated by law. § 37-90-137(4), C.R.S. The application for a decree confirming Applicant's right to withdraw and use groundwater from the Dawson Aquifer should be granted pursuant to § 37-90-137(4) and (9)(c), C.R.S., subject to the provisions of the decree in Case No. 86CW057 and the provisions of this Decree.
9. This plan for augmentation satisfies the requirements of § 37-90-137(9)(c), C.R.S. for replacement of depletions resulting from the operation of Dawson Aquifer wells.
10. Subject to paragraph 5.D. of this Decree, the rights to groundwater determined herein shall not be administered in accordance with priority of appropriation. Such rights are not "conditional water rights" as defined by § 37-92-103(6), C.R.S., requiring findings of reasonable diligence are not applicable to the groundwater rights determined herein. The determination of groundwater rights herein need not include a date of initiation of the withdrawal project. See § 37-92-305(11), C.R.S.
11. Administration of this plan for augmentation pursuant to the terms of this Decree will protect the vested water rights and decreed conditional water rights of others.

JUDGMENT AND DECREE

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

12. 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.

13. For purposes of jurisdiction in this **case**, §37-92-302(2), C.R.S., does not require that the application be supplemented with a well permit or evidence of its denial.
14. The Applicant may locate the 173 Dawson wells anywhere on the subject property subject to the provisions of this Decree.
15. Applicant may withdraw up to 259.5 acre-feet per year and not more than a total of 25,950 acre-feet of not nontributary groundwater from the Dawson Aquifer under the plan for augmentation decreed herein pursuant to § 37-90-137(9)(c) , C.R. S.
16. Applicant has complied with all requirements and met all standards and burdens of proof, including but not limited to §§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) and (9) , C.R.S., to adjudicate its plan for augmentation, and is therefore entitled to a decree confirming and approving its plan for augmentation as described in the findings of fact.
17. Pursuant to §37-92-305(5) , C.R.S. , the **replacement** water herein shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally used.
18. The 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.
19. 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.
20. Retained Jurisdiction.
 - A. If Applicant elects to take credit for claimed **return** flow credits to the Dawson Aquifer or Plum Creek tributaries Applicant shall invoke the Court's retained , jurisdiction and provide notice to all parties. Applicant shall submit data and conclusions supporting the claim to the State Engineer and the Objectors and the State Engineer shall have six months to make a determination. If the Applicant or the parties are dissatisfied with the State Engineer's determination or lack of

determination regarding the claimed **return** flow credits, a final determination shall be made by the Water Court after notice and hearing.

- B. Pursuant to §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 including without limitation the question of whether the frequency of augmentation replacements and accounting need to be adjusted once annual depletions hereunder reach 10 acre-feet. The court also retains continuing jurisdiction for the purposes of determining compliance with the terms of the augmentation plan, or for the purpose of amending this Decree to provide for a different type of wastewater treatment, pursuant to the provisions of this Decree.
- C. 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 which is required 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, Applicant shall thereupon have the burden of proof to show: (1) that any modification sought by Applicant 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 Applicant in response to the **Objectors'** petition does avoid injury to other appropriators.

ENTERED this _____ day of _____, 1998.

Water Judge
Water Division No. 1

THE FOREGOING IS HEREBY APPROVED AS TO CONTENT AND FORM AND APPROVED FOR ENTRY BY THE WATER JUDGE.

WAYNE J. FOWLER P.C. and
FRIEDLOB SANDERSON RASKIN
PAULSON AND TOURTILLOTT, LLC

Date: _____

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THE FOREGOING IS HEREBY APPROVED AS TO CONTENT AND FORM AND APPROVED FOR ENTRY BY THE WATER JUDGE.

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ATTORNEYS FOR TOWN OF CASTLE
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