

<p>DISTRICT COURT, WATER DIVISION NO. 2, COLORADO Pueblo County Judicial Building 320 West 10th Street Pueblo, Colorado 81003-2940 (719) 583-7048</p> <hr/> <p>CONCERNING THE APPLICATION FOR WATER RIGHTS OF SADDLE MOUNTAIN MUTUAL WATER COMPANY</p> <p>IN TELLER COUNTY</p>	<p>FILED Document – District Court 2003CW99 CO Pueblo County District Court 10th JD Filing Date: Nov 27 2009 4:52PM MST Filing ID: 28250974 Review Clerk: Mardell Didomenico</p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 03CW99</p>
<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF REFEREE</p>	

The above-entitled application was filed on October 31, 2003, and was referred to the undersigned Water Referee for Water Division No. 2, State of Colorado, by the Water Judge of said Court in accordance with the provisions of Article 92 of Chapter 37, Colorado Revised Statutes (1973), known as the “Water Right Determination and Administration Act of 1969.” 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 hereby enters the following Findings of Fact, Conclusions of Law and Ruling of the Referee:

FINDINGS OF FACT

1. Name, address and telephone number of applicant:

Saddle Mountain Mutual Water Company (“Company”)
 c/o Blatchley Associates, Inc.
 P.O. Box 27567
 Denver, Colorado 80227
 (303) 989-6932

2. The application in this case was filed with the Water Clerk for Water Division No. 2 on October 31, 2003. Timely and adequate notice of that application was given in the manner required by law. None of the lands or water rights involved in the application is located within the boundaries of any designated groundwater basin. This Court has jurisdiction over

the subject matter of this proceeding and over all persons or entities that may be affected by the application herein, whether or not they have appeared in this proceeding.

3. Statements of opposition to the Company's application were timely filed by the City of Cripple Creek, Canon Heights Irrigation and Reservoir Company, Pisgah Reservoir and Ditch Company, and Alyce M. Brown. The Saddle Mountain Property Owners Association was allowed to intervene and file a statement of opposition on March 6, 2006. All of the statements of opposition have been resolved by stipulations consenting to entry of this Ruling and Decree, which are on file with the Court. No other statements of opposition to the application were filed herein, and no person or entity has sought to intervene in this proceeding. The time for filing statements of opposition and motions to intervene has now expired.
4. The undersigned Referee has consulted with the Division Engineer for Water Division No. 2 regarding the Company's application. The Division Engineer issued a written Summary of Consultation to the Company, dated September 16, 2005. The Company filed a Certificate of Mailing of the Division Engineer's Summary of Consultation with the Court and served a copy of that consultation report upon the opposers on September 21, 2005. The Court has duly considered the Division Engineer's Summary of Consultation as required by law.
5. Based on the evidence presented by the Company in this proceeding, the Referee finds the statements in the Company's application to be true. That application requests a decree: (1) authorizing a change of the Company's water rights in the Watson Ditch No. 1 and the Welty Ditch to add augmentation use to the decreed irrigation use of those water rights; and (2) approving a plan for augmentation to replace out-of-priority water depletions occurring on lots and outlots within the following platted and approved subdivisions or portions of subdivisions located in Water Division No. 2: Saddle Mountain Heights Filing Nos. 1, 2 and 3; Saddle Mountain Ranch Filing No. 4, Units 1 and 2; and Deer View Filing No. 1 (hereinafter referred to as the "Division 2 Subdivisions"). A map depicting the locations of the subdivisions is attached hereto as **Exhibit A** and incorporated herein by reference. Each of the Company's claims is further described below.

FIRST CLAIM - CHANGE OF WATER RIGHTS

6. The Referee finds that the Company requests approval of a change in use and place of use of the following-described senior water rights:

- A. Names of structures:
- i. Watson Ditch No. 1 (Four Mile Creek Priority No. 32 and Arkansas River Priority No. 90 in former Water District No. 12).
 - ii. Welty Ditch (Four Mile Creek Priority No. 64½ and Arkansas River Priority No. 280½ in former Water District No. 12).
- B. Original decrees:
- i. Watson Ditch No. 1: Decreed on February 3, 1894, by the District Court of Fremont County, State of Colorado.
 - ii. Welty Ditch: Decreed on June 13, 1904 in Civil Action No. 2452, by the District Court of Fremont County, State of Colorado.
- C. Points of diversion:
- i. Watson Ditch No. 1: The headgate is located on the east side of Four Mile Creek in the NE1/4 of the NE1/4 of Section 1, Township 15 South, Range 71 West of the 6th P.M., Teller County, Colorado. However, as confirmed in the previous decreed change of 1.46 cfs of the Watson Ditch No. 1, entered on April 8, 1986 in Case No. 85CW78, District Court for Water Division No. 2, the Watson Ditch No. 1 has been diverted for many years below the outlet works of Wright's (Pisgah) Reservoir located in Section 31, Township 14 South, Range 70 West of the 6th P.M.
 - ii. Welty Ditch: The headgate is located on the west bank of Hay Creek approximately 200 yards south of the quarter corner of the north line of Section 17, Township 14 South, Range 70 West of the 6th P.M., Teller County, Colorado.
- D. Sources:
- i. Watson Ditch No. 1: Four Mile Creek, tributary to the Arkansas River.
 - ii. Welty Ditch: Hay Creek, tributary to Four Mile Creek, tributary to the Arkansas River.
- E. Appropriation dates:

- i. Watson Ditch No. 1: May 1, 1872.
- ii. Welty Ditch: September 1, 1880.

F. Amounts:

- i. Watson Ditch No. 1: 1.6 cfs. The Referee finds that of that amount, the Company owns and seeks to change 0.14 cfs herein.
- ii. Welty Ditch: 2.0 cfs. The Referee finds that of that amount, the Company owns 0.52 cfs and seeks to change 0.04 cfs herein.

G. Uses:

- i. Watson Ditch No. 1: Irrigation.
- ii. Welty Ditch: Irrigation.

H. Names and addresses of owners of land on which structures located:

- i. Watson Ditch No. 1: John T. Hatton
 230 Ute Trail
 Woodland Park, Colorado 80863
- ii. Welty Ditch: Andrew McKee
 51 Carriage Drive
 Florissant, Colorado 80816

7. The Company has presented evidence in this proceeding of the historic use of the Watson Ditch No. 1 and the Welty Ditch water rights, respectively, based upon which the Referee hereby makes the following Findings of Fact:

A. Watson Ditch No. 1:

- i. The Watson Ditch No. 1 was decreed for the irrigation of 40 acres of pasture and hay meadows located in the SW1/4 of Section 31, Township 14 South, Range 70 West of the 6th P.M., in the NW1/4 of Section 6, Township 15 South, Range 70 West of the 6th P.M., and in the NE1/4 of Section 1, Township 15 South, Range 71 West of the 6th P.M., Teller County, Colorado.

These historically irrigated lands are located on a gravel terrace along the east side of Four Mile Creek.

- ii. In the decree entered on April 8, 1986 in Case No. 85CW78, the District Court for Water Division No. 2 approved a change of 1.46 cfs of the Watson Ditch No. 1 water right to augmentation use, among other purposes. That decree established that the Watson Ditch No. 1 historically diverted an average of 186.0 acre-feet per year, with an average annual historic consumptive use of 34.8 acre-feet to irrigate 32.5 acres with the applicant's 1.46 cfs interest, or a 1.07 acre-feet per acre unit consumptive use rate. *See* 85CW78 Decree, Findings of Fact ¶ 10. The Referee finds that it is reasonable to rely upon such previously adjudicated unit consumptive use rate herein, because the Company's ownership interest in the Watson Ditch No. 1 water right historically irrigated the same types of crops on lands immediately adjacent to the historically irrigated lands that were at issue in the 85CW78 proceeding. The Referee further finds that the prior historic use analysis in Case No. 85CW78 relied upon diversion records from the representative historical period of 1952 through 1979 when the Watson Ditch No. 1 water right was diverted at its decreed location. Thus, the Referee ultimately finds and determines that the Company's 0.14 cfs ownership interest in the Watson Ditch No. 1 water right historically irrigated 2.81 acres which, on the basis of a calculated average per unit consumptive use of 1.07 acre-feet per acre, yields 3.01 acre-feet of consumptive use of irrigation water per year. The 2.81 acres that have been dried-up and monumented are described on the corrected survey attached hereto as **Exhibit B** and incorporated herein by reference.

B. Welty Ditch:

- i. The Welty Ditch water right was decreed for the irrigation of 70 acres of land located in the E1/2 of the NW1/4 and the E1/2 of the SW1/4 of Section 17, and the N1/2 and the SW1/4 of the NW1/4 of Section 20, all in Township 14 South, Range 70 West of the 6th P.M., Teller County, Colorado. Historical investigation by the Company's water engineers, however, reveals that up to 113 acres of primarily hay meadow crops were historically irrigated under the Welty Ditch water right.
- ii. The Referee finds that the Company's water engineers have evaluated the diversion records for the Welty Ditch water right covering the representative historical period of 1942 through 1970. Notwithstanding the historical evidence showing that up to 113 acres were irrigated under the Welty Ditch

water right, the Company's water engineers have conservatively assumed that, on average, approximately only 58 of those 113 acres were consistently irrigated. Based on the diversion records, the Company's water engineers have determined that irrigation of grass crops on those 58 acres consumed an average of 72 acre-feet per year, or an average annual historic consumptive use of 1.07 acre-feet per acre. Therefore, the Referee finds that the Company's 0.04 cfs ownership interest in the Welty Ditch water right historically irrigated 0.894 acre which, on the basis of a calculated average per unit consumptive use of 1.07 acre-feet per acre, yields 0.96 acre-feet of consumptive use of irrigation water per year. The 0.894 acre that has been dried-up and monumented is described on the survey attached hereto as **Exhibit C** and incorporated herein by reference.

8. As discussed under the Second Claim below, the Company's water rights in the Watson Ditch No. 1 (0.14 cfs) and the Welty Ditch (0.04 cfs), as approved for change herein, were dried up and dedicated to an "augmentation plan" that was administratively approved by the State Engineer in 1972 and that has been in effect since then. The Second Claim below seeks this Court's approval of the same terms and conditions upon which the State Engineer approved that plan and has long administered the Company's Watson Ditch No. 1 and Welty Ditch water rights. The Referee finds that so long as the Company's dry up of historically irrigated lands under the Watson Ditch No. 1 (2.81 acres) and the Welty Ditch (0.894 acre) water rights remains in place and the Company does not exceed an annual average of 3.97 acre-feet of consumptive use per year under those rights, no material injury will occur to other vested or decreed conditional water rights from the change of the Company's Watson Ditch No. 1 and Welty Ditch water rights from irrigation to augmentation use. The dry-up areas shown on **Exhibits B and C** shall be monumented as reasonably required by the Division Engineer. Applicant shall forego diversion of its respective amounts of 0.14 cfs and 0.04 cfs at the headgates of the Watson Ditch No. 1 and the Welty Ditch with the result that the historical depletions of both water rights will be returned to the stream for replacement of the projected depletions from the Company's shareholders at the confluence of West Four Mile Creek and Four Mile Creek in Section 12, Township 15 South, Range 71 West of the 6th P.M.

SECOND CLAIM - APPROVAL OF PLAN FOR AUGMENTATION

9. The Referee finds that the Company is a recently incorporated non-profit mutual ditch and reservoir company that holds and will exercise the above-described water rights in the Watson Ditch No. 1 and the Welty Ditch for the benefit of its shareholders, who own lots or other lands located within the Company's service area, which includes, but is not limited to, the Division 2 Subdivisions under this plan for augmentation. The Company will serve as the entity responsible for operating this augmentation plan for the Company's shareholders

in accordance with the terms and conditions of this Ruling and Decree. In addition to complying with the terms and conditions of this Ruling and Decree, the shareholders of the Company shall be required to comply with the Company's Articles of Incorporation, Bylaws, Rules and Regulations, and Policies, as they exist or may be amended in the future, in order to obtain replacement water under this plan for augmentation. The Referee finds that the Company's Articles and Bylaws grant sufficient authority to administer and enforce the terms and conditions of this Ruling and Decree against the Company's shareholders, and that by becoming a shareholder of the Company, each shareholder covenants and agrees to be subject to and bound by all terms and conditions applicable to this plan for augmentation, including but not limited to the metering of all well diversions and the use of only non-evapotranspiration septic systems, which requirements constitute covenants running with the shareholder's land. The Referee therefore finds and determines that the Company shall be responsible for administering and enforcing the terms of the augmentation plan with respect to the Company's shareholders and for reporting to the Division Engineer water use of the Company's shareholders within the Division 2 Subdivisions as required in paragraph 15 below, for implementing the dry-up and replacement requirements under this decree and for accounting for the operation of this plan for augmentation on at least an annual basis or otherwise as reasonably required by the Division Engineer.

10. As referenced in the First Claim above, the Referee finds that the Company's above-described interests in the Watson Ditch No. 1 and the Welty Ditch water rights were dedicated to an administratively-approved "augmentation plan" authorized by the State Engineer on August 14, 1972, and in effect since that time. That plan provided for the replacement of out-of-priority water depletions that would occur from in-house domestic use wells on the then-proposed total of 849 lots within various subdivisions to be located in Water Division Nos. 1 and/or 2; augmentation is now needed for the final total of 468 lots that were platted and approved by Park County. The Company seeks a decree approving the existing plan as to the 317 platted and approved lots and outlots located within the Division No. 2 Subdivisions; excluded from this plan for augmentation are the 151 platted and approved lots and outlots in Saddle Mountain Heights Subdivision, Filing No. 2 (Slater Creek Ranch), which are located in Water Division No. 1 ("Division 1 Subdivision"). Attached hereto as **Exhibit D** and incorporated herein by reference is a map depicting the lot-by-lot dividing line between Water Division Nos. 1 and 2 in the Saddle Mountain Heights Subdivision, Filing No. 2, which map was developed in consultation with the State Engineer's Office. The Company intends to separately pursue approval of a plan for augmentation for those lots located within Water Division No. 1, and the Referee finds that the subject augmentation water rights in the Watson Ditch No. 1 and the Welty Ditch will not be used for the Water Division No. 1 augmentation plan, which will rely upon separate augmentation water rights located in that water division. Together, the Division 1 Subdivision and the Division 2 Subdivisions constitute the Company's current service area. *See* Table 1 below. Based upon the evidence presented herein by the Company, the Referee

finds that at the present time, 12 of the lots within the Company’s service area are reported to be occupied on a full-time basis and all other lots therein are either occupied on a seasonal basis or are not yet developed. Further, the Referee finds that there is a trend towards consolidation of multiple lots into single, larger lots within the Company’s service area. Therefore, the final number of occupied lots within the Company-s service area will be less than the 468 total lots referenced above.

11. As set forth in Table 1 below, the Company seeks approval of a plan for augmentation to replace out-of-priority water depletions occurring on the following number of lots and outlots located within the Division 2 Subdivisions, which, as found in paragraph 10 above, will be subject to some consolidation of lots in the future:

Table 1 APPROVED PLATTED LOTS AND OUTLOTS	
Subdivision	Lots in Water Division No. 2
Saddle Mountain Heights Filing No. 1	131 (includes four outlots)
Saddle Mountain Heights Filing No. 2	95 (includes one outlot)*
Saddle Mountain Heights Filing No. 3	34
Saddle Mountain Ranch Filing No. 4, Unit 1	7
Saddle Mountain Ranch Filing No. 4, Unit 2	20
Deer View Filing No. 1	30 (includes one outlot)
TOTAL:	317

* 151 lots out of the total 246 lots within the Saddle Mountain Heights Filing No. 2 Subdivision of the original Slater Creek Ranch are located in Water Division No. 1 and are not covered by this augmentation plan.

Each of the above lots is or will be supplied domestic water by individual wells, and wastewater treatment on the above lots and outlots is or will occur by individual non-evaporative septic tank/soil absorption systems. In accordance with established engineering standards, the Referee finds, therefore, that such domestic water use will consume approximately 10% of the water diverted by the Company’s shareholders, for which consumptive use amount replacement water must be provided by the Company to prevent injury to other water rights.

12. The Referee finds that the plan approved by the State Engineer in 1972 was predicated on the following water use assumptions for the subdivisions that make up the Company's service area, which assumptions the Company seeks approval of herein as to the Division 2 Subdivisions:
 - A. 90% of the lots within the subdivisions are second homes for the purchasers of lots and have only seasonal occupancy, with a daily per capita water requirement of 60-80 gallons per day per capita.
 - B. The owners of such second home lots spend on average 14 days on the lots during the summer months, and 16 days throughout the other nine months of the year, for a total of 30 days of occupancy per year.
 - C. The remaining 10% of lots within the subdivisions are year-round residences, with a daily per capita water requirement of 80-100 gallons per day per capita.
 - D. The estimated population of all residences on lots within the subdivisions is 3.5 people per unit.
 - E. 10% of the water used in residences on lots within the subdivisions is consumed in-house and in the individual septic systems.

No livestock watering was included in the original plan.

13. The Referee finds, based upon the water use assumptions described in paragraph 12 above, that the following Table 2 sets forth the domestic and livestock water use depletions that are projected to occur within the Division 2 Subdivisions at the time of reaching full buildout:

Table 2 Saddle Mountain Division 2 Subdivisions PROJECTED WATER USE REQUIREMENTS AND CONSUMPTION	
	Water Division 2
a. Total Lots Platted	317*
b. Original Full-Time Lots Projected	32
c. Original Second Home Lots Projected	285
d. Annual Water Use Full-Time Lot (acre-feet/year)	0.314
e. Annual Water Use Second Home (acre-feet/year)	0.0258
f. Total Full-Time In-House Use (acre-feet/year) (b x d)	10.05
g. Total Second Home In-House Use (acre-feet/year) (c x e)	7.35
h. Annual Total In-House Water Use (acre-feet/year) (f + g)	17.40
i. Annual Total In-House Consumptive Use (h x 10%)	1.74
j. Total Livestock Water Use (acre-feet/year)**	0.40
k. Annual Replacement Requirements (acre-feet/year) (i + j)	2.14
Total Available Replacement Water in Plan (acre-feet/year)	3.97

* In the original plan approved by the State Engineer, 10% of the lots were assumed to be full-time occupancy while 90% of the lots were assumed to be second homes with 30 days occupancy per year (14 days in the 3 summer months and 16 days throughout the remaining 9 months). Some lots have been consolidated and others will be in the future, reducing the total number of buildable lots.

** Includes consumptive use based on 36 horse equivalents.

14. The Referee finds that the following Table 3 sets forth the monthly distribution of domestic depletions that is projected to occur within the Division 2 Subdivisions at the time of buildout, as well as the monthly allocation of consumptive use credits available to replace those depletions under the Company's Watson Ditch No. 1 and Welty Ditch water rights, as changed herein:

Table 3
(Values in Acre-Feet)

Month	Projected CU of Company's Shareholders	Average Annual Dry-up Credits Watson Ditch*	Average Annual Dry-up Credits Welty Ditch**	Total Average Annual Replacement Water
January	0.156			
February	0.156			
March	0.156			
April	0.156	0.07	0.15	0.22
May	0.156	0.75	0.33	1.08
June	0.244	1.05	0.38	1.43
July	0.244	0.57	0.10	0.67
August	0.244	0.30		0.30
September	0.156	0.24		0.24
October	0.156	0.03		0.03
November	0.156			
December	0.156			
Totals	2.14	3.01	0.96	3.97

*Available credit so long as 10-year moving average of historical consumptive use credit under the Company's Watson Ditch water rights is at least 3.01 acre-feet per year.

** Available credit so long as 10-year moving average of historical consumptive use credit under the Company's Welty Ditch water rights is 0.96 acre-feet per year.

- Table 3 above indicates that approximately 2.14 acre-feet of replacement water is required to fully augment and replace in-house domestic and livestock water use depletions projected to occur within the Division 2 Subdivisions at buildout, and to thereby prevent injury to other water rights. The 3.97 acre-feet per year of consumptive use credit available to the Company

under its Watson Ditch No. 1 and Welty Ditch water rights, as changed herein, is more than adequate to fully replace the anticipated 1.74 acre-feet of annual domestic water use depletions that are projected to occur within the Division 2 Subdivisions at full buildout. The Company requests the right also to use the projected surplus of 2.23 acre-feet per year of said consumptive use water to replace any out-of-priority depletions associated with outdoor stockwatering use within the Division 2 Subdivisions, estimated at 0.40 acre-feet per year as described in this paragraph below, and to replace any out-of-priority depletions related to in-house domestic and livestock water use within the Division 2 Subdivisions which exceed the projected total of 2.14 acre-feet of annual depletions. The Referee finds, however, that the Company's projected in-house domestic depletions are based upon the particular water use assumptions described in paragraph 12 above, which assumptions are not certain to occur as the Division 2 Subdivisions develop over time and ultimately reach buildout. For purposes of empirically testing and confirming the validity of such water use assumptions in practice, the Company has stipulated with the opposing parties to account for and to augment and replace out-of-priority domestic use water depletions only on the basis of actual metered well diversions in the Division 2 Subdivisions. In order to implement such stipulation and ensure that the Company does not exceed its available augmentation and replacement supplies under the Watson Ditch No. 1 and Welty Ditch water rights, as changed herein, the Referee finds that the following terms and conditions shall apply to this plan for augmentation:

- A. The Company shall meter and keep records of all well diversions of the Company's shareholders occurring in the Division 2 Subdivisions, and shall augment all out-of-priority depletions to Four Mile Creek Basin on the basis of such actual metered well diversions by the Company's shareholders.
- B. The Company shall file an annual water use accounting report with the State and Division Engineers by November 15 of each year, and the opposing parties in this case will be entitled to obtain a copy of such report upon request and payment of the Company's reasonable copying costs therefor. Such report will show total metered well diversions by the Company's shareholders in the Division 2 Subdivisions for the preceding water year (November 1 through October 31) and full replacement of any out-of-priority water depletions associated with such diversions during said year. Such report shall separately account for in-house and livestock water use by the Company's shareholders under this plan for augmentation, with said livestock water use being calculated in accordance with the provisions of paragraph 15.D. below. If in the administration of the augmentation plan the Company finds that any well pumping or water usage under the operation of the augmentation plan exceeds the water use assumptions contained in this decree, the Company shall report such findings to the Division Engineer, shall take such enforcement action as is authorized by the Company's Articles of Incorporation, Bylaws, Rules and Regulations, and

Policies, and shall cooperate with the Division Engineer if the Division Engineer reasonably determines that additional enforcement action is necessary.

- C. In order to provide a safety factor to ensure that the Company's domestic in-house water depletions do not exceed the augmentation supplies, the State Engineer shall issue well permits for lots in the Division 2 Subdivisions until the Company's reported total in-house depletions reach 90% of the available augmentation and replacement supplies hereunder, or 3.57 acre-feet of consumptive use per year (3.97 acre-feet of available replacement supplies x .90); provided, however, that such well permit cap shall not prevent the Company from using replacement water in excess of 3.57 acre-feet of consumptive use, up to and including the full 3.97 acre-feet of replacement water, for in-house and livestock water uses within the Division 2 Subdivisions in accordance with this Ruling and Decree. Pursuant to this Ruling and Decree, the State Engineer shall not issue any well permits for lots located within the Division 2 Subdivisions beyond the 90% domestic depletion limit unless ordered to do so by the Court under its retained jurisdiction, as described in paragraphs 15.D. and 26 below. Once the 90% limit has been reached, the Company shall be responsible for allocating the available augmentation water among its shareholders and for monitoring water use by such shareholders, in accordance with the Company's organization as a mutual ditch and reservoir company existing under the laws of the State of Colorado.
- D. The Company intends to permit stockwatering use by its shareholders under this plan for augmentation. With respect to such outdoor use, the Referee finds that the Company's engineers have calculated the consumptive use of stockwatering to be 0.0112 acre-foot per horse or equivalent livestock per year, which is reasonable and consistent with established engineering standards. On that basis, the Referee finds that the Company shall be permitted to use the surplus augmentation supplies which exceed the above-referenced 90% domestic depletion limit, to augment stockwatering use within the Division 2 Subdivisions. Those surplus supplies will be limited for the time being to a surplus of 0.40 acre-foot of replacement water for livestock water use (3.97 acre-feet - 3.57 acre-feet) and the Company's outdoor use shall not exceed augmentation of 36 head of stock per year in the Division 2 Subdivisions under this augmentation plan (0.0112 x 36 horse equivalent = 0.40 acre-foot of consumptive use per year); provided, however, that if the Company ever reaches the 90% in-house depletion limit in the future and there are then less than 36 head of stock in the Division 2 Subdivisions which are being augmented hereunder, then the Company may invoke the Court's limited retained jurisdiction set forth in paragraph 26 below and request an order that the State Engineer issue additional domestic well permits commensurate with the amount of surplus replacement water that is not already committed to stockwatering use at that time, in

return for the Court ordering that this Ruling and Decree be modified to accordingly reduce the total number of head of stock which may be augmented by the Company hereunder. In the annual reports required by paragraph 15.B. above, the Company shall separately account for augmentation of all head of stock owned by the Company's shareholders in the Division 2 Subdivisions hereunder, on the basis of 0.0112 acre-foot per horse or equivalent livestock per year, which shall be distinguished from domestic in-house water use by the Company's shareholders within the Division 2 Subdivisions. No other outdoor uses shall be permitted hereunder except by Water Court application to amend this plan for augmentation or by application for approval of a separate augmentation plan.

16. The engineering analysis presented by the Company herein shows that the effect of leaving water from the Watson Ditch No. 1 and the Welty Ditch in the stream during the summer is to supply senior water rights on Four Mile Creek with replacement water at a time when it can be used by such rights during the irrigation season. The Company's engineering analysis herein also shows that the Four Mile Creek tributaries typically run dry or nearly dry downstream of the Division 2 Subdivisions in the late summer, fall and winter seasons, such that wintertime replacement to Four Mile Creek from on-site storage would not produce any appreciable benefit to senior downstream water rights. Therefore, the Referee finds that by foregoing diversions and leaving in the stream the historic consumptive use from the Watson Ditch No. 1 and the Welty Ditch water rights, as changed herein, the Company's depletions to the stream system will essentially balance out on an annual basis and the Company will provide replacement water of adequate quality, quantity, location and timing to maintain historical return flows and to meet the lawful entitlements of and prevent injury to vested water rights.
17. In addition to any other applicable provisions in this Ruling and Decree, including but not limited to the provisions of paragraph 15 above, the Referee finds that the Company's plan for augmentation for the Division 2 Subdivisions should be granted subject to the following terms and conditions:
 - A. All water use by the Company's shareholders shall be metered, recorded and reported to the Division Engineer on at least an annual basis, demonstrating compliance with this Ruling and Decree. The information to be reported by the Company shall include the total number of wells that have been permitted and drilled by the Company's shareholders, and the total head of livestock owned by the Company's shareholders, within the Division 2 Subdivisions at the time of reporting.
 - B. The Company shall account for all water use and replacement water required under this plan for augmentation on an annual basis or as otherwise reasonably required by the Division Engineer, through the use of accounting forms approved by the Division

Engineer and substantially similar to the proposed accounting forms which are attached hereto for “illustrative” purposes as **Exhibit E**. The Company’s accounting forms for this plan for augmentation may be modified over time so long as the Division Engineer approves any such modifications.

- C. The Division Engineer shall determine the type of augmentation station or other means of confirming that sufficient diversions, including a return flow component, are available in priority at the decreed points of diversion of the Company’s Watson No. 1 Ditch and the Welty Ditch in order for the Company to have use of the consumptive use credits under those water rights in the plan for augmentation approved herein. The Company shall construct, operate and maintain such structures as may reasonably be required by the Division Engineer for that purpose. In any event, such augmentation station or structures shall be installed and operable by the time the water uses under the plan for augmentation results in a replacement obligation of more than 0.40 acre-feet per year. The Court shall retain jurisdiction to determine the reasonableness of any such requirements or to resolve disputes over the Company’s compliance with such requirements.
- D. In accordance with C.R.S. § 37-92-305(8), the State Engineer shall curtail all out-of-priority diversions occurring under this plan for augmentation, the depletions from which are not so replaced as to prevent injury to vested water rights.

The Referee finds that no material injury will occur to other vested and decreed conditional water rights, so long as the plan for augmentation granted herein is operated in accordance with the above-described terms and conditions and the other applicable provisions of this Ruling and Decree, including, without limitation, the provisions of paragraph 15 above.

CONCLUSIONS OF LAW

- 18. Timely and adequate notice of the Company’s application was given in the manner required by C.R.S. § 37-92-302(3), and this Court has jurisdiction over all persons and entities affected hereby, whether or not they have participated in this proceeding. The Referee concludes that the published notice of the Company’s application put interested parties, to the extent reasonably possible, on inquiry notice of the nature, scope and impact of the claims granted herein.
- 19. The Company’s application is one contemplated by law, and this Court has exclusive jurisdiction over the subject matter of this proceeding. C.R.S. §§ 37-92-203 and 37-92-302.
- 20. The time for filing statements of opposition and motions to intervene has expired by operation of law. C.R.S. §§ 37-92-302(1)(c) and 37-92-304(3).

21. The Company has complied with and satisfied all legal standards and burdens of proof applicable to its application herein, including but not limited to C.R.S. §§ 37-92-301 through 37-92-305, inclusive, and is entitled to entry of this Ruling and Decree as a matter of law.
22. The Referee concludes that the Company has demonstrated that the approval of its claims for a change of water rights and plan for augmentation will not injuriously affect the owners of or persons entitled to use water under vested water rights or decreed conditional water rights. C.R.S. § 37-92-305(3). The Referee further concludes that the Company's plan for augmentation is sufficient to permit the continuation of diversions within the Division 2 Subdivisions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the Company has demonstrated its ability to provide replacement water necessary to meet the lawful requirements of senior diverters at the time, location and extent to which such seniors would be deprived of their lawful entitlement by the Company's diversions hereunder. C.R.S. § 37-92-305(8). Therefore, the Company's claims for approval of a change of water rights and plan for augmentation should be granted as a matter of law, subject to the terms and conditions of this Ruling and Decree.

JUDGMENT AND DECREE

23. Each of the foregoing Findings of Fact and Conclusions of Law set forth in paragraphs 1 through 22 above is incorporated herein by this reference as if fully set forth and is hereby modified as necessary to constitute the Judgment and Decree of this Court.
24. The Company's First Claim for a change of the water rights described herein for the Watson Ditch No. 1 and the Welty Ditch is hereby approved and adjudicated, subject to the terms and conditions set forth herein.
25. The Company's Second Claim for approval of a plan for augmentation for the Division 2 Subdivisions is hereby approved and adjudicated, subject to the terms and conditions set forth herein. In accordance with the provisions of C.R.S. §§ 37-90-137(2) and 37-92-305(6)(a), and subject to the terms and conditions set forth in this Judgment and Decree, including but not limited to the provisions of paragraph 15 above, the State Engineer shall issue well permits, as needed, for those lots or other lands within the Division 2 Subdivisions that are covered by this Judgment and Decree.
26. Pursuant to C.R.S. § 37-92-304(6), the Court shall retain general jurisdiction over issues of potential injury due to the change of water rights and plan for augmentation approved herein for a period of five years from 75% buildout of the Division 2 Subdivisions, which shall occur, for the purposes of this Judgment and Decree, when 75% of the lots and outlots within the Division 2 Subdivisions have wells constructed on them the out-of-priority diversions

from which are being augmented and replaced under this Judgment and Decree. The Company shall be required to certify in writing when 75% buildout of the Division 2 Subdivisions so occurs, which certification shall be filed with the Court and served on the Division Engineer and all parties hereto, and which shall trigger start of the five-year retained jurisdiction period under this Judgment and Decree. Within such time limitation, the Court's retained jurisdiction may be invoked by the Division Engineer or any party to this case upon the filing of a verified petition with this Court under the above caption and case number and with appropriate notice to all other parties hereto. If a party other than the Company seeks to invoke the Court's retained jurisdiction, then that party shall have the burden of establishing the *prima facie* facts alleged in the petition, including the existence of any alleged material injury to that party's water rights. If the Court finds those facts to be established, then the Company shall thereupon bear the burden of showing: (a) that any modifications sought by the Company will avoid injury to other vested water rights; or (b) that any modifications sought by the petitioner is not required to avoid injury to other vested water rights; or (c) that any term or condition proposed by the Company in response to the petition will avoid injury to other vested water rights. Additionally, in accordance with the provisions of paragraph 15.D. above, the Court shall indefinitely retain limited jurisdiction over this case for purposes of permitting the Company to petition the Court for an order authorizing issuance of additional well permits by the State Engineer and a corresponding modification of the stockwatering limits under this Judgment and Decree.

27. Except to the extent that the Court has specifically retained jurisdiction herein, this Judgment and Decree is final.

DATED this 27th day of November, 2009.



Mardell R. DiDomenico

Mardell R. DiDomenico
Water Referee
Water Division No. 2