

FILED IN
WATER COURT
DIVISION 1
W. CO., COLO.
OCT - 4 1976
LOIS CLINEBELL
CLERK

IN THE DISTRICT COURT IN AND FOR

WATER DIVISION NO. 1

STATE OF COLORADO

Case No. W-7797

IN THE MATTER OF THE APPLICATION)
OF WESTERN REALTY AND DEVELOPMENT) FINDINGS OF FACT, CONCLUSIONS
COMPANY, FOR WATER RIGHTS) OF LAW AND DECREE APPROVING
) PLAN FOR AUGMENTATION
IN PARK COUNTY) INCLUDING EXCHANGE

THIS MATTER, having come on for hearing upon the application of Western Realty and Development Company, a Colorado corporation, for approval of the plan for augmentation which was filed in October, 1974, and the Court having considered the pleadings, the files herein, and the evidence presented, FINDS:

1. Timely and adequate notice of this proceeding has been given in the manner required by law, and the Water Judge sitting in this Court has jurisdiction over the subject matter of these proceedings and over all parties affected hereby, whether they have appeared or not. Statements of Opposition have been filed herein by the City and County of Denver, acting by and through its Board of Water Commissioners, represented by Michael L. Walker, Attorney; and the State of Colorado, by and through C. J. Kuiper, State Engineer, W. G. Wilkinson, Division Engineer, and through Ben L. Wright, Jr., Donald H. Hamburg, and James D. Geissinger, Attorney at Law. No other parties have entered their opposition in this proceeding, and the time for filing Statements of Opposition has expired.

2. Applicant owns approximately 26 acres of land in Sections 12 and 13, Township 8 South, Range 76 West, 6th P.M., which has been subdivided and platted as the Jefferson Heights Amended 1972 Subdivision, containing 50 lots for single family residences.

The plat map of the subdivision is attached herewith as Exhibit A.

3. The lands to be developed by the Applicant are not located within a designated groundwater basin.

4. Applicant owns the following water right:

1.50 cfs. decreed to the E. C. Whitten No. 1 Ditch from Michigan Creek, a tributary of the South Platte River, appropriation date of June 1, 1885, by decree of May 22, 1913, of the District Court in and for Park County, for irrigation purposes, headgate located on the right bank of said stream near the West quarter corner of Section 12, Township 8 South, Range 76 West of the 6th P.M.

The historic use of the 1.50 cfs. has been for the irrigation of hay meadows. The 1.5 cfs. decreed to the E. C. Whitten No. 1 Ditch was used on approximately 26 acres with an average annual consumptive use estimated at 12.50 acre feet.

The Applicant, by a Plan of Augmentation granted by this Court (Case No. W-7543), transferred a portion of this right to Florissant Heights Filing No. 3. The Decree in W-7543 provides that 10.4 acres of land under the E. C. Whitten No. 1 Ditch shall be permanently removed from irrigation and that 0.60 cfs. of the E. C. Whitten No. 1 water right and 5.00 acre feet of the total original historic consumptive use be converted to a storage right.

In order that the present Plan for Augmentation might be put into effect, Western Realty and Development Company, the owner of the water right, will immediately and permanently cease irrigation of an additional 6.5 acres of land, changing 0.37 cfs. of the remaining 0.9 cfs. and 3.14 acre-feet of the remaining 7.5 acre-feet of historic consumptive use of irrigation water for the Jefferson Heights Amended 1972 Subdivision.

5. The source of supply for the domestic water service

for the 50 single-family residential units will be from ground-water occurring in the alluvium and consolidated bed rock of Michigan Creek, a tributary of the South Platte River. The means of diversion of such water will be by on-lot domestic wells. Water from these wells will be used for domestic in-house only purposes, with no irrigation or other outside uses. Sewage disposal systems will be of the septic-soil absorption type. No evapotranspiration disposal waste systems will be allowed. Yard irrigation and all uses other than domestic, in-house use will be prohibited by restrictive covenants by provisions of this decree and by appropriate conditions placed upon the well permits issued by the State Engineer.

Based upon the septic-soil absorption systems, the consumptive use is estimated to be 10 percent of diversions.

6. As long as the stream depletion is replaced in the amount, at the time and at the place of its occurrence, during a time of valid call for water by a water right entitled thereto, the stream is the same in all respects as it would have been in the absence of the wells, and no injurious effect will occur to the owners of or persons entitled to use vested or decreed conditional water rights.

7. The estimated net depletion to the South Platte River and its tributaries resulting from Applicant's development at full development is 1.57 acre feet per year. This figure is based on a 100% occupancy rate of 3.5 people per unit, 365 days per year, allowing 80 gallons per person per day, or approximately 0.31 acre feet per year of gross diversions for each unit, and a 10 per cent consumptive use factor.

8. In order to avoid injury to vested water rights of appropriators from the South Platte River and its tributaries which

would result from the above-described depletions caused by Applicant's development, Applicant has filed the plan for augmentation herein. Under such plan, the Applicant will utilize the said E. C. Whitten No. 1 water right to compensate the South Platte River basin for the depletion resulting from the operation of the above-described wells. The total annual future depletion, 1.57 acre feet per year, will be less than the total depletion of 3.14 acre feet per annum presently and historically occurring pursuant to the use of the 0.37 cfs. of the E. C. Whitten No. 1 Ditch now owned by the Applicant.

Applicant will compensate the stream directly by forever abandoning to Michigan Creek 0.04 cfs. of the E. C. Whitten No. 1 water right, the historic consumptive use of which has been approximately 0.36 acre feet per year. In addition, the consumptive use of 2.78 acre-feet per year resulting from 0.33 cfs. of the said E. C. Whitten No. 1 water right will be stored in the Jefferson Heights Ground Water Reservoir at a rate not to exceed 0.35 cfs. when the E. C. Whitten No. 1 is in priority. The intake for the reservoir will be located on the upslope side or northeast corner of Lot 118A of said subdivision in the NW 1/4 SW 1/4, Township 8 South, Section 12, Range 76 West, 6th P.M., and will extend in a southwesterly direction toward Michigan Creek within the same Section 12.

This reservoir is composed of a thick soil and talus mantel and bed rock which has weathered to various depth. The mantel consists of earth, sandy shales and boulders where as the bed rock is described as predominantly decomposed granites. Each of these materials will have varying percolative rates which provide time lags from 21 months to 42 months which will meter the water in

storage back to Michigan Creek and which will in time provide a continuous replacement of water depleted by the individual wells in the subdivision.

Water will be stored in the reservoir at such times and in such amounts as the Division Engineer, Water Division 1, shall direct, in order to compensate for year-round depletions not compensated for by the abandonment of the 0.04 cfs. of the E. C. Whitten No. 1 Ditch water right to the stream and in proportion to the number of homes occupied or ready for occupancy as of April first of each year.

Applicant will cease the diversion of 0.37 cfs. of the afore-described E. C. Whitten No. 1 water right for irrigation and cause the dry-up of 6.50 acres of the land historically irrigated, providing a total average annual consumptive use of 3.14 acre feet. The legal description of the 6.50 acre tract which will be dried up is depicted in a plat attached hereto and made a part hereof as Exhibit B, which plat shall be filed of record in the Park County Clerk and Recorder's office, and, when taken together with this decree, which shall also be filed of record, will constitute a covenant running with that land.

The water rights committed herein to this plan will be used only as directed by this decree and for no other purpose unless pursuant to subsequent adjudication.

The remaining 0.53 cfs. of the Applicant's E. C. Whitten No. 1 water right will be available to the Applicant, to continue irrigation of pasture lands not under this plan or that plan for Florissant Heights Filing No. 3.

If the plan for augmentation is operated and administered in accordance with the above-detailed description, it will have the effect of replacing water in the stream at the time and places

and in the amounts of the depletions caused by the development's use of water. As a result, the underground water to be diverted by the development wells, which would otherwise be considered as appropriated and unavailable for use, will now be available for appropriation without material injury to owners of users of water rights on the South Platte River or its tributaries.

9. All subsequent lot purchasers in the Jefferson Heights Amended 1972 Subdivision as hereinabove described will be bound by the terms of this decree. This decree shall be filed of record in Park County and thereby constitute a covenant running with the land. The restrictive covenants running with the property, adopted at the time of subdivision, shall allow the use of water for domestic, in-house purposes only, and then only as set forth in this plan for augmentation, and shall prohibit all other uses. To further facilitate the enforcement of this condition, the obligations and rights attendant to this plan for augmentation have been included in the protective covenants for Jefferson Heights Amended 1972 Subdivision, and shall respectively be assumed by and assigned to the Homeowners' Association, which shall be comprised of all lot owners within the subdivision. The new covenants are attached herein and made a part hereof as Exhibit C. The 0.37 cfs. of the E. C. Whitten No. 1 water right will be conveyed to the association. The association shall enforce, and shall be required by the restrictive covenants pursuant to which it is created, to enforce the restrictions in the covenants. It will be empowered to be sued on behalf of its constituent property owners by any person entitled to enforce the decree in this matter and it may in turn sue its constituent property owners to force compliance with the terms hereof, or join them in any enforcement procedure. In addition,

the association shall report to the Division Engineer of Water Division 1 any known violations of the conditions of this decree. Upon any such notice and due investigation or otherwise, the Division Engineer may require the curtailment of diversions by the well of such violating party until compliance is accomplished. On or before April 1 of each year of its existence, the association will report to the Division Engineer the name of the president of the association and the number of homes then occupied or available for occupancy.

10. The Court finds that by the imposition of the conditions set forth in these Findings, wells for domestic, in-house purposes only may be constructed and utilized without adversely affecting any vested water rights on the South Platte River or its tributaries, and that by the institution of the augmentation plan herein approved, the purchasers of Applicant's lots, or their successors and assigns, may secure permits for and use such wells without adversely affecting any vested water rights on the South Platte River or its tributaries, and without the necessity of administering or curtailing the withdrawal of water from any of such domestic wells in times of shortage so long as the conditions of this decree are met, provided, however, that before permit applications will be approved by the State Engineer the required filing fee is paid.

CONCLUSIONS OF LAW

The court concludes, as a matter of law:

1. The plan for augmentation proposed by Applicant is one contemplated by law, and if administered in accordance with this decree, will permit the depletions associated with the provision of water service for domestic in-house only purposes to 50 single-

family residential units by means of on-lot wells in Applicant's development without adversely affecting any other vested water rights in the South Platte River or its tributaries.

2. This decree constitutes a portion of the law required to be enforced by the State Engineer and Division Engineer within the meaning of C.R.S. 1973 § 37-92-202 (2), § 37-92-301 and § 37-92-501 (1). The State Engineer may lawfully be required under the terms of this decree to administer the plan for augmentation in the manner set forth herein and not to curtail diversions, in times of shortage, through any of such wells, the depletions for which are compensated by the operation of the augmentation plan herein approved. The Division Engineer may lawfully curtail diversions through any wells included herein if they, or the other features of this plan for augmentation, are being operated or used in violation of the terms of this decree. In addition, any person adversely affected by the operation of such wells retains the remedies he has under the law against the owners or users of said wells to force them to comply with the priority system of which they are a part.

DECREE

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The plan for augmentation as found and described in all preceding paragraphs is hereby approved.

2. The State Engineer, the Division Engineer of Water Division No. 1, and other water administration officials shall administer the plan for augmentation as herein approved, including requiring Applicant to: cease forthwith the diversion of 0.37 cfs. of the E. C. Whitten No. 1 water right; to cease the irrigation of 6.50 acres of the hay meadow historically irrigated;

to abandon 0.04 cfs. of said water right to Michigan Creek, tributary to the South Platte River; to store a maximum 2.78 acre feet per year, at a rate of flow not to exceed 0.33 cfs. under the priority of the E. C. Whitten No. 1, at such times and in such amounts as the Division Engineer, Water Division No. 1, may direct, in the Jefferson Heights Ground Water Reservoir to be constructed pursuant to the conditions within this decree of this court; to allow the natural release from said ground water reservoir to Michigan Creek, a tributary to the South Platte River, in addition to the said 0.04 cfs. of the said E. C. Whitten No. 1 water right left in the stream, to compensate for annual depletions caused by the development and to prevent material injury to the owners or users of vested water rights, but in no case shall such compensation total more than 3.14 acre feet per year.

3. The changes in use of 0.37 cfs. of the E. C. Whitten No. 1 water right herein contemplated are hereby specifically ordered, adjudged and decreed as follows:

0.33 cfs. of said right is hereby changed to a storage right of 2.78 acre feet per year to be filled once each year from Michigan Creek and stored in the Jefferson Heights Ground Water Reservoir, which is to be constructed in the NW 1/4 SW 1/4, Section 12, Township 8 South, Range 76 West, 6th P.M. Applicant shall only store under the priority of the E. C. Whitten No. 1 during the months of May and June, the historic season of use of that water right. The E. C. Whitten No. 1 water right owned by Applicant shall retain its priority date and number for the purposes of administration.

Use of the entire 0.37 cfs. of said water right shall be allowed for domestic, in-house uses only, including exchange to

compensate for depletions of the South Platte River and its tributaries caused by use of water by the Applicant's development pursuant to the plan herein decreed.

The remaining 0.53 cfs. of said water right shall be available to the Applicant, on completion of the necessary legal procedures for any other use allowed by law. So long as the transferable consumptive use dedicated herein is held or utilized for the purposes of augmentation pursuant to this decree, the water rights will not be subject to abandonment despite the lack of records of use by the Water Commissioner. The water rights committed to this plan for augmentation shall be used only as directed by this decree and for no other purpose, unless pursuant to subsequent adjudication.

4. Evapotranspiration waste systems shall not be allowed within the development under this plan. All waste water resulting from the use of water in the 50 units of the development approved under this plan shall be returned through septic systems discharging into septic-soil absorption fields.

5. The State Engineer, in the discharge of his responsibilities with respect to the processing of applications for permits to construct and utilize wells for the provision of water supply to 50 single-family residential units, all for domestic, in-house use only, shall recognize the existence and operation of the plan for augmentation herein approved. Provided, however, that before permit applications shall be approved by the State Engineer, they shall be accompanied by such filing fee as is required. Each permit issued for such wells shall incorporate within it the provisions of this decree respecting the curtailment of diversions if such wells or the other features of this

plan for augmentation are being operated or used in violation of the terms of this decree.

6. All subsequent lot purchasers within the Jefferson Heights Amended 1972 Subdivision in the County of Park, State of Colorado, as hereinabove defined, shall be bound by the terms of the decree in this matter and the decree shall be filed of record in Park County and thereby constitute a covenant running with the land. The plat showing the legal description of the 6.50 acres of formerly irrigated land to be dried up (Exhibit B) shall be filed in the Park County records. The 6.50 acre tract of land shall not be irrigated or subirrigated by the use of any water right decreed to the E. C. Whitten No. 1 headgate or by the use of any other water rights transferred to such land, absent an appropriate decree therefore from the District Court in and for Water Division No. 1, and after actual notice of the application therefore has been served upon each of the parties hereto.

The restrictive covenants running with the property adopted at the time of subdivision, shall allow the use of water solely for domestic, in-house purposes in a single-family dwelling only, and then only as permitted under this plan for augmentation, and shall prohibit all other uses. To further facilitate the enforcement of this condition, Applicant has formed a homeowners' association as hereinabove provided, and the obligations and rights attendant to this plan for augmentation shall be included in the covenants and shall also be assumed by and assigned to the homeowners' association. The 0.37 cfs. of the E. C. Whitten No. 1 water right shall be conveyed to the association. The association shall enforce, and shall be required by the restrictive covenants running with the land, to enforce the restrictions in the covenants.

It will be empowered to be sued on behalf of its constituent property owners by any person entitled to enforce the decree in this matter and it may in turn sue its constituent property owners to force compliance with the terms hereof, or join them in any enforcement procedure. In addition, the association shall report to, and be required in the covenants to report to the Division Engineer of Water Division No. 1, any known violations of the conditions of this decree. Upon any such notice and due investigation, or otherwise, the Division Engineer shall require the curtailment of well diversions until compliance is accomplished. On or before April 1 of each year of its existence, the association shall report to the Division Engineer the name and address of the president of the association and the number of homes occupied and available for occupancy. The restrictive covenants (Exhibit C) shall be filed for record in the office of the Clerk and Recorder, County of Park, within ninety (90) days of the date hereof.

7. The State Engineer and the Division Engineer of Water Division No. 1 shall not, at the request of senior appropriators or on their own initiative, curtail the diversion of water through any of the wells provided for herein so long as such plan is being administered in accordance with this decree, and specifically so long as water is used solely for domestic, in-house purposes in a single-family dwelling and sufficient replacement water is available.

8. It is specifically ordered, adjudged and decreed that the vested rights of others will not be materially injured by the construction and use solely for domestic, in-house purposes in single-family dwellings, of such domestic wells.

9. Pursuant to C.R.S. 1973 § 37-92-304 (6) the approval

of this plan for augmentation shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others during any hearing commencing in the two calendar years 1977 and 1978.

DATED this 4th day of October, 1976.

Donald A. Caspente
Water Judge
Water Division No. 1
State of Colorado

Approved as to Form and Content:

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