

DISTRICT COURT, WATER DIVISION NO. 2, COLORADO

RESUME OF CASES FILED AND/OR ORDERED PUBLISHED DURING MAY 2017

TO: ALL INTERESTED PARTIES

Pursuant to C.R.S. 37-92-302, you are hereby notified that the following is a resume of applications and certain amendments filed and/or ordered published during May 2017, in Water Division No. 2. The names and addresses of applicants, description of water rights or conditional water rights involved and description of ruling sought as reflected by said applications, or amendments, are as follows:

CASE NO. 2016CW3076 – SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT (SOUTHEASTERN), 31717 United Avenue, Pueblo, CO 81001; (719) 948-2400; c/o Lee E. Miller, General Counsel; lee@secwcd.com. Please send all pleadings and correspondence to: Stephen H. Leonhardt, Alix L. Joseph, and Morgan Figuers; Burns, Figa & Will, P.C.; 6400 S. Fiddlers Green Circle, Suite 1000, Greenwood Village, Colorado 80111; (303) 796-2626.

First Amendment to Application for Changes of Fryingpan-Arkansas Project Conditional Water Rights and to Amend Decrees to Correct Clerical Errors.

LAKE, CHAFFEE, AND PUEBLO COUNTIES

2. Southeastern filed its Application for Changes of Fryingpan-Arkansas Project Conditional Water Rights and to Amend Decrees to Correct Clerical Errors in this case on November 23, 2016 (Application). As part of the Application, Southeastern requested corrections to clerical errors in the previously decreed legal descriptions of the Otero to Wapaco Section – Subsections A and B. In this First Amendment to the Application, Southeastern: (a) revises the corrected legal description for the Otero to Wapaco Section – Subsection A; and (b) withdraws its claim to correct the decreed legal description for Otero to Wapaco Section – Subsection B. 3. Paragraph 5.1 of the Application described the corrections to clerical errors the Otero to Wapaco Sections. Accordingly, Southeastern amends paragraph 5.1 of the Application to delete the correction to the Otero to Wapaco Section – Subsection B and to read as follows: “5.1. The legal description of the Otero to Wapaco Section – Subsection A in the Case No. 5141 Decree, Priority No. A-98C, contains clerical errors. The intended point of diversion is a point on Clear Creek at or near the current outlet works of Clear Creek Reservoir. To reflect this physical reality, the legal description should be a point in the SW1/4 of the NE1/4 of Section 8, Township 12 South, Range 79 West of the 6th P.M.; UTM X = 392301.4, UTM Y = 4319958.7.” Table 1 in the Application references paragraph 5.1. To make Table 1 consistent with the revisions to paragraph 5.1, Southeastern deletes footnote 3, on page 3, in Table 1, which referred to the previously applied for correction to Otero to Wapaco Section – Subsection B. Southeastern also revises footnote 2, on page 3, in Table 1, in the row describing the Otero to Wapaco Section – Subsection A conditional right, to read as follows: “If the Court grants Southeastern’s request in this Application to correct a clerical error in this legal description, the description will be a point in the SW1/4 of the NE1/4 of Section 8, Township 12 South, Range 79 West of the 6th P.M.; UTM X = 392301.4, UTM Y = 4319958.7.” 4. In all other respects, the Application remains unchanged.

CASE NO. 2017CW3023 – CEDAR LANE INVESTMENTS, LLC (“Applicant”), c/o Barry Martin, 111 S. Tejon Street, Suite 222, Colorado Springs, CO 80903; FOUNTAIN MUTUAL IRRIGATION COMPANY (“FMIC” or “Co-Applicant”), c/o Gary Steen, P.E., Manager, 487 Anaconda Drive, Colorado Springs, CO 80919 (Please

address all correspondence and inquiries regarding this matter to Applicant’s attorneys: MONSON, CUMMINS & SHOHET, LLC, Steven T. Monson and Ryan W. Farr, 319 North Weber Street, Colorado Springs, CO 80903; (719) 471-1212)

Application for Conditional Groundwater Rights and to Supplement and Amend Plan for Augmentation

EL PASO COUNTY, COLORADO

II. Summary of Application. On April 19, 2010, Applicant received a final decree adjudicating a groundwater right, a change of water right, and a plan for augmentation in Case No. 09CW6, District Court, Water Division 2. This case granted a groundwater right for Cedar Lane Well for in-building drinking and sanitation, commercial, industrial, and landscape irrigation uses. Commercial and industrial use includes the right to reuse of the water supply. Out-of-priority stream depletions to Fountain Creek caused by the use of Cedar Lane Well are augmented in time, quantity, and location by use of consumptive use credits attributable to two shares of FMIC stock. This Application seeks to adjudicate an additional conditional groundwater right for Cedar Lane Well and to supplement the original two shares of FMIC stock with an additional four shares, bringing the total shares of FMIC stock dedicated to this plan for augmentation to six. This supplement is made pursuant to Paragraph 27 of Case No. 09CW6 allowing the addition of FMIC shares to the existing plan for augmentation of Case No. 09CW6. FMIC is a co-applicant in this case for the purposes of protecting the company’s interests under the proposed use of the FMIC shares. **III. Application for Conditional Groundwater Right.** Name of Structure. Cedar Lane Well, not yet constructed. A. Date of Original Decree. The original decree was entered April 19, 2010 in Case No. 09CW6, District Court, Water Division 2 (“Case No. 09CW6”). B. Legal Description. Pursuant to the decree in Case No. 09CW6, Cedar Lane Well is to be located on Applicant’s property in the SE1/4 of Section 33, Township 14 South, Range 66 West of the 6th P.M., as shown on Exhibit A attached to the Application. (All exhibits mentioned herein are incorporated by reference and may be inspected at the office of the clerk of this Court.) The specific location where the Cedar Lane Well will be determined by the Applicant’s Engineer. C. Source. The source of the water for the Cedar Lane Well is the alluvium of Fountain Creek, tributary to Fountain Creek, tributary to the Arkansas River. D. Appropriation Date and Amounts. The appropriation date for Cedar Lane Well under Case No. 09CW6 is January 12, 2009 for 100 gallons per minute with maximum annual diversions totaling 9 acre-feet, conditional. The Appropriation date for this Application is April 30, 2017 by the filing of the Application with Water Court. Water has not yet been applied to beneficial use. E. Amount of Water Claimed. The rate claimed remains 100 gpm as awarded in Case No. 09CW6; however, Applicant claims an additional 18 acre-feet of diversions in addition to the 9 acre-feet of diversions awarded in Case No. 09CW6, thus bringing the total diversions under both Cedar Lane Well groundwater rights to 27 acre-feet. F. Uses. The water from Cedar Lane Well shall be used for in-building drinking and sanitation, commercial, industrial, and landscape

irrigation uses. The commercial and industrial uses may include reused of the water supply. G. Ownership. Applicant is the owner of the land upon which Cedar Lane Well is located. **IV. Supplement to Plan for Augmentation.** A. Name of Structure to be Augmented. The structure to be augmented is Cedar Lane Well as set forth in Section III of this Application. B. Water Rights to be Used for Supplemental Augmentation. The water rights to be used for supplemental augmentation are an additional four shares of FMIC stock. These shares are in addition to the two shares of FMIC stock already committed to the plan for augmentation decreed in Case No. 09CW6. The total of six shares of FMIC stock will be used to augment all uses described in Case No. 09CW6 and this Application. FMIC diverts its water to the Fountain Mutual Ditch from Fountain Creek, tributary to the Arkansas River, at its headgate located in the SW1/4 of Section 20, Township 14 South, Range 66 West of the 6th P.M. FMIC's water rights were originally decreed for irrigation purposes. Those water rights have been the subject of numerous change actions and plans of augmentation. FMIC water rights are decreed as follows:

DIRECT FLOW

Fountain Creek Priority No.	Priority Date	Decree Date	Total Decree (cfs)
4	9/21/1861	3/6/1882	9.84 (5.38) ¹
7	4/1/1862	3/6/1882	1.125
11	2/1/1863	3/6/1882	16.69
17	12/31/1863	3/6/1882	4.25 (2.125) ²
21	12/31/1864	3/6/1882	4.65
28	12/31/1866	3/6/1882	8.48
29	12/31/1867	3/6/1882	9.68
41	9/21/1874	3/6/1882	17.05
168	1/31/1903	6/2/1919	343.2

STORAGE

Fountain Creek Priority No.	Priority Date	Decree Date	Total Decree (cfs)
Fountain	3/18/1903	6/2/1919	10,000

C. Historic Use. FMIC water rights have been decreed for use in numerous other changes of water rights and plans of augmentation. In those previous cases, this court has determined that each share of FMIC has historically yielded on the average the equivalent of 0.7 acre feet of net replacement or consumptive use water each year, which number represents a portion of the farm headgate delivery. These findings have been previously established by this court, without limitation, in the decrees in Case Nos.

¹ FMIC's interest in Priority No. 4 is 5.38 cfs. The amount of 1.73 cfs was changed on application of Security Water District in Case No. 90CW28. In addition to the 5.38 cfs, FMIC claims the right to divert any of the remaining 2.73 cfs decreed to this priority which is not used by the other owners thereof.

² Priority No. 17 is referred to as the Janitell's right and FMIC has used ½ of the water, or 2.125 cfs, in return for the carriage of the other 2.125 cfs to its owner through the FMIC ditch. By Decree Authorizing Change in Point of Diversion in Civil Action No. 38180, entered July 29, 1959, the point of diversion for this 4.25 cfs of Priority No. 17 of the Laughlin Ditch was changed to the headgate of the Fountain Mutual Ditch.

01CW66, 01CW153, 02CW112, 03CW81, 04CW55, 05CW33, 07CW51, 09CW92, 09CW119, and 12CW99, District Court, Water Division 2. The replacement or augmentation credit allowed to FMIC water rights, as also determined in prior cases, is a percentage of the FMIC actual delivery to its shareholders computed on the basis of the following table:

FMIC REPLACEMENT CREDIT

Month	Replacement Credit as a Percentage of Farm Headgate Delivery
January	47
February	58
March	70
April	70
May	70
June	70
July	72
August	72
September	74
October	66
November	40
December	49

This historic consumptive use of FMIC shares has been used in several prior cases, which findings are binding as a matter of *res judicata*. Williams v. Midway Ranches Property Owners Association, Inc., 938 P.2d 515 (Colo. 1997). There have been no material changed circumstances since the last decree to modify these historic consumptive use determinations. Applicant requests that the Court again find that each FMIC share has historically yielded on the average the equivalent of 0.7 acre-feet of net replacement or consumptive use water each year, which number represents a portion of the farm headgate delivery. The total amount of consumptive use under the FMIC water rights varies from year to year based upon the amount of water available for diversion under those rights. Therefore, the actual consumptive use available from such shares shall be based on actual in-priority diversions applied to the above monthly replacement credits schedule. Since FMIC relies upon these prior determinations, diversion records and a map are not submitted. D. Statement of Plan for Supplemental Augmentation. The consumptive use attributable to the Applicant's four additional shares of FMIC stock shall be committed to the plan for augmentation in Case No. 09CW6, as amended and supplemented hereunder, to replace out-of-priority depletions associated with the diversions from Cedar Lane Well. E. Depletions and Return Flows. As decreed in Case No. 09CW6, a portion of the diversions from Cedar Lane Well will be used for in-building drinking and supply and sanitary purposes associated with commercial and/or industrial use of Applicant's Property, which use has a well head depletion of ten percent (10%) of diversions with return flows of ninety percent (90%) of the amount diverted being returned to the same Fountain Creek groundwater system. Additional diversions from Cedar Lane Well may also be used and reused for commercial and/or industrial purposes, including, but not limited to, gravel washing, materials processing, greenhouse irrigation, and truck washing, which uses are considered to have a well head depletion of one hundred percent (100%) of diversions

with no return flows claimed to the same Fountain Creek groundwater system. Some of the diversions from Cedar Lane Well may be used for sprinkler irrigation of lawn and landscaping on Applicant's Property, which use is considered to have a well head depletion of eighty-five percent (85%) of diversions with fifteen percent (15%) of the amount diverted being returned to the same Fountain Creek groundwater system. The amount diverted for Applicant's separate uses from Cedar Lane Well shall be determined by Applicant's separate metering for each category of use. Such uses of Cedar Lane Well can be made without injury to other vested water rights, provided that all out-of-priority well depletions are replaced under the terms and provision of this plan for augmentation. The lagged depletions from Cedar Lane Well to Fountain Creek will be calculated based upon the use of an Alluvial Water Accounting System analysis performed by Applicant's engineer. Replacement water from the Applicant's six shares of FMIC stock will be made to replace all out-of-priority depletions caused by Applicant's diversions from Cedar Lane Well for Applicant's uses as determined by the Alluvial Water Accounting System analysis and based on the depletion percentages for the uses set forth above. F. Replacement by FMIC. Water available under Applicant's shares will be diverted at the headgate of the Fountain Mutual Ditch and released back to Fountain Creek at the Spring Creek or McRae Augmentation Stations, and Applicant will contract with FMIC for the use of the augmentation stations. The replacement credits under this plan for FMIC shares will be computed as a percentage of actual FMIC in-priority diversions applied to the above monthly replacement credit schedule, subject to 20-year running averages for replacement credits as contained in Case No. 09CW6. G. FMIC Storage. Applicant's pro rata interest in FMIC's 10,000 acre-feet of decreed storage in Big Johnson Reservoir will be stored in Big Johnson Reservoir, together with any excess consumptive use credits from FMIC shares dedicated for augmentation purposes. Such storage and use shall be in accordance with FMIC rules and regulations. The water so stored in Big Johnson Reservoir is to be used as augmentation and may be delivered by means of an intraditch exchange during any month in which Applicant's deliveries of water under its direct flow rights to the Spring Creek Augmentation may be inadequate. The intraditch exchange from Big Johnson Reservoir to the Spring Creek Augmentation Station will operate at any time FMIC is diverting water, except when both (a) Big Johnson Reservoir is full, and (b) the date is between November 15 and March 15. This intraditch exchange will operate from Big Johnson Reservoir, which is located in Sections 8, 17, and 18, Township 15 South, Range 65 West of the 6th P.M., up the Fountain Mutual Ditch to the location of the Spring Creek Augmentation Station in the NE1/4 of Section 29, Township 14 South, Range 66 West of the 6th P.M. As an alternative to the delivery of water to the Spring Creek Augmentation Station, Applicant's replacements may also be made by releasing water from Big Johnson Reservoir and returning it to Fountain Creek through the McRae Reservoir augmentation station, in addition to the intraditch exchange. Such release can be made at any time to the extent that Applicant owns a pro rata portion of the water stored in Big Johnson Reservoir. H. Maximums. Applicant's out-of-priority depletions to Fountain Creek shall not exceed the consumptive use available under its six shares of FMIC stock. Applicant shall monitor and regulate its diversions so that the out-of-priority depletions to Fountain Creek associated with the diversions from Cedar Lane Well approved in this decree shall not exceed the consumptive use available

under its shares of FMIC stock. I. Changed Water Rights. Applicant's FMIC waters rights as changed herein for augmentation purposes will be permanently removed from their historical use for irrigation and the historically irrigated property will no longer be irrigated at such time as these shares are committed to meet depletions under this plan of augmentation. Until so used in this plan of augmentation, such FMIC shares may be continued to be used through the Fountain Mutual Ditch in accordance with the terms of its decrees. Once shares have been dedicated to this plan for replacement purposes, those shares will not be used for other purposes absent a new water court application. The Fountain Mutual system is a water short system, and the withdrawal of water deliveries under the Fountain Mutual Ditch to lands under the FMIC system results in naturally reduced irrigation and the dry up of property. No dry up covenant of Fountain Mutual lands is therefore required for shares committed to this plan of augmentation. Williams v. Midway Ranches Property Owners Association, Inc., 938 P.2d 515 (Colo. 1997). J. Additional Information, Requests, and Terms. 1. The use of the additional shares of FMIC stock is to be changed to augmentation use as set forth herein. Applicant further requests the ability to add additional shares of FMIC to this plan for augmentation in order to provide a supplemental source of augmentation water as is provided by Paragraph 27 of the decree in Case No. 09CW6. Any additional shares added to this augmentation plan shall be committed to this plan by a subsequent change of water right through the Water Court committing such additional FMIC shares to the uses and purposes under this augmentation plan. 2. A totalizing flow meter will be installed on Cedar Lane Well to allow accurate monitoring of this augmentation plan, and monthly accountings shall be made to the Division Engineer demonstrating compliance with this plan for Cedar Lane Well, including well diversions, total stream depletions, augmentation water credit, and any intraditch exchange. 3. Lynn and Russel Wells, whose address is 2755 E. Las Vegas Street, Colorado Springs, Colorado 80906, are claimants of a well permitted under State Engineer Permit No. 199853. This well may be located within 600 feet of the Cedar Lane Well. Pursuant to § 37-90-137(2)(a)(II)(B), C.R.S., Applicant has provided Lynn and Russel Wells with notice of this application at least fourteen days before making this application by certified mail. 4. Applicant shall participate in the USGS Fountain Creek Transit Loss Model or its future equivalent through its membership in FMIC and appropriate transit losses will be assessed. Applicant will curtail its diversions as required and directed by the Division Engineer if the available water directly attributable to Applicant's shares of FMIC stock is not sufficient to fully augment the depletions under this plan. **WHEREFORE**, Applicant requests that this Application for Conditional Groundwater Right and to Supplement and Amend Plan for Augmentation be granted as requested herein, and for such other and further relief as the Court deems appropriate in these circumstances.

CASE NO. 2017CW3024. A case with this number does not exist in Water Division 2 and is listed in the resume only for purposes of accounting for the case number.

CASE NO. 2017CW3025; Previous Case No. 2010CW80 - ALEBRIE, LLC, Attn: Fredric Speaker, 1146 CR 49, Salida, CO 81201 (Serve all pleadings on: Steven P. Jeffers, No. 17858, Elizabeth M. Joyce, No. 46484, Lyons Gaddis Kahn Hall Jeffers Dworak & Grant, PC, 363 Centennial Parkway, Suite 110, Louisville, CO 80027, 720-726-3671; Fax 303-776-9100)

Application To Make Conditional Water Right Absolute

CHAFFEE AND FREMONT COUNTIES

2. Name of Structure: Alebrie Pond Exchange. **3. Describe Conditional Appropriative Right of Exchange:** 3.1 Original Decree was entered on May 26, 2011 in Case No. 2010CW80, in the District Court, Water Division No. 2. **3.2 Legal Description:** The downstream terminus of the exchange is the confluence of the Arkansas River and Bear Creek in the NE ¼ NE ¼ of Section 15, Township 49 N, Range 9 East of the N.M.P.M. in Chaffee County, approximately 630 feet from the North section line and 250 feet from the East section line. The upstream terminus of the exchange is the pond intake on Bear Creek, at a point approximately 235 feet from the South line and 80 feet from the West line of Section 23, Township 49 N, Range 9 East of the N.M. P.M. in Fremont County. A map showing the location of these exchange points is attached to the Application as Appendix A. (All exhibits mentioned herein are incorporated by reference and may be inspected at the office of the clerk of this Court.) **3.3 Source:** The source for diversion is Bear Creek. The source of exchange water is water leased from the Upper Arkansas Water Conservancy District and delivered to the Arkansas River or its tributaries pursuant to lease with the Applicant dated April 20, 2011, a copy of which is attached to the Application as Appendix B. **3.4 Appropriation Date:** November 8, 2010. **3.5. Amount:** The maximum rate of the exchange is 0.167 cfs (75 gpm), up to 1.5 acre feet per year, CONDITIONAL. **3.6 Use:** The water is exchanged for all uses decreed for Alebrie Pond and for replacement of evaporation depletions from the pond. The decreed uses for the pond are recreation, aesthetic, livestock and wildlife watering, and fish propagation. **4. Work done for completion of the appropriation during the subject diligence period:** Applicant has maintained its lease of augmentation water with the District, continued to fill the pond when water was available pursuant to its augmentation plan, and used the water for all decreed purposes. Applicant has designed and is currently constructing a new home on the property where the pond is located. Over the past 6 years, Applicant has expended approximately \$5,400 on the annual water lease payments, and expended other funds for the improvements to the property where the pond is located. In addition, Applicant has added a new outlet gate from the pond, and replaced the inlet pipe used to divert water under this exchange. **5. Claim to make conditional water right absolute:** **5.1 Date water applied to beneficial use:** December 31, 2012. **5.2 Amount:** 0.167 cfs (75 gpm), for a total of 1.5 acre feet per year **5.3 Use:** all uses decreed for Alebrie Pond and for replacement of evaporation depletions from the pond. **5.4 Place of use:** The water is diverted by exchange for use in the Alebrie Pond. **6. Owner of land upon which structures are located:** Applicant. Applicant requests that the Court find the conditional exchange has been made absolute in full, or in the alternative, continue the conditional water right for another six years.

CASE NO. 2017CW3026 - GREGORY S. GREEN AND ELIZABETH C. MARMET, 2135 Eddington Way, Colorado Springs, CO 80916

(Direct correspondence to MacDougall & Woldridge, P.C., Julianne M. Woldridge, Attorney for Applicants, 1586 So. 21st St., Suite 200, Colorado Springs, CO 80904)

Application for Conditional Water Right

PARK COUNTY

2. Name of structure: Green Spring. **3. Legal description of point of diversion:** SE1/4SE1/4 of Section 10, T.15S., R.72W., 6th P.M., Park County, CO, Easting 462882E, Northing 4290019N, Zone 13, NADM83 (a map of the location is attached to the application on file with the Water Court). **4. Source:** spring. **5. Date of Appropriation:** May 16, 2016. The appropriation was initiated by the filing of this application. **6. Amount claimed:** 6 gallons per hour, conditional. **7. Proposed uses:** indoor domestic uses in one dwelling, irrigation of less than one-acre of gardens, and wildlife watering. **8. Names and addresses of owners of land upon which the spring is located:** The spring is located on the border of land owned by Applicants and land owned by Robert Moore, P.O. Box 3276, Evergreen, CO 80437-3276. Applicants request an adjudication of this conditional water right described above.

CASE NO. 2017CW3027 (Water Div. 2) and CASE NO. 2017CW3076 (Water Div. 1) - TC & C, LLC, 17572 Colonial Park Drive, Monument, CO 80132

(Please direct all correspondence and inquiries regarding this matter to Applicant's attorney: James J. Petrock, Petrock & Fendel, 700 17th Street, #1800, Denver, CO 80202; (303) 534-0702)
Application for Approval of Plan for Augmentation

EL PASO COUNTY

Groundwater to be augmented: 13.2 acre-feet per year for 300 years of not nontributary Dawson aquifer groundwater as decreed in Case No. 08CW164, District Court, Water Division 1. Applicant is the owner of the groundwater and associated land decreed in Case No. 08CW164, which is comprised of 58 acres generally located in the N1/2 of Section 27, T11S, R66W of the 6th P.M., El Paso County, as described and shown on Attachment A to the Application (Subject Property). (All exhibits mentioned herein are incorporated by reference and may be inspected at the office of the clerk of this Court.) **Water rights to be used for augmentation:** Return flows from the use of not nontributary Dawson aquifer groundwater and return flows and direct discharge of nontributary Arapahoe and Laramie-Fox Hills aquifer groundwater underlying the Subject Property as also decreed in Case No. 08CW164. **Statement of plan for augmentation:** The Dawson aquifer groundwater will be used to serve 15 residential lots and 1 commercial lot on the Subject Property, including through existing Well Permit Nos. 19714 and 225258. Each residential lot will use 0.6 acre-feet per year for 300 years for in house use (0.35 acre-feet) and irrigation of 4500 square feet of lawn, garden, and trees (0.25 acre-feet per year). The commercial lot will use approximately 4.2 acre-feet per year for 300 years for commercial and irrigation use. In the alternative, the groundwater for the commercial lot may also be used for an additional residential lot for the same residential use described above. Applicant reserves the right to revise these amounts and uses without having to amend or republish this application. Sewage treatment for in house and commercial use will be provided by non-evaporative septic

systems. Return flows associated with in house and commercial use will be approximately 90% of water used for that purpose and return flow associated with irrigation use will be approximately 15% of water used for that purpose. Because depletions may occur to stream systems in Water Divisions 1 and 2, this application is being filed in both divisions. Based on the location of the Subject Property, return flows from use of the water on the Subject Property return to the South Platte River stream systems and such return flows are sufficient to replace the total annual actual depletion. Applicant requests that the total actual depletion be returned to the South Platte River stream systems and for a finding that those replacements are sufficient to prevent injury to all affected stream systems. Applicant will reserve an equal amount of nontributary Arapahoe and Laramie-Fox Hills aquifer groundwater decreed in Case No. 08CW164 to meet post pumping augmentation requirements. Further, Applicants pray that this Court grant the application and for such other relief as seems proper in the premises.

CASE NO. 2017CW3028; Previous Case No. 2008CW91 – LUCAS ESCH FARMS, INC. AND PATRICK ESCH FARMS, INC., 717 Colorado, Springfield, CO 81073

(Please address all pleadings and correspondence to: Chris D. Cummins of Monson, Cummins & Shohet, 319 N. Weber St., Colorado Springs, CO 80903, (719) 471-1212).

Application for Findings of Reasonable Diligence

LINCOLN AND CROWLEY COUNTIES

Name of Structures as described in original decree: Lucas Pond No. 1. Legal

Description: In the NW¼ SW¼ Section 17, Township 17 South, Range 58 West, 6th P.M., approximately 2,040 feet from the south line and approximately 870 feet from the west line of said Section 17. UTM coordinates - Northing: 42_69881 N, Easting: 13_0593885 E, Zone 13, NAD83 (see Exhibit A attached to the Application). (All exhibits mentioned herein are incorporated by reference and may be inspected at the office of the clerk of this Court.) **Source:** Runoff, natural seeps and springs tributary to Cramer Creek, and Cramer Creek, tributary to Breckenridge Creek, tributary to Horse Creek, tributary to the Arkansas River. **Date of Initiation of Appropriation:** December 10, 2008. **Amount Claimed:** 2.6 acre feet, conditional. **Uses:** Stockwater, wildlife, wetlands, recreation, piscatorial, and fire protection. **Pond Specifications:** Lucas Pond No. 1 will have approximately 1.4 acres of surface area, and impound approximately 2.6 acre feet of water. The height of the dam shall be less than 10 feet. Lucas Pond No. 1 will be located and the waters therefrom used exclusively upon the lands of the Applicants. **Remarks:** The uses conditionally decreed to Lucas Pond No. 1 include components of wetlands uses which may result in the use of up to 9.3 annual acre feet of water in Lucas Pond No. 1. As such, Lucas Pond No. 1 is decreed for the use of 9.3 annual acre feet of total diversions, conditional, with 2.6 acre feet being stored in Lucas Pond No. 1 at any one time. The 6.7 acre foot difference between the maximum 9.3 annual acre feet of diversions and the 2.6 acre feet of storage at any one time was affirmed and decreed by the Water Court, Division 2, in Case No. 13CW3040. **Lucas Pond No. 3. Legal Description:** In the NE¼ NE¼, Section 20, Township 17 South, Range 58 West, 6th P.M., approximately 940 feet from the north line and approximately 820 feet from the east line of said Section 20. UTM coordinates: Northing 42_68964 N, Easting 13_0594990 E, Zone 13, NAD83 (see Exhibit A on file with the court). **Source:** Runoff, natural seeps and springs tributary to Cramer Creek, and Cramer Creek,

tributary to Breckenridge Creek, tributary to Horse Creek, tributary to the Arkansas River. Date of Initiation of Appropriation: December 10, 2008. Amount Claimed: 2.1 acre feet, conditional. Uses: Stockwater, wildlife, wetlands, recreation, piscatorial, and fire protection. Pond Specifications: Lucas Pond No. 3 will have approximately 1.1 acres of surface area, and impound approximately 2.1 acre feet of water. The dam shall be less than 10 feet in height. Lucas Pond No. 3 will be located and the waters therefrom used exclusively upon the lands of the Applicants. Remarks: The uses conditionally decreed to Lucas Pond No. 3 include components of wetlands uses which may result in the use of up to 7.5 annual acre feet of water in Lucas Pond No. 3. As such, Lucas Pond No. 3 is decreed for the use of 7.5 annual acre feet of total diversions, conditional, with 2.1 acre feet being stored in Lucas Pond No. 1 at any one time. The 5.4 acre foot difference between the maximum 7.5 annual acre feet of diversions and the 2.1 acre feet of storage at any one time was affirmed and decreed by the Water Court, Division 2, in Case No. 13CW3040. **Detailed outline of what has been done towards completion of the appropriation and application of water to beneficial use as conditionally decreed, including expenditures**: The water rights conditionally decreed in 08CW91 are part of a wetlands banking project being developed by Applicants and their partners. Additional conditional water rights were sought and obtained for this same project in companion cases 11CW47, 13CW3040, and 14CW3048. Applicants assert that these combined cases represent an integrated water project, and that diligent work on one feature of the project constitutes diligence on the entire project, consistent with C.R.S. §37-92-301(4)(b). Since the conditional decree in 08CW91, Applicants have expended in excess of \$100,000.00 on adjudication of the additional water rights in Case Nos. 11CW47, 13CW3040, and 14CW3048, including engineering and legal fees, plus an additional approximately \$10,000.00 in consulting fees in working towards obtaining all necessary federal and state permits for the wetlands bank project. Applicants have therefore expended in excess of \$110,000.00 during this diligence period. **Names of the owners of land on which each structure is located, is or will be stored, and upon which water is or will be placed to beneficial use, and additional terms**: The land, on which all structures will be located and upon which the water will be placed to beneficial use is owned by the Applicants. The address of the Applicants is set forth above. Applicants' property includes Sections 17, 18, 20, 21, 27, 28, and 34, Township 17 South Range 58 West, 6th P.M. The Applicants shall install and maintain such water measuring devices as deemed essential by the State Engineer or Division Engineer and the same shall be installed and operated in accordance with the instruction of that office. Applicants' primary purpose in the construction, use and adjudication of these structures is preservation, enhancement and development of wetlands on Applicants' property, and associated uses of wildlife, stockwater, fire protection, recreation, piscatorial, and augmentation, to the extent applicable now or in the future. The water rights previously decreed in Case No. 08CW91 (as affirmed in Case No. 13CW3040) are "tributary" to the Arkansas River. Cramer Creek is intermittent, with live flows near the confluence with Breckenridge Creek only during major local storm events, if at all. Applicants' property and the subject water rights are located within the "Horse Creek Basin", as discussed by the Colorado Supreme Court in State Engineer v. Smith Cattle, Inc., 780 P.2d 546 (Colo. 1989) and as discussed in the "Horse Creek Basin Study" completed by

the Office of the State Engineer in 1989. Such findings and studies have determined that limited hydraulic connections may exist between the tributaries of the Horse Creek Basin and downstream water rights on the mainstem of the Arkansas River. “*Horse Creek receives water from these tributaries only in time of flood; there is no significant connection between this basin and the Arkansas River*”. Smith Cattle at 548. The SEO Study stated its intent to develop and identify the scope of the Horse Creek Basin “so that it could be administered without having to consider the impact of rights in the basin on the senior water rights of the Arkansas mainstem.” Study at 10. Historically, valid calls outside of the Horse Creek Basin upon water rights located therein have occurred only in times of significant precipitation events, during which times live flows from the Horse Creek Basin have occurred. The water rights decreed in Case No. 08CW91 (13CW3040) shall be administered by the State Engineer call based upon actual stream conditions and consistently with the administration of other water rights in the Horse Creek Basin.

CASE NO. 2017CW3029; Previous Case Number 2008CW83 – JBS FIVE RIVERS CATTLE FEEDING, LLC, d/b/a COLORADO BEEF, 2258 U.S. Highway 50, Lamar, CO 81052

(Please direct all pleading and correspondence to Applicant’s counsel: William H. Caile and Kylie J. Crandall, Holland & Hart LLP, 555 17th Street, Suite 3200, P.O. Box 8749, Denver, CO 80201-8749).

Application for Finding of Reasonable Diligence

PROWERS COUNTY

Name of Structures: A. Hunter Well No. 1, a/k/a Colorado Beef Well No. 1, Well Permit No. 42941-F (“Well No. 1”). B. Hunter Well No. 2, a/k/a Colorado Beef Well No. 2, Well Permit No. 42942-F (“Well No. 2”). Well No. 1 and Well No. 2 are collectively referred to herein as the “Colorado Beef Wells.” **Overview:** The Colorado Beef Wells were originally decreed absolute water rights for irrigation use in Case No. W-2028, Water Division 2. In Case No. 08CW83, Water Division 2, Colorado Beef obtained a decree which, *inter alia*, changed the use of 492 shares (the “Shares”) of capital stock in the Fort Lyon Canal Company (“Fort Lyon”), so that the Shares could be used for stock watering, commercial, and other uses related to the Colorado Beef feedlot. The decree in Case No. 08CW83 also corrected the legal descriptions of the Colorado Beef Wells, and adjudicated junior, conditional water rights for certain new uses and increased amounts for the Colorado Beef Wells. **Information from Previous Decree:** A. **Date of original decree:** May 5, 2011, in Case No. 08CW83, Water Division 2 (“Original Decree”). The Court entered Amended Findings of Fact, Conclusions of Law, Judgment and Decree (“Amended Decree”) in Case No. 08CW83 on April 11, 2012. B. **Subsequent decrees awarding diligence:** N/A. C. **Legal descriptions (as corrected in Case No. 08CW83):** i. **Well No. 1:** SE 1/4 of SW 1/4 of Section 30, Township 22 South, Range 47 West of 6th P.M. at a distance of approximately 4,675 feet from the North Section Line and 1,900 feet from the West Section Line, in Prowers County, Colorado. See Map on file with the Court as Exhibit A. ii. **Well No. 2:** SE 1/4 of SW 1/4 of Section 30, Township 22 South, Range 47 West of 6th P.M. at a distance of approximately 4,965 from the North Section Line and 2,005 feet from the West Section Line, in Prowers County, Colorado. See Exhibit A to the Application. D. **Source:** Groundwater

tributary to the Arkansas River. E. Appropriation date: October 31, 2008. F. Amounts: i. Well No. 1: 2.28 cfs, or 1023 gpm, not to exceed 850 acre feet in any one calendar year, CONDITIONAL. ii. Well No. 2: 2.28 cfs, or 1023 gpm, not to exceed 850 acre feet in any one calendar year, CONDITIONAL. iii. These amounts are cumulative of, and not in addition to, the amount decreed to the wells for irrigation use in Case No. W-2028. G. Uses: Commercial, stock watering, irrigation, and other purposes associated with the Colorado Beef feedlot; and augmentation, substitution, and replacement uses in connection with the maintenance of historical return flows associated with the change of Fort Lyon Shares approved in Case No. 08CW83, and subject to the terms of paragraph 12(G)(ii) of the Amended Decree in that case. Irrigation use shall occur in portions of Sections 28, 29 and 30, Township 22 South, Range 47 West of the 6th P.M. in Prowers County. Augmentation use of this water right shall only occur in connection with maintenance of historical return flows associated with the change of Fort Lyon Shares approved in Case No. 08CW83. H. Remarks: (i) The Colorado Beef Wells are “LAWMA Structures” that are covered under the Augmentation Plan decreed to the Lower Arkansas Water Management Association (“LAWMA”) in Case No. 02CW181, Water Division 2, and under LAWMA’s annual Rule 14 Plan. (ii) The existing irrigation use (“Irrigation Use”) of the Colorado Beef wells is a pre-1985 use and is covered by the LAWMA Rule 14 Plan. No change was made in Case No. 08CW83 to the existing Irrigation Use. (iii) Feedlot uses of the Colorado Beef Wells (“Feedlot Uses”) are uses that were permitted after December 31, 1985 and are augmented pursuant to the LAWMA Augmentation Plan. Colorado Beef obtained well permits Nos. 42941-F and 42942-F for expanded uses associated with the Feedlot Uses. No change was made in Case No. 08CW83 to well permits Nos. 42941-F and 42942-F or the existing Feedlot Uses. (iv) Use of the Colorado Beef Wells for augmentation, substitution, and replacement uses in connection with the maintenance of historical return flows associated with the change of Fort Lyon Shares approved in Case No. 08CW83 (“Replacement Uses”) are uses that were permitted or decreed after December 31, 1985, and must therefore be covered under the LAWMA Augmentation Plan or another suitable augmentation plan. (v) Any expanded uses of the Colorado Beef Wells for irrigation, pursuant to the subject conditional water rights decree in Case No. 08CW83, will be uses that were permitted or decreed after December 31, 1985, and must therefore be covered under the LAWMA Augmentation Plan or another suitable augmentation plan. (vi) LAWMA currently augments existing Irrigation Uses and Feedlot Uses of the Colorado Beef wells pursuant to the LAWMA Rule 14 Plan and the LAWMA Augmentation Plan, as described above. In the future, LAWMA may also augment Replacement Uses, but currently the Replacement Uses are not covered by any plan for augmentation. (vii) Feedlot Uses and Replacement Uses of the Colorado Beef Wells are deemed to be 100 percent consumptive. All out-of-priority depletions associated with the Feedlot Uses and Replacement Uses will be fully accounted for and augmented under the terms of the LAWMA Augmentation Plan or other suitable augmentation plan or substitute water supply plan as may be approved by the Water Court or the Colorado State Engineer in subsequent proceedings and upon proper notice. **Detailed outline of what has been done toward completion of the appropriations and application of water to beneficial use as decreed**: A. The Water Court entered the Original Decree in Case No. 08CW83 on May 5, 2011, and the Original Decree established May 31,

2017 as the date by which an application for finding of reasonable diligence must be filed in order to maintain the conditional water rights for the Colorado Beef Wells. The Colorado Beef Wells, and the subject conditional water rights, are components of a water supply project designed and implemented by Colorado Beef to incorporate the Fort Lyon Shares into Colorado Beef's overall water supply. During the diligence period, Colorado Beef has undertaken the following activities and expenditures towards development of this water supply project and in furtherance of the completion of the appropriations for the subject conditional water rights and application of water to beneficial uses for decreed purposes: (i) Colorado Beef obtained a Permit to Conduct a Designated Activity of State Interest and to Engage in Development in a Designated Area of State Interest ("1041 Permit") from Prowers County for construction of Colorado Beef Reservoir and the dry-up of historically irrigated land associated with its Fort Lyon Water Supply Project. (ii) Colorado Beef negotiated the terms of a Stipulation to Amend Decree with the Fort Lyon Canal Company, which resulted in entry of the Amended Decree in Case No. 08CW83 on April 11, 2012. (iii). Colorado Beef completed construction of Colorado Beef Reservoir in 2012, and has constructed significant new water supply infrastructure, including pipelines connecting the Colorado Beef Wells and Colorado Beef Reservoir with a blending station, and return flow structures. (iv) Colorado Beef participated with the Amity Canal Company in the financing and construction of a syphon to convey flows in the Riverview Drain under the Amity Canal and to the Arkansas River. (v). In the spring of 2011, Colorado Beef began revegetation efforts on the land historically irrigated by the Fort Lyon shares changed in Case No. 08CW83. Colorado Beef has continued to make significant efforts to complete revegetation, including planting, mowing, weed control and application of water when available. A panel of three experts appointed by the Fort Lyon Board has conducted annual field evaluations of the revegetation progress, and Colorado Beef has provided annual Status Reports regarding revegetation to the Fort Lyon Board and the parties in Case No. 08CW83. In January of 2016, Colorado Beef filed a successful petition to extend the Initial Compliance Period for revegetation under the Amended Decree. (vi) Colorado Beef has maintained daily accounting, per the terms of the Amended Decree in Case No. 08CW83, which includes the pumping of the Colorado Beef Wells. This accounting has been provided to the Division Engineer on a monthly basis. (vii). On March 8, 2016, Colorado Beef entered into an agreement with LAWMA for, *inter alia*, replacement of return flows pursuant to the Amended Decree in Case No. 08CW83. Colorado Beef worked with LAWMA to prepare and file the Application for Plan for Augmentation in Case No. 16CW3018, Water Division 2, which is an application by LAWMA to add the Colorado Beef return flows to LAWMA's plan for augmentation. Colorado Beef has continued to participate as a party in Case No. 16CW3018 and has participated in proceedings to obtain and renew substitute water supply plan approvals in connection with Case No. 16CW3018. (viii). Colorado Beef has participated in proceedings before the Fort Lyon Board of Directors on the Application of Arkansas River Farms, LLC ("ARF") and LAWMA concerning the change of place and type of use of Fort Lyon shares owned by ARF and the change of gates and laterals through which ARF may receive delivery of share water. (ix). During the diligence period, Colorado Beef has continually monitored and reviewed water court filings, and filed statements of opposition where appropriate to protect Colorado Beef's water rights,

including the subject conditional water rights. Without limitation, during the diligence period Colorado Beef has participated as an objector in Case Nos. 05CW107-A and 05CW107-B (City of Lamar); 10CW04 (Super Ditch); 11CW03 (Shane, et al.); 12CW80 (abandonment protest); 12CW94 (Catlin Augmentation Association); 13CW07 (Town of Fowler); 13CW3060 (City of Lamar); 13CW3167 (LAWMA); 14CW3004 (LAWMA); 15CW3007 (07CW74) (Tri-State Generation and Transmission Association); and 15CW3067 (LAWMA). (x) Colorado Beef has engaged the services of legal counsel, consultants and contractors in connection with the above-referenced activities. (xi) Total expenditures associated with the above-described activities during the diligence period are difficult to calculate, but are conservatively estimated to be in excess of \$2,000,000. C. The list of activities described above is not intended to be exclusive, and Colorado Beef reserves the right to present additional evidence of reasonable diligence as appropriate. The Colorado Beef Wells are located on land owned by Applicant.

THE WATER RIGHTS CLAIMED BY THE FOREGOING APPLICATION(S) MAY AFFECT IN PRIORITY ANY WATER RIGHTS CLAIMED OR HERETOFORE ADJUDICATED WITHIN THIS DIVISION AND OWNERS OF AFFECTED RIGHTS MUST APPEAR TO OBJECT AND PROTEST WITHIN THE TIME PROVIDED BY STATUTE, OR BE FOREVER BARRED.

YOU ARE HEREBY NOTIFIED that any party who wishes to oppose an application, or application as amended, may file with the Water Clerk a verified statement of opposition setting forth facts as to why the application should not be granted, or why it should be granted only in part or on certain conditions, such statement of opposition must be filed by the last day of July 2017, (forms available at Clerk's office or at www.courts.state.co.us, after serving parties and attaching a certificate of mailing, filing fee \$158.00). The foregoing are resumes and the entire application, amendments, exhibits, maps and any other attachments filed in each case may be examined in the office of the Clerk for Water Division No. 2, at the address shown below.

Witness my hand and the seal of this Court this 5th day of June, 2017.

Mardell R. DiDomenico



Mardell R. DiDomenico, Clerk
District Court, Water Div. 2
Pueblo Judicial Building
501 N. Elizabeth Street, Suite 116
Pueblo, CO 81003; (719) 404-8832

(Court seal)

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