

## County Attorney

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November 30, 2023

MS-20-6 Forest Heights Estates  
Minor Subdivision

Reviewed by: Lori L. Seago, Senior Assistant County Attorney  
April Willie, Paralegal

### WATER SUPPLY REVIEW AND RECOMMENDATIONS

#### Project Description

1. This is a proposal by Jon P. Didleau and Phyllis J. Didleau Revocable Trust (“Applicant”) for subdivision of 4 single-family lots on an existing 32.62-acre parcel of land (the “property”). The property is zoned RR-5 (Rural Residential).

#### Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the water demand for the subdivision is 3.08 acre-feet/year, comprised of .26 acre-feet/year for household use for each of the 4 residential lots totaling 1.04 acre-feet/year, 0.27 acre-feet per year for 2,175 square feet of irrigation per lot for a total of 1.08 acre-feet, and 0.06 acre-feet/year per head for stock watering of up to 16 head for a total of 0.96 acre feet per year. Based on this total demand, Applicant must be able to provide a supply of 924 acre-feet of water (3.08 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

#### Proposed Water Supply

3. The Applicant has provided for the source of water to derive from the not-nontributary Dawson aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2018CW3026. Applicants sought to amend this original plan for

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augmentation in the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2022CW3060 (“Decree”). The groundwater decreed underlying the property includes 2,270 acre-feet of water in the Dawson aquifer, 2,130 acre-feet of water in the Denver aquifer, 1,450 acre-feet of water in the Arapahoe aquifer and 951 acre-feet of water in the Laramie-Fox Hills aquifer. The Decree approved the pumping of up to 3.08 acre-feet per year for 300 years and 924 acre-feet total of Dawson aquifer water. The Court further awarded a vested right to use up to 4 wells on the property.

The approved augmentation plan has a term of 300 years and requires that non-evaporative septic system return flows be used for augmentation during the pumping period for the 4 approved wells. Applicant must reserve 943 acre-feet of its water rights in the Laramie-Fox Hills aquifer for the replacement of post-pumping depletions.

### State Engineer’s Office Opinion

5. In a letter dated November 1, 2023, the State Engineer reviewed the proposal to subdivide the 32.168 +/- acre parcel into 4 single-family residential lots. The State Engineer stated that “[t]he anticipated source of water is to be provided by four on-lot wells. These wells will produce from the Dawson aquifer. The wells will operate pursuant to the augmentation plan decreed in case no. 22CW3060, which amended the decree in case no. 18CW3026 (Division 2)/18CW3057 (Division 1). The water underlying this property was adjudicated and the applicant is the owner of water rights in the Dawson, Denver, Arapahoe, and Laramie Fox-Hills aquifers.” The State Engineer identified the total estimated water requirement at 3.08 acre-feet/year (0.77 acre-feet/year/lot).

The State Engineer stated that “[b]ased on the above, it is our opinion, pursuant to CRS 30-28-136(1)(h)(l), that the anticipated water supply can be provided without causing material injury to decreed water rights so long as the applicant obtains well permits issued pursuant to C.R.S. 37-90-137(4) and the plan for augmentation noted herein, for all wells in the subdivision ....”

### Recommended Findings

6. Quantity and Dependability. Applicants’ water demand for Forest Heights Estates subdivision is 3.08 acre-feet per year from the Dawson aquifer for a total demand of 924 acre-feet for the subdivision for 300 years. The Decree allows for 4 wells to withdraw water from the Dawson aquifer up to 3.08 acre-feet per year, for a total of 924 acre-feet over 300 years, which equals the current demand.

**Based on the water demand of 3.08 acre-feet/year for the Forest Heights Estates subdivision and the Decree permitting withdrawals in that amount, the County Attorney’s Office recommends a finding of sufficient water quantity and dependability for Forest Heights Estates.**

7. Quality. The water quality requirements of Section 8.4.7.B.10 of the Land Development Code must be satisfied. **El Paso County Public Health shall provide a recommendation as to the sufficiency of water quality.**

8. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a Water Resources Report dated July 28, 2023, the Water Supply Information Summary, the State Engineer Office's Opinion dated November 1, 2023, and Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgement and Decree in Division 2 Case No. 2022CW3060. The recommendations herein are based on the information contained in such documents and on compliance with the requirements set forth below. ***Should the information relied upon be found to be incorrect, or should the below requirements not be met, the County Attorney's Office reserves the right to amend or withdraw its recommendations.***

**REQUIREMENTS:**

A. Applicants and their successors and assigns shall comply with the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Case No. 22CW3060, specifically, that water withdrawn from the Dawson aquifer by each of the proposed four wells permitted shall not exceed 0.77 annual acre-feet, based on a total combined annual withdrawal of 3.08 acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. Applicants must create a homeowners' association ("HOA") for the purpose of enforcing covenants and assessing any necessary fees related to compliance with the water determinations and replacement plans for the property.

C. Applicants shall create restrictive covenants upon and running with the property which shall advise and obligate future lot owners of this subdivision, their successors and assigns, and the HOA regarding all applicable requirements of the Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 2 Case No. 2022CW3060, including the limitations on diversions and use of water for each well and lot, the requirement to meter and record all well pumping, and information on how records are to be recorded.

Covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 924 acre-feet of Dawson aquifer water and 943 acre-feet of Laramie-Fox Hills aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2022CW3060 to satisfy El Paso County's 300-year water supply requirement for the 4 lots of Forest Heights Estates. The Covenants shall further identify that 231 acre-feet (0.77 acre-feet/year) of Dawson aquifer water is allocated to each of the 4 lots. Said reservations shall not be separated for transfer of title to the property and shall be used exclusively for primary water supply.

2) Advise of responsibility for costs. The Covenants shall advise the HOA, lot owners and their successors and assigns of their obligations regarding the costs of operating the plans for augmentation, which include pumping of the Dawson wells in a manner to replace depletions during pumping and the cost of drilling Laramie-Fox Hills aquifer wells in the future to replace post-pumping depletions.

3) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require each lot owner to use a non-evaporative septic system to ensure that return flows from such systems are made to the stream system to replace actual depletions during pumping and shall state that said return flows shall not be separately sold, traded, assigned, or used for any other purpose. The Covenants shall also include the following or similar language to ensure that such return flows shall only be used for replacement purposes: "Return flows shall only be used for replacement purposes, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, sold, traded, bartered, assigned, or encumbered in whole or in part for any other purpose."

4) Address future lot conveyances. The following or similar language shall be included in the Covenants to address future conveyances of the lots subsequent to the initial conveyance made by Applicants/Declarant:

"The water rights referenced herein shall be explicitly conveyed; however, if a successor lot owner fails to so explicitly convey the water rights, such water rights shall be intended to be conveyed pursuant to the appurtenance clause in any deed conveying said lot, whether or not the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Case No. 2022CW3060 and the water rights therein are specifically referenced in such deed. The water rights so conveyed shall be appurtenant to the lot with which they are conveyed, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, sold, traded, bartered, assigned or encumbered in whole or in part for any other purpose. Such conveyance shall be by special warranty deed, but there shall be no warranty as to the quantity or quality of water conveyed, only as to the title."

5) Advise of monitoring requirements. The Covenants shall advise the HOA, future lot owners of this subdivision and their successors and assigns of their responsibility for any metering and data collecting that may be required regarding water withdrawals from Dawson or Laramie-Fox Hills aquifers.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 22CW3060 and C.R.S. § 37-90-137(4) and (10).

7) Address amendments to the covenants. The Covenants shall address amendments using the following or similar language:

“Notwithstanding any provisions herein to the contrary, no changes, amendments, alterations, or deletions to these Covenants may be made which would alter, impair, or in any manner compromise the water supply for the Forest Heights Estates pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Case No. 2022CW3060. Further, written approval of the proposed amendments must first be obtained from the El Paso County Planning and Community Development Department, and as may be appropriate, by the Board of County Commissioners, after review by the County Attorney’s Office. Any amendments must be pursuant to an Order from the Division 2 Water Court approving such amendment, with prior notice to the El Paso County Planning and Community Development Department for an opportunity for the County to participate in any such adjudication.”

8) Address termination of the Covenants. The Covenants shall address termination using the following or similar language:

“These Covenants shall not terminate unless the requirements of the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Case No. 22CW3060 are also terminated by order of the Water Court and a change of water supply is approved in advance of termination by the Board of County Commissioners of El Paso County.”

D. Applicants and their successor and assigns shall reserve in any deeds of the property Dawson aquifer water in the decreed amount of 231 acre-feet (0.77 acre-feet per year) per lot, as well as 943 acre-feet of Laramie-Fox Hills aquifer water. Said reservation shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for primary and replacement supply.

E. Applicants and their successors and assigns shall convey by recorded warranty deed these reserved Dawson aquifer water rights at the time of lot sales. Specifically, applicant and future lot owners shall convey sufficient water rights in the Dawson aquifer underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement.

Any and all conveyance instruments shall recite as follows:

For the water rights and return flows conveyed for the primary supply (Dawson aquifer):  
“These water rights conveyed, and the return flows therefrom, are intended to provide a 300-year supply, replacement during pumping, and replacement of post-pumping depletions for each lot of Forest Heights Estates. The water rights so conveyed, and the return flows therefrom, shall be appurtenant to each of the respective lots with which they are conveyed, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, sold, traded, bartered, assigned or encumbered in whole or in

part for any other purpose. Such conveyance shall be by special warranty deed, but there shall be no warranty as to the quantity or quality of water conveyed, only as to the title.”

F. Applicant shall convey to the HOA by recorded warranty deed the reserved 943 acre-feet of Laramie-Fox Hills water rights for use in the augmentation plan to replace post-pumping depletions. Applicant shall recite in the deed that this water shall be used exclusively for augmentation supply and shall not be sold, conveyed, traded, bartered, assigned, or encumbered in whole or in part for any other purpose.

G. Applicants and their successors and assigns shall submit a Declaration of Covenants, Conditions, and Restrictions, form deeds, and any plat notes required herein to the Planning and Community Development Department and the County Attorney’s Office for review, and the same shall be approved by the Planning and Community Development Department and the County Attorney’s Office prior to recording the final plat. Said Declaration shall cross-reference Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2022CW3060 and shall identify the obligations of the individual lot owners thereunder.

H. Applicants and their successors and assigns shall record all applicable documents, including but not limited to agreements, assignments, warranty deeds regarding the water rights, and Declaration of Covenants in the land records of the Office of the Clerk and Recorder of El Paso County, Colorado.

I. The following plat note shall be added that addresses the State Engineer’s admonition to advise landowners of potential limited water supplies in the Denver Basin:

“Water in the Denver Basin aquifers is allocated based on a 100-year aquifer life; however, for El Paso County planning purposes, water in the Denver Basin aquifers is evaluated based on a 300-year aquifer life. Applicant and all future owners in the subdivision should be aware that the economic life of a water supply based on wells in a given Denver Basin aquifer may be less than either the 100 years or 300 years used for allocation indicated due to anticipated water level declines. Furthermore, the water supply plan should not rely solely upon non-renewable aquifers. Alternative renewable water resources should be acquired and incorporated in a permanent water supply plan that provides future generations with a water supply.”

cc: Ryan Howser, Project Manager, Planner