

EL PASO COUNTY



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SF-21-11 Mountain Shadows Vacate and Replat a/k/a
McGehee Minor Subdivision

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FINDINGS AND CONCLUSIONS:

1. This is a proposal by Dale and Stephanie McGehee ("Applicant") for a 2-lot minor subdivision on a parcel of approximately 10.5 +/- acres (the "Property"). This proposal will vacate Lot 3 of the Mountain Shadows Ranch 2nd Phase into 2 residential lots. The property is zoned RR-5 (Rural Residential).

2. The Applicant has provided for the source of water to derive from an individual on-lot well, as provided in the decree and plan for augmentation in Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) ("Decree" or "Augmentation Plan") granted to Dale and Stephanie McGehee on August 31, 2017. An existing well (Permit No. 81469-F) is located on the Property and will be used by both lots. Pursuant to the Water Supply Information Summary ("WSIS"), the water demand is 0.26 acre-feet for each lot for household use, plus an additional 0.256 acre-feet total for irrigation and 0.044 acre-feet for stock watering for a total water demand of 0.82 acre-feet/year for the subdivision (0.41 acre-feet/lot). Based on this total demand, Applicant must be able to provide a supply of 246 acre-feet of water (0.82 acre-feet per year x 300 years) to meet the County's 300 year water supply requirement.

3. In a letter dated March 2, 2021, the State Engineer reviewed the submittal to vacate and replat the 10.495 +/- acre parcel into a 2-lot minor subdivision. The State Engineer stated that the "proposed water source for the two lots is an existing well permit no. 81469-F, to be used as a shared well. Well permit no. 81469-F is constructed in the Dawson aquifer and operates pursuant to the decreed augmentation plan in Division 1 Water Court Case no. 17CW3054 and may withdraw 0.82 acre-foot per year for ordinary household purposes inside two single family dwellings, irrigation of home lawn and garden and the watering of domestic animals." The State Engineer refers to the *Water Resources Report For McGehee Minor Subdivision – Mountain Shadows Vacate and Replat* ("Report") by Chris Cummins dated December 23, 2020. The Report was subsequently updated on June 28, 2021; however, the

annual water demand of 0.82 acre-feet/year for the subdivision remains consistent in both reports.

The State Engineer identified that a shared well is to be used in the subdivision and stated: “This office does not encourage the use of shared wells and will in no way enforce or administer well sharing agreements. However, should the county approve a division of land that relies on a shared well we recommend the use of a well sharing agreement that outlines well maintenance, use, and access. At no point should the agreement, or shared nature of the well, expand the uses of the well beyond those uses allowed on the well permit.”

Finally, the State Engineer provided the opinion that “pursuant to C.R.S. § 30-28-136(1)(h)(I), it is our opinion that the proposed water supply is adequate and can be provided without causing injury to decreed water rights.”

4. Findings of Fact, Conclusions of Law, Judgment and Decree, Colorado Water Division Consolidated Court Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) (“Decree”/“Augmentation Plan”).

Pursuant to the Decree, the following amounts of water have been adjudicated and were determined to be available underlying the property (Source of table is *Water Resources Report* dated June 28, 2021):

Aquifer	Saturated Thickness (ft)	Total Water Adjudicated (Acre Feet)	Annual Average Withdrawal – 100 Years (Acre Feet)	Annual Average Withdrawal – 300 Years (Acre Feet)
Dawson (NNT)	490	1,029	10.3	3.4
Denver (NT)	510	910	9.1	3.0
Arapahoe (NT)	240	428	4.3	1.4
Laramie-Fox Hills (NT)	200	315	3.2	1.05

The Decree granted to Applicants a vested right to 1,029 acre-feet of water in the not-nontributary Dawson aquifer. The Augmentation Plan permits withdrawal of 246 acre-feet from the Dawson aquifer (0.82 acre-feet/year) for this subdivision. The beneficial uses permitted by the Decree are “residential uses and a guest cottage, commercial uses, livestock water, home office use, irrigation, hot tub and/or swimming pool purposes, and augmentation of depletions in this plan for augmentation through return flows from a non-evaporative septic system.”

Replacement of Depletions During Pumping. The Augmentation Plan provides for a pumping period of a minimum of 300 years. For any wells constructed into the not-nontributary Dawson aquifer, the Applicant is required to replace actual stream depletions on an annual basis during the 300 years of pumping by residential return flows from a non-evaporative septic system to the Arkansas and South Platte River systems. As stated in the Decree/Augmentation Plan, “...septic

system return flows are assumed to equal at least 0.18 acre feet annually, so they will equal or exceed the greatest amount of annual depletions that are projected to occur during the projected 300 year pumping period.” Such return flows may not be otherwise used, sold, traded, or assigned.

Replacement of Post-Pumping Depletions. The Decree/Augmentation Plan requires that Applicant reserve and dedicate to the plan “225 acre feet of the Denver aquifer water decreed herein for the purpose of replacing all post-pumping depletions to the South Platte River system.” The Decree/Augmentation Plan further requires that successors in interest shall be required to construct Denver aquifer wells for the purpose of meeting the post-pumping obligations and that a total of up to 225 acre-feet of Denver groundwater will be used to replace any injurious post-pumping depletions. The Decree/Augmentation Plan requires that these waters may not be severed from ownership of the overlying Property.

5. Analysis. Applicant’s water demand for the Mountain Shadows Vacate and Replat is 0.82 acre-feet per year from the Dawson aquifer for total demand of 246 acre-feet for the subdivision for 300 years. Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) authorizes withdrawal of 246 acre-feet of water (0.82 acre-feet/year) of Dawson aquifer water for a period of 300 years. Based on the demand of 0.82 acre-feet/year for the 2-lot subdivision and the Decree/Augmentation Plan permitting withdrawals in the amount of 0.82 acre-feet/year for the shared well serving the 2 lots on the Property, there appears to be a sufficient water supply to meet the water demands of the Mountain Shadows Vacate and Replat a/k/a McGehee Minor Subdivision.

6. The water quality requirements of Section 8.4.7.B.10.g., of the Land Development Code must be satisfied.

7. Therefore, based upon the Water Supply Information Summary, a finding of sufficiency and no injury by the State Engineer, Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) and based on the requirements below, the County Attorney’s Office recommends a finding that the proposed water supply is **conditionally sufficient** in terms of quantity and dependability, subject to the County’s approval of a well-sharing agreement. El Paso County Public Health shall provide a recommendation as to water quality.

REQUIREMENTS:

A. Applicant, its successors and assigns, shall comply with all requirements of Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2), specifically, that water use shall not exceed 0.82 acre-feet/year for the shared well serving the 2-lot subdivision and that all stream depletions will be replaced with non-evaporative septic system return flows for a period of 300 years, pursuant to the Court’s augmentation plan.

B. The County prefers that when there is a plan for augmentation that Applicant create a homeowners' association ("HOA"); however, alternatively to establishing an HOA, especially for minor subdivisions such as this, Applicant may create restrictive covenants upon and running with the property which shall advise and obligate future lot owners of this subdivision and their successors and assigns regarding all applicable requirements of Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) as well as their obligations to comply with the plan for augmentation, including, but not limited to, ensuring that return flows by the use of non-evaporative septic systems are made to the stream systems, and that such return flows shall only be used to replace depletions and shall not be separately sold, traded, or assigned in whole or in part for any other purpose. The Covenants more specifically shall require that each lot served by a Dawson aquifer well have an occupied single-family dwelling that is generating return flows from a non-evaporative septic system before any irrigation or animal watering is allowed from the well. In addition, the Covenants shall advise future lot owners of this subdivision and their successors and assigns of their obligations regarding costs of operating the plan for augmentation, which will include pumping of the Dawson well in a manner to replace depletions during pumping and the cost of drilling Denver aquifer wells in the future to replace post-pumping depletions. Such Covenants shall also address responsibility for any metering and data collecting that may be required regarding water withdrawals from the well pursuant to the plan for augmentation, and shall protect the viability of the water supply by placing limitations in the Covenants as to amendments and termination as applied to said water supply.

The covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 246 acre-feet of not-nontributary Dawson aquifer water pursuant to Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) to satisfy El Paso County's 300-year water supply requirement for the 2 lots of the Mountain Shadows Vacate and Replat a/k/a McGehee Minor Subdivision.

2) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require each lot owner to use non-evaporative septic systems to ensure that return flows from such systems are made to the stream system to replace actual depletions during pumping, shall reserve said return flows to replace 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 more specifically shall require that each lot served by the Dawson aquifer well have an occupied single-family dwelling that is generating return flows from a non-evaporative septic system before any irrigation or animal watering is allowed from the well. 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."

3) 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 Applicant/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 plan for augmentation in Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) 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."

4) The Covenants shall advise future lot owners of this subdivision, their successors and assigns, of their responsibility for any metering and data collecting that may be required regarding water withdrawals from the existing or future wells in the Dawson aquifer and future wells which may be constructed in the Denver aquifer.

5) 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 Mountain Shadows Vacate and Replat pursuant to the plan for augmentation in Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2). Further, written approval of any such 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 a Decree from the 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."

6) The Covenants shall address termination using the following or similar language:

"These Covenants shall not terminate unless the requirements of the plan for augmentation in Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) 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."

C. Applicant and its successors and assigns shall reserve in the Covenants and in any deeds of the Property the decreed amount of at least 0.82 acre-feet annually for the subdivision (0.41 acre-feet annually per lot) for a period of 300 years for a total of 246 acre-feet for the 2-lot subdivision for 300 years. 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. Applicant shall convey by recorded warranty deed these reserved Dawson aquifer water rights to the individual lot owners. Applicant shall provide copies of said Covenants or other such reservation and conveyance instruments that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney's Office prior to recording the minor subdivision plat.

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, and replacement during pumping, for each of the 2 lots of the Mountain Shadows Vacate and Replat. 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."

D. Applicant and its successors and assigns shall reserve in the Covenants and in any deeds of the Property a total of 225 acre-feet of water in the Denver aquifer for use in the augmentation plan to replace post-pumping depletions. Pursuant to the Decree/Augmentation Plan, Applicant shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for augmentation supply. Applicant shall convey by recorded warranty deed these reserved Denver aquifer water rights to the HOA or to the individual lot owners (with appropriate deed restrictions) for use in the augmentation plan. Applicant shall provide copies of such reservation and conveyance instruments that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney's Office prior to recording the minor subdivision plat.

E. Applicant and its successors and assigns at the time of lot sales, shall convey by warranty deed to individual lot owners sufficient water rights in the Dawson aquifer pursuant to Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) underlying the respective lots to satisfy El Paso County's 300 year water supply requirement. Dawson aquifer requirements are 123 acre-feet/lot (0.41 acre-feet/year x 300 years). Said conveyance instruments shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for the primary supply and replacement during pumping for the respective lots. Applicant shall provide form deeds for such conveyances that shall be reviewed and approved by both the Planning and Community

Development Department and the County Attorney's Office prior to recording the minor subdivision plat.

F. Applicant and its successors and assigns shall submit a Declaration of Covenants, Conditions and Restrictions 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 Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2) and shall identify the obligations of the individual lot owners thereunder.

G. Applicant and its successors and assigns shall record all applicable documents, including, but not limited to, the decree in Colorado District Court Water Division Consolidated Case Nos. 17CW3054 (Div. 1) and 17CW3015 (Div. 2), agreements, assignments, and 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.

H. Applicant shall submit a proposed well-sharing agreement 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 in order to obtain full water sufficiency for the subdivision.

I. Applicant shall ensure that the *Water Resources Report* dated June 28, 2021, the updated WSIS indicating household water demand of 0.52 acre-feet/year, and the *Water Quality Report* dated June 28, 2021 are uploaded on eDARP prior to the Planning Commission hearing on this matter.

J. 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. Applicants 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: John Green, Planner II