

## County Attorney

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March 22, 2024

SF-23-24 Hay Creek Valley

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

### WATER SUPPLY REVIEW AND RECOMMENDATIONS

#### Project Description

1. Hay Creek Valley is a proposal to combine six parcels and subdivide this 214-acre tract (the “property”) into 20 single-family lots by Randall and Andrea O’Leary (“Applicant”). The property is zoned RR-5 (Rural Residential).

#### Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the subdivision is estimated to use 12.93 acre-feet/year comprising of 6.72 acre-feet per year for household use (0.34 acre-feet/year for a single-family dwelling), 5.38 acre-feet per year for irrigation of 6 acres, 0.72 acre-feet per year for stock watering of 80 animals and 0.11 acre-feet per year for fire protection. The Water Resources Report (“Report”), however, states that the fire protection cistern will be filled and maintained with offsite water rather than with groundwater from the underlying aquifers. Based on this total demand, after subtracting the amount for fire protection, Applicant must be able to provide a supply of 3,846 acre-feet of water (12.82 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 one or more individual on-lot wells withdrawing from the not-nontributary Denver aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree in Division 2 Case No. 22CW3092 (“Decree”). There is an existing well with Permit No. 119564 serving an existing residence

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located on the property. This well must be re-permitted pursuant to the augmentation plan approved in the Decree.

The Decree allocates 8,147 acre-feet of water from the not-nontributary portion of the Denver aquifer. As El Paso County requires a 300-year supply, 8,147 acre-feet is divided by 300, leaving 27.16 acre-feet per year available to 20 lots from the Denver aquifer. Available Denver aquifer withdrawals available for this subdivision are to be used for the following: domestic, structure and equipment washing, hot tub, irrigation, commercial, stock water, recreation, wildlife, fire protection, and also storage and augmentation purposes.

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 20 approved wells. Applicant must reserve 3,846 acre-feet of its water rights in the Denver aquifer and an additional 3,993 of its water rights in the Laramie-Fox Hills aquifer which shall be used for replacement of post pumping depletions. Each of the 20 wells may pump up to 0.81 acre-feet per year.

#### State Engineer's Office Opinion

4. In a letter dated February 7, 2024, the State Engineer stated that “[t]he proposed water supply is individual on-lot wells constructed in the not-nontributary Denver aquifer operating pursuant to the augmentation plan approved by the Division 2 Water Court in case no. 22CW3092. . .” There is an existing well with permit no. 119564 which will be re-permitted pursuant to the augmentation plan. Based on El Paso county’s 300-year requirement, 16.2 acre-feet/year or 0.81 acre-feet/year/well is allowed for withdrawal from all 20 wells pursuant to the Decree and augmentation plan.

Finally, the State Engineer provided their opinion, “. . . pursuant to 30-28-136(1)(h)(I), C.R.S. it is our opinion that the proposed water supply is adequate and can be provided without causing injury to decreed water rights so long as the Denver aquifer wells are operated in compliance with the decree granted in case no. 22CW3092.”

#### Recommended Findings

5. Quantity and Dependability. Applicant’s water demand for Hay Creek Valley is 12.82 acre-feet per year. This results in a demand of 3,846 acre-feet for the subdivision for 300 years. Under the Decree, Applicant owns the right to withdraw up to 16.2 acre-feet per year, for a total of 4,860 over 300 years, which is a surplus to the requested demand.

**Based on the water demand of 12.82 acre-feet/year for Hay Creek Valley and the Decree’s allowable amount of up to 16.2 acre-feet per year, the County Attorney’s Office recommends a finding of sufficient water quantity and dependability for the Hay Creek Valley.**

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

7. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a Water Resources Report dated March 2024, the Water Supply Information Summary, the State Engineer's Office Opinion dated February 7, 2024 and Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree in Division 2 Case No. 22CW3092 entered on June 29, 2023. 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. Applicant and its successors and assigns shall comply with all requirements of the Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree in Division 2 Case No. 22CW3092 ("Decree"), including that water withdrawn from the Denver aquifer shall not exceed 16.2 acre-feet per year, or 0.81 annual acre-feet per well. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

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

C. Applicant 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 Referee, and Decree in Division 2 Case No. 22CW3092.

Covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 3,846 acre-feet of not-nontributary Denver aquifer water and 3,993 acre-feet of Laramie-Fox Hills aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree of Division 2 Case No. 22CW3092 to satisfy El Paso County's 300-year water supply requirement for the 20 lots of Hay Creek Valley. The Covenants shall further identify that 192.3 acre-feet (0.641 acre-feet/year) of Denver aquifer water is allocated to each residential lot and the entire 3,993 acre-feet of Laramie-Fox Hills is allocated to the HOA. Said reservations shall not be separated from 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, the lot owners, and their successors and assigns of their obligations regarding the costs of operating the plans for augmentation, which include pumping of the Denver 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 that lot owners 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 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. Lot owners must follow all applicable laws, rules, regulations, court orders, and permit conditions related to return flows."

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 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 Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree in Division 2 Case No. 22CW3092 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, data collecting, and reporting that may be required regarding water withdrawals from existing and future wells in the Denver and Laramie-Fox Hills aquifers.

6) Require well permits. The Covenants shall require that well permits be obtained or re-permitted pursuant to the requirements of Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree in Division 2 Case No. 22CW3092 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 Hay Creek Valley pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree in Division 2 Case No. 22CW3092. 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 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 determination.”

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 Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree in Division 2 Case No. 22CW3092 are also terminated by the Division 2 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. Applicant and its successors and assigns shall reserve in any deeds of the property Denver aquifer water in the decreed amount of 3,846 acre-feet as well as 3,993 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. Applicant and its successors and assigns shall convey by recorded warranty deed these reserved Denver aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Denver aquifer underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement. This amount is 192.3 acre-feet per lot (0.641 acre-feet/year).

Any and all conveyance instruments shall also recite as follows:

For the water rights and return flows conveyed for the primary supply (Denver aquifer): “These water rights conveyed, and the return flows therefrom, are intended to provide a 300-year water supply, and replacement during pumping, for each of the lots of Hay Creek Valley. 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 3,993 acre-feet of Laramie-Fox Hills aquifer 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. Applicant and its 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. 22CW3092 and shall identify the obligations of the individual lot owners thereunder.

H. Applicant and its successors and assigns shall record all applicable documents, including but not limited to Findings of Fact, Conclusions of Law, Ruling of Referee, and Decree of Water Court: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation from Division 2 Water Court, Case No. 22CW3092, 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.

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.”

J. Prior to recording the final plat:

- 1) Upload into eDARP proof that the existing well operating under Permit No. 119564 has be re-permitted.
- 2) A new WSIS must be uploaded to eDARP to reflect the water amounts listed in the Water Resources Report dated March 2024.

cc: Kylie Bagley, Project Manager, Planner