

# EL PASO COUNTY



## OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

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MS-17-001      Cordero Minor Subdivision  
(Minor Subdivision)

Reviewed by:    M. Cole Emmons, Senior Assistant County Attorney  
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### **FINDINGS AND CONCLUSIONS:**

1. This is a proposal by Angel Cordero, Jr. ("Applicant") for a 2 lot minor subdivision on 35.55 +/- acres ("Property"). The Applicant desires to replat the parcel into 2 lots; 1 lot of approximately 17 acres and a second lot of approximately 18 acres. There is currently an existing single family residence and an existing well on the parcel. The Property is currently zoned A-35 (Agricultural); however, there is a concurrent request pending to rezone the property to A-5 (Agricultural).

2. The Applicant has provided for the source of water to derive from individual on-lot wells into the not nontributary Arapahoe aquifer located within the Upper Black Squirrel Creek Designated Ground Water Basin pursuant to the Colorado Ground Water Commission Findings and Order re: Determination of Water Right No. 3344-BD dated October 12, 2016 ("Determination") and associated Replacement Plan No. 3344-BD dated June 12, 2018 ("Replacement Plan").<sup>1</sup> The Determination provides that there is a total quantity of 635 acre-feet of water underlying Applicant's 35.55 acre parcel. The Replacement Plan permits pumping a total of 1.0 acre-feet annually for 300 years in the subdivision, and that the allowed annual amount of water that may be withdrawn from each on-lot well shall not exceed 0.5 acre-feet.

3. Pursuant to the Water Supply Information Summary and Applicant's letter to the Colorado Division of Water Resources dated January 12, 2018, the Applicant estimates the annual water needs to serve the 2 lot minor subdivision as follows: 0.30 acre-feet per lot for household use, 0.15 acre-feet per lot for irrigation of 3000 square feet of landscaping, and 0.05 acre-feet per lot for stock watering of 4 large domestic animals. The total water demand for the

<sup>1</sup> The Colorado Ground Water Commission Determination No. 3343-BD also adjudicated water rights in the Laramie-Fox Hills aquifer underlying Applicant's property in the amount of 1,040 acre-feet total. Since the Arapahoe aquifer will be utilized to provide water supply to this subdivision, the balance of this review will focus on the Arapahoe water supply obtained in Determination No. 3344-BD and accompanying replacement plan.

subdivision is 1.0 acre-feet per year (0.50 acre-feet per lot). Based on Applicant's demand of 1.0 acre-feet per year for the subdivision, Applicant must be able to provide a supply of 300 acre-feet of water (1.0 acre-feet per year x 300 years) to meet the County's 300-year water supply requirement.

4. In letters dated August 15, 2018 and April 23, 2019, and as affirmed in an email dated January 22, 2020, the State Engineer's Office reviewed the submittal to plat the 35.55 +/- acre parcel into a 2 lot minor subdivision. The State Engineer reviewed the Determination and confirmed that the proposed water source for the subdivision is a bedrock aquifer in the Denver Basin. The State Engineer further stated that pursuant to the Applicant's Replacement Plan dated June 12, 2018, "[e]ach well is allowed to divert 0.5 acre-feet annually to serve 1 single family residence, irrigation of 3,000 square-feet of lawn and garden, and watering of 4 large domestic animals." The Engineer noted that based on the County's 300 year rule, the amount of water available underlying the Property is 2.12 acre-feet per year (635 acre-feet total divided by 300 years equals 2.12).

The State Engineer further noted that there is an existing well on the Property identified by Well Permit No. 304886 and stated that "the proposed water supply to the subdivision does not include well permit no. 304886, the plan of the developer and well owner appears to be that it no longer be used (and not re-permitted). Approval of the subdivision will therefore require the well to be plugged and abandoned."

Finally, the State Engineer stated the opinion that "pursuant to Section 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 water rights."

5. Determination No. 3344-BD. The Colorado Ground Water Commission adjudicated water in the Arapahoe aquifer in the Denver Basin located within the Upper Black Squirrel Creek Designated Ground Water Basin underlying the Property in the amount of 635 acre-feet (6.35 acre-feet for 100 years or 2.12 acre-feet for 300 years as required by the El Paso County 300 year rule). The Upper Black Squirrel Creek Ground Water Management District did not oppose the application.

The Determination and Replacement Plan allow withdrawal of the not nontributary Arapahoe aquifer water for this subdivision using non-evaporative septic system return flows to replace depletions to the stream system during 300 years of pumping the Arapahoe aquifer as noted in Exhibit A to the Replacement Plan.

The Decree provides for maximum withdrawal of the Arapahoe aquifer water through 2 wells for 300 years. The Replacement Plan as applied to this 2 lot subdivision, allows for a maximum total withdrawal of 1.0 acre-feet annually from the Arapahoe aquifer or 0.50 acre-feet annually for each of the 2 lots. Household use will consist of 0.30 acre-feet annually per lot, 0.15 acre-feet for irrigation, and 0.05 acre-feet for stock watering of up to 4 large domestic animals. Beneficial uses include domestic, irrigation, livestock watering, and replacement.

Replacement of Depletions During Pumping. As stated in the Replacement Plan, the Applicant will provide “0.585 acre-feet per year of replacement water to the alluvial aquifer of the Upper Black Squirrel Creek Designated Ground Water Basin. The proposed source of replacement water is septic and leaching field return flows from the in-house use and deep percolation from irrigation use of the ground water to be pumped under the plan. The Applicant estimates that return flows from each lot will consist of 90% of the water used for in-house purposes and 15% of the water used for irrigation of lawn and garden. . . .[thus] the return flow per lot would be 0.293 acre-feet annually, and the return flows under the plan will total 0.585 acre-feet per year for the 2 lots at full build out.” Therefore, Applicants, their successors and assigns, must use nonevaporative septic systems and leach fields for each single-family dwelling and above ground spray irrigation systems to generate these return flows.

Replacement of Post-Pumping Depletions. The Determination does not provide for post-pumping depletions. As noted in an email by the State Engineer on January 22, 2020, that “pursuant to Rule 5.3.6(C) of the Designated Basin rules replacement plans ‘shall provide for the depletion of alluvial water for the first 100 years due to all previous pumping, and if pumping continues beyond 100 years shall replace actual impact until pumping ceases, assuming water table conditions in the bedrock aquifer.’ Therefore, under the rules post-pumping depletions are not required to be replaced.” Applicant, its successors and assigns, therefore, will be required to ensure annual return flows in the amount of 0.585 acre-feet are replaced to the alluvial aquifer of the Upper Black Squirrel Creek Ground Water Basin by use of non-evaporative septic systems and above ground spray irrigation systems during the 300 years of operation of the water supply system.

6. Analysis. There is total amount of 635 acre-feet of water available underlying Applicant’s property deriving from the Arapahoe aquifer. Applicant’s water demand for the Cordero Minor Subdivision is 0.5 acre-feet per lot or 1.0 acre-feet annually for the subdivision requiring a total demand of 300 acre-feet for the subdivision for 300 years. The Determination and Replacement Plan in Colorado Ground Water Division Nos. 3344-BD authorize withdrawal of 0.5 acre-feet per lot annually of Arapahoe aquifer water for a period of 300 years or a total of 300 acre-feet; therefore, the supply of water available exceeds the water demand for the subdivision. Based on the foregoing, there appears to be a sufficient water supply to meet the water demands of the Cordero Minor Subdivision.

7. Section 8.4.7.B.10.g., of the El Paso County Land Development Code allows for the presumption of acceptable water quality for minor subdivision projects such as this.

8. Therefore, based upon the documentation provided with the proposal, based on the finding of sufficiency and no injury by the State Engineer, based on the Determination and Replacement Plan identified as Nos. 3344-BD, based on necessary compliance with the required replacement of actual depletions to the Designated Basin, and based on the requirements below, the County Attorney’s Office recommends a finding that the proposed water supply is **sufficient** in terms of quantity and dependability. There is a presumption of sufficient water quality.

## REQUIREMENTS:

A. Applicant, its successors and assigns, shall comply with all requirements of Colorado Ground Water Commission Determination and Replacement Plan Nos. 3344-BD, specifically, that water use shall not exceed 1.0 acre-feet annually for the 2 lot subdivision (the Replacement Plan limits withdrawal to 0.50 acre-feet annually for each of the 2 lots), and that all stream depletions will be replaced with non-evaporative septic system and above ground spray irrigation system return flows for a period of 300 years, pursuant to the Commission's Replacement Plan.

B. The County prefers that when there is a plan for replacement, that Applicant, its successors and assigns, create a homeowners' association ("HOA"); however, alternatively to establishing an HOA, especially for minor subdivisions such as this, Applicant, its successors and assigns, 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, regarding all applicable requirements of Colorado Ground Water Commission Determination and Replacement Plan Nos. 3344-BD, as well as their obligations to comply with the plan for replacement, including, but not limited to, ensuring that return flows by the use of non-evaporative septic systems and above ground spray irrigation systems are made to the stream systems, and that such return flows shall only be used to replace depletions and shall not be sold, traded, or assigned in whole or in part for any other purpose. The Covenants more specifically shall require the Arapahoe aquifer wells to serve on each lot 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 wells. In addition, the Covenants shall advise future lot owners of this subdivision, their successors and assigns, of their obligations regarding costs of operating the plan for replacement. Such Covenants shall also address responsibility for any metering and data collecting that may be required regarding water withdrawals from wells pursuant to the plan for replacement, 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 300 acre-feet (150 acre-feet per lot) of not-nontributary Arapahoe aquifer water pursuant to the plan for replacement in Colorado Ground Water Commission Determination and Replacement Plan Nos. 3344-BD, to satisfy El Paso County's 300 year water supply requirement for the 2 lots of the Cordero Minor Subdivision.
- 2) Require evaporative septic systems and above ground spray irrigation systems and reserve return flows from the same. The Covenants shall require each lot owner to use non-evaporative septic systems and above ground spray irrigation systems and require them to ensure that return flows from such systems are used to replace actual depletions to the alluvial of the Upper Black Squirrel Creek Ground Water Basin during 300 years of pumping, shall reserve said return flows to replace depletions during pumping, and shall

state that said return flows shall not be sold, traded or used for any other purpose. The Covenants more specifically shall require the Arapahoe aquifer well on each lot to be serving 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 replacement in Colorado Ground Water Commission Determination and Replacement Plan Nos. 3344-BD, and the water rights 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 Arapahoe aquifer wells.

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 Cordero Minor Subdivision pursuant to the plan for replacement in Colorado Ground Water Commission Determination and Replacement Plan No. 3344-BD. 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 a Determination from the Colorado Ground Water Commission, with prior notice to El Paso County Planning and Community Development for an opportunity for the County to participate in any such adjudication."

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

"These Covenants shall not terminate unless the requirements of the plan for replacement in Colorado Ground Water Commission Determination and Replacement Plan No. 3344-BD are also terminated by order of the Commission, and a change of water supply is approved in advance of termination by the Board of County Commissioners of El Paso County."

C. Applicant, its successors and assigns, shall reserve in the Covenants and in any deeds of the Property the decreed amount of at least 0.50 acre-feet per lot annually and shall reserve a total decreed amount of at least 1.0 acre-feet of Arapahoe aquifer water for the 2 lots in the subdivision for 300 years for a total of 300 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 Arapahoe aquifer water rights to the individual lot owners pursuant to Colorado Ground Water Commission Determination and Replacement Plan Nos. 3344-BD. Applicant, its successors and assigns, at the time of lot sales, shall convey by warranty deed to individual lot owner(s) sufficient water rights in the Arapahoe aquifer underlying the lots to satisfy El Paso County's 300 year water supply requirement. Arapahoe aquifer requirements for each lot are as follows: 150 acre-feet for each lot (0.50 acre-feet/year x 300 yrs.). 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 said Covenants or other such reservation instrument and 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 of 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 (Arapahoe 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 Cordero Minor Subdivision. 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, its successors and assigns, shall submit 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 before the final plat will be recorded. Said Declaration shall cross-reference Colorado

Ground Water Commission Determination and Replacement Plan Nos. 3344-BD and shall identify the obligations of the individual lot owners thereunder.

E. Applicant, its successors and assigns, shall record all applicable documents, including, but not limited to, Ground Water Commission Determination and Replacement Plan Nos. 3344-BD and 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.

F. As noted by the State Engineer's Office, the Applicant must provide evidence to confirm that the well associated with Well Permit No. 304886 is plugged and abandoned. **Therefore, before the Final Plat will be recorded, Applicant shall provide evidence acceptable to both the Planning and Community Development Department and the County Attorney's Office that it has complied with the State Engineer's requirement that Well Permit No. 304886 has been plugged and abandoned.**

G. As further noted by the State Engineer's Office, 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: Nina Ruiz, Project Manager, Planner III