

EL PASO COUNTY



OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

Kenneth R. Hodges, County Attorney

Assistant County Attorneys

Lori L. Seago
Steven A. Klaffky
Mary Ritchie
Bryan E. Schmid
Nathan J. Whitney
Christopher M. Strider
Terry A. Sample
Dorey L. Spotts
Steven W. Martyn

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Boyd Minor Subdivision Filing No. 1
Final Plat MS-22-4

Reviewed by: Lori L. Seago, Senior Assistant County Attorney
Edi Anderson, Paralegal, ACP

FINDINGS AND CONCLUSIONS:

1. This is a subdivision proposal by Christopher and Jessica Boyd ("Applicant") for a 3-lot subdivision on a parcel of 35.88 acres 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 2.25 acre-feet/year, reflecting 0.30 acre-feet/lot for household use (0.90 acre-feet total), plus 1.2 acre-feet/year for irrigation and 0.15 acre-feet/year for stock watering, equating to 0.75 acre-feet/year for each lot. Based on this total demand, Applicant must be able to provide a supply of 675 acre-feet of water (2.25 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 individual on-lot wells in the not nontributary Dawson aquifer as provided in Findings of Fact, Conclusions of Law, Ruling of Referee, and Judgment and Decree, Division 1 Case No. 21CW3156, consolidated with Division 2 Case No. 21CW3041 (hereinafter referred to as "Case No. 21CW3156", "Decree" or "Augmentation Plan"). The Decree was granted to Christopher and Jessica Boyd on March 11, 2022.

The Decree adjudicated 3,340 acre-feet of Dawson-aquifer water underlying the 35.88-acre property.¹ Pursuant to the Augmentation Plan, "2.25 acre-feet per year for 300 years of not nontributary Dawson Aquifer groundwater [are] decreed herein." The Dawson-aquifer groundwater

¹ Note: The Decree also adjudicated water in the following aquifers: Denver (2,990 acre-feet), Arapahoe (1,590 acre-feet), and Laramie-Fox Hills (1,100 acre-feet).

will serve 3 individual wells, each serving one of 3 residences in the amount of 0.3 acre-feet/year for household use, plus 0.4 acre-feet/year for irrigation, and 0.05 acre-feet/year for stock watering for up to 4 large domestic animals per lot. The water use will total 0.75 acre-feet/year for each lot. Pursuant to the Decree, water may be used for "domestic, commercial, irrigation, including in greenhouses, swimming pool filling, stockwatering, fire protection, and augmentation purposes, including storage, both on and off the Subject Property."

State Engineer's Office Opinion

4. In a letter dated May 10, 2022, the State Engineer stated the estimated water requirements are 2.25 acre-feet/year, which reflects "in-house use in one single-family dwelling (0.3 acre-feet/year/lot); irrigation of 8,000 square-feet of lawn, garden, trees, and use in greenhouses (0.4 acre-feet/year/lot); and watering of 4 large domestic animals (0.05 acre-feet/year/lot)." The State Engineer noted that "the plan for augmentation allows for an average diversion of 2.25 acre-feet annually for a maximum of 300 years which is equal to the annual demand for this subdivision."

Finally, the State Engineer provided their opinion that "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. Our opinion that the water supply is adequate is based on our determination that the amount of water required annually to serve the subdivision is currently physically available, based on current estimated aquifer conditions."

Recommended Findings

5. Quantity and Dependability. Applicant's water demand for the Boyd Minor Subdivision Filing No. 1 is 2.25 acre-feet per year for a total demand of 675 acre-feet for the subdivision for 300 years. The Decree and Augmentation Plan in Case No. 21CW3156 permits withdrawal of 2.25 acre-feet/year (675 acre-feet total) of Dawson-aquifer water for a period of 300 years.

Based on the water demand of 2.25 acre-feet/year for the Boyd Minor Subdivision Filing No. 1 and Case No. 21CW3156 permitting withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Boyd Minor Subdivision Filing No. 1.

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: The Water Supply Information Summary provided on March 28, 2022, a Water Resources Report for the Boyd Subdivision Filing No. 1 dated March 21, 2021, the State Engineer's Office Opinion dated May 10, 2022, and Decree and Augmentation Plan in Case No. 21CW3156 issued on March 11, 2022. 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 Decree and Augmentation Plan in Case No. 21CW3156. Water use shall not exceed 2.25 acre-feet annually for the 3-lot subdivision for a period of 300 years. Stream depletions shall be replaced with non-evaporative septic system return flows for a period of 300 years pursuant to the Court's approved augmentation plan.

B. The County prefers that when there is an augmentation plan, Applicant 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. For minor subdivisions such as this, however, Applicant may elect to solely rely on the covenant provisions required below and forego creation of an HOA.

C. Applicant shall 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 the Decree and Augmentation Plan in Case No. 21CW3156.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 675 acre-feet of not nontributary Dawson aquifer water and 675 acre-feet of nontributary Laramie-Fox Hills aquifer water pursuant to Case No. 21CW3156. The Covenants shall further identify that 225 acre-feet (0.75 AF/year) of Dawson aquifer water and 225 acre-feet of Laramie-Fox Hills aquifer water is allocated to each residential lot. 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 water supply.

2) Advise of responsibility for costs. The Covenants shall advise 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 deletions 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 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. 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 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 Case No. 21CW3156 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 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 wells in the Dawson and/or Laramie-Fox Hills aquifers.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Case No. 21CW3156 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 Boyd Minor Subdivision Filing No. 1 pursuant to Case No. 21CW3156. 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 the Division 1 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 Case No. 21CW3156 are also terminated by the Division 1 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 Dawson aquifer water in the decreed amount of 225 acre-feet (0.75 AF/year for 300 years) and Laramie-Fox Hills aquifer water in the decreed amount of 225 acre-feet per lot. 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 those reserved Dawson and Laramie-Fox Hills aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson and Laramie-Fox Hills aquifers to satisfy El Paso County's 300-year water supply requirement.

Any and all conveyance instruments shall also 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 water supply, and replacement during pumping, for each of the lots of the Boyd Minor Subdivision Filing No. 1. 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 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 Case No. 21CW3156 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, Case No. 21CW3156, 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. 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: Kylie Bagley, Planner II