

# EL PASO COUNTY



## OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

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MS-21-1            D. Johnson Minor Subdivision

Reviewed by:    Lori L. Seago, Senior Assistant County Attorney  
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### **FINDINGS AND CONCLUSIONS:**

1. This is a proposal by Delroy and Janet Johnson ("Applicant") for a 4-lot minor subdivision on a parcel of approximately 28.65 +/- acres (the "Property"). The Applicant plans to subdivide the Property into 4 lots with minimum lot sizes of 5 acres. There is currently an existing single-family home and existing well on the Property. The property is zoned RR-5 (Rural Residential).

2. The Applicant has provided for the source of water to derive from individual on-lot wells, as provided in the decree and plan for augmentation in Colorado District Court Water Division Consolidated Case Nos. 02CW119 (Div. 2) and 02CW184 (Div. 1) ("Decree" or "Augmentation Plan"). An existing well (Permit No. 179281) is located on the Property. 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 0.113 acre-feet total for irrigation, for a total of 0.373 acre-feet/lot/year for a total demand of 1.493 acre-feet/year for the minor subdivision. Based on this total demand, Applicant must be able to provide a supply of 447.9 acre-feet of water (1.493 acre-feet per year x 300 years) to meet the County's 300 year water supply requirement.

3. In a letter dated March 15, 2021, the State Engineer reviewed the submittal to subdivide the 28.62 +/- acre parcel into a 4-lot minor subdivision. The State Engineer stated that the "supply of water to the subdivision will be four individual on-lot wells operating pursuant to a court decreed plan for augmentation ...." Further, the State Engineer stated that according to the WSIS, the "estimated water demand for the development [is] 1.581 acre-feet/year for the entire development. This amount breaks down [to] 0.395 acre-foot/year for each of the four lots."

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<sup>1</sup> Note: This number differs from an updated WSIS and an updated Water Resources Report dated May 2021, which identified the water demand at 1.493 acre-feet/year or 0.373 acre-feet/lot.

Pursuant to the Decree, the following amounts of water have been adjudicated and were determined to be available underlying the property:

Aquifer	Tributary Status	Volume (A/F)	Annual Allocation 100 Year (AF/Year)	Annual Allocation 300 Year (AF/Year)
Dawson	NNT	1,570	15.70	5.23
Denver	NNT	2,530	25.30	8.43
Arapahoe	NNT	1,100	11.00	3.66
Laramie-Fox Hills	NT	816	8.16	2.72

The State Engineer stated that the “plan for augmentation decreed in Division 1 Water Court case no. 02CW184 (Division 2 Water Court case no. 02CW119) allows for diversion of 3.0 acre-feet annually from the Dawson aquifer for a maximum of 300 years. The annual allowed diversion is reduced according to (paragraph) 13 of the court decree, to account for the existing well’s cumulative withdrawals. According to the decree, this reduction must be accounted for if the subdivision creates five lots, which is not the case in this referral.”

The State Engineer further notes that “Permit No. 59979-F was issued pursuant to CRS 37-90-137(4) for use of a well constructed under Permit No. 179281, for use in ordinary household purposes inside not more than one single family dwelling, the irrigation of home gardens and lawns, and the watering [of] domestic animals. It appears that this well is located on proposed Lot 1 of the property and the applicant has proposed to continue to utilize the existing well pursuant to the decreed plan for augmentation.”

The State Engineer stated that the “annual estimated demand, for the entire subdivision, is 1,581 acre-feet as allowed by the augmentation plan. As a result, the water may be withdrawn in that annual amount for a maximum of 300 years.” Finally, the State Engineer provided the 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 and operates the wells in accordance with the terms and conditions of any future well permits.”

4. Decree and Augmentation Plan, Colorado Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) (“Decree”/“Augmentation Plan”). The Decree/Augmentation Plan was issued to Delroy L. Johnson and Janet M. Johnson on May 5, 2003. It permits withdrawal from the not-nontributary Dawson aquifer for this subdivision. The aquifer requires the use of septic return flows from indoor uses to meet the respective requirements to replace depletions to the stream system during 300 years of pumping. Such return flows may not be otherwise used, sold, traded, or assigned.

The Decree/Augmentation Plan provides for maximum withdrawal of 3.0 acre-feet/year for the subdivision; however, the “number of acre feet of water each well shall be allowed to

divert on an annual basis shall be calculated by dividing the number of lots into the number 3.0, but in no event to exceed 1.0 acre feet per well per year.” As detailed in the *Water Resources Report for Delroy Johnson Subdivision* dated May 2021 (“*Report*”), it is anticipated that each lot will use 0.373 acre-feet of water each year, for a total water demand of 1.493 acre-feet/year for the subdivision. The beneficial uses permitted by the decree are household use, irrigation, and stock watering.

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 Black Squirrel Creek drainage, which is tributary to Monument Creek, Fountain Creek, and the Arkansas River. As stated in the Decree/Augmentation Plan, “[b]ased on pumping of 3.0 acre feet annually, maximum stream depletions during the pumping period would be 0.69 acre feet annually. Septic system return flows from even only three single family homes will equal 0.73 acre feet annually, and will be used to replace such depletions.”

Replacement of Post-Pumping Depletions. The Decree/Augmentation Plan requires that Applicant’s “post-pumping replacement obligation will be determined by multiplying the average annual Dawson pumping by the appropriate stream depletion factor according to the total depletion percentages shown on Table III<sup>2</sup>. Annually, that amount of water shall then be pumped from the Laramie-Fox Hills aquifer ....” The Decree/Augmentation Plan further requires that successors in interest shall be required to construct a Laramie-Fox Hills aquifer well for the purpose of meeting the post-pumping obligations and that a total of up to 816 acre-feet of Laramie-Fox Hills 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 D. Johnson Subdivision is 1.493 acre-feet per year from the Dawson aquifer for total demand of 447.9 acre-feet for the subdivision for 300 years. Colorado Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) authorizes withdrawal of 1,570 acre-feet of water (5.23 acre-feet/year) of Dawson aquifer water for a period of 300 years. Based on the demand of 1.493 acre-feet/year for the 4-lot subdivision and the Decree/Augmentation Plan permitting withdrawals in the amount of 1.0 acre-feet/year for each well on each of the 4 lots on the Property, there appears to be a sufficient water supply to meet the water demands of the D. Johnson Minor Subdivision.

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

7. Therefore, based upon the Water Supply Information Summary, a finding of sufficiency and no injury by the State Engineer, the Decree and Augmentation Plan in Colorado

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<sup>2</sup> Table III attached to the Decree/Augmentation Plan and attached hereto to this document.

Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) 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 Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119), specifically, that water use shall not exceed 1.0 acre-feet/lot/year for the 4-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 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 Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) 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 Dawson aquifer wells 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 wells. 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 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. 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 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 447.9 acre-feet of not-nontributary Dawson aquifer water pursuant to Colorado Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) to satisfy El Paso County's 300-year water supply requirement for the 4 lots of the D. Johnson 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 Dawson aquifer wells 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 Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) 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 Laramie-Fox Hills 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 D. Johnson Minor Subdivision pursuant to the plan for augmentation in Colorado Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119). 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 Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) 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 1.493 acre-feet annually for the subdivision for a period of 300 years for a total of 447.9 acre-feet for the 4-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 4 lots of the D. Johnson 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 and its successors and assigns shall reserve in the Covenants and in any deeds of the Property a total of 816 acre-feet of water in the Laramie-Fox Hills 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 Laramie-Fox Hills 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 Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) underlying the respective lots to satisfy El Paso County's 300 year water supply requirement. Dawson aquifer requirements are 111.9 acre-feet (0.373 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 Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119) 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 Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119), 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. As noted by the State Engineer's Office, the Applicant must obtain well permits pursuant to C.R.S. § 37-90-137(4) and pursuant to Colorado Water Division 1 Court Case No. 02CW184 (Division 2 Water Court Case No. 02CW119).

I. Prior to plat recording, Applicant shall upload an updated Colorado Division of Water Resources letter to eDARP that confirms the accurate water demand of 1.493 acre-feet/year for the subdivision, as noted in footnote 1.

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

**TABLE III**

**Dawson Stream Depletion Factors  
Johnson Property  
(as % of pumping)**

YRS	Arkansas River	South Platte River	YRS	Arkansas River	South Platte River
10	0.50	0.09	310	12.34	10.69
20	1.05	0.28	320	12.08	10.88
30	1.60	0.54	330	11.80	11.01
40	2.13	0.84	340	11.54	11.09
50	2.65	1.18	350	11.29	11.12
60	3.17	1.52	360	11.03	11.15
70	3.67	1.88	370	10.78	11.16
80	4.16	2.25	380	10.53	11.17
90	4.65	2.61	390	10.31	11.15
100	5.11	3.00	400	10.08	11.15
110	5.57	3.38	410	9.86	11.14
120	6.02	3.77	420	9.65	11.12
130	6.47	4.14	430	9.43	11.11
140	6.88	4.55	440	9.22	11.09
150	7.31	4.93	450	9.02	11.06
160	7.74	5.27	460	8.82	11.03
170	8.12	5.65	470	8.63	11.00
180	8.51	6.01	480	8.45	10.95
190	8.91	6.36	490	8.25	10.92
200	9.29	6.72	500	8.08	10.86
210	9.63	7.11	510	7.90	10.82
220	9.99	7.47	520	7.75	10.75
230	10.33	7.84	530	7.56	10.71
240	10.67	8.21	540	7.40	10.66
250	11.01	8.57	550	7.24	10.60
260	11.33	8.94	560	7.09	10.53
270	11.65	9.30	570	6.94	10.47
280	11.93	9.69	580	6.78	10.41
290	12.26	10.03	590	6.64	10.34
300	12.55	10.39	600	6.51	10.27