

EL PASO COUNTY

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MS-19-9 Edgewood Minor Subdivision

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FINDINGS AND CONCLUSIONS:

1. This is a proposal by James D. Martens and Karen L. Martens ("Applicant") for a 2-lot minor subdivision on a parcel of approximately 12.23 +/- acres (the "Property"). The Applicant plans to subdivide the Property into 2 lots with an average lot size of 6.11 acres. There is currently an existing single-family home 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 District Court Water Division 2 Case No. 2019CW3006 ("Decree" or "Augmentation Plan"). An existing small capacity or exempt well (Permit No. 172086) is located on the Property. Pursuant to the Water Supply Information Summary ("WSIS"), the water demand is 0.25 acre-feet for each lot for household use, plus an additional 0.67 acre-feet total for irrigation, stock water, and a mixture of uses (the Decree allows for additional uses) for a total demand of 1.17 acre-feet/year for the minor subdivision. Based on this total demand, Applicant must be able to provide a supply of 351 acre-feet of water (1.17 acre-feet per year x 300 years) to meet the County's 300 year water supply requirement.

3. In a letter dated October 15, 2019, the State Engineer reviewed the submittal to plat the 12.228 +/- acre parcel into a 2-lot minor subdivision. The State Engineer notes that the first lot will be 7.215 +/- acres and the 2nd lot will be 5.013 +/- acres. The Engineer stated that the "water is to be provided by two on-lot wells, one producing from the Dawson aquifer and one producing from the Denver aquifer, that will operate pursuant to the augmentation plan decreed by the Division 2 Water Court in case no. 2019CW3006."

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 acre/feet (100/year)	Annual Allocation acre-feet (300/year)
Dawson	NNT	624	6.24	2.08
Denver	NNT 4%	612	6.12	2.04
Arapahoe	NT	520	5.20	1.73
Laramie-Fox Hills	NT	342	3.42	1.14

The State Engineer stated that the “plan for augmentation decreed in Division 2 Water Court case no. 2019CW3006 allows for diversion of 0.78 acre-feet annually from the Denver aquifer for a maximum of 300 years using the existing Martens Well No. 1 (currently operating under well permit no. 172086) on proposed Lot 1 and 0.39 acre-feet annually from the Dawson aquifer for a maximum of 300 years using the proposed Martens Well No. 2 on proposed Lot 2.”

The State Engineer further noted that Applicant intends to apply to permit the existing well on the Property. The State Engineer directed that “the applicant apply for, and obtain a new well permit issued pursuant to Section 37-90-137(4) C.R.S., or plug and abandon this well.” Finally, the State Engineer provided the opinion “pursuant to CRS 30-28-136(1)(h)(I), 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, Division 2, Case No. 19CW3006 (“Augmentation Decree”/“Augmentation Plan”). The Augmentation Decree is in the name of James and Karen Martens and it approves the plan for augmentation to allow withdrawal from the not nontributary Dawson and Denver aquifers for this subdivision. Both aquifers require 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 provides for maximum withdrawal of 1.17 acre-feet/year for the subdivision. Martens Well No. 1 may pump up to 0.78 acre-feet/year from the Denver aquifer and Martens Well No. 2 may pump up to 0.39 acre-feet/year from the Dawson aquifer (0.78 + 0.39 = 1.17 acre-feet). Pursuant to the Augmentation Plan, the households will use 0.25 acre-feet of water per year per lot for household use, with the remaining allocation for other uses to include irrigation, stock watering, and a mixture of uses.

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 (Martens Well No. 2), 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. For wells constructed in the Denver aquifer (Martens Well No. 1), 4%

replacement is required by residential return flows from a non-evaporative septic system. The Augmentation Plan indicates “annual consumptive use for non-evaporative septic systems is 10% per year per residence. At the household use rate of 0.25 acre feet per residence per year, total of 0.50 acre feet (assuming two residences), 0.45 acre-feet is replaced to the stream system per year, utilizing non-evaporative septic systems. Applicant will not cause stream depletions to exceed this amount during pumping.”

Replacement of Post-Pumping Depletions. The Decree requires the Applicant to replace any injurious post-pumping depletions by reserving all of the nontributary Laramie-Fox Hills aquifer water (342 acre-feet), plus 16 acre-feet of Arapahoe aquifer water. Applicant must construct wells first into the Laramie-Fox Hills aquifer and then if necessary into Arapahoe aquifer to replace post-pumping depletions. The reserved Laramie-Fox Hills and Arapahoe groundwater will be used to replace any injurious post-pumping depletions, and the Decree requires that these waters may not be severed from ownership of the overlying Property.

5. Analysis. Applicant’s water demand for the Edgewood Minor Subdivision is 1.17 acre-feet per year (0.78 acre-feet from the Denver well and 0.39 acre-feet from the Dawson well) for a total demand of 351 acre-feet for the subdivision for 300 years. District Court Water Division 2, Case No. 19CW3006, authorizes withdrawal of 0.78 acre-feet/year (234 acre-feet total) of Denver aquifer water for a period of 300 years and 0.39 acre-feet/year (117 acre-feet total) of Dawson aquifer water for a period of 300 years. Based on the demand of 1.17 acre-feet/year for the 2 lot subdivision and the Decree and Augmentation Plan permitting withdrawals in that amount for a period of 300 years, there appears to be a sufficient water supply to meet the water demands of the Edgewood 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 Augmentation Plan and Decree in Case No. 2019CW3006, 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. Prior to plat recording, the Applicant shall:
 - 1) Provide proof to the County that the existing well on the Property has been re-permitted pursuant to the requirements of the decree in Case No. 19CW 3006; and
 - 2) Provided to the County an amended decree in Case No. 19CW3006 that reconciles the conflict between the augmentation provisions in paragraph 19.C and the rest of the decree.

B. Applicant, its successors and assigns, shall comply with all requirements of District Court Water Division 2, Case No. 19CW3006, specifically, that water use shall not exceed 1.17 acre-feet annually for 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.

C. 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 District Court Water Division 2, Case No. 19CW3006, 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 Denver and 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 and Denver wells in a manner to replace depletions during pumping and the cost of drilling Laramie-Fox Hills and Arapahoe 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 234 acre-feet of not nontributary Denver aquifer water and 117 acre-feet of Dawson aquifer water pursuant to the Augmentation Plan, District Court Water Division 2, Case No. 19CW3006, to satisfy El Paso County's 300-year water supply requirement for the 2 lots of the Edgewood 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 Denver and 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 District Court Water Division 2, Case No. 19CW3006, 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 Denver or Dawson aquifers and future wells which may be constructed in the Laramie-Fox Hills and Arapahoe aquifers.

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 Edgewood Minor Subdivision pursuant to the plan for augmentation in District Court Water Division 2, Case No. 19CW3006. 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 Determination from the 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 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 District Court Water Division 2, Case No. 19CW3006, are also terminated by order of 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 the Covenants and in any deeds of the Property the decreed amount of at least 1.17 acre-feet annually for the subdivision (0.78 acre-feet/year for the Denver aquifer and 0.39 acre-feet/year for the Dawson aquifer) for a period of 300 years for a total of 351 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 and Denver 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 and Denver aquifers): “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 Edgewood 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.”

E. Applicant and its successors and assigns shall reserve in the Covenants and in any deeds of the Property at least 342 acre-feet of water in the Laramie-Fox Hills aquifer and 16 acre-feet of water in the Arapahoe aquifer for use in the augmentation plan to replace post-pumping depletions. Pursuant to the Decree and plan for augmentation, 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 and Arapahoe 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.

F. 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 Denver and Dawson aquifers,

pursuant to District Court Water Division 2, Case No. 19CW3006, underlying the respective lots to satisfy El Paso County's 300 year water supply requirement. Denver aquifer requirements are 234 acre-feet (0.78 acre-feet/year x 300 years) and Dawson aquifer requirements are 117 acre-feet (0.39 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.

G. Applicant, 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 District Court Water Division 2, Case No. 19CW3006 (including plan for augmentation) and shall identify the obligations of the individual lot owners thereunder.

H. Applicant, its successors and assigns, shall record all applicable documents, including, but not limited to, the decree in District Court Water Division 2, Case No. 19CW3006 (including plan for augmentation) 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.

I. 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 the Decree and plan for augmentation in District Court Water Division 2, Case No. 19CW3006.

J. Prior to recording the minor subdivision plat, Applicant shall provide proof 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 if Applicant intends to continue to use the existing well pursuant to the plan for augmentation, that it has obtained a new well permit issued pursuant to C.R.S. § 37-90-137(4), or that it has plugged and abandoned that well.

K. 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: Gabe Sevigny, Project Manager