

EL PASO COUNTY



OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

Diana K. May, County Attorney

Assistant County Attorneys

M. Cole Emmons
Lori L. Seago
Lisa A. Kirkman
Steven A. Klaffky
Peter A. Lichtman
Mary Ritchie
Bryan E. Schmid

December 6, 2019

MS-19-8 Wolff Run Estates (a/k/a Pony Tracks Subdivision Filing No. 2)
(Minor Subdivision)

Reviewed by: M. Cole Emmons, Senior Assistant County Attorney *M.C.E.*
Edi Anderson, Paralegal

FINDINGS AND CONCLUSIONS:

1. This is a proposal by Gregory and Tanya Wolff ("Applicant") for a 2 lot minor subdivision on 9.7 +/- acres of land, plus right-of-way ("Property"). The Applicant desires to replat the parcel into 2 lots. There is currently an existing single family residence and an existing well on what will be the newly created Lot 1. The property is zoned RR-5 (Residential Rural).

2. The Applicant has provided for the source of water to derive from individual on-lot wells into the Dawson aquifer pursuant to the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree regarding Gregory S. Wolff and Tanya R. Wolff, District Court Water Division 2, Case No. 18CW3001 (c/r 18CW3001 Div. 1) ("Decree"). The Decree provides that the plan for augmentation permits pumping a total of 0.99 acre-feet annually from as many as 4 on-lot Dawson aquifer wells located on the property. Applicant is platting and developing only 2 lots and will apportion all of the water supply decreed between 2 lots instead of 4 lots.

3. Pursuant to the Water Supply Information Summary, the Applicant estimates its annual water needs to serve the 2 lot minor subdivision as follows: 0.80 acre-feet for household use, plus 0.19 acre-feet for uses which may include landscaping irrigation, horses, or stock watering or any mixture of said uses. The total water demand for the subdivision is 0.99 acre-feet per year (0.495 acre-feet per each lot). Based on Applicant's demand of 0.99 acre-feet per year for the subdivision, Applicant must be able to provide a supply of 297¹ acre-feet of water (0.99 acre-feet per year x 300 years) to meet the County's 300-year water supply requirement.

¹ The total amount adjudicated in the Dawson aquifer is 296 acre-feet total, however, the decree states Applicant may withdraw 0.99 acre-feet/year for 300 years which totals 297 acre-feet. This appears to be a "rounding issue." The Water Resources Report by MVE, Inc., cites a permitted withdrawal of 0.247 acre-feet/lot (based on 4 lots). Based on Applicant's proposal for 2 lots, the total amount would equal 0.494 acre-feet/lot or 0.988 acre-feet/year (296.4 acre-feet for a period of 300 years).

4. In a letter dated August 28, 2019, the State Engineer's Office reviewed the submittal to plat the 9.7 +/- acre parcel into a 2 lot minor subdivision. The State Engineer reviewed the Decree and Water Supply Information Summary and confirmed that the proposed water source for the subdivision is a bedrock aquifer in the Denver Basin. The State Engineer further stated that the water demand encompasses "household use inside one single family dwelling per lot (0.40 acre-feet/year per lot), with the remaining 0.095 acre-feet/year per lot available for other such uses such as landscape irrigation, domestic animals, or livestock watering." The Engineer noted the following amounts of water have been adjudicated and are available under the Property:

Aquifer	Tributary Status	Volume (A/F)	Annual Allocation (100/year)	Annual Allocation (300/year)
Dawson	NNT	296	*	0.99
Denver	NNT	796	7.96	*
Arapahoe	NNT	386	3.86	*
Laramie-Fox Hills	NT	281	2.81	*

* State Engineer states these values were not included in the table in 2018CW3001.

The State Engineer stated that the "plan for augmentation decreed in Division 2 Water Court case no. 2018CW3001 allows for diversion of 0.99 acre-feet annually from Dawson aquifer for a maximum of 300 years."

The State Engineer further noted that an application had been received to register the existing well on the property. Additional information was required, so a permit has not yet been issued. The State Engineer has advised the Applicant that they will need to "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 that "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(2) 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."

5. Decree, Case No. 18CW3001. The Water Court Decree adjudicates water in all four Denver Basin aquifers underlying the Property in the respective amounts identified in the Table in Paragraph 4 above. The Decree approves the plan for augmentation to allow withdrawal of the not nontributary Dawson aquifer water for this subdivision using septic return flows to replace depletions to the stream system during 300 years of pumping the Dawson aquifer and using Laramie-Fox Hills water to replace post-pumping depletions. The Decree advises that Applicant or their successors cannot use either of the not nontributary Denver or Arapahoe aquifers without first obtaining a plan for augmentation.

The Decree provides for maximum withdrawal of the Dawson aquifer water through Wolff Well Nos. 1-4 for 300 years, but recognizes that if only two lots are developed, as planned for this subdivision, either lesser proportionate amounts or the full allotment may be withdrawn. The plan for augmentation, as applied to this 2-lot subdivision, allows for a maximum total withdrawal of 0.99 acre-feet annually from the Dawson aquifer or 0.495 acre-feet annually for each of the 2 lots. Indoor use will be 0.4 acre-feet annually per lot and other uses including irrigation and stock watering of up to 4 horses or equivalent livestock per residence will be approximately 0.094 acre-feet annually for each of the 2 lots. Beneficial uses include domestic, commercial, irrigation, stock water, recreation, wildlife, wetlands, fire protection, piscatorial, and storage and augmentation associated with these uses.

Replacement of Depletions During Pumping. The plan for augmentation provides for a pumping period of a minimum of 300 years. For any wells constructed into the non-tributary 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 non-evaporative septic systems. While depletions will occur to both the South Platte River and Arkansas River systems, the plan requires Applicant to replace depletions only to the Arkansas River system. The Decree indicates the consumptive use for non-evaporative septic systems is 10% per year per residence; therefore, at an annual household use rate of 0.4 acre-feet per lot totaling 0.8 acre-feet for both lots pumping the maximum 0.99 acre-feet annually, 0.72 acre-feet will be replaced to the stream system per year using non-evaporative septic systems. Based on the Division Engineer's Consultation Report, the maximum annual stream depletions over the 300-year pumping period will be approximately 24.3% or 0.243 acre-feet annually; thus, the Decree concludes that stream depletions will be more than adequately augmented with the following caveat: "... provided at least 2 residences are constructed on the Applicant's Property and are receiving annual deliveries for in-house use and septic system return flows are made in the amounts described [in Paragraph 22.C of the Decree]." The caveat goes on to state "[i]f only one residence is constructed on the Applicant's Property, the full amount of 0.99 acre feet per year cannot be withdrawn, as septic return flows . . . would not be sufficient to replace maximum annual depletions. . . ." (Decree, P. 7, n. 2). Therefore, Applicants, their successors and assigns, must use nonevaporative septic systems and leach fields for each single-family dwelling, and must have at least two dwellings on the property in order to use the full allotment of 0.99 acre-feet annually.

Replacement of Post-Pumping Depletions. The Decree requires the Applicant to replace any injurious post-pumping depletions by reserving up to 267 acre-feet of water from the nontributary Laramie-Fox Hills aquifer, or greater amounts as necessary, and constructing wells into the Laramie-Fox Hills aquifer to replace post-pumping depletions. The Water Supply Report prepared by MVE, Inc., states that the remaining 14 acre-feet shall also be reserved as a source for replacing post-pumping depletions; therefore, Applicant will need to reserve the entire 281 acre-feet of adjudicated Laramie-Fox Hills aquifer water for replacement purposes. The reserved Laramie-Fox Hills aquifer 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.

6. Analysis. Applicant's water demand for the Wolff Run Estates Minor Subdivision is 0.495 acre-feet per lot or 0.99 acre-feet annually using the full allotment of Dawson aquifer water allowed under the plan for augmentation for the 2 lot subdivision for a total demand of 297 acre-feet for the subdivision for 300 years. The decree and augmentation plan in District Court Water Division 2, Case No. 18CW3001 authorizes withdrawal of 0.99 acre-feet/year of Dawson aquifer water per year for a period of 300 years. Applicant proposes to use only 2 of the 4 wells allowed in the Decree but will use all of the water decreed in the Dawson aquifer so will use the total amount allowed to be pumped annually:0.99 acre-feet total for 2 lots. Therefore, there appears to be a sufficient water supply to meet the water demands of the Pony Tracts Subdivision Filing No. 2.

7. 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.

8. Therefore, based upon the Water Supply Information Summary, based on the finding of sufficiency and no injury by the State Engineer, based on the decree and augmentation plan in District Court Water Division 2 Case No. 18CV3001, 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 District Court Water Division 2, Case No. 18CW3001 (c/r 18CW3001 Div. 1), specifically, that water use shall not exceed 0.99 acre-feet annually for the 2 lot subdivision (the Decree limits withdrawal to 0.99 acre-feet annually for the subdivision based on 4 lots, which equates to 0.2475 acre-feet/lot annually for 4 lots or 0.495 acre-feet/lot annually for 2 lots), 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, 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 District Court Water Division 2, Case No. 18CW3001, 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 sold, traded, or assigned in whole or in part for any other purpose. The Covenants more specifically shall require the Dawson 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 augmentation, which will include pumping of the Dawson wells in a manner to replace depletions during pumping and the cost of drilling a Laramie-Fox Hills aquifer well 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 297 acre-feet of not nontributary Dawson aquifer water pursuant to the plan for augmentation in District Court Water Division 2, Case No. 18CW3001 to satisfy El Paso County's 300 year water supply requirement for the 2 lots of the Wolff Run Estates Minor Subdivision.
- 2) Require 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 depletions during 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 Dawson 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 augmentation in District Court Water Division 2, Case No. 18CW3001 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 Dawson aquifer well 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 Wolff Run Estates Minor Subdivision pursuant to the plan for augmentation in District Court Water Division 2, Case No. 18CW3001. 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 Division 2 Water Court approving such amendment, 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 or similar language:

“These Covenants shall not terminate unless the requirements of the plan for augmentation in District Court Water Division 2, Case No. 18CW3001 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.”

C. Applicant, its successors and assigns, shall reserve in the Covenants and in any deeds of the Property the decreed amount of at least 0.495 acre-feet per lot annually and shall reserve a total decreed amount of at least 0.99 acre-feet of Dawson aquifer water for the 2 lots in the subdivision for 300 years for a total of 297 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 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 2 lots of the Wolff Run Estates 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 shall reserve in the Covenants and/or in any deeds of the Property all 281 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 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 aquifer water rights to the HOA or to the individual lot owners (with appropriate deed restrictions) for use in the augmentation plan. Pursuant to the Decree, "Applicant shall comply with C.R.S. §37-90-137(9)(b), requiring the relinquishment of the right to consume two percent (2%) of the amount of the nontributary groundwater withdrawn annually. Ninety-eight percent (98%) of the nontributary groundwater withdrawn annually may therefore be consumed." 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, 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 Dawson aquifer, pursuant to District Court Water Division 2, Case No. 18CW3001, underlying the respective lots to satisfy El Paso County's 300 year water supply requirement. Dawson aquifer requirements for each lot are as follows: 148.5 acre-feet for each lot (0.495 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 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.

F. 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 prior to recording the final plat. Said Declaration shall cross-reference District Court Water Division 2, Case No. 18CW3001 (including plan for augmentation) and shall identify the obligations of the individual lot owners thereunder.

G. 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. 18CW3001 (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.

H. As noted by the State Engineer's Office, the Applicant must obtain well permits pursuant to C.R.S. § 37-90-137(2) and pursuant to the Decree and plan for augmentation in District Court Water Division 2, Case No. 18CW3001.

I. 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 permit 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.

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: Lindsay Darden, Planner II