

# EL PASO COUNTY



## OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

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MS-19-003      Poenitsch Minor Subdivision (May also have been known as Mullins Minor Subdivision)

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

1. This is a minor subdivision proposal by Christy Mullins and Thomas Poenitsch ("Applicant") to subdivide an 18.66 +/- acre<sup>1</sup> parcel ("subject property") into 3 lots. The first lot will be 7.9 acres, and the second and third lots will be 5.0 acres each. The property is zoned RR-5 (Residential Rural).

2. The Applicant has provided for the source of water for the 3-lot subdivision to derive from individual on-lot wells, withdrawing from the not nontributary Dawson aquifer, as adjudicated by the Findings of Fact, Conclusions of Law, Ruling and Decree of Water Court, Division 2, Case No. 18CW3054 ("Decree" or "Case No. 18CW3054"), which includes the "Augmentation Plan". The Applicant provided a Water Supply Information Summary setting forth the water demand at 1.0 acre-feet per year for each lot (3.0 acre-feet/subdivision) for a period of 300 years. Applicant must be able to provide a supply of 900 acre-feet of water (3.0 acre-feet/year x 300 years) to meet the County's 300 year water supply requirement. The Applicant notes that there is an existing well on the subject property which is identified as Well Permit No. 163813-A.

The following table is derived from tables and information provided in both the Decree and the State Engineer's letter, and summarizes the Denver Basin water supply available underlying the Applicant's property as follows:

<sup>1</sup> There is inconsistency in the acreage amount noted in the submittal documents. Some documents refer to 18.66 acres and some documents refer to 18.86 acres. This review will reference the acreage amount of 18.66.



Aquifer	Total Water Appropriation (Acre-Feet)	Annual Appropriation (Acre-Feet) 100 years	Annual Appropriation (Acre-Feet) 300 years
Dawson (NNT)	1,280.0	12.8	4.27
Denver (NNT)	1,170.0	11.7	
Arapahoe (NT)	809.0	8.09	
Laramie-Fox Hills (NT)	532.0	5.32	

3. In a letter dated April 3, 2019, and as confirmed on October 22, 2019, the State Engineer reviewed the proposal to subdivide approximately 18.66 +/- acres into 3 lots: 1 lot of 7.9 acres and the 2<sup>nd</sup> and 3<sup>rd</sup> lots of 5.0 acres each. The State Engineer notes that the estimated water source derives from the Dawson aquifer operating pursuant to Water Court Case No. 2018CW3054 and Augmentation Plan. The State Engineer further states that the water requirement is "1.0 acre-feet/year for each residence. This amounts to a total of 3.0 acre-feet/year." Further, the State Engineer notes that the Decree provides that "1.0 acre-foot can be used for a combination of household use, irrigation of lawn and garden, structure and equipment washing, and the watering of chickens and horse[s] or other equivalent livestock."

The State Engineer's Office previously issued Well Permit No. 163813-A to Paul O. Pease, Jr. and Virginia B. Pease in 1994, and the State Engineer notes that the well is located on Applicant's property. The State Engineer states that if the Applicant wishes to utilize the existing well pursuant to the Augmentation Plan, it will require 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 stated 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 operate the wells in accordance with the terms and conditions of any future well permits."

4. Decree and Augmentation Plan, Division 2 Water Court Case No. 18CW3054. This Decree adjudicates water in the Denver Basin aquifers underlying the 18.66 acres of this subdivision, to include 1,280 total acre-feet in the not-nontributary Dawson aquifer, as well as water adjudicated in the Denver, Arapahoe, and Laramie-Fox Hills aquifers in the amounts noted in the table in paragraph 2. The Decree identified an existing well, Permit No. 163813-A (Mullins Well No. 1), located on the property which is permitted to withdraw 1.0 acre-feet per year. The Decree notes that a complete well permit application will need to be filed for the existing well, as well as for the new wells to be constructed on the remaining lots, and new permits need to be issued. The Decree adjudicates an allowed average annual amount of withdrawal of 4.27 acre-feet from the Dawson aquifer

based on a 300 year aquifer life. The Decree holds that approval of the Application for water rights will not result in any material injury to senior vested water rights. The Decree advises that water from the not-nontributary Denver aquifer cannot be used except in accordance with an approved augmentation plan.

The Augmentation Plan states that the allowed annual amount that may be withdrawn from each of the Mullins Wells Nos. 1, 2, & 3 in the Dawson aquifer is 1.0 acre-feet per year "within single family dwellings on up to three lots, for a maximum total of 3.0 acre feet being withdrawn from the Dawson aquifer annually .... Such use shall be a combination of household use, irrigation of lawn and garden, structure and equipment washing, and the watering of chickens and horses or other equivalent livestock." Withdrawals are anticipated to be as follows: 0.26 acre-feet per lot for residential or household use and 0.05 acre-feet per lot for landscape irrigation per 1,000 square feet.

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 use 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 a household use rate of 0.26 acre-feet per lot per year, 0.234 acre-feet per lot is returned to the stream system per year, for a total of 0.702 acre-feet replaced from the 3 lots annually. The Decree states that based on the Division Engineer's Consultation Report, the maximum annual stream depletions over the 300-year pumping period will be approximately 23.2% of pumping; thus, the Decree concludes that the 0.702 acre-feet of annual replacement "... is sufficient to meet the maximum depletion amount occurring in year 300 of 0.702 acre-feet." Therefore, Applicants, their successors and assigns, must use nonevaporative septic systems and leach fields for each single-family dwelling.

Replacement of Post-Pumping Depletions. The Augmentation Plan requires the Applicant to replace any injurious post-pumping depletions by reserving up to a total of 814 acre-feet of water from the nontributary Laramie-Fox Hills and Arapahoe aquifers, and constructing wells into the Laramie-Fox Hills and Arapahoe aquifers to replace post-pumping depletions. The Augmentation Plan states "Applicant will reserve up to a total of 814 acre-feet of water, with 532 acre-feet of water from the nontributary Laramie-Fox Hills aquifer being supplemented by 282 acre-feet from the Arapahoe aquifer in order to cover post pumping depletions of 797 acre-feet ...which will be sufficient to cover maximum post pumping depletions." The Decree requires that these reserved waters may not be severed from ownership of the overlying property.

5. 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 proposal.

6. Analysis. As described above, pursuant to the Division 2 Water Court Case No. 18CW3054 and Augmentation Plan, the Decree adjudicated a total of 1,280 acre-feet of water from the Dawson aquifer water supply underlying the subject property, which equates to 4.27 acre-feet/year based on El Paso County's 300 year water supply requirement. The Augmentation Plan allows withdrawal of 1.0 acre-feet/year per lot (3.0 acre-feet total) of Dawson aquifer water for 300 years (900 acre-feet total supply). Based on the Water Supply Information Summary, the subdivision requires an annual withdrawal or demand of 3.0 acre-foot/year for a total of 900 acre-feet for 300 years. Therefore, the 900 acre-feet of Dawson aquifer water for 300 years adjudicated in the Decree should meet the 900 acre-feet total demand for 300 years. Pursuant to the Decree and Augmentation Plan and based on the finding of sufficiency and no injury by the State Engineer 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 as to the subdivision.

#### **REQUIREMENTS:**

A. Applicant, its successors and assigns, shall comply with all requirements of Division 2 Water Court Case No. 18CW3054 Decree and 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. 18CW3054, 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 both a Laramie-Fox Hills aquifer well and an Arapahoe 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 900 acre-feet of not nontributary Dawson aquifer water pursuant to the plan for augmentation in District Court Water Division 2, Case No. 18CW3054 to satisfy El Paso County's 300 year water supply requirement for the 3 lots of the Poenitsch 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. 18CW3054 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 will 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 Poenitsch Minor Subdivision pursuant to the plan for augmentation in District Court Water Division 2, Case No. 18CW3054. 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. 18CW3054 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 1.0 acre-feet per lot annually and shall reserve a total decreed amount of at least 3.0 acre-feet of Dawson aquifer water annually for the 3 lots in the subdivision for 300 years for a total of 900 acre-feet for the 3 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, 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. 18CW3054, underlying the respective lots to satisfy El Paso County's 300 year water supply requirement. Dawson aquifer requirements for each lot are as follows: 300 acre-feet for each lot (1.0 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 (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 3 lots of the Poenitsch 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 532 acre-feet of water in the Laramie-Fox Hills aquifer plus at least 282 acre-feet of water in the Arapahoe aquifer for a total of 814 acre-feet 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 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.

E. 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. 18CW3054 (including plan for augmentation) and shall identify the obligations of the individual lot owners thereunder.

F. 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. 18CW3054 (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.

G. Applicant shall comply with the requirements of the State Engineer's Office regarding Well Permit No. 163813-A, specifically, that if the Applicant continues to utilize the existing well, the applicant must apply for and obtain a new well permit pursuant to C.R.S. § 37-90-137(4), or alternatively, the Applicant must plug and abandon the well. All additional wells must be obtained pursuant to C.R.S. 37-90-137(2).

**H. 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.**

I. The following plat note shall be added 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, the Homeowners Association, 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, Planner II