



OFFICE OF THE COUNTY ATTORNEY
CIVIL DIVISION

Steven A. Klaffky, Interim County Attorney

Assistant County Attorneys

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

June 6, 2022

MS-22-1 McDermott Subdivision Filing No. 1¹
Minor Subdivision

Reviewed by: Lori L. Seago, Senior Assistant County Attorney
April Willie, Paralegal

WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a proposal by Craig and Sally McDermott (“Applicants”) for subdivision of 3 single-family lots (4 dwellings) on an existing 29.32-acre parcel (the “property”). The existing lot 1 will be 19.525 acres and will contain 2 single-family dwellings, lots 2 and 3 will each be 5.0 acres and will each contain a single-family dwelling. The property is zoned RR-5 (Rural Residential).

Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the subdivision demand is 1.2 acre-feet for in-house use for four dwellings, 0.550 and .600 acre-feet for irrigation, and 0.200 acre-feet for animal watering, for a total of 2.55 acre-feet/year for the 3-lot (4-dwelling) subdivision. Based on the total demand, Applicants must be able to provide a supply of 765 acre-feet of water (2.55 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

Proposed Water Supply

3. The Applicants have provided for the source of water to derive from individual on-lot wells, as provided in Findings of Fact, Conclusions of Law, Ruling of the Referee, Judgment and Decree and Plans for Augmentation in District Court, Water Division 2, Case Nos. 19CW3031 and 21CW3023 dated February 20, 2020 and October 7, 2021, respectively (“Decree and/or

¹ This is the name of the subdivision as identified on the plat. The EPC file name is 12930 Herring Road.

“Augmentation Plans”). The Decree in Case No. 19CW3031 adjudicated the following water supply beneath Applicants’ property:

AQUIFER	Annual Average Withdrawal 100 Years (Acre Feet)	Annual Average Withdrawal 300 Years (Acre Feet)	Total Withdrawal (Acre Feet)
Dawson (NNT)	20.17	6.72	2,050
Denver (NNT)	19.6	6.53	1,960
Arapahoe (NT)	13.0	4.33	1,300
Laramie-Fox Hills (NT)	8.55	2.85	855

The Decree and Augmentation Plans provide for the total withdrawal of up to 2.55 acre-feet of water per year from the Dawson aquifer. In Case No. 19CW3031, the approved augmentation plan permits the withdrawal of 1.25 acre-feet of water per year for two residences, including annual amounts of 0.6 acre-feet for in-house use, 0.55 acre-feet for irrigation, and 0.1 acre-feet for stock watering. Case No. 21CW3023 approves an amended augmentation plan permitting the withdrawal of an additional 1.3 acre-feet annually for up to two residences, including 0.6 acre-feet for in-house use, 0.6 acre-feet for irrigation, and 0.1 acre-feet for stock watering. The Augmentation Plans require the replacement of actual stream depletions during pumping through septic return flows which will “return to the Monument Creek stream system and such flows are sufficient to replace total actual depletions.” Further, Applicants must reserve a total of 780.3 acre-feet of Laramie-Fox Hills aquifer water to replace post-pumping depletions.

4. Applicants provided a *Water Resources Report for 12930 Herring Road Subdivision* dated January 2022 by JDS-Hydro Consultants (“*Report*”). The *Report* summarizes the wells and water demands as follows:

Currently constructed Well No. 1 (Lot 1) – Well Permit No. 84196-F²

In-house use for 2 residences: 0.30 acre-feet per year per residence
 Irrigation and stock-watering use: 0.325 acre-feet per year per residence
 (Total = 0.625 acre-feet/year for 300 years or 375 acre-feet total for 300 years)

To be constructed Well No. 2 (Lot 3) – Well Permit No. 86389-F

In-house use: 0.30 acre-feet per year
 Irrigation and stock watering use: 0.35 acre-feet per year
 (Total = 0.65 acre-feet/year for 300 years or 195 acre-feet total for 300 years)

² The original Permit No. 217838 was re-permitted to Permit No.84196-F on April 10, 2020.

To be constructed Well No. 3 (Lot 2)

In-house use: 0.30 acre-feet per year
Irrigation and stock watering use: 0.35 acre-feet per year
(Total = 0.65 acre-feet/year for 300 years or 195 acre-feet total for 300 years)

The *Report* states that the “current water rights and augmentation plan in place are adequate to meet the estimated overall demand and resulting alluvial depletions of 0.59 acre-feet for three (3) lots and four (4) total residences.” Further, it states that the Augmentation Plans require replacement of actual stream depletions and reservation of 780.3 acre-feet total of the nontributary Laramie-Fox Hills aquifer water but reserves the right to substitute the use of other nontributary groundwater, including return flows.

State Engineer’s Office Opinion

5. In a letter dated March 21, 2022, the State Engineer reviewed the proposal to subdivide the 29.32 +/- acre parcel into 3 lots. Lot 1 will have two single-family residences. The State Engineer stated that the “proposed supply of water is to be provided by three on-lot wells, operating pursuant to two court decreed water rights (19CW3031 and 21CW3023). . . .” The water underlying this property was adjudicated and the Applicants are the owner of water rights in the Dawson, Denver, Arapahoe, and Laramie Fox-Hills aquifers. The State Engineer identified the total estimated water requirement at 2.55 acre-feet/year (1.25 acre-feet/year for Lot 1 and 0.65 acre-foot/year each for both Lot 2 and Lot 3). Water use rates from Water Court case no. 19CW3031 are .30 acre-foot per year for each ordinary household, 0.0125 acre-foot per year per horse, and 0.065 acre-foot per year for each 1,000 square feet of lawn and garden irrigation. Water use rates from Water Court case no 21CW3023 are 0.30 acre-foot per year for each ordinary household, 0.0125 acre-foot per year per horse, and 0.05 acre-foot per year for each 1,000 square feet of lawn and garden irrigation.

The State Engineer noted that there is a currently operating well permit no. 84196-F which was re-permitted from the previous permit no. 217838 and which operates on Lot 1 and may not serve more than two single-family dwellings.

The State Engineer stated that the “annual estimated demand, for the entire subdivision, is 2.55 acre-feet as allowed by the augmentation plan. And finally, “[b]ased on the above, it is our 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”

Recommended Findings

6. Quantity and Dependability. Applicants’ water demand for McDermott Subdivision Filing No. 1 Minor Subdivision is 2.55 acre-feet per year from the Dawson aquifer for a total demand of 765 acre-feet for the subdivision for 300 years, with replacement water provided

through the septic system return flows to replace actual stream depletions during pumping and with 780.3 acre-feet of Laramie-Fox Hills aquifer water post-pumping, but reserving the right as decreed to substitute the use of other nontributary groundwater for post-pumping depletions.

Based on the water demand of 2.55 acre-feet/year for the McDermott Subdivision Filing No. 1 Minor Subdivision and the Decree and Augmentation Plans permitting withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the McDermott Subdivision Filing No. 1 Minor Subdivision.

7. Quality. The water quality requirements of Section 8.4.7.B.10 of the Land Development Code must be satisfied. **El Paso County Public Health shall provide a recommendation as to the sufficiency of water quality.**

8. Basis. The County Attorney's Office reviewed the following documents in preparing this review: the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree and Augmentation Plans, Case Nos. 19CW3031 dated February 20, 2020 and 21CW3023 dated October 7, 2021, the Water Supply Information Summary provided February 25, 2022, the Water Resources Report dated February 23, 2022, Well Permit No. 84196-F dated December 8, 2021, and the State Engineer Office's Opinion dated March 21, 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. Applicants and their successors and assigns shall comply with the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree and Augmentation Plans in Case Nos. 19CW3031 and 21CW3023 ("Decree and Augmentation Plans"). Water use shall not exceed 2.55 acre-feet annually for the 3-lot subdivision. Withdrawals from Well No. 1 shall not exceed 1.25 acre-feet/year and withdrawals from Well Nos. 2 and 3 shall not exceed 1.3 acre-feet/year. Stream depletions shall be replaced with septic system return flows for a period of 300 years and post-pumping depletions will be replaced by Laramie-Fox Hills aquifer water pursuant to the Augmentation Plans.

B. The County prefers that when there is an augmentation plan, Applicants create a homeowners' association ("HOA") for the purpose of enforcing covenants and assessing any necessary fees related to compliance with the water determinations and replacement plans for the property. For minor subdivisions such as this, however, Applicants may elect to solely rely on the covenant provisions required below and forego creation of an HOA.

C. Applicants and their successors and assigns 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, including their obligations to comply with the augmentation plan.

The covenants shall specifically address the following:

- 1) Identify the water rights associated with the property. The Covenants shall reserve 765 acre-feet of not nontributary Dawson aquifer water pursuant to the Decree and Augmentation Plans to satisfy El Paso County's 300-year water supply requirement for the 3 lots of McDermott Subdivision Filing No. 1. The Covenants shall further identify that 375 acre-feet (1.25 AF/year) of Dawson aquifer water is allocated to Lot 1 and 195 acre-feet (0.65 AF/year) of Dawson aquifer water is allocated to each of Lots 2 and 3.
- 2) Advise of responsibility for costs. The Covenants shall advise lot owners and their successors and assigns of their obligations regarding the costs of compliance with the Decree and Augmentation Plans, which include pumping of the Dawson wells in a manner to replace depletions during pumping and drilling Laramie-Fox Hills aquifer wells in the future to replace post-pumping depletions.
- 3) Require evaporative septic systems and reserve return flows from the same. The Covenants shall require each residential 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 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."
- 4) Require reservation of 780.3 acre-feet of Laramie-Fox Hills aquifer water to replace post-pumping depletions pursuant to the Decree and Augmentation Plans. The Covenants shall further identify that 382.5 acre-feet of Laramie-Fox Hills aquifer water is allocated to Lot 1 and 198.9 acre-feet of Laramie-Fox Hills aquifer water is allocated to each of Lots 2 and 3. The Covenants shall recite that this water shall not be separated from transfer of title to the property and shall be used exclusively for augmentation supply.
- 5) 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 Applicants/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 Findings of Fact, Conclusions of Law, Ruling of Referee, Decree and Augmentation Plans in Case Nos. 19CW3031 or 21CW3023 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.”

6) 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 Dawson aquifer wells.

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 McDermott Subdivision Filing No. 1 minor subdivision pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee, Decree and Augmentation Plans in Case Nos. 19CW3031 or 21CW3023. 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 an Order 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.”

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 the Findings of Fact, Conclusions of Law, Ruling of Referee, Decree and Augmentation Plans in Case Nos. 19CW3031 or 21CW3023 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. Applicants and their successor assigns shall reserve and convey by recorded warranty deed the reserved Dawson and Laramie-Fox Hills aquifer water rights at the time of lot sales. Specifically, Applicants and future lot owners shall convey sufficient water rights in the Dawson and Laramie-Fox Hills aquifers underlying the respective lots pursuant to the Decree and Augmentation Plans. Sufficient water rights are 375 acre-feet of Dawson aquifer water and 382.5 acre-feet of Laramie-Fox Hills aquifer for Lot 1 and 195 acre-feet of Dawson aquifer water and 198.9 acre-feet of Laramie-Fox Hills aquifer water for each of Lots 2 and 3.

Any and all conveyance instruments shall recite as follows:

For the water rights and return flows conveyed for the primary supply (Dawson and Laramie-Fox Hills aquifers): “These water rights conveyed, and the return flows therefrom, are intended to provide a 300-year supply, replacement during pumping, and replacement of post-pumping depletions for each lot of the McDermott Subdivision Filling No. 1 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. Applicants and their successors and assigns shall submit Covenants, 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 documents shall cross-reference Findings of Fact, Conclusions of Law, Ruling of Referee, Decree and Augmentation Plans in Case Nos. 19CW3031 or 21CW3023 and shall identify the obligations of the individual lot owners thereunder.

F. Applicants and their successors and assigns shall record all applicable documents, including, but not limited to, Findings of Fact, Conclusions of Law, Ruling of Referee, Decree and Augmentation Plans in Case Nos. 19CW3031 or 21CW3023 and any assignments thereof, any warranty deeds regarding the water rights, and any Declaration of Covenants in the land records of the Office of the Clerk and Recorder of El Paso County, Colorado.

G. Applicants and/or lot owners must obtain well permits pursuant to the Findings of Fact, Conclusions of Law, Ruling of Referee, Decree and Augmentation Plans in Case Nos. 19CW3031 or 21CW3023.

H. Prior to recording the final plat, Applicants shall upload the following updated documents to EDARP:

- Application Form identifying that the subdivision includes 3 lots with 4 dwellings.

- Water Supply Information Summary indicating 4 total units/households in Section 9 and correcting the name of the development to be consistent with that on the final plat.

I. 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: Kylie Bagley, Planner I