

County Attorney

Kenneth R. Hodges, County Attorney
719-520-6485
Centennial Hall
200 S. Cascade, Suite 150
Colorado Springs, CO 80903
www.ElPasoCo.com

Board of County Commissioners
Holly Williams, District 1
Carrie Geitner, District 2
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March 6, 2023

MS-20-4 Kinch Minor Subdivision

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

WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a proposal for approval of the Kinch Minor Subdivision, a minor subdivision application by Paul and Amy Kinch (“Applicant”) for a 4-lot subdivision on a parcel of 29.12 acres of land (the “property”). The property is zoned RR-5 (Rural Residential).

Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the water demand for the subdivision is 1.41 acre-feet/year, comprised of 1.20 acre-feet/year for household use for 4 single-family dwellings, 0.105 acre-feet/year for irrigation, and 0.105 acre-feet/year for stock watering. Based on this total demand, Applicant must be able to provide a supply of 423 acre-feet of water (1.41 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

Proposed Water Supply

3. The Applicant has provided for the source of water to derive from the not-nontributary Dawson aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068 (“Decree and Augmentation Plan”). In the Decree and Augmentation Plan, the Court granted a vested right to 437 acre-feet of water in the Dawson aquifer underlying Applicant’s property and approved the pumping of 423 acre-feet pursuant to the approved augmentation plan for beneficial uses consisting of domestic, irrigation, stock water, fire protection, and storage and augmentation. The Court also granted vested rights to 40.5 acre-feet of water in the Denver aquifer, 468 acre-feet of water in the Arapahoe aquifer, and 830 acre-feet of water in the Laramie-Fox Hills

ASSISTANT COUNTY ATTORNEYS

NATHAN J. WHITNEY
CHRISTOPHER M. STRIDER

STEVEN A. KLAFFKY
TERRY A. SAMPLE

LORI L. SEAGO
DOREY L. SPOTTS

BRYAN E. SCHMID
STEVEN W. MARTYN

aquifer. The Court further awarded a vested right to use 4 wells on the property, one of which is currently permitted and constructed as an exempt well under Well Permit No. 276175-A.

The approved augmentation plan has a term of 300 years and requires that septic system return flows be used for augmentation during the pumping period for the 4 approved wells. Applicant must reserve 373 acre-feet of its water rights in the Laramie-Fox Hills aquifer shall be used for replacement of post-pumping depletions. Kinch Well No. 1 may pump up to 0.51 acre-feet per year, and Kinch Wells Nos. 2-4 may each pump up to 0.30 acre-feet per year. The existing well must be re-permitted under the Decree and Augmentation Plan.

State Engineer's Office Opinion

4. In a letter dated April 13, 2022, the State Engineer stated that “[t]he Water Supply Information Summary, included with submittal, estimated a total annual use for the subdivision of 1.41 acre-feet per year pursuant to Division 2 Water Court Case No. 20CW3068. Case No. 20CW3068 allows for the use of Kinch Well’s 1 thru 4 with well no. 1 allowed to pump up to 0.51 acre-feet per year and well’s 2-4 allowed to pump 0.30 acre-feet per year.” The State Engineer noted that the well will produce from the Dawson aquifer pursuant to the augmentation plan decreed in case no. 20CW3068. The State Engineer further noted that one existing well is located on the property and must be re-permitted as a non-exempt well.

Finally, the State Engineer provided their opinion, “[p]ursuant to 30-28-136(1)(h)(l) C.R.S., that the anticipated water supply can be provided without causing material injury to decreed water rights ...[and] is adequate....”

Recommended Findings

5. Quantity and Dependability. Applicant’s water demand for the Kinch Minor Subdivision is 1.41 acre-feet per year for a total demand of 423 acre-feet for the subdivision for 300 years. The Decree and Augmentation Plan allows for 38 wells limited to an annual withdrawal of 0.47 acre-feet for household use.

Based on the water demand of 1.41 acre-feet/year for the Kinch Minor Subdivision and the Decree and Augmentation Plan withdrawals in that amount, the County Attorney’s Office recommends a finding of sufficient water quantity and dependability for the Kinch Minor Subdivision.

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

7. Basis. The County Attorney’s Office reviewed the following documents in preparing this review: a *Water Resources Report* dated March 2022, the Water Supply Information Summary, the State Engineer’s Office Opinion dated April 13, 2022, and Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin

Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068 entered on September 14, 2021. 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. Applicant and its successors and assigns shall comply with all requirements of the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068, specifically, that water withdrawn from the Dawson aquifer by each of the proposed four wells permitted shall not exceed 0.51 annual acre-feet for Kinch Well No. 1 and 0.30 annual acre-feet for Kinch Wells 2-4, based on a total combined annual withdrawal of 1.41 acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

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

C. Applicant 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, and the HOA regarding all applicable requirements of the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 423 acre-feet of Dawson aquifer water and 373 acre-feet of Laramie-Fox Hills aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068 to satisfy El Paso County's 300-year water supply requirement for the 4 lots of the Kinch Minor Subdivision. The Covenants shall further identify that 153 acre-feet (0.51 AF/year) of Dawson aquifer water and 134.92 acre-feet of Laramie-Fox Hills aquifer water is allocated to Lot 4 and 90 acre-feet (0.30 AF/year) of Dawson aquifer water and 79.36 acre-feet of Laramie-Fox Hills aquifer water is allocated to Lots 1-3. Said reservations shall not be separated from transfer of title to the property and shall be used exclusively for primary water supply.

2) Advise of responsibility for costs. The Covenants shall advise the HOA, lot owners, and their successors and assigns of their obligations regarding the costs of operating the plans for augmentation, which 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.

3) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require each lot owner to use a non-evaporative septic system to ensure that return flows from such systems are made to the stream system to replace actual 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 in the subdivision 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. 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) 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 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068 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."

5) Advise of monitoring requirements. The Covenants shall advise the HOA, 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 existing and future wells in the Dawson and/or Laramie-Fox Hills aquifers.

6) Require well permits. The Covenants shall Require that well permits be obtained pursuant to the requirements of Findings of Fact, Conclusions of Law, Ruling of Referee

and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068 and C.R.S. § 37-90-137(4) and (10).

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 Kinich Minor Subdivision pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068. 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 the Colorado Ground Water Commission 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 determination.”

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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068 are also terminated by 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 any deeds of the Property Dawson aquifer water in the decreed amount of 153 acre-feet (0.47 acre-feet per year) and 134.92 acre-feet of Laramie-Fox Hills aquifer water for Lot 4, and Dawson aquifer water in the decreed amount of 90 acre-feet (0.30 acre-feet per year) and 79.36 acre-feet of Laramie-Fox Hills aquifer water for Lots 1-3. 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.

E. Applicant and its successors and assigns shall convey by recorded warranty deed these reserved Dawson and Laramie-Fox Hills aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson and Laramie-Fox Hills aquifers underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement.

Any and all conveyance instruments shall also 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 water supply, and replacement during pumping, for each of the lots of the Kinch 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.”

F. Applicant and its successors and assigns shall submit a Declaration of Covenants, Conditions, and Restrictions, 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 Declaration shall cross-reference Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 20CW3068 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 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. 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. Applicant 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: Ryan Howser, Project Manager, Planner III