

# EL PASO COUNTY



## OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

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SF-21-15 Winsome Filing No. 2 Subdivision  
Final Plat

Reviewed by: Lori L. Seago, Senior Assistant County Attorney  
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### **UPDATED WATER SUPPLY REVIEW AND RECOMMENDATIONS** (Replacing in its entirety the previous water review dated October 13, 2021)

#### Project Description

1. This is a proposal by Winsome, LLC ("Applicant") for a subdivision of 61 single-family lots, 1 commercial lot, plus additional tracts, open space, and right-of-way on 254.158 acres (the "Property"). This filing is a portion of the McCune Ranch property. On July 9, 2019, the Board of County Commissioners approved applications to rezone the parcel and for a preliminary plan to include 143 single-family lots on 766 acres for McCune Ranch. The property is zoned RR-2.5 (Rural Residential).

#### Estimated Water Demand

2. Single-Family Lots. Pursuant to the Water Supply Information Summary ("WSIS"), the subdivision demand is 0.60 acre-feet per residential lot, comprised of 0.30 acre-feet for household use, 0.25 acre-feet for irrigation, and 0.05 acre-feet for stock watering, for a total of 36.6 acre-feet per year for the subdivision based on a total of 61 lots. Based on the total demand, Applicant must be able to provide a supply of 10,980 acre-feet of water (36.6 acre-feet per year x 300 years) to meet the County's 300-year water supply requirement for the residential lots.

3. Commercial Lot. Pursuant to the Water Supply Information Summary ("WSIS"), the water demand for the 1 commercial lot is 2.31 acre-feet/year, plus 2.46 acre-feet/year for irrigation, for a total of 5.0 acre-feet per year for the commercial lot.<sup>1</sup> Based on the total demand, Applicant

<sup>1</sup> The WSIS notes that irrigation for the commercial lot is 2.46 acre-feet/year; however, the actual amount accounted for is 2.693 acre-feet/year for irrigation, which is consistent with the *Water Resources Report* and equates to a total water demand of 5.0 acre-feet for the commercial lot.

must be able to provide a supply of 1,500 acre-feet of water (5.0 acre-feet per year x 300 years) to meet the County's 300-year water supply requirement for the commercial lot.

#### Proposed Water Supply

4. The Applicant has provided for the source of residential water to derive from individual on-lot wells, as provided in Colorado Ground Water Commission ("Commission") Findings and Order No. 1692-BD for the McCune Ranch subdivision dated June 25, 2008. On February 3, 2020 the Commission approved Replacement Plan No. 2<sup>2</sup>, which authorized the withdrawal of 49.8 acre-feet of water per year for 300 years from the Dawson aquifer, for up to 83 lots. On August 27, 2021, the Commission approved Replacement Plan No. 4, which authorized the withdrawal of 37.8 acre-feet per year for 300 years from the Dawson aquifer, for up to 63 lots.<sup>3 4</sup> The Replacement Plans require the use of septic return flows for replacement water through the installation and use of a septic system on each residential lot which has a well.

The Applicant has provided for the source of commercial water to derive from an individual on-lot well in the Denver aquifer, as provided in Colorado Ground Water Commission Findings and Order No. 1691-BD for the McCune Ranch subdivision dated June 25, 2008. On March 31, 2020, 1,500 acre-feet of water in the Denver aquifer were conveyed to Applicant by special warranty deed. Pursuant to Determination No. 1691-BD, this location of the Denver aquifer is considered non-tributary; therefore, no replacement plan is necessary.

5. Applicant provided a *Water Resources Report for Winsome Filing No. 2* dated February 2021 and as revised August 2021 by JDS-Hydro ("*Report*"). The *Report* identified water rights for the overall Winsome development, including this subdivision, as summarized below:

Aquifer	Determination	Tributary Status	Area (Acres)	Total Volume (A/F)	Annual Allocation 300-Year (A/F)
Dawson	1692-BD	NNT	766.66	69,797	232.66
Denver	1691-BD	NT	766.66	44,985	149.95
Arapahoe	1690-BD	NT	766.66	33,901	113.00
Laramie Fox Hills	1689-BD	NT	766.66	22,435	74.78
<b>TOTAL</b>					<b>570.39 acre-feet/year</b>

<sup>2</sup> Replacement Plan No. 2 cancelled and replaced Replacement Plan No. 1, which was approved on June 29, 2018 and is not further discussed herein.

<sup>3</sup> Replacement Plan No. 4 cancelled and replaced Replacement Plan No. 3, which was approved on December 1, 2020 and is not further discussed herein. Replacement Plan No. 4 was approved subsequent to the Water Resources Report and SEO letter, but does not negatively affect the ultimate recommendations in those documents.

<sup>4</sup> Determination No. 1692-BD was issued to George and Evelyn McCune and Replacement Plan No. 2 – 1692-BD was issued to McCune Ranch, LLC. On March 31, 2020, Dawson water rights in Determination No. 1692-BD were deeded to Applicant by Special Warranty Deed. Replacement Plan No. 3 – 1692-BD was issued directly to the Applicant.

As further described in the *Report*, Winsome Filing No. 1 was previously allocated 28.20 acre-feet/year and Filing No. 2 will require 36.6 acre-feet/year from the Dawson aquifer. The *Report* notes that of the 61 lots in Filing No. 2, 36 will be augmented as part of Replacement Plan No. 2 and 25 will be augmented as part of Replacement Plan No. 3 (now Replacement Plan No. 4). The total water supply currently available for withdrawal from the Dawson aquifer is 85.8 (now 87.6) acre-feet per year and the total water demand for Filings 1 and 2 is 64.80 acre-feet/year; therefore, there is an ample water supply available for the 61 residential lots. Beneficial uses of the water supply pursuant to the determinations are domestic indoor, industrial, commercial, irrigation, augmentation, stock watering, recreational, water feature, piscatorial, wildlife, and replacement.

There is a total of 149.95 acre-feet/year of Denver aquifer water available in Determination No. 1691-BD.<sup>5</sup> The *Report* indicates that 60 acre-feet/year is allocated for the 1 lot commercial subdivision; however, the Special Warranty Deed dated March 31, 2020, deeding 1,500 acre-feet to the Applicant from the Denver aquifer pursuant to Determination No. 1691-BD provided evidence for only 5 acre-feet per year being available for this commercial lot. Based on the water demand for the commercial lot at 5.0 acre-feet/year (1,500 acre-feet total) and a supply of 1,500 acre-feet, there is an ample water supply available from the Denver aquifer for the commercial lot in this Filing No. 2.

#### State Engineer's Office Opinion

6. In a letter dated April 5, 2021, the State Engineer reviewed the proposal to subdivide the 254.58 +/- acre parcel into 61 single-family lots and 1 commercial lot. The State Engineer stated that the "water supply for the residential lots is individual on-lot wells producing from the not-nontributary Dawson Aquifer that would be permitted pursuant to the amended replacement plan for Determination of Water Right no. 1692-BD and the proposed source of water supply for the commercial lot is an individual on-lot well producing from the nontributary Denver Aquifer that would be permitted pursuant to Determination of Water Right no. 1691-BD." The State Engineer identified the total estimated water requirement at 41.6 acre-feet/year (0.6 acre-feet/year per residential lot and 5.0 acre-feet/year for the commercial lot). The State Engineer further states that the Replacement Plan No. 2 "allows for the withdrawal of 49.8 acre-feet per year of ground water from the Dawson aquifer for 300 years, through 83 wells to be located on 83 residential lots on 278.1 acres, of which a portion of the subject 254.58 acres is a part and appears to be lots 3-5 and lots 30-62. Each well may withdraw 0.6 acre-feet per year of ground water to be used for use in one single family dwelling, the irrigation of landscape, lawn and gardens and the watering of domestic animals and stock." The State Engineer further notes that Winsome Filing No. 1 was approved to withdraw 28.2 acre-feet/year from the 49.8 acre-feet, leaving 21.6 acre-feet per year available for Filing No. 2. Further, Replacement Plan No. 3 allows withdrawal of 36 acre-feet/year "through 60 wells to be located on 60 residential lots on 479.4 acres, of which a portion of the subject 254.58 acres is a part and appears to be lot 2 and lots 6 – 29. Each well may withdraw 0.6 acre-feet per year."

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<sup>5</sup> The Water Resources Report notes that 89.95 acre-feet/year will be sold to Sterling Ranch.

The State Engineer cited the *Water Resources Report* in identifying that 60 acre-feet/year are available to the Applicant from the Denver aquifer for a period of 300 years out of the total of 149.95 acre-feet/year adjudicated in Determination No. 1691-BD to be used for the commercial lot. The State Engineer notes that the documentation provided indicates 1,500 acre-feet of Denver water was transferred to Applicant via a Special Warranty Deed and that if 60 acre-feet/year was transferred to the Applicant, appropriate documentation should be provided.

The State Engineer acknowledged the existence of several other water determinations referenced in Applicant's *Water Resources Report*. Those determinations include Determination Nos. 1690-BD and 1689-BD; however, since those water rights are not identified as sources of water for this subdivision, they are not analyzed further in either the State Engineer's letter or in this review.

Finally, the State Engineer stated that "[b]ased upon the above and pursuant to Sections 30-28-136(1)(h)(I), C.R.S., it is our opinion that the proposed water supply is adequate and can be provided without causing injury to water rights."

#### Recommended Findings

7. Quantity and Dependability. Applicant's water demand for the Winsome Filing No. 2 subdivision is 41.6 acre-feet per year from the Dawson and Denver aquifers for a total demand of 12,480 acre-feet for the subdivision for 300 years.

- The demand for the 61 residential lots can be met by the remaining 6480 acre-feet (21.6 AF/year) of Dawson aquifer water authorized for withdrawal in Replacement Plan No. 2 and 4500 acre-feet (15 AF/year) of the 11,340 (37.8 AF/year) of Dawson aquifer water authorized for withdrawal in Replacement Plan No. 4.
- The demand for the commercial lot can be met by the 1,500 acre-feet (5 AF/year) of Denver aquifer water deeded to Applicant via special warranty deed dated March 31, 2020 under Commission Findings and Order No. 1691-BD.

**Based on the water demand of 12,480 acre-feet/year for the Winsome Filing No. 2 subdivision and the replacement plans and Commission Findings and Order permitting withdrawals in excess of that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for Winsome Filing No. 2.**

8. 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.**

9. Basis. The County Attorney's Office reviewed the following documents in preparing this review: the Water Supply Information Summary provided June 24, 2021, the Water Supply Report revised August 2021, the State Engineer Office's Opinion dated April 5, 2021, Commission Determination of Water Right Nos. 1691-BD and 1692-BD, and Replacement Plan

No. 2 and Replacement Plan No. 4. 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 Determination of Water Right No. 1692-BD and with all requirements of Replacement Plan Nos. 2 and 4 – Determination of Water Right No. 1692-BD. Water use shall not exceed 0.6 acre-feet annually per well for the 61-lot subdivision, and all stream depletions shall be replaced with non-evaporative septic system return flows for a period of 300 years. Further, the Applicant and its successors and assigns shall comply with all requirements of Determination of Water Right No. 1691-BD, specifically, that water use shall not exceed 5.0 acre-feet/year for the 1 commercial lot.

B. The County requires that when there is a replacement plan, Applicant shall 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.

C. Applicant and 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 and their successors and assigns regarding all applicable requirements of Determination No. 1691-BD and Determination No. 1692-BD, as well as their obligations to comply with Replacement Plan Nos. 2 and 4.

The covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 10,980 acre-feet of not nontributary Dawson aquifer water pursuant to Determination and Replacement Plan Nos. 2 and 4 – 1692-BD and 1,500 acre-feet of nontributary Denver aquifer water pursuant to Determination No. 1691-BD to satisfy El Paso County's 300-year water supply requirement for the 61 residential lots and 1 commercial lot, respectively, of the Winsome Filing No. 2 Subdivision.

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 Determinations and Replacement Plans, which include pumping of the Dawson or Denver wells in a manner to replace depletions during pumping.

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) 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 Determination No. 1691-BD or Determination and Replacement Plan Nos. 2 and 4 - 1692-BD 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 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 and Denver aquifer wells.

6) 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 Winsome Filing No. 2 Subdivision pursuant to the Colorado Ground Water Commission Findings and Order Nos. 1691-BD and 1692-BD and Replacement Plan Nos. 2 and 4. 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 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 adjudication."

7) 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 Colorado Ground Water Commission Findings and Order Nos. 1691-BD and 1692-BD and Replacement Plan Nos. 2 and 4 are also terminated by order of the Commission, 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 Dawson aquifer water in the decreed amount of at least 0.60 acre-feet per residential lot annually and a total decreed amount of at least 36.6 acre-feet annually for the 61 residential lots in the subdivision for 300 years, for a total of 10,980 acre-feet of Dawson aquifer water for the subdivision. Applicant and its successors and assigns shall also reserve in the Covenants and in any deeds of the Property the decreed amount of 5.0 acre-feet per commercial lot annually of Denver aquifer water for the 1 commercial lot in the subdivision for 300 years, for a total of 1,500 acre-feet of Denver aquifer water. Said reservations 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 successor assigns shall convey by recorded warranty deed these reserved Dawson and Denver aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson or Denver aquifer underlying the respective lots pursuant to Commission Determination Nos. 1691-BD and 1692-BD and Replacement Plan Nos. 2 and 4 under 1692-BD. Sufficient water rights are 180 acre-feet from the Dawson aquifer (0.60 acre-feet/year x 300 years) for each of the residential lots, and a total of 1,500 acre-feet from the Denver aquifer (5.0 acre-feet/year x 300 years) for the commercial lot.

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 lot of the Winsome Filing No. 2 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 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 Colorado Ground Water Commission Determination Nos. 1691-BD and 1692-BD and Replacement Plan Nos. 2 and 4 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, Colorado Ground Water Commission Findings and Order No. 1691-BD and 1692-BD and Replacement Plan Nos. 2 and 4. and any assignments thereof, any warranty deeds regarding the water rights, and the Declaration of Covenants in the land records of the Office of the Clerk and Recorder of El Paso County, Colorado.

H. Applicant and/or lot owners must obtain well permits pursuant to Colorado Ground Water Commission Findings and Order Nos. 1691-BD and 1692-BD and Replacement Plan Nos. 2 and 4.

I. Prior to recording the final plat, Applicant shall upload the following documents to eDARP:

- Updated Letter of Intent clarifying that the water for the commercial lot will be provided by the Denver aquifer (see Page 4, Paragraph 4 indicating capacity in the "Dawson" aquifer).
- The March 13, 2018 amendment to 1692-BD and the February 18, 2020 amendment to 1691-BD mentioned in the State Engineer's Office Opinion. Should those amendments require correction of the information and analysis contained in the Water Resources Report, Applicant shall also upload a corrected Report.
- Updated Water Supply Information Summary correcting the annual amount of irrigation for the commercial lot to 2.693 acre-feet per year.

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: John Green, Planner II