

# EL PASO COUNTY



## OFFICE OF THE COUNTY ATTORNEY CIVIL DIVISION

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July 14, 2021

**NOTE: This review supersedes the water review submitted on July 12, 2021.**

Circle A Minor Subdivision  
MS-20-7

Reviewed by: Lori L Seago, Senior Assistant County Attorney  
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### **FINDINGS AND CONCLUSIONS:**

1. This is a minor subdivision proposal by the Daniel B. Andres Trust ("Applicant") for a subdivision of 3 single-family lots on 14.867 +/- acres of land (the "Property"). An existing residence and existing well are currently present on the Property. The Property is zoned RR-5 (Rural Residential).

2. The Applicant has provided for the source of water to derive from individual on-lot wells as provided in the Findings and Order Determination No. 4043-BD and Replacement Plan No. 4043-RP, both approved by the Colorado Ground Water Commission on November 9, 2020 ("Determination" and "Replacement Plan"). Pursuant to the Water Supply Information Summary ("WSIS"), the water demand is 0.78 acre-feet for household use, 2.96 acre-feet for irrigation, 0.25 acre-feet for stock watering, and 0.0566 for greenhouse use for a total of 4.05 acre-feet per year for the subdivision (1.35 acre-feet/year/lot). Based on a total demand of 4.05 acre-feet per year for the subdivision, Applicant must provide a water supply of 1,215 acre-feet (4.05 acre-feet per year x 300 years) to meet the County's 300-year water supply requirement.

3. In a letter dated April 29, 2021, the State Engineer's Office reviewed the submittal to subdivide the 14.9 +/- acre parcel into 3 lots. The State Engineer stated that the "proposed source of water supply is individual on-lot wells producing from the not-nontributary (actual replacement) Dawson aquifer .... Determination of Water Right no. 4043-BD was issued by the Ground Water Commission ("Commission") on November 9, 2020 for an allowed average annual amount of withdrawal of ground water of 13.18 acre-feet from the Dawson Aquifer (based on an aquifer life of 100 years) ...." The Replacement Plan was also approved on November 9, 2020, and allows withdrawal of 4.05 acre-feet/year. The State Engineer stated that the water may be withdrawn through each of 3 wells on the 3 residential lots and that "[e]ach well may withdraw 1.35 acre-feet per year of groundwater to be used for in-home use, irrigation of landscape and

gardens, domestic animals, commercial, fire protection, recreational, greenhouse, replacement and the water of stock animals, either directly or after storage. These allowed uses are consistent with the proposed uses specified in the Water Supply Report.”

The State Engineer identified 3 well permits associated with the Property:

- a. Well Permit 85148-F was issued for the use of an existing well originally constructed under the now-cancelled permit no. 101207. This well will be used on Lot 1.
- b. Well Permit No. 85145-F was issued pursuant to the Replacement Plan and will be utilized on Lot 2. The State Engineer’s Office will need documentation confirming the well has been constructed by February 23, 2022, or the permit will expire.
- c. Well Permit No. 85146-F was issued pursuant to the Replacement Plan and will be utilized on Lot 3. The State Engineer’s Office will need documentation confirming the well has been constructed by February 23, 2022, or the permit will expire.

The State Engineer opined that “the allowed average annual amount of withdrawal of 4.05 acre-feet per year from the Dawson aquifer pursuant to the Replacement Plan for Determination of Water Right no. 4043-BD for a maximum of 300 years, is sufficient to supply the requirement of 4.05 acre-feet/year.” Finally, the State Engineer stated that “[b]ased upon the above and pursuant to Section 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 decreed water rights.”

4. Determination of Water Right No. 4043-BD. The Colorado Ground Water Commission issued Determination of Water Right No. 4043-BD to the Danial B. Andres Trust on November 9, 2020, identifying the total amount of water underlying the 14.9 acres of the Property as 1,360 acre-feet in the Dawson aquifer. Due to an existing small-capacity well which was utilized on the Property since 1978, the amount of water currently available was reduced by 42 acre-feet to compensate for the amount of water already withdrawn. The adjusted amount of ground water available from the Dawson aquifer underlying the Property is 1,318 acre-feet. The allowed uses are identified as “in-home use, irrigation of landscape and gardens, domestic animals, commercial, fire protection, recreational, greenhouse, replacement and the watering of stock animals, either directly or after storage.”

5. Replacement Plan - Determination of Water Right No. 4043-RP. On November 9, 2020, the Commission approved the Replacement Plan, which allows withdrawal of 1.35 acre-feet of water through each of 3 wells on each lot for a period of 300 years.

Replacement of Depletions. The Replacement Plan provides a pumping period of 300 years. Replacement of depletions must be provided annually in the acre-feet amounts shown in Exhibit A.<sup>1</sup> As the Replacement Plan states: “[a]nnual replacement requirements may be computed by pro-rating between the values given on Exhibit A, or for simplicity may be taken as the amount shown in the next succeeding 5 years increment.” Further, the “Applicant must provide the required annual amount of replacement water for the first 100 years, or for as long as a well is operated pursuant to this plan, whichever is longer. To assure adequate return flows, at least one well must be serving an occupied single-family dwelling that is generating return

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<sup>1</sup> Exhibit A was attached to Replacement Plan No. 4043-RP and is also incorporated into this water review as Attachment A.

flows via a non-evaporative septic system before any irrigation or animal watering is allowed to be served by any of the wells.”

6. Analysis. Applicant’s water demand is 4.05 acre-feet/year for the entire subdivision using Dawson aquifer water which is allowed under the Replacement Plan for the 3-lot subdivision. The total water demand for the subdivision for 300 years is 1,215 acre-feet. The WSIS and the *Water Resources Report for Circle A* dated April 9, 2021, confirm the annual water supply for the subdivision is 4.05 acre-feet for 300 years (1.35 acre-feet/lot/year). With an annual demand of 4.05 acre-feet and a total available supply of 4.05 acre-feet/year, there appears to be a sufficient water supply to meet the water demands of the Circle A Minor Subdivision.

7. The water quality requirements of Section 8.4.7.B.10.g., of the Land Development Code must be satisfied.

8. Therefore, based on the Water Supply Information Summary, based on the finding of sufficiency and no injury by the State Engineer, based on the Determination of Water Right 4043-BD and Replacement Plan No. 4043-RP, 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. El Paso County Public Health shall provide a recommendation as to water quality.

#### REQUIREMENTS:

A. Applicant and its successors and assigns shall comply with all requirements of Determination of Water Right 4043-BD and Replacement Plan No. 4043-RP, specifically, that water use shall not exceed 1.35 acre-feet annually for each of 3 wells located on each of the 3 lots in the subdivision; and that all stream depletions will be replaced with non-evaporative septic system return flows for a period of 300 years.

B. The County prefers that when there is a plan for replacement, Applicant create a homeowners’ association (“HOA”); however, alternatively to establishing an HOA, especially for minor subdivisions such as this, Applicant 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 Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP, as well as their obligations to comply with the plan for replacement, 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 and their successors and assigns of their obligations regarding costs of operating the plan for replacement. 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 replacement, 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 1,215 acre-feet (405 acre-feet per lot) of not-nontributary Dawson aquifer water pursuant to Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP, to satisfy El Paso County's 300-year water supply requirement for the 3 lots of the Circle A 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 during 300 years of 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 replacement in Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP 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 and 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 wells.

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 Circle A Minor Subdivision pursuant to the plan for replacement in Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP. 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, with prior notice to the 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 language:

“These Covenants shall not terminate unless the requirements of Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP 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.”

C. Applicant or its successors and assigns shall reserve in the Covenants and in any deeds of the Property the decreed amount of at least 1.35 acre-feet per lot annually and shall reserve a total decreed amount of at least 4.05 acre-feet/year of Dawson aquifer water for the 3 lots in the subdivision for 300 years for a total of 1,215 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 pursuant to Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP. Applicant or its successors and assigns shall, at the time of lot sales, convey by warranty deed to individual lot owner(s) sufficient water rights in the Dawson aquifer underlying the lots to satisfy El Paso County’s 300-year water supply requirement. Dawson aquifer requirements for each lot are as follows: 405 acre-feet for each lot (1.35 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 Circle A

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 or 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 before the final plat will be recorded. Said Declaration shall cross-reference Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP and shall identify the obligations of the individual lot owners thereunder.

E. Applicant or its successors and assigns shall record all applicable documents, including, but not limited to, Colorado Ground Water Commission Determination 4043-BD and Replacement Plan No. 4043-RP, 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.

F. Applicant or its successors and assigns shall provide proof to the State Engineer’s Office that wells have been constructed under Well Permit No. 85145-F and Well Permit No. 85146-F prior to February 23, 2022 or the permits will expire.

G. As further noted by the State Engineer’s Office, 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. Ryan Howser, Planner II

Exhibit A  
Replacement Plan - Determination No.: XX-BD  
Page 1 of 3

Designated Basin Summary Table for Daniel B. Andres Trust							
Pumping Rate of 4.05 acre-feet per year for 300 Years from the Dawson aquifer							
Section(s): Section 23, T11S, R65W, 6th P.M.							
Year	Pumping (Q) (AF/YR)	Annual Depletion (q) (AF/YR)	Depletion as a % of Pumping (q/Q)	Year	Pumping (Q) (AF/YR)	Annual Depletion (q) (AF/YR)	Depletion as a % of Pumping (q/Q)
1	4.0	0.000	0.00	51	4.0	0.006	0.16
2	4.0	0.000	0.00	52	4.0	0.007	0.17
3	4.0	0.000	0.00	53	4.0	0.007	0.17
4	4.0	0.000	0.00	54	4.0	0.007	0.18
5	4.0	0.000	0.00	55	4.0	0.008	0.19
6	4.0	0.000	0.00	56	4.0	0.008	0.20
7	4.0	0.000	0.00	57	4.0	0.008	0.21
8	4.0	0.000	0.00	58	4.0	0.009	0.21
9	4.0	0.000	0.00	59	4.0	0.009	0.22
10	4.0	0.000	0.00	60	4.0	0.009	0.23
11	4.0	0.000	0.00	61	4.0	0.010	0.24
12	4.0	0.000	0.00	62	4.0	0.010	0.25
13	4.0	0.000	0.00	63	4.0	0.010	0.26
14	4.0	0.000	0.00	64	4.0	0.011	0.27
15	4.0	0.000	0.00	65	4.0	0.011	0.27
16	4.0	0.000	0.01	66	4.0	0.011	0.28
17	4.0	0.000	0.01	67	4.0	0.012	0.29
18	4.0	0.000	0.01	68	4.0	0.012	0.30
19	4.0	0.000	0.01	69	4.0	0.013	0.31
20	4.0	0.000	0.01	70	4.0	0.013	0.32
21	4.0	0.001	0.01	71	4.0	0.013	0.33
22	4.0	0.001	0.02	72	4.0	0.014	0.34
23	4.0	0.001	0.02	73	4.0	0.014	0.35
24	4.0	0.001	0.02	74	4.0	0.015	0.36
25	4.0	0.001	0.02	75	4.0	0.015	0.37
26	4.0	0.001	0.03	76	4.0	0.015	0.38
27	4.0	0.001	0.03	77	4.0	0.016	0.39
28	4.0	0.001	0.03	78	4.0	0.016	0.40
29	4.0	0.001	0.04	79	4.0	0.017	0.41
30	4.0	0.002	0.04	80	4.0	0.017	0.42
31	4.0	0.002	0.04	81	4.0	0.017	0.43
32	4.0	0.002	0.05	82	4.0	0.018	0.44
33	4.0	0.002	0.05	83	4.0	0.018	0.45
34	4.0	0.002	0.06	84	4.0	0.019	0.46
35	4.0	0.002	0.06	85	4.0	0.019	0.47
36	4.0	0.003	0.07	86	4.0	0.020	0.48
37	4.0	0.003	0.07	87	4.0	0.020	0.49
38	4.0	0.003	0.08	88	4.0	0.020	0.50
39	4.0	0.003	0.08	89	4.0	0.021	0.52
40	4.0	0.004	0.09	90	4.0	0.021	0.53
41	4.0	0.004	0.09	91	4.0	0.022	0.54
42	4.0	0.004	0.10	92	4.0	0.022	0.55
43	4.0	0.004	0.10	93	4.0	0.023	0.56
44	4.0	0.005	0.11	94	4.0	0.023	0.57
45	4.0	0.005	0.12	95	4.0	0.024	0.58
46	4.0	0.005	0.12	96	4.0	0.024	0.59
47	4.0	0.005	0.13	97	4.0	0.024	0.60
48	4.0	0.006	0.14	98	4.0	0.025	0.62
49	4.0	0.006	0.14	99	4.0	0.025	0.63
50	4.0	0.006	0.15	100	4.0	0.026	0.64

Exhibit A  
 Replacement Plan - Determination No.: -BD  
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Designated Basin Summary Table for  
 Pumping Rate of acre-feet per year for Years from the aquifer  
 Section(s):

Year	Pumping (Q) (AF/YR)	Annual Depletion (q) (AF/YR)	Depletion as a % of Pumping (q/Q)	Year	Pumping (Q) (AF/YR)	Annual Depletion (q) (AF/YR)	Depletion as a % of Pumping (q/Q)
105	4.0	0.028	0.70	155	4.0	0.053	1.31
106	4.0	0.029	0.71	156	4.0	0.054	1.32
107	4.0	0.029	0.72	157	4.0	0.054	1.34
108	4.0	0.030	0.73	158	4.0	0.055	1.35
109	4.0	0.030	0.74	159	4.0	0.055	1.36
110	4.0	0.031	0.75	160	4.0	0.056	1.37
111	4.0	0.031	0.77	161	4.0	0.056	1.39
112	4.0	0.032	0.78	162	4.0	0.057	1.40
113	4.0	0.032	0.79	163	4.0	0.057	1.41
114	4.0	0.032	0.80	164	4.0	0.058	1.43
115	4.0	0.033	0.81	165	4.0	0.058	1.44
116	4.0	0.033	0.83	166	4.0	0.059	1.45
117	4.0	0.034	0.84	167	4.0	0.059	1.46
118	4.0	0.034	0.85	168	4.0	0.060	1.48
119	4.0	0.035	0.86	169	4.0	0.060	1.49
120	4.0	0.035	0.87	170	4.0	0.061	1.50
121	4.0	0.036	0.89	171	4.0	0.061	1.51
122	4.0	0.036	0.90	172	4.0	0.062	1.53
123	4.0	0.037	0.91	173	4.0	0.062	1.54
124	4.0	0.037	0.92	174	4.0	0.063	1.55
125	4.0	0.038	0.94	175	4.0	0.063	1.57
126	4.0	0.038	0.95	176	4.0	0.064	1.58
127	4.0	0.039	0.96	177	4.0	0.064	1.59
128	4.0	0.039	0.97	178	4.0	0.065	1.60
129	4.0	0.040	0.98	179	4.0	0.066	1.62
130	4.0	0.040	1.00	180	4.0	0.066	1.63
131	4.0	0.041	1.01	181	4.0	0.067	1.64
132	4.0	0.041	1.02	182	4.0	0.067	1.66
133	4.0	0.042	1.03	183	4.0	0.068	1.67
134	4.0	0.042	1.05	184	4.0	0.068	1.68
135	4.0	0.043	1.06	185	4.0	0.069	1.69
136	4.0	0.043	1.07	186	4.0	0.069	1.71
137	4.0	0.044	1.08	187	4.0	0.070	1.72
138	4.0	0.044	1.10	188	4.0	0.070	1.73
139	4.0	0.045	1.11	189	4.0	0.071	1.75
140	4.0	0.045	1.12	190	4.0	0.071	1.76
141	4.0	0.046	1.13	191	4.0	0.072	1.77
142	4.0	0.046	1.15	192	4.0	0.072	1.79
143	4.0	0.047	1.16	193	4.0	0.073	1.80
144	4.0	0.047	1.17	194	4.0	0.073	1.81
145	4.0	0.048	1.18	195	4.0	0.074	1.82
146	4.0	0.048	1.20	196	4.0	0.074	1.84
147	4.0	0.049	1.21	197	4.0	0.075	1.85
148	4.0	0.049	1.22	198	4.0	0.075	1.86
149	4.0	0.050	1.23	199	4.0	0.076	1.88
150	4.0	0.051	1.25	200	4.0	0.076	1.89