

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
Stan VanderWerf, District 3
Longinos Gonzalez, Jr., District 4
Cami Bremer, District 5

March 18, 2024

SP-23-7 Wyoming Estates Filing No. 2
Preliminary Plan

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

WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a proposal for approval of the Wyoming Estates Filing No. 2, an application by Home Run Restorations Inc. (“Applicant”) for a 6-lot subdivision on a parcel of 40 acres of land (the “property”). The property was originally platted as 4 residential lots in Wyoming Estates.¹ This preliminary plan seeks approval of the water supply for existing Lots 2 and 3 of Wyoming Estates (which will not be re-platted) and will split the original lots 1 and 4, resulting in 4 new lots which will be Lots 1-4 of Wyoming Estates Filing No 2, resulting in a total of 6 lots for this project. This review will address the entire 6 lots. 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 6 residential lots is estimated to include indoor use of 1.50 acre-feet/year (0.25 acre-feet/year for a single-family dwelling), irrigation for 0.344 acres estimated at 0.86 acre-feet/year (0.143 acre-feet per year per lot) and 0.37 acre-feet per year for the watering of 12 heads of livestock (0.031 acre-feet per year per head of livestock). The total estimated demand is 2.73 acre-feet per year for the 6 lots. Based on this total demand, Applicant must be able to provide

¹ The County Attorney’s Office filed water findings and conclusions in Wyoming Estates, file number MS-19-6, on November 5, 2020.

ASSISTANT COUNTY ATTORNEYS

NATHAN J. WHITNEY
CHRISTOPHER M. STRIDER

STEVEN A. KLAFFKY
TERRY A. SAMPLE

LORI L. SEAGO

BRYAN E. SCHMID
STEVEN W. MARTYN

DOREY L. SPOTTS
MERI GERRINGER

a supply of 819 acre-feet of water (2.73 acre-feet per year x 300 years) to meet the County's 300-year water supply requirement.

Proposed Water Supply

The Applicant has provided for the source of water for the original Wyoming Estates (4 lots) to derive from one or more individual on-lot wells withdrawing from the not-nontributary Denver aquifer as provided in Determination of Water Right No. 3542-BD ("Denver Determination") and Replacement Plan for Water Right 3542-BD ("Denver Replacement Plan"), permitting a total withdrawal of 1.82 acre-feet per year of groundwater from the Denver aquifer. Lots 2 and 3 of Wyoming Estates are served by current well permit numbers 85600-F and 85881-F issued pursuant to the Denver Determination and Replacement Plan. Each well allows for 0.455 acre-feet per/year withdrawal. The water supply for Lots 1 and 3 of Wyoming Estates Filing No. 2 are wells with permit no. 85882-F and 87630-F operating pursuant to the Denver Determination and Replacement Plan. The wells are each permitted to withdraw up to 0.455 acre-feet per year.

The Applicant has also provided for the source of water for Lots 2 and 4 of Wyoming Estates Filing No. 2 to derive from one or more individual on-lot wells withdrawing from the Arapahoe aquifer as provided in Determination of Water Right No. 3541-BD ("Arapahoe Determination"), permitting a total withdrawal of 12.9 acre-feet/year for 100 years. To comply with El Paso County's 300-year rule, that amount would be divided by 3, resulting in 4.3 acre-feet/year for 300 years. The ground water from the Arapahoe aquifer is subject to a 4% replacement of the amount of the underlying water withdrawn annually be returned to the uppermost aquifer in the vicinity of the permitted point or points of withdrawal.

State Engineer's Office Opinion

4. In a letter dated October 12, 2023, the State Engineer stated that the proposed water supply for the 6 lots includes 2 new wells constructed in the Arapahoe aquifer operating pursuant to Determination no. 3541-BD, and existing wells in the Denver aquifer operating pursuant to Determination no. 3542-BD, and its associated Replacement Plan no. 3542-RP.

Lots 2 and 3 of the original Wyoming Estates are currently served by well permit nos. 85600-F and 85881-F drawing from the Denver aquifer operating pursuant to the Denver Determination and Replacement Plan. The wells are each permitted to draw 0.455 acre-feet/year for domestic use inside 1 single-family dwelling, the watering of domestic animals and irrigation of 3,000 square-feet of lawns and garden.

Proposed Lots 1 and 3 of Wyoming Estates Filing No. 2 have well permits nos. 85882-F and 87630-F issued pursuant to the Denver Determination and Replacement Plan. The wells are each permitted to draw 0.455 acre-feet/year for domestic use inside 1 single-family dwelling, the watering of domestic animals, and the irrigation of 3,000 square-feet of lawns and gardens.

Lots 2 and 4 of Wyoming Estates Filing No. 2 will be new wells constructed in the Arapahoe aquifer operating pursuant to the Arapahoe Determination which allows up to 4.3 acre-

feet per year total between both wells to be used for residential, lawn and garden irrigation, the watering of domestic animals, and replacement (subject to 4% replacement).

Finally, the State Engineer provided their opinion, “. . . pursuant to section 30-28-136(1)(h)(l), 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.”

Recommended Findings

5. Quantity and Dependability. Applicant’s water demand for Wyoming Estates Filing No. 2 is 2.73 acre-feet per year. This results in a demand of 819 acre-feet for the subdivision for 300 years. Under the Denver Determination and Replacement Plan, Applicant owns the right to withdraw up to 546 acre-feet or 1.82 acre-feet per year of water from the Denver aquifer, and under the Arapahoe Determination, Applicant owns the right to withdraw up to 1,290 acre-feet or 4.3 acre-feet per year (4% replacement) based on a 300-year allocation for use within the subdivision.

Based on the water demand of 819 acre-feet total or 2.73 acre-feet/year (0.455 acre-feet per lot per year) for Wyoming Estates Filing No. 2 and the right to withdraw up to 546 acre-feet per year from the Denver aquifer, as well as an additional 1,290 acre-feet total per year from the Arapahoe aquifer, the County Attorney’s Office recommends a finding of sufficient water quantity and dependability for the Wyoming Estates Filing No. 2.

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 February 20, 2024, the Water Supply Information Summary, the State Engineer’s Office Opinion dated October 12, 2023, Determination of Water Right No. 3542-BD entered on July 2, 2018, and Replacement Plan No. 3542-RP entered on July 2, 2020, as well as Determination of Water Right No. 3541-BD entered on July 2, 2018. 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 Colorado Ground Water Commission Determination of Water Right No. 3542-BD (“Denver Determination”) and Replacement Plan No. 3542-RP (“Denver Replacement Plan”), including that water withdrawn from the Denver aquifer shall not exceed 1.82 combined acre-feet per year. Pursuant to the Denver Replacement Plan, the allowed annual amount of groundwater to be

withdrawn from wells is 0.455 acre-feet per year.

Applicant and its successors and assigns shall comply with all requirements of the Colorado Ground Water Commission Determination of Water Right No. 3541-BD ("Arapahoe Determination"), including that water withdrawn from the Arapahoe aquifer shall not exceed 4.3 combined acre-feet per year.

B. Applicant may 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, Applicant may elect to solely rely on 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 and their successors and assigns regarding all applicable requirements of the Denver Determination and Replacement Plan and the Arapahoe Determination.

Covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 546 acre-feet of not-nontributary Denver aquifer water pursuant to the Denver Determination to satisfy El Paso County's 300-year water supply requirement for the 4 lots utilizing the Denver aquifer in Wyoming Estates and Wyoming Estates Filing No. 2. The Covenants shall further identify that 136.5 acre-feet (0.455 acre-feet/year) of Denver aquifer water is allocated to each of Wyoming Estates Lots 2 and 3 and Wyoming Estates Filing No. 2 Lots 1 and 3.

The Covenants shall reserve 273 acre-feet of not-nontributary Arapahoe aquifer water pursuant to the Arapahoe Determination to satisfy El Paso County's 300-year water supply requirement for the 2 lots utilizing the Arapahoe aquifer in Wyoming Estates Filing No. 2. The Covenants shall further identify that 136.5 acre-feet (0.455 acre-feet/year) of Arapahoe aquifer water is allocated to each of Lots 2 and 4.

2) Advise of responsibility for costs. The Covenants shall advise the lot owners and their successors and assigns of their obligations regarding the costs of operating the plan for replacement, which include the installation and/or maintenance of totalizing flow meters.

3) Require non-evaporative septic systems and reserve return flows from the same. The Covenants shall require lot owners for Wyoming Estates Lots 2 and 3 and Wyoming Estates Filing No. 2 Lots 1 and 3 to use a non-evaporative septic system to ensure that return flows from such system 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 shall also require that the wells

on these Lots serve an occupied single-family dwelling that is generating return flows from a non-evaporative septic system. 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. Lot owners must follow all applicable laws, rules, regulations, court orders, and permit conditions related to return flows."

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 the Denver Determination and Replacement Plan or the Arapahoe Determination 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 future lot owners of this subdivision and their successors and assigns of their responsibility for any metering, data collecting, and reporting that may be required regarding water withdrawals from existing and future wells in the Denver and Arapahoe aquifers.

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 Wyoming Estates or Wyoming Estates Filing No. 2 pursuant to Determination of Water Right Nos. 3541-BD, 3542-BD and Replacement Plan No. 3542-BD. 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.”

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 Determination of Water Right Nos. 3541-BD, 3542-BD and Replacement Plan No. 3542-BD are also terminated by the Colorado Ground Water 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 any deeds of the property Denver aquifer water in the decreed amount of 136.5 acre-feet (0.455 acre-feet/year) for each of Wyoming Estates Lots 2 and 3 and Wyoming Estates Filing No. 2 Lots 1 and 3 and Arapahoe aquifer water in the decreed amount of 136.5 acre-feet (0.455 acre-feet/year) for Wyoming Estates Filing No. 2 Lots 2 and 4. 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 Denver and Arapahoe aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Denver aquifer underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement. Sufficient water rights are 136.5 acre-feet (0.455 acre-feet/year x 300 years) of Denver aquifer water for Wyoming Estates Lots 2 and 3 and Wyoming Estates Filing No. 2 Lots 1 and 3 and 136.5 acre-feet (0.455 acre-feet/year x 300 years) of Arapahoe aquifer water for Wyoming Estates Filing No. 2 Lots 2 and 4.

Any and all conveyance instruments shall also recite as follows:

For the water rights and return flows conveyed for the primary supply (Denver and Arapahoe 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 Wyoming Estates and Wyoming Estates Filing No. 2. 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 Determination of Water Right Nos. 3541-BD, 3542-BD and Replacement Plan No. 3542-RP 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 Determination of Water Rights Nos. 3541-BD, 3542-BD and Replacement Plan No. 3542-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.

H. Applications for well permits submitted by persons other than the Applicant must include evidence that the permittee has acquired the right to the portion of the water being requested.

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. 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