

EL PASO COUNTY



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September 27, 2022

Ivilo Minor Subdivision
MS-22-8

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

1. This is a subdivision proposal by Pawel Posorski ("Applicant") for a 3-lot subdivision on a parcel of approximately 14 acres of land (the "property"). The property is currently zoned RR-5 (Rural Residential); however, there is a concurrent zoning request under File No. P-22-19 to rezone the property to RR-2.5 (Rural Residential).

Estimated Water Demand

2. Pursuant to the Water Supply Information Summary ("WSIS"), the water demand for the subdivision is 3.0 acre-feet/year, reflecting 0.26 acre-feet/lot for household use (0.78 acre-feet total), plus 1.868 acre-feet/year for irrigation and 0.33 acre-feet/year for stock watering.¹ The water demand for each lot is 1.0 acre-feet/year. Based on this demand, Applicant must be able to provide a total supply of 900 acre-feet of water (3.0 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 individual on-lot wells in the not nontributary Dawson aquifer as provided in Division 2 Water Court Case No. 2018CW3035 (hereinafter referred to as "Case No. 18CW3035" or "Decree"). The Decree was granted to Janice

¹ Note: the total sum of the household, irrigation, and stock watering use equates to 2.978 acre-feet. The balance of this review will indicate the "rounded-up" sum of 3.0 acre-feet for the water demand.

Woodard on November 19, 2018 and adjudicated the following water rights under the 13.84-acre property²:

Aquifer	Total Decreed Water (acre-feet)	Annual Acre-Feet Allocation (300 years)
Dawson NNT	1,160 AF	3.87
Denver NT	1,160 AF	3.87
Arapahoe NT	553 AF	1.84
Laramie-Fox Hills NT	384 AF	1.28
Total Legal Supply		10.86

An augmentation plan was also entered on November 19, 2018 under Case No. 18CW3035, but was later amended on March 15, 2022 under Case No. 21CW3048 (hereinafter "Augmentation Plan"). The Augmentation Plan provides that the "Posorski Wells Nos. 1 through 3 may each pump up to 1.0 acre-feet of water per year from the Dawson aquifer under the revised plan for augmentation decreed herein." And further, "[i]ndoor use will utilize an estimated 0.26 acre-feet of water per year per residence, with remaining 0.74 acre-feet per year pumping entitlement available for other uses on the Applicant's Property, including, irrigation of lawn and garden, and the watering of horses or equivalent livestock". The Augmentation Plan provides that depletions during pumping will be replaced by residential return flows from non-evaporative septic systems. Post-pumping depletions will be replaced by reserved water in the Laramie-Fox Hills and Arapahoe aquifers.

State Engineer's Office Opinion

4. In a letter dated September 21, 2022, the State Engineer stated the estimated water requirements are 3.0 acre-feet/year, which reflects "0.78 acre-feet for in-house use (0.26 acre-feet/lot), 1.868 acre-feet for irrigation of up to 11,000 square-feet per lot (0.0566 acre-feet/1,000 square-feet) and 0.33 acre-feet for the watering of 30 horses (10 horses/lot assuming 0.011 acre-feet/horse). The total annual demand for the subdivision would be 3.0 acre-feet." The State Engineer noted that the "decreed augmentation plan in the amended case no. 21CW3048 allows for the total annual withdrawal of 3.0 acre-feet (1 acre-foot/year lot) from the not nontributary Dawson aquifer, based on a 300 year allocation approach." The State Engineer

² On November 6, 2019, the property, including appurtenances, was conveyed from Janice Woodard to MCU Family Living Trust under Reception No. 219139272. On August 17, 2020, the property, including appurtenances, was conveyed from MCU Family Living Trust to Pawel Posorski under Reception No. 220123315.

also advised that the existing well on the property (permit no. 82898-F) needs to be re-permitted pursuant to the amended augmentation plan.

Finally, the State Engineer provided their opinion that “pursuant to 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, provided well permit no. 82898-F is re-permitted to operate pursuant to the amended augmentation plan in case no. 21CW3048. Our opinion that the water supply is adequate is based on our determination that the amount of water required annually to serve the subdivision is currently physically available, based on current estimated aquifer conditions.”

Recommended Findings

5. Quantity and Dependability. Applicant’s water demand for the Ivilo Minor Subdivision is 3.0 acre-feet per year for a total demand of 900 acre-feet for the subdivision for 300 years. The Augmentation Plan in Case No. 21CW3048 permits withdrawal of 3.0 acre-feet/year (900 acre-feet total) of Dawson-aquifer water for a period of 300 years.

Based on the water demand of 3.0 acre-feet/year for the Ivilo Minor Subdivision and Augmentation Plan in Case No. 21CW3048 permitting withdrawals in that amount, the County Attorney’s Office recommends a finding of sufficient water quantity and dependability for the Ivilo 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: The Water Supply Information Summary provided on September 8, 2022, a Water Resources Report prepared by JDS-Hydro dated March 2022, the State Engineer’s Office Opinion dated September 21, 2022, the Decree and Augmentation Plan in Case No. 18CW3035 dated November 19, 2018, and the Amended Augmentation Plan in Case No. 21CW3048 filed on March 15, 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. Applicant and its successors and assigns shall comply with all requirements of the Augmentation Plan in Case No. 21CW3048. Water use shall not exceed 3.0 acre-feet annually for the 3-lot subdivision for a period of 300 years. Stream depletions shall be replaced with non- evaporative septic system return flows for a period of 300 years pursuant to the Court’s approved

augmentation plan.

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 and their successors and assigns regarding all applicable requirements of the Augmentation Plan in Case No. 21CW3048.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 900 acre-feet of not nontributary Dawson aquifer water, 384 acre-feet of nontributary Laramie-Fox Hills aquifer water, and 433 acre-feet of nontributary Arapahoe aquifer water pursuant to Case No. 21CW3048. The Covenants shall further identify that 300 acre-feet (1.0 AF/year) of Dawson aquifer water and how the combined total of 817 acre-feet of Laramie-Fox Hills and/or Arapahoe aquifer water shall be allocated to each residential lot. 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 or replacement water supply pursuant to Case No. 21CW3048.

2) Advise of responsibility for costs. The Covenants shall advise 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 and Arapahoe 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 deletions 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, assigned, or used for any other purpose. The Covenants more specifically shall require that each lot served 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 Case No. 21CW3048 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 wells in the Dawson, Laramie-Fox Hills, and/or Arapahoe aquifers.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Case No. 21CW3048 and C.R.S. § 37-90-137(4), and specifically, that Well Permit No. 82898-F shall be re-permitted.

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 Ivilo Minor Subdivision pursuant to Case No. 21CW3048. 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 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 Case No. 21CW3048 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 300 acre-feet (1.0 AF/year for 300 years) for the primary water supply and a specifically identified one-third portion of combined total of Laramie-Fox Hills and/or Arapahoe aquifer water in the decreed amount of 817 acre-feet per lot for replacement of post-pumping depletions. 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 those reserved Dawson, Laramie-Fox Hills, and Arapahoe aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson, Laramie-Fox Hills, and/or Arapahoe aquifers 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 Ivilo 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 Case No. 21CW3048 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, Case No. 21CW3048, Case No. 18CW3035, Case No. 18CW3077, 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: Matthew Fitzsimmons, Senior Planner