

EL PASO COUNTY



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MS-21-9 Treasured Acres Filing No. 1
Minor Subdivision

Reviewed by: Lori L. Seago, Senior Assistant County Attorney
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WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a proposal by Jerry and Sharon Lomax (Applicant) for subdivision of a 15.18-acre parcel (the "property") into 3 single-family lots. All lots are estimated to be 5.06 acres in size. Lot 1 is currently occupied and an existing well is present on the property. The property is zoned RR-5 (Rural Residential).

Estimated Water Demand

2. Pursuant to the Water Supply Information Summary ("WSIS"), the subdivision demand is 0.20 acre-feet/lot for in-house use (0.60 acre-feet total), plus an additional 2.9 acre-feet/year which may be divided among the following uses: irrigation, stock watering, piscatorial, commercial, and recreation, for total water demand of 3.5 acre-feet/year for the 3-lot subdivision. Based on the total demand, Applicant must be able to provide a supply of 1,050 acre-feet of water (3.5 acre-feet/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, as provided in Colorado Ground Water Commission ("Commission") Determination No. 3668-BD and Replacement Plan No. 3668-RP dated April 29, 2019 (respectively "Determination" and "Replacement Plan"). The Determination adjudicated a total of 1,060 acre-feet of not nontributary Dawson aquifer water beneath Applicant's property. The Replacement Plan permits withdrawal of water through 3 wells on 3 lots in an amount not to exceed 3.5 acre-feet/year total for all wells, based on 1.16 acre-feet/lot/year. The allowed uses are "household use, irrigation of lawn and gardens,

watering of domestic animals, greenhouse irrigation, piscatorial/pond, recreation, agricultural, replacement and commercial.” Replacement of depletions during pumping must occur through individual on-lot non-evaporative septic systems on each lot pursuant to the Replacement Plan.

The Replacement Plan provides that replacement of depletions must be provided annually in the amounts identified in the Replacement Plan and which will require that “at least one well must be serving an occupied single-family dwelling that is generating return flows via a non-evaporative septic system before any other use is allowed to be served by any of the wells.”

4. The Applicant provided a *Water Resources Report For Treasured Acres Farm Minor Subdivision* dated May 28, 2021 by Monson, Cummins & Shohet, LLC (“*Report*”). The *Report* summarizes the water demand of 3.5 acre-feet/year (1.16 acre-feet/lot/year) and the water supply for the subdivision as provided by Determination and Replacement Plan No. 3668-BD and 3668-RP. The *Report* further identifies that there is an existing non-exempt well on the property that Applicant intends to use on Lot 1.¹

Monson, Cummins, & Shohet, LLC provided subsequent correspondence dated September 9, 2021, addressing the water demand of 0.20 acre-feet/year for in-house use, which is less than the County’s presumptive use value of 0.26 acre-feet/residence. The letter stated that the “minimum presumptive 0.26 value does not apply where there is another minimum value ‘established as acceptable by the State Engineer’. Land Development Code §8.4.7(d). The 0.20 acre-foot per home minimum was established for the property in the April 29, 2019, Findings and Order issued by the Colorado Ground Water Commission authorizing the Replacement Plan associated with Determination of Water Right No. 3668-BD”

State Engineer’s Office Opinion

5. In a letter dated October 20, 2021, the State Engineer reviewed the proposal to subdivide the 15.18-acre parcel into 3 single-family lots. The State Engineer stated the “source of water supply is individual on-lot wells producing from the not-nontributary (actual replacement) Dawson aquifer, including well permit no. 85875-F, pursuant to the Replacement Plan for Determination of Water Right no. 3668-BD.” The letter identified that the “Replacement Plan for Determination of Water Right no. 3668-BD allows for the withdrawal of 3.5 acre-feet per year of ground water from the Dawson aquifer for 300 years, through three wells, including the existing well operated under permit no. 85875-F, to be located on three residential lots on the 15 acres which is the subject property of this referral.” Finally, the State Engineer stated that “[b]ased on 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

6. Quantity and Dependability. Applicant’s water demand for the Treasured Acres Filing No. 1 Minor Subdivision is 3.5 acre-feet per year from the Dawson aquifer for a total

¹ The *Report* incorrectly identifies the well permit no. as “3668-RP”. The correct well permit no. is 85875-F.

demand of 1,050 acre-feet for the subdivision for 300 years, with replacement water occurring through non-evaporative septic systems to replace actual stream depletions.

Based on the water demand of 3.5 acre-feet/year for the Treasured Acres Filing No. 1 Minor Subdivision and the Determination and Replacement Plan permitting withdrawals in the amount of 3.5 acre-feet/year, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for Treasured Acres Filing No. 1 Minor Subdivision.

7. 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.**

8. Basis. The County Attorney's Office reviewed the following documents in preparing this review: Colorado Ground Water Commission Determination and Replacement Plan Nos. 3668-BD and 3668-RP dated April 29, 2019, the Water Supply Information Summary provided October 26, 2021, the *Water Resources Report* dated May 28, 2021, correspondence from Monson, Cummins & Shohet, LLC dated September 9, 2021, and the State Engineer Office's Opinion dated October 20, 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 Colorado Ground Water Commission Determination No. 3668-BD and 3668-RP dated April 29, 2019 ("Determination and Replacement Plan"). Water use shall not exceed 3.5 acre-feet annually for the 3-lot subdivision. Stream depletions shall be replaced with non-evaporative septic system return flows for a period of 300 years.

B. The County prefers that when there is a replacement plan, Applicant 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 the covenant provisions required below and forego creation of an HOA.

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 the Determination and Replacement Plan, including their obligations to comply with the augmentation plan.

The covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 1,050 acre-feet of not nontributary Dawson aquifer water pursuant to the Determination and Replacement Plan to satisfy El Paso County's 300-year water supply requirement for the 3 residential lots of the Treasured Acres Filing No. 1 Minor Subdivision. The Covenants shall further identify that 350 acre-feet (1.16 acre-feet/year) of Dawson aquifer water is allocated to each of the three lots.

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 Determination and Replacement Plan, which include pumping of the Dawson 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 Colorado Ground Water Commission Determination No. 3668-BD and 3668-RP, 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 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 Treasured Acres Filing No. 1 Minor Subdivision pursuant to the Colorado Ground Water Commission Determination No. 3668-BD and 3668-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 an Order 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 Determination No. 3668-BD and 3668-RP are also terminated by order of 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 successor assigns shall reserve and convey by recorded warranty deed the reserved Dawson aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson aquifer underlying the respective lots pursuant to the Determination and Replacement Plan. Sufficient water rights are 350 acre-feet of Dawson aquifer water for each lot.

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 lot of the Treasured Acres Filing No. 1 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.”

E. Applicant and its successors and assigns shall submit Covenants, 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 documents shall cross-reference the Colorado Ground Water Commission Determination No. 3668-BD and 3668-RP and shall identify the obligations of the individual lot owners thereunder.

F. Applicant and its successors and assigns shall record all applicable documents, including, but not limited to, Colorado Ground Water Commission Determination and Replacement Plan Nos. 3668-BD and 3668-RP and any assignments thereof, any warranty deeds regarding the water rights, and any Declaration of Covenants in the land records of the Office of the Clerk and Recorder of El Paso County, Colorado.

G. Applicant and/or lot owners must obtain well permits pursuant to Colorado Ground Water Commission Determination No. 3668-BD and 3668-RP.

H. Prior to recording final plat, Applicant must re-upload their *Water Resources Report* dated May 28, 2021 to eDARP.

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. 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