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August 8, 2023

SF-23-15 Mariah Trail Filing No. 1

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 Mariah Trail Filing No. 1, a subdivision application by Thomas Kirk ("Applicant") for a 6-lot subdivision on a parcel of 35 acres of land (the "property"). 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 subdivision is 3.75 acre-feet/year, comprised of .30 acre-feet/year for household use for each of the 6 residential lots totaling 1.8 acre-feet/year, 0.05 acre-feet per 1,000 square foot/year for irrigation per lot for a total of 1.8 acre-feet per year, and 0.125 acre-feet/year per horse for stock watering of up to twelve horses for a total of .150 acre-feet per year. Based on this total demand, Applicant must be able to provide a supply of 1,125 acre-feet of water (3.75 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 the not-nontributary Dawson aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 2022CW3094 ("2022 Decree"). The groundwater underlying the property was decreed in Case No. 2006CW189, Water Division 1 ("2006 Decree"). In the 2022 Decree, the Court recognized that the Applicant had been granted via quitclaim deed certain water rights from the 2006 decree, including 2,103 acre-feet of water in the Dawson aquifer and 1,563 acre-feet of water in the Arapahoe aquifer, both underlying Applicant's property. The 2022 Decree

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approved the pumping of up to 3.75 acre-feet per year for 300 years and 1,125 acre-feet total of Dawson aquifer water. The 2006 Decree allows water to be utilized for domestic, industrial, commercial, irrigation, livestock watering, fire protection, recreational, fish and wildlife and exchange and augmentation purposes, including storage, both on and off the property. The Court further awarded a vested right to use up to 6 wells on the property, one of which is currently permitted and constructed under Well Permit No. 85835-F and operates pursuant to the 2006 Decree.¹

The approved augmentation plan has a term of 300 years and requires that non-evaporative septic system return flows be used for augmentation during the pumping period for the 6 approved wells. Applicant must reserve 1,125 acre-feet of its water rights in the Arapahoe aquifer which shall be used for replacement of post-pumping depletions. Each of the 6 wells may pump up to 0.625 acre-feet per year.

State Engineer's Office Opinion

4. In a letter dated June 29, 2023, the State Engineer stated that “[t]he estimated annual water requirements totals 1.8 acre-feet for in-house use (0.3 acre-feet/year/lot), 1.8 acre-feet for irrigation of up to 0.82 acres (6,000 square-feet of lawn irrigation/lot and based on 0.05 acre-feet/year/1,000 square-feet of lawn irrigation) and 0.15 acre-feet for the watering of 12 heads (based on 0.0125 acre-feet/year/head). The total annual demand for the subdivision would be 3.75 acre-feet/year.” The State Engineer noted that the wells will produce from the Dawson aquifer pursuant to the augmentation plan decreed in case no. 2022CW3094. The State Engineer further noted that one existing well is located on the property operating under the 2006 Decree and must be re-permitted pursuant to the 2022 Decree.

Finally, the State Engineer provided their opinion, “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.”

Recommended Findings

5. Quantity and Dependability. Applicant's water demand for the Mariah Trail Filing No. 1 is 3.75 acre-feet per year for a total demand of 1,125 acre-feet for the subdivision for 300 years. The 2022 Decree allows for 6 wells to withdraw water from the Dawson aquifer in those total amounts.

Based on the water demand of 3.75 acre-feet/year for Mariah Trail Filing No. 1 and the 2022 Decree withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for Mariah Trail Filing No. 1.

¹ Applicant must obtain a new well permit pursuant to the new augmentation plan in 22CW3094 Decree and Augmentation Plan.

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 April 2023, the Water Supply Information Summary, the State Engineer's Office Opinion dated June 29, 2023, and Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 2022CW3094 entered on February 3, 2023. 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 Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 2022CW3094, specifically, that water withdrawn from the Dawson aquifer by each of the proposed six wells permitted shall not exceed 0.625 annual acre-feet, based on a total combined annual withdrawal of 3.75 acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. Applicant must 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.

C. Applicant shall create restrictive covenants upon and running with the property which shall advise and obligate future lot owners of this subdivision, their successors and assigns, and the HOA regarding all applicable requirements of the 2022 Decree.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 1,125 acre-feet of Dawson aquifer water and 1,125 acre-feet of Arapahoe aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 2022CW3094 to satisfy El Paso County's 300-year water supply requirement for the 6 lots of the Mariah Trails Filing No. 1 subdivision. The Covenants shall further identify that 187.5 acre-feet (0.625 acre-feet/year) of Dawson aquifer water is allocated to each of the 6 lots. Said reservations shall not be separated from transfer of title to the property and shall be used exclusively for primary water supply.

2) Advise of responsibility for costs. The Covenants shall advise the HOA, 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 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 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 in the subdivision 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 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 Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 22CW3094 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 HOA, 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 existing and future wells in the Dawson and/or Arapahoe aquifers.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 22CW3094 and C.R.S. § 37-90-137(4) and (10).

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 Mariah Trail Filing No. 1 pursuant to Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 22CW3094. 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.”

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 Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 22CW3094 are also terminated by the Division 1 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 187.5 (0.625 acre-feet per year) per 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 and replacement supply.

E. Applicant and its successors and assigns shall convey by recorded warranty deed these 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 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 Mariah Trails Filing No. 1. 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 shall convey by recorded warranty deed the reserved 1,125 acre-feet of Arapahoe aquifer water rights for use in the augmentation plan to replace post-pumping depletions. Applicant shall recite in the deed that this water shall be used exclusively for augmentation supply and shall not be sold, conveyed, traded, bartered, assigned, or encumbered in whole or in part for any other purpose.

G. 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 Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 1 Case No. 2022CW3094 and shall identify the obligations of the individual lot owners thereunder.

H. Applicant and its successors and assigns shall record all applicable documents, including but not limited to agreements, assignments, 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.

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.”

K. Prior to recording the final plat, Applicant shall:

- 1) Record the 2022 Decree in the records of the El Paso County Clerk and Recorder’s Office and upload the recorded decree into eDARP;
- 2) Upload into eDARP proof that the existing well operating under Permit No. 85835-F has been repermited.

cc: Kylie Bagley, Project Manager, Planner