

# EL PASO COUNTY



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SP-17-007      Abert Ranch  
(Preliminary Plan)

Reviewed by:      M. Cole Emmons, Senior Assistant County Attorney  
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## **FINDINGS AND CONCLUSIONS:**

1. This is a proposal by BF Ranch Trust 2015 (Applicant) for approval of a Preliminary Plan to subdivide approximately 40 acres of land into 10 single-family residential lots. The property is currently zoned RR-2.5 (Rural Residential).

2. The Applicant has provided for the source of water to derive from individual on-lot wells withdrawing from the not nontributary Dawson aquifer. Applicant estimates its annual water requirements for 10 lots as follows: household use at 2.6 acre-feet, irrigation of lawn and gardens at 2.25 acre-feet, stock watering for 20 head of livestock at 0.25 acre-feet, and other uses at 2.90 acre-feet for a total of 8.0 acre-feet for the subdivision or 0.80 acre-feet per lot. Applicant will need to provide a supply of 2,400 acre-feet of water (8.0 acre-feet /year x 300 years) to meet the County's 300-year water supply requirement.

3. In letters dated September 5, 2017 and March 27, 2018, the State Engineer's Office reviewed the proposed water supply for this 10 lot preliminary plan. In its September 2017 letter, the Engineer stated the Applicant must ensure that "other unspecified uses" were allowed by the augmentation Decree and provide clarification to the County prior to subdivision approval.

In a letter dated March 22, 2018, Applicant's water attorney, Henry Worley, advised that "other unspecified uses" were not limited to the listed examples in the Decree. He advised that return flows of no less than 0.18 acre-feet annually would replace depletions

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during the entire 300 year pumping period no matter what use is made of the 0.8 acre-foot per lot allowed to be withdrawn annually, and that the State Engineer would determine whether the uses identified in a well permit were non-speculative and beneficial, and if so, the uses should be permitted.

The State Engineer’s March 2018 letter considered the additional information provided by Mr. Worley. The State Engineer’s Office indicates that the water supply withdrawing from the Dawson aquifer operates pursuant to the plan for augmentation decreed in Consolidated Water Court Case Nos. 2015CW3153 (Division No. 1) and 2015CW3062 (Division No. 2) (“Decree”). The following chart delineates the available water supply pursuant to the Decree.

<b>Aquifer</b>	<b>Annual amount available for the 39.83 acre parcel</b>	
	<b><i>100 year allocation</i></b>	<b><i>300 year allocation</i></b>
Dawson	37.8 a/f	12.6 a/f
Denver	36.2 a/f	12.0 a/f
Arapahoe	16.6 a/f	5.5 a/f
Laramie–Fox Hills	12.3 a/f	4.1 a/f

The Engineer noted that the “plan for augmentation decreed in consolidated case nos. 2015CW3153 (Division 1) and 2015CW3062 (Division 2) allows for an average diversion of 12.0 acre-feet annually and 3,600 acre feet total over a 300-year period.” Further, the “decree allows the withdrawal from up to 15 wells in the Dawson aquifer pursuant to the decreed augmentation plan. According to the decree, the allowed withdrawal from each Dawson aquifer well will be limited to 0.8 acre-feet/year/lot regardless of the number of lots ultimately platted.”

In the letter dated March 27, 2018, the State Engineer addressed the 2.90 acre-feet of water identified as “other uses” by the Applicant. The State Engineer noted that the “other/unspecified uses” must be uses permitted by the Decree. The Engineer noted that pursuant to the Decree, the “uses of water on the proposed lots are expected to be, but shall not be limited to, some or all of the following uses: for indoor uses for drinking and sanitary purposes, in the principal houses and in stand-alone home offices or guest cottages, for livestock watering, for landscape and garden irrigation, hot tubs, swimming pools, and decorative uses such as decorative ponds and fountains, and augmentation through septic system return flows.” In summary, the State Engineer stated, “an applicant must demonstrate the uses applied for are non-speculative and water can be put to beneficial use and each Dawson aquifer well would not exceed and [sic] annual amount of withdrawn [sic] of 0.8 acre-feet/year.”

The State Engineer’s Office also provided an advisory to the Applicant related to any onsite drainage/water quality pond that may be part of the project. The Engineer advised the Applicant that “. . . unless the structure can meet the requirements of a ‘storm

water detention and infiltration facility' as defined in section 37-92-602(8), Colorado Revised States, the structure may be subject to administration by this office. The applicant should review the *DWR's Administrative Statement Regarding the Management of Storm Water Detention Facilities and Post-Wildland Fire Facilities in Colorado* to ensure that the notification, construction and operation of the proposed structure meets statutory and administrative requirements."

Finally, pursuant to C.R.S. § 30-28-136(1)(h)(l), the Engineer is of the opinion that the water supply is adequate and can be provided without causing injury to decreed water rights.

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

5. Plan for Augmentation. The Decree in Consolidated Water Court Case Nos. 2015CW3153 (Division No. 1) and 2015CW3062 (Division No. 2) provides for a plan for augmentation permitting up to 15 wells to be used in the subdivision. Based on 15 wells withdrawing at 0.8 acre-feet annually, the augmentation plan states that 12.0 acre-feet per year over 300 years (3,600 acre-feet total) of not nontributary Dawson aquifer groundwater is required to be augmented pursuant to the Decree.

Return flows from septic systems will be used to replace depletions caused by pumping the not nontributary Dawson aquifer during 300 years for a total of 3,600 acre-feet. The Decree states: "it is assumed that each well constructed pursuant to this plan for augmentation will be used in at least one single family dwelling, and will cause septic system return flows of at least 0.18 acre foot annually, or at least 2.7 acre foot annually if 15 wells are constructed."

The Decree further states: "in order to generate required return flows to replace depletions during pumping, each Dawson aquifer well must be used to provide water to one or more single family dwellings on the Property, and annual withdrawals shall be limited to withdrawal of 0.8 acre foot per well. Because this augmentation plan is dependent on return flows from indoor residential uses, no Dawson aquifer well approved pursuant to this plan for augmentation shall be allowed to pump water for any purpose unless it is also used in a residence on the lot on which such well is located. Total post-pumping depletions from Applicant's withdrawals shall in no instance exceed the 3,265 acre feet of water reserved and available for replacement from the Denver aquifer."

The Decree requires the Applicant, its successors and assigns, to dedicate to the plan for augmentation, 3,625 acre-feet of nontributary Denver aquifer groundwater to replace post-pumping depletions resulting from pumping 15 wells for 300 years.

The Court ruled that withdrawal of up to 12.0 acre-feet per year and no more than 3,600 acre-feet total from the Dawson aquifer will not result in material injury to vested water rights pursuant to the provisions of the decreed plan for augmentation.

6. Analysis. The Water Court decreed withdrawal of 0.8 acre-feet of water per lot annually for 300 years for a total of 3,600 acre-feet from the Dawson aquifer that can be withdrawn from up to 15 individual wells. The 10 wells in this subdivision will use 8.0 acre-feet/year total annually (2,400 acre-feet total for 300 years) from an available supply of 12.0 acre-feet annually (3,600 total for 300 years), which will leave a surplus of 4.0 acre-feet annually (1,200 acre-feet total for 300 years). Based on the foregoing, there should be sufficient supply to meet the County's 300-year water supply rule.

7. Therefore, at this time, based on the finding of no injury and sufficiency by the State Engineer, the decreed water rights and plan for augmentation in Consolidated Water Court Case Nos. 2015CW3153 (Division No. 1) and 2015CW3062 (Division No. 2), and based on the requirements listed below, the County Attorney's Office recommends a finding that the proposed water supply is **sufficient** in terms of quantity and dependability. The El Paso County Health Department shall make a finding as to water quality.

#### REQUIREMENTS:

Plat Notes and Documentation are required to address the following:

A. Applicant, its successors and assigns, shall create an HOA and advise the HOA and all future owners of these lots of all applicable requirements of the Decree entered in Consolidated Water Court Case Nos. 2015CW3153 (Division No. 1) and 2015CW3062 (Division No. 2), as well as their obligations to comply with the Decree and plan for augmentation, including, but not limited to, costs of operating the plan for augmentation, which will include the costs for constructing and pumping a nontributary Denver well(s) to replace post-pumping depletions, and the responsibility for metering and collecting data regarding water withdrawals from said well(s).

B. Applicant shall assign or convey to the HOA, Applicant's interests, rights, and obligations in the plan for augmentation, and shall create restrictive covenants upon and running with the property which shall obligate individual lot owners and the HOA to carry out the requirements of the plan for augmentation. Such assignment or conveyance shall be accomplished by an appropriate agreement and assignment or conveyance instrument that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney's Office prior to recording the final plat.

C. Depletions During Pumping. The Decree requires non-evaporative septic systems to replace depletions during 300 years of pumping from the not nontributary

Dawson aquifer. Specifically, the Decree states: “[a]ll septic system return flows are dedicated to this plan for augmentation, and shall not be sold, leased or otherwise used for any other purpose.” Therefore, deeds of the property and lots shall specifically state that all return flows shall be dedicated by Grantee to replacing depletions during pumping of the Dawson aquifer pursuant to the plan for augmentation, and said return flows shall not be sold, leased or otherwise used for any other purpose, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, bartered, or encumbered. In addition, the Covenants shall recite that return flows from non-evaporative septic systems shall comply with the requirements of the plan for augmentation, that such return flows shall only be used to replace depletions, shall not be sold, leased or otherwise used for any other purpose, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, bartered, or encumbered. Finally, the Covenants also shall state: “to generate required return flows to replace depletions during pumping, each Dawson aquifer well must be used to provide water to one or more single family dwellings on the Property, and annual withdrawals shall be limited to withdrawal of 0.8 acre foot per well. Because this augmentation plan is dependent on return flows from indoor residential uses, no Dawson aquifer well approved pursuant to this plan for augmentation shall be allowed to pump water for any purpose unless it is also used in a residence on the lot on which such well is located.”

D. Post-Pumping Depletions. Applicant shall reserve in any deeds of the property at least 2,400 acre-feet of nontributary Denver aquifer water as decreed in Consolidated Water Court Case Nos. 2015CW3153 (Division No. 1) and 2015CW3062 (Division No. 2) for use in the augmentation plan to replace post-pumping depletions. This 2,400 acre-feet amount is from the 3,625 acre-feet that the Decree requires to be reserved; however, because only 10 wells instead of 15 will be drilled in this subdivision, the entire 3,625 acre-feet of Denver aquifer water does not have to be conveyed to the HOA. Applicant shall convey by recorded warranty deed these reserved water rights to the HOA for use in the augmentation plan. Said deed shall provide that the water rights shall be appurtenant to the subdivision, to be used for the benefit of all of the lot owners to provide a source of augmentation water to replace post-pumping stream depletions caused by pumping wells in the not nontributary Dawson aquifer underlying the subdivision, shall not be separated from the transfer of title to the land, and shall not be separately conveyed, bartered or encumbered. Applicant shall provide copies of such reservation and conveyance instruments that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney’s Office prior to recording the final plat.

E. Applicant, its successors and assigns, at the time of lot sales, shall convey by warranty deed to individual lot owners, sufficient water rights in the Dawson aquifer underlying each lot to satisfy El Paso County’s 300 year water supply requirement: 240 acre-feet (0.80 acre-feet/lot x 300 yrs.). Said Deed shall provide that the water right shall be appurtenant to the land, to be used for the benefit of the lot owner, shall not be separated from the transfer of title to the land, and shall not be separately conveyed,

bartered, or encumbered. It is anticipated that these conveyances will satisfy the State Engineer's evidentiary requirement that an applicant for an individual on-lot well has acquired the right to the portion of water being requested on the application. Applicant shall provide a form deed for such conveyance that shall be reviewed and approved by both the Planning and Community Development Department and the County Attorney's Office prior to recording the final plat.

F. Applicant shall submit Declaration of Covenants, Conditions, and Restrictions as well as Bylaws and Articles of Incorporation of the HOA 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 the decreed plan for augmentation, the related water rights decrees, and shall recite the obligations of the individual lot owners and the HOA under each of these documents. Applicant shall provide a copy of the Certificate of Incorporation of the HOA by the Secretary of State to the Planning and Community Development Department and the County Attorney's Office prior to recording the final plat.

G. Applicant, its successors and assigns, shall record all applicable documents including, but not limited to, the Decree and plan for augmentation in Consolidated Water Court Case Nos. 2015CW3153 (Division No. 1) and 2015CW3062 (Division No. 2), agreements, assignments, and warranty deeds regarding the water rights, Declaration of Covenants, By-laws, and Articles of Incorporation 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, which is based on an allocation approach. Applicants, the Home Owners Association, 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 indicated due to anticipated water level declines. Furthermore, the water supply plan should not rely solely upon non-renewable aquifers, and Applicants, their successors and assigns, including individual lot owners in the subdivision and the HOA may be required to acquire, develop, and incorporate alternative renewable water resources in a permanent water supply plan that provides future generations with a water supply."

cc: Kari Parsons, Project Manager, Planner II