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July 15, 2024

MS-24-3 McLean Minor Subdivision

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

WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a proposal for approval of McLean Minor Subdivision, an application by Susan McLean (“Applicant”) to subdivide a parcel of 38.68 acres of land (the “property”) into two single-family residential 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 subdivision is 1.76 acre-feet/year. The estimated uses are not delineated in the WSIS. Based on this total demand, Applicant must be able to provide a supply of 528 acre-feet of water (1.76 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 Referee and Decree in Division 2 Case No. 2023CW3041 (“Decree”). The groundwater decreed underlying the property includes 2,980 acre-feet of water in the Dawson aquifer. The Decree approved the pumping of up to 2.28 acre-feet per year for a maximum of 300 years for up to three (3) new wells and 1.0 acre-feet per year for a maximum of 300 years for an existing exempt well.

There is an exempt domestic well currently located on the Applicant’s property under Well Permit No. 223432. This well will continue to be used on one of the subdivided lots and will not be included in the augmentation plan based on the Decree. 300 acre-feet of the Dawson aquifer water

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underlying the property should be reserved for use by this permitted well which may pump up to 1.0 acre-feet per year.

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 approved well yet to be constructed.¹ Applicant must reserve 1,100 acre-feet of its water rights in the Laramie-Fox Hills aquifer which shall be used for replacement of post-pumping depletions. The well yet to be constructed in the Dawson aquifer may pump up to 0.76 acre-feet per year.

State Engineer's Office Opinion

4. In a letter dated June 26, 2024, the State Engineer broke down the estimated annual water requirement totals, including Lot 1, which has an existing well under permit no. 223432 allowing withdrawal from the Dawson aquifer in the amount of 1.0 acre-feet annually for household use, irrigation of lawn and gardens, watering of domestic animals and stock and fire protection, and Lot 2 utilizing 0.76 acre-feet for household use, lawn and garden irrigation, and livestock watering. The State Engineer noted that the wells will produce from the not-nontributary Dawson aquifer pursuant to the augmentation plan decreed in Case No. 2023CW3041.

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 the McLean Minor Subdivision is 1.76 acre-feet per year for a total demand of 528 acre-feet for the subdivision for 300 years. The Decree allows for the permitted well to withdraw 1.0 acre-feet from the Dawson aquifer for a total of 300 acre-feet over 300 years and the Augmentation Plan allows for up to three additional (3) wells to withdraw water from the Dawson aquifer for a maximum withdrawal of 2.28 acre-feet per year (0.76 acre-feet per lot), for a total of 684 additional acre-feet over 300 years.

Based on the water demand of 1.76 acre-feet/year for McLean Minor Subdivision and the Decree's allowable amount of 1.0 acre-feet per year for the permitted well on Lot 1 and up to 0.76 acre-feet per year for the additional well for Lot 2, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for McLean 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.**

¹ The augmentation plan does not apply to the permitted well #223432.

7. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a *Water Resources Report* dated December 2023, the Water Supply Information Summary, the State Engineer's Office Opinion dated February 9, 2024, and Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 2 Case No. 2023CW3041 entered on April 6, 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 Referee and Decree in Division 2 Case No. 2023CW3041, specifically, that water withdrawn from the Dawson aquifer by the not yet constructed well shall not exceed 0.76 annual acre-feet, and the exempt well under permit no. 223432 shall not withdraw in excess of 1.0 annual acre-feet based on a total combined annual withdrawal of 1.76 acre-feet. Depletions during pumping for the not yet constructed well shall be replaced by individual on-lot non-evaporative septic systems.

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, when only one well is subject to the augmentation plan, 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, their successors and assigns, regarding all applicable requirements of the Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 2 Case No. 2023CW3041.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve at least 528 acre-feet of Dawson aquifer water and 1,100 acre-feet of Laramie-Fox Hills aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2023CW3041 to satisfy El Paso County's 300-year water supply requirement for the 2 lots of the McLean Minor Subdivision. The Covenants shall further identify that 300 acre-feet of Dawson aquifer water is allocated to Lot 1, and that 228 acre-feet (0.76 acre-feet/year) of Dawson aquifer water and 366.66 acre-feet of Laramie-Fox Hills aquifer water is allocated to Lot 2, in accordance with the Augmentation Plan. Said reservations shall not be separated from transfer of title to the property and shall be used exclusively for primary water supply and augmentation.

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 augmentation, which include pumping of the Dawson well on Lot 2 in a manner to replace depletions during pumping and the cost of drilling a Laramie-Fox Hills aquifer well 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 the owner of Lot 2 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 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 Referee and Decree in Division 2 Case No. 23CW3041 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 and data collecting that may be required regarding water withdrawals from existing and future wells in the Dawson an/or Laramie-Fox Hills 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 Referee and Decree in Division 2 Case No. 23CW3041 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 McLean Minor Subdivision pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 23CW3041. 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 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 Referee and Decree in Division 2 Case No. 23CW3041 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 528 acre-feet. 300 acre-feet (1.0 acre-feet per year) for Lot 1 and 228 acre-feet (0.76 acre-feet per year) for Lot 2 as well as 1,100 acre-feet of Laramie-Fox Hills aquifer water (366.66 acre-feet per year per lot for up to 3 lots). 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 and/or Laramie-Fox Hills aquifers 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 McLean 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2023CW3041 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 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.

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: Joe Letke, Project Manager, Planner