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November 13, 2024

MS-22-11 Nabulsi-Abushaban Subdivision

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 a subdivision application by Taher Nabulsi, Rola Abushaban and Nabulsi-Abushaban Family Trust (“Applicant”) for a 4-lot subdivision on 24.8 acres (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 2.28 acre-feet/year, comprised of 0.26 acre-feet/year per for household uses, 0.26 acre-feet/year for irrigation and 0.05 acre-feet/year for stock watering for a total of 0.57 acre-feet/year per household/lot. Based on this total demand, Applicant must be able to provide a supply of 684 acre-feet of water (2.28 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 up to four (4) wells withdrawing from the not-nontributary Dawson aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020 (“Decree” or “Augmentation Plan”). The Decree allocated 950 acre-feet (3.2 acre-feet/year for 300 years) of Dawson aquifer water to the property. The Augmentation Plan allows water to be withdrawn from the Dawson aquifer through up to 4 wells in an annual amount that shall not exceed 2.28 acre-feet for up to 300 years. The allowed annual amount of water to be withdrawn from each on-lot well shall not exceed 0.57

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acre-feet to be used for domestic, irrigation, stock water, recreation, wildlife, fire protection, and also for storage and augmentation purposes associated with such uses.

There are three existing wells on the property anticipated to supply water to three of the lots (one per lot).<sup>1</sup> These wells must be re-permitted as non-exempt wells in accordance with the Augmentation Plan. The fourth lot will be supplied by a well not yet constructed.

The approved Augmentation Plan has a term of 300 years and requires that septic system return flows be used for augmentation during the pumping period for the 4 approved wells. Applicant must reserve 713 acre-feet total of its water rights in the Laramie-Fox Hills aquifer to be used for replacement of post-pumping depletions.

#### State Engineer's Office Opinion

4. In a letter dated December 27, 2023, the State Engineer stated that “[t]he proposed source of water is individual on lot wells producing from the not-nontributary Dawson aquifer that will operate pursuant to the decree and plan for augmentation in case no. 2022CW3020.” The allowed average annual amount of withdrawal provided for in the Decree is 3.2 acre-feet annually for a maximum of 300 years. The augmentation plan approved allows for an average diversion of 2.28 acre-feet annually for a maximum of 300 years. This equates to 0.57 annual acre-feet for each of the four (4) lots.

Finally, the State Engineer stated that, “... pursuant to 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 decreed water rights.”

#### Recommended Findings

5. Quantity and Dependability. Applicant's water demand for the Nabulsi-Abushaban Subdivision is 2.28 acre-feet per year for a total demand of 684 acre-feet for the subdivision for 300 years. The Augmentation Plan allows for four (4) wells necessary to meet the needs of this subdivision, limited to an annual withdrawal of 0.57 acre-feet per well, for a total of 2.28 acre-feet.

**Based on the water demand of 2.28 acre-feet/year for the Nabulsi-Abushaban Subdivision and the Augmentation Plan permitting withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Nabulsi-Abushaban 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.**

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<sup>1</sup> Permit Nos. 85841-A, 137196 and 23585.

7. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a *Water Resources Report* dated August 25, 2023, the *Water Supply Information Summary*, the *State Engineer's Office Opinion* dated December 27, 2023, and Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020 entered on April 20, 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: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020, specifically, that water withdrawn from the Dawson aquifer shall not exceed 0.57 annual acre-feet per well for up to four (4) wells, based on a total combined annual withdrawal of 2.28 acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. The County requires 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 decree and augmentation plan 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020, including the limitations on diversions and use of water for each well and lot, the requirement to meter and record all well pumping, and information on how records are to be kept.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 684 acre-feet of not-nontributary Dawson aquifer water and 714 acre-feet of Laramie-Fox Hills aquifer water pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020 to satisfy El Paso County's 300-year water supply requirement for the four (4) lots of the Nabulsi-Abushaban Subdivision. The Covenants shall further identify that 171 acre-feet (0.57 acre-feet/year) of Dawson aquifer water is allocated to each lot. Said reservations shall not be separated from transfer of

title to the property and shall be used exclusively for primary and replacement 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 plan 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 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 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: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020 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 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: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020 and C.R.S. § 37-90-137(4) and (10), to include the requirement that three (3) existing wells be re-permitted as non-exempt wells according to the Augmentation Plan.

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 Nabulsi-Abushaban Subdivision pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020. 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 Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020 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 684 acre-feet and 713 acre-feet of Laramie-Fox Hills aquifer water. Said reservations 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 Laramie-Fox Hills aquifers underlying the respective lots to satisfy El Paso County’s 300-year water supply requirement, which amount is 171 acre-feet (0.57 acre-feet per year) per lot.

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 Nabulsi-Abushaban 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 shall convey, or provide proof of previous conveyance of, 713 acre-feet of Laramie-Fox Hills aquifer water to the HOA for use in the Augmentation Plan to replace post-pumping depletions.

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 Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree: Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation in Division 2 Case No. 22CW3020, 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.

I. Applications for well permits submitted by persons other than the Applicant must include evidence that the permittee has acquired the right to the portion of the water being requested.

J. 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 provide proof that well nos. 85841-A, 137196 and 23585 have been re-permitted as non-exempt pursuant to the Augmentation Plan.

cc: Joe Letke, Project Manager, Planner