

## County Attorney

Kenneth R. Hodges, County Attorney  
719-520-6485  
Centennial Hall  
200 S. Cascade, Suite 150  
Colorado Springs, CO 80903  
www.ElPasoCo.com

Board of County Commissioners  
Holly Williams, District 1  
Carrie Geitner, District 2  
Stan VanderWerf, District 3  
Longinos Gonzalez, Jr., District 4  
Cami Bremer, District 5

November 20, 2023

SF-22-3 Falcon Acres

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 subdivision by Thousand Hills Land & Cattle Co LLC (“Applicant”) for an 8-lot subdivision on a parcel of 49.2 acres of land (the “property”). The property is currently zoned RR-5 (Residential).

#### Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the water demand for the subdivision of 49.2 acres into 8 residential lots is comprised of 0.3 acre-feet of household use per home for a total of 2.4 acre feet for the 8 lots, 0.2 acre-feet per lot for irrigation of 4,000 square feet per lot for a total of 1.6 acre-feet for the 8 lots, and 0.05 acre-feet per lot for the watering of 4 animals per lot for a total of 0.4 acre-feet for the 8 lots, for a total demand of 0.55 acre-feet per year per lot or 4.4 acre-feet per year total for the 8 lots. Based on this total demand, Applicant must be able to provide a supply of 1,320 acre-feet of water (4.4 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

#### Proposed Water Supply

The Applicant has provided for the source of water to derive from one or more individual on-lot wells withdrawing from the not-nontributary Arapahoe aquifer as provided in Determination of Water Right No. 1146-BD (“Determination”). The Determination allocated 1,422 total acre-feet or 14.2 annual acre-feet of water in the Arapahoe aquifer to the property for 100 years. However, El Paso County requires a 300-year allocation approach, which would reduce that amount by a third, or 4.73

#### ASSISTANT COUNTY ATTORNEYS

NATHAN J. WHITNEY  
CHRISTOPHER M. STRIDER

STEVEN A. KLAFFKY  
TERRY A. SAMPLE

LORI L. SEAGO

BRYAN E. SCHMID  
STEVEN W. MARTYN

DOREY L. SPOTTS  
MERI GERINGER

acre-feet/year. The Determination allows the Applicant to withdraw from one or more wells in any combination, so long as the total combined withdrawal of the wells does not exceed the amounts allowed in the Determination, which allows for an annual amount of water from the Arapahoe aquifer of 4.73 acre-feet for a 300-year allocation. The applicant anticipates up to 8 wells, withdrawing up to 0.55 acre-feet per year for 300 years for domestic, commercial, industrial, irrigation and replacement supply. Though the Determination does not require approval of a replacement plan before water may be withdrawn from the aquifer, it does require the return of 4% of the water withdrawn annually to the uppermost aquifer in the vicinity of the points of withdrawal. Applicant has identified non-evaporative septic systems on each lot as the mechanism for complying with this requirement.

#### State Engineer's Office Opinion

4. In a letter dated October 19, 2023, the State Engineer stated that the lots will be serviced by individual on-lot wells producing from the not-nontributary Arapahoe aquifer that will operate pursuant to the Determination of Water Right No. 1146-BD. The estimated water demand per lot is 0.55 acre-feet/year/lot, with a total demand for all 8 lots of 4.4 acre-feet/year.

Finally, the State Engineer provided their opinion, “. . . pursuant to section 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.” The State Engineer goes on to state that three existing wells must be plugged and abandoned upon subdivision approval, and a well abandonment report must be filed with their office prior to approval.

#### Recommended Findings

5. Quantity and Dependability. Applicant's water demand for Falcon Acres is 4.4 acre-feet (0.55 acre-feet per lot) per year for a total demand of 1,320 acre-feet for the subdivision for 300 years. Under Determination of Water Right No. 1146-BD, Applicant has the right to use up to 1,422 acre-feet from the Arapahoe aquifer (based on an aquifer life of 100 years).

**Based on the water demand of 4.4 acre-feet/year (1,320 acre-feet total) for the Falcon Acres and the right to withdraw Arapahoe aquifer water of 14.2 (100-year allocation) or 4.73 (300-year allocation), which is in excess of the demand, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Falcon Acres.**

6. The water quality requirements of Section 8.4.7.B.10.g. of the EI Paso County Land Development Code must be satisfied. **EI 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 September 27, 2023, the Water Supply Information Summary, the State Engineer's Office Opinion dated October 19, 2023, Determination of Water Right No. 1146-BD entered on April 16, 2007. 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 Colorado Ground Water Commission Determination of Water Right No. 1146-BD, including that water withdrawn from the Arapahoe aquifer shall not exceed 14.2 acre-feet total per year for up to 100 years. The allowed annual amount of groundwater to be withdrawn is 4.73 acre-feet for up to 300 years.

B. Section 8.4.7 (B)(4)(e)(iii) of the El Paso County Land Development Code requires that, for subdivisions of 4 lots or more, the applicant establish an HOA to carry out the obligations under the Determination. Where no replacement plan is required, however, 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 and their successors and assigns regarding all applicable requirements of Determination of Water Right No. 1146-BD.

Covenants shall specifically address the following:

- 1) Identify the water rights associated with the property. The Covenants shall reserve 1,320 acre-feet of not-nontributary Arapahoe aquifer water pursuant to Determination of Water Right No. 1146-BD to satisfy El Paso County's 300-year water supply requirement for the 8 lots of Falcon Acres. The Covenants shall further identify that 165 acre-feet (0.55 acre-feet/year) of Arapahoe aquifer water is allocated to each residential lot.
- 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 replacement, which include the installation and/or maintenance of totalizing flow meters.
- 3) Require and reserve return flows. 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 return 4% of withdrawals to the uppermost aquifer 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 this purpose: "Return flows shall only be used for the purpose of complying with 4% return requirement in Determination 1146-BD, 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. Lot owners must follow all applicable laws, rules, regulations, court orders, and permit conditions related to return flows."

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 Determination of Water Right No. 1146-BD 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, data collecting, and reporting that may be required regarding water withdrawals from existing and future wells in the Arapahoe aquifer.

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 Falcon Acres pursuant to Determination of Water Right No. 1146-BD. 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.”

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 Determination of Water Right No. 1146-BD are also terminated by 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 successors and assigns shall reserve in any deeds of the Property Arapahoe aquifer water in the decreed amount of 165 acre-feet (0.55 acre-feet annually) per residential 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 return supply.

E. Applicant and its successors and assigns shall convey by recorded warranty deed these reserved Arapahoe aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Arapahoe aquifer underlying the respective lots to satisfy El Paso County's 300-year water supply requirement. Sufficient water rights are 165 acre-feet (0.55 acre-feet/year x 300 years) from the Arapahoe aquifer for each residential lot.

Any and all conveyance instruments shall also recite as follows:

For the water rights and return flows conveyed for the primary supply (Arapahoe aquifer): "These water rights conveyed, and the return flows therefrom, are intended to provide a 300-year water supply for each of the lots of Falcon Acres. 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 Determination of Water Right No. 1146-BD 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 Determination of Water Right No. 1146-BD, 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.

H. 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.

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.”

J. Prior to recording the final plat, Applicant shall comply with conditions in the State Engineer’s Office letter regarding well nos. 74444-A, 113499, and 211298. Applicant shall provide proof to the County that said wells have been plugged and abandoned and a Well Abandonment Report filed with the State Engineer’s Office.

cc: Ryan Howser, Project Manager, Planner