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October 22, 2024

SF-24-5 Berisford 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 Amy and Christopher Berisford (“Applicant”) for a 4-lot subdivision on 19.88 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 6.244 acre-feet/year, comprised of 1.561 acre-feet/year per household/lot. Based on this total demand, Applicant must be able to provide a supply of 1,873.2 acre-feet of water (6.244 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 Determination of Water Right No. 4653-BD (“Determination”) and Replacement Plan No. 4653-RP (“Replacement Plan”). The Determination allocated 1,900 acre-feet of Dawson aquifer water to the property. The Replacement Plan allows water to be withdrawn from the Dawson aquifer through up to 4 wells in an annual amount that shall not exceed 6.244 acre-feet for up to 300 years. The allowed annual amount of water to be withdrawn from each on-lot well shall not exceed 1.561 acre-feet to be used for domestic, livestock, domestic animals, irrigation, recreation, fire suppression, wildlife, and replacement either directly or after storage.

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The approved Replacement Plan has a term of 300 years and requires that septic system return flows be used for replacement during the pumping period for the approved wells.

State Engineer's Office Opinion

4. In a letter dated August 6, 2024, the State Engineer stated that “[t]he proposed water supply is individual on lot wells producing from the Dawson aquifer underlying the property allocated under Determination of Water Right nos. 4653-BD and the associated replacement plan 4653-RP.” The allowed average annual amount of withdrawal provided for in Determination of Water Right No. 4653-BD is 19.0 acre-feet for 100 years, or 6.33 acre-feet for 300 years. The replacement plan approved for Determination of Water Right 4653-BD allows for an average diversion of 6.244 acre-feet annually for a maximum of 300 years. This equates to 1.561 annual acre-feet for each of the four (4) lots.

Finally, the State Engineer stated that, “... 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 Berisford Subdivision is 6.244 acre-feet per year for a total demand of 1,873.2 acre-feet for the subdivision for 300 years. The Replacement Plan allows for four (4) wells necessary to meet the needs of this subdivision, limited to an annual withdrawal of 1.561 acre-feet per well, for a total of 6.244 acre-feet.

Based on the water demand of 6.244 acre-feet/year for the Berisford Subdivision and the Replacement Plan permitting withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the Berisford 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.**

7. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a *Water Resources Report* dated March 28, 2024, the *Water Supply Information Summary*, the *State Engineer's Office Opinion* dated August 6, 2024, Replacement Plan No. 4653-RP for Determination of Water Right No. 4653-BD entered on February 27, 2024. 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. 4653-BD and Replacement Plan No. 4653-RP, specifically, that water withdrawn from the Dawson aquifer shall not exceed 1.561 annual acre-feet per well for up to four (4) wells, based on a total combined annual withdrawal of 6.244 acre-feet. Depletions during pumping shall be replaced by individual on-lot non-evaporative septic systems.

B. The County prefers that when there is a replacement 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 replacement plan for the property. For a four-lot subdivision such as this, however, in which the replacement of post-pumping depletions is not required, 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. 4653-BD and Replacement Plan No. 4653-RP, 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 recorded.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 1,873.2 acre-feet of not-nontributary Dawson aquifer water pursuant to Determination of Water Right No. 4653-BD and Replacement Plan No. 4653-RP to satisfy El Paso County's 300-year water supply requirement for the four (4) lots of the Berisford Subdivision. The Covenants shall further identify that 468.3 acre-feet (1.561 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 water supply.

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 plans for augmentation, which include pumping of the Dawson wells in a manner to replace depletions during pumping.

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 Determination of Water Right No. 4653-BD and Replacement Plan No. 4653-RP 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 aquifer.

6) Require well permits. The Covenants shall require that well permits be obtained pursuant to the requirements of Determination of Water Right No. 4653-BD and Replacement Plan No. 4653-RP 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 the Berisford Subdivision pursuant to Determination of Water Right No. 4653-BD and Replacement Plan No. 4653-RP. 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 Determination of Water Right No. 4653-BD and Replacement Plan No. 4653-RP 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 Dawson aquifer water in the decreed amount of 1,873.2 acre-feet (6.244 acre-feet per year). 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 the Berisford 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 Determination of Water Right No. 4653-BD and Replacement Plan No. 4653-RP 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. 4653-BD, Replacement Plan No. 4653-RP, 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."

cc: Joe Letke, Project Manager, Planner