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November 2, 2022

MS-20-4 Kinch Subdivision
Minor Subdivision

Reviewed by: Lori L. Seago, Senior Assistant County Attorney
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WATER SUPPLY REVIEW AND RECOMMENDATIONS

Project Description

1. This is a minor subdivision proposal by Paul and Amy Kinch (“Applicants”) for a 4-lot subdivision on a parcel of 29.12 acres of land (the “property”). There is an existing residence and existing well on the property which will continue to be utilized (Lot 1). Applicant also intends to construct a guest house on Lot 1. 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 1.41 acre-feet/year, comprised of 0.26 acre-feet/year for 4 single-family dwellings, 0.20 acre-feet/year for a guest house, and 0.17 acre-feet/year for irrigation. Based on this total demand, Applicant must be able to provide a supply of 423 acre-feet of water (1.41 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 individual on-lot wells in the not nontributary Dawson aquifer as provided in Findings of Fact, Conclusions of Law, Ruling of Referee and Decree Adjudicating Denver Basin Groundwater and Approving Plan for Augmentation, Division 2 Case No. 20CW3068 (“Case No. 20CW3068”, “Decree” or “Augmentation Plan”). The Decree was granted to Paul and Amy Kinch and recorded on October 18, 2021.

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The Decree adjudicated 437 acre-feet of Dawson-aquifer water underlying the 29.12-acre property.¹ The Augmentation Plan provides that 0.51 acre-feet/year may be pumped from Kinch Well No. 1 (an existing well). A total of 0.30 acre-feet/year may be pumped from each of Kinch Well Nos. 2 through 4 (yet to be constructed). A maximum of 1.41 acre-feet may be withdrawn from the Dawson aquifer per year. The Decree notes the beneficial uses on the property are: “domestic, irrigation, stock water, fire protection, and also for storage and augmentation.”

State Engineer’s Office Opinion

4. In a letter dated April 13, 2022, the State Engineer stated that the estimated water requirements are 1.41 acre-feet/year and that the Case No. 20CW3068 permits Kinch Well No. 1 to pump 0.51 acre-feet/year and Kinch Well Nos. 2 through 4 to pump 0.30 acre-feet/year. The State Engineer notes that there is an existing well on the parcel identified as Well permit No. 276175-A which is an exempt well. They note that “[t]he applicant should be expected to re-permit this well pursuant to case no. 2020CW3068 and 37-90-137(4) as a non-exempt well for use in this subdivision.” Further, the State Engineer states that the “annual estimated demand, for the entire subdivision, is a maximum of 1.41 acre-feet as allowed by the augmentation plan. As a result, the water may be withdrawn in that annual amount for a maximum of 300 years.”

Finally, the State Engineer provided their opinion that “pursuant to CRS 30-28-136(1)(h)(l), that the anticipated water supply can be provided without causing material injury to decreed water rights so long as the applicant obtains well permits issued pursuant to C.R.S. 37-90-137(4) and the plan for augmentation ...” And finally, “[o]ur opinion that the water supply is adequate is based on our determination that the amount of water required annually to serve the subdivision is currently physically available, based on current estimated aquifer conditions.”

Recommended Findings

5. Quantity and Dependability. Applicant’s water demand for the Kinch Minor Subdivision is 1.41 acre-feet per year for a total demand of 423 acre-feet for the subdivision for 300 years. The Decree and Augmentation Plan in Case No. 20CW3068 permits withdrawal of 1.41 acre-feet/year (423 acre-feet total) of Dawson aquifer water for a period of 300 years.

Based on the water demand of 1.41 acre-feet/year for the Kinch Minor Subdivision and Case No. 20CW3068 permitting withdrawals in that amount, the County Attorney’s Office recommends a finding of sufficient water quantity and dependability for the Kinch 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 Note: The Decree also adjudicated water in the following aquifers: Denver (40.5 acre-feet), Arapahoe (468 acre-feet), and Laramie-Fox Hills (830 acre-feet).

7. **Basis.** The County Attorney's Office reviewed the following documents in preparing this review: a *Water Resources Report* from JDS-Hydro Consultants, Inc. dated March 2022, including the Water Supply Information Summary included in the *Report*, the State Engineer's Office Opinion dated April 13, 2022, and Decree and Augmentation Plan in Case No. 20CW3068 filed on September 14, 2021 and recorded on October 18, 2021. 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 Decree and Augmentation Plan in Case No. 20CW3068, specifically, that water use shall not exceed 1.41 acre-feet annually for the 4-lot subdivision for a period of 300 years. Stream depletions shall be replaced by residential return flows from 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 decrees and augmentation plans 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 Decree and Augmentation Plan in Case No. 20CW3068.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 423 acre-feet of Dawson aquifer water and 373 acre-feet of Laramie – Fox Hills water pursuant to Case No. 20CW3068 to satisfy El Paso County's 300-year water supply requirement for the 4 lots of the Kinch Minor Subdivision. The covenants shall further identify that 153 acre-feet of Dawson aquifer water is reserved to Lot 4 and that 90 acre-feet of Dawson aquifer water is reserved to each of Lots 1-3. Said reservations shall not be separated from transfer of title to the property and shall be used exclusively for primary water supply. The Covenants must also reserve 373 acre-feet in the nontributary Laramie-Fox Hills aquifer groundwater decreed herein to replace post-pumping depletions.

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 plans 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 more specifically shall require that two lots in the subdivision have an occupied single-family dwelling, or that Lot 4 have both an occupied single-family dwelling and a guest house, that is generating return flows from a non-evaporative septic system before any irrigation or animal watering is allowed. 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 Case No. 20CW3068 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 Laramie-Fox Hills aquifers.

6) Require well permits. The Covenants shall Require that well permits be obtained pursuant to the requirements of Case No. 20CW3068 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 Kinch Minor Subdivision pursuant to Case No. 20CW3068. 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 adjudication.”

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 Case No. 20CW3068 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 153 AF/year for Lot 4 and 90 AF/year for each of Lots 1-3. 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 Kinch 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. 373 acre-feet of water in the Laramie – Fox Hills aquifer reserved pursuant to Case No. 20CW3068 shall be conveyed to the HOA for use in the augmentation plan to replace post-pumping depletions. Pursuant to the augmentation plan, Applicant shall recite that this water shall not be separated from transfer of title to the Property and shall be used exclusively for augmentation supply.

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 Case No. 20CW3068 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, Case No. 20CW3068, 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. Prior to recording the final plat, Applicant shall:

1) upload the updated WSIS to eDARP that matches the document provided in the *Water Resources Report*.

2) re-permit Well permit no. 276175-A and upload the new permit into eDARP.

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."

cc: Kylie Bagley, Project Manager, Planner II