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VR-24-6 Kettle Creek Estates Filing No. 2

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 Kettle Creek Estates Filing No. 2, an application by J & M Investments LLC (“Applicant”) to subdivide a parcel of 5.13 acres of land (the “property”) into two single-family residential lots. The property is zoned RR 2.5 (Rural Residential).

Estimated Water Demand

2. Pursuant to the Water Supply Information Summary (“WSIS”), the water demand for the subdivision is 0.72 acre-feet/year comprised of 0.26 acre-feet per year per household, irrigation in the amount of 0.158 acre-feet and stock watering for 4 horses at 0.011 per animal for a total of 0.044 acre-feet. Based on this total demand, Applicant must be able to provide a supply of 216 acre-feet of water (0.72 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 for Lot 2 to derive from an individual on-lot well in the Arapahoe aquifer as provided in the Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2023CW3045 (“Decree and Augmentation Plan”). The groundwater decreed underlying the property includes 87.2 acre-feet in the Denver aquifer, 227 acre-feet in the Arapahoe aquifer and 135 acre-feet in the Laramie-Fox Hills aquifer. The Decree and Augmentation Plan approved the pumping of up to 0.50 acre-feet per year for a maximum of 300 years for the yet to be constructed well on Lot 2 from the Arapahoe aquifer.

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There is an exempt domestic well currently located on the Applicant's property under Well Permit No. 172655. This well will continue to be used on one of the subdivided lots (Lot 1) and will not be included in the augmentation plan based on the Decree. This permitted well may pump up to 0.29 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 on Lot 2.¹ Applicant must reserve 135 acre-feet of its water rights in the Laramie-Fox Hills aquifer which shall be used for replacement of post-pumping depletions.

State Engineer's Office Opinion

4. In a letter dated December 23, 2024, the State Engineer broke down the estimated annual water requirement totals to be . . . "0.72 acre-feet for both lots. The proposed well for Lot 2 will be completed into the Arapahoe aquifer and withdraw 0.44 acre-feet/year for use in a single-family residence, lawn and garden irrigation and animal watering. The applicant is proposing to continue use of the existing well with Permit no. 172655 for Lot 1 at an estimated rate of 0.28 acre-feet/year." The State Engineer noted that the wells will produce from the Denver and Arapahoe aquifers pursuant to the augmentation plan decreed in Case No. 2023CW3045.

Finally, the State Engineer provided their opinion, ". . . pursuant to CRS 30-28-136(1)(h)(l), it is our opinion that the proposed water supply can be provided without causing material injury to decreed water rights, and is **adequate**, so long as the plan for augmentation is operated according to its decreed terms and conditions."

Recommended Findings

5. Quantity and Dependability. Applicant's water demand for Kettle Creek Estates Filing No. 2 is 0.72 acre-feet per year for a total demand of 216 acre-feet for the subdivision for 300 years. The Decree allows for the permitted well to withdraw 0.29 acre-feet from the Denver aquifer for a total of 87 acre-feet over 300 years and the Decree and Augmentation Plan allows for an additional well to withdraw water from the Arapahoe aquifer for a maximum withdrawal of 0.50 acre-feet per year, for a total of 150 additional acre-feet over 300 years.

Based on the water demand of 0.72 acre-feet/year for Kettle Creek Estates Filing No. 2 and the Decree's allowable amount of 0.29 acre-feet per year for the permitted well on Lot 1 and up to 0.50 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 Kettle Creek Estates Filing No. 2.

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 #172655.

7. Basis. The County Attorney's Office reviewed the following documents in preparing this review: a *Water Resources Report* dated March 2024, the *Water Supply Information Summary*, the *State Engineer's Office Opinion* dated December 23, 2024, and Findings of Fact, Conclusions of Law, Ruling of the Referee and Judgment and Decree in Division 2 Case No. 2023CW3045 entered on December 3, 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 2023CW3045, specifically, that water withdrawn from the Arapahoe aquifer by the not yet constructed well shall not exceed 0.50 annual acre-feet, and the exempt well under permit no. 172655 shall not withdraw in excess of 0.29 annual 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. 2023CW3045.

Covenants shall address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve at least 132 acre-feet of Arapahoe aquifer water, 84 acre-feet of Denver aquifer water and 135 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. 2023CW3045 to satisfy El Paso County's 300-year water supply requirement for the 2 lots of the Kettle Creek Estates Filing No. 2. The Covenants shall further identify that 84 acre-feet of Denver aquifer water is allocated to Lot 1, and that 132 acre-feet (0.44 acre-feet/year) of Arapahoe aquifer water and 135 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 Arapahoe 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. 23CW3045 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 Arapahoe 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 in Division 2 Case No. 23CW3045 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 Kettle Creek Estates Filing No. 2 pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in Division 2 Case No. 23CW3045. 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. 23CW3045 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 Denver aquifer water in the decreed amount of 87 acre-feet for Lot 1 and Arapahoe aquifer water in the decreed amount of 150 acre-feet and Laramie-Fox Hills aquifer water in the decreed amount of 135 acre-feet for Lot 2. 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 Arapahoe, Denver and Laramie-Fox Hills aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Arapahoe, Denver 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 (Arapahoe and Denver aquifers): “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 Kettle Creek Estates Filing No. 2. 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. 2023CW3045 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: Ryan Howser, Project Manager, Planner