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July 19, 2023

VR-23-11 High Forest Estates Subdivision Filing No. 1

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 the High Forest Estates Subdivision Filing No. 1, a subdivision application by Paula Donohoo, Mardelle Frazier and Brian Frazier (“Applicants”) for a 2-lot subdivision on a parcel of 13.81 acres of land (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 of 13.81 acres into 2 residential lots is comprised of 0.30 acre-feet of indoor household use per home for a total of 0.60 acre-feet for the subdivision, irrigation of 1.06 acre-feet per lot for a total 2.12 acre-feet for the subdivision, and stock watering of 8 animals (0.06 acre-feet/year/head) for a total of 0.48 acre-feet for the subdivision, for a total annual demand of 1.60 acre-feet per lot or 3.20 acre-feet for the subdivision. Based on this total demand, Applicant must be able to provide a supply of 960 acre-feet of water (3.20 acre-feet per year x 300 years) to meet the County’s 300-year water supply requirement.

Proposed Water Supply

Applicants have provided for the source of water to derive from one or more individual on-lot wells¹ withdrawing from the not-nontributary Dawson aquifer as provided in Findings of Fact,

¹ Including Well Permit No. 79072-F which is required to be re-permitted pursuant to the Decree in 2020CW3077.

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Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077 (“Decree”). The Decree adjudicated the following water supply beneath Applicants’ property:

Aquifer	Amount Decreed (AF)	Annual amount (AF) (100-year allocation)	Annual amount (AF) (300-year allocation)
Dawson (NNT)	1230	12.3	4.1
Denver (NT)	910	9.1 AF	3.0
Arapahoe (NT)	630	6.3	2.1
Laramie-Fox Hills (NT)	380	3.8	1.26

The allowed annual amount of groundwater to be withdrawn from the Dawson aquifer by all wells operating under the augmentation plan approved as part of the Decree shall not exceed 3.2 acre-feet. While the Decree allows up to three (3) wells in the Dawson aquifer, Applicant intends to only apply for 2 to serve the proposed lots. The Decree allows for a proportionate allocation of the maximum withdrawal of 3.2 acre-feet of Dawson aquifer water if less than 3 lots are developed.²

The Decree approved an augmentation plan with a term of 300 years and requires that return flows from in-house use of groundwater shall occur through individual on-lot non-evaporative septic systems. Further, Applicants must reserve all of their decreed water in the nontributary Laramie-Fox Hills aquifer, and up to 610 acre-feet of water from the nontributary Arapahoe aquifer to replace any injurious post-pumping depletions.

State Engineer’s Office Opinion

4. In a letter dated May 22, 2023, the State Engineer stated that “[t]he proposed water source is individual on lot wells constructed in the Dawson aquifer operating pursuant to the decreed augmentation plan in consolidated case nos. 2020CW3077 (99CW143) (Division 1) and 2020CW3027 (99CW119) (Division 2). The allowed average annual amount of withdrawal shall not exceed 3.2 acre-feet per year for a maximum of 300 years.

Finally, the State Engineer provided their opinion, “. . . 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, provided well permit no. 79072-F is re-permitted to operate pursuant to the augmentation plan in case no. 2020CW3077.”

² As explained in the *Water Resources and Water Quality Report* dated November 29, 2022 and provided by the Applicant, the Decree assumed indoor household use of 0.25 acre-feet per residence in its augmentation plan. The Applicant, in order to meet El Paso County’s presumptive use value of 0.26 acre-feet per residence, allocated in its estimated water demand set forth in the WSIS 0.30 acre-feet per residence for indoor household use, and reduced the allocations for other uses accordingly.

Recommended Findings

5. Quantity and Dependability. Applicants' water demand for High Forest Estates Subdivision Filing No. 1 is 3.2 acre-feet per year for a total demand of 960 acre-feet for the subdivision for 300 years. The Decree, including the approved augmentation plan, allows for up to three wells limited to an annual withdrawal of 1.3 acre-feet for wells 1-2 and well number 3 may pump up to 0.6 acre-feet of water per year, or a maximum total of 3.2 acre-feet being withdrawn from the Dawson aquifer annually.

Based on the water demand of 3.2 acre-feet/year for the High Forest Estates Subdivision Filing No. 1 and the Decree approving withdrawals in that amount, the County Attorney's Office recommends a finding of sufficient water quantity and dependability for the High Forest Estates Subdivision Filing No. 1.

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 November 29, 2022, the *Water Supply Information Summary*, the State Engineer's Office Opinion dated May 22, 2023, Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077 dated February 25, 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077, specifically, that water withdrawn from the Dawson aquifer by each of the proposed wells permitted shall not exceed 3.2 acre-feet total. The allowed annual amount of groundwater to be withdrawn from each well is 1.3 acre-feet for wells 1-2 and well number 3 may pump up to 0.6 acre-feet of water per year (3.2 acre-feet total). 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 decrees and replacement plans for the property. For minor subdivisions such as this, 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077.

Covenants shall specifically address the following:

1) Identify the water rights associated with the property. The Covenants shall reserve 960 acre-feet of not-nontributary Dawson aquifer water, 380 acre-feet of nontributary Laramie-Fox Hills aquifer water, and 610 acre-feet of nontributary Arapahoe Aquifer water to satisfy El Paso County's 300-year water supply requirement for the 2 lots of the High Forest Estates Subdivision Filing No. 1. The Covenants shall further identify that 480 acre-feet (1.6 AF/year) of Dawson aquifer water, 190 acre-feet of Laramie-Fox Hills aquifer water, and 305 acre-feet of Arapahoe aquifer water is allocated to each lot in the subdivision.

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 and drilling Laramie-Fox Hills or Arapahoe 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 each lot in the subdivision have an occupied single-family dwelling 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077 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 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 Dawson, Laramie-Fox Hills and Arapahoe aquifers.

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 the High Forest Estates Subdivision Filing No. 1 pursuant to Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077. 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 a Decree from the 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.”

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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077 are also terminated by the 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 480 acre-feet (1.6 acre-feet annually), 190 acre-feet of Laramie-Fox Hills aquifer water, and 305 acre-feet of Arapahoe aquifer water per 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 replacement supply.

E. Applicant and its successors and assigns shall convey by recorded warranty deed these reserved Dawson, Laramie-Fox Hills, and Arapahoe aquifer water rights at the time of lot sales. Specifically, Applicant and future lot owners shall convey sufficient water rights in the Dawson, Laramie-Fox Hills, and Arapahoe aquifers underlying the respective lots to satisfy El Paso County's 300-year water supply requirement. Sufficient water rights are 480 acre-feet from the Dawson aquifer, 190 acre-feet from the Laramie-Fox Hills aquifer, and 305 acre-feet from the Arapahoe aquifer for each lot in the High Forest Estates Subdivision Filing No. 1.

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 High Forest Estates Subdivision Filing No. 1. 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 District Court Case No. 20CW3077 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 Findings of Fact, Conclusions of Law, Ruling of Referee and Decree in District Court Case No. 20CW3077, 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 upload into eDARP:
- 1) An updated Water Resources Report that corrects the tables on pp. 5-6 to reflect no more than 4 heads of livestock per lot.
 - 2) Proof that the well under Permit No. 79272-F has been re-permitted under Case No. 20CW3077.

cc: Ryan Howser, Project Manager, Planner