

BME POA Membership:

The Beaver Mountain Estates Board of Directors created a water committee with the goal to develop written recommendations to achieve sustainable, long-term, and reliable water system operations for our community. This committee is comprised of the following property/homeowners:

- Matt Dorsett
- Kevin Hendricks
- Ed Cannon
- Jeff Booth
- Sheri Howard

These individuals offer a variety of work experience backgrounds (engineering, real estate development, municipal water management, municipal water design, and BME water system operations) and viewpoints that will be beneficial towards solving our water system issues.

The committee has been meeting weekly since mid-January, discussing existing infrastructure and operations, water permitting, water rights, water usage, and water system governance. The goal is to issue a report presenting the committee's findings and recommendations to the association membership. Currently, the POA has contracted with two consultants to assist in preparing this report and developing recommendations for moving forward.

- Davis Engineering Service, Inc. in Alamosa has been contracted to create a hydraulic model of our water distribution network. This model will be used 1) to identify leak locations, to prioritize system repairs and preventative maintenance, 2) to establish future infrastructure needs and costs, and 3) to determine future system funding needs.
- Mirko Kruse with Kruse Law PLLC, a water rights attorney in Salida, has been retained to resolve the association's water rights and permitting issues. Attached you will find a memo from Kruse explaining the history and various options / paths to achieve compliance with the state of Colorado water division.

From an operational perspective, the committee has worked to ensure leaks are repaired in a timely fashion, has purchased supplies for an additional 1,000 linear feet of slip lining, and has ordered the meters and appurtenances necessary to install meters on all existing homes and homes under construction.

The committee aims to have transparent, regular, and accurate updates to the membership, and will be presenting a comprehensive update on efforts to date at the Annual Meeting on July 8th.

Regards,
BME POA Water Committee

To: Membership, Beaver Mountain Estates Home Owners Association
From: Mirko Kruse
Re: Water Rights Issues
Date: March 17, 2023

EXECUTIVE SUMMARY

Beaver Mountain Estates Home Owners Association (“BME”) has several substantial water issues. Most significantly, BME’s water system is physically set up to supply the 50 lots in BME Phase III even though doing so would violate the terms of BME’s well permits and water rights. Those homes in BME Phase III are at risk of being issued a cease and desist order from the Division Engineer that would shut off their water supply until a solution is reached.

The good news is that there are solutions available to BME. BME does own water rights that could serve all three phases of BME, they are just not currently legally allowed to do so, and alternatively BME has been in discussions with the San Luis Valley Water Conservancy District to provide the legal water supply BME needs. Both are good options but will undoubtedly require some time and effort to pursue.

MEMORANDUM

1. Background and History of BME Water Supply

A. Original BME Water System

Until BME entered into a merger agreement with Case Walker in 2007, BME’s water system was supplied from one primary well (Permit No. 57640-F) and a backup well (Permit No. 49806-F) into a 10,000 gallon holding tank on Lot 43. These wells were “augmented” (allowed to pump out-of-priority) from two separate augmentation certificates granted by the San Luis Valley Water Conservancy District (“SLVWCD”) and TMW, Inc., that were purchased and issued in the mid-1990’s. Combined, these augmentation certificates allow BME to pump 19.5 acre-feet per year and consumptively use 2.85 acre-feet per year from the 68 lots that comprise the BME Phase I and II developments.

B. Original Case Walker Water System

Case Walker's predecessor, Foothills Land & Investments LP, obtained an augmentation plan in Water Court Case No. 01CW24 that utilized its share of the Church Ditch water right to augment wells to be drilled for the 50 lots comprising that development (currently BME Phase III). The augmentation plan allocated 7.0 acre-feet per year of consumptive use to offset future well withdrawals in the subdivision.

The plan contemplated that Case Walker would drill individual wells to serve each lot or no more than one well to serve a cluster of up to eight lots. The plan also required that Case Walker construct an augmentation pond, to store water during the irrigation season from the Church Ditch water right so that the water could be released from the pond in the winter to replace winter-time depletions from the wells. It does not appear that Case Walker ever constructed this augmentation pond and to date only one well permit has been issued under this augmentation plan (Permit No. 61314). But that well has never provided a water supply to BME Phase III.

C. Merger with Case Walker

In 2004, Davis Engineering issued a memorandum outlining Case Walker's options for developing and completing its water system to the 50 lots located in BME Phase III. One of those options included integrating its water system with BME's water system that was already built out and functioning. Case Walker pursued this solution, entering into an interim agreement in 2004 with BME to integrate the two water systems once Case Walker completed its wells and portion of the water system. Then in 2007, BME and Case Walker entered into a permanent merger agreement under which Case Walker agreed to complete the projects necessary to provide a water supply that could serve the 50 lots in BME Phase III in exchange for BME taking over and managing the assets of that water system once completed and integrated into the BME water system.

Since at least 2011, there had been continuous delays and hurdles with Case Walker's efforts to develop and complete its water system, including lack of financing, water quality problems, and a general failure to find the legal and engineering solution needed to complete its water system. As evidenced in documents kept by BME, considerable efforts were made by BME to help finance and find the best solution to complete this portion of the water system.

In 2012, Case Walker and BME applied for a well permit, and drilled, a supplemental well located on BME Phases I and II. This well was originally intended to be the well that could eventually help serve BME Phase III, but was drilled on BME Phases I and II because of the water quality issues experienced from the existing (but inactive) well on BME Phase III. And because Case Walker had not completed the requirements of its augmentation plan in Case No. 01CW24, this well was permitted pursuant to BME's augmentation certificates from the SLVWCD and TMW, Inc. This well (Permit No. 76806-F) is currently inactive and has never been legally allowed to serve BME Phase III.

Unfortunately, the current situation is much as it has been for the past 20 years: there is no legal or physical supply of water available to BME Phase III, except what is being illegally supplied from BME's original water system.

Despite this, BME Phase III appears to be fully merged with BME Phases I and II. The original BME water system is physically connected to the water lines servicing the lots on BME Phase III.

D. Agreement with Crow's Nest Lots

In August of 2009, BME entered into an agreement with Foothills Land & Investments LP to provide water service to the three lots in the "Crow's Nest" (Lots 6A, 6B, and 6C), in exchange for Foothills conveying 0.5 acre-feet of its water rights from the Church Ditch to BME in addition to paying a tap fee and annual fees to BME for the water service. Under that agreement, Foothills was also required to pay for the cost of pressurizing BME's water system to allow it to serve the Crow's Nest lots.

My current understanding is that the Crow's Nest Lots do not have homes on them and are not currently requiring a water supply but that they could in the future.

E. Current BME Water Rights and Water System

Currently, BME owns or holds a contractual interest in the following water rights:

- 7.0 acre-feet of consumptive use from the Church Ditch water right, as described in Case No. 01CW24 and as conveyed by Quit Claim Deed from Case Walker to BME in September of 2022.
- 0.5 acre-feet of consumptive use from the Church Ditch water right, as described in Case No. 01CW24 and as conveyed from Foothills Land & Investments LP to BME in August of 2009.
- 1.365 acre-feet of consumptive use by virtue of Augmentation Certificate No. 248, issued by the San Luis Valley Water Conservancy District on August 18, 1997.
- 1.485 acre-feet of consumptive use by virtue of Augmentation Certificate No. 200, issued by TMW, Inc on March 31, 1995.
- Five wells and well permits (Permit Nos. 76806-F, 57640-F, 49805-F, 49806-F, and 61314-F). Permit No. 61314-F was originally drilled by Case Walker and is still listed as owned by Case Walker according to the records of the Division Engineer.

2. Current Water Rights Issues

A. Non-compliant Augmentation Sources

Currently, BME's water system is not in compliance with the augmentation certificates issued to BME from the SLWCD and TMW, Inc. Those certificates only augment BME's water system to the extent that it supplies the original 68 lots in BME Phases I and II. They do not allow—nor would there be enough physical augmentation supply—to supply service to the 50 lots in BME Phase III or Crow's Nest lots. My understanding is that there are currently five lots in BME Phase III that have a home on them and are being served from BME's water system. There is also three more homes expected to be constructed in BME Phase III this coming summer.

Conversely, the augmentation plan decreed in Case No. 01CW24 and Church Ditch water right—previously owned by Case Walker—cannot legally serve the 68 lots in BME Phases I and II. It can only legally serve the 50 lots in BME Phase III under the conditions of that plan and water right.

B. Non-compliant Well Permits

Well permits are issued pursuant to the augmentation plans/sources that allow them to pump out-of-priority. This includes BME's primary operating well, Permit No. 57640-F, that is only permitted to supply water to the 68 lots in BME Phases I and II (because its corresponding augmentation supplies only allow service to those lots). Therefore, to the extent that BME's water system supplies water to the one home in BME Phase III, that use is not strictly allowed under BME's well permit. Nor could that well supply water to the Crow's Nest lots.

C. Over Use

Currently, BME's water system is allowed to pump 19.5 acre-feet per year and consumptively use 2.85 acre-feet per year for the 68 lots comprising BME Phases I and II. That is only an allocation of 0.287 acre-feet per lot per year, which includes uses for not only in-home uses but also for some outdoor irrigation. One standard rule-of-thumb is to allocate at least 0.333 acre-feet per home to serve in-home uses only. Therefore, it appears that BME's water system was planned for a more seasonal community or a community with less demand.

BME's experience has not aligned with these expectations, however. As early as January of 2006, then-water commissioner Perry Alsaugh issued a courtesy letter to BME warning that it was over pumping and over-using its augmentation supply. He noted that although BME was not near its full build out, its water system was nearing its legal limits and that this issue would need to be addressed in the future.

My understanding is that this pattern has continued, and BME has pumped its water supply at near capacity even though it is not fully built out.

In addition, BME has connected its existing water supply now with water lines that could serve an additional 50 lots. It is clear that BME cannot rely alone on its current system's water allocation to serve all of BME Phases I, II, and III.

3. Potential Solutions for Augmentation Issue

There are at least two options available to BME to obtain a legal augmentation supply that can serve all three phases of BME and allow the water system to be fully integrated: (A) an agreement with the SLVWD to have the SLVWCD cover BME's wells under its augmentation plan, or (B) to amend BME's Church Ditch water right and augmentation plan in 01CW24 to cover all of BME's three phases and to develop the augmentation pond or find alternate storage for BME's augmentation water that is required under the conditions of that plan.

A. Agreement with San Luis Valley Water Conservancy District

Dee Greeman has been assisting BME over the past several years with obtaining an additional augmentation supply through coverage from the SLVWCD. BME already has some augmentation from the SLVWCD through Augmentation Certificate No. 248 for 1.365 acre-feet of consumptive use.

Based on a conversation I recently had with SLVWCD's attorney, Tod Smith, the basic structure of a deal would be for BME to convey its 7.5 acre-feet of the Church Ditch water right to the SLVWCD in exchange for the SLVWCD issuing a new augmentation certificate to BME in a like amount. This augmentation certificate, in addition to amending BME's existing augmentation certificate, would cover BME's water system for all three phases. BME would be required to continue to pay annual administration fees to the SLVWCD for its operation of its augmentation plan.

Negotiations had stalled recently with the SLVWCD to complete this deal because SLVWCD's attorney had certain concerns with BME's Church Ditch water right. Based on my recent conversation with Tod Smith, I believe these concerns can be addressed and progress made.

Along with Tod Smith, I will be meeting with representatives from the Division Engineer's office within the next several weeks to discuss the structure of this plan and whether that office has any concerns of its own. Either way I will be working with Tod Smith to move forward with this deal and plan for obtaining an augmentation supply for BME.

B. Amendment of BME's Augmentation Plans

If a deal with the SLVWCD cannot be worked out, another potential option is to augment the Phase III lots pursuant to BME's own water rights from the Church Ditch and augmentation plan in Case No. 01CW24. This option would require building out the augmentation pond required in the terms of the decree in Case No. 01CW24 or finding other augmentation storage on the South Fork of the Rio Grande River. In addition, to fully integrate the water system to

serve all three phases of BME, the augmentation plan in 01CW24 would need to be amended so that the Church Ditch water right can augment not only Phase III, but also Phases I and II lots.

Conversely, BME's augmentation certificates from the SLVWCD and TMW, Inc. would need to be amended so that they can serve Phase III lots as well.

4. Potential Solution for Well Permit Issue

Once the augmentation supplies are obtained and/or amended so that they can serve the lots in all three phases of BME, then obtaining the necessary well permits should not be difficult. It will simply be a matter of filing an application with the Division of Water Resources to re-permit BME's wells under the new augmentation supplies.

5. Potential Solution for Over Pumping Issue

BME's over pumping issue will only be solved by obtaining additional supplies or restricting uses.

BME may be able to obtain an additional augmentation supply if it acquires additional augmentation water owned by Case Walker. The Church Ditch water right was adjudicated in Case No. 01CW24 in an amount of 7.0 acre-feet per year of consumptive use to serve the 50 lots in BME Phase III. That amount of consumptive use has already been conveyed to BME.

The Church Ditch water right was also adjudicated for an additional 6.62 acre-feet of consumptive use, however, to augment any lots within one mile of the South Fork of the Rio Grande River upstream or adjacent to BME Phase III. It is my understanding that Case Walker still owns this portion of the Church Ditch water right and there may be some or all of this water available as an additional augmentation supply if BME would want to consider acquiring this water from Case Walker.

If this additional water is not acquired or available, the SLVWCD may be amenable to increasing its augmentation supply to BME without BME exchanging an additional source. This could be the subject of negotiation with SLVWCD if BME desires additional augmentation.

Otherwise, BME may need to consider additional rules and regulations aimed at measuring and restricting its members' water usage, especially as additional homes are constructed in the future.

Sincerely,



Mirko L. Kruse
Kruse Law PLLC