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Via Email

Board of Directors
Sopris Village Home Owners Association

Re: Sopris Village HOA Water Rights

Dear Board of Directors,

The Sopris Village Home Owners Association (“HOA”) provides a potable water supply to 130 homes. It is my understanding that much of the infrastructure was installed in the late 1970’s, portions of which may need to be replaced in the near future. You have asked for an analysis of the HOA’s existing water rights including a valuation of the water rights. This letter first provides a brief overview on Colorado water law to help frame the issues for you.

Colorado Water Law

Colorado follows the prior appropriation system of water law. Under this system, the earliest user of water has the greatest right to its use. The priority system developed before statehood through the customs of the mining industry. Miners relied upon water for milling and sluicing uses, and frequently diverted it great distances from the source for later use. The “first in time, first in right” system developed to protect the interest of these early miners and later irrigators, who made considerable investments to deliver the water from its source to distant places of use. It works to by prevent new “junior” water users from installing diversion works upstream and depleting the “senior” water users’ claim.

The mechanism developed to protect the earliest users (“seniors”) is the date of appropriation. This is the date on which the “first step” toward use of the water is taken by the appropriator. Historically, this was the date when someone started digging a ditch or constructing a pond or reservoir. To bring order to the appropriation system, courts began issuing decrees recognizing these appropriation dates.

Under the prior appropriation system, in times of shortage, seniors can demand that juniors completely cease to use the water until the seniors’ rights are satisfied. This right to divert and use water subject only to the earlier rights of others is incorporated into the Colorado Constitution. COLO. CONST., Art. XVI, Sec. 5.

The appropriation system has continued to develop to include both a judicial process, where water rights are recognized by court decree, and an administrative process for apportioning water rights between users on the stream. This administrative process is entrusted to the Colorado Division of Water Resources, headed by the State Engineer. This agency is divided into seven divisions based upon the various stream systems. Your property is located in Division 5, which consists primarily of the Colorado River basin and its tributaries.

Administration of water rights is complex. It varies between stream systems and is highly dependent on weather conditions and available storage. Legal mechanisms have developed that allow for new, junior appropriations to divert during periods of drought. These include court decreed plans for augmentation or changes of water rights to add new or additional uses. Also, there are governmental entities that supply augmentation water to replace out of priority depletions from sources owned or contracted for by the government from the various reservoirs. One such entity serving the Roaring Fork Valley is the Basalt Water Conservancy District.

Colorado considers nearly all water to be tributary to the stream.¹ Water pumped from a well is generally treated as tributary to the river and is therefore administered within the priority system. There are additional regulations that apply to obtain a well permit prior to drilling a well, but the appropriation system still applies and wells may be curtailed or administered in times of drought if the depletions from the well are not replaced through a court decreed augmentation plan.

Colorado also distinguishes between conditional and absolute water rights. A conditional water right is one for which the first step toward an appropriation has been taken but for which has not been applied to beneficial use. For example, a ditch may be laid out on a map, but water has not yet been diverted and used to irrigate a field. A conditional water right is an “inchoate” right. That means that it is only partial and subject to being taken away if the owner fails to complete the appropriation.

A conditional water right becomes absolute once it has been put to use for its decreed purposes. Upon proof to the water court that the conditional right has become absolute, the court will recognize the absolute status of the water right through entry of a decree. An absolute water right is final and permanently vested. It can only be taken away by a subsequent court decree abandoning the right.

A water right is considered a property right and is conveyed like real estate. It entitles the owner of that right to put that water to beneficial use, without waste, in the amount and for the purposes to which it is decreed. In other words, because water is a public resource, an appropriator is only entitled to divert what is reasonably necessary for the identified use – the

¹ There are exceptions for water that is determined to be “non-tributary”, such as water found in the Denver Basin aquifers where different rules apply. However, in the Roaring Fork Valley, all water is presumed to be tributary.

“duty of water.” For example, a standard duty of water is that one cfs is necessary to irrigate 40 acres of land. However, the court may modify this standard duty as indicated in a decree.

A water right is tied, or appurtenant, to the land on which it is used. However, because it is a property right, it may also be sold separate from the land to which it was initially decreed. Water rights may also be changed to a new use or used elsewhere pursuant to a decree recognizing the new uses.

Water rights have implied as well as express limitations on the amount that may divert or be used. The implicit limitations ripen over time and constitute the “historical use” of a water right. A water right that is changed is limited in the future at its new point of diversion or place of use pursuant to its historical use. Thus, a water right decreed for 10 cfs that only historically diverted 5 cfs, could not be moved to a new location and divert the full 10 cfs.

Water is measured in many ways. Some common forms are in cubic feet per second (“cfs”) and acre feet (“af”). One cfs equals 449 gallons per minute. An acre foot is the amount of water necessary to cover an acre in one foot of water, or 325,851 gallons.

Sopris Village HOA Water Rights

The HOA owns several water rights as follows:

Sopris Village Well No. 1 – Decreed in case No. W-2413 in the amount of 0.22 cfs (100 gpm), conditional, for domestic, municipal and irrigation purposes with an appropriation date of February 19, 1974. This water right was subsequently made absolute in Case No. 79CW41.

Sopris Village Well No. 2 – Decreed in Case No. W-3594 in the amount of 0.22 cfs (100 gpm), conditional, for domestic, municipal and irrigation purposes with an appropriation date of February 19, 1974. This water right was subsequently made absolute in Case No. 82CW0244.

Robinson Ditch – The HOA’s predecessor changed portions of the Robinson Ditch water right to allow it to divert at the Sopris Village Wells No. 1 and No. 2 in Case W-3593 as alternate points of diversion for the water right. The amount changed is a total of 0.5 cfs with total diversions not to exceed 300 acre feet per year for irrigation domestic and municipal purposes, which diversions may only occur during the historical irrigation season. The priority changed include:

- Original filing, Priority 38, appropriation date of June 15, 1882, amount of 0.062 cfs, absolute;
- First Enlargement, Priority 140, appropriation date of April 15, 1886, amount of 0.031 cfs, absolute;
- Second Enlargement, Priority 167, appropriation date of November 15, 1886, amount 0.025 cfs, absolute;

- Morrison Enlargement & Extension, Priority 212c, appropriation date of April 25, 1899, amount 0.133 cfs, absolute; and
- Fourth Enlargement, Priority 326, appropriation date of April 20, 1900, amount 0.249 cfs, absolute.

The HOA's water rights decreed to the Sopris Village Wells No. 1 and No. 2 are somewhat "junior" in the priority system. In times of drought, these wells could be curtailed as the depletions from the wells would deprive senior rights of their water. These water rights generally consist of a group of water rights known as the "Cameo Call" that divert near Grand Junction during the summer months. However, the irrigation, domestic and municipal uses are provided from the changed rights in the Robinson Ditch, which right is senior to the Cameo Call. Thus, it is the Robinson Ditch rights that supply water during the summer months. As a result, when there is a call, the wells are allowed to continue to divert. There has not historically been a call in the non-irrigation season that would affect the priority of the wells.

The historical use of the HOA's interest in the Robinson Ditch rights were quantified and determined in Case W-3593. That court decree moved the Robinson Ditch rights to the two wells. The decree determined that 0.5 cfs historically irrigated the lands upon which the subdivision would be located. It provided an average of 300 acre feet per year of water for irrigation, of which 65 acre feet were consumptively used.

The water right that the HOA owns in the Robinson Ditch that could be moved, changed, sold, or applied to a different use is the 65 acre feet per year of consumptive use credits. The total 300 acre feet of diversions is the amount that was removed from the stream and 235 acre feet of that water then returned and could not be re-used or put to an additional use. Thus, it could not be put to another use, unless that use is deemed to be non-consumptive such as in generating hydropower. Because the 235 acre feet is not consumable but must be left in the river it has limited value.

The water right that does have value is the 65 acre feet. Determining its value is difficult. There is not much of a market for water rights in the mid-valley area around Basalt and El Jebel. There is a governmental entity, the Basalt Water Conservancy District ("BWCD"), that leases water on an annual basis from Ruedi Reservoir. Annual costs are between \$69 per acre foot for agricultural use and \$326 per acre foot for industrial use, which is adjusted annually. Current residential rate is \$198 per acre foot plus \$20 per developed unit. Depending upon lot sizes, one acre foot could be used to replace depletions for 1-3 homes.

The two well water rights have limited value other than to the HOA. The rights that could be conveyed would be limited to the historical use of those wells. This would be the amount consumed, which for domestic uses is typically only 5% of what is diverted. And because the Robinson Ditch rights are used in the summer months, the well rights would be limited to non-irrigation season depletions. A water rights engineer would need to be consulted on developing the historical use of these rights.

Furthermore, Well No. 2 has not been in use for some time. A water right can be abandoned through prolonged periods of non-use. The law creates a rebuttable presumption that a water right is deemed to be abandoned after 10 years of non-use. The abandonment process is initiated by the Division Engineer in the water court every 10 years, the next cycle is to begin in 2020. Continued non-use of this well raises the potential that it could be subject to abandonment by the water court.

I have reviewed the analysis from Corona Water Law and his cost approach to value the 65 acre feet and generally concur with that determination of a value of approximately \$180,000 for the 65 acre feet. However, there is not a demand for water in the Roaring Fork Valley or in the Colorado River Basin that could not otherwise be served by a BWCD contract or contract from other governmental raw water supplier.² One of these Districts may be interested in acquiring additional water, however, my understanding is that they have more supply than demand presently.

It is also unlikely that the HOA could trade its rights for service by another water supplier. Typically, municipal water suppliers will require: 1) a dedication of water rights necessary to serve a proposed development; 2) payment for the costs necessary to extend service from existing lines to the development; and 3) a tap fee representative of the individual lot owner's interest in the overall water treatment infrastructure.

Another method to determine the value of these rights is to consider the decrease in property values to the homes if you were to sell the water. This analysis, however, is not the value of the water right, but the increased value of each home by having irrigated lawns and landscaping. The HOA may wish to consult with a realtor about the potential decrease in property values by eliminating outdoor irrigation. My suspicion is that the decrease in property values would greatly exceed the amount the HOA could realize from a sale.

Potential Next Steps

The HOA has identified a number of options to replace its aging infrastructure these are discussed in turn.

Repair as needed by HOA. This option could result in the least near-term impact. The HOA presently has a legal water supply and it would not result in immediate capital outlay. While the average life of certain components is nearing their end, it is unlikely that the entire system will need to be replaced all at once. Rather, it is more likely that individual components will fail requiring a piecemeal approach to the overall repair. This option could result in damage to individual properties waiting for failure rather than a pro-active replacement, with potential liability to the HOA if its lines cause damage. Also, many water lines are in the back yards of the members and portions are covered by vegetation such as trees that would increase

² Other raw water providers include the West Divide Water Conservancy District, Ute Water Conservancy District, and Colorado River Water Conservation District with their own supplies.

the expense in the event of a break. The water lines are in hard to access locations, and the bit by bit approach does not solve the concern of putting lines in the road rights of way.

Form a special district to pay for repairs. A special district could bond for the project allowing the costs of the replacement program to be spread out over time through payment of property taxes. However, creating a special district has the additional costs of consultants to do the requisite studies and obtain court approval and affirmative vote of the membership. Also, this process requires a resolution from the county authorizing the creation. The formation of multiple special districts is not favored, with the preference towards the centralization of services. The fact that the HOA is currently served by the Mid-Valley Metro District for sewer service and is in the service area for potable water would create competing metro districts contrary to the goal of providing centralized service. Creating a new special district would be politically very difficult.

Request water from the Mid-Valley District. The Mid-Valley District would provide another entity other than the HOA that would be responsible for the maintenance and operation of the HOA's water system. It is likely that connection to that district would require the HOA to pay for the costs of construction for the additional water lines to Mid-Valley's specifications. The HOA members would also likely be required to pay tap fees to connect to that system as well as dedicate water rights and adjudicate a change of water rights to move its water rights to the Mid-Valley wells. There is a statutory process that would allow the Mid-Valley District to create a special sub-district for the HOA that could then borrow for the costs of the infrastructure to be paid back over time through an increased property tax or other mechanism.

Please contact me if you have any questions.

Sincerely,

Scott Grosscup