Policy 2011-1 (AMENDED)

CONCERNING THE EVALUATION OF NEW DIVISIONS OF LAND BY SUBDIVISION, SUBDIVISION EXEMPTION, AND CLUSTER DEVELOPMENT WHEN CONSIDERING PROPOSALS FOR WATER SUPPLY FROM PROPOSED WELLS OR EXISTING WELLS

Objective

The objective of this policy is to give guidance for the evaluation of wells used as a water supply in a new subdivision, as defined in Section 30-28-101(10)(a), C.R.S. ("Subdivision") This policy also revokes the following policies:

- The January 3, 1985 policy whose subject was the "Combination of smaller parcels to qualify for "Domestic" use under CRS 37-92-602(3)(b)(II)",
- POLICY MEMORANDUM 93-5, dated February 14, 1994, that addresses the situation "In Over-Appropriated Basins - Expanding the use of a Pre-May 8, 1972 well on an intact Pre-June 1, 1972[1] Lot of Less Than 35 acres - to Add a Water Supply for one Single Family Dwelling",
- Policy 95-7, dated December 28, 1995, whose subject was "Subdivision Water Supply Plan Review", along with that policy's Descriptive Clarification A dated April 18, 2000, and
- Continued revocation of the March 1, 1988 MEMORANDUM that had been previously revoked by Policy 95-7

In addition, this policy will clarify the State Engineer's position on the validity of an existing well located on a parcel of land when providing comments to county planning departments for subdivision exemptions or cluster developments that involve that parcel.

[1] When a lot is described as being "pre" or "post-June 1 , 1972", that date is a reference to the effective date of SB72-35, that is, the date on which certain county requirements regarding subdivision water supplies became effective (30-28-133). Note that 30-28-133(1) allowed counties until September 1, 1972 to adopt and enforce such regulations. Therefore, in many counties, a parcel created after June 1, 1972 but before September 1, 1972 may qualify as a "pre-June 1, 1972 parcel" if the county adopted and enforced the regulations after the parcel's creation date but on or prior to September 1, 1972. If a county did not adopt and enforce regulations until after September 1, 1972, all parcels created after June 1, 1972 are "post-June 1, 1972" parcels.

Policy

1. Divisions of land by subdivision and the effect of 37-92-602(3)(b)(III)

Any well, existing or proposed, that will be located in a Subdivision that results in the creation of one or more new parcels will be subject to an evaluation of whether the well will cause material injury. This evaluation for material injury does not extend to Subdivisions that the county requires of a landowner for the sole purpose of "legalizing" a parcel that has been in existence since June 1, 1972 nor does it apply to subdivisions for which the State Engineer has already provided comment to the county and the county has not requested new comments.

If the well is in an over-appropriated basin and in a tributary source, or a not nontributary source in the Denver Basin, it shall be presumed to cause injury unless the well meets the requirements of subsection 37-92-602(3)(b)(IV).[2] In such a case, an assessment that the subdivision's proposed water supply will not cause material injury can only be allowed if the proposed well is part of a court-approved augmentation plan and can be issued a well permit under such a plan. Note that, as stated in Policy 2003-2, the State Engineer will not approve substitute water supply plans for wells in new Subdivisions.

2. Existing well on divisions of land by subdivision exemption or creation of cluster development

Through a separate memo, dated March 11, 2011, the State Engineer has encouraged county planners to forward land use actions to the State Engineer's Office for comment in any case where the county is presented with a proposal to split a parcel of land when the parcel has an existing well or a permit issued for the construction of a well. In the event that the land division results in the well being located on a parcel that is smaller than the parcel that was considered when issuing the original well permit, unless the well qualifies for the exemption in 37-92-602(3)(b)(IV)[2], the SEO will request that the county not complete the land use action until the applicant has obtained a receipt for submission of an application to re-permit the well consistent with the law as it applies to the size of the parcel that it will be located on. Further, any requirement to re-permit a well should be plainly visible on the plat such that the current owner and any prospective buyer will be aware of the requirement.

When the water supply relies on the existing well exception in 37-92-602(3)(b)(IV), the SEO will request that the county make plainly visible on the plat that no additional exempt well permits would be allowed to be constructed on the land area encumbered by the acreage description of the existing well, along with a description of which proposed lots are affected by that encumbrance.

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[2] SB20-155 modified section 37-92-602, adding subsection (3)(b)(IV) which describes that for an existing well "permitted under the presumption set forth in subsection (3)(b)(II)(A) of this section, the presumption is not lost if" several conditions are met. Importantly, the well may only be used on a single parcel of the divided land.

Background

1. Divisions of land by subdivision and the effect of 37-92-602(3)(b)(III)

The State Engineer's Office receives Subdivision water supply plans from county planning departments for review to provide “an opinion regarding material injury likely to occur to decreed water rights by virtue of diversion of water necessary or proposed to be used to supply the proposed Subdivision and adequacy of proposed water supply to meet requirements of the proposed Subdivision” as required under Section 30-28-136(h)(I), C.R.S. Often that review includes consideration of existing wells on the property and wells proposed to be permitted after the Subdivision is complete. Section 37-92-602(3)(b)(II)(A) allows the permitting of wells for residential uses with a presumption of no material injury. Therefore, it would appear that a Subdivision's water supply could be provided by exempt wells issued pursuant to 37-92-602(3)(b)(II)(A) based on a presumption that none of the wells would cause material injury.

To prevent such an outcome, as a result of the General assembly enacting SB7 in 1975, 37-92-602(3)(b)(III) states the following:

> "(III) If the (permit) application is for a well, as defined in subparagraph (II) of this paragraph (b), which will be located in a subdivision, as defined in section 30-28-101(10), C.R.S., and approved on or after June 1, 1972, pursuant to article 28 of title 30, C.R.S., for which the water supply plan has not been recommended for approval by the state engineer, the cumulative effect of all such wells in the subdivision shall be considered in determining material injury."

The plain language of this provision in the statutes applies only to consideration of an “application” for a well, not consideration of an existing well. The plain language also requires consideration of the “cumulative effect of all such wells” when determining injury. These statements have led to questions of whether an existing well, for which no permit application is required, should also be subject to the cumulative effect consideration, regardless of when and how it was permitted. Also, use of the term “cumulative effect” raises the question of whether there is a certain number of wells, or a certain volume of depletion that results from the cumulative pumping of all wells that will cross a threshold and be considered injurious. The result of these questions has been difficult and often inconsistent analysis of water supply plans that propose the use of a limited number of new or existing wells.

The Division of Water Resources' documentation on exempt well permitting suggests a straightforward implementation of 37-92-602(3)(b)(III). In 1972 HB-1042 created the statutory "presumption that there will not be material injury from exempt wells that would be used "solely for ordinary household purposes inside a single-family dwelling" and for wells on "a tract of land of 35 acres or more;" This allowance gave landowners the ability to use a well for a water supply for their residence without an analysis of injury that would otherwise

have been required pursuant to 37-92-602(3)(b)(I) [at the time, this statute was 148-21-45(3)(b)(I)].

During the same year, SB-35 was enacted. This legislation required the State Engineer to give an opinion to county planning departments regarding water supplies for new Subdivisions, including Subdivisions that would use wells. Then, during 1975, SB-7 enacted the new provision found in 37-92-602(3)(b)(III). Given this sequence of new legislation, it is reasonable to conclude that the objective of 37-92-602(3)(b)(III) was to prevent continued, large-scale subdivision of land into numerous parcels, each of which would qualify for an exempt household use only well under the presumption of no injury. Since Colorado water law did not - and does not now - recognize a de minimis amount for the purposes of determining injury, it is reasonable to conclude that 37-92-602(3)(b)(III) would apply to the cumulative effect that occurred from one well as much as from 100 wells. From this, the intent of 37-92-602(3)(b)(III) is that post-SB-35 parcels, that is, those created after June 1, 1972 according to the provisions of 30-28-133, can obtain a water supply only from wells that do not cause injury; no presumption of no injury would apply. This disallows the use of a well that could otherwise have been permitted according to the presumption of no injury and it also requires that any new or existing well (including pre-May 8, 1972 wells) that would be used in the subdivision, be evaluated according.to 37-92-602(3)(b)(I) to determine whether that well will cause injury.

Therefore, all wells, except existing wells meeting the requirements of 37-92-602(3)(b)(IV), proposed as the water supply in a Subdivision must be evaluated to determine whether they cause injury, without the allowance of the presumption of non-injury found in 37-92-602(3)(b)(II)(A).

2. Existing well on divisions of land by subdivision exemption or creation of cluster development

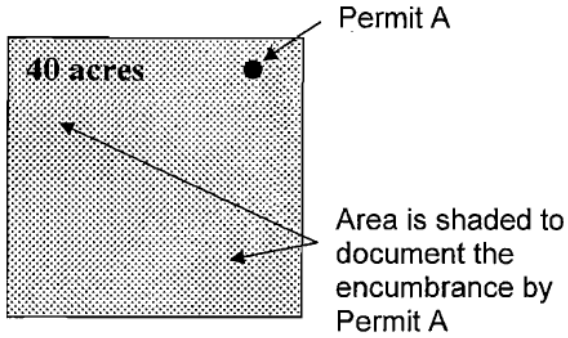
Many counties routinely allow parcels of land to be divided under limited conditions with an exemption from the statutory subdivision process identified in 30-28-133 ("Subdivision Exemption"). A division of land by Subdivision Exemption that involves a parcel that is 35 acres or larger, when that parcel has an existing well permit whose issuance is premised on the parcel being 35 acres or larger, has potential to create a conflict between the continued legal operation of the existing well on one of the newly-created parcels and the evaluation of a new well permit for another of the newly-created parcels.

A simple example is the scenario where a landowner owns a square 40-acre parcel. According to 37-92-602(3)(b)(II)(A), because the parcel is larger than 35 acres, the landowner may acquire a well permit (“Permit A”) for use in up to three single-family dwellings, irrigation of one acre of lawn and garden, domestic animal watering, and pasture livestock watering. One requirement is that it be the only exempt well permit on the parcel. In granting such a permit, the State Engineer's Office (SEO) will document that the 40-acre

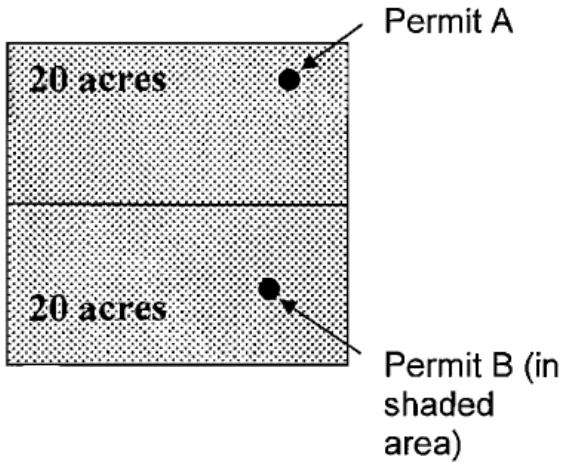
parcel has been considered in issuing a well permit and that no other exempt well permit may be issued on that land, nor may that land be considered as the basis for the issuance of another exempt permit.

If that same landowner splits that parcel through a Subdivision Exemption and the well is located on a newly-created parcel of smaller than 35 acres, it would appear that the original basis for the issuance of Permit A is no longer valid due to the fact that the well is no longer located on a "parcel" of 35 acres. If that situation is not corrected, an application for an exempt well permit on another of the newly-created parcels ("Permit B"), would appear to invalidate one of the conditions for the issuance of Permit A, that is, the original well would no longer be the only well on the original 40 acres.

Before the split



After the split



If the land split takes place without reconciling the issue at that time, the unavoidable outcome in this scenario is that at a later date, the SEO must do one of the following:

1. Allow Permit A to stay in effect and deny Permit B,
2. Allow Permit A to stay in effect and issue Permit B, resulting in a violation of Permit A's conditions of approval,
3. Revoke Permit A and issue Permit B, resulting in a requirement that Permit A be reissued with its allowed uses being reduced to household purposes inside a single family dwelling with no outside uses allowed.

None of the alternatives is desirable from a legal or administrative perspective. This same scenario may also occur when the original parcel is smaller than 35 acres. Therefore, for a division of land that results in a well being located on a parcel that is smaller than the parcel that was considered when issuing the original well permit, the State Engineer's Office will recommend that the county require that, as a condition of approving the land division,

the existing well owner re-permit the well consistent with current law as it applies to the newly created parcel on which the well is located. This eliminates the possibility of sharing a tributary well between newly-created parcels using an existing well's ability to serve more than one single family dwelling, since a new well permit on a parcel of less than 35 acres will be limited to inside uses only in just one single-family dwelling.

The exception to this approach is when Permit A and the water supply for the other parcel encumbered by Permit A meet the requirements of 37-92-602(3)(b)(IV). In this situation Permit A is the only well on a tract of land of thirty-five acres or more and the other parcel has a water supply that is not an exempt well, such as a municipal water tap or a non-exempt well.

Approval

This policy may only be modified or revoked in writing by the State Engineer. This policy was originally approved on March 11, 2011. It was modified to reflect the statutory changes in SB20-155.

Approved this 24th day of March 2021.

Kevin G. Rein, P.E.
State Engineer/Director