



Guideline 2019-2

LATE SUBDIVISION LETTER PROCESS

Objective

Document the process the Division of Water Resources (DWR) follows when it encounters a post-Senate Bill 35 subdivision¹ outside the Designated Basins, without an approved subdivision water supply plan (referred to as a “**No Referral Subdivision**” in this guideline).

Introduction

For proposed subdivisions of land as defined in section 30-28-101(10)(a), C.R.S., a water supply plan must be developed and that plan referred by the county “to the state engineer for an opinion regarding material injury likely to occur to decreed water rights”². The State Engineer provides that opinion in the form of a “**Subdivision Letter**”. When the proposed water supply is from tributary wells, the status of the stream system at the location of the proposed subdivision is a factor in determining if material injury will occur. If the stream system is over-appropriated³ at the location of a proposed subdivision, the Subdivision Letter would offer the opinion that the cumulative effect of all tributary wells within the boundaries of the subdivision would cause material injury and that a plan for augmentation would be required to replace out-of-priority depletions caused by the operation of the wells. However, if water is available for appropriation (i.e., the stream system is not over-appropriated), it is likely the Subdivision Letter would find that a water supply from individual on-lot wells that are exempt from administration within Colorado’s water rights priority system (exempt well permits) would not cause material injury. Even after certain conditions change, such as a basin becoming over-appropriated after the county’s final approval of the subdivision, DWR honors the opinion expressed in the Subdivision Letter written at the time the subdivision was approved and relies on that opinion to continue to issue well permits within the subdivision.

Throughout the state there are multiple No Referral Subdivisions where it appears the State Engineer did not receive a referral to review the proposed water supply plan, no record of such a review is available, and there is no Subdivision Letter. In over-appropriated stream

¹ When a subdivision is described as being “pre-” or “post-Senate Bill 35”, this is a reference to Senate Bill 1972-35, which required counties to adopt and enforce subdivision regulations (see section 30-28-133). Note that section 30-28-133(1) allowed counties until September 1, 1972 to adopt and enforce such regulations. Therefore, in some counties, a subdivision or parcel created after June 1, 1972 but before September 1, 1972 may qualify as a “pre-SB-35 subdivision or parcel” if the county adopted and enforced the regulations after the creation date of the subdivision or parcel, but on or prior to September 1, 1972. If a county did not adopt and enforce regulations until after September 1, 1972, DWR generally considers subdivisions or parcels created after June 1, 1972 as “post-SB-35 subdivisions or parcels”. For subdivisions created during the period the county was developing regulations, DWR will defer to the county for a determination of the “pre-” or “post-Senate Bill 35” status of the subdivision.

² referral process required in section 30-28-136(h)(l)

³ This term and basic information about the prior appropriation system of water rights are included in the Background section.



systems DWR will not issue exempt well permits for lots in post-Senate Bill 35 subdivisions without a Subdivision Letter.

Guideline

DWR will issue a “Late Subdivision Letter” at the time DWR is made aware of the No Referral Subdivision. The Late Subdivision Letter will consider what the opinion would have been at the time of subdivision platting based on the appropriation status of the stream at that time in accordance with the five potential subdivision cases described in the table below. These categories were first established in a letter from the State Engineer to Routt County dated February 1, 2018. The Late Subdivision Letter will consider subdivision platting dates and stream over-appropriation dates. If appropriate, well permits will be issued based on that Late Subdivision Letter. When DWR staff issue a Late Subdivision Letter they will follow the current subdivision letter documentation process including adding the subdivision to the database, mapping the boundaries, and adding all county and DWR supporting documents to DWR’s subdivision files.

POST SENATE BILL 35 SUBDIVISIONS WITHOUT AN EXISTING SUBDIVISION LETTER Please see important notes included below table					
Subdivision Cases	A1	A2	A3	A4	A5
Over-appropriated, but approved before over-appropriation	✓	✓			
Over-appropriated and approved after over-appropriation			✓		
Not over-appropriated				✓	✓
In water provider service area		✓	✓		✓
Not in water provider service area	✓			✓	
Case A1: Subdivisions approved by the county <u>prior</u> to the determination that the stream system is over-appropriated, not located within a water provider service area					
The State Engineer will assume that the intent for the water supply for the lots at the time of County approval was individual on-lot wells limited to ordinary household purposes inside one single family dwelling, operating under <u>exempt</u> well permits issued pursuant to section 37-92-602(3)(b)(I).					
Case A2: Subdivisions approved by the county <u>prior</u> to the determination that the stream system is over-appropriated and located within a water provider service area					
As directed by section 37-92-602(6), lots that can obtain water service through a central water system generally do not qualify for an exempt well because another water supply is available to serve the lot. Without subdivision water supply plans describing the details of proposed water provider systems, it is not known if this office would have concluded those central supply systems were adequate or if such a water supply plan would have been approved. Further, there are locations within water provider service areas where water taps may not currently be physically available and wells are the only available water supply. Without approved water provider-based					

subdivision water supply plans on file, the State Engineer's Office will assume we would have offered a favorable opinion of subdivision water supply plans relying on individual on-lot wells and the county would have approved that plan for the subdivision, so long as the water supplier does not object. The State Engineer's Office will further assume that those Subdivision Letters would have approved individual on-lot wells limited to ordinary household purposes inside one single family dwelling operating under an exempt well permit issued pursuant to section 37-92-602(3)(b)(I).

Consistent with the State Engineer's Guideline 2003-5, lots within a water provider service area may be able to obtain exempt well permits if the water provider submits a letter waiving their objection to the issuance of an exempt well permit. If the water supplier submits the well permit application in their name, the State Engineer's Office assumes they do not object. If the water provider does object, the lot owner would have to obtain a water court decree for a plan for augmentation and obtain a non-exempt well permit.

Case A3: Subdivisions approved by the County after the determination the stream system is over-appropriated

When a stream system is determined to be over-appropriated, the State Engineer cannot find that material injury will not occur pursuant to section 37-92-602(3)(b)(I) and cannot apply the presumption of non-injury because section 37-92-602(3)(b)(III), requires that the cumulative effect of all wells in a post-SB-35 subdivision be considered when determining material injury to senior water rights. Because the stream system is over-appropriated, the pumping of tributary groundwater from the wells for any use, including in-house use only, within the subdivision would cause out-of-priority depletions to the stream system. Therefore, the effect of this statutory provision in 37-92-602(3)(b)(III) is that the State Engineer must consider the impact of those depletions and, therefore, cannot rely on the statutory presumption of no material injury for such a well. As a result, the State Engineer cannot issue exempt well permits for lots within these subdivisions. The only alternative is obtaining non-exempt well permits operating under an approved plan for augmentation. Furthermore, all uses of the wells (including in-house and any outside uses) must be covered by the plan for augmentation.

Case A4: Subdivisions not located within a water provider service area and not over-appropriated

The State Engineer will assume that the intent for the water supply for the lots at the time of County approval was individual on-lot wells operating under an exempt well permit issued pursuant to section 37-92-602(3)(b)(I). So long as water remains available for appropriation, uses would not be limited to ordinary household purposes inside one single family dwelling. Additional uses under section 37-92-602 as requested may be allowed.

If evidence (as described in the note below) is provided that the developer intended additional uses of groundwater as described in 37-92-602 beyond one single family dwelling, the Late Subdivision Letter will note these uses, and should the stream system become over-appropriated at a later date, future new wells within the subdivision will be allowed ordinary household purposes inside one single family dwelling and the documented additional uses. If no additional uses can be documented, the Late Subdivision Letter will note that after the area becomes over-appropriated the use of new wells will be limited to ordinary household purposes inside one single family dwelling as described in Case A1.

Case A5: Subdivisions located within a water provider service area and not over-appropriated

As directed by section 37-92-602(6), lots that can obtain water service through a central water system generally do not qualify for an exempt well because another water supply is available to serve the lot. Without subdivision water supply plans describing the details of proposed water provider systems, it is not known if this office would have concluded those central supply systems were adequate or if such a water supply plan would have been approved. Without approved water provider-based subdivision water supply plans on file, the State Engineer's Office will assume we would have offered a favorable opinion of subdivision water supply plans relying on individual on-lot wells and the county would have approved that plan for the subdivision, so long as the water supplier does not object. Those subdivision water supply plans would have approved exempt individual on-lot wells issued pursuant to section 37-92-602(3)(b)(I). So long as water remains available for appropriation, uses would not be limited to ordinary household purposes inside one single family dwelling. Additional uses under section 37-92-602 as requested may be allowed.

Consistent with the State Engineer's Guideline 2003-5, lots within a water provider service area may be able to obtain exempt well permits if the water provider submits a letter waiving their objection to the issuance of an exempt well permit. If the water supplier submits the well permit application in their name, the State Engineer's Office assumes they do not object. If the water provider does object, then in order to construct and operate a well, the lot owner would have to obtain a non-exempt well permit, which does not require an augmentation plan in an area available to appropriation.

If evidence, as described in the note below, is provided that the developer intended additional uses of groundwater as described in 37-92-602 beyond one single family dwelling, the Late Subdivision Letter will note these uses and should the stream system in these areas become over-appropriated at a later date, future new wells within the subdivision will be allowed ordinary household purposes inside one single family dwelling and the documented additional uses. If no additional uses can be documented, the Late Subdivision Letter will note that after the area becomes over-appropriated, the use of new wells will be limited to ordinary household purposes inside one single family dwelling as described in Case A2.

Notes

Evaluation of well permit applications:

The State Engineer's Office cannot guarantee the issuance of well permits, but rather must evaluate each well permit application received. The guidance provided in these tables describes how the State Engineer's Office expects to act on well permit applications for lots in the different cases. Should for any reason, a parcel not qualify for an exempt well permit, the applicant's alternative is to obtain a non-exempt well permit. For parcels located in an over-appropriated stream system, a water court decreed plan for augmentation must be obtained before a non-exempt permit could be issued.

Well permit statutes:

Well permits issued pursuant to section 37-92-602 are exempt from administration in Colorado's water rights priority system and do not require an approved plan for augmentation to operate. Well permits issued pursuant to 37-90-137(2) are not exempt from administration, and in over-appropriated basins, do require an approved plan of augmentation.

Uses allowed on permits issued pursuant to section 37-92-602(3)(b)(I):

Additional uses may be allowed under Cases A1 and A2 if the applicant can provide evidence dated from the time the subdivision proposal was submitted to the county for approval, showing the developer intended some additional uses allowed under section 37-92-602. Such evidence would be the plat, covenants, or formal submittals to the county or responses from the county related to the development. The evidence provided will be evaluated on a case-by-case basis.

Consolidated lots:

Provided the total number of lots does not increase, the date of the original subdivision approval will be used for the purposes of evaluation of well permit applications for those lots resulting from the consolidation of original lots.

Subdivisions where wells withdraw nontributary groundwater:

Subdivisions where wells withdraw nontributary groundwater (typically located within the Denver Basin) will be evaluated in accordance with applicable statutes and rules and are not subject to this Guideline.

Background:

Use of water in Colorado is based on the Prior Appropriation system where water rights for the use of water are established, in part, on the date water was first put to beneficial use. The water right with the earliest adjudication and date of use (senior right) has priority over more recent water rights (junior rights). In times of insufficient physical supply within a stream system, diversions under water rights with later adjudication and date of use (junior rights) must be curtailed (reduced or shut off completely) to allow that water to continue to flow downstream in order to fulfill the needs of a senior right. A stream system becomes "over-appropriated" when at some or all times of the year, the water supplies of the stream system are insufficient to satisfy all the decreed water rights within that stream system.

In Colorado, all ground water is considered to be tributary to the stream system unless proven otherwise. Therefore, when a well is operated, the groundwater that is pumped from the well is water that would otherwise contribute to the flow in a surface stream and be used at times to fulfill the needs of senior rights. When a stream system is over-appropriated, the operation of a well can cause a depletion to the stream system at times when the water supply is insufficient to satisfy all decreed water rights on the stream system. This depletion will cause injury to a senior right because the senior right has been deprived of the water that was diverted by the well. To prevent this injury, a well owner can obtain approval for a plan for augmentation from the water court. This plan for augmentation describes how replacement water will be provided to the stream system in the amount that would be depleted by the well, at a place to mitigate impacts caused by the depletions to the stream system and at the time the impacts from the well reach the stream system. The types of wells that operate under a plan for augmentation are called **non-exempt**, as they are not exempt from administration in the water right priority system, and are issued well permits pursuant to section 37-90-137(2).

Colorado statutes provide an exemption in section 37-92-602 for certain residential wells (typically with pumping rates of 15 gallons per minute or less), where the wells may operate as exempt from administration in the water right priority system. These wells are referred to as **exempt wells**. In an over-appropriated stream system, this statutory exemption, along

with a statutorily-allowed presumption of non-injury, can allow these wells to operate without a plan for augmentation and without the requirement to curtail their use when the stream system is under administration due to insufficient water supplies.

When evaluating an application for an exempt well permit, the State Engineer must first determine whether the affected stream system is over-appropriated. For a stream system that is not over-appropriated, the use of a well would typically not cause material injury because water is still available for appropriation, and there is sufficient water to satisfy all decreed water rights within that system. For this situation, a well permit could typically be issued pursuant to section 37-92-602(3)(b)(I).

If a stream system is over-appropriated, the State Engineer must consider the potential for material injury to other water rights. If certain statutory criteria are met, the State Engineer can presume there is no material injury and an exempt well permit can be issued pursuant to section 37-92-602(3)(b)(II)(A). The statutory criteria are generally specific to residential wells where the well must be the only well on a parcel, the return flows from the use of the well are returned to the same stream system where the well is located, and the uses are restricted to those described in 37-92-602(1).

In addition to the above requirements, if the parcel is included in a subdivision as defined in section 30-28-101(10)(a), approved by the county after the county implemented the requirements of Senate Bill 35 (enacted in 1972) and a subdivision water supply plan has not been recommended for approval by the State Engineer, the State Engineer can no longer presume no injury. The unique treatment of exempt wells in subdivisions is specifically described in section 37-92-602(3)(b)(III). Without the statutory presumption of no injury described in section 37-92-602(3)(b)(II)(A), an exempt well permit would not be available. In this situation, only non-exempt well permits can be issued which requires an approved plan for augmentation.

Approval

This guideline may only be modified or revoked in writing by the State Engineer.

Approved this 16th day of May, 2019.



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State Engineer/Director