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MEMORANDUM

September 28, 2009

TO: Water Resources Review Committee

FROM: David Beaujon, Senior Analyst, 303-866-4781

SUBJECT: Regulation of Exempt Wells

This memorandum summarizes the state law that regulates exempt wells. It describes how water from these wells may be used and it describes the roles of the State Engineer and the water court in regulating these wells. It also summarizes the 2009 law that authorizes owners of exempt wells to collect rainwater. The Water Resources Review Committee will receive a briefing from the State Engineer concerning the regulation of exempt wells at the September 30, 2009, meeting of the committee.

Regulation of Exempt Wells

Overview. State law exempts certain wells from the provisions of Article 92 of Title 37, Colorado Revised Statutes, that regulate the use of stream water and ground water that is connected to streams. Essentially, these wells are exempt from administration and enforcement within the priority system. However, the wells must obtain a permit from the State Engineer and operate within statutory limits. For example, exempt wells are generally limited to pumping no more than 15 gallons per minute. Exempt well permits may be obtained for household purposes, lawn and garden watering, fire protection, livestock watering, or ground water monitoring.¹ Exempt well permits are generally not available for areas where a municipality or a water district can provide water to the property. In most cases, no more than one exempt well permit can be issued for a single lot.² There are 210,000 exempt wells in Colorado.

State policy concerning exempt wells. According to the legislative declaration for the exempt well law, the state's policy is to allow citizens to obtain a water supply in less densely populated areas for in-house and domestic animal uses where other supplies are not available.³ In-house only wells may not be used for lawn watering or any other outside use.

¹ Section 37-92-602 (1), C.R.S..

² *Guide to Well Permits, Water Rights, and Water Administration*, January 2008, Division of Water Resources

³ Section 37-92-602 (6), C.R.S.

Consequently, most of the water pumped by these wells is unconsumed and eventually returns to the stream system. According to the legislative declaration, such wells are not intended to cause injury to prior vested water rights, and whenever possible, applicants for such well permits may be required to develop augmentation or substitute supply plans to protect vested water rights from the effects of well pumping.

Rebuttable presumption of noninjury. State law provides a *rebuttable presumption of noninjury* for exempt wells that operate within specified limitations in over-appropriated basins.⁴ Unconsumed water from exempt wells must return to the stream system in which the well is located. The presumption of noninjury for these wells may be overcome by providing evidence of material injury to a vested water right.

Subdivisions and exempt wells. Since June 1, 1972, state law has prohibited a board of county commissioners from approving a subdivision unless there is sufficient water in terms of quantity, dependability, and quality.⁵ To assist with the county's determination, the developer must submit evidence of the subdivision's water supply to the county. This report may include information about the proposed subdivision's water rights or a supply plan if it will receive water from a public or private water provider.⁶ The county is required to provide this report to the State Engineer for an opinion about potential injury to other water rights from the subdivision's water use and the adequacy of its water supply plan.⁷ The State Engineer is required to consider the cumulative effect of all wells in the subdivision prior to granting a permit for a new well in that subdivision.⁸

Expiration of exempt well permits. Applicants who have been granted an exempt well permit must construct the well within two years after the permit is issued. However, the State Engineer may extend the permit for additional one-year periods if the applicant shows *good cause* for not being able to comply with the deadline. The law is silent on what constitutes good cause.

Appeals of State Engineer's decision. Final decisions by the State Engineer to grant or deny an exempt well permit may be appealed to the water court within 30 days of the State Engineer's decision. The water court judge may reverse the State Engineer's decision and order that the application be granted or denied, as well as impose terms and conditions on the application.⁹

⁴ Section 37-92-602 (3) (b) (II) (A), C.R.S.

⁵ Section 30-28-133 (6) (a), C.R.S.

⁶ Section 30-28-133 (3) (d), C.R.S.

⁷ Section 30-28-136 (1) (h) (I), C.R.S.

⁸ Section 37-92-602 (3) (b) (III), C.R.S.

⁹ Section 37-92-602 (3) (f), C.R.S.

Adjudication of exempt wells. Owners of exempt wells are not required to adjudicate their well in water court. However, such owners may not assert injury to their right unless they have filed for adjudication of their right in water court.¹⁰ Adjudication establishes the priority of the well. The priority of an exempt well is based on the date the well permit was granted or first put to use if the well existed prior to the permit requirements.

Rainwater Collection Systems and Exempt Wells

In 2009, the legislature passed Senate Bill 09-080 that exempts certain small residential precipitation collection systems from the provisions of Article 92 of Title 37, C.R.S. Specifically, the new law allows precipitation to be collected from a home's roof. Eligible persons must have an exempt well permit or otherwise qualify for such a permit. In general, the collected water may be used for ordinary household purposes, fire protection, watering of animals and livestock, and irrigation of up to one acre of gardens and lawns. However, persons with exempt well permits are limited to using the collected water under the same restrictions as their well permit. For example, an owner of a well permit that is restricted to in-house use only would not be allowed to use harvested water to irrigate a lawn or garden.¹¹

¹⁰ Concerning Application for Water Rights of Turkey Canon Ranch Ltd. Liability Co., 1997, 937 P.2d 739.

¹¹ Additional information about exempt wells is available at www.water.state.co.us.