



February 1, 2018

Chad Phillips
Planning Director
Routt County Planning Department
PO Box 773749
Steamboat Springs, CO 80477

Subject: Well Permits and Subdivisions within Routt County, Water Division 6

Dear Mr. Phillips:

This letter is to clarify the position of the Division of Water Resources (DWR) regarding the issuance of individual on-lot well permits within subdivisions in Routt County. Changes to the over-appropriated status of streams within Routt County combined with a lack of previously-approved subdivision water supply plans, affects DWR's evaluation of well permit applications on lots included in a subdivision of land as defined in section 30-28-101(10)(a), C.R.S. This letter serves as an opinion regarding material injury likely to occur to decreed water rights from a water supply for a subdivision as referenced in section 30-28-136(h), for subdivisions without an existing opinion on file with DWR. This letter, coupled with subdivision platting dates and stream over-appropriation dates, serves as a guide to what types of well permits may be issued for subdivisions within Routt County. A map showing the stream systems considered to be over-appropriated and the date they became over-appropriated is attached hereto as Attachment C.

Summary of the Opinion:

The State Engineer's Office has evaluated the conditions under which certain subdivisions were created and has taken into consideration the fact that we have no record that a water supply plan was referred to the State Engineer's Office at the time the subdivisions were created for many subdivisions within Routt County. We have further considered what the likely approach would have been for a water supply plan for these subdivisions and what our opinion would have been. Finally, we have considered our well-established practice of honoring such an opinion on the use of individual on-lot wells in a subdivision where a water supply plan was referred, even after certain conditions have changed, such as a basin becoming over-appropriated. These considerations and the rationale



discussed below will allow the issuance of well permits under limited conditions. The details of the allowances for well permitting are identified in the attachments to this letter.

Background:

As you may know, 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 the place where the depletions impact 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 typically 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 the bulleted list in Attachment B, Case B1.

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.

The subdivision referral process described in section 30-28-136 would result in typical categories of water supply opinions from the State Engineer based on the over-appropriated status of the stream system at the time of referral. Prior to the determination of any basin being over-appropriated, the State Engineer would have reviewed the proposed water supply plan for a subdivision as contemplated in section 30-28-136(h)(I), and would have given the opinion that a water supply plan that proposed to use individual on-lot exempt wells, would not cause material injury because water was available for appropriation at the time of subdivision creation. As a matter of established practice, in such situations, if, after making such a determination, the stream system becomes over-appropriated, the State Engineer relies on and honors the original opinion provided pursuant to section 30-28-136(h)(I) that exempt well permits can be issued and the wells in the subdivisions would not cause material injury. A second typical category is when the proposed subdivision is within an over-appropriated stream system. In that case, the State Engineer's opinion is that only non-exempt well permits issued pursuant to an approved plan for augmentation can prevent injury.

In Routt County there are multiple subdivisions where it appears the State Engineer did not receive a referral to review the proposed water supply plan or no record of such a review is available. For those basins considered to be over-appropriated, the State Engineer does not have an existing "opinion" to rely on and the basis for issuance of exempt well permits within these subdivisions that were previously approved by Routt County is in question. This letter is intended to clear up any questions that result from a lack of an opinion regarding material injury likely to occur from a subdivision's water supply plan.

Conclusion:

After review of our files and the County's files, and discussion with County planning

staff regarding the County's subdivision approval procedures, we offer the opinions outlined in Attachment A for the water supply of subdivisions in several categories. For subdivisions where an opinion from the State Engineer is not currently on file, this letter and its attachments serve as the State Engineer's opinion on the subdivisions' water supply plan. As you know, we plan to work with you in the coming months to document the appropriate category from Attachment A for each existing subdivision. We will use that documentation to guide well permitting for existing subdivisions going forward.

For future subdivisions, we will review the proposed water supply plan provided in the County's referral, and provide a State Engineer's opinion of material injury and adequacy as contemplated in section 30-28-136(h)(l). We will use those opinions on water supply plans to evaluate well permit applications within new subdivisions.

Finally, for those parcels of less than 35 acres in existence prior to the implementation of Senate Bill 35 (known as Pre-1972 parcels) or those approved by the County through the County's exemption from subdivision regulations process as allowed under section 30-28-101(10)(d), a subdivision water supply plan is not necessary. However, in order to provide a complete picture of well permitting considerations for these lots, we offer comments on the availability of exempt well permits in Attachment B.

If you have any questions concerning this matter, particularly regarding the coordination between DWR and Routt County on the subdivision water supply plan review process, please contact Megan Sullivan for assistance. Questions from the public should be directed to DWR's Groundwater Information line, which is answered by staff specializing in the well permit application and issuance process Monday through Friday, 9 AM -4 PM (303-866-3587).

Sincerely,



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

Attachments: A - Well permitting in Post SB-35 Subdivisions without existing opinions from the State Engineer
B - Well permitting for Pre SB-35 Parcels/Lots and Subdivision Exemptions
C - Map of Currently Over-Appropriated Basins in Routt County

ec: Erin Light, PE, Division Engineer

**ATTACHMENT A: POST SB-35 SUBDIVISIONS
WITHOUT AN EXISTING OPINION FROM THE STATE ENGINEER
Please see important notes included below**

Case A1: Subdivisions approved by the county prior 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 an exempt well permit issued pursuant to section 37-92-602(3)(b)(I).

Case A2: Subdivisions approved by the county prior 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 clear 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 in Routt County where water taps are currently not 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. It is further assumed that those subdivision water supply plans 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, then in order to construct and operate a well, 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 within 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, including in-house use only permits, for lots within these subdivisions. The only alternative would be non-exempt well permits operating under an approved plan for augmentation. Furthermore, all uses of the wells (including in-house and any outside uses) would have to be included in 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). Because water is still available for appropriation, uses would not necessarily be limited to ordinary household purposes inside one-single family dwelling. Additional uses under section 37-92-602 as requested may be allowed.

Should the stream system in these areas become over-appropriated at a later date, this becomes 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 clear 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). Because water is still available for appropriation, uses would not necessarily 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.

Should the stream system in these areas become over-appropriated at a later date, this becomes Case A2.

Note on the 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 would have to be obtained before a non-exempt permit could be issued.

Note regarding 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.

Note on 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.

Note on 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.

Note regarding Case A2:

DWR's approach in Case A2 is based on our current understanding of the County's limited allowance for vault systems in general and specifically the current plan for sewage disposal within Morrison Creek Metropolitan Water and Sanitation District. There is currently an allowance for 542 vault systems within the District and otherwise lots will be consolidated to a minimum size of 5 acres with on-site septic and leach field. If there are substantial changes to this approach, the State Engineer's Office will need to reevaluate the allowances in this letter before issuing additional well permits.

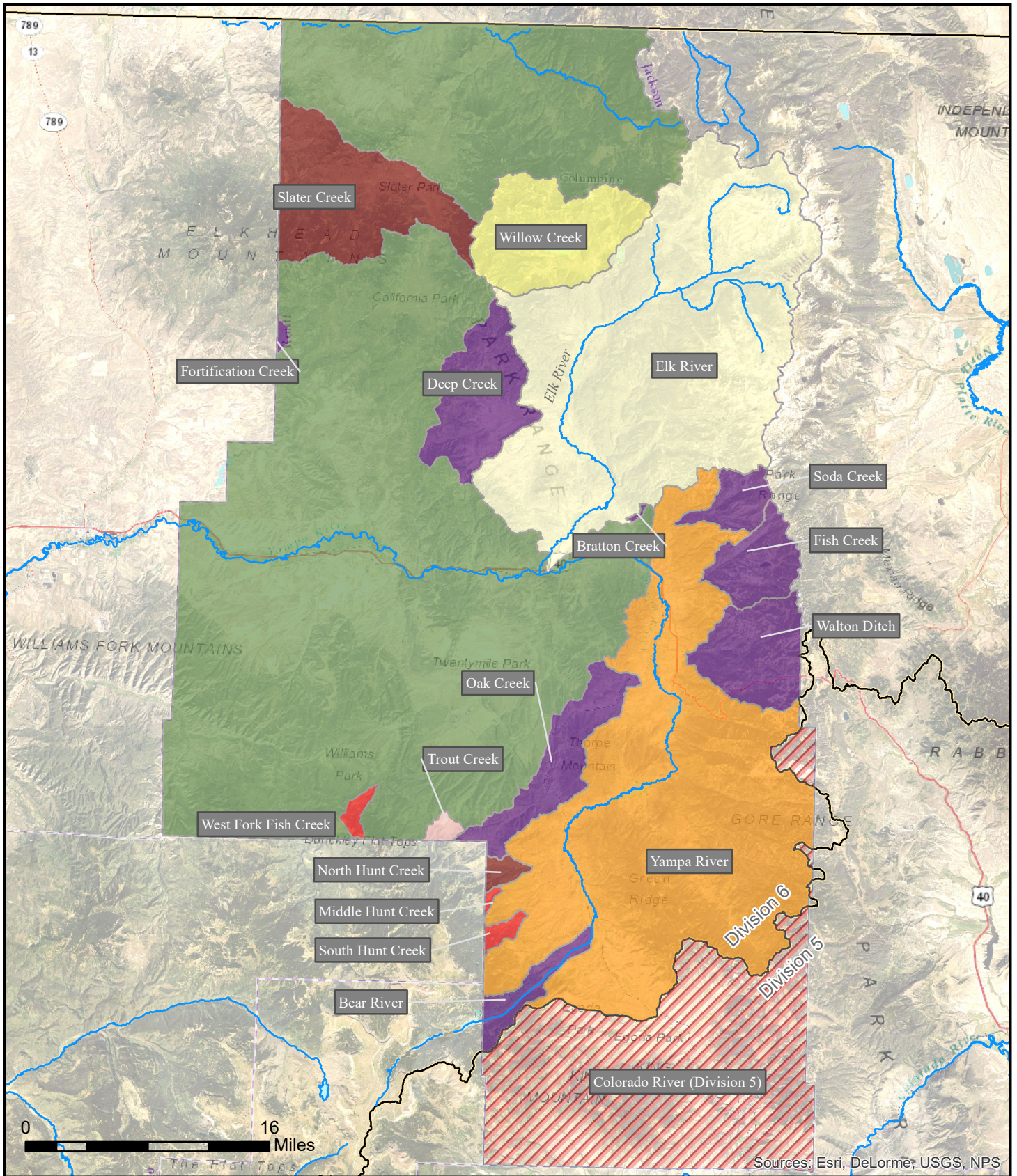
ATTACHMENT B: PRE-SB 35 PARCELS/LOTS OR SUBDIVISION EXEMPTION PARCELS Please see important notes included below
Case B1: Parcels/lots not located within a water provider service area, in an over-appropriated basin
<p>Well permitting and subdivision statutes do not provide for a water supply review process for these parcels at the time of parcel creation. Therefore, water supply plans for these parcels are most likely not available. In an over-appropriated stream system, such a parcel could qualify for an <u>exempt</u> well permit issued under the presumption of non injury pursuant to section 37-92-602(3)(b)(II)(A), as long as the well is the only exempt well on the parcel and return flows are returned to the same stream system in which the well is located. The possible permitted uses are:</p> <ul style="list-style-type: none"> • if a parcel is less than 35 acres, the use is restricted to ordinary household purposes only in one single family dwelling with no outside use, <u>or</u> • if on a lot in a cluster development, the use is limited to a single family dwelling where the ratio of water use within the development is limited to one acre-foot of water per 35-acre increment (this may allow for some outside uses), <u>or</u>, • if the well is on a parcel of 35 acres or more, the uses are limited to ordinary household purposes inside up to three single family dwellings, the watering of poultry, domestic animals, and livestock, and up to one acre of irrigation of home lawn and gardens.
Case B2: Parcels/lots located within a water provider service area, in an over-appropriated basin
<p>Parcels within a water provider service area may obtain an exempt well permit if the water provider supplies a letter waiving their objection to the issuance of an exempt well permit, consistent with the State Engineer’s Guideline 2003-5. If the water supplier submits the well permit application in their name, the State Engineer’s Office assumes they do not object. If they do not object, then <u>exempt</u> well permits can be issued as described in Case B1.</p>
Case B3: Stream system not over-appropriated
<p>If water is available for appropriation, the State Engineer can find that material injury will not occur pursuant to section 37-92-602(3)(b)(I) and <u>exempt</u> well permits may be issued. If the parcel is located within the service area of a water provider, an exempt well permit may not be available unless the applicant obtains a letter from the water provider waiving any objection to the exempt well, consistent with the State Engineer’s Guideline 2003-5. If the water supplier submits the well permit application in their name, the State Engineer’s Office assumes they do not object. If the non-objection letter is provided, well permits may be issued pursuant to section 37-92-602(3)(b)(I) and the uses would not necessarily be limited to ordinary household purposes inside one-single family dwelling. Additional uses under section 37-92-602 as requested may be allowed. Lot owners may also be able to obtain a non-exempt well permit without a plan for augmentation .</p> <p>Should the stream system in these areas become over-appropriated at a later date, this becomes Case B1 or B2.</p>

Note on the 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 would have to be obtained before a non-exempt permit could be issued.









Note on uses allowed on permits issued pursuant to the B cases:

Additional uses may be allowed on any of the B cases where parcels were created prior to the basin being over-appropriated. Such permits may be issued pursuant to section 37-92-602(3)(b)(I), if the applicant can provide evidence dated from the time the parcel creation was approved by the County and prior to over-appropriation, 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 or State Engineer's Office related to the development. The evidence provided will be evaluated on a case-by-case basis



Sources: Esri, DeLorme, USGS, NPS

Year of Over-Appropriation

	Non-Critical Area		2006
	1972		2007
	1985		2011
	1991		2014

ROUTT COUNTY CRITICAL AREAS

Last Updated: November 14, 2017



COLORADO
 Division of Water Resources
 Department of Natural Resources