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William A. Paddock

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NONTRIBUTARY GROUND WATER: A CONTINUING DILEMMA

William A. Paddock
Law Office of John U. Carlson
Denver, Colorado

COLORADO WATER ISSUES AND OPTIONS:
THE 90'S AND BEYOND
Toward Maximum Beneficial Use
of Colorado's Water Resources

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# TABLE OF CONTENTS

**HISTORICAL ORIGINS OF THE CURRENT CONTROVERSY**  
1

**DELIBERATION OF THE GETCHES COMMITTEE**  
9

A. Matters of Consensus  
B. Matters of Disagreement  
C. Proposed Legislation  

**WHAT THE GENERAL ASSEMBLY DID: SENATE BILL 5**  
14

A. Definition of Nontributary Ground Water  
B. Protection of Vested Rights in Natural Streams  
C. State Engineer Rules and Regulations  
D. Well Permit Requirements  
E. Means of Allocation  
F. Implied Consent to Use Nontributary Ground Water  
G. Changes to the 1969 Act's Adjudication Procedures  

**CONCLUSION**  
31
I. HISTORICAL ORIGINS OF THE CURRENT CONTROVERSY

Historically, Colorado has declined to follow common law doctrines for allocation of its water resources. In 1882 in Coffin v. Left Hand Ditch\(^1\) the Colorado Supreme Court rejected the common law doctrine of riparian rights as unsuited for the semi-arid conditions of the state and instead embraced the doctrine of prior appropriation for the allocation of surface water. Adoption of this doctrine for surface flows naturally led to its extension to physically related subsurface flows. In McClellan v. Hurdle\(^2\), the Colorado Court of Appeals said:

"[I]t is a matter of no moment whether the water reaches a certain point by percolation through the soil, by a subterranean channel, or by obvious surface channel. If by any of these natural methods it reaches the point, and is there appropriated in accordance with law, the appropriator has a priority in it which cannot be divested by the wrongful diversion by another; nor can there be any substantial diminution."\(^3\)

This decision was a radical departure from common law doctrines governing allocation ground water.\(^4\) The repudiation of the common law was completed with respect to tributary ground water by the Colorado Supreme Court in Nevius v. Smith\(^5\) where it held:

"The argument of the defendants, based on decisions from other states, that percolations belong to the owner of the soil is unsound in Colorado. Ever since Comstock v. Ramsey, 55 Colo. 244, 13 P.1107, we have held that seepage and percolation belong to the river ..."

These cases refute any claim that percolation or seepage of any water belongs to the land owner, and
This decision was expressly confined to such waters as "belong to the river" and left undecided the law to be applied to water which was not "tributary" to a natural surface stream, implicitly assuming there was some ground water which had no hydraulic connection to the surface stream.

Sixteen years later, in Safranek v. Town of Limon, the Colorado Supreme Court reviewed Colorado's ground water law and concluded the law governing the use of nontributary groundwater was unsettled. There the Court was asked to review a condemnation award to Safraneks for land condemned by the Town. The Safraneks had appealed contending that the award failed to compensate them for the percolating waters under their land. The Safraneks' claim to compensation was based upon the assertion that "In this State percolating sub-surface waters, not tributary to any stream, are the property of the owner of the land, as at common law."

The Court held that Safranek's proof failed to establish the water was nontributary and went on to state:

"Had it been established by the record in this case that the water diverted by the town was nontributary ground water, such as an underground lake, the waters of which are not a part or source of a natural stream, still the above-quoted statement upon which counsel for respondents base their claim of ownership of the water would not be a correct statement of Colorado law. We have long since departed from the English common-law doctrine of ownership of percolating waters by the surface owner, Nevius v. Smith, supra, and we would, in such case, be confronted with the question upon
which there is an absence of statutory law in Colorado as well as of direct decision by our courts. Whether in such case we should follow the California doctrine of reciprocal rights, developed from its law of riparian rights, or whether we should extend one step further our Colorado doctrine of first in time, first in right, need not now be determined. 9

Safranek set the stage for Whitten v. Coit 10 which is the source of much of the confusion surrounding the law of nontributary ground water. In 1948 the Mesa County District Court entered a decree in a general adjudication under the 1943 adjudication act granting decrees to 18 claimants for the use of water from a "nontributary" aquifer. In 1957 eight of these claimants brought suit against the State Engineer and others for (1) a mandatory injunction requiring the state to recognize and enforce the 1948 decree; (2) to enjoin undecreed diversion from the aquifer; and (3) to require other well owners to properly cement and equip their wells to prevent waste. The District Court ordered the State Engineer to administer the waters as if they were waters of a "public stream" and the State Engineer appealed.

On appeal the Colorado Supreme Court reached four famous legal conclusions, namely (1) the constitutional right to divert the unappropriated waters of any natural stream does not apply to nontributary water; (2) the 1943 adjudication act was not designed nor intended to apply to wells withdrawing nontributary groundwater; (3) under the 1957 Colorado Ground Water Act the General Assembly contemplated that there would be an equitable and efficient
use of nontributary underground water not pursuant to any theory of appropriation; and (4) that decree granted for nontributary ground water under the 1943 Act were void for want of subject matter jurisdiction.

In dictum, the court went on to address the question left open in Safranek v. Limon, i.e. the rule of law governing nontributary ground water, and stated:

"We approve the language used by ... Mr. William R. Kelly, ... in a well documented article11 ... 'The landowner has property in the water in his soil. It is a vested right which cannot be taken away by mere legislation. It is subject only to the reasonable use doctrine. If the ground water is in motion so as to be tributary to a natural stream, or part of the stream water table, it has always been subject to priorities of appropriation on the natural stream. But, unless it is tributary to the natural stream, it is not subject to the law of appropriation.'"12

As noted in a subsequent opinion, this part of Whitten v. Coit curiously ignored the passage from the Safranek opinion where the court had stated the law governing nontributary ground water was unsettled. Following Whitten v. Coit and other problems with the 1957 Ground Water Act, the General Assembly conducted a detailed study of ground water problems and then enacted new legislation dealing with nontributary ground water. That legislation, the Colorado Ground Water Management Act of 1965,13 (1965 Act) reversed the policy of the 1957 Act as conceived by the majority in Whitten v. Coit, and instead made "designated ground water" subject to the doctrine of appropriation but modified that doctrine so as to promote the full economic development of
the resource, which meant the lowering of historic water levels. The 1965 Act contained a comprehensive statutory scheme for the identification and management of "designated" ground water resources including methods for limiting the rate of ground water mining and to promote conservation. Nontributary ground water may be included within designated ground water basins.

The immediate concern of the 1965 Act was ground water development in the Ogallala aquifer of the eastern high plains and the alluvial aquifers of Kiowa and Bijou Creeks. Once designated ground water basins were established in those areas the focus rapidly shifted to the use of nontributary ground water in the Denver Basin resulting from population growth south of Denver. That area had not been included in a designated ground water basin so the State Engineer was without express statutory guidance on the issuance of well permits. He first adopted a 1/2 mile spacing policy and allowed use of nontributary ground water apparently by appropriation. In 1967 the General Assembly reduced the spacing requirement to 600 feet. Thereafter, heavy development of nontributary ground water continued in the Denver Basin and, in some areas caused substantial water level declines, at least in artesian water levels. To resolve the problems created by growth in the Denver metropolitan area, in 1973 the State Engineer requested legislation setting a minimum useful life for withdrawal of nontri-
butary ground water located outside of designated ground
water basins.

In hearings on the proposed legislation, a number of
water users appeared and raised objections, based upon the
dictum in Whitten v. Coit, that landowners owned the nontribu-
butary ground water beneath their property. The General
Assembly responded by enacting S.B. 213 which required, in
addition to a finding of no material injury to the vested
rights of others, that the State Engineer:

"in considering whether the permit shall be issued,
only the quantity of water underlying the land
owned by the applicant or by the owners of the
area, by their consent to be served, is considered
unappropriated; the minimum useful life of the
aquifer is one hundred years, assuming there is no
substantial artificial rechange within said period, ...
17"

S.B. 213 reflects the doctrinal confusion over the law
of nontributary ground water introduced by Whitten v. Coit.
The statute is cast in the language of prior appropriations
but attempted to accommodate Whitten v. Coit by limiting the
class of appropriators to overlying landowners or those with
their consent to be served. However, it totally failed to
address the resultant problems created by introducing land
ownership as a criteria for issuing permits under the 1965
Act. One such problem can be illustrated by the large
portions of the Denver Basin aquifers which have been
included within designated ground water basins while adjoined
by nondesignated nontributary ground water in the same
aquifers. S.B. 213 made no provision for reconciling the
conflicting withdrawal rates nor did it contain any means for integration of rights acquired under S.B. 213 with appropria-
tive rights acquired under the 1965 Act, if the latter were later included within a designated ground water basin. Failure to address these questions introduced further uncertainty into the law.

As often occurs, things became worse. Following the enactment of the Water Right Determination and Administration Act of 1969\textsuperscript{18} (1969 Act) a practice of obtaining decrees for nondesignated nontributary ground water rights developed, primarily with the water judges for Water Divisions No. 1 and 2. This was done without any apparent jurisdictional predicate\textsuperscript{19} but appeared to have the sanction of the Colorado Supreme Court.\textsuperscript{20} Then came the so-called "Huston filings" in which Mr. Huston and his co-venturers attempted to explain the statutory confusion by asserting that nontributary water was subject to appropriation under the Colorado Constitution\textsuperscript{21} and under the 1969 Act. This assertion caused a wave of mass hysteria which culminated five years later with the opinion of the Colorado Supreme Court in \textit{State of Colorado, et al v. Southwestern Colorado Water Conservancy District, et al}\textsuperscript{22}.

That case resolved many legal issues, principal among them being (1) whether nontributary ground water outside of designated ground water basins was subject to the constitutional right of appropriation; (2) who may use or appro-
appropriate such waters; and (3) how rights to use such water may be obtained and confirmed. The court's holding on these issues can be summarized as follows:

(1) Nontributary ground water is not subject to appropriation under Colo. Const. Art. XVI, §§5 and 6;
(2) Nontributary ground water is not subject to adjudication or administration under the 1969 Act;
(3) Nontributary ground water is not a vested property right of the overlying landowner. Rather, it is subject to the plenary control of the General Assembly to regulate it as it sees fit, subject to constitutional limitations;
(4) Rights to nontributary ground water located outside of designated ground water basins may only be obtained by application for a well permit from the State Engineer under §37-90-137; and
(5) Water judges have jurisdiction to determine whether certain underground water is tributary or nontributary.

This decision swept away the dictum from Whitten v. Coit which had caused much of the doctrinal confusion that has plagued the law of nontributary ground water in Colorado. The court clearly stated that this water was not a constitutionally protected property right coincident with ownership of the overlying land. While this ruling was surprising to many, the effect of the Court's ruling was quite limited because by S.B. 213 the General Assembly had limited the right to use nontributary ground water to overlying landowners or those with their consent.

Of greater impact was the court's ruling that nontributary ground water was not subject to adjudication under the 1969 Act. This holding cast substantial doubt on the validity of previous decrees and terminated an applicant's
ability to obtain decrees confirming rights in the resource under the procedures of the 1969 Act. These concerns prompted "stop gap" legislation in the form of S.B. 439. That bill conferred jurisdiction on water judges to adjudicate rights in nontributary ground water under the procedural provisions of the 1969 Act, purported to retroactively validate previous decrees, and permitted pending applications to be acted upon without republishing notice. However, the possibility that S.B. 439 conferred vested rights on landowners prompted concerns that the Governor would veto the bill. To avoid this possibility House-Senate Joint Resolution 1038 was passed declaring that S.B. 439 was procedural only.

Instead of exercising his veto the Governor instructed the Director of the Department of Natural Resources to appoint a committee to review the law of nontributary ground water. The resulting committee came to be known as the "Getches Committee."

PART II. DELIBERATIONS OF THE GETCHES COMMITTEE

The Governor charged the Getches Committee to "initiate at once a study of possible alternative approaches to the administration of ground water" by bringing together a group of experts in ground water matters to help formulate recommendations for consideration by the legislature. By separate letter to the Senate the Governor asked the General Assembly
to move at once toward comprehensive legislation that would address the issue of how the state would exercise its plenary control over nontributary ground water. With this mandate the Getches Committee was in a position to address the underlying philosophical questions of whether this resource should be used and, if used, how it should be allocated. To do so, the Committee would have found it necessary to articulate a concept of the public good and public goals which would govern future use and allocation of the resource.

The Committee was composed of individuals representing a broad spectrum of interests but was heavily weighted with persons whose interests lay in the Denver Basin. Those interests appeared to dominate the Committee and accordingly directed its efforts to solving Denver Basin problems while largely ignoring the public policy implications of their actions. Accordingly, the Committee failed to give careful consideration to and articulate a public policy rationale for its recommendations. Instead, it listed problem areas upon which a consensus was possible and set those forth. Next, the Committee identified its areas of no consensus and denominated those as legislative issues. Finally, two separate working groups drafted different forms of proposed legislation. One was a minimum change proposal designed to ratify past practices with minimum disruption and the other proposing a more comprehensive approach for administrative control of nontributary ground water resources.
A. Matters of Consensus

The list of matters upon which the Committee reached a consensus is found in Appendix I. Several of its "policy" views are worthy of note. The Committee agreed that nontributary ground water must be allocated with special care because of its finite nature and believed limits should be placed upon its use to conserve it for the future.

The Committee also believed that any allocation scheme for nontributary ground water must take into account differences in hydrology and water needs in different areas of the state. This belief, if implemented, would have required administration of the resource responsive to local conditions and needs. Such flexibility in management would preclude the adoption of any statewide rule governing allocation and limiting use to landowners. The Committee failed, however, to articulate any public policy goals governing use of this resource and was reluctant to delegate policy making or management authority to the State Engineer. Instead, it agreed that his technical expertise made him the proper authority to decide technical matters, but felt policy questions should be addressed by the legislature or delegated to other unidentified bodies.

B. Matters of Disagreement

The matters of disagreement, the so-called "legislative issues" on the Committee are found in summary form in Appendix II. They fall into three general categories, water
use policy, well permit terms and conditions and the delega-
tion of policy making and administrative responsibilities. The failure of the committee to make recommendation or provide a detailed discussion of the pros and cons of these issues was its central failing because it was impossible for the General Assembly to meaningfully evaluate the implications of the legislation presented to it.

Under the category of water policy the Committee felt that the use of nontributary ground water should vary depending upon local conditions. Accordingly, it is felt a uniform statewide rules were inappropriate and that minimum aquifer lives should be established for most aquifers. Ironically, the Committee also held the conflicting view that the overlying landowner should be entitled to the use of the nontributary ground water underlying his land.

With respect to well permits, the Committee was against requirements that encouraged use of nontributary ground water to avoid loss of rights. Instead, it suggested that permits be renewable upon a showing of continuing need. The committee reached no consensus on what procedures should be followed in well permit issuance but was able to agree that the courts should not be delegated administrative functions pertaining to well permits.

On the issue of policy making and administration the Committee was deadlocked and provided the General Assembly a list of common sense alternatives with no evaluation of pros
and cons of any.

C. Proposed Legislation

The proposed legislation took two forms. The first was termed a minimum change or status quo proposal. The heart of that proposal was that it retained a uniform, statewide minimum aquifer life and limited rights to acquire rights in nondesignated nontributary ground water to overlying landowners or those with their consent based upon current law. As such, it is a laissez-faire approach designed to privatize the resource and thereby place management decisions in the hands of landowners except to the extent of imposing a minimum useful life on all users. A summary of its central components is attached as Appendix III.

The second proposal was a revised Ground Water Management Act and a summary of its central provisions is attached as Appendix IV. It proposed substantial changes to the 1965 Act to accommodate the Committee's stated goals, including conservation, management based upon local conditions and elimination of one statewide rule. The fundamental element of this proposal was establishment of a technically "qualified" commission to make policy decisions and the establishment of an administrative system for management of the resource. This proposal was not favored primarily because it did not limit rights based solely upon land ownership and second because it introduced uncertainty for developers and existing entities dependent upon nontributary ground water in
the Denver Basin. This uncertainty was, at least in part, the result of the lack of any articulated principles upon which decisions regarding use of the resource would be made.

PART III. WHAT THE GENERAL ASSEMBLY DID: SENATE BILL 5

The legislation which eventually passed the General Assembly, Senate Bill 5, is a perplexing piece of work. It bears little resemblance to either proposal of the Getches Committee and implemented remarkably few of the matters upon which the committee had consensus. The difficulty that surfaced when the legislation was introduced was lack of a solid majority in favor of either continuance of the status quo or in favor of the minimum changes proposed by the Denver Basin interests. As a result, numerous political bargains had to be struck in order to maintain the support necessary to pass any bill. The result is a bill which, while making some advances, has created at least as many problems as it solved, contains provisions of questionable constitutional validity, and has made unwarranted concessions to certain special interests.

On the brighter side, there is now a fixed definition of nontributary ground water, there is a clarification of what constitutes injury to nontributary ground water right, the doctrine of prior appropriation is clearly declared inapplicable to such ground water, well permits for such ground
water are renewable upon good cause shown, and there is no requirement for a quadrennial finding of reasonable diligence. In addition, there is a statutory procedure by which public water supply entities can obtain the implied consent to use the nontributary ground water within their boundaries.

On the darker side is the virtual exemption of the mining industry from any meaningful control when it seeks to dewater an aquifer for mining purposes. There is also an awkward provision for determining tributary and nontributary ground water in the Denver Basin, the effect of which may be to deprive surface users of water they historically received in exchange for a promise of future augmentation. The bill contains a provision of doubtful constitutional validity which attempts to restrict use of the tributary ground water in the Denver Basin aquifers to only the overlying landowners or those with their consent. It also continues a single statewide allocation rule and fails to articulate any concept of the public goals for use of the resource.

A. Definition of Nontributary Ground Water

Nontributary ground water is defined by S.B. 5 as ground water, the withdrawal of which will not, within 100 years, deplete the flow of a natural surface stream at an annual greater than one-tenth of one percent of the annual withdrawal rate. This determination, with certain exceptions, is based upon aquifer conditions at the time the well permit is issued. The purpose of this definition is to
establish which pumping effects on streams need not be compensated.

The determination whether the ground water is tributary or nontributary is made based upon aquifer characteristics existing at the time the well permit is applied for. This fact can dictate which water users must pay all or a substantial part of the compensation to the surface stream. In an aquifer under artesian pressure which is discharging to a stream, a reduction in pressure and the resulting reduced aquifer to stream discharge, will be felt much more rapidly over a much larger area than in an aquifer under water table conditions. Thus, those who first seek to withdraw ground water under artesian conditions will more likely be found to be seeking tributary ground water and may have an augmentation obligation. When water table conditions exist pumping effects will be felt less rapidly, a larger portion of the aquifer may be nontributary and, in the tributary portions, the stream depletions will be less. Later, if the hydraulic connection is broken between the stream and aquifer, stream losses will have reached their maximum and any new uses in the aquifer may be considered nontributary. Thus, the burden of augmentation may fall more heavily upon the first persons to withdraw water from the aquifer.

These considerations lead to the enactment of the second portion of the definition of nontributary ground water. For the Dawson, Denver, Arapahoe and Laramie-Fox
Hills aquifers (the Denver Basin's primary aquifers) the determination of whether ground water is nontributary is to be made assuming that the hydrostatic pressure level (artesian pressure) has been lowered at least to the top of the aquifer throughout the aquifer. This has the effect of increasing the amount of the aquifer that will initially meet the definition of nontributary ground water. It also helps avoid the inequity of placing the majority of the augmentation requirement on those who first develop in the aquifer. However, it does not address the potential unaugmented depletions resulting from reduction in artesian pressure.

B. Protection of Vested Rights in Natural Streams

In apparent recognition of the potential for injury to surface water rights from withdrawals in the Denver Basin aquifers, the General Assembly directed the State Engineer to promulgate such rules and regulations, applying exclusively to those aquifers, as were necessary to prevent material injury to surface water rights. It authorized the State Engineer to require that nontributary ground water users relinquish up to 2% of the amount of water withdrawn for this purpose.

With respect to withdrawals of ground water from tributary portions of the aquifer as defined by S.B. 5, the General Assembly required a court approved plan for augmentation prior to use of the water. However, full augmentation of all stream depletions is only required of persons with-
drawing ground water from the Dawson aquifer.\textsuperscript{29} There, the
determination of amount of augmentation required is to be
made based upon actual aquifer conditions. However, to
determine which portions of the Dawson aquifer are tributary
it is to be assumed that there is no artesian pressure,
thereby increasing the amount of the aquifer considered
nontributary and decreasing the amount deemed tributary.
This, in turn, has the effect of placing the bulk of the
augmentation burden on those in the "tributary" portions of
the Dawson aquifer, although depletions will be caused by
those withdrawing water from the "nontributary" portions of
the aquifer as well.

With respect to withdrawals of ground water by wells in
the Denver, Arapahoe and Laramie-Fox Hills aquifers which
are located greater than one mile from any point of contact
between the aquifer and any natural surface stream, such
users may be required to replace no more than four percent of
their annual withdrawal without regard to actual depletions.
Wells closer than one mile form any such contact points must
augment their stream depletions but their augmentation
requirement is determined upon the assumption that the
hydrostatic pressure level in the aquifer has been reduced to
the top of the aquifer throughout the aquifer.

These provisions are the result of a political com-
promise, not an engineering evaluation. If it were other-
wise, there would have been no augmentation requirement for
nontributary ground water because, after all, the purpose for seeking a definition of nontributary ground water was to identify pumping effects which need not be compensated. These provisions as a whole then raise serious questions about the competency of legislative fact finding in S.B. 5. As purely political compromises the General Assembly had no occasion to inquire into the facts supporting them and made no independent determination of those facts.

C. State Engineer Rules and Regulations

Since 1973, the State Engineer has been empowered to adopt rules and regulations for the administration of nontributary ground water. This power has never been exercised. Under S.B. 5 the State Engineer is required to promulgate rules and regulations for two purposes. The first is to expedite the well permitting process and is to be accomplished by prescribing reasonable criteria and procedures for the application for, and the evaluation, issuance, extension and administration of well permits to withdraw ground water from nontributary sources and from both the tributary and nontributary portions of the Denver Basin aquifers. The second purpose is to protect rights to surface flows in the Denver Basin as is to be accomplished with rules and regulations which apply to both the tributary and nontributary portions of the Denver Basin aquifers.

To implement this mandate the State Engineer has proposed two sets of rules and regulations. The first are
statewide rules which will apply to all nontributary well permit applications and while the second set will apply to the Denver Basin only. The proposed statewide rules deal with procedural matters for filing of well permit applications, the factual data which must be supplied with an application and the criteria to be applied in evaluating the factual data provided.

The Denver Basin aspect of the State Engineer's rule making responsibilities is more complex. In those rules he will be attempting to establish presumptive aquifer characteristics to expedite well permit processing and establish the criteria for augmentation by all Denver Basin aquifer wells in order to prevent injury to surface water rights. Carrying out these duties will require the State Engineer to establish the methods for determining whether ground water is tributary or nontributary, the location and extent of aquifers, the points of contact between surface streams and aquifers, the method for determining stream depletions and prescription of the terms and conditions for augmentation.

The vast array of tasks to be undertaken by the State Engineer in this rule making raise many questions about the legal effect of the rules. S.B. 5 makes clear that any aquifer characteristics established by the State Engineer are presumptive only. It was apparently the intent of the General Assembly to allow the presumptive characteristics to be rebutted with site specific data. However, it does not
state what are considered to be aquifer characteristics subject to this right of rebuttal.

For the right of rebuttal to be effective it may also require application of different criteria, than that adopted by the State Engineer, for evaluation of the factual data. However, the language of the statute only states that presumptive aquifer characteristics are rebuttable. Thus, it is susceptible to an interpretation that the once established, the State Engineer's criteria for determining aquifer characteristics is controlling and is to be applied by the water judge. This interpretation gives meaning to the statutory language while promoting the avowed legislative goals of expediting well permit processing and reducing litigation. There are sound arguments on both sides of this issue and its resolution will largely determine future control of the fact finding process in use of nontributary ground water.

D. Well Permit Requirements

S.B. 5 continues the previous policy of requiring well permits prior to construction of a well to withdraw nontributary ground water while eliminating the requirement that wells be constructed and water placed to beneficial use within one year. Instead, upon good cause shown to the State Engineer, well permits for nontributary ground water, and any wells withdrawing ground water from the Denver Basin aquifers, may be extended for successive one year periods.
It eliminates any requirement that the water be applied to beneficial use to prevent loss of the rights and instead permits the State Engineer to only require a well owner to submit notice of commencement of beneficial use.

Not addressed is the question of what is "good cause" for extension of a permit and what effect the failure to show "good cause" has on the entitlement to use water and the procedure to be followed if "good cause" is not shown. The only reported decision to address this issue was Mooney v. Kuiper, which involved a predecessor statute. There the Colorado Supreme Court indicated, in dictum, that if the State Engineer was unable to find "good cause", he could cancel the well permit and effectively terminate the underlying right, a judicial decree notwithstanding. Thus, caution should be exercised to insure "good cause" is shown and that any administrative remedies are exercised in the event of a denial of an extension.

S.B. 5 contains a striking exception to the well permit requirement for wells used for dewatering mines in connection with extraction of minerals. There, no well permit is required unless the water is to be put to beneficial use. If the water is to be put to beneficial use then the well permits must be granted in the amount requested by the user unless there will be material injury to the vested water rights of others. If injury will result from issuance of the permit requested, the applicant may propose, and the permit
must contain, terms and conditions to prevent injury. However, injury is said not to result from the loss of artesian pressure or the lowering of water levels alone.

This far reaching exemption provides no means for regulating water usage or for preventing injury where the water withdrawal is not placed to beneficial use. It permits a mine dewatering project to effectively dewater all or a part of an aquifer and upset the attempt of S.B. 5 to establish a minimum life of the aquifer. It also provides those who have water rights in the same aquifer no recourse to protect themselves where the water withdrawn is not applied to beneficial use.

Even where the water is applied to beneficial use, there is little a water user can do to protect himself because lowering of water levels is not considered injury. Unless it was rendered physically impossible to obtain the amount of water he was entitled to, an existing water right owner has no obvious protection from the results of mine dewatering on his source of supply. There is no apparent policy justification for elevating the interests of the mining industry above those of all other water users and this portion of the law ought to be reconsidered.

E. Means of Allocation

Nontributary ground water continues to be allocated on the basis of land ownership. S.B. 5 continues the policy of S.B. 213 which limits the class of users of nontributary
ground water to those who own the overlying land or those with landowner's consent to use the water. It also continues the policy of requiring a 100 year life of the aquifer thus limiting the annual withdrawal rate to one percent per year of the water underlying the land. This decision, would have been unexceptional had it ended there. However, S.B. 5 went on to provide that the land ownership and 100 year aquifer life would apply to any ground water in the Dawson, Denver, Arapahoe, Laramie-Fox Hills and Dakota aquifers of the Denver Basin and the ownership criteria was made to apply without regard to whether tributary or nontributary ground water was involved.

A limitation on aquifer life for tributary ground water could conceivably be justified as a reasonable exercise of the police power for conservation purposes. However, because the bill expressly recognize that portions of these aquifers may be tributary to natural surface streams, it is hard to imagine how the land ownership limitation can pass constitutional muster. There appears to be no way, consistent with the constitutional right of the public to appropriate the unappropriated waters of every natural stream, to limit the class of appropriators of this tributary ground water to only overlying landowners.

F. Implied Consent to Use Nontributary Ground Water

S.B. 5 clarifies the procedures by which municipalities and other water supply entities can obtain implied consent to
withdraw nontributary ground water from beneath the lands of others. The desire for such a provision arises where a municipality or other water supply entity wishes to use nontributary ground water within its boundaries as part of its water supply. The General Assembly rationalized this provision by finding that for most individuals it would be economically infeasible to drill wells on their own property to serve themselves. It therefore apparently concluded that it was better for the municipality to have the right to use the water. The bill fails to articulate why this is a proper result.

The same section permits any existing municipality or quasi-municipal water supplier which is obligated either by law or by contract in effect on January 1, 1985, to be the principal provider of a public water supply within its municipal or quasi-municipal boundary in existence on January 1, 1985, to adopt an ordinance incorporating the ground water of the Dawson, Denver, Arapahoe and Laramie-Fox Hills and Dakota aquifers underlying all or any specified portion of the entities boundary into its water service plan. Subject to certain exceptions, any such ordinance enacted prior to September 1, 1985 is effective against any reservation, conveyance or consent to use such ground water given after January 1, 1985 and not properly recorded on or before August 31, 1985. Ordinances effective on or after September 1, 1985 are effective against any prior reserva-
tion, conveyance or consent given before the effective date but not properly recorded before the effective date of the ordinance.

The long term role of this provision is limited. The statutory language limits its applicability to entity boundaries as they existed on January 1, 1985 and it cannot be used to obtain implied consent from owners of land incorporated within the entities boundaries after that date. The reason for this limitation is unclear because it would have been useful to such entities to be able to continue to obtain implied consent to use such ground water beneath new lands incorporated within their boundaries in the future.

G. Changes to the 1969 Act's Adjudication Procedures

The Water Right Determination and Administration Act of 1969 was designed for adjudication and administration of surface water and tributary ground water under the doctrine of prior appropriation. To use the procedures of the 1969 Act for the determination of rights to use nontributary ground water, it was necessary to make certain revisions to the Act.

The first revision for this purpose was to make it clear that the law of prior appropriation does not apply to nontributary ground water. That change appears both in Sections 37-82-101 and 37-92-102(1)(a), 15 C.R.S. (as amended by S.B. 5) which provide that nontributary ground
water is not "water of the natural stream" and hence not subject to prior appropriation.

The next significant change was that dealing with well permits. The prior law required an applicant to have a well permit, a denial or failure of the State Engineer to act on the application therefor within six months, before the Court could act upon the merits of his water right application. In practice this resulted in a six month delay before judicial proceedings could begin. The law now only requires the submission of an application for determination of nontributary water rights to the water judge, a copy of which is sent to the State Engineer by the water clerk. No separate well permit application or other filing with the State Engineer is required although filing of a well permit application is not proscribed. This provision applies only ground water from wells described in section 37-90-137(4), 15 C.R.S. (as amended by S.B. 5) and therefore includes both the tributary and nontributary portions of the Dawson, Denver, Arapahoe, Laramie-Fox Hills and Dakota aquifers.

The State Engineer is given four months from the date of filing of the application with the water clerk to issue a determination with respect to the facts of the application. At the end of that four month period the applicant must supplement the application with evidence that the State Engineer has issued or failed to issue his determination as to the facts of the application whereupon the court has
authority to hear the application on its merits. If the State Engineer issues a determination as to the facts of the application, his findings are presumptive as to the facts found subject to rebuttal by any party.42

The statute is silent as the evidentiary effect of these presumptions and therefore they should be applied in accordance with CRE 301. Pursuant to CRE 301 and section 37-92-304(3) the applicant has the burden of persuasion and therefore the burden of going forward with the evidence. To the extent that the State Engineer's findings support the applicant, a prima facie case would be established on those issues and the burden of going forward shifted to opposing parties. Conversely, to the extent the findings do not support the applicant, then as part of its case in chief the applicant must rebut the State Engineer's findings. Since the State Engineer's findings are presumptive of the facts found the applicant must, in its case in chief, carry the burden of persuasion on those facts or be subject to dismissal at the close of his case in chief.

Another area of major change in the 1969 Act is found in section 37-92-305(11), 15 C.R.S. (as amended by S.B. 5). It provides (1) that prior appropriation does not apply to the administration of nontributary ground water, (2) that dates of initiation of the "withdrawal project" need not be included in any decree, (3) that quadrennial findings of reasonable diligence need not be required, and (4) that
requirements for diligence filings in previously entered decrees are not to be enforced. These are largely housekeeping changes that eliminate provisions designed for prior appropriation law. While these are helpful clarifications, establishing the date of initiation of the "withdrawal project" has continued significance for issuance of additional well permits.

Section 37-92-302(2) no longer requires filing a well permit in order to obtain an adjudication of rights. Once the adjudication is completed no well permit need be applied for until construction of the well is contemplated. However, unless filing of the water rights application with the State Engineer by the water clerk is the legal equivalent of filing a well permit application, then the obtaining of a decree may not establish the date of issuance of a well permit needed to qualify for the protection of section 37-90-137(10). That section provides that owners of permits issued pursuant to section 37-90-137(4) are entitled to the subsequent issuance of additional well permits and that the standards of section 37-90-137(4) are to be applied to the applications for additional well permits as if those applications had been submitted on the same dates as the original applications were filed. If the original well permit applications, as defined by section 37-90-137(1), are not filed for some years after a decree is obtained then the date of the original application for purposes of section
37-90-137(10) may not be the decree date but instead the date the first permit application was filed. This can result in a loss of water and other advantages section 37-90-137(10) was designed to protect.

This problem is not always cured by the remaining provisions of section 37-92-305(11). Those provisions permit the water judge to retain jurisdiction over determinations of ground water from wells described in section 37-90-137(4) to determine the annual amount of water available for withdrawal based upon actual aquifer characteristics derived from test drilling or actual well construction. Only after the courts retained jurisdiction is invoked and the final determination is made, does the decree control the amount of ground water to be annually withdrawn pursuant to a permit issued under section 37-90-137(4). It may therefore be advisable to submit well permit applications to the State Engineer at or before filing of an application with the water clerk to insure the earliest possible date for fixing aquifer characteristics for use in the issuance of future additional well permits. In the alternative, the court's retained jurisdiction should be invoked at the earliest possible date to fix the amount of water available.

These retained jurisdiction provisions also present questions involving adequacy of notice. Section 37-90-137(6), 15 C.R.S. (1984 supp.) authorizes use of the procedures of the 1969 Act to obtain determinations of rights
to nontributary ground water. These procedures include notice by publication in the resume. Resume notice constitutes the notice of claim and the water judge may only consider those matters that are presented in a proper application and in a manner that provides proper notice. The application must include inter alia a description of the source of water and the amount of water claimed. If the resume notice states only a specific volume of water and then the aquifer characteristic reveal an additional amount of water is available, a question arises whether the water judge can enter a decree for a greater amount without republication of notice. Under recent decisions by the Colorado Supreme Court additional notice may be required. Accordingly, careful attention should be given in drafting applications to insure that proper notice is given to avoid the need for republication.

CONCLUSION

Senate Bill 5 represents a substantial change in existing law. It did not alter the basic method for allocation of nontributary ground water based on land ownership and a minimum aquifer life. Rather, it added numerous new provisions designed to serve various interest groups but lacks any apparent unifying goal other than the notion that some new law was better than none. Unfortunately, many
of the provisions are not carefully drafted nor integrated into the existing statutory scheme. As a consequence, the result will likely be more confusion instead of less and will undoubtedly spawn additional litigation in any already overly litigated area of the law.

Of greater significance is the continued failure to carefully consider the public policy impacts of the use of nontributary ground water. There has been no careful consideration of whether the resource should be used at all and if so, for what purposes. Given the finite nature and value of the resource this question is critical. It is arguable that this resource should be conserved and only used as an emergency supply in times of drought. Alternatively, since it is finite, it seems it ought not constitute the sole or even major portion of a water supply for permanent human populations. Instead, at most it should only be used on an interim basis for such purposes pending development of renewable supplies.

If however, the decision is made to allow use of this ground water there should be an articulation of the reasons and purposes for its use. If the use is to be municipal, then we should now be addressing the problems of replacement of this water when it becomes economically infeasible to continue withdrawal or is no longer available. We should be
identifying alternate sources of supply and evaluating the impact on our future water use resulting from today's decisions.

For example, if our replacement supplies for Denver Basin growth are to be derived from transmountain diversions, can we be sure that western slope water will continue to be available then? Will its availability have been preempted by western slope development or forfeited to downstream states for nonuse? Assuming that water is available from the western slope, will transmountain diversions be economically viable at the time we need them? If so, who should bear those expenses, the public at large or those whose use of nontributary ground water has created the need. If those who create the need are to pay the costs, should we start collecting a trust fund for that purpose now? If our decision is to use western slope water, shouldn't that be a publically made decision, not one that events force upon us?

If nontributary ground water is to be used in one part of the state, should it be used statewide on the same basis? If so, what are the implications of that decision? For example, in Western Colorado there remains much undeveloped renewable surface water that Colorado is entitled to use under interstate compact. Projects necessary to develop those renewable supplies are expensive and if built, will be financed, in some measure, by the water user. The compara-
tive expense of nontributary water may make its use more economically attractive source of supply in the near term, eliminating the incentive to develop the renewable supplies. Should we allow decisions about complete development of renewable compact entitlements to be made by default in the market place? If so, what risks are we running of losing our ability to ever develop those entitlements and do those risks outweigh the short term gains from development of nontributary ground water?

It is also important to carefully consider the proper basis for allocation. Why is landownership a meaningful criteria? What social or public policy values are furthered by it? Given that the United States is the largest landowner in the state, is it a rule we wish to apply state wide? Would it be more appropriate to limit its application to one part of the state and not others? If so, what basis is it to be done upon and for what reasons?

These are examples of the substantial questions that remain unexplored and unanswered regarding our use of nontributary ground water. They are also questions in need of serious examination in order for the State of Colorado to know how its future water needs will be met.
1. 6 Colo. 443 (1882)
2. 3 Colo. App. 430, 33 P. 280 (1893)
3. 3 Colo. App. at 434, 33 P. at 282
5. 86 Colo. 178, 279 P. 44 (1929)
6. 86 Colo. at 181-182, 279 P. at 45
7. 123 Colo. 330, 228 P.2d 975 (1951)
8. 123 Colo. at 335-336, 228 P.2d at 977
9. 123 Colo. at 335-336, 228 P.2d at 978
11. Subsequent research disclosed no support for Mr. Kelly's conclusion. Symposium on Colorado Water Law, 47 Den L.J. 177, 314 (1970)
12. 153 Colo. at 173-174, 385 P.2d at 140
21. Colorado Constitution, Art. XVI, Sections 5 and 6
22. 671 P.2d 1294 (Colo. 1983)
23. See, Whitten v. Coit, supra at note 10


25. Section 37-90-103 (10.5), 15 C.R.S. (as amended by S.B. 5)

26. Section 37-90-137(9), 15 C.R.S. (as amended by S.B. 5)

27. Section 37-90-137(9)(b), 15 C.R.S. (as amended by S.B. 5)

28. Section 37-90-137(9)(c), 15 C.R.S. (as amended by S.B. 5)

29. Id.


31. Section 37-90-137(9), 15 C.R.S. (as amended by S.B. 5)

32. Id.

33. Section 37-90-137(a)(II), 15 C.R.S. (as amended by S.B. 5)

34. 194 Colo. 477, 573 P.2d 538 (1978)

35. Section 37-90-137(7), 15 C.R.S. (as amended by S.B. 5)

36. Section 37-90-137(4)(b), 15 C.R.S. (as amended by S.B. 5)

37. Section 37-90-137(4)(a) and (b)(II), 15 C.R.S. (as amended by S.B. 5)

38. Colorado Constitution, Art. XVI, Sections 5 and 6

39. Section 37-90-137(8), 15 C.R.S. (as amended by S.B. 5)

40. Section 37-90-137(8)(a)-(f), 15 C.R.S. (as amended by S.B. 5)

41. Section 37-92-302(2), 15 C.R.S. (as amended by S.B. 5)

42. Section 37-92-305(6), 15 C.R.S. (as amended by S.B. 5)

43. E.g., Danielson v. Jones, 698 P.2d 240 (Colo. 1985)


APPENDIX I

AREAS OF AGREEMENT.

1. Some development and use of nontributary groundwater is desirable.

2. Nontributary groundwater must be allocated with special care because it is essentially a nonrenewable resource. This necessitates placing limits on use of nontributary groundwater to conserve it for the future.

3. Legislative control and allocation of nontributary groundwater is consistent with the Colorado Constitution.

4. The definition of nontributary groundwater should be clarified. The Groundwater Legislation Committee agreed that groundwater is not tributary if pumping will not affect a stream more than one percent of the annual amount to be pumped in 100 years.

5. Any nontributary groundwater allocation scheme must recognize that no groundwater is totally nontributary.

6. Withdrawals of nontributary groundwater that affect the stream should be compensated. A requirement of augmentation of affected surface sources should be imposed.

7. Uses and rights established under existing groundwater laws should be respected and preserved to the extent possible, considering the finite nature of the resource.

8. Holders of nontributary groundwater permits should not be entitled to a particular water level or pressure. The legislature can consider measures to prevent extraordinary, unfair, economic effects on existing well users but should not significantly inhibit new groundwater development.

9. There are ambiguities, uncertainties, and gaps in Colorado's nontributary groundwater law.

10. The 1965 Groundwater Management Act is not adequate to meet all of Colorado's future needs.

11. Priority administration is an unworkable concept for nontributary groundwater.

12. The interests of overlying landowners with respect to nontributary groundwater should be clarified.
13. The requirement of a well permit is an acceptable basic means of controlling groundwater use.

14. The State Engineer should play an important role in making technical determinations concerning nontributary groundwater. Policy questions can be decided by the legislature or delegated to administrative bodies and officials.

15. A groundwater allocation scheme must take account of differences in hydrology and water needs in different areas of the state.

16. Groundwater legislation should be drafted to allow for the possibility of artificial recharge.

17. Changes in the law should minimize complication and expense.
APPENDIX II

 ISSUES OF NO CONSENSUS LEFT TO THE LEGISLATURE.

A. Should nontributary groundwater be considered primarily a temporary, supplemental, or emergency source of supply when surface water is not available. The Committee was reluctant to find that the wisest and best use of nontributary groundwater is always a backup source for other sources of water supply. However, the Committee agreed that such use may be the most desirable depending on the circumstances.

B. What should be included in the terms of a groundwater permit?

1. Length of permit: The Committee recommends that the length of the permit should be finite if no well is drilled, but the permit should be renewable upon to a demonstration of continuing need.

2. Pumping rate.

3. Requirement of beneficial use within a fixed time (not favored by the Committee).

C. How should a minimum aquifer life be established?

1. Hydrology.

   The Groundwater Legislation Committee strongly recommended that aquifer life depend on the unique hydrology of particular aquifers. Thus, application of the fixed 100-year minimum life for all aquifers (now applicable under S.B. 213) is disfavored by most Committee members.

2. Existing and anticipated uses.

   The majority of the Committee favored setting minimum aquifer life, depending in part on what uses are now being made and those anticipated for the aquifer in the future.

D. Other than aquifer life, what should be considered in establishing an allowable pumping rate?

1. Effects on established uses and rights of others?

2. Extent of land overlying an aquifer owned by the proposed user? The Committee generally felt that
a landowner should be able to use the quantity of water under the land.

3. Potential damage to the aquifer.

4. Reliability of continued pumping in the manner proposed?

5. Possibility of allowing variable withdrawals from year to year?

E. Should differences among areas be considered? If so, how?

The Committee opposed the application of a uniform system that is applicable to all areas of the state. The Committee strongly recommends allocation and administration of nontributary groundwater according to the characteristics of the area of use. The Committee did not agree on how local differences should be considered. There are several possibilities.

1. Administrative rules particular to individual areas.

2. Requirement that State Engineer consider factors that vary among areas.

3. Delegation of authority to local entities.

4. Special laws relating to Denver Basin (and others).

F. Who should make decisions regarding groundwater allocation and administration?

1. Policy setting -- statewide.
   a. Legislature?
   b. State Engineer?
   c. Groundwater Commission?

2. Policy setting -- local or particularized issues.
   a. Legislature?
   b. State Engineer?
   c. Groundwater Commission?
   d. Special Districts?
3. Administrative rule making regarding permitting.
   a. State Engineer, with appeal to court on the record?
   b. State Engineer, with de novo reconsideration of rules by court?
   c. Groundwater Commission, with appeal to the court de novo?

4. Permit issuance.
   a. State Engineer with appeal to court?
   b. Groundwater Commission?
   c. Court recognizes statutory rights; State Engineer issues permit, with appeal to court?

G. To what extent should the judicial process be extended to the allocation of groundwater? The Committee strongly recommended that to the extent judicial processes are used for nontributary groundwater matters, the water court (rather than the district courts) be used. The Committee opposed courts performing administrative functions such as issuance of well permits.

H. What procedure should be followed in the permitting process?
   1. Notice?
   2. Hearing?
   3. Fees?

I. Should changes be made in the Groundwater Management Act of 1965?

   The Committee did not reach consensus on a recommendation to amend the Act, but it recognized several of the Act's shortcomings. If changes are to be made in the Act, the Committee recommended that:

   1. The powers of the Groundwater Commission should be confined to policy matters, leaving technical matters to the State Engineer;

   2. The composition of the Commission's membership should be changed;

   3. The priority list under C.R.S. §37-90-109 should be eliminated.
4. The Committee was divided on whether the Act should be extended to give the Commission powers over all nontributary groundwater rather than only the groundwater in designated basins.

J. What are the fiscal impacts of the system?

The Committee recommended careful analysis of any legislative proposal to determine the costs and benefits. Fee structures, costs, and other possible sources of revenue must be evaluated. Private costs must also be considered.
MINIMUM CHANGE PROPOSALS

1. Land ownership, or consent of the owner, is the sole basis upon which rights to nontributary ground water are obtained. Under the "nonrenewable" draft, the land ownership doctrine would apply to ground water which is nontributary and nonrenewable. Under the "semi tributary" draft, the doctrine would apply to ground water which is 100% nontributary and to groundwater which is 50-99% nontributary.

2. "Nontributary" is defined to eliminate the uncertainty under current law. Under the definition, water is not tributary if within 100 years pumping will not affect the stream more than 1% of the amount to be annually pumped.

3. The administration of nontributary wells by priority is prohibited. Presumably other well owners can enforce the terms of permit or decree, but not curtail pumping allowed by permit or decree.

4. The practice of obtaining a water court decree for a permitted well is specifically sanctioned, but not required.

5. The administration of ground water which is partially tributary and partially nontributary is addressed. A permittee will be required to replace all the water diverted from the stream by that portion of his pumping of water deemed to be tributary.

6. There is no legal right to water pressure or water level.

7. The appropriation doctrine of "use it or lose it" is declared to be inapplicable to nontributary ground water.

8. Permits implied consent of a landowner in a municipality to appropriation of nontributary ground water beneath the landowner's property by the municipality.

9. Review of rules and regulations adopted by state engineer for granting or denial of permits, and for administration of wells, is subject to review under C.R.S. §37-92-501 which provides for de novo consideration of basis for rules and regulations, rather than normal "arbitrary and capricious" standard for review under APA.
APPENDIX IV

REVISED GROUND WATER MANAGEMENT ACT PROPOSAL

1. Land ownership is not the basis upon which rights to nontributary ground water are obtained. Any person may apply to the state engineer for a right to nontributary ground water outside a currently designated basin. A permit will be granted or denied based upon rules of the Groundwater Commission, which would address priorities of use, rates of withdrawal, aquifer life, and protection of existing water rights. Landowners may limit surface access to possible well sites.

2. "Nontributary" is defined to eliminate the uncertainty under current law. Under the definition, water is not tributary if within 100 years pumping will not affect the stream more than 1% of the amount to be pumped annually.

3. Prohibits establishment of new designated ground water basins; substitutes the concept of designated aquifers, a device which serves to shift the burden on the issue of tributariness.

4. Substitutes a "reasonable depletion" concept for the arbitrary "100 year life of aquifer" rule.

5. State engineer has authority to establish replacement or augmentation requirements to protect other water rights where the water to be pumped is part tributary and part nontributary.

6. Alters the composition of the Groundwater Commission to make it more representative of the user constituency.

7. Wells are to be administered by the state engineer. Nontributary well owners outside designated basins have no right to particular water level; test is economic reach.

8. Well permits issued by the state engineer are not conditional permits.

9. Permits are for a five year term, with five year renewals, upon a showing of "continuing need."

10. The state engineer can initiate forfeiture provisions if the water remains unused for five years or more.

11. Permit decisions of the state engineer are final and have the same effect as a water court decree, if not appealed to the water court.
12. Appeals of the state engineer permitting decisions to water court are *de novo*, unless formal evidentiary proceedings were used.

13. Nontributary ground water rules and regulations will be reviewed under the APA standard (i.e., not trial *de novo*).

14. Groundwater Commission has broad authority over allocation and use of nontributary ground water, including authority to establish the life of the aquifer, the permissible pumping rate, the priority of uses for such water, the protection of existing uses and rights, and procedures for averaging depletion and for recharge.

15. Establishes a fee schedule for well permits, and provides that fees will be used for the costs of administration of nontributary ground water.

16. Provides a local management option in designated aquifers, similar to that allowed in designated ground water districts.