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0292 Committee on Nontributary Ground Water

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Report to the Colorado General Assembly:

**RECOMMENDATIONS FOR 1985
COMMITTEE ON:**

Nontributary Ground Water



COLORADO LEGISLATIVE COUNCIL

RESEARCH PUBLICATION NO. 292

December, 1984

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COLORADO LEGISLATIVE COUNCIL
" RECOMMENDATIONS FOR 1985

*Colorado General Assembly, Legislative Council,
" Committee on Nontributary Ground Water.*

COMMITTEE ON:
NONTRIBUTARY GROUND WATER

Legislative Council
Report to the
Colorado General Assembly

Research Publication No. 292
December, 1984

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Colorado Legislative Council
recommendations for 1985

To Members of the Fifty-fifth Colorado General Assembly:

Submitted herewith is the final report of the Committee on Nontributary Ground Water. The committee was appointed by the Legislative Council pursuant to House Joint Resolution No. 1027, 1984 session.

At its meeting of October 15, the Legislative Council reviewed this report and approved a motion to forward the committee's recommendations to the Fifty-fifth General Assembly.

Respectfully submitted,

/s/ Senator Ted L. Strickland
Chairman
Colorado Legislative Council

TLS/pn

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LEGISLATIVE COUNCIL
COMMITTEE ON NONTRIBUTARY GROUND WATER

Members of the Committee

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Sen. James Rizzuto	Rep. Faye Fleming
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	Rep. Jim Scherer
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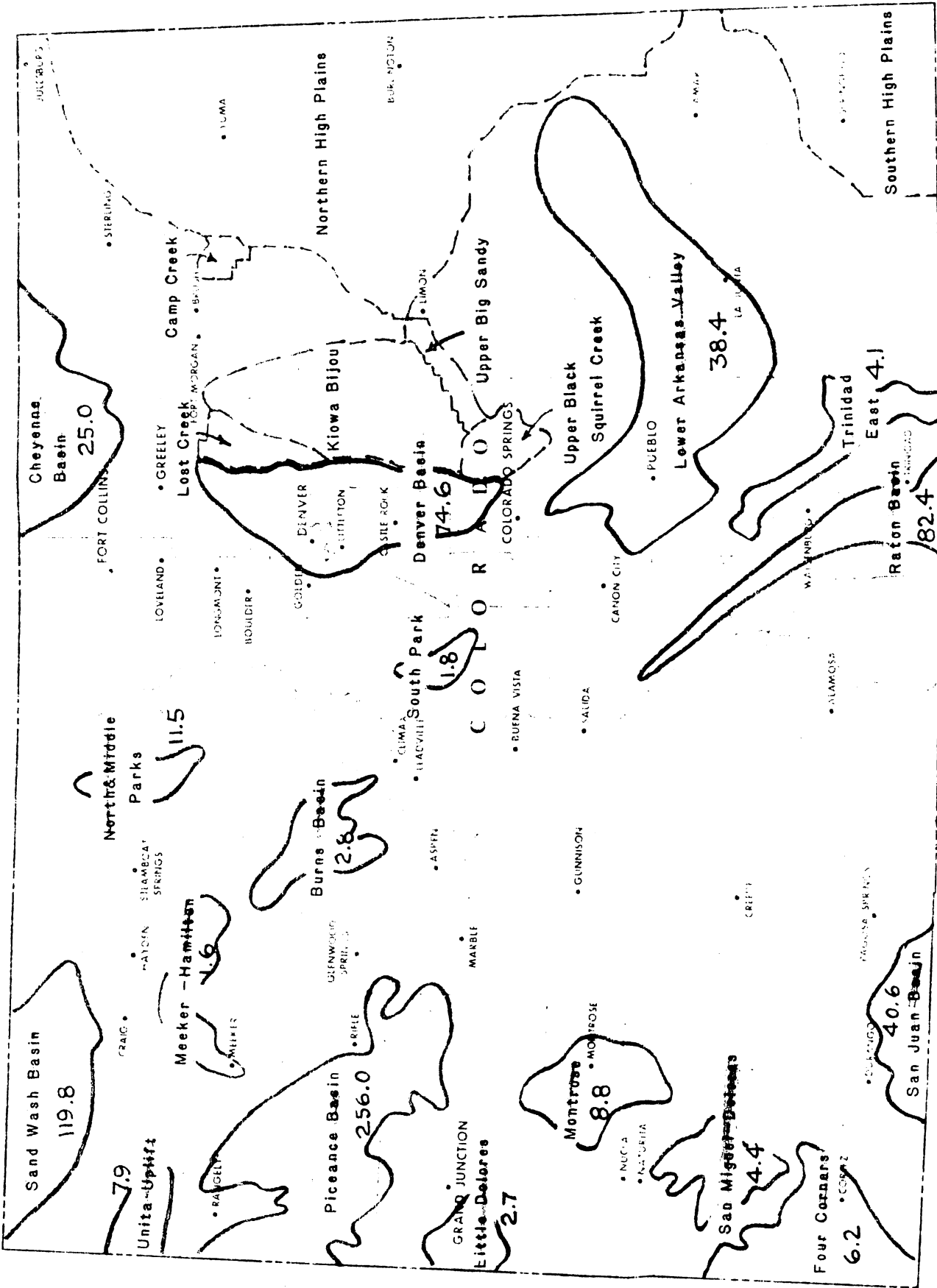
I. BACKGROUND

A. Groundwater Resources in Colorado.

Colorado has a substantial number of nontributary groundwater aquifers. The water in storage in these aquifers may total as much as 680 million acre feet. The location, approximate boundaries, and estimated volume of water in storage boundaries of designated basins are shown on the map on page two.

Most nontributary groundwater aquifers in Colorado receive some natural recharge. However, these aquifers also experience natural outflows in amounts generally equal to recharge. Thus it is not safe to assume that use of an amount equal to recharge will have no stream effect. This principle is illustrated in the table on page three which shows that the total recharge to the Denver Basin aquifers (54.7 cfs annually) equals the total annual discharge to streams, even though the equation may not be in balance for each aquifer in the basin.

OFFICE OF THE STATE ENGINEER



Location map of Colorado showing the approximate boundaries of known or inferred non-tributary aquifers/aquifer units. Figures represent estimated quantity of total ground water storage in millions of acre-feet. Designated ground water basins are outlined by dashed lines.

SUMMARY OF COMMITTEE RECOMMENDATIONS AND FINDINGS

Pursuant to House Joint Resolution 1027, the Interim Committee on Nontributary Ground Water was directed to conduct:

A study of the report submitted by the task force convened by the Executive Director of the Department of Natural Resources concerning nontributary ground water in Colorado. The study may consider the effect of nontributary ground water on tributary ground water. The study shall be limited to no more than four sessions.

As directed by the Legislative Council, the interim committee held four meetings. At the first meeting, presentations were made by members of the Department of Natural Resources' Groundwater Legislation Committee concerning the hydrologic, geologic, and legal aspects of nontributary ground water. Also, the report of the Groundwater Legislation Committee was distributed for the interim committee's review.

The next two meetings focused on a discussion of the report and the accompanying draft bills. The committee made the report available to the state's various water conservancy and conservation districts, ground water management districts, various water organizations and associations, and other interested persons. Organizations and individuals were invited to comment on the report before the committee.

For the last meeting of the committee, interested persons were invited to submit amendments to the two draft proposals and/or submit their own proposals. Two additional proposals were considered. The Executive Director of the Department of Natural Resources submitted an outline for a bill, and the Colorado Water Congress submitted a draft proposal. The draft proposals were not recommended by the interim committee but are contained in Appendix A.

Committee Recommendations

As a result of the committee's activities, the Interim Committee on Nontributary Ground Water recommends the following bills to the Colorado General Assembly.

Concerning Ground Water -- Bill 26

Bill 26 amends section 37-90-137, Colorado Revised Statutes, concerning permits to construct wells outside designated ground water basins; amends the legislative declaration in the "1965 Colorado Ground Water Management Act" to recognize the unique nature of nontributary ground water resources outside designated ground water

basins; defines nontributary ground water; provides for the dewatering of geologic formations by removing nontributary ground water for mining purposes; and establishes standards for rulings of the referee and decisions of the water judge.

Concerning Requiring Holders of Well Permits to Report to the State Engineer -- Bill 27

Bill 27 empowers the State Engineer to require a report on the amount of ground water pumped by the holder of a conditional or final well permit if such information is necessary for the protection of vested water rights or for the proper administration of ground water.

Concerning Penalties for Violating any Provision of a Well Permit -- Bill 28

Bill 28 provides for criminal and civil penalties for the violation of any provision of a well permit.

Other Committee Activities

Ground Water Quality Protection Strategy

For informational purposes, the Department of Health reported on its activities concerning the development and implementation of a statewide strategy for the protection of ground water quality. The department's report is on file in the office of the Legislative Council.

Federal Wilderness Legislation

Pursuant to permission granted by the Colorado Legislative Council on September 24, 1984, the committee discussed the "Colorado Wilderness Act of 1984" (S.2916) which is pending before the United States Congress. The legislation would designate certain wilderness areas in Colorado. The interim committee transmitted a resolution to all members of the Colorado congressional delegation supporting the efforts of Colorado's United States senators to include language in the act which protects existing water rights in the state.

BACKGROUND

The Department of Natural Resources' Groundwater Legislation Committee was formed at the direction of the governor as a result of the Colorado Supreme Court decision in State of Colorado v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (Colo. 1983), better known as the Huston case and the passage of Senate Bill 439 (1983 session). The governor's October 11, 1983, letter to the General Assembly, concerning the signing of Senate Bill 439, indicated that he would request the Executive Director of the Department of Natural Resources to "...initiate at once a study of possible alternative approaches to the administration of groundwater." The Groundwater Legislation Committee was established and chaired by the Executive Director of the Department of Natural Resources. Twenty-three persons served on the committee. The membership, including water attorneys, engineers, the State Engineer, water users, water providers and legislators, is detailed below.

Groundwater Legislation Committee

David H. Getches, Executive Director, Department of Natural Resources	Senator Tilman H. Bishop Morton W. Bittinger
John Carlson	Thomas V. Cech
Ralph Curtis	Jeris Danielson, State Engineer
Harlan W. Erker	David L. Harrison
Joy Hilliard	Marcia M. Hughes
Joe Knopinski	Kahna Le
Senator Harold L. McCormick	Representative Scott McInnis
Clyde O. Martz	Dennis H. Montgomery
Representative Chris Paulson	Glenn E. Porzak
Ben Saunders	Duane Woodard, Attorney General for the state of Colorado
Representative Ruth Wright	Representative Walter A. Younglund

The committee held fifteen meetings between November, 1983, and July, 1984. They discussed the state's ground water resources and ground water law, ground water administration in other states, the Huston decision, and Senate Bill 439. As a result of their

deliberations, the committee submitted a report on their activities and research and two draft proposals for legislation to the interim committee (see Appendix A). Of the two draft proposals, one suggests "minimum" changes to Senate Bill 213 (1973 session), section 37-90-137 (4), Colorado Revised Statutes, and the other revises the "1965 Ground Water Management Act."

Committee Activities

The Interim Committee on Nontributary Ground Water reviewed the Groundwater Legislation Committee's report and recommended bills. As a part of this review, the interim committee requested presentations on the background information in the Groundwater Legislation Committee report. These presentations addressed the types of ground water resources in the state and the development of ground water law in the state. Particular emphasis was given to the following topics: the five types of ground water in the state, the Denver Basin, the Huston case, and Senate Bill 439.

Types of Ground Water

The State Engineer reviewed the five types of ground water in Colorado -- underground, designated, exempt, nontributary, and geothermal wells.

For the purpose of defining the waters of a natural stream in the "Water Right Determination and Administration Act of 1969," underground water is defined in section 37-92-103 (11), Colorado Revised Statutes, as "...that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate or direction of movement of the water in that alluvial aquifer or natural stream." Underground water is considered different from designated ground water which is defined in section 37-90-103 (6), Colorado Revised Statutes. Designated ground water means:

...that ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principle water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin.

Designated ground water does not include any ground water within the Dawson-Arkose, Denver, Arapahoe, or Laramie-Fox Hills formations located outside the boundaries of designated ground water basins in

existence on January 1, 1983. Designated ground water is administered by the Colorado Ground Water Commission.

Exempt ground water, defined in section 37-92-602 (1), Colorado Revised Statutes, is water from wells which: 1) do not exceed fifteen gallons per minute of production and are used for ordinary household purposes, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, and the irrigation of not over one acre of home gardens and lawns, but not used for more than three single-family dwellings; 2) do not exceed fifteen gallons per minute of production and are used for drinking and sanitary facilities in commercial business; 3) are used exclusively for fire-fighting purposes if said wells are capped, locked, and available for use only in fighting fires; and 4) do not exceed fifty gallons per minute which are in production as of May 22, 1971, and were and are used for ordinary household purposes for not more than three single-family dwellings, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, and the irrigation of not over one acre of gardens and lawns.

Pursuant to section 37-90-137 (4), Colorado Revised Statutes, (Senate Bill 213, 1973 session), nontributary ground water is all ground water other than: 1) underground water defined in section 37-92-103, Colorado Revised Statutes; 2) designated ground water defined in section 37-90-103 (6), Colorado Revised Statutes; and 3) ground water pumped from small capacity wells and domestic wells in accordance with sections 37-90-105 and 37-92-602, Colorado Revised Statutes, respectively.

Geothermal fluid is defined in section 37-90.5-103 (2), Colorado Revised Statutes, as naturally occurring ground water, brines, vapor, and steam associated with a geothermal resource.

Denver Basin

The Denver Basin is comprised of four aquifers -- the Dawson-Arkose, the Denver, the Arapahoe, and the Laramie-Fox Hills. The approximate geographic boundaries of the basin are the foothills, Greeley, Limon, and Fountain.

Two management systems operate in the Denver Basin. The eastern portion of the Denver Basin, which comprises approximately 49 percent of the basin, is administered by the Colorado Ground Water Commission as a designated basin. The remaining portion is administered pursuant to Senate Bill 213 (1973), section 37-90-137 (4), Colorado Revised Statutes. Permits to construct a well outside a designated ground water basin are to be issued by the State Engineer only for that quantity of unappropriated water underlying the land and if the minimum useful life of the aquifer is one hundred years, assuming there is no substantial artificial recharge during that time period.

Huston Case

In State of Colorado v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (Colo. 1983), commonly referred to as the Huston case, the Colorado Supreme Court rejected John Huston's claim that references to "appropriation" in Senate Bill 213 (1973 session) made nontributary ground water subject to the "doctrine of prior appropriation." The doctrine of prior appropriation means "first in time, first in right."

The primary elements of the court's decision are:

1) nontributary ground water is not subject to the appropriation doctrine established in article XVI of the Colorado Constitution;

2) nontributary ground water in a designated ground water basin, established pursuant to the 1965 act (37-90-101 et seq., Colorado Revised Statutes), is subject to the modified doctrine of prior appropriation as provided in that act;

3) rights to nontributary ground water, which is not located in a designated basin, may be obtained only through application for a well permit from the State Engineer pursuant to section 37-90-137 (4), Colorado Revised Statutes (Senate Bill 213, 1973 session); and

4) the adjudication procedures, provided for in the 1969 act (37-92-101 et seq., Colorado Revised Statutes), do not apply to determinations of rights in nontributary ground water (Senate Bill 439 (1983 session)).

Senate Bill 439 (1983 session)

In response to the Colorado Supreme Court's decision in the Huston case, the General Assembly enacted Senate Bill 439 in 1983. Section 37-92-203 (1), Colorado Revised Statutes, was amended to include the determination of rights to nontributary ground water as a part of water matters which a water judge may consider. Along with Senate Bill 439, the General Assembly adopted House Joint Resolution 1038 (1983 session). The General Assembly stated that its intention in enacting Senate Bill 439 was procedural only, and section 37-90-137 (4), Colorado Revised Statutes, continues to control the granting of permits for nontributary ground water outside of designated basins.

Committee Recommendations

Nontributary Ground Water

Concerning Ground Water -- Bill 26

Because of the complexity of the issues pertaining to nontributary ground water and the various concerns and issues presented by interested persons, the committee recommends Bill 26, the Colorado Water Congress' proposal, with the broad title of "Concerning Ground Water." The bill and title provide a framework for the consideration of nontributary ground water by the General Assembly during the 1985 session.

Section 1 declares that it is the policy of the state to continue to moderate an equitable development of nontributary ground water resources consistent with conservation. The General Assembly has the ability to legislatively establish rights for the diversion and use of nontributary ground water. Such water shall be devoted to beneficial use in amounts based upon conservation of the resource and protection of vested water rights. Economic development of the resource must allow for the reduction of hydrostatic pressure levels and aquifer water levels. The doctrine of prior appropriation does not apply. Nontributary ground water shall be allocated as provided in Bill 26 and such allocation shall be based on ownership of the overlying land.

Section 2 defines nontributary ground water as ground water which, if diverted, will not, within one hundred years from the time diversion is allowed to begin, affect the flow of a natural stream in an annual amount greater than 1 percent of the annual amount allowed to be diverted. Nontributary ground water includes all ground water within the Denver, Arapahoe, and Laramie-Fox Hills formations. The diversion of ground water from such formations will not materially affect vested water rights to the flow of any natural stream.

Section 3 provides that a permit to construct a well to divert nontributary ground water outside a designated ground water basin does not expire and does not require the filing of a statement of beneficial use. However, the permit may require the metering of diversions from wells drilled and the reasonable recording and disclosure of such metered diversion. The provisions of 37-90-137 (1) and (2), Colorado Revised Statutes, concerning permits to construct a well apply except that the applicant is entitled to divert the quantity of water, exclusive of artificial recharge, underlying the land owned by the applicant or underlying land owned by another who has consented to the diversion. The reduction of either hydrostatic pressure or water level in the aquifer is not deemed to materially injure vested ground water rights. Permits are to allow diversions on the basis of an 100-year aquifer life. Owners of permits are entitled to seek permits for additional wells on the same basis as the original permit.

Concerning the dewatering of geologic formations by removing nontributary ground water to allow for or permit mining, the following applies: 1) no well permit is required unless the nontributary ground water will be beneficially used; and 2) if a permit is required, the State Engineer shall allow the rate of withdrawal shown by the applicant to be necessary to dewater the mine if the applicant demonstrates that vested water rights or other rights will not be materially injured.

Section 4 states the standards for rulings of the referee and decisions of the water judge. Nontributary ground water shall not be administered in accordance with priority of appropriation. Determination of rights to such water need not include a date of initiation of the diversion project. Such determinations do not require subsequent showings or findings of reasonable diligence and such determinations entered prior to July 1 of 1985 shall not be enforced to the extent of such diligence requirements on or after that date. To the extent the diversion of ground water will, within 100 years from the time diversion begins, affect the flow of a natural stream in an annual amount greater than 1 percent of the annual amount allowed to be diverted, then an amount of water equal to the entire effect upon such natural stream shall be replaced where and as necessary to prevent material injury to vested water rights.

Section 5 provides that the bill shall take effect on July 1, 1985.

Other Issues Pertaining to Ground Water -- Bills 27 and 28.

In addition to the bill concerning ground water, the committee determined that the State Engineer may need to know the amount of ground water being pumped by holders of conditional or final well permits for the protection of vested water rights or for the proper administration of the state's ground water. To assist the State Engineer in the administration of well permits, the committee also agreed to provide penalties for the violation of conditional or final well permits.

Concerning Requiring Holders of Well Permits to Report to the State Engineer -- Bill 27

Bill 27 empowers the State Engineer to require a report on the amount of ground water pumped by the holder of a conditional or final well permit if such information is necessary for the protection of vested water rights or for the proper administration of ground water.

Concerning Penalties for Violating any Provision of a Well Permit --
Bill 28

Bill 28 provides for criminal and civil penalties for the violation of any provision of a well permit. Any person who violates any provision of his conditional or final permit is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than \$500 or by imprisonment in the county jail for not more than ninety days or both. Any such person also is subject to a civil action brought by the Attorney General on behalf of the State Engineer and is subject to a civil penalty assessed by the court of not less than \$100 nor more than \$1,000 for each violation. Any civil penalties collected are to be transmitted to the State Treasurer to be credited to the general fund.

Other Committee Activities

Ground Water Quality Protection Strategy

For informational purposes, the Department of Health presented its ground water quality protection strategy. In June of 1983, the department conducted a series of meetings on the development and implementation of a statewide strategy. Subsequent to those meetings, an advisory committee was established by the department to review the findings of these public meetings and review the proposed ground water quality protection strategy for the state. On May 15, 1984, the Water Quality Control Commission formally adopted a goal for the strategy. The goal is to protect the beneficial use of the state's ground water. The department has scheduled five meetings to describe the implementation of the strategy based on the goal. These meetings are to be held throughout the state during October and November of 1984.

Federal Wilderness Legislation

On September 24, 1984, the Colorado Legislative Council granted permission to the interim committee to discuss the legislation pending in Congress concerning the designation of wilderness areas in Colorado.

At the third meeting of the interim committee on September 26, 1984, David Getches, Executive Director of the Department of Natural Resources, commented on the designation of wilderness areas in Colorado as proposed in United States Senator William Armstrong's wilderness bill (S. 2916) and the possible implications on Colorado water and water rights. In addition to Mr. Getches' testimony, representatives of the Colorado Water Congress, including the mayor of Colorado Springs, Representative Chris Paulson, and others, commented on the implications of the bill and the Sierra Club v. Block (84-K-2) lawsuit pending in the United States District Court in Colorado.

As a result of this testimony and the committee's discussion, the following resolution was transmitted to United States Senator William Armstrong, United States Senator Gary Hart, all other members of the Colorado congressional delegation, and to all members of the United States Senate Subcommittee on Public and Reserved Water of the United States Senate Energy and Natural Resources Committee.

RE: S. 2916, 98th Congress 2nd Session

Be It Resolved by the Interim Committee on Nontributary Ground Water under the authority of the Colorado Legislative Council to consider the federal designation of wilderness areas in Colorado, including any water rights in association therewith:

That, the Interim Committee on Nontributary Ground Water of the General Assembly of the state of Colorado supports the efforts of United States Senator William Armstrong and United States Senator Gary Hart to include in the "Colorado Wilderness Act of 1984" language protecting water rights established pursuant to Colorado's constitution and statutes and water rights under applicable interstate compacts, and creating no new water rights in the United States and which has a reasonable likelihood of passage in the United States Congress.

Be It Further Resolved, That copies of this Resolution be transmitted to United States Senator William Armstrong, United States Senator Gary Hart, all other members of the Colorado Congressional delegation, and to all members of the United States Senate Subcommittee on Public and Reserved Water of the United States Senate Energy and Natural Resources Committee.

In addition, the committee asked the Colorado Attorney General and the water users who are engaged in existing reserved water rights litigation to consult on the Sierra Club v. Block suit in order to make a recommendation to the Executive Director of the Department of Natural Resources, the Director of the Colorado Water Conservation Board and the General Assembly regarding the state of Colorado's position in this lawsuit. The Executive Director of the Department of Natural Resources and the Director of the Colorado Water Conservation Board were requested to report on what has been done and what should be done in this matter so the committee can consider appropriate recommendations.

At the committee's final meeting on October 9, 1984, Mr. Getches, Executive Director of the Department of Natural Resources; William McDonald, Director of the Colorado Water Conservation Board; and Attorney General Duane Woodard discussed the efforts of the Colorado Water Conservation Board and the Attorney General's office in determining the proper action which should be taken with regard to the

Sierra Club lawsuit. They assured the interim committee that as developments occur the leadership of the Colorado General Assembly and the standing committees on agriculture will be apprised of any state action.

BILL 26

A BILL FOR AN ACT

1 CONCERNING GROUND WATER.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Makes a legislative declaration. Defines "nontributary ground water". Provides that permits to construct wells outside designated ground water basins to divert nontributary ground water shall not expire. Allows for metering of diversions and for disclosure of such metering. States that material injury to vested ground water rights shall not be deemed to result from the reduction of either hydrostatic pressure or water level in the aquifer. Retains the one-hundred-year life of an aquifer. Authorizes the owners of permits to seek permits for additional wells on the same basis as the original permits. Provides for the dewatering of geologic formations by removing nontributary ground water to facilitate mining. States that nontributary ground water shall not be administered in accordance with priority of appropriation. States that, to the extent that the diversion of ground water will, within one hundred years from the time the diversion begins, affect the flow of a natural stream in an annual amount greater than one percent of the annual amount to be diverted, an amount of water equal to the entire effect upon such natural stream shall be replaced as necessary to prevent material injury to vested water rights.

2 Be it enacted by the General Assembly of the State of Colorado:

3 SECTION 1. 37-90-102, Colorado Revised Statutes, is

1 amended to read:

2 37-90-102. Legislative declaration. (1) It is declared
3 that the traditional policy of the state of Colorado,
4 requiring the water resources of this state to be devoted to
5 beneficial use in reasonable amounts through appropriation, is
6 affirmed with respect to the designated ground waters of this
7 state, as said waters are defined in section 37-90-103 (6).
8 While the doctrine of prior appropriation is recognized, such
9 doctrine should be modified to permit the full economic
10 development of designated ground water resources. Prior
11 appropriations of ground water should be protected and
12 reasonable ground water pumping levels maintained, but not to
13 include the maintenance of historical water levels. All
14 designated ground waters in this state are therefore declared
15 to be subject to appropriation in the manner defined in this
16 article.

17 (2) THE GENERAL ASSEMBLY RECOGNIZES THE UNIQUE, FINITE
18 NATURE OF NONTRIBUTARY GROUND WATER RESOURCES OUTSIDE OF
19 DESIGNATED GROUND WATER BASINS. SUCH NONTRIBUTARY GROUND
20 WATER SHALL BE DEVOTED TO BENEFICIAL USE IN AMOUNTS BASED UPON
21 CONSERVATION OF THE RESOURCE AND PROTECTION OF VESTED WATER
22 RIGHTS. ECONOMIC DEVELOPMENT OF THE RESOURCE MUST ALLOW FOR
23 THE REDUCTION OF HYDROSTATIC PRESSURE LEVELS AND AQUIFER WATER
24 LEVELS. THE DOCTRINE OF PRIOR APPROPRIATION SHALL NOT APPLY
25 TO THE ADMINISTRATION OF NONTRIBUTARY GROUND WATER. TO
26 CONTINUE THE MODERATE AND EQUITABLE DEVELOPMENT OF

1 NONTRIBUTARY GROUND WATER RESOURCES CONSONANT WITH
2 CONSERVATION SHALL BE THE POLICY OF THIS STATE. SUCH WATER
3 SHALL BE ALLOCATED AS PROVIDED IN THIS ARTICLE AND SHALL BE
4 UPON THE BASIS OF OWNERSHIP OF THE OVERLYING LAND. THE
5 GENERAL ASSEMBLY RECOGNIZES THAT IT HAS PLENARY POWER TO
6 ESTABLISH RIGHTS FOR THE DIVERSION AND USE OF NONTRIBUTARY
7 GROUND WATER.

8 SECTION 2. 37-90-103, Colorado Revised Statutes, as
9 amended, is amended BY THE ADDITION OF A NEW SUBSECTION to
10 read:

11 37-90-103. Definitions. (10.5) "Nontributary ground
12 water" means that ground water which, if diverted, will not,
13 within one hundred years from the time diversion is allowed to
14 begin, affect the flow of a natural stream in an annual amount
15 greater than one percent of the annual amount allowed to be
16 diverted. The general assembly finds and determines that
17 "nontributary ground water" includes all ground water within
18 the Denver, Arapahoe, and Laramie-Fox Hills formations and
19 that the diversion of ground water from those formations will
20 not materially affect vested water rights to the flow of any
21 natural stream.

22 SECTION 3. 37-90-137 (1), (3) (a), and (4), Colorado
23 Revised Statutes, as amended, are amended, and the said
24 37-90-137 is further amended BY THE ADDITION OF THE FOLLOWING
25 NEW SUBSECTIONS, to read:

26 37-90-137. Permits to construct wells outside designated

1 areas - fees - permit no ground water right - evidence - time
2 limitation. (1) From ON and after May 17, 1965, no new wells
3 shall be constructed outside the boundaries of a designated
4 ground water basin nor the supply of water from existing wells
5 outside the boundaries of a designated ground water basin
6 increased or extended, unless the user makes an application in
7 writing to the state engineer for a permit to construct a
8 well, in a form to be prescribed by the state engineer. The
9 applicant shall specify the particular **designated** aquifer from
10 which the water is to be diverted, the beneficial use to which
11 it is proposed to apply such water, the location of the
12 proposed well, the name of the owner of the land on which such
13 well will be located, the average annual amount of water
14 applied for in acre-feet per year, the proposed maximum
15 pumping rate in gallons per minute, and, if the proposed use
16 is AGRICULTURAL irrigation, a description of the land to be
17 irrigated and the name of the owner thereof, together with
18 such other reasonable information as the state engineer may
19 designate on the form prescribed.

20 (3) (a) Any permit to construct a well OUTSIDE A
21 DESIGNATED GROUND WATER BASIN, EXCEPT A PERMIT ISSUED PURSUANT
22 TO SUBSECTION (4) OF THIS SECTION, issued on or after April
23 21, 1967, shall expire one year after the issuance thereof,
24 unless the applicant to whom such permit was issued shall
25 furnish to the state engineer, prior to such expiration,
26 evidence that the water from such well has been put to

1 beneficial use or unless, prior to such expiration, the state
2 engineer, upon application AND with good cause shown as to why
3 the well has not been completed and an estimate of the time
4 necessary to complete the well, extends such permit for only
5 one additional period certain, not to exceed one year; but the
6 limitation on the extension of well permits provided for in
7 this paragraph (a) shall not apply to well permits for
8 federally authorized water projects contained in paragraph (d)
9 of this subsection (3). The state engineer shall charge a
10 reasonable fee for such extension. A PERMIT ISSUED PURSUANT
11 TO SUBSECTION (4) OF THIS SECTION SHALL NOT EXPIRE AND SHALL
12 NOT REQUIRE THE FILING OF A STATEMENT OF BENEFICIAL USE BUT
13 MAY REQUIRE THE METERING OF DIVERSIONS FROM WELLS DRILLED
14 PURSUANT TO SUCH PERMIT AND THE REASONABLE RECORDING AND
15 DISCLOSURE OF SUCH METERED DIVERSIONS.

16 (4) In the issuance of a permit to construct a well in
17 ~~those--aquifers--which--do--not--meet--the--definitions--of--section~~
18 ~~37-90-103-(6)-or-section-37-92-103-(11);--and--do--not--meet--the~~
19 ~~exemptions--set--forth--in--sections-37-90-105-and-37-92-602~~ TO
20 DIVERT NONTRIBUTARY GROUND WATER OUTSIDE A DESIGNATED GROUND
21 WATER BASIN, the provisions of subsections (1) and (2) of this
22 section shall apply; ~~except that in-considering-whether-the~~
23 ~~permit-shall-be-issued;--only~~ THE APPLICANT SHALL BE ENTITLED
24 TO DIVERT that quantity of water, EXCLUSIVE OF ARTIFICIAL
25 RECHARGE, underlying the land owned by the applicant or ~~by-the~~
26 ~~owners-of--the--area;--by--their--consent;--to--be--served--is~~

1 considered--to--be--unappropriated;-the-minimum-useful-life-of
2 the-aquifer-is-one-hundred-years;-assuming-that--there--is--no
3 substantial--artificial--recharge--within--said-period;-and-no
4 material-injury-to-vested-water-rights-would-result--from--the
5 issuance--of--said-permit UNDERLYING LAND OWNED BY ANOTHER WHO
6 HAS CONSENTED IN WRITING TO THE APPLICANT'S DIVERSION.
7 MATERIAL INJURY TO VESTED GROUND WATER RIGHTS SHALL NOT BE
8 DEEMED TO RESULT FROM THE REDUCTION OF EITHER HYDROSTATIC
9 PRESSURE OR WATER LEVEL IN THE AQUIFER. SUCH PERMITS SHALL
10 ALLOW DIVERSIONS ON THE BASIS OF AN AQUIFER LIFE OF ONE
11 HUNDRED YEARS. The state engineer may adopt PROCEDURAL rules
12 and regulations PURSUANT TO SECTION 37-92-501 to assist in,
13 but not as a prerequisite to, the granting or denial of
14 permits to construct SUCH wells, and-for-the-administration-of
15 this-underground-water IT BEING THE INTENT OF THE GENERAL
16 ASSEMBLY TO EXERCISE ITS PLENARY POWER TO ESTABLISH THE
17 SUBSTANTIVE BASIS ON WHICH NONTRIBUTARY GROUND WATER OUTSIDE
18 DESIGNATED GROUND WATER BASINS SHALL BE DIVERTED AND USED.
19 OWNERS OF PERMITS GRANTED UNDER THIS SUBSECTION (4) SHALL BE
20 ENTITLED TO THE ISSUANCE OF PERMITS FOR ADDITIONAL WELLS TO BE
21 CONSTRUCTED ON THE LAND DESCRIBED IN THIS SUBSECTION (4). THE
22 STANDARDS OF THIS SUBSECTION (4) SHALL BE APPLIED AS IF THE
23 APPLICATIONS FOR THOSE ADDITIONAL WELL PERMITS WERE FILED ON
24 THE SAME DATES THAT THE ORIGINAL APPLICATIONS WERE FILED.

25 (7) In the case of dewatering of geologic formations by
26 removing nontributary ground water to facilitate or permit

1 mining, the following shall apply:

2 (a) No well permit shall be required unless the
3 nontributary ground water being removed will be beneficially
4 used.

5 (b) In the event that such nontributary ground water
6 will be beneficially used, a well permit will be required
7 pursuant to subsection (1) of this section. The provisions of
8 subsections (2), (3), and (4) of this section shall not apply
9 to such well permits.

10 (c) In the issuance of a permit pursuant to this
11 subsection (7), the state engineer shall allow the rate of
12 withdrawal shown by the applicant to be necessary to dewater
13 the mine if the applicant demonstrates that no material injury
14 to vested water rights or to other rights in nontributary
15 ground water will result from the issuance of the permit. The
16 reduction of pressure levels or of water levels alone does not
17 constitute material injury. The applicant for a permit is
18 entitled to propose terms or conditions which will prevent
19 material injury.

20 (d) Permits issued pursuant to this subsection (7) shall
21 not expire and shall not require the filing of statements of
22 beneficial use but may require the metering or other
23 reasonable measurement of withdrawals of ground water under
24 such permits and the reasonable recording and disclosure of
25 such measured withdrawals.

26 (8) The provisions of subsection (4) of this section

1 shall not apply to nor shall they affect any right to the use
2 of ground water, including a conditional water right, or any
3 plan for augmentation to protect or permit the use of ground
4 water which has vested or has been established or decreed or
5 which is the subject of a pending application in the water
6 court prior to July 1, 1985; nor shall the provisions of
7 subsection (4) of this section apply to or in any way affect
8 any well permit issued prior to July 1, 1985.

9 SECTION 4. 37-92-305, Colorado Revised Statutes, as
10 amended, is amended BY THE ADDITION OF A NEW SUBSECTION to
11 read:

12 37-92-305. Standards with respect to rulings of the
13 referee and decisions of the water judge. (11) Nontributary
14 ground water shall not be administered in accordance with
15 priority of appropriation, and determinations of rights to
16 nontributary ground water need not include a date of
17 initiation of the diversion project. Such determinations
18 shall not require subsequent showings or findings of
19 reasonable diligence, and such determinations entered prior to
20 July 1, 1985, which require such showings or findings shall
21 not be enforced to the extent of such diligence requirements
22 on or after said date. To the extent that the diversion of
23 ground water will, within one hundred years from the time
24 diversion is allowed to begin, affect the flow of a natural
25 stream in an annual amount greater than one percent of the
26 annual amount allowed to be diverted, then an amount of water

1 equal to the entire effect upon such natural stream shall be
2 replaced where and as necessary to prevent material injury to
3 vested water rights.

4 SECTION 5. Effective date. This act shall take effect
5 July 1, 1985.

6 SECTION 6. Safety clause. The general assembly hereby
7 finds, determines, and declares that this act is necessary
8 for the immediate preservation of the public peace, health,
9 and safety.

BILL 27

A BILL FOR AN ACT

1 CONCERNING REQUIRING HOLDERS OF WELL PERMITS TO REPORT TO THE
2 STATE ENGINEER.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Empowers the state engineer to require holders of conditional or final well permits to report to the state engineer the amount of ground water such holder is pumping if, in the determination of the state engineer, such information is necessary for the protection of vested rights or for the proper administration of the ground water in the state.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. 37-90-110 (1), Colorado Revised Statutes, is
5 amended BY THE ADDITION OF A NEW PARAGRAPH to read:

6 37-90-110. Powers of the state engineer. (1) (g) To
7 require holders of conditional or final well permits to report
8 to the state engineer the amount of ground water such holder
9 is pumping if, in the determination of the state engineer,
10 such information is necessary for the protection of vested
11 rights or for the proper administration of the ground water in

1 the state.

2 SECTION 2. Effective date. This act shall take effect
3 July 1, 1985.

4 SECTION 3. Safety clause. The general assembly hereby
5 finds, determines, and declares that this act is necessary
6 for the immediate preservation of the public peace, health,
7 and safety.

BILL 28

A BILL FOR AN ACT

1 CONCERNING PENALTIES FOR VIOLATING ANY PROVISION OF A WELL
2 PERMIT.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides for criminal and civil penalties for violation of any provision of a well permit.

3 Be it enacted by the General Assembly of the State of Colorado:

4 SECTION 1. Article 90 of title 37, Colorado Revised
5 Statutes, as amended, is amended BY THE ADDITION OF A NEW
6 SECTION to read:

7 37-90-142. Violation of permit - penalties. (1) It is
8 unlawful for any person to violate any provision of his
9 conditional or final permit.

10 (2) Any person who violates subsection (1) of this
11 section is guilty of a misdemeanor and, upon conviction
12 thereof, shall be punished by a fine of not more than five
13 hundred dollars, or by imprisonment in the county jail for not

1 more than ninety days, or by both such fine and imprisonment.

2 (3) Any person who violates subsection (1) of this
3 section shall also be subject to a civil action brought by the
4 attorney general on behalf of the state engineer and shall be
5 subject to a civil penalty assessed by the court of not less
6 than one hundred dollars nor more than one thousand dollars
7 for each such violation. All civil penalties collected under
8 this subsection (3) shall be transmitted to the state
9 treasurer, who shall credit the same to the general fund.

10 SECTION 2. Effective date - applicability. This act
11 shall take effect July 1, 1985, and shall apply to acts
12 committed on or after said date.

13 SECTION 3. Safety clause. The general assembly hereby
14 finds, determines, and declares that this act is necessary
15 for the immediate preservation of the public peace, health,
16 and safety.

APPENDIX A

REPORT OF
GROUNDWATER LEGISLATION COMMITTEE

STATE OF COLORADO
DEPARTMENT OF NATURAL RESOURCES
1313 SHERMAN STREET, ROOM 718
DENVER, COLORADO 80203
DAVID H. GETCHES, EXECUTIVE DIRECTOR

AUGUST 1, 1984

REPORT OF
GROUNDWATER LEGISLATION COMMITTEE

STATE OF COLORADO
DEPARTMENT OF NATURAL RESOURCES
1313 SHERMAN STREET, ROOM 718
DENVER, COLORADO 80203

AUGUST 1984

Chairman: David H. Getches, Executive Director,
Department of Natural Resources

Members: Senator Tilman M. Bishop
Morton W. Bittinger
John Carlson
Thomas V. Cech
Ralph Curtis
Jeris Danielson, State Engineer
Harlan W. Erker
David L. Harrison
Joy Hilliard
Marcia M. Hughes
Joe Knopinski
Kahna Le
Senator Harold L. McCormick
Representative Scott McInnis
Clyde O. Martz
Dennis M. Montgomery
Representative Chris Paulson
Glenn E. Porzak
Ben Saunders
Duane Woodard, Attorney General
Representative Ruth Wright
Representative Walter A. Younglund

Coordinator: Hamlet J. Barry III, Deputy Director,
Department of Natural Resources

Staff: Barbara Welles, Department of Natural Resources
John Huyler, Accord Associates

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ACKNOWLEDGMENTS

The Department of Natural Resources and the State of Colorado are indebted to the members of the Groundwater Legislation Committee for hundreds of hours they devoted to the Committee's work. Their thought and concern produced the number and quality of recommendations found in this report. Several Committee members also contributed to subcommittees appointed to draft specific legislative proposals. The chairs of those two subcommittees, David Harrison and Clyde Martz deserve special recognition for their efforts. Glenn Porzak also chaired a work group that defined nontributary groundwater in a manner that was embraced by the Committee.

We thank Senator Tilman M. Bishop for making members of the Legislative Drafting Office available to the Committee. Doug Brown of that office was kind enough to assign John Berry and Gary Davis to work with the Committee and the drafting subcommittees. We are grateful for their participation.

In addition to committee members, several other people participated in meetings and worked on legislative proposals. They helped the Committee greatly. Michael Shimmin's assistance was especially notable. Wendy Weiss represented Attorney General Duane Woodard when he could not attend. Her great help in drafting legislative proposals enhanced the Committee's product.

The Committee's work put extra burdens on the Department of Natural Resources' staff. Chips Barry did much of the organizational work and is responsible for the comprehensive minutes that provide a useful record of Committee meetings. Barbara Welles was generous with her time in assisting the Committee. Terii Lamphier handled the Committee's secretarial work.

We were fortunate to have the advice of John Huyler of Accord Associates. He helped us plan our meetings to get the maximum participation from the group and still complete our work on schedule. The Committee enjoyed the benefit of several people who made presentations. They included: Bill Paddock of the Colorado Attorney General's Office; Victor Gleason of the Metropolitan Water District of Southern California; Professor J. David Aiken of the University of Nebraska, Department of Agricultural Economics; Kathy Ferris of the

Arizona Department of Water Resources; Richard Gorton of the U.S. Army Corps of Engineers; Robert Longenbaugh of the Colorado Division of Water Resources and Committee members Jeris Danielson, Harlan Erker and David Harrison.

Finally, we thank Governor Richard D. Lamm for paying many of the Committee's expenses.

David H. Getches
August 1, 1984

TABLE -- Regional scale steady-state water budget for the bedrock aquifers.
(Values in cubic feet per second)^{1/}

SOURCE	AQUIFER				TOTAL
	DAWSON	DENVER	ARAPAHOE	LARAMIE- FOX HILLS	
Precipitation Recharge	40.6	5.5	2.8	5.8	54.7
Discharge to principal drainage area					
Plum	6.1	1.1	.3	--	7.5
Cherry	10.3	.2	--	--	10.5
South Platte	.3	2.2	2.4	.5	5.4
Box Elder	2.6	.2	.9	.1	3.8
Lost	---	.1	.6	.2	.9
Kiowa	5.9	.2	.2	.7	7.0
Bijou	.6	2.1	2.1	2.1	6.9
San Arroya - Badger	--	--	--	1.1	1.1
Big Sandy	.2	.3	.5	.2	1.2
Rush - Steel Fork	--	--	.1	.5	.6
Black Squirrel	.4	.7	.5	.2	1.8
Monument-Fountain	<u>7.0</u>	<u>.3</u>	<u>.5</u>	<u>.2</u>	<u>8.0</u>
TOTAL DISCHARGE (cfs)	<u>33.4</u>	<u>7.4</u>	<u>8.1</u>	<u>5.8</u>	<u>54.7</u>
TOTAL DISCHARGE (acre-ft/yr)	<u>24,200</u>	<u>5,300</u>	<u>5,900</u>	<u>4,200</u>	<u>39,600</u>

^{1/}From a report entitled "Bedrock Aquifers in the Denver Basin, Colorado--A Quantitative Water-Resource Appraisal" by S. G. Robson. U. S. Geological Survey Profession Paper XXX (from review draft copy dated August 1983.)

B. Development of Colorado Groundwater Law

Statutes dealing with groundwater in Colorado are of recent vintage. An early general enactment only condemned waste from artesian wells and required collection of data by well drillers. A simple law regulating well construction was passed in 1953. The 1953 law was replaced by a 1957 enactment in which the legislature dealt for the first time with protecting groundwater supplies. The law required a permit from the State Engineer for new or expanded wells.

Before 1965, the legislature did not distinguish between tributary and nontributary water. The courts, however, consistently held that all waters within a natural stream were subject to the law of prior appropriation under the Colorado Constitution. Those waters include all water that is tributary to a natural stream and groundwater sources are presumed to be tributary unless shown otherwise. E.g., Safranek v Town of Limon, 123 Colo. 330, 228 P. 2d 975 (1951).

Colorado's early judicial recognition that much groundwater is connected with a stream and should be administered in the same manner as surface water recognized hydrologic reality. The law of many states still does not distinguish between groundwater that is connected with, and has an effect upon, surface water and groundwater that is essentially isolated from a natural stream. Those states manage their tributary groundwater resources according to laws different from those applicable to surface water, creating anomalous and sometimes inequitable and impractical situations. In enacting the 1969 Water Rights Determination and Administration Act, the legislature made explicit what the courts had earlier decided: that tributary groundwater was subject to the law of prior appropriation.

The Colorado Supreme Court held that nontributary groundwater is not subject to the same legal regime as tributary groundwater. Thus the 1957 Act did not authorize adjudication or administration of rights in nontributary water. Whitten v Coit, 153 Colo. 157, 385 P. 2d 131 (1963). The Colorado legislature then enacted the Colorado Groundwater Management Act of 1965. The Act dealt specifically with nontributary groundwater, authorizing the creation of designated groundwater basins to allow the planned depletion and use of nontributary groundwater. The Act has been used largely in Eastern Colorado and the area underlain by the Ogallala Aquifer. Under the 1965 Act, statutory rights may be acquired to nontributary groundwater under a modified form of prior appropriation. The Act's stated purpose is to permit the full economic development of designated groundwater. Rights under the 1965 Act may be acquired only if water is available that has not been appropriated by others and the appropriation will not unreasonably impair existing water rights or create unreasonable waste.

After the 1965 Act, nontributary water outside designated basins was subject only to a well permit requirement--the same requirement that applies to tributary water. The only restrictions in granting such a permit were that the State Engineer determine that there will be no material injury to vested water rights of others and that unappropriated water is available. In 1973, the legislature added a provision, still known as "S.B. 213," which added the requirement that 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 to be unappropriated." The amendment also stipulated that the minimum useful life of the aquifer is to be 100 years.

As of late 1984, groundwater law in Colorado can be summarized as follows.

- o Groundwater that has a significant effect on the waters of a stream is considered tributary and is managed like the water in a stream, except that a well permit from the State Engineer is required.
- o Nontributary water comes under the special provisions of the 1965 Groundwater Management Act if a designated groundwater basin has been established, in which case a modified form of appropriation applies under the supervision of the Groundwater Commission and, in most cases, a local groundwater management district.
- o Nontributary groundwater outside designated basins may be used if the overlying landowner or someone with the landowner's consent obtains a permit from the State Engineer. Water may not be withdrawn at a rate that would deplete the water underlying the landowner's land in less than 100 years. Another limitation is that the permittee may not cause "material injury" to someone else.

C. The Huston Case.

Many Coloradans recognize the uncertainty in nontributary groundwater law. References to "appropriation" in S.B. 213 led some to argue that the legislature intended to make nontributary groundwater subject to the doctrine of prior appropriation. Seizing on this argument, John Huston and a number of other claimants attempted to appropriate much of the nontributary groundwater in the state.

After lengthy and expensive litigation, the Colorado Supreme Court rejected the Huston claims and clarified much of the former uncertainty in nontributary groundwater law. Colorado v Southwestern Colorado Water Conservation Dist., 671 P. 2d 1294 (Colo. 1983). The court held:

1. Nontributary groundwater is not subject to appropriation under the constitution.
2. Landowners do not own nontributary groundwater beneath their land.
3. Rights in nontributary groundwater are subject only to the well permit procedures found in S.B. 213.
4. The water court does not have jurisdiction over applications for permits to use nontributary groundwater.
5. The legislature is free to deal with nontributary groundwater as it sees fit.

D. Senate Bill 439.

Many water users and their attorneys were concerned that the Huston decision generated uncertainty concerning the validity of existing and pending groundwater claims. They were particularly concerned that the lack of water court jurisdiction could affect rights. In response to these concerns, the legislature enacted S.B. 439 in 1983. The Bill specified the water court as a forum to determine whether the S.B. 213 well permit criteria are satisfied.

S.B. 439 itself created some new ambiguities. In an attempt to clear them up the legislature passed a resolution stating that S.B. 439 was not intended to create new substantive rights, but only to deal with procedural matters. This leaves uncertain whether water courts can recognize conditional rights in nontributary groundwater. There is no statutory provision for conditional rights although some water courts (notably Division 1) had recognized such rights. Many legislators said that they intended the enactment of S.B. 439 to serve as a temporary solution until groundwater regulation could be more fully examined.

E. The Groundwater Legislation Committee.

Governor Richard D. Lamm signed S.B. 439 into law on October 11, 1983. In doing so, he sent a letter to the Colorado Senate that recognized the ambiguities created or not resolved by the new law and asked the legislature to "move at once toward comprehensive legislation that will address the issue of how the state should exercise its plenary control over nontributary groundwater." The Governor's letter is included in Appendix A. Governor Lamm directed David H. Getches, Executive Director of the Colorado Department of Natural Resources, to "initiate at once a study of possible alternative approaches to the administration of groundwater" by bringing together a group of experts in groundwater matters to "help the Department formulate recommendations that can be considered by the legislature next year." Getches established the Groundwater Legislation Committee as directed by Governor Lamm. The Committee members are listed on the inside cover of this report.

The full Committee met regularly a total of 15 times from November, 1983 through July, 1984. The first several meetings were devoted to gathering a background in Colorado groundwater

and how groundwater management is handled in other jurisdictions. The Committee began with a survey of groundwater resources in the state and an introduction to geologic and hydrologic matters. A session was spent reviewing the law of groundwater as it now exists. Experts from Arizona, Nebraska, and California addressed the Committee. The Committee also discussed the work of the groundwater task force of the Metropolitan Water Roundtable and the role of groundwater in the preparation of the Metropolitan Denver Systemwide Environmental Impact Statement.

The Committee spent several meetings identifying approaches that could be followed in formulating new groundwater legislation for the State of Colorado. It began by noting and categorizing the interests to be addressed in any comprehensive nontributary groundwater legislation. Three work groups were established to deal with goals and policies, administrative procedures, and definitions. The work groups met separately several times and the report of each was discussed in meetings of the full Committee. The Committee generally accepted a definition of "nontributary groundwater."

Subcommittees were then formed to propose drafts of two different types of legislation: a draft that would maintain essentially the status quo, making the minimum changes needed to deal with the most serious ambiguities and problems under existing law; and a draft that proposed more sweeping changes, particularly in the procedures and institutions used to allocate and administer nontributary groundwater.

Each subcommittee met several times, reporting their proposals to the full Committee. The Committee met at least once on each proposal and then tested them on several factual scenarios. The discussion and use of scenarios resulted in revisions of each of the subcommittee proposals. The final versions of both proposals are found in Appendices B and C.

On July 24, 1984, the Groundwater Legislation Committee held its final meeting. The primary purpose of the meeting was to seek agreement from the committee on issues that had been discussed throughout its several months of meetings. This report is drawn in large part from a consensus reached and views expressed on numerous issues at the Committee's final meeting.

II. BASIC ASSUMPTIONS AND AGREEMENTS.

The Groundwater Legislation Committee studied a variety of approaches to managing groundwater. The diversity of interests and backgrounds among the members made discussions lively and informative. The Committee examined even the most basic assumptions. It began with no preconceived notions and was not pushed toward any predetermined conclusions. Committee members were open minded and generally objective in reviewing the ideas of others.

The Groundwater Legislation Committee did not reach total consensus on all aspects of a legislative proposal to deal with nontributary groundwater issues in Colorado. The Committee agreed, however, on more points than those on which it disagreed. The Committee's assumptions and agreements are the product of extensive inquiry and discussion extending over nine months. Although the legislature should re-examine each of the points on which the Groundwater Legislation Committee found consensus, the Committee urges the legislature to consider carefully the positions it reached in light of the tremendous effort and debate that surrounded its deliberations. The Groundwater Legislation Committee's agreements are suggested as starting points for the legislature as it considers enacting groundwater legislation.

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

Colorado has vast nontributary groundwater resources, estimated at about 700 million acre feet. It would be unwise to prohibit indefinitely all use of the resource.

- B. Nontributary groundwater must be allocated with special care because it is essentially a nonrenewable resource.

Users of surface streams and tributary groundwater can withdraw from their water sources only as much as nature provides. In successive years, entirely new supplies are provided. But once nontributary groundwater is withdrawn, the resource will not be replenished for future use. This necessitates placing limits on use of nontributary groundwater to conserve it for the future. By contrast, use of surface water and tributary groundwater is limited only by water users' needs.

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

The Colorado Supreme Court held in the Huston case that nontributary groundwater is not subject to appropriation under the Colorado Constitution. It also held that a landowner does not own the nontributary groundwater under the land. Thus allocation of rights is the function of the legislature.

- D.. The definition of nontributary groundwater should be clarified.

Nontributary groundwater is now defined by Colorado case law as groundwater that will not affect a stream within 100 years; water with a stream effect within 40 years is tributary. The law is uncertain about the nature of water having a stream effect between 40 and 100 years and what constitutes an "effect" is unclear. 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.

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

It is an hydrological fact that no aquifer is purely nontributary, such that it can neither be affected by surface water use, nor its use affect surface water. The effects, however, are often distant in time or location or are insignificant in quantity. When there is an appreciable effect on surface water supplies the rights of persons under the appropriation system may be affected.

- F. Withdrawals of nontributary groundwater that affect the stream should be compensated.

Well pumping often results in withdrawal of a combination of tributary and nontributary groundwater. A good groundwater allocation scheme can allow management of predominately nontributary groundwater consistent with protection of rights in surface streams and tributary groundwater. A requirement of augmentation of affected surface sources should be imposed.

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

Many uses of nontributary groundwater have been established based on early (pre-1957) Colorado law, under the 1957 Act, under the Groundwater Management Act of 1965, and under Senate Bill 213. Many people now have equities and expectations and certain statutory rights to withdraw water. A comprehensive nontributary groundwater law should minimize interference with established uses under such laws. However, doing so will not

be easy, because of the many different "classes" of wells obtained under different statutory schemes, and because many owners of "early" wells expect relief when their wells go dry.

- H. Holders of nontributary groundwater permits should not be entitled to a particular water level or pressure.

Absolute protection of water level or pressure would theoretically prevent pumping of nontributary groundwater by all but the first pumper because any subsequent user would affect the pressure and level in the first well. Developers of new wells can anticipate possible effects of future pumping of others in deciding where to locate their wells and how deep to drill. The legislature can consider measures to prevent extraordinary, unfair, economic effects on existing well users but should not significantly inhibit new groundwater development.

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

Existing law says little about nontributary groundwater except in designated groundwater basins established pursuant to the 1965 Groundwater Management Act. The only explicit statutory requirement (S.B. 213) outside designated groundwater basins is that one obtain a well permit that will be granted to an overlying landowner or someone with the landowner's consent if there will be no material injury to vested rights of others and if withdrawal will not exhaust the groundwater beneath the landowner's land in less than 100 years. There is language suggesting that nontributary groundwater can be appropriated. This may give rise to expectations that nontributary wells will be administered in priority. As explained in II, K below,

priority administration is often unpractical. Any attempt to administer wells in priority by date of permit or by class (e.g., "pre-213"; "post-213"; "pre-Huston"; "post-Huston", etc.) would be extremely difficult.

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

The Act has been effectively applied in few areas of the state. In 1983 (H.B. 1399), the legislature prohibited the Act's further use in the Denver Basin. The present Groundwater Commission represents mostly agricultural interests. The law does not distinguish among several aquifers that may underlie a single basin. Cumbersome listing procedures are required.

- K. Priority of administration is a concept generally inapplicable to nontributary groundwater.

There are serious practical problems in administering a groundwater source so that rights based on priority are protected. To make a priority system work wells at varying distances from a senior well must be shut down at different times, considering hydrologic characteristics that affect the rate of subsurface flows and anticipating sufficiently in advance the uses to be made of groundwater.

- L. The interests of overlying landowners with respect to nontributary groundwater should be clarified.

Landowners can be vested with interests in groundwater under their land. It is not clear whether a landowner is entitled to an exclusive right to pump; or a quantity of water equivalent to that which underlies the land; or to prevent

others from pumping the water; to as much water as is needed; or to equitable consideration in a permitting process for uses on the land, or no special rights at all. At a minimum under existing law, a landowner can prevent others from drilling a well on the land without permission, unless the driller has the power of eminent domain.

- M. The requirement of a well permit is an acceptable basic means of controlling groundwater use.

Ordinarily one's only access to groundwater is by pumping it from a well. Thus, legislative policies and regulation are best accomplished through well permit conditions.

- N. The State Engineer should play an important role in making technical determinations concerning nontributary groundwater.

Administration of any groundwater law that provides for wise use of the resource and protection of the public interest and private rights will require complex determinations about the nature and extent of the resource and the effects of extracting it. The State Engineer's technical expertise, independence, and obligation to act in the public interest make it appropriate for him to decide technical matters. Policy questions can be decided by the legislature or delegated to administrative bodies and officials.

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

Every aquifer is different from every other in hydrological characteristics--depth, permeability, quality, size, and

configuration. Further, present and future demands for water and the availability of other water sources vary. A groundwater allocation scheme should consider and reflect such differences.

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

There is a little artificial recharge now in Colorado from spreading or injection projects. However, the federal government may soon initiate a pilot recharge project. In other states such as California, recharge using imported surface water is of such great importance it allows for management of aquifers as if they contained a renewable resource.

- Q. Changes in the law should minimize complication and expense.

The technical determinations required in administering groundwater can impose great expense on private individuals and government institutions. The number and complexity of procedures for making and reviewing decisions should be carefully considered in light of possible delays and expense. Fees, taxes, and other charges for applications, permits, wells, and quantities of water pumped should be set in light of costs borne by the public. The legislature can balance the public interest involved in allowing present economic development of a nonrenewable resource against conserving it for future uses.

III. LEGISLATIVE ISSUES.

In designing a nontributary groundwater management law for Colorado, the legislature should resolve several important issues. The Groundwater Legislation Committee recommends acceptance of its positions on the general points expressed in the agreements and assumptions section of this report. Drafting legislation consistent with the agreed points requires several specific choices. This section identifies the most important issues and choices for resolving them. The Committee's comments and preferences are expressed where applicable.

A. Should nontributary groundwater be considered primarily a temporary, supplemental, or emergency source of supply when surface water is not available?

Because groundwater pumping is essentially "mining" a finite resource, it can only support limited use for a limited time. 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. Relevant circumstances to be considered include: nature and extent of demands for water, availability of alternate supplies, and patterns of growth.

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.

In order to set a pumping rate, it is necessary to establish a minimum aquifer life. The annual rate, or average rate, can then be established depending upon relevant factors. See C and D below.

3. Requirement of beneficial use within a fixed time.

The Committee does not favor such a requirement because it is an incentive to put water to use simply to maintain the permitted right. Instead, the legislature should impose conditions that result in conservation of the resource.

C. How should a minimum aquifer life be established?

It is necessary to decide how long an aquifer should last so that annual limits or average annual usage can be determined.

1. Hydrology.

The Groundwater Legislation Committee strongly recommends 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 favors 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?

As stated in the paragraph on assumptions and agreements, the Committee favors respecting existing uses and rights, but not to the extent of assuring a particular well level or pressure. See Section II, G and H.

2. Extent of land overlying an aquifer owned by the proposed user?

The Committee generally feels that a landowner should be able to use the quantity of water under the land.

3. Potential damage to the aquifer (e.g., subsidence, intrusion of pollutants)?

4. Reliability of continued pumping in the manner proposed?

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

In some instances, it may be wise to allow pumping at different rates in different years, consistent with an average of maximum annual rate. Groundwater pumping may be necessary for mine dewatering for a short period only, making a temporary permit appropriate.

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

The Committee opposes 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. Some members urge that the determination be made by an administrative entity. 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).

The committee recommends that because of the special characteristics of the Denver Basin and the presumed demands for groundwater along the front range, that the Denver Basin (Dawson-Arkose, Denver, Arapahoe, Laramie-Fox Hills) should be administered consistent with those conditions. The Committee was evenly split on the desirability of continuing to apply existing law (S.B. 213) in the Denver Basin, but most felt if the law were changed to provide a means for dealing with partially tributary groundwater, existing law would be adequate. The Committee is not satisfied that only such minor changes would be adequate for all aquifers in the state, such as those west of the Continental Divide or in the San Luis Valley.

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

Several determinations must be made in the process of allocating and administering groundwater. What entity should decide depends on the type of decision to be made. Considerations include cost, expediency, need for expertise, separation of powers, and due process.

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 urges close scrutiny of this issue. A practice of confirming rights in nontributary groundwater developed in Division 1 was found inapplicable by the Supreme Court in Huston. Last year S.B. 439 recognized the practice. The Legislature should clearly institute or end the practice. In so doing they should consider the costs and delays of using the judicial process and the alternatives.

The Committee strongly recommends that to the extent judicial processes are used for nontributary groundwater matters, the water court (rather than the district courts) be used. The Committee opposes courts performing administrative functions such as issuance of well permits. It favors using courts for appeals or confirmation of administrative decisions by the State Engineer. Most of the Committee recommends that rules and regulations of the State Engineer and Groundwater Commission be reviewable on appeal to the water court. The Committee is split on whether Administrative Procedure Act rules should apply or whether a trial de novo should be held on setting rules and regulations.

H. What procedure should be followed in the permitting process?

1. Notice?
2. Hearing?
3. Fees?

The Committee feels that the procedures for granting a well permit in all types of groundwater (whether tributary or nontributary) should be uniform so far as possible.

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 recognizes several of the Act's shortcomings. See Section II, J. If changes are to be made in the Act, the Committee recommends 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. Some suggested abolishing the Commission.

J. What are the fiscal impacts of the system?

The Committee recommends 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.

IV. CONSIDERATION OF SPECIFIC PROPOSALS.

The Groundwater Legislation Committee spent several weeks considering two rather different legislative approaches.

Subcommittees were assigned the tasks of developing the different proposals. One drafted a "minimum change" proposal; the other a "revised Groundwater Management Act" which includes more extensive changes.

Both subcommittees agreed on using a new, clearer definition of "nontributary" as follows:

Non-tributary groundwater is that groundwater which, if withdrawn, would not affect the flow in a natural stream in an annual amount greater than one percent of the maximum annual amount allowed to be withdrawn, within one hundred years of the time withdrawal begins.

A. Minimum change proposal.

The minimum change proposal included in Appendix B, reflects the conclusions of the Committee that at a minimum, legislation should be enacted to:

- o Clarify the definition of nontributary groundwater.
- o Eliminate the "diligence" requirements that force a permitted well to be developed and used within a period of one year (plus a one year extension).
- o Provide for allocation and administration of partially tributary water.
- o Determine the scope and forum for judicial review.

A few additional changes were included in the proposal as drafted. The essential features of the minimum change proposal, including the two variations that were discussed, are:

1. Land ownership, or consent of the owner, is the sole basis upon which rights to nontributary groundwater are obtained. Under the "nonrenewable" draft, the land ownership doctrine would apply to groundwater which is nontributary and nonrenewable. Under the "semi tributary" draft, the doctrine would apply to groundwater which is 100% nontributary and to groundwater which is 50-99% nontributary.
2. "Nontributary" is defined to eliminate the uncertainty under current law (stream effect within 40 years is tributary; more than 100 years is not tributary). 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 groundwater 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 groundwater.
8. Implies consent of a land owner in a municipality to appropriation of nontributary groundwater beneath the land owner'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.

B. Revised Groundwater Management Act proposal.

The revised Groundwater Management Act proposal would effect more extensive changes. The most recent draft of the proposal is included in Appendix C along with an explanatory memorandum, which is Appendix D. The proposal would grant the Groundwater Commission policy authority and the State Engineer administrative authority over all nontributary groundwater, set policy and make rules on an individual aquifer basis rather than on a statewide basis, change designation procedures to deal with aquifers rather than basins, and continue existing designated basins. Groundwater administration in the Denver Basin would be the same as under existing law, subject only to the same changes as in the minimum change proposal. The essential features of the Revised Groundwater Management Act proposal are:

1. Land ownership is not the basis upon which rights to nontributary groundwater are obtained. Any person may apply to the state engineer for a right to nontributary groundwater 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 (stream effect within 40 years is tributary; more than 100 years is not tributary). 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 groundwater 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 groundwater 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 groundwater, 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 groundwater.

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

C. Committee views.

Most of the Committee members present at the conclusion of the final meeting supported the minimum change proposal. Besides philosophical difference about the importance of land ownership in groundwater allocation, a number of issues raised by the revised Groundwater Management Act proposal prevent members of the Committee from supporting it. One unsettled question about the proposal is how nontributary groundwater would be managed outside designated basins. Some members question the necessity of mandating a distinction between designated and non-designated aquifers. Although the draft recognizes the right of a landowner to control access to the land for constructing a well, it does not assure that landowners (except those in the Denver Basin) have a right to pump the quantity of water underlying their land.

The Committee generally believes that the revised Groundwater Management Act could be drafted to incorporate nearly all of the desirable features of the minimum change proposal. However, the minimum change proposal could not be expanded to accommodate the approach of the revised Groundwater Act because the tie between landownership and one's entitlement to quantities of water cannot easily be reconciled with another approach. In addition, the localized administration feature of the revised Groundwater Management Act does not fit the concept of simple, statewide conditions for permit issuance embodied in the minimum change proposal.

The Committee concludes that it may be possible to develop a greater consensus around a different proposal for a revised Groundwater Management Act. The staff did not press for such a proposal because of time constraints. The legislature will need to determine its position on the several issues set out in the preceding sections of this report. If the legislature then so requests, an attempt will be made by the Department of Natural Resources to develop further drafts of legislation. Perhaps the Groundwater Legislation Committee would be reconvened for this purpose.

STATE OF COLORADO

EXECUTIVE CHAMBERS

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Denver, Colorado 80203
Phone (303) 866-2471



Richard D. Lamm
Governor

October 11, 1983

The Honorable
State Senate
Fifty-fourth General Assembly
First Regular Session
State Capitol
Denver, Colorado 80203

Ladies and Gentlemen:

Today I signed into law Senate Bill 439, a measure that gives water courts certain authority over well permitting procedures for groundwater not connected with any surface streams. I am concerned that the Act is a stop-gap measure that was hastily passed in the wake of the Colorado Supreme Court's decision in Colorado vs Southwestern Water Conservation District, better known as the Huston case. It fails to address the need for comprehensive treatment of the issues involved in allocating our non-renewable groundwater resources. In addition, the Act creates a number of ambiguities by invoking a set of procedures and a forum both designed for renewable surface water and applies them to finite groundwater resources.

In signing Senate Bill 439, I want to make two points abundantly clear:

1. The legislation is signed with the understanding that it results in no substantive change in existing law, but merely imposes additional procedures for carrying out the well-permitting procedures set forth in CRS 37-90-137(4). Senate Bill 439 allows for recognition of rights that can only be perfected by the well permit process provided for in existing law. Allowing a forum for determining the criteria of Section 37-90-137(4), if the State Engineer fails to act in a reasonable time or denies a well permit, is a desirable end, although the procedures and language of the 1969 Water Rights Act that will apply are not well suited to that task. I understand the import of House Joint Resolution 1038 to be a reaffirmation

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that Senate Bill 439 does not create a prior appropriation system for non-tributary groundwater and therefore does not create any priority system in non- tributary groundwater. The measure, I am informed, is intended to prevent dislocations for people who came before the water court and staked their investments on the pre-Huston jurisdictional approach that the Supreme Court said was improper.

2. We must move at once toward comprehensive legislation that will address the issue of how the state should exercise its plenary control over non-tributary groundwater. In doing so I believe that we should consider all the alternatives. We should look at the experience of other states and face several important issues: Is the 100-year limit in the well permit statute appropriate? Should communities be assured of a longer life-line? Should the life of the limited resource be prolonged by using it only to supplement renewable surface water sources? Are there simple, inexpensive procedures for applying whatever rules are developed? The answers to any of these questions are of vital importance to our children and grandchildren. We are making long-run determinations about how a finite, lifegiving resource is to be used. Thus our planning responsibilities must be undertaken with a consciousness of the impact on future generations. Those resources can give us long-run security or a short-run binge. The choice is clear.

So that we will move toward fulfilling our responsibility to address the great issue of how to deal with non-tributary groundwater, I am asking David Getches, Executive Director of the Department of Natural Resources, to initiate at once a study of possible alternative approaches to the administration of groundwater. I am directing him to bring together a group of water law experts from within our state to help the Department formulate recommendations that then can be considered by the Legislature next year. I understand that many in the Legislature are dedicated to working for the prompt enactment of appropriate legislation.

My remarks should not be intended as critical of the Legislature's efforts. I recognize the pressures you were under in the brief

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session last month in dealing with tremendous budgeting and revenue needs. An imperfect result was understandable in those circumstances. But I firmly believe that our invaluable groundwater resources must be carefully managed and this can only be the result of a more thoughtful and thorough process. I trust that the process has now been set in motion.

I will look forward to working with the Legislature toward the mutually desired end of better management of our precious groundwater.

Respectfully,

Richard D. Lamm
Governor

APPENDIX B
MINIMUM CHANGE PROPOSAL

1. Section 37-90-137(1) is amended as follows:

37-90-137. Permits to construct wells outside designated areas - fees - permit no ground water right - evidence - time limitation. (1) From and after May 17, 1965, no new wells shall be constructed outside the boundaries of a designated ground water basin, nor the supply of water from existing wells outside the boundaries of a designated ground water basins increased or extended, unless the user makes an application in writing to the state engineer for a "permit to construct a well", in a form to be prescribed by the state engineer. The applicant shall specify the particular ~~designated~~ aquifer from which the water is to be diverted, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the average annual amount of water applied for in acre-feet per year, the proposed maximum pumping rate in gallons per minute, and, if the proposed use is AGRICULTURAL irrigation, a description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the state engineer may designate on the form prescribed.

2. Section 37-90-137(3)(a) is amended as follows:

37-90-137. Permits to construct wells outside designated areas - fees - permit no ground water right - evidence - time limitation. (3)(a). Any permit to construct a well, issued on or after April 21, 1967, shall expire one year after the issuance thereof, unless the applicant to whom such permit was

issued shall furnish to the state engineer, prior to such expiration, evidence that the water from such well has been put to beneficial use, or unless prior to such expiration the state engineer, upon application, with good cause shown, as to why the well has not been completed and an estimate of the time necessary to complete the well, extends such permit for ~~only one~~ AN additional period ~~certain, not to exceed one year~~ UPON A SHOWING OF CONTINUING NEED TO USE WATER FROM SUCH WELL, but the limitation on the extension of well permits provided for in this paragraph (a) shall not apply to well permits for federally authorized water projects contained in paragraph (d) of this subsection (3). The state engineer shall charge a reasonable fee for such extension. MORE THAN ONE SUCH EXTENSION MAY BE PERMITTED BY THE STATE ENGINEER.

3. Section 37-90-137(4) is amended as follows:

(4) In the issuance of a permit to construct a well ~~in these aquifers which do not meet the definitions of section 37-90-103(6) or section 37-92-103(11), and do not meet the exemptions set forth in sections 37-90-105 and 37-92-602,~~ OUTSIDE A DESIGNATED GROUND WATER BASIN, NOT MEETING THE EXEMPTION SET FORTH IN SECTION 37-92-602, IN AN AQUIFER, OR ANY PORTION THEREOF, IN WHICH THE GROUND WATER SUPPLY IS NON-RENEWABLE, the provisions of subsections (1) and (2) of this section shall apply; except that, in considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant ~~or by the owners of the area by their consent, to be served,~~ OR UNDER LAND OWNED BY ANOTHER WHO HAS CONSENTED IN WRITING TO APPLICANT'S APPROPRIATION, ~~is~~ SHALL BE considered ~~to be~~ unappropriated; the minimum useful life of the aquifer ~~is~~ SHALL BE one hundred years, assuming that there is no substantial artificial recharge within said period;

and no material injury to vested water rights ~~would~~ WILL result from the issuance of said permit. The state engineer may adopt rules and regulations PURSUANT TO § 37-92-501 to assist in, but not as a prerequisite to, the granting or denial of permits to construct wells and for the administration of this underground water. MATERIAL INJURY WOULD NOT BE CONSIDERED TO RESULT MERELY FROM THE REDUCTION OF PRESSURE LEVEL OR WATER LEVEL IN THE AQUIFER. IN THE EVENT ANY EXISTING MUNICIPAL OR QUASI-MUNICIPAL DISTRICT WATER SUPPLIER HAS AN OBLIGATION TO SERVE WATER TO USERS WITHIN A CERTAIN MUNICIPAL LIMIT OR QUASI-MUNICIPAL DISTRICT BOUNDARY IN EXISTENCE PRIOR TO [THE EFFECTIVE DATE OF THIS ACT], AND INDIVIDUAL WATER USERS ARE PRECLUDED FROM DEVELOPING THEIR OWN SUPPLY FROM NON-TRIBUTARY GROUND WATER, THEN THE OWNERS OF LAND WITHIN THAT MUNICIPAL LIMIT OR DISTRICT BOUNDARY SHALL BE DEEMED TO HAVE CONSENTED TO THE APPROPRIATION OF GROUND WATER UNDERLYING THEIR LAND.

4. Repeal Section 37-90-137(6). (The material in this section is replaced in other sections.)

5. Add a new Section (6) as follows:

IN CASES SUCH AS DEWATERING OF GEOLOGIC FORMATIONS TO FACILITATE MINING, WHICH REQUIRE THE ALLOCATION OF THE ASSUMED 100 YEAR MINIMUM LIFE ON A NON-UNIFORM BASIS, THE STATE ENGINEER MAY ALLOW GREATER RATES OF WITHDRAWAL SO LONG AS THERE EXISTS ADEQUATE PROTECTION IN THE FORM OF COVENANTS, BOND OR THE LIKE TO ASSURE THE OVERALL MINIMUM USEFUL AQUIFER LIFE OF 100 YEARS IS MAINTAINED IN THE OTHER REGIONS OF THE AQUIFER AND SO LONG AS THE OTHER REQUIREMENTS OF SUBSECTION (4) ARE MAINTAINED.

6. All of Section 37-90-137 as amended and all of Section 37-90-138 shall be relocated from Article 90 and re-enacted as Section 37-92-701.

7. Add Sections 37-92-103(____) as follows:

.NON-TRIBUTARY GROUND WATER IS THAT GROUND WATER WHICH, IF WITHDRAWN, WOULD NOT AFFECT THE FLOW IN A NATURAL STREAM IN AN ANNUAL AMOUNT GREATER THAN ONE PERCENT OF THE MAXIMUM ANNUAL AMOUNT ALLOWED TO BE WITHDRAWN WITHIN ONE HUNDRED YEARS OF THE TIME WITHDRAWAL BEGINS.

.NON-RENEWABLE AQUIFER OR PORTION THEREOF MEANS AN AQUIFER OR A PORTION THEREOF IN WHICH THE TOTAL WITHDRAWAL ENTITLED TO BE MADE FROM THAT AQUIFER OR PORTION THEREOF UNDER DECREES AND PERMITS EXISTING AT THE TIME OF APPLICATION REACHES AN AMOUNT WHICH WOULD CAUSE A REDUCTION IN THE AMOUNT OF GROUND WATER IN STORAGE WHICH WOULD NOT RECOVER TO NATURAL LEVELS WITHIN 100 YEARS IF ALL WITHDRAWALS FROM THAT AQUIFER OR PORTION THEREOF STOPPED. THE GROUND WATERS OF THE DAWSON, DENVER, ARAPAHOE, LARAMIE-FOX HILLS AND DAKOTA FORMATIONS SHALL BE DEEMED TO BE NON-RENEWABLE.

.NON-TRIBUTARY GROUND WATER RIGHT MEANS A RIGHT TO USE IN ACCORDANCE WITH ITS PERMIT, OR DECREE IF ONE IS OBTAINED, A CERTAIN PORTION OF NON-TRIBUTARY GROUND WATER OUTSIDE OF A DESIGNATED GROUND WATER BASIN. NON-TRIBUTARY GROUND WATER RIGHTS SHALL NOT BE ADMINISTERED ON THE BASIS OF PRIORITY OF APPROPRIATION AS BETWEEN OTHER RIGHTS TO NON-TRIBUTARY GROUND WATER.

8. Amend Section 37-92-302(1)(a) as follows:

37-92-302. Applications for water rights or changes of such rights - plans for augmentation. (1)(a). Any person who desires a determination of a water right or a conditional water right and the amount and priority thereof, including a determination that a conditional water right has become a water right by reason of the completion of the appropriation, a determination with respect to a change of a water right, approval

of a plan for augmentation, or quadrennial finding of reasonable diligence OR A DETERMINATION OF NON-TRIBUTARY GROUND WATER RIGHTS OUTSIDE A DESIGNATED BASIN shall file with the water clerk in quadruplicate a verified application setting forth facts supporting the ruling sought, a copy of which shall be sent by the water clerk to the state engineer and the division engineer.

9. Add a new subsection 37-92-305(11):

(11) IN THE DETERMINATION OF RIGHTS TO NON-TRIBUTARY GROUND WATER OUTSIDE A DESIGNATED GROUND WATER BASIN THE STANDARDS OF SECTION 37-92-505(4) AND (5) SHALL APPLY IF THE AQUIFER IS NON-RENEWABLE. PROCEEDINGS FOR SUCH DETERMINATION MAY BE COMMENCED AT ANY TIME AND MAY INCLUDE A DETERMINATION OF THE RIGHT TO SUCH WATER FOR EXISTING AND FUTURE USES. DECREES MAKING SUCH DETERMINATIONS FOR FUTURE USES NEED NOT BE CONDITIONAL AND FINDINGS OF REASONABLE DILIGENCE SHALL NOT BE REQUIRED. CLAIMS PENDING AS OF OCTOBER 11, 1983 WHICH HAVE BEEN PUBLISHED PURSUANT TO SECTION 37-92-302 IN THE RESUME NEED NOT BE REPUBLISHED. NON-TRIBUTARY GROUND WATER SHALL NOT BE ADMINISTERED IN ACCORDANCE WITH PRIORITY OF APPROPRIATION AND SUCH DETERMINATIONS NEED NOT INCLUDE A DATE OF APPROPRIATION. TO THE EXTENT THAT THE WITHDRAWAL OF GROUND WATER WOULD AFFECT THE FLOW IN A NATURAL STREAM IN AN ANNUAL AMOUNT GREATER THAN ONE PERCENT OF THE MAXIMUM ANNUAL ALLOWABLE WITHDRAWAL WITHIN ONE HUNDRED YEARS, THEN AN AMOUNT OF WATER EQUAL TO THE ENTIRE STREAM EFFECT SHALL BE REPLACED WHERE AND AS NECESSARY TO PREVENT INJURY TO VESTED WATER RIGHTS AND DECREED CONDITIONAL RIGHTS. SO LONG AS SUCH REPLACEMENT IS MADE, THE COURT MAY ENTER AN APPROPRIATE DECREE DETERMINING THE NON-TRIBUTARY GROUND WATER RIGHTS AND TRIBUTARY WATER RIGHTS, BUT ONLY THAT PORTION DETERMINED AS NON-TRIBUTARY GROUND WATER SHALL BE SUBJECT TO THE PROVISIONS OF SECTION 37-92-701(4).

APPENDIX C
REVISED GROUNDWATER MANAGEMENT ACT PROPOSAL

37-90-101. Short Title. [To remain the same.]

37-90-102. Legislative declaration. It is declared that ~~the traditional~~ TO BE THE policy of the state of Colorado ~~requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the designated ground waters of this state, as said waters are defined in section~~ 37-90-103(6). ~~While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of~~ REASONABLE DEPLETION OF NON-TRIBUTARY GROUND WATER AND designated ground water resources IN A MANNER THAT BALANCES CONSERVATION AND ECONOMIC DEVELOPMENT OF THE RESOURCE. ~~Prior appropriations~~ EXISTING USES of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels. All NONTRIBUTARY GROUND WATER AND designated ground waters in this state are therefore declared to be subject to appropriation AND USE in the manner defined in this article.

37-90-103 Definitions. [To remain the same except as indicated below.]

(6) "Designated ground water" means that ground water IN ANY BASIN THAT WAS IN EXISTANCE ON _____, AND which in its natural course would not be available to and required for the fulfillment of decreed surface rights, or ground water in areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least fifteen years preceding the date of the first hearing on the proposed designation of the basin, and which in both cases is within the geographic boundaries of a designated ground water basin. "Designated ground water" shall not include any ground water within the Dawson-Arkose, Denver, Arapahoe, or Laramie-Foxhills Formation located outside the boundaries of any designated ground water basin that was in existence on January 1, 1983.

(7) "Designated ground water basin" means that area established by the ground water commission in accordance with section 37-90-106, BUT NO NEW DESIGNATED GROUND WATER BASINS SHALL BE ESTABLISHED AFTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

* * *

(10A) "NONTRIBUTARY GROUND WATER" MEANS THAT GROUND WATER WHICH, TO THE EXTENT THAT WHEN PUMPED FROM A WELL OR OTHERWISE DIVERTED, WOULD NOT AFFECT THE FLOW IN A NATURAL

STREAM IN AN ANNUAL AMOUNT GREATER THAN ONE PERCENT OF THE MAXIMUM ANNUAL AMOUNT TO BE PUMPED OR DIVERTED, WITHIN ONE HUNDRED YEARS OF THE TIME PUMPING OR DIVERSION BEGINS.

(10B) "DESIGNATED GROUND WATER AQUIFER" MEANS AN AQUIFER ESTABLISHED BY THE STATE ENGINEER IN ACCORDANCE WITH SECTION 37-90-106.5; HOWEVER, DETERMINATION OF A DESIGNATED GROUND WATER AQUIFER BY THE STATE ENGINEER SHALL NOT BE CONCLUSIVE THAT ALL GROUND WATER IN THE AQUIFER IS NONTRIBUTARY GROUND WATER, BUT AFTER A DESIGNATED GROUND WATER AQUIFER IS ESTABLISHED, ANY PERSON CONTENDING THAT GROUND WATER WITHIN THE DESIGNATED GROUND WATER AQUIFER IS NOT NONTRIBUTARY GROUND WATER SHALL HAVE THE BURDEN OF PROOF ON THAT ISSUE. NO DESIGNATED GROUND WATER AQUIFER SHALL INCLUDE ANY PORTION OF AN AQUIFER ALREADY INCLUDED WITHIN A DESIGNATED GROUND WATER BASIN AND NO DESIGNATED GROUND WATER SHALL INCLUDE THE DENVER-ARKOSE, DENVER, ARAPAHOE, OR LARAMIE-FOXHILLS FORMATIONS.

37-90-104 Commission - organization - expenses. (1)

There is created a ground water commission to consist of twelve members, nine of whom shall be appointed by the governor and confirmed by the senate.

(2) The appointed members of the commission holding office as of July 1, 1971, shall continue in office for the term of their appointment and until their successors are appointed.

(3)(a) All appointments to the commission shall be for four-year terms, except those made to fill vacancies, which shall be for the remainder of the term vacated.

(b) Appointments made after July 1, 1971, as terms expire or are vacated, shall be made so that the commission includes FOUR MEMBERS FROM THE WESTERN SLOPE; ONE MEMBER FROM THE SAN LUIS VALLEY; AND FOUR MEMBERS FROM THE EASTERN SLOPE, INCLUDING AT LEAST TWO MEMBERS FROM A DESIGNATED GROUND WATER BASIN. AT LEAST THREE MEMBERS SHALL HAVE EDUCATIONAL AND PROFESSIONAL QUALIFICATIONS IN GROUND WATER HYDROLOGY AND AT LEAST TWO SHALL HAVE LEGAL EDUCATION. ALL SHALL BE WELL VERSED IN GROUND WATER MATTERS ~~six-members-who are-resident-agriculturists-of-designated-ground-water basins,-with-no-more-than-two-resident-agriculturists-from the-same-ground-water-basin-to-be-members-of-the-commission at-the-same-time:-one-member-who-shall-be-a-resident-agriculturist-shall-be-appointed-from-water-division-3,-and-two~~

~~residents-of-the-state-representing-municipal-or-industrial water-users-of-the-state,-one-of-whom-shall-be-appointed from-the-area-west-of-the-continental-divide.~~

(4) In addition to the appointed members, the executive director of the department of natural resources, the state engineer, and the director of the Colorado water conservation board shall be voting members of the commission. Seven voting members shall constitute a quorum at any regularly or specially called meeting of the commission, and a majority vote of those present shall rule. The commission shall establish and maintain a schedule of four general meetings each year. The chairman, at his discretion, may call special meetings of the commission to dispose of accumulated business.

(5) Members of the commission shall be paid no compensation, but shall be paid actual necessary expenses incurred by them in the performance of their duties as members thereof and a per diem of ~~twenty-five~~ FIFTY dollars per day while performing official duties, not to exceed ~~one~~ TWO thousand ~~two-hundred~~ dollars in any year.

(6) The commission shall biennially select a chairman and vice-chairman from among the appointed members. ~~The state-engineer-shall-be-ex-officio-the-executive-director-of-the-commission-and-shall-carry-out-and-enforce-the decisions,-orders,-and-policies-of-the-commission.--The-commission-may-delegate-to-the-executive-director-the-authority to-perform-any-of-the-functions-of-the-commission-as-set~~

forth-in-this-article-except-the-determination-of-a
designated-ground-water-basin-as-set-forth-in-section
37-90-106,-the-establishment-of-priority-of-claims-for-the
appropriation-of-designated-ground-water-as-set-forth-in
section-37-90-109,-and-the-creation-of-ground-water-manage-
ment-districts.--If-any-person-is-dissatisfied-with-any
action-of-the-executive-director-under-the-exercise-of-the
powers-delegated-by-the-commission,-he-may-appeal-said
action-to-the-commission,-which-shall-hear-his-appeals-as
specified-in-sections-37-90-113-and-37-90-114.

37-90-105. Small capacity wells. [To remain the same.]

37-90-106. [To remain the same, so that the boundaries of existing designated ground water basins can be altered, but the proposed amendment to section 37-90-103(7) provides that no new designated basins shall be established after the effective date of these amendments.]

37-90-106.5 Determination of designated ground water basins AQUIFERS. (1) The ~~commission~~ STATE ENGINEER shall, ~~from-time-to-time~~ as SOON AS adequate factual data becomes available, determine designated ground water basins AQUIFERS and subdivisions thereof by geographic description, and, as future conditions require and factual data justify, shall alter the boundaries or description thereof. In making such determinations, the ~~commission~~ STATE ENGINEER shall make the following findings:

(a) The name of the aquifer; ~~within-the-proposed designated-basin,~~

(b) The boundaries of ~~each~~ THE aquifer; ~~being considered,~~

(c) The estimated quantity of water stored in each aquifer;

(d) The estimated annual rate of recharge TO THE AQUIFER AND THE ANNUAL RATE OF DISCHARGE TO NATURAL STREAMS;

~~(e)-The-estimated-use-of-the-ground-water-in-the-area,~~

~~(f)-If-the-source-is-an-area-of-use-exceeding-fifteen years-as-defined-in-section-37-90-103(6),-the-commission shall-list-those-users-who-have-been-withdrawing-water~~

~~during the fifteen year period, the use made of the water, the average annual quantity of water withdrawn, and the year in which the user began to withdraw water.~~

(2) Before determining or altering the boundaries of a designated ground water AQUIFER basin or subdivisions thereof, the state engineer shall prepare and file in his office a map ~~clearly showing all lands included therein, together with a written description thereof~~ sufficient to apprise interested parties of the boundaries of the proposed AQUIFER basin or subdivisions thereof. The ~~commission~~ STATE ENGINEER shall publish the same and hold a hearing thereon. Following such hearing, the ~~commission~~ STATE ENGINEER shall enter an order to either create the proposed designated ground water AQUIFER basin, to include modification of the proposed boundaries, if any, or dismiss the ~~original~~ proposal, according to the factual information presented or available.

(3) AT THE TIME THE STATE ENGINEER DETERMINES A DESIGNATED GROUND WATER AQUIFER UNDER SUBSECTION (1) OF THIS SECTION, HE SHALL DETERMINE THE REPLACEMENT REQUIREMENTS NECESSARY TO AUGMENT NATURAL STREAMS SO AS TO PREVENT MATERIAL INJURY TO VESTED WATER RIGHTS AND CONDITIONAL WATER RIGHTS TO THE USE OF WATERS OF THE STATE AS DEFINED IN §37-92-103(13) FROM WITHDRAWALS OF GROUND WATER FROM THE DESIGNATED GROUND WATER AQUIFER, AND AS REQUIRED, SHALL AMEND SUCH REQUIREMENTS AS CONDITIONS JUSTIFY IN CONNECTION WITH THE ISSUANCE OF INDIVIDUAL PERMITS. THEREAFTER, ALL

GROUND WATER IN A DESIGNATED GROUND WATER AQUIFER SHALL BE SUBJECT TO APPROPRIATION AND USE IN THE MANNER DEFINED IN THIS ARTICLE. THE STATE ENGINEER MAY ADOPT RULES AND REGULATIONS TO ASSIST IN, BUT NOT AS A PREREQUISITE TO, THE PERFORMANCE OF THE FOREGOING DUTIES.

(4) THE STATE ENGINEER SHALL ONLY DESIGNATE AN AQUIFER IF THERE IS SUFFICIENT NONTRIBUTARY GROUND WATER IN THE AQUIFER TO JUSTIFY DESIGNATION.

(5) THE STATE ENGINEER SHALL NOT DETERMINE AS PART OF ANY DESIGNATED GROUND WATER AQUIFER THE DAWSON-ARKOSE, DENVER, ARAPAHOE, OR LARAMIE-FOXHILLS FORMATIONS.

37-90-107. Application for use of ground water -
publication of notice - permits - hearing on objections. (1)
Any person desiring to appropriate USE NONTRIBUTARY GROUND
WATER OR ground water ~~for-a-beneficial-use~~ in a AN EXISTING
designated ground water basin OR AQUIFER shall make appli-
cation to the ~~commission~~ STATE ENGINEER in a form to be
prescribed by the ~~commission~~ STATE ENGINEER IN ACCORDANCE
WITH SECTION 37-90-137(1). ~~The-applicant-shall-specify-the~~
~~particular-designated-ground-water-basin-or-subdivision~~
~~thereof-from-which-water-is-proposed-to-be-appropriated,-the~~
~~beneficial-use-to-which-it-is-proposed-to-apply-such-water,-~~
~~the-location-of-the-proposed-well,-the-name-of-the-owner-of~~
~~the-land-on-which-such-well-will-be-located,-the-estimated~~
~~average-annual-amount-of-water-applied-for-in-acre-feet,-the~~
~~estimated-maximum-pumping-rate-in-gallons-per-minute,-and-if~~
~~the-proposed-use-is-irrigation,-the-description-of-the-land~~
~~to-be-irrigated-and-the-name-of-the-owner-thereof,-together~~
~~with-such-other-reasonable-information-as-the-commission-may~~
~~designate-on-the-form-prescribed.~~ The amount of water
applied for shall only be utilized on the land designated
DESCRIBED on the application. NO PERMIT SHALL BE ISSUED
PURSUANT TO THIS SECTION UNLESS THE APPLICANT OWNS THE LAND
ON WHICH THE PROPOSED WELL IS TO BE LOCATED OR HAS THE
CONSENT OF THE LANDOWNER TO CONSTRUCT THE WELL AT THE PRO-
POSED LOCATION. The type or place of use shall not be

changed without first obtaining authorization from the ~~ground-water-commission~~ STATE ENGINEER PURSUANT TO CRITERIA SET FORTH IN SUBSECTION (5).

(2) Upon the filing of such application, a ~~preliminary-evaluation-shall-be-made-to-determine-if-the application-may-be-granted.--If-the-application-can-be-given favorable-consideration-by-the-ground-water-commission-under existing-policies,-then,-within-thirty-days,-the-application shall-be-published~~ THE STATE ENGINEER SHALL PUBLISH NOTICE OF THE APPLICATION WITHIN THIRTY DAYS.

(3) After the expiration of the time for filing objections, if no such objections have been filed, the ~~commission~~ STATE ENGINEER shall, if ~~it-finds-that-the proposed-appropriation-will-not-unreasonably-impair-existing water-rights-from-the-same-source,-and-will-not-create unreasonable-waste,-grant-the-said-application,-and-the state-engineer-shall~~ HE OR SHE FINDS THAT THE PROPOSED USE IS CONSISTENT WITH THE CRITERIA ESTABLISHED BY THE GROUND WATER COMMISSION PURSUANT TO SECTION 37-90-111, issue a ~~conditional~~ permit, OR IN A DESIGNATED BASIN A CONDITIONAL PERMIT, to the applicant to ~~appropriate~~ USE all or a part of the waters applied for, subject to such reasonable conditions and limitations as the ~~commission~~ STATE ENGINEER may specify. IF AN APPLICANT SEEKS TO DIVERT NONTRIBUTARY GROUND WATER FROM AN AQUIFER OUTSIDE AN EXISTING DESIGNATED GROUND WATER BASIN OR AQUIFER, THE STATE ENGINEER SHALL, WITHIN SIX MONTHS FROM THE DATE OF THE FILING OF THE APPLI-

CATION, MAKE A DETERMINATION WHETHER OR NOT THE AQUIFER SHALL BE DESIGNATED PURSUANT TO SECTION 37-90-106.5. IF THE STATE ENGINEER DETERMINES THAT THE AQUIFER SHOULD BE DESIGNATED IN ACCORDANCE WITH SECTION 37-90-106.5, HE SHALL IMMEDIATELY PROCEED TO DESIGNATE THE AQUIFER PURSUANT TO SECTION 37-90-106.5; OTHERWISE, THE PERMIT SHALL BE SUBJECT TO THE PROVISIONS OF SECTION 37-90-137(4) IN THE CASE OF NONTRIBUTARY GROUND WATER IN THE DAWSON-ARKOSE, DENVER, ARAPAHOE, OR LARAMIE-FOXHILLS FORMATIONS OR _____ IN THE CASE OF NONTRIBUTARY GROUND WATER IN OTHER AQUIFERS. IN THE EVENT A WATER JUDGE DETERMINES THAT GROUND WATER TO BE DIVERTED IS NONTRIBUTARY GROUND WATER CONTRARY TO A DETERMINATION OF THE STATE ENGINEER, THE STATE ENGINEER SHALL, WITHIN SIX MONTHS FROM THE DATE THE JUDGMENT BECOMES FINAL, AFTER ANY APPEAL, MAKE A DETERMINATION WHETHER OR NOT THE AQUIFER SHALL BE DESIGNATED PURSUANT TO SECTION 37-90-106.5.

(4) If objections have been filed with the time in said notice specified, the ~~commission~~ STATE ENGINEER shall set a date for a hearing on the application and the objections thereto, and shall notify the applicants and the objectors of the time and place. Such hearing shall be held in the designated ground water basin, IF ONE EXISTS, and within the district, if one exists, in which the proposed well will be located, or at such other place as may be designated by the ~~commission~~ STATE ENGINEER for the convenience of, and as agreed to by, the parties involved. IF THE

PROPOSED WELL WILL NOT BE LOCATED WITHIN A DESIGNATED GROUND WATER BASIN, THE HEARING MAY BE HELD IN DENVER AT THE OFFICE OF THE STATE ENGINEER OR IN THE DIVISION WITHIN WHICH THE WATER RIGHTS ARE SITUATED. If after such hearing it appears that ~~there are no unappropriated waters in the designated source, or that the proposed appropriation would unreasonably impair existing water rights from such source, or would create unreasonable waste~~ THE PROPOSED USE WOULD BE INCONSISTENT WITH THE CRITERIA ESTABLISHED BY THE GROUND WATER COMMISSION PURSUANT TO SECTION 37-90-111, the application shall be denied; otherwise it shall be granted in accordance with subsection (3) of this section. The ~~commission~~ STATE ENGINEER shall consider all evidence presented at the hearing and all other matters set forth in this section in determining whether the application should be denied or granted.

(5) In ascertaining whether a proposed use will ~~create unreasonable waste or unreasonably affect the rights of other appropriations~~ BE CONSISTENT WITH COMMISSION CRITERIA, the ~~commission~~ STATE ENGINEER shall UTILIZE HIS TECHNICAL EXPERTISE AND SHALL take into consideration the ~~area~~ HYDROLOGIC and geologic conditions OF THE AQUIFER FROM WHICH WATER WOULD BE DIVERTED, INCLUDING the ~~average annual yield~~ AMOUNT OF ECONOMICALLY RECOVERABLE WATER IN STORAGE and THE recharge rate of the ~~appropriate water supply~~ AQUIFER, the ~~priority and~~ quantity of existing claims of all persons to use the water, ~~the proposed method of use,~~ and

all other matters ~~appropriate to such questions~~ RELEVANT TO DETERMINING WHETHER THE PROPOSED USE WILL BE CONSISTENT WITH COMMISSION CRITERIA. With regard to whether a proposed use will impair uses under existing water rights, impairment shall include ~~the unreasonable lowering of the water level,~~ ~~or~~ the unreasonable deterioration of water quality, beyond reasonable economic limits of ~~withdrawal or~~ use.

(6) THE STATE ENGINEER SHALL ACT TO GRANT OR DENY A PERMIT PURSUANT TO THIS SECTION WITHIN 180 DAYS OF THE LAST DATE OF THE PUBLICATION REQUIRED BY SUBSECTION (2) OF THIS SECTION; PROVIDED, HOWEVER, THAT IF THE COMMISSION HAS NOT ADOPTED CRITERIA FOR THE AQUIFER FROM WHICH WATER IS PROPOSED TO BE DIVERTED, THE STATE ENGINEER SHALL ACT TO GRANT OR DENY A PERMIT WITHIN 180 DAYS OF THE FINAL ADOPTION OF SUCH CRITERIA. FAILURE TO ACT WITHIN SUCH TIME LIMITS SHALL BE DEEMED, AT THE OPTION OF THE APPLICANT, A DENIAL OF THE PERMIT.

(7) EVERY PERMIT ISSUED BY THE STATE ENGINEER PURSUANT TO THIS SECTION ~~SHALL CLEARLY STATE THAT THE~~ ISSUANCE OF THE PERMIT IS NOT AN ASSURANCE AND DOES NOT GUARANTEE THAT GROUND WATER WILL BE AVAILABLE IN THE AMOUNT STATED IN THE PERMIT AT THE TIME THE PERMIT IS ISSUED OR AT ANY TIME IN THE FUTURE.

(8) THE COMMISSION SHALL ESTABLISH AND MAY REVISE, AS NECESSARY, A SCHEDULE OF NONREFUNDABLE ANNUAL FEES FOR THE PROCESSING OF APPLICATIONS FOR PERMITS SUBJECT TO THE PROVISIONS OF SECTION 37-90-107 SUFFICIENT TO COVER THE

REASONABLE COSTS OF PROCESSING AND ADMINISTERING THE PERMIT,
BUT IN NO EVENT SHALL A FEE EXCEED _____
_____ DOLLARS.

(9) ALL FEES COLLECTED PURSUANT TO SUBSECTION (8) AND ALL FINES COLLECTED FOR VIOLATIONS OF THIS ARTICLE SHALL BE TRANSMITTED TO THE STATE TREASURER WHO SHALL CREDIT THE SAME TO THE NONTRIBUTARY GROUND WATER FUND, WHICH FUND IS HEREBY CREATED. THE MONEYS IN SUCH FUND SHALL BE APPROPRIATED ANNUALLY TO THE STATE ENGINEER BY THE GENERAL ASSEMBLY WHICH SHALL REVIEW EXPENDITURES OF SUCH MONEYS TO ASSURE THAT THEY ARE USED ONLY TO FUND THE EXPENSES OF ADMINISTERING THE NONTRIBUTARY PERMIT SYSTEM, INCLUDING THE EXPENSES OF THE GROUND WATER COMMISSION AND EXPENSES FOR ANY STUDIES NECESSARY TO IMPLEMENT ITS POWERS UNDER THE ACT, AS WELL AS STUDIES BY THE STATE ENGINEER OF HYDROLOGICAL CONDITIONS OF AQUIFERS AS NECESSARY TO DETERMINE WHETHER THEY SHOULD BE DESIGNATED GROUND WATER AQUIFERS. ANY FUNDS NOT REQUIRED TO ADMINISTER THE NONTRIBUTARY PERMIT SYSTEM MAY BE APPROPRIATED TO FUND RESEARCH ON METHODS OF WATER CONSERVATION.

37-90-108. [To remain the same, but would apply only to designated ground water.]

37-90-108.5. WELLS TO DIVERT WATER FROM NONTRIBUTARY AQUIFERS OUTSIDE OF DESIGNATED BASINS - EVIDENCE OF WELL CONSTRUCTION AND BENEFICIAL USE - FORFEITURE. (1)(a) AFTER HAVING RECEIVED A PERMIT TO DIVERT WATER FROM A NONTRIBUTARY AQUIFER OUTSIDE THE BOUNDARIES OF A DESIGNATED GROUND WATER BASIN, THE APPLICANT, WITHIN FIVE YEARS FROM THE DATE SUCH PERMIT IS ISSUED, SHALL CONSTRUCT THE WELL AND SHALL APPLY WATER FROM SUCH WELL TO A BENEFICIAL USE.

(b) THE APPLICANT, UPON COMPLETION OF THE WELL, SHALL FURNISH INFORMATION TO THE STATE ENGINEER, IN THE FORM PRESCRIBED BY THE STATE ENGINEER, AS TO THE DEPTH OF THE WELL, THE WATER BEARING FORMATIONS INTERCEPTED BY THE WELL, AND THE MAXIMUM SUSTAINED PUMPING RATE IN GALLONS PER MINUTE.

(c) IF THE WELL DESCRIBED IN THE PERMIT IS NOT CONSTRUCTED AND THE REQUIRED INFORMATION FURNISHED TO THE STATE ENGINEER WITHIN FIVE YEARS FROM THE DATE THE PERMIT WAS ISSUED AS PROVIDED IN THIS SUBSECTION (1), THE PERMIT SHALL EXPIRE AND BE OF NO FORCE AND EFFECT; EXCEPT THAT, UPON A SHOWING OF CONTINUING NEED TO DEVELOP AND USE THE NONTRIBUTARY GROUND WATER RESOURCE, THE STATE ENGINEER MAY GRANT AN EXTENSION OF TIME FOR A PERIOD NOT TO EXCEED FIVE YEARS. MORE THAN ONE SUCH EXTENSION MAY BE PERMITTED BY THE STATE ENGINEER.

(2) (a) IF THE WELL OR WELLS DESCRIBED IN A PERMIT HAVE BEEN CONSTRUCTED IN COMPLIANCE WITH SUBSECTION (1) OF THIS SECTION, THE APPLICANT, WITHIN FIVE YEARS FROM THE DATE SUCH PERMIT WAS ISSUED, SHALL FURNISH BY SWORN AFFIDAVIT TO THE STATE ENGINEER, IN THE FORM PRESCRIBED BY THE STATE ENGINEER, EVIDENCE THAT WATER FROM SUCH WELL OR WELLS HAS BEEN PUT TO THE USE FOR WHICH THE PERMIT WAS ISSUED.

(b) SUCH AFFIDAVIT SHALL BE PRIMA FACIE EVIDENCE OF THE MATTERS CONTAINED THEREIN, BUT SHALL BE SUBJECT TO OBJECTION BY OTHERS AND TO SUCH VERIFICATION AND INQUIRY AS THE STATE ENGINEER SHALL CONSIDER APPROPRIATE IN EACH PARTICULAR CASE.

(c) IF SUCH REQUIRED AFFIDAVIT IS NOT FURNISHED TO THE STATE ENGINEER WITHIN THE TIME AND AS PROVIDED IN THIS SUBSECTION (2), THE PERMIT SHALL EXPIRE AND BE OF NO FORCE OR EFFECT EXCEPT AS PROVIDED IN SUBSECTION (3) OF THIS SECTION.

(3) THE REQUIREMENT THAT A STATEMENT THAT WATER HAS BEEN PUT TO THE USE FOR WHICH THE PERMIT WAS ISSUED SHALL BE FILED SHALL APPLY TO ALL PERMITS WHEREIN THE WATER WAS PUT TO SUCH USE ON OR AFTER _____ . IF EVIDENCE THAT WATER HAS BEEN PLACED TO THE USE FOR WHICH IT WAS PERMITTED HAS NOT BEEN RECEIVED AS OF THE EXPIRATION DATE OF THE PERMIT, THE STATE ENGINEER SHALL SO NOTIFY THE APPLICANT BY CERTIFIED MAIL. THE NOTICE SHALL GIVE THE APPLICANT THE OPPORTUNITY TO SUBMIT PROOF THAT THE WATER WAS PUT TO THE USE FOR WHICH IT WAS PERMITTED PRIOR TO THE EXPIRATION DATE, BUT, DUE TO EXCUSABLE NEGLIGENCE, INADVERTENCE, OR MISTAKE, THE APPLICANT FAILED TO SUBMIT THE EVIDENCE ON TIME. THE PROOF MUST BE RECEIVED BY THE STATE ENGINEER WITHIN TWENTY DAYS OF RECEIPT OF THE NOTICE BY THE APPLICANT AND MUST BE ACCOMPANIED BY A FILING FEE OF THIRTY DOLLARS. IF THE PROOF CAN BE GIVEN FAVORABLE CONSIDERATION BY THE STATE ENGINEER THEN, WITHIN THIRTY DAYS, A SYNOPSIS OF THE PROOF SHALL BE PUBLISHED, SPECIFYING THAT OBJECTIONS SHALL BE FILED WITHIN THIRTY DAYS. AFTER THE EXPIRATION OF THE TIME FOR FILING OBJECTIONS, IF NO SUCH OBJECTIONS HAVE BEEN FILED, THE STATE ENGINEER SHALL, IF HE OR SHE FINDS THE PROOF TO BE SATISFACTORY, FIND THAT THE PERMIT SHOULD REMAIN IN FORCE AND EFFECT. IF OBJECTIONS HAVE BEEN FILED TOGETHER WITH A NONREFUNDABLE FILING FEE OF TEN DOLLARS, THE STATE ENGINEER SHALL SET A DATE FOR A HEARING ON THE PROOF AND THE OBJECTIONS THERETO AND SHALL NOTIFY THE APPLICANT AND THE OBJECTORS OF THE TIME AND PLACE. THE STATE ENGINEER SHALL CONSIDER ALL EVIDENCE PRESENTED AT THE HEARING AND ALL OTHER MATTERS SET FORTH IN THIS SECTION IN DETERMINING WHETHER THE PERMIT SHOULD REMAIN IN FORCE AND EFFECT.

(4) WHEN, AFTER INITIALLY PLACING WATER TO THE USE FOR WHICH IT WAS PERMITTED, A WATER USER HAS, FOR A PERIOD OF FIVE OR MORE SUCCESSIVE YEARS, FAILED TO USE ALL OR ANY PORTION OF NONTRIBUTARY GROUND WATER LOCATED OUTSIDE THE BOUNDARIES OF A DESIGNATED GROUND WATER BASIN TO WHICH HE OR SHE IS ENTITLED UNDER A PERMIT, THE STATE ENGINEER MAY INITIATE FORFEITURE PROCEEDINGS TO DETERMINE THE VALIDITY OF THE UNUSED RIGHT OR PORTION THEREOF. IF A USE FOR THE NONTRIBUTARY GROUND WATER NO LONGER EXISTS, THE WATER RIGHT SHALL BE FORFEITED. SUCH PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE PROCEDURES FOR REVOCATION OF A LICENSE UNDER THE STATE ADMINISTRATIVE PROCEDURE ACT, AND AFTER PUBLICATION AS PROVIDED IN SECTION 37-90-112.

37-90-109. [To remain the same, but would apply only to designated ground water.]

37-90-110. Powers of the state engineer. (1) In the administration and enforcement of this article and in the effectuation of the policy of this state to PERMIT REASONABLE DEPLETION OF

NONTRIBUTARY GROUND WATER AND DESIGNATED GROUND WATER IN A MANNER THAT BALANCES CONSERVATION AND ECONOMIC DEVELOPMENT OF THESE RESOURCES conserve-its-designated-ground-water-resources, and TO for-the protection-of vested rights, the state engineer is empowered:

(a) To require all flowing wells to be equipped with valves so that the flow of water can be controlled;

(b) To require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves, or pumps, either above or below the land surface AND TO PREVENT THE POLLUTION OF GROUND WATER RESOURCES;

(c) To go upon all lands, both public and private, for the purpose of inspecting wells, pumps, casings, pipes, fittings, and measuring devices, including wells used or claimed to be used for domestic or stock purposes;

(d) To order the cessation of the use of a well pending the correction of any defect that the state engineer has ordered corrected;

(e) To commence actions to enjoin the illegal opening or excavation of wells or withdrawal or use of water therefrom, and to appear and become a party to any action or proceeding pending in any court or administrative agency when it appears that the determination of such action or proceeding might result in depletion of the ground water resources of the state contrary to the public policy expressed in this article or might injure vested rights of other appropriators;

(f) To ISSUE ORDERS take-such-action-as-may-be-required to enforce compliance with any WELL PERMIT, RULE, OR regulation, control MEASURE ISSUED, PROMULGATED, OR INSTITUTED, or-order

established by the ground-water commission as provided for under the provisions of this article.

(g) IN THE EVENT AN ORDER OF THE STATE ENGINEER IS NOT COMPLIED WITH, TO APPLY TO THE WATER JUDGE OF THE PARTICULAR DIVISION FOR AN INJUNCTION ENJOINING THE PERSON TO WHOM SUCH ORDER WAS DIRECTED FROM CONTINUING TO VIOLATE SAME. THE TERM "INJUNCTION" INCLUDES MANDATORY RELIEF.

(I) IN SUCH PROCEEDING, IF THE COURT UPHOLDS THE ORDER OF THE STATE ENGINEER, THE PERSON AGAINST WHOM SUCH ORDER WAS ISSUED SHALL PAY THE COSTS OF THE PROCEEDING, INCLUDING THE COSTS OF A REASONABLE ATTORNEY FEE.

(II) ANY PERSON WHO HAS AN INTEREST IN THE SUBJECT MATTER OF SUCH PROCEEDINGS MAY INTERVENE, IF SUCH INTERVENTION IS TIMELY AND WILL NOT CAUSE UNQUE DELAY.

(III) IN THE CASE OF A VIOLATION OF AN INJUNCTION ISSUED UNDER THE PROVISIONS OF THIS SUBSECTION, THE WATER JUDGE SHALL TRY AND PUNISH THE OFFENDER FOR CONTEMPT OF COURT.

(IV) SUCH PROCEEDINGS SHALL BE IN ADDITION TO, AND NOT BE IN LIEU OF, ANY OTHER PENALTIES AND REMEDIES, PUBLIC OR PRIVATE, PROVIDED BY LAW.

(n) TO SUPERVISE AND CONTROL THE EXERCISE AND ADMINISTRATION OF ALL RIGHTS ACQUIRED TO THE USE OF DESIGNATED GROUND WATER. IN THE EXERCISE OF THIS POWER THE STATE ENGINEER MAY, BY ORDER, PROHIBIT OR LIMIT WITHDRAWAL OF WATER FROM ANY WELL DURING ANY PERIOD THAT HE OR SHE DETERMINES THAT SUCH WITHDRAWAL OF WATER FROM SAID WELL WOULD CAUSE UNREASONABLE INJURY TO PRIOR VESTED RIGHTS; EXCEPT THAT NOTHING IN THIS ARTICLE SHALL BE CONSTRUED AS ENTITLING ANY PRIOR DESIGNATED GROUND WATER USER TO THE MAINTENANCE OF THE HISTORIC WATER LEVEL OR ANY OTHER LEVEL BELOW WHICH WATER STILL CAN BE ECONOMICALLY EXTRACTED WHEN THE TOTAL ECONOMIC PATTERN OF THE PARTICULAR DESIGNATED GROUND WATER BASIN IS CONSIDERED.

(i) TO ESTABLISH A REASONABLE GROUND WATER LEVEL IN AN AREA HAVING A COMMON GROUND WATER SUPPLY, CONSISTENT WITH GUIDELINES ESTABLISHED BY THE COMMISSION.

(j) TO ISSUE PERMITS FOR THE CONSTRUCTION OF NEW, REPLACEMENT, OR SUPPLEMENTAL WELLS. ANY PERMITS ISSUED FOR REPLACEMENT OR SUPPLEMENTAL WELLS SHALL SET FORTH THE CONDITIONS UNDER WHICH A WELL MAY BE MODIFIED BY A CHANGE OF THE WELL ITSELF OR THE PUMPING EQUIPMENT THEREFOR, BY THE DRILLING OF A SUPPLEMENTAL WELL, OR OTHERWISE, IN ORDER TO MAKE IT POSSIBLE FOR THE OWNER OF A WELL TO OBTAIN THE WATER TO WHICH SUCH OWNER MAY BE ENTITLED BY VIRTUE OF HIS ORIGINAL USE.

(k) TO ORDER THE TOTAL OR PARTIAL DISCONTINUANCE OF ANY DIVERSION TO THE EXTENT THE WATER BEING DIVERTED IS NOT NECESSARY FOR APPLICATION TO A BENEFICIAL USE;

(l) TO PRESCRIBE MEASURING AND RECORDING METHODS FOR THE MEASUREMENT OF WATER LEVELS IN AND THE AMOUNT OF WATER WITHDRAWN FROM WELLS AND TO REQUIRE REPORTS TO BE MADE AT THE END OF EACH PUMPING SEASON SHOWING THE TOTAL AMOUNT OF WATER WITHDRAWN FROM A

WELL, THE DATE AND WATER LEVEL AT THE BEGINNING OF THE PUMPING SEASON, THE DATE AND WATER LEVEL AT THE END OF THE PUMPING SEASON, AND SHOWING ANY PERIOD OF MORE THAN THIRTY DAYS' CESSATION OF PUMPING DURING SUCH PUMPING SEASON.

(m) UPON APPLICATION THEREFOR BY ANY PERMIT HOLDER, TO AUTHORIZE A CHANGE IN ACREAGE SERVED, PLACE OR TYPE OF USE OF AND BY ANY WATER RIGHT, OR OF ANY WELL LOCATION GRANTED UNDER THE AUTHORITY OF THE COMMISSION, BUT ONLY UPON SUCH TERMS AND CONDITIONS AS WILL NOT CAUSE MATERIAL INJURY TO THE VESTED RIGHTS OF OTHER WATER USERS. THE STATE ENGINEER MAY REQUIRE THE APPLICANT TO REIMBURSE THE STATE ENGINEER FOR THE REASONABLE COSTS OF ADMINISTERING SUCH TERMS AND CONDITIONS. SUCH CHANGE MAY BE MADE ONLY AFTER PUBLICATION OF SUCH APPLICATION AS PROVIDED IN SECTION 37-90-112.

(2) NO SUPPLEMENTAL WELLS OR ALTERNATE POINT OF DIVERSION WELLS SHALL BE ALLOWED IN ANY NONTRIBUTARY AQUIFER OR DESIGNATED GROUND WATER BASIN IN WHICH THE PROPOSED WELL OR WELLS COMBINED WOULD DEplete THE AQUIFER IN EXCESS OF THE RATE OF DEPLETION PRESCRIBED BY THE GROUND WATER COMMISSION OR BY THE GROUND WATER MANAGEMENT DISTRICT RULES AND REGULATIONS.

37-90-111. Powers of the ground water commission - limitations. (1) in the administration and enforcement of this article and in the effectuation of the policy of this state to ~~conserve-its-designated-ground-water-resources~~ PERMIT REASONABLE DEPLETION OF NONTRIBUTARY GROUND WATER AND DESIGNATED GROUND WATER IN A MANNER THAT BALANCES CONSERVATION AND ECONOMIC DEVELOPMENT OF THESE RESOURCES and TO ~~for-the~~ protection of vested rights, and ~~except-to-the-extent-that~~ ~~similar-authority-is-vested-in-ground-water-management~~ districts pursuant to section 37-90-130(2), the ground water commission is empowered:

(a) ~~To supervise and control the exercise and administration of all rights acquired to the use of designated ground water,--In the exercise of this power it may, by summary order, prohibit or limit withdrawal of water from any well during any period that it determines that such withdrawal of water from said well would cause unreasonable injury to prior appropriators,--except that nothing in this article shall be construed as entitling any prior designated ground water appropriator to the maintenance of the historic water level or any other level below which water still can be economically extracted when the total economic pattern of the particular designated ground water basin is considered, and further except that no such order shall take effect until six months after its entry.~~

(a) TO ADOPT RULES AND REGULATIONS, WHICH MAY APPLY STATEWIDE OR TO A SPECIFIC NONTRIBUTARY AQUIFER OR DESIGNATED GROUND WATER BASIN, TO CARRY OUT ITS POLICY RESPONSIBILITIES WITH RESPECT TO THE CONSERVATION, DEVELOPMENT, AND USE OF THE NONTRIBUTARY GROUND WATER AND DESIGNATED GROUND WATER RESOURCES OF THE STATE. SUCH RULES MAY INCLUDE, BUT ARE NOT LIMITED TO, THE ESTABLISHMENT OF THE FOLLOWING:

(I) THE MINIMUM USEFUL LIFE OF AN AQUIFER OR AQUIFERS;

(II) THE MAXIMUM RATE AT WHICH NONTRIBUTARY GROUND WATER AND DESIGNATED GROUND WATER MINING WILL BE PERMITTED;

(III) THE MAINTENANCE OF REASONABLE WATER PUMPING LEVELS; BUT THE ESTABLISHMENT OF A REASONABLE PUMPING LEVEL SHALL NOT INCLUDE AN HISTORIC PUMPING LEVEL OR BE DEEMED TO GUARANTEE A PRESSURE LEVEL OR WATER LEVEL IN THE AQUIFER;

(IV) THE PROTECTION OF EXISTING RIGHTS FROM UNREASONABLE IMPAIRMENT;

(V) PRIORITIES AMONG TYPES OF USES FOR WHICH NONTRIBUTARY GROUND WATER AND DESIGNATED GROUND WATER WITHDRAWALS WILL BE PERMITTED, WHICH MAY INCLUDE THE RESERVATION OF A PORTION OF AN AQUIFER OR AQUIFERS FOR FUTURE USES; IN ESTABLISHING SUCH PRIORITIES, THE COMMISSION SHALL GIVE PREFERENCE TO THE USE OF NONTRIBUTARY GROUND WATER AS A SOURCE OF WATER TO SUPPLEMENT DOMESTIC AND MUNICIPAL WATER SUPPLIES DURING DROUGHT AND LOW-FLOW CONDITIONS, BOTH AT PRESENT AND IN THE FUTURE, AND AS A SOURCE OF REPLACEMENT WATER TO MAINTAIN EXISTING LEVELS OF USE OF TRIBUTARY GROUND

WATER WHICH DEVELOPED PRIOR TO THE INTEGRATION OF THE APPROPRIATION, USE, AND ADMINISTRATION OF TRIBUTARY GROUND WATER WITH SURFACE WATER;

(VI) CRITERIA AND PROCEDURES FOR AVERAGING DEPLECTIONS, FOR ARTIFICIAL RECHARGE OF THE AQUIFER, AND FOR ACCOMMODATING OVERDRAFTS WHERE NONTRIBUTARY GROUND WATER AND DESIGNATED GROUND WATER RESOURCES MAY BE USEFUL TO SUPPLEMENT SURFACE SUPPLIES IN LOW RUNOFF YEARS;

(VII) CRITERIA FOR OPTIMIZING THE BENEFICIAL USE OF NONTRIBUTARY GROUND WATER AND DESIGNATED GROUND WATER RESOURCES, INCLUDING THE EFFICIENT USE OF THE WATER, THE PREVENTION OF WASTE, THE REUSE OF THE WATER, AND THE USE OF AVAILABLE ALTERNATE SOURCES OF SUPPLY.

(VIII) FOR ANY CLASS OF PERMITS, A LIMITATION ON THE PERIOD OF THE PERMIT, TO INCLUDE THE ISSUANCE OF TEMPORARY PERMITS FOR NONTRIBUTARY AQUIFERS FOR WHICH SPECIFIC RULES HAVE NOT BEEN PROMULGATED.

~~(b)--To establish a reasonable ground-water pumping level in an area having a common designated ground-water supply.--Water in wells shall not be deemed available to fill the water right therefor if withdrawal therefrom of the amount called for by such right would, contrary to the declared policy of this article, unreasonably affect any prior water right, or result in withdrawing the ground-water supply at a rate materially in excess of the reasonably anticipated average rate of future recharge.~~

(b) BEFORE ADOPTING RULES AND REGULATIONS PURSUANT TO PARAGRAPH (1)(a) ABOVE, THE GROUND WATER COMMISSION SHALL CONFER AND CONSULT WITH THE BOARD OF DIRECTORS OF ANY GROUND WATER MANAGEMENT DISTRICT THAT WOULD BE AFFECTED BY THE RULES AND REGULATIONS AND SHALL CONSIDER ANY COMPREHENSIVE PLAN FOR THE USE OF AN AQUIFER, OR DEPENDENT UPON SUCH USE, DEVELOPED BY A LOCAL GROUND WATER MANAGEMENT DISTRICT OR OTHER LOCAL GOVERNMENTAL ENTITY.

(2) EXISTING RULES AND REGULATIONS AND POLICY GUIDELINES OF THE GROUND WATER COMMISSION AS OF THE EFFECTIVE DATE OF THIS STATUTE SHALL REMAIN IN EFFECT UNTIL REPEALED, MODIFIED, AMENDED, OR SUPERSEDED BY THE COMMISSION; BUT NO RULES AND REGULATIONS OR POLICY GUIDELINES IN EFFECT AS OF THE EFFECTIVE DATE OF THIS STATUTE AFFECTING A MANAGEMENT DISTRICT CREATED UNDER THIS ACT SHALL BE REPEALED, MODIFIED, AMENDED, OR SUPERCEDED WITHOUT THE CONSENT OF SUCH MANAGEMENT DISTRICT.

~~(4)~~ (3) In any area within a designated ground water basin which has not been included within the boundaries of a ground water management district, the commission has the authority to exercise any power given by this article to the board of directors of a ground water management district, but before instituting control measures pursuant to section 37-90-130, the commission shall follow the procedures set out in section 37-90-131.

37-90-112 Notice - publication. [To remain the same.]

37-90-113 Hearings. (1) Hearings on all matters to be heard by the STATE ENGINEER ~~commission-shall~~ MAY be held IN DENVER AT THE OFFICE OF THE STATE ENGINEER OR IN THE DIVISION WITHIN ~~within-the-boundaries-of-the-designated ground-water-basin-and-within-the-ground-water-management district,-if-one-exists,-in~~ which the WELL water-rights directly involved are IS situated. The hearings shall-be conducted before the ~~commission~~ STATE ENGINEER SHALL BE CONDUCTED ON THE RECORD, EXCEPT THAT HEARINGS ON THE GRANTING OR DENIAL OF A WELL PERMIT MAY BE CONDUCTED INFORMALLY, AND SHALL BE CONDUCTED under reasonable rules and regulations of procedure prescribed by ~~it~~ HIM. All ~~parties-to-the-hearing,-including-the-commission,-have-the right-to-subpoena-witnesses,-who-shall-be-sworn-by-the chairman-or-acting-chairman-of-the-commission-to-testify under-oath-at-the-hearing.~~ All parties to the hearing shall be entitled to be heard either in person or by attorney.

(2) In any hearings required to be conducted by the ~~commission~~ STATE ENGINEER, ~~it~~ HE may, in ~~its~~ HIS discretion, have such hearings conducted before such agent as ~~it~~ HE may designate, either alone or in conjunction with the appearance of the ~~commission~~ STATE ENGINEER if the agent is technically qualified to conduct or assist in such hearings.

37-90-114. Other administrative hearings. [Repeal.]

37-90-115. Appeals from action of state engineer ~~or the ground-water-commission~~ time for taking - notice - costs - evidence - trial. (1) Any person dissatisfied with any decision, act, or FAILURE OR refusal to act of the state engineer ~~or the-commission~~ under this article may take an appeal to the WATER JUDGE OF THE WATER DIVISION ~~district court-of-the-county~~ wherein the water rights or wells involved are situated. FILING OF AN APPLICATION IN ACCORDANCE WITH THE PROCEDURES OF SECTION 37-92-302 SHALL CONSTITUTE APPEAL OF A DENIAL OF A WELL PERMIT.

(2) Notices of such appeal shall be served by the appellant upon the state engineer ~~or the-commission~~ and all parties interested within thirty days after notice of such decision, act, or FAILURE OR refusal to act, and unless such appeal is taken within said time, the action of the state engineer ~~or the-commission~~ shall be final and conclusive, EXCEPT THAT THE FILING OF AN APPLICATION TO DETERMINE RIGHTS TO NONTRIBUTARY GROUND WATER IN ACCORDANCE WITH THE PROCEDURE_s OF SECTION 37-92-302 SHALL CONSTITUTE NOTICE OF SUCH APPEAL FOR THE PURPOSES OF THIS SUBSECTION.

(3) Notice of such appeal, proof of service, and docketing of the appeal in the WATER DIVISION OF THE district court shall be accomplished in the same manner as any other civil suit originally commenced in the district courts of this state. Costs shall be taxed to the appellant as in any other civil suit.

(4) EXCEPT FOR REVIEW OF RULES AND REGULATIONS, WHICH SHALL BE SUBJECT TO REVIEW UNDER THE STATE ADMINISTRATIVE PROCEDURE ACT BY THE WATER JUDGE OF THE WATER DIVISION WHEREIN THE AQUIFER IS LOCATED, proceedings upon appeal shall be de novo; except that evidence taken in a hearing before the ~~commission~~ STATE ENGINEER may be considered as original evidence, subject to legal objection, the same as if said evidence were originally offered in such ~~district court~~ WATER DIVISION OF THE DISTRICT COURT.

(5) It is the duty of the ~~commission-and~~ state engineer upon being served with notice of appeal, as provided in this section, to forthwith transmit to the WATER DIVISION OF the district court to which the appeal is taken the papers, maps, plats, field notes, orders, decisions, and other available data affecting the matter in controversy or certified copies thereof, which certified copies shall be admitted in evidence as of equal validity with the originals.

(6) IF AN APPEAL IS NOT TAKEN FROM ANY DECISION OF THE STATE ENGINEER, THAT DECISION SHALL BE FINAL TO THE SAME EXTENT AS WOULD BE THE CASE IF IT WERE A DECISION OF THE WATER COURT.

37-90-116. Fees. [Repeal.]

37-90-117. Water conservation board - duties. [To remain the same.]

37-90-118. ~~Ground-water~~ LOCAL management OF DESIGNATED BASINS AND AQUIFERS.

(1) Within areas determined as designated ground water basins by action of the commission in accordance with section 37-90-106, ground water management districts may be formed in the manner, and having the power, provided in sections 73-90-118 to 37-90-135, ~~but no district shall be organized unless all ground water aquifers with the geographic boundaries of the district have been designated as a part of the district by the commission.~~

(2) WITHIN AREAS DETERMINED AS DESIGNATED GROUND WATER AQUIFERS BY THE STATE ENGINEER OUTSIDE OF DESIGNATED GROUND WATER BASINS, GROUND WATER MANAGEMENT DISTRICTS MAY BE FORMED IN THE MANNER, AND HAVING THE POWER, PROVIDED IN SECTIONS 73-90-118 TO 37-90-135, OR LOCAL MANAGEMENT AUTHORITY MAY BE GIVEN, BY ACTION OF THE COMMISSION, TO CONSERVANCY DISTRICTS OR OTHER LOCAL GOVERNMENT ENTITIES WITH POWERS COMPARABLE TO THOSE GRANTED HEREIN TO GROUND WATER MANAGEMENT DISTRICTS AND SUBJECT, BY LAW OR AGREEMENT, TO THE SUPERVISORY AUTHORITY OF THE COMMISSION AS PROVIDED IN THIS ACT.

(3) NO DISTRICT SHALL BE ORGANIZED AND NO LOCAL MANAGEMENT AUTHORITY SHALL BE GRANTED TO A LOCAL AGENCY UNLESS ALL GROUND WATER AQUIFERS SUBJECT TO ADMINISTRATION BY SUCH DISTRICT OR LOCAL AUTHORITY LIE WITHIN THE GEOGRAPHIC BOUNDARIES OF SUCH DISTRICT OR AUTHORITY AND NO TWO MANAGEMENT ENTITIES SHALL EXERCISE AUTHORITY WITHIN THE SAME GEOGRAPHIC AREA.

37-90-119 to 135. provisions related to management districts. [To remain the same.]

37-90-137. permits to construct wells outside deisgnated areas - fees - permit no ground water right - evidence - time limitation. [To remain the same, except as follows:]

(1) From and after May 17, 1965, no new wells shall be constructed, ~~outside-the-boundaries-of-a-designated ground-water-basin,~~ nor the supply of water from existing wells ~~outside-the-boundaries-of-a-designated-ground-water basin~~ increased or extended, unless the user makes an application in writing to the state engineer for a "permit to construct a well", in a form to be prescribed by the state engineer. The applicant shall specify the ~~partieular-designated~~ aquifer from which the water is to be diverted, the beneficial use to which it is proposed to apply such water, the location of the proposed well, the name of the owner of the land on which such well will be located, the average annual amount of water applied for in acre-feet per year,

the proposed maximum pumping rate in gallons per minute, and, if the proposed use is irrigation, a description of the land to be irrigated and the name of the owner thereof, together with such other reasonable information as the state engineer may designate on the form prescribed.

(2) EXCEPT FOR APPLICATIONS SUBJECT TO THE PROVISIONS OF SECTION 37-90-107, Upon receipt of an application for a replacement well or a new, increased, or additional supply of ground water, ~~from an area outside the boundaries of a designated ground-water basin,~~ accompanied by a filing fee of twenty-five dollars, the state engineer shall make a determination as to whether or not the exercise of the requested permit will materially injure the vested water rights of others. If the state engineer finds that there is unappropriated water available for withdrawal by the proposed well and that the vested water rights of others will not be materially injured, and can be substantiated by hydrological and geological facts, he shall issue a permit to construct a well, but not otherwise; except that no permit shall be issued unless the location of the proposed well will be at a distance of more than six hundred feet from an existing well, but if the state engineer, after a hearing, finds that circumstances in a particular instance so warrant, he may issue a permit without regard to the above limitation. The permit shall set forth such conditions for drilling, casing, and equipping wells and other diversion facilities as are reasonably necessary to prevent

waste, pollution, or material injury to existing rights. The state engineer shall endorse upon the application the date of its receipt, file and preserve such application, and make record of such receipt and the issuance of the permit in his office so indexed as to be useful in determining the extent of the uses made from various ground water sources.

* * *

(4) In the issuance of a permit to construct a well WHICH WOULD WITHDRAW NONTRIBUTARY GROUND WATER OUTSIDE A DESIGNATED GROUND WATER BASIN OR AQUIFER, NOT MEETING THE EXEMPTION SET FORTH IN SECTION ~~in-these-aquifers-which-do not-meet-the-definitions-of-section-37-90-103(6)-or-section 37-92-103(ii);--and-do-not-meet-the-exemptions-set-forth-in section-37-90-0105-and 37-92-602,~~ the provisions of subsections (1) and (2) of this section shall apply; except that, in considering whether the permit shall be issued, only that quantity of water underlying the land owned by the applicant or UNDER LAND OWNED BY ANOTHER WHO HAS CONSENTED IN WRITING TO APPLICANT'S APPROPRIATION, ~~by-the-owners-of the-area,-by-their-consent,-to-be-served-is~~ SHALL BE considered ~~to-be~~ unappropriated; the minimum useful life of the aquifer is one hundred years, assuming that there is no substantial artificial recharge within said period; and no material injury to vested water rights would result from the issuance of said permit. The state engineer may adopt rules

and regulations to assist in, but not as a prerequisite to, the granting or denial of permits to construct wells and for the administration of this underground water.

37-90-138 - 141. Miscellaneous provisions relating to well logs, recording existing beneficial uses, and management districts. [To remain the same.]

DRAFT MEMORANDUM

TO: Groundwater Legislation Committee

FROM: Work Group #2 (Revised Groundwater Management Act Proposal)

DATE: July 24, 1984

SUBJECT: Objectives, scope and justification of
proposed changes in ground water legislation

For the purpose of briefing the General Committee on the rationale of Work Group #2 for the changes it proposes in the ground water laws of Colorado, Work Group #2 submits the following report:

Background Data

Colorado ground water law has developed in a piecemeal fashion. Prior to 1957, wells were not subject to state regulation. In that year, well registration was required under a statute that negated the creation by such registration of any water right. Although well sources of supply were presumed to be tributary to surface or underground streams, there was no procedure for permitting wells, determining their tributary or nontributary character in fact or administering their diversions on a priority basis.

In 1965 alluvial wells were placed under state engineer administration, and by separate legislation provision was made for creation of designated basins for loosely defined ground water sources of supply and for regulating diversion

and use of designated ground waters under policies established by the Ground Water Commission and implemented by local ground water management districts. In this legislation no attention was given to the establishment of an administrative structure that could (i) build a data base to identify and conserve depletable nontributary sources not placed within a designated basin; (ii) determine relationships of various sources of supply between themselves and between ground water sources and stream discharges; (iii) protect vested rights from junior depletions without continued monitoring, participation and enforcement by individual water users; and (iv) determine rights in water on a uniform, nonduplicitous and cost-justifiable basis. Ground water sources outside of stream alluvium areas or designated basins were essentially unregulated; they were permitted on administrative findings that there was unappropriated water and no injury to vested rights; they were sometimes adjudicated in stream adjudications but, according to Whitten v. Coit, 153 Colo. 157 (1963), without proper jurisdiction under law; they were rarely subject to administration or regulation within either a tributary or nontributary basin structure.

After intensive study of stream-ground water relationships between 1967 and 1969 as a result of People v. Fellhauer, the Water Right Determination and Administration Act was enacted in 1969. It provided a comprehensive regimen for adjudication and administration of streams and tributary

ground water rights; it wholly ignored the adjudication and administration of nontributary rights. It left those rights to the permitting process of Section 137 of the Ground Water Management Act, if outside designated ground water basins, or to the procedures prescribed in that Act if diversions are made within the basin. No attention was given to the depletable character of nontributary resources or to any system for administering priorities or protecting expectations in such sources of supply.

Then came S213, an amendment to Section 137, as a stopgap measure, to give the landowner control over nontributary ground waters in and under his land and a right to permit wells and withdraw water from such wells at an arbitrary 100-year depletion rate. Although landowners, particularly in the Denver Basin, gained comfort from the allocation procedure, that comfort necessarily rested on (i) a continuing ability to establish that the source of supply was nontributary under judicial nontributary standards; and (ii) an ability to adjudicate a right in such water notwithstanding conditions imposed in well permits and the absence of any clear jurisdiction in any court to make such determination.

In this hodgepodge setting, the Colorado Supreme Court made a determination in the Huston case that the Water Court did not have jurisdiction to make a determination that the appropriator or claimant of a non-tributary source of

supply had a water right; or that such claimant had any rights resting on land ownership other than those expressly conferred on him by the General Assembly. Following the decision, the legislature attempted to fill a jurisdictional crack by joint resolution; and the Governor approved the legislative act on the condition that a thorough study of ground water legislation be initiated and that appropriate legislation be submitted to the General Assembly as soon as practicable.

Work Group #2 responded to its perception of the Governor's mandate. It identified some thirteen problems in ground water administration under existing law. It endeavored to address each of the identified problems. It did this in a way, so far as practicable, (i) that would achieve simplicity and uniformity in well administration; (ii) that would minimize duplicity and unnecessary cost to water users in acquiring and protecting their rights; and (iii) that would permit conservation and optimum utilization of depletable sources of supply.

The Problems Identified

Subgroup #2 identified the following problems in current ground water legislation and administrative practice:

1. The criteria prescribed by § 137(4) (S213) for utilization of ground waters outside of designated basins, namely land ownership and a 100-year depletion life, are arbitrary, nonresponsive to optimum aquifer development, inflexible where flexibility may be needed for optimum water use and possibly unreliable where aquifers may have significant tributary characteristics. Reservoir charac-

teristics differ from aquifer to aquifer to an extent that a strong public interest exists in fitting use patterns to individual aquifer characteristics wherever practicable; making the water available to the user without an unearned bonus to the landowner; and permitting withdrawals measured by beneficial use or continued need rather than on property boundary characteristics. Although alternatives to land ownership might be preferable in fact for the users in the Denver Basin, the proprietary criteria may there be so firmly entrenched that change may not be feasible at this time.

2. No basis exists under present law, outside of a designated basin, for exercising conservation authority with respect to depletable sources of supply; for permitting and facilitating aquifer recharge where feasible and for varying rates of withdrawal as variations occur in the hydrologic weather cycles. A depletable resource is believed to be best managed where such variations are possible.

3. No basis exists under present law, outside of a designated basin, for establishing local management districts to make value judgments on the best utilization and conservation of the resource.

4. Well permits are limited to one year and are nonextendable, a condition that encourages drilling and development of nonrenewable resources before the need for such resource exists in fact; a different level of diligence may be desirable for nonrenewable resources than for stream and alluvium appropriations.

5. Adjudication and preservation of ground water rights involves duplicitous and unnecessarily expensive procedures. The ground water user must now establish entitlement (i) on application to state engineer for well permit; (ii) on completion of well in accordance with permit; (iii) of determination that source of supply is nontributary or partially tributary to stream; (iv) on determination of right before water referee; and (v) on redetermination of right, if contested, before a water judge. A single determination of right, with appropriate notice and hearing, and opportunity for appeal, should suffice.

6. Procedures for securing and perfecting well permits differ (i) if the source is a designated basin; (ii) if the source is nontributary water

outside of a designated basin; and (iii) if the source is tributary or partially tributary water. Application processes could and should be uniform in all cases.

7. Existing law places responsibility on permittee or applicant to develop hydrologic and engineering data on character of source, augmentation requirements and adjudication of right. Data base can best be developed by state engineer for at least threshold use in all proceedings.

8. Notice and opportunity for hearing is not given with respect to well permit applications, particularly with respect to determinations made under Section 137(4). If grievances exist with respect to any well development, they should be heard and determined before wells are drilled and court adjudication is initiated.

9. Appellate procedures for challenges to determinations by the state engineer are placed in the District Court for the judicial district in which the diversion is made rather than the water court. This anomaly is aggravated by the decision of the Supreme Court in the Huston case where the determinations of the State Engineer and the Water Court relate to the same aquifer characteristic issues. The state engineer's decision authority needs to be broadened to the extent of his professional and managerial expertise with review in the water court.

10. Monitoring of ground water diversions is almost nonexistent because of a lack of appropriations for such purpose. Patterns exist in other jurisdictions and in other regulatory areas for the beneficiary to bear a reasonable share of the administrative cost. At the very least, the applicant for a well permit should bear the cost of collecting the data necessary to act on the application.

11. The character of the ground water right both inside and outside designated ground water basins is largely undefined and may be subject to unpredictable changes as water draw-down in the aquifer occurs.

12. Where land ownership requirement for water use exists, the land owner gets unprecedented and unearned bonus for water development. The owner of

land, as in oil and gas setting, may control access to be sure; but he cannot claim economic benefit from lawful removal of resources from under his land. The rule of capture should apply to water as to oil and gas to the extent to which the user can put the resource to a beneficial use.

13. Nineteen years experience under the Ground Water Management Act of 1965 has disclosed a number of problems that should be addressed and corrected, including without limitation the following:

a. The definition of "designated ground water" in § 37-90-103(6) is vague and ambiguous.

b. Designated ground water basin boundaries are not necessarily set on the basis of hydrologic and geologic information but, in some cases, have been adjusted by the Ground Water Commission based upon political concerns.

c. The procedures for establishing a priority list of existing rights is extremely time-consuming and serve no substantial purpose unless priority administration is to be implemented.

d. Administration of wells withdrawing nontributary ground water on the basis of priority is not practical.

e. The process of issuing final permits must await the results of the priority list procedure and, to date, the Commission has only issued a small percentage of final permits.

f. The Commission is predominately rural and agricultural in outlook, having little experience with municipal, industrial and commercial uses.

g. The Commission has no enforcement staff and has delegated all of its delegable authority to the state engineer.

h. Designations of basins as contrasted to designations of common aquifer sources of supply serves no particular purpose. Considerable opposition has arisen to designation of the remaining portions of the Denver Basin under the Management Act, as evidenced by House Bill No.

1399, enacted in 1983 to prevent the Ground Water Commission from establishing new designated ground water basins to include ground water within the Dawson-Arkose, Denver, Arapahoe or Laramie-Fox Hills formations outside existing designated ground water basins.

The Work Group #2 Solutions

In contrast with the focus of the Harrison Subcommittee, Work Group #2 has addressed all of the foregoing problems. It has made a conscious effort to make the fewest changes possible to correct perceived inadequacies in present law. At the same time, it has sought wherever possible to simplify procedures, to seek uniformity and clarity in definitions and statutory proscriptions, to utilize the technical expertise of the state engineer for the protection of vested rights where possible with suitable review to avoid arbitrary or capricious abuses of power. To these ends, in broad terms, Work Group #2 proposes:

1. The aquifers covered by House Bill No. 1399 must continue to be excluded from designation under the Management Act either as basins or as aquifers, and will continue to be subject to § 137(4), but the proposed amendments will permit local management and will permit flexibility in the allocation and administration of nontributary ground water outside the Denver Basin where appropriate and desirable.

2. In lieu of further use of designated ground water basins as a vehicle for allocating and conserving depletable sources of supply, we propose that the state engineer be given authority and responsibility, promptly on development of an adequate data base, to designate aquifers containing significant nonrenewable sources of supply, placing such designated aquifers under the jurisdiction of a restructured Ground Water Commission to develop

criteria for utilization of nontributary waters, either on a statewide or aquifer-by-aquifer basis, and giving jurisdiction to the state engineer to determine augmentation requirements in the first instance and to administer such aquifers under the guidelines prescribed by law and the regulations of the Ground Water Commission. The Denver Basin aquifers are excluded from such designation as above indicated and will continue to be administered under the proprietary mandates of S213. The function of such aquifer designations are:

a. The designation shifts the burden of proof as to the tributary character of the source of supply; one contesting the augmentation determination of the state engineer would have the burden of showing the presence and quantity of further stream impacts.

b. The designation is a vehicle to confer jurisdiction on the Ground Water Commission to monitor withdrawals and uses of a nonrenewable, or partially nonrenewable, source of supply. The discretion of such Commission is limited by parameters set in the proposed legislation and would not affect predesignation vested rights.

c. The designation permits establishment of local management authorities to conserve, replenish and regulate nonrenewable sources of supply without first designation of a ground water basin.

d. The designation permits collective augmentation programs and generic determinations of stream relationships without the cost and delay of making such determinations in Water Court on a well-by-well basis.

3. The Committee's draft sets uniform procedures for permitting of wells, whether located in a designated basin, in a designated aquifer, or outside of both. The procedure consists of an application, publication of notice, receipt of objections if any, a determination of right by the state engineer, and an opportunity for review in the Water Court. If no objection is made or no appeal is taken from the determination of the state engineer, that determination will have the same effect in law as the determination by the Water Court. No further adjudication proceeding will be required to protect the priority of the permittee.

4. The proposal eliminates prospectively the proprietary concept that limits use of nontributary waters to those underlying specific tracts; it substitutes a statutory priority system that allows diversions at permitted locations to the extent of the appropriator's beneficial use unless otherwise limited by rules of the Ground Water Commission. Lawful access to a drillsite is required through ownership of the land by the permittee by consent of the legal owner. The benefits that are believed to flow from the elimination of the proprietary concepts are:

a. All aquifer supplies are available for beneficial use within policy limitations fixed on an aquifer-by-aquifer basis;

b. Flexibility is permitted in rates of diversion to make accommodation for hydrologic cycles, emergency situations, and local aquifer conditions;

c. It allows adjustments in withdrawals, subject to vested rights, as the data base relating to an aquifer expands; and

d. It avoids the necessity for payment to the landowner for lawful withdrawal of water in and under his land.

5. The administrative structure for all ground water administration is changed to centralize all administrative and technological functions in the state engineer's office and to limit the Ground Water Commission to policy determinations within parameters set by law.

6. All proposed changes can be made without impairment of vested rights. By grandfather provisions, the Work Group's proposal makes no change in existing designated basins, does not alter any local management practice without approval of the local management district, and protects all existing rights. Although it recognizes appropriative rights in all ground water sources, the proposed statute would define the appropriative right and give certainty and predictability to rights acquired through the full permitting process.

7. Provision is made, within reasonable dollar limits, for the applicant to pay the costs of processing his application for a permit, together with costs of building the data base for effective designated aquifer administration.

8. Well permits are extended to a five-year term in a designated aquifer source of supply and may be extended where a continuing need for the water supply exists but actual drilling is delayed. Provision is further made, however, for forfeiture of ground water rights where diversion and need are interrupted for any five-year term. The combination of these provisions avoids the threshold pressure to use or lose, but prevents water rights being held for speculative purposes.

9. The following modifications in the Ground Water Management Act are proposed to meet the problems that have surfaced over the past 19 years, as discussed above, in conduct of operations under said Act, together with certain changes that are needed to integrate said Act into the comprehensive administrative structure that is proposed. The following changes are made in response to the problems enumerated in paragraph 13 of the problem section of this memorandum:

a. There was substantial agreement that the definition of "designated ground water" is confusing and should be replaced by the term "nontributary" ground water. The term "nontributary" ground water has been defined on the basis of existing case law. However, we recognized that existing designated ground water basins had been established on the basis of the definition of "designated ground water" and that any change might have unintended consequences in existing designated basins. For that reason, we left the old definition in force with respect to existing basins.

b. One of the problems with the existing Management Act is the co-mingling of policy and technical functions at the Commission level. The Ground Water Commission is not a technical body, but it has been delegated responsibility for making such technical decisions as designating basins. We addressed this problem by making two changes. First, we provided for the designation of aquifers, rather than basins, on

the grounds that aquifers, not basins, are the appropriate hydrologic units for management. Second, we separated the technical decision to designate an aquifer, which should be made by the state engineer on the basis of hydrologic and geologic information, from policy determinations, such as the minimum useful life of the aquifer, which should be set by the Commission.

c. The procedures for establishing a priority list of existing rights is extremely time-consuming and serve no substantial purpose unless priority administration is to be implemented. We have simply eliminated the priority list procedure for designated aquifers.

d. As a general proposition, curtailing diversions by junior appropriators in inverse order of priority does not provide a satisfactory method of protecting senior appropriators of nontributary ground water because cessation of diversions from one will not make available an equivalent amount of water at another, except perhaps in the most localized of conditions. However, priority does play an important role in the issuance of new permits, both inside and outside existing designated ground water basins. In that circumstance, priority protects existing vested rights from injury which would result from issuance of new permits. We believe that the seniority of such rights should be protected to the extent they are evidenced by an unexpired well permit or a decree of the Water Court.

e. We have eliminated both the priority list procedure and the process of issuing final permits in designated aquifers. Under the existing Management Act, issuance of final permits requires a finding by the Commission that water has been put to a beneficial use. We believe the investigation is unnecessary. Instead, we provided that permits become final when issued by the state engineer unless judicial review is sought.

f. We agreed that the composition of the Ground Water Commission needs to be changed if new designated aquifers are to be established, particularly on the Western Slope. As

originally enacted, the Management Act provided for a broad geographical spectrum of representation, but as time passed, the requirement was added that two-thirds of the appointed members of the Commission be "resident agriculturalists of designated ground water basins." The high percentage of resident agriculturalists from existing basins may have been appropriate during the formative stages of policy development in eastern Colorado, where the predominate water use was for irrigation, but it is no longer appropriate, especially on the Western Slope, where there will be a wide variety of uses for nontributary ground water. In connection with the proposed changes to the composition of the Committee, it should be noted that amendments to the Management Act in 1979 transferred much of the Commission's authority to local management districts once final permits were issued. In addition, we have provided that no rules and regulations or policy guidelines in effect as of the effective date of the amendments affecting an existing management district could be repealed, modified, amended, or superseded without the consent of such management district. Thus, changes in the composition of the Commission will not have an impact on existing designated basins which are predominately rural and agricultural in character.

g. The Commission has no enforcement staff and has delegated all of its delegable authority to the state engineer. This criticism points up an organizational problem under the Management Act, which co-mingles policy, technical, and administrative functions at the Commission level. Our proposed changes separate policy functions, which are delegated solely to the Commission, from technical and administrative functions, which are delegated solely to the state engineer. We believe this separation of functions is consistent with traditional Colorado administrative practice and insulates administration by the state engineer from policy determinations.

Conclusion

Work Group #2 has been made aware of the political impediments the Committee will face in seeking substantial legislative revisions to present ground water laws. Organized opposition has been anticipated from:

1. Well owners in the Denver Basin and in designated basins who fear changes in the law will adversely affect their present and future rights;
2. Supporters of the land ownership doctrine who see it as a vehicle to hold water rights for future use or to sell their water entitlements for a substantial profit; and
3. A segment of the Water Bar that resists any enlargement of the jurisdiction of the state engineer's office.

Concessions are made in the draft to ameliorate these concerns. But even with such concessions, we recognize that the approach of the Harrison Committee has a much better chance for legislative success. Nonetheless, the Committee must ask whether that success, if obtained, serves any significant purpose and satisfies the Governor's mandate in establishing the Groundwater Legislation Committee. Though it clarifies some ambiguities in the present law, it wholly fails to address most of the problems identified in this memorandum and fails in the basic objective of the Committee to secure a sound, uniform and cost-effective administrative structure.