

The Landowner's Right to Nontributary Ground Water

Colorado Division of Water Resources
August 29, 2011

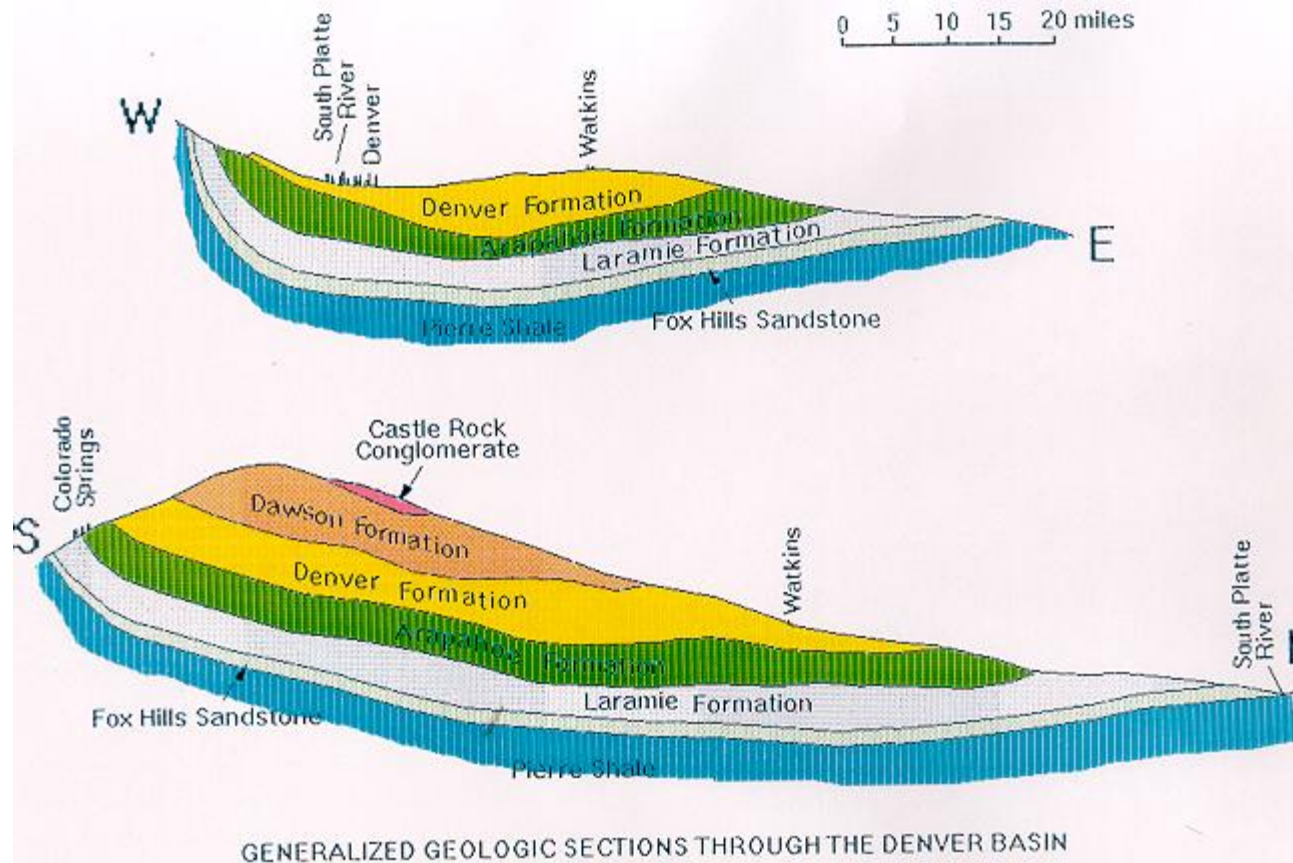
This is an informative tutorial provided to the citizens of Colorado to aid in the understanding of nontributary ground water in the state. As the administrator of ground water use in Colorado, the Division of Water Resources is responsible for water well permitting and providing consultation to the water court on water rights matters. This tutorial is provided in that capacity only and should not be taken as legal advice on specific water rights matters.

Landowners' Right to Nontributary Ground Water

- The objective of this short tutorial is to inform landowners of the nature of their right to nontributary ground water based on landownership, the legal basis for that right, and possible exceptions.
- This discussion includes, in particular, ground water in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills Aquifers of the Denver Basin.

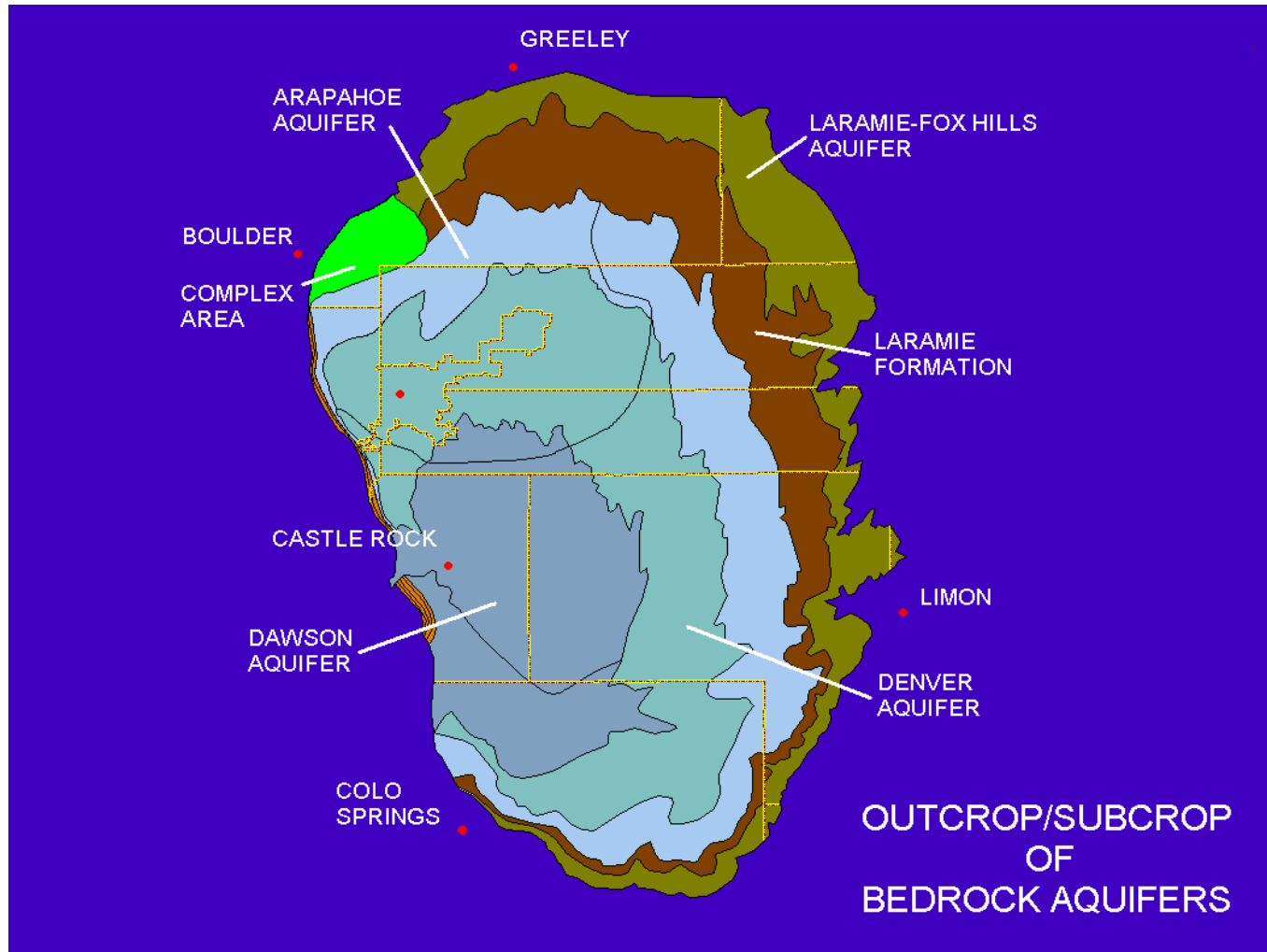
Landowners' Right to Nontributary Ground Water

Idealized cross-section of the Denver Basin



Landowners' Right to Nontributary Ground Water

Geographic location of the Denver Basin



Landowners' Right to Nontributary Ground Water

- In 1973, the Colorado General Assembly enacted Senate Bill 73-213. This legislation set forth two important statutory provisions regarding nontributary ground water, including nontributary ground water in the Denver Basin.
 - The right to withdraw nontributary ground water resides with the owner of the land overlying the aquifer.
 - The amount of nontributary ground water that can be withdrawn by the landowner is limited to the total amount underlying the landowner's land, at a rate no greater than one percent per year of that total amount¹.

1. This is where the term "100-year aquifer life" comes from.

Landowners' Right to Nontributary Ground Water

- These two important aspects of nontributary ground water rights (association with land ownership and one percent per year limitation) were codified in the Colorado Revised Statutes, specifically, Section 37-90-137(4), C.R.S., effective July 6, 1973.
- For areas within Designated Ground Water Basins, where 37-90-137(4) doesn't apply, these two important aspects were adopted by policy and later codified in the Colorado Revised Statutes in 37-90-107(7).

Landowners' Right to Nontributary Ground Water

1973 Law (SB213)

- Since the water right is land ownership-based, how does the landowner proceed?
 - How is the water right quantified?
 - Physical amount is based on aquifer properties (thickness and specific yield), multiplied by the amount of land.
 - Withdrawal is limited to one percent annually of physical amount available (“100-year aquifer life”).
 - What are the requirements?
 - Must have land ownership.
 - Must determine “saturated thickness” and “specific yield.”

Approval Process for Withdrawal of Nontributary Ground Water

Nontributary Ground Water, outside Designated Ground Water Basins

Water user wishes to withdraw nontributary Denver Basin ground water. Does the water user own the subject land?

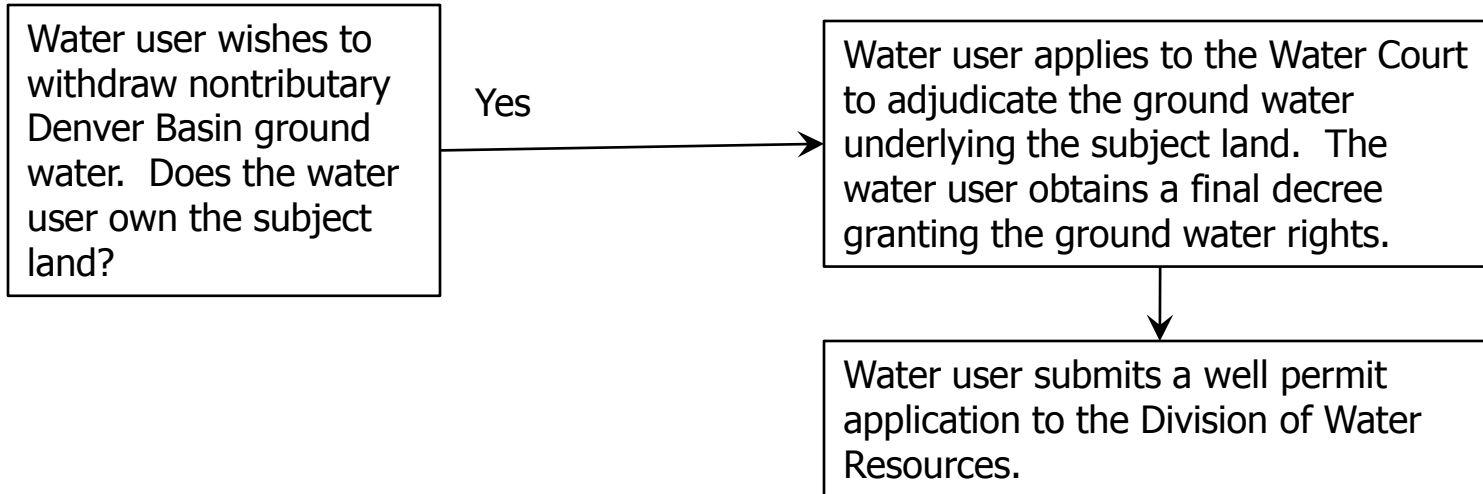
Nontributary Ground Water, *outside* Designated Ground Water Basins

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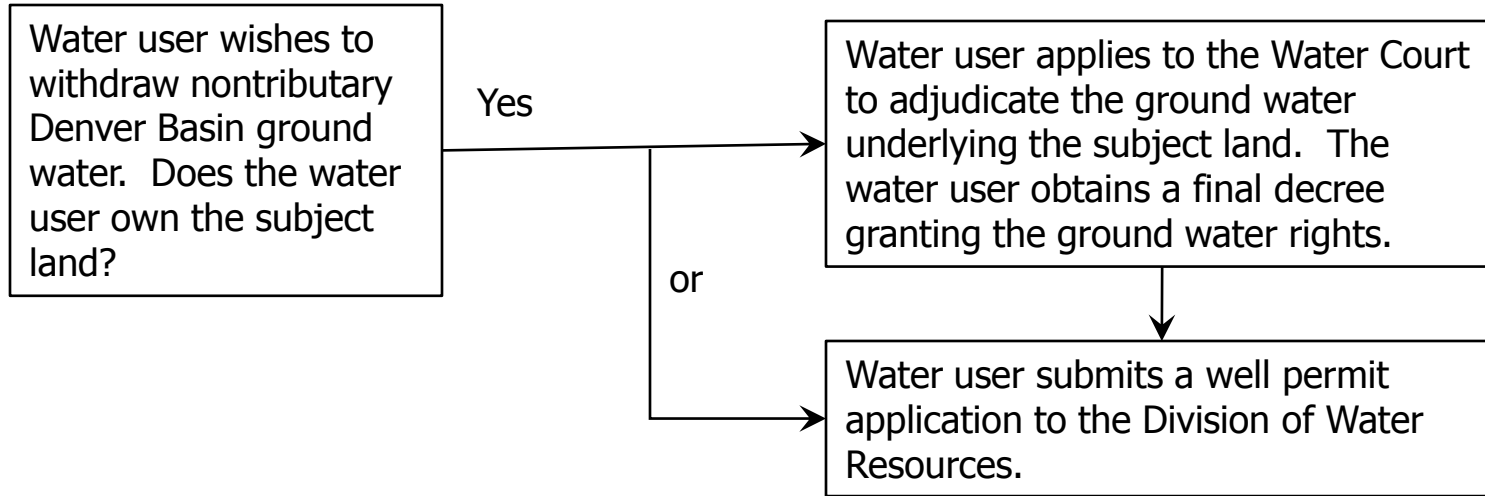
Yes

Water user applies to the Water Court to adjudicate the ground water underlying the subject land. The water user obtains a final decree granting the ground water rights.

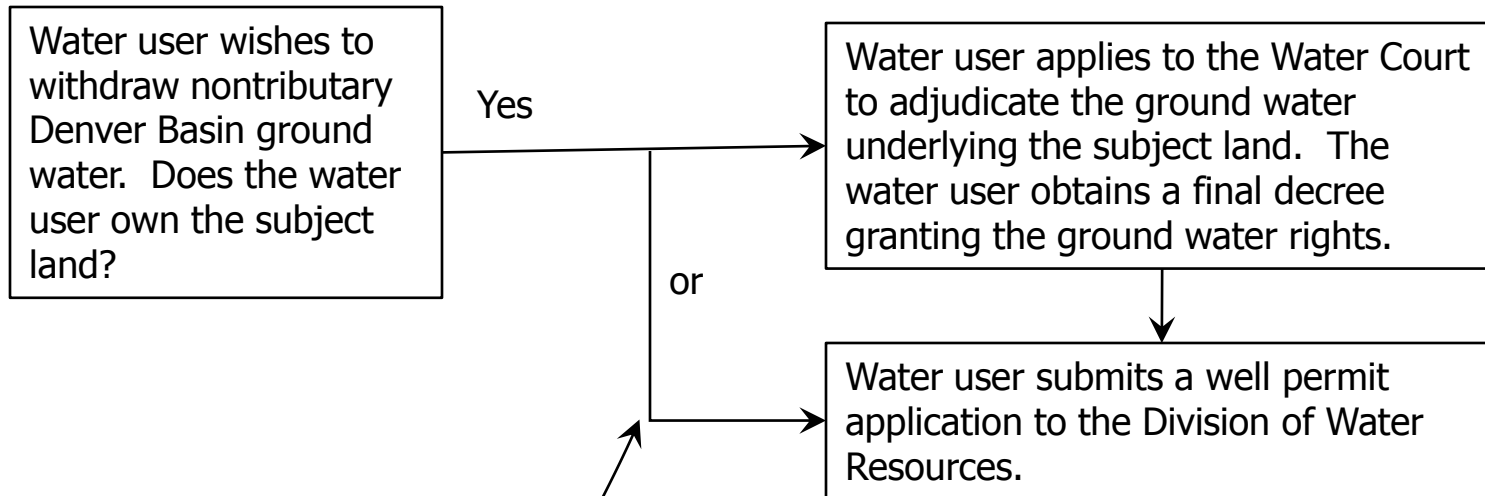
Nontributary Ground Water, *outside* Designated Ground Water Basins



Nontributary Ground Water, *outside* Designated Ground Water Basins

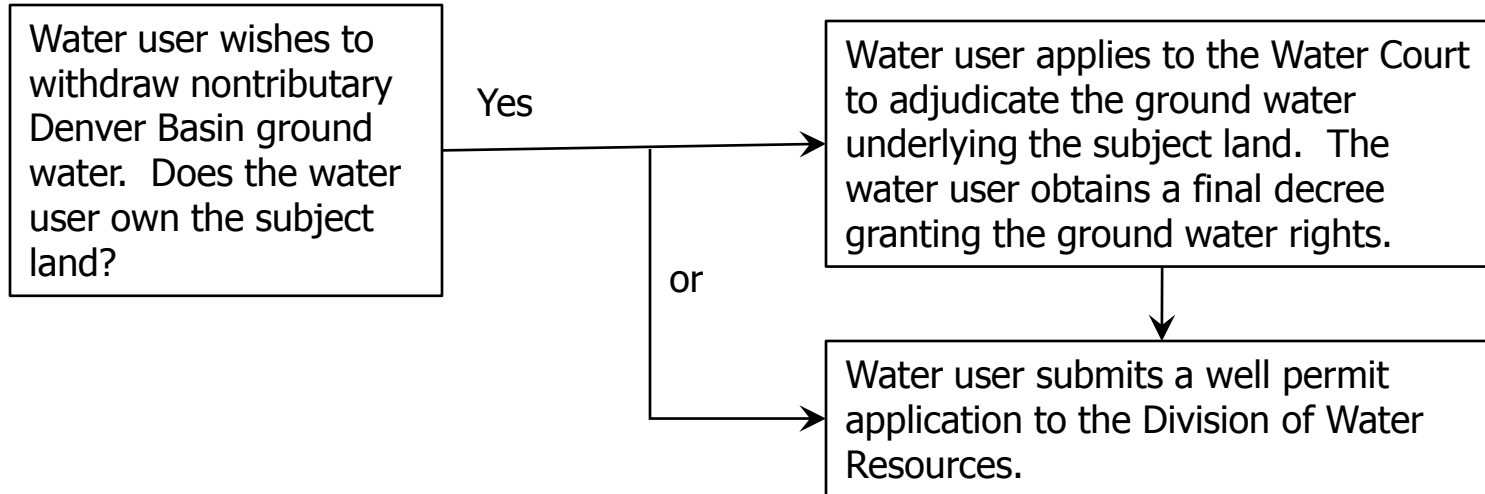


Nontributary Ground Water, *outside* Designated Ground Water Basins

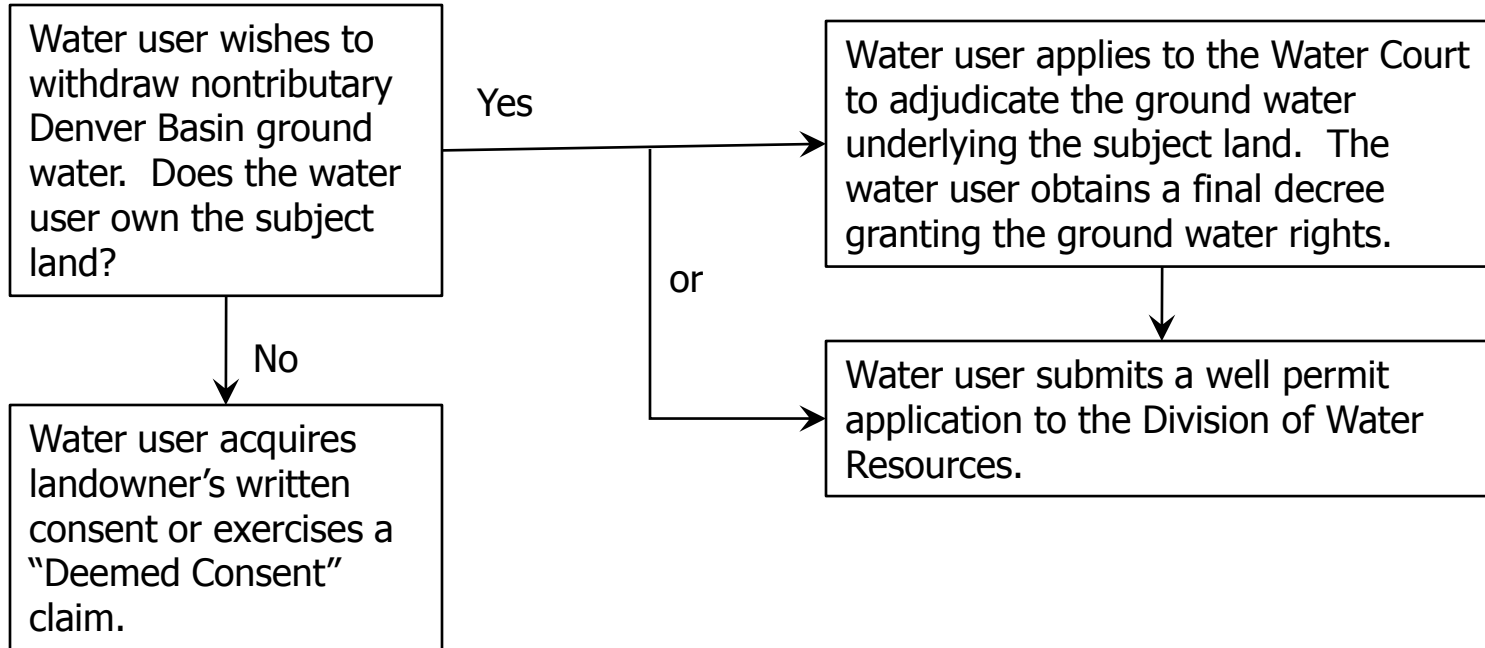


Note: Outside the Designated Ground Water Basins, a water court decree is not necessary to get a well permit for Denver Basin ground water. The landowner may simply apply for a well permit without applying to water court.

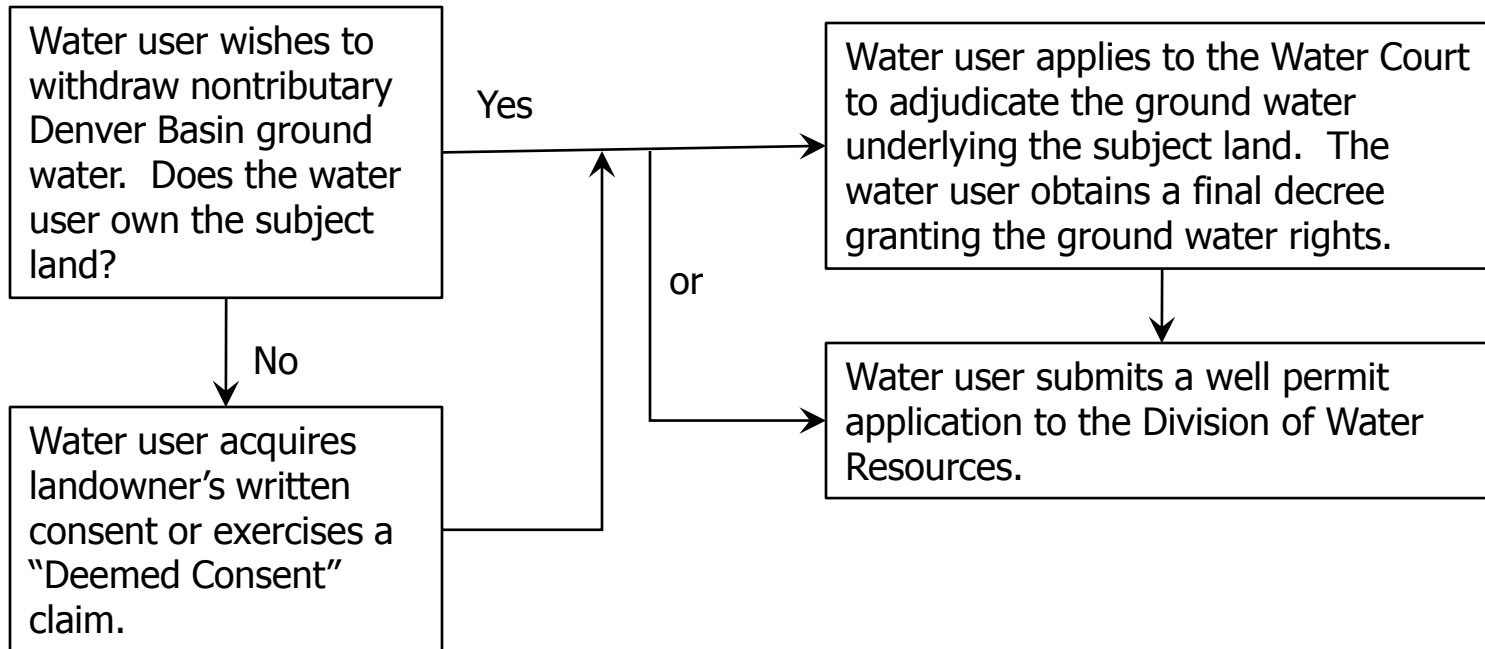
Nontributary Ground Water, *outside* Designated Ground Water Basins



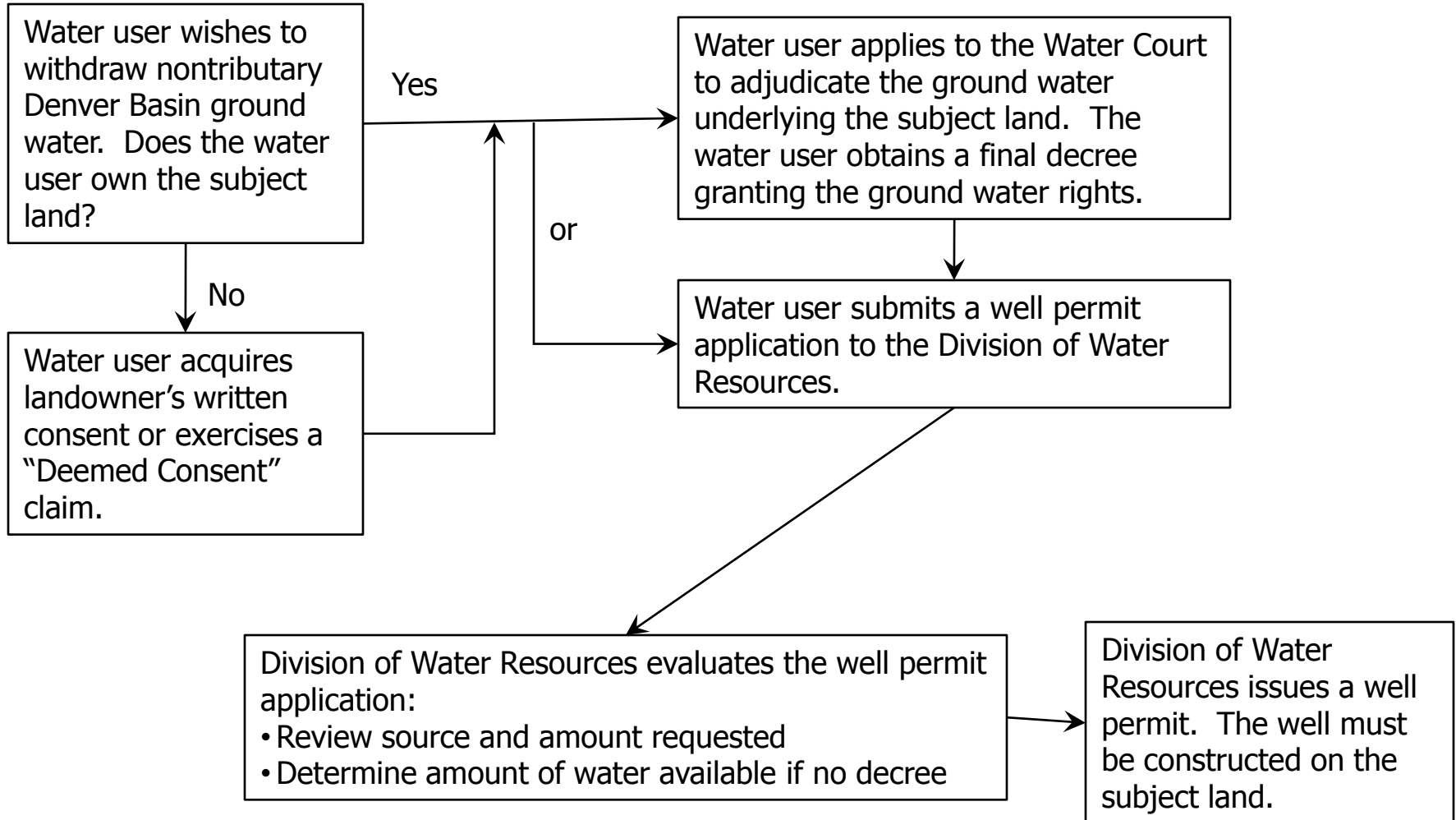
Nontributary Ground Water, *outside* Designated Ground Water Basins



Nontributary Ground Water, *outside* Designated Ground Water Basins



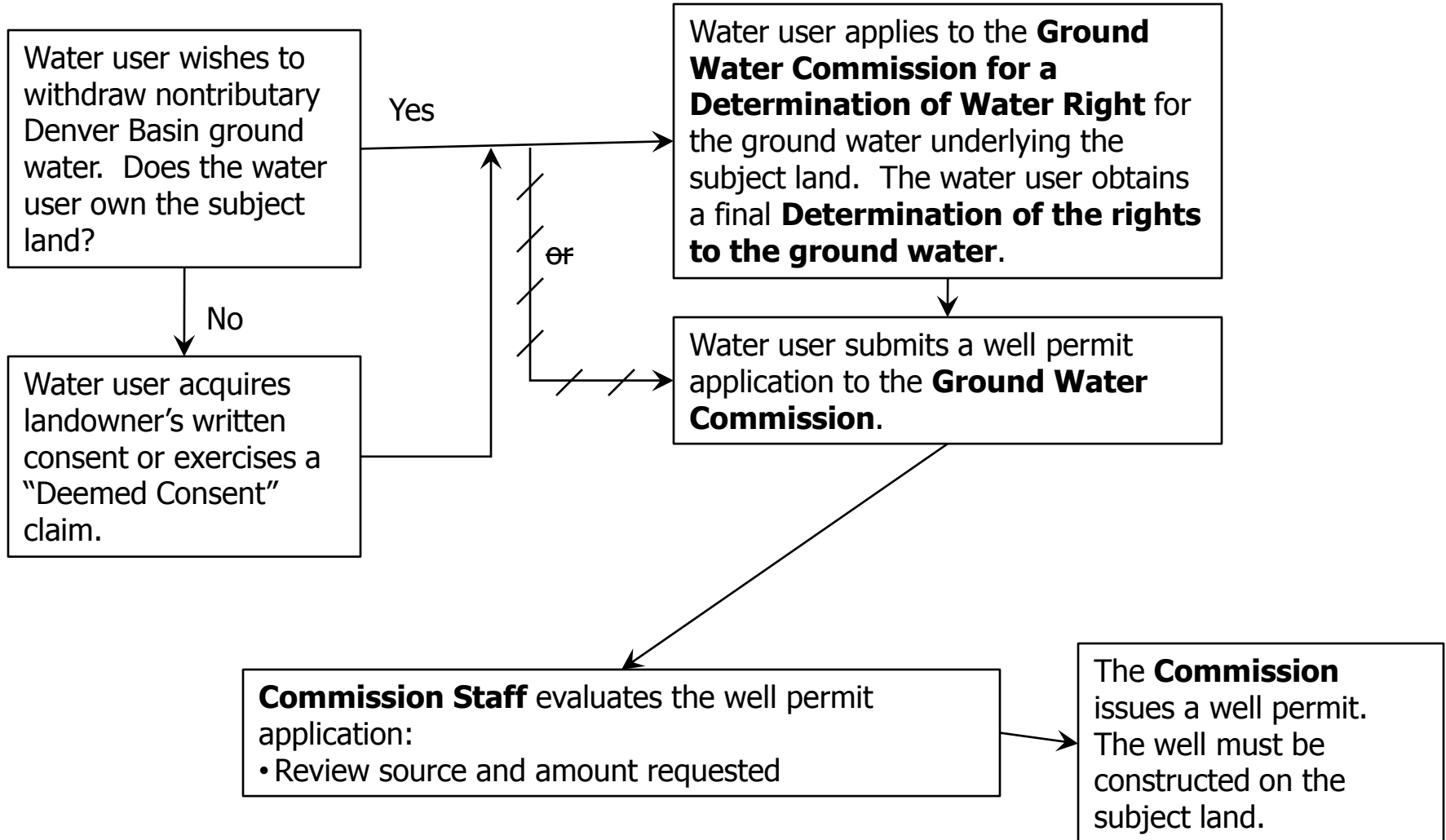
Nontributary Ground Water, *outside* Designated Ground Water Basins



That was outside
Designated Ground Water
Basins.

What about inside
Designated Ground Water
Basins?

Nontributary Ground Water, *inside* Designated Ground Water Basins



What is
“Deemed Consent?”

Deemed Consent (Section 37-90-137(8), C.R.S.)

(Similar provisions in Designated Basins per Rule 5.3.10)

- “Therefore, wherever any existing municipal or quasi-municipal water supplier is obligated either by law or by contract in effect prior to January 1, 1985, to be the principal provider of public water service to landowners within a certain municipal or quasi-municipal boundary in existence on January 1, 1985...”
- “...said water supplier may adopt an ordinance or resolution, after ten days' notice...which incorporates ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers underlying [its] boundary into its actual municipal service plan.”
- “...the owners of land which overlies such ground water shall be deemed to have consented to the withdrawal...”

Deemed Consent (Section 37-90-137(8), C.R.S.)

(Similar provisions in Designated Basins per Rule 5.3.10)

What does that mean?

- In summary, a water provider with a service boundary established before January 1, 1985 may claim the Denver Basin ground water within that boundary, even if it lies beneath private property.
- The water provider must adopt an ordinance or resolution, which requires public notice.
- The deemed consent of the landowner is not applicable if the water has been previously quantified through a previously-issued well permit or decree.

Landowners' Right to Nontributary Ground Water

Therefore...

- The right to withdraw nontributary ground water resides with the owner of the land overlying the aquifer.
- Exceptions:
 - The landowner grants written consent to another party.
 - A municipal or quasi-municipal water supplier claims the ground water; consent is “deemed” to have been given by the landowner.
 - Must have a district boundary in existence before January 1, 1985
 - A well in the vicinity with a right predating July 6 1973 encumbers the landowner’s property (Pre-213 Cylinder of Appropriation)¹.
 - A previous landowner already adjudicated the ground water or acquired a well permit, effectively separating the water from the land¹ .

1. These conditions can be checked using the Division of Water Resources’ mapping tool, *AquaMap* at www.water.state.co.us.

Landowners' Right to Nontributary Ground Water

Two important points to remember in closing:

- If the ground water right has not already been separated from the land by written consent, deemed consent, or through a previous landowner's adjudication, the landowner has the exclusive right to that ground water. The landowner needs to take no action to protect that exclusive right.
- Regardless of the party withdrawing the ground water and regardless of the beneficial use, the water cannot be withdrawn at a rate greater than one percent of the total amount each year.
 - This means that whether the user is a residential homeowner using the water for domestic use, or an oil company using the water for fracking, no more than one percent of the water calculated to be available under a claimed parcel of land can be withdrawn each year.