

Colorado and Federal Water Law Basics

Grad 592



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Colorado Constitution

Article 16

Section 5. Water of streams public property.

The **water of every natural stream**, not heretofore appropriated, within the state of Colorado, is hereby declared to be the **property of the public**, and the same is **dedicated to the use of the people** of the state, **subject to appropriation** as hereinafter provided.

Prior Appropriation Doctrine

- Earliest appropriators have the **highest priority**; “First in time, first in right.”
- Water must be put to **beneficial use** without waste or speculation.
- **Remote uses** and **transfers** allowed.
- Right of use can be **forfeited by non-use**.



Elements of an Appropriation

- Intent to apply water to a beneficial use
- A diversion of water from a natural source
- Application of water to a beneficial use within a reasonable time (Can and Will Doctrine)

Administration Systems

- Permit system (Wyoming, Nebraska, Kansas)
- Water Court (only in Colorado)
- Combination



Types of Water Rights

Direct Flow Right



Storage Right



Conditional Right

Absolute Right

Elements of a Water Right

- Usufructory property right: right to use something belonging to another
- Priority date
- Place of use
- Time of use
- Point of diversion
- Beneficial use
- Amount of use: flow rate (cfs) or storage amount (AF)

Owner's Responsibilities

- Cannot waste water
- Irrigation systems must be reasonably efficient.
- Anti-Speculation Doctrine– you get only what you can use, unless you are a municipality (great and growing cities doctrine).

Owner's Responsibilities

- Non-use of right is subject to abandonment (10 years).
- Call for water right when stream in shortage.
- Any change in water right must result in no injury to other water rights, including junior rights (return flow patterns must be protected).

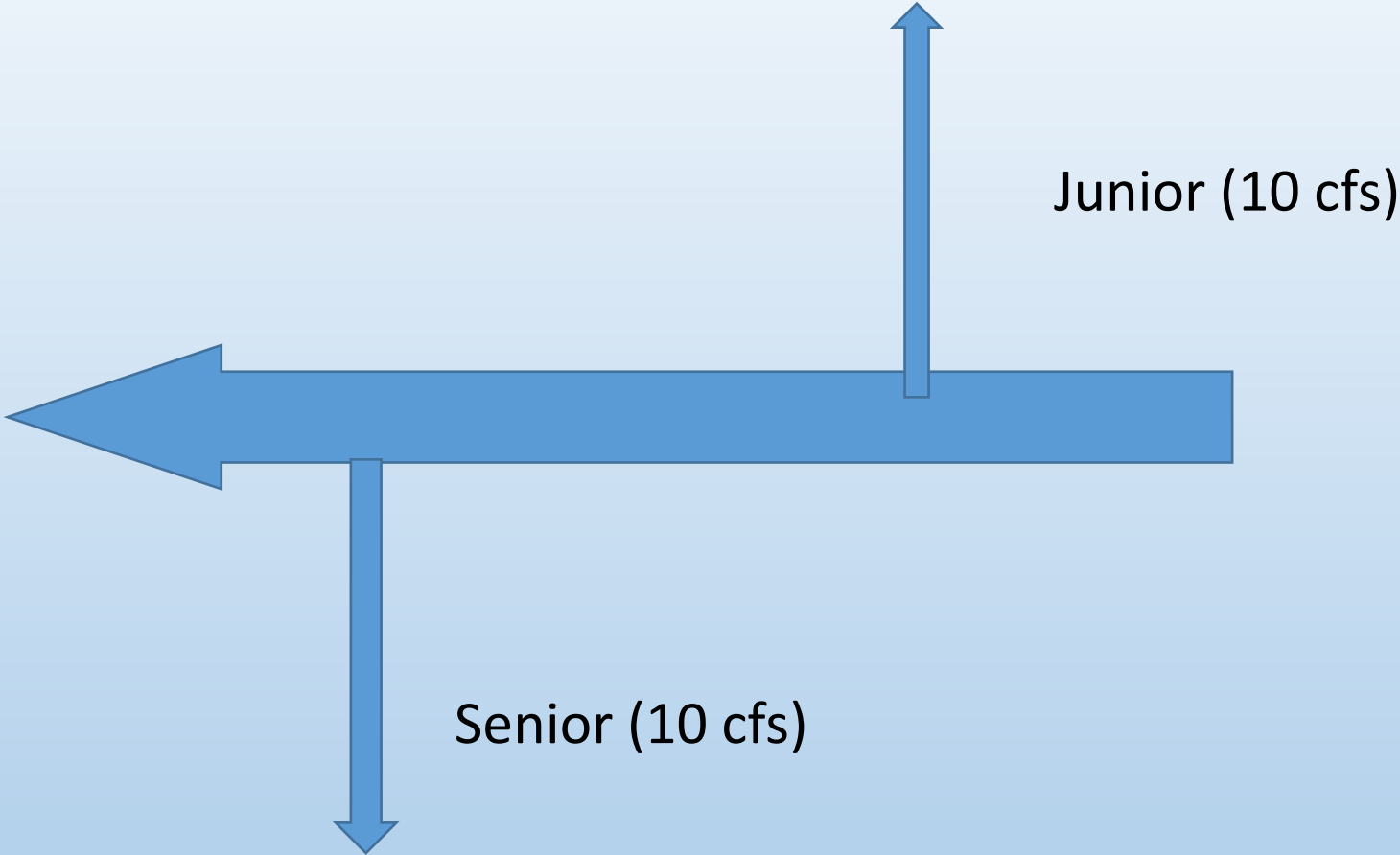
Administration of Water Rights

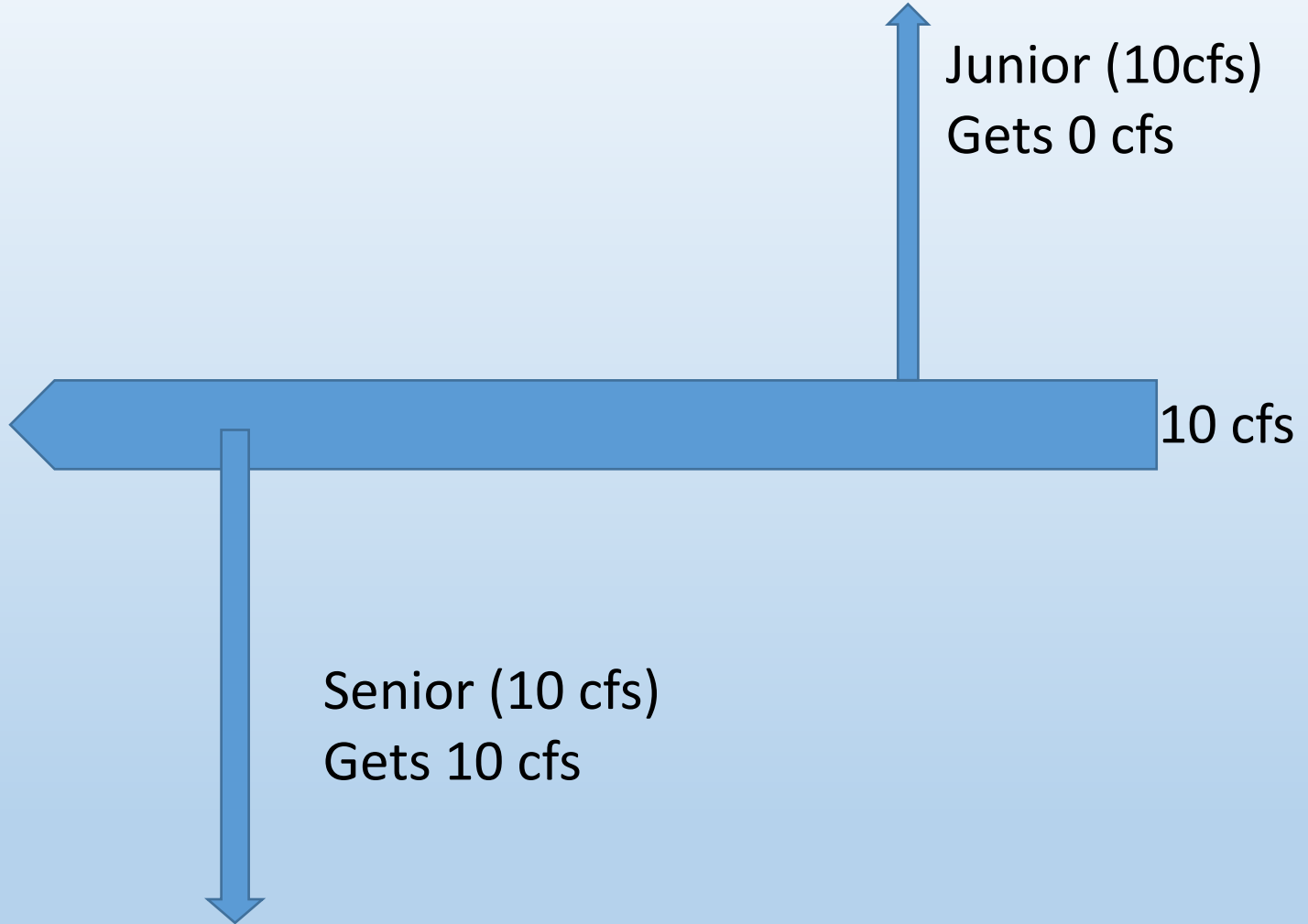
Colorado Division of Water Resources

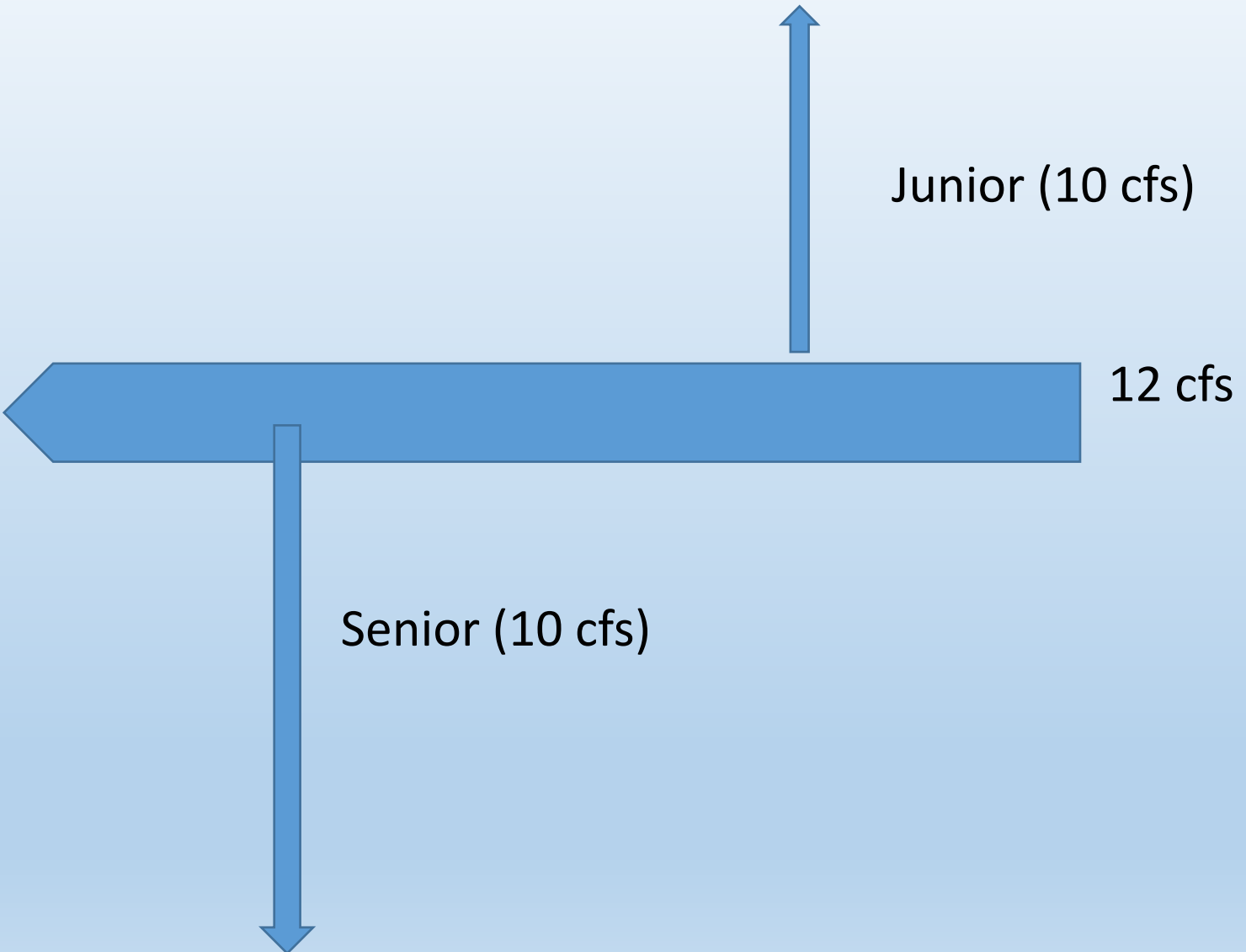
Are Authorized to:

- Administer water
- Order water users to take certain action
- Rulemaking
- Issue groundwater permits
- Participate in Water Court proceedings
- Enter upon private land (without a warrant)
- Retrieve power records (well pumping)

Water Administration Examples

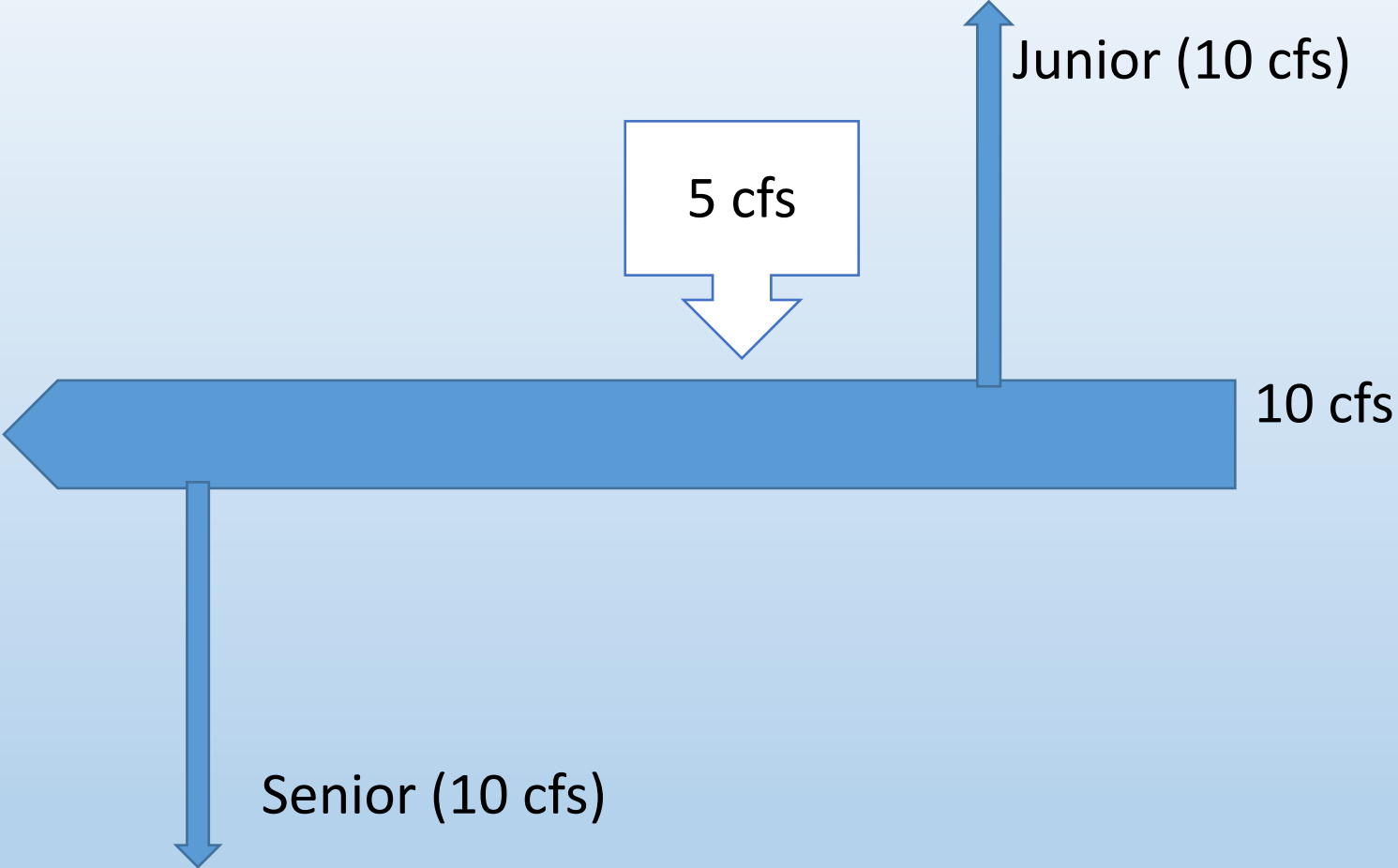


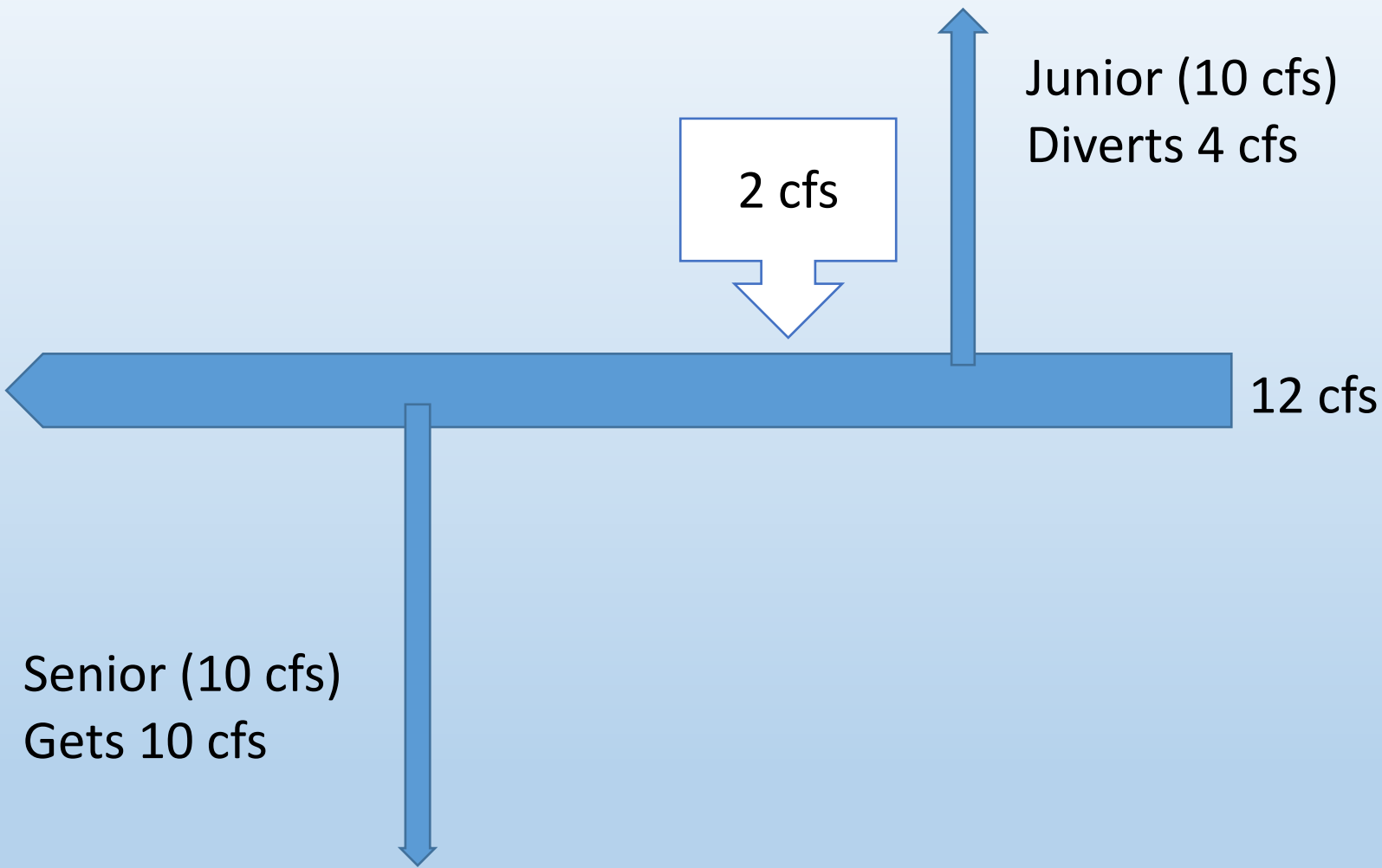






Return Flows





Change in Water Right

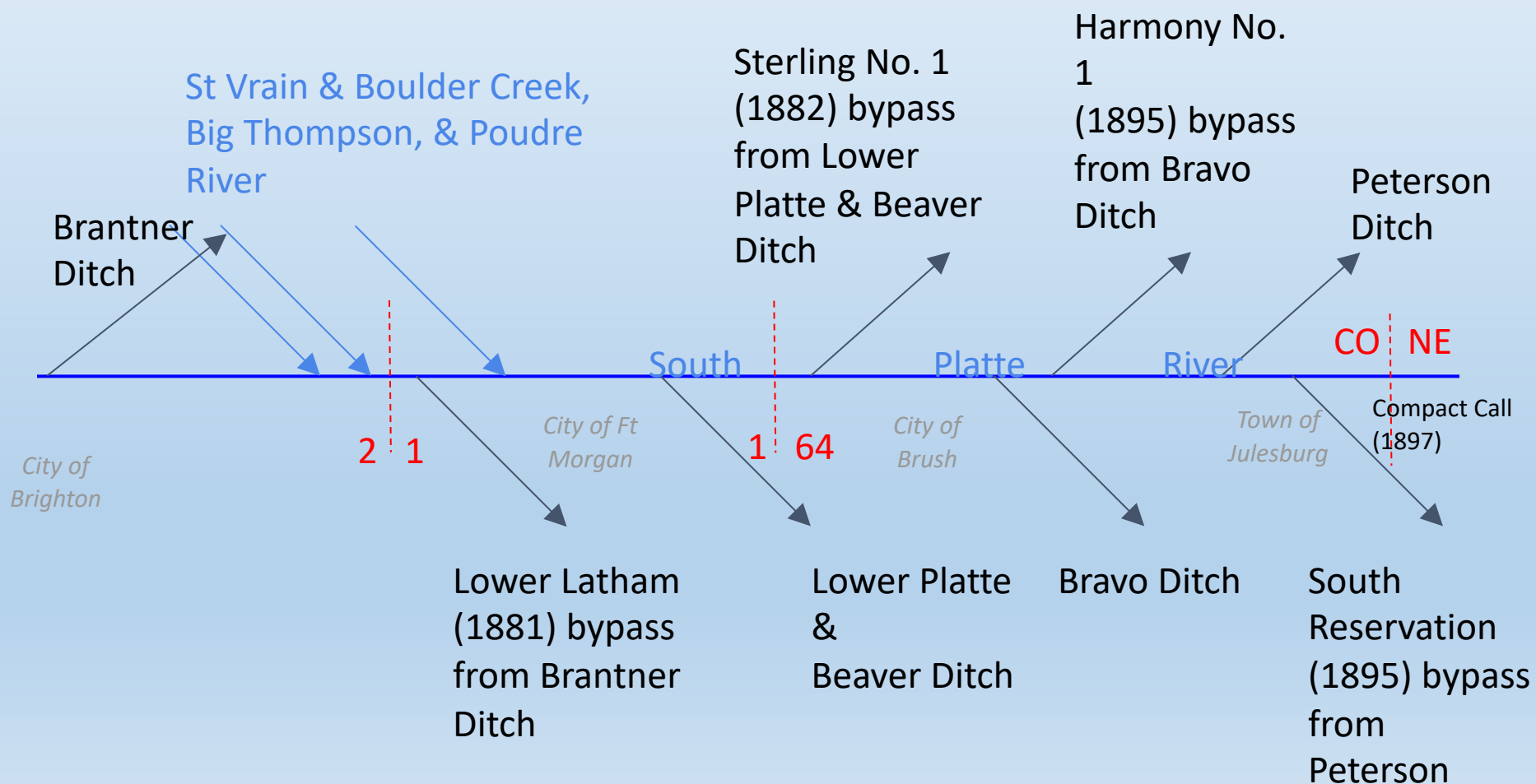
Can change use and place of use of a water right and retain priority date, subject to conditions:

- Change is subject to obtaining a revised court decree
- Water rights is measured by historic consumptive use (HCU), the beneficial consumptive use made in time, location and amount of original appropriation over a representative historical time period.
- No material injury to other water rights, i.e. return flow patterns must be maintained.

Augmentation Plans

- Allows a person to divert out of priority so long as senior water rights are not injured.
- Usually used in basins that are over-appropriated.
- Makes for more complications in administration of water rights.

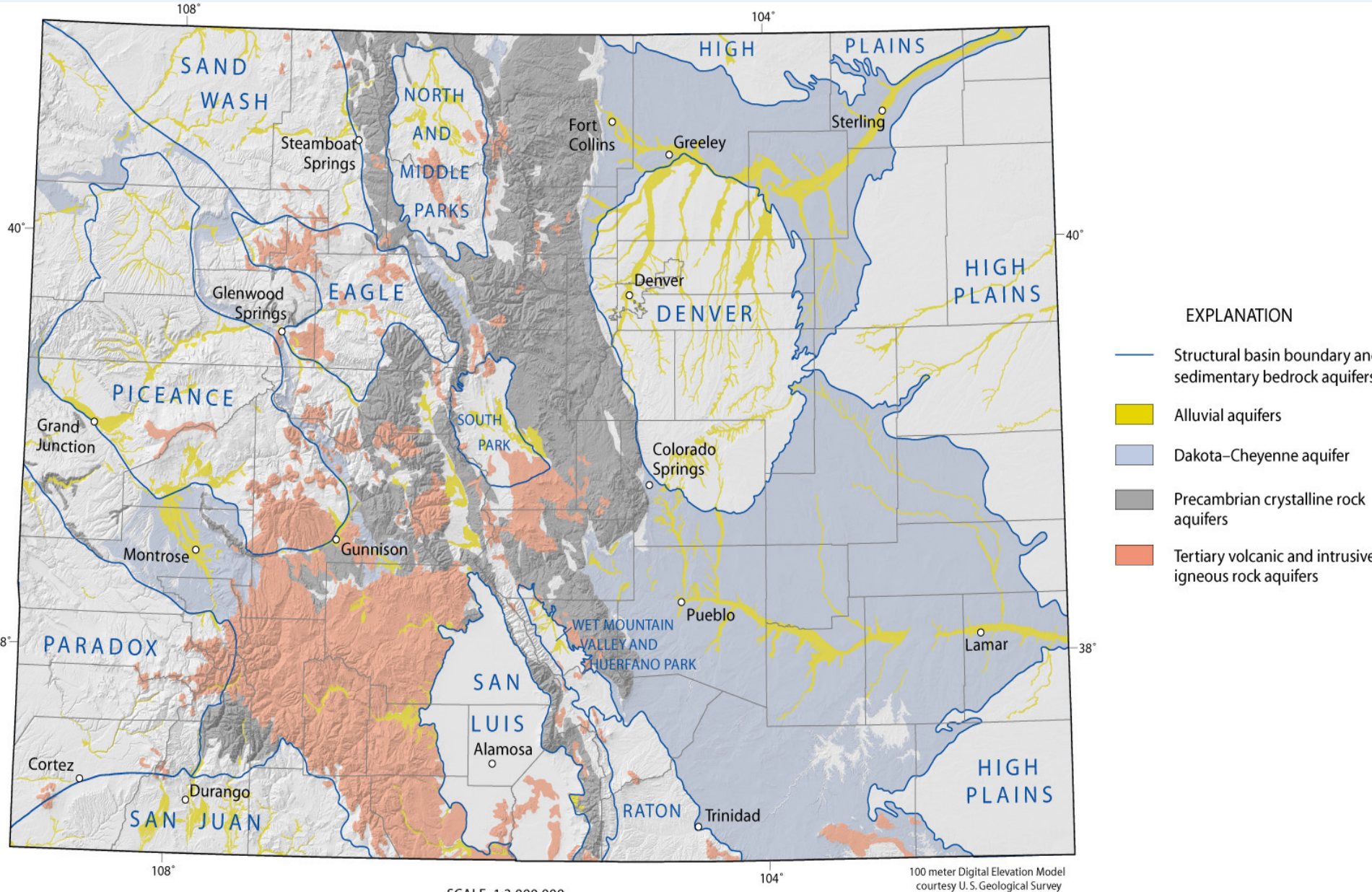
S. Platte River Calls - July 23, 2007



Groundwater

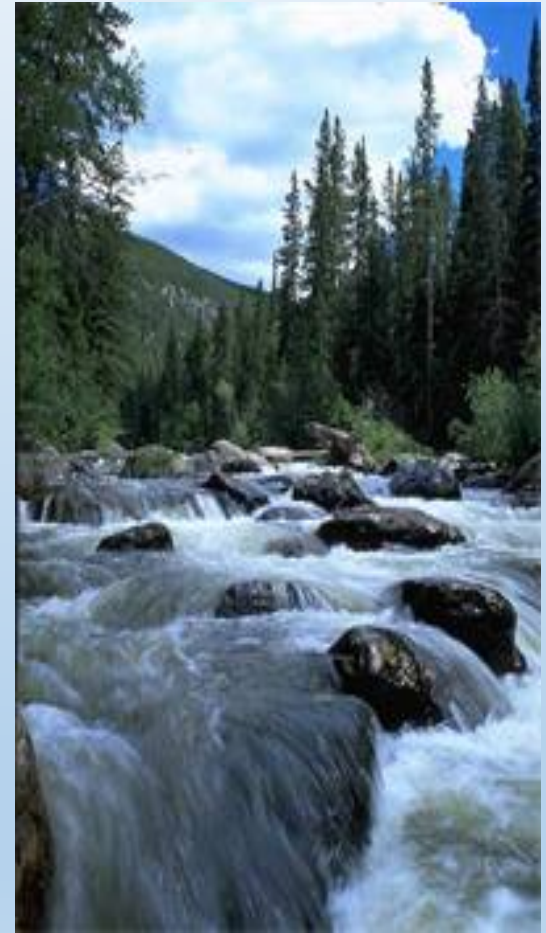
- Types of groundwater in Colorado Law:
 - Tributary: hydraulically connected to surface water
 - Non-tributary: pumping will not materially effect surface water, depletions must be replaced by 2% of water pumped
 - Not non-tributary: closer to streams and depletions must be replaced by 4% of water pumped
 - Designated Groundwater: not connected to surface water

Groundwater Aquifers



Instream Flows

- Originally a water user had to divert water to obtain a water right.
- In 1973 the General Assembly recognized the need to “correlate the activities of mankind with some reasonable preservation of the natural environment.”
- Colorado Water Conservation Board is the only entity that can own an instream flow right.



Recreational In-Channel Diversion

- Governmental entities hold this kind of water right.
- Beneficial use is recreational (kayaking and rafting).
- In-channel structures control the flow of water.



Water Quality Laws

- Colorado Water Control Act (1975) recognized the need to protect, maintain and improve the quality of water for public consumption, protection of wildlife and aquatic life and for domestic, agricultural, industrial and recreational uses.



The normally pristine Poudre River near the Milton Seaman Reservoir is now black with silt and ash.
USDA-Creative Commons

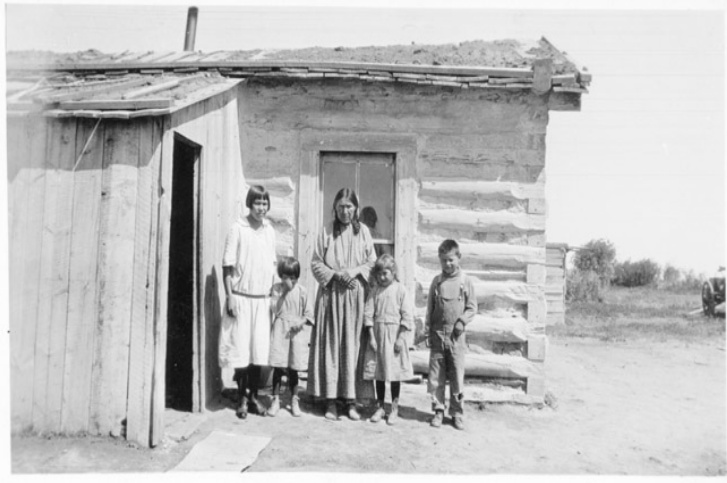
- Conditioned on no material injury to water rights.
- CWCA created the Water Quality Control Commission which sets standards for water bodies.

Federal Water Law

- Interstate compacts (9) and Equitable apportionment decrees
- Clean Water Act
- Safe Drinking Water Act
- Endangered Species Act
- NEPA
- International treaties



Federal Reserved Water Rights Doctrine



- Established for Tribal Reservations in *Winters v. U.S.*, 207 U.S. 564 (1908)



- Applied to lands set aside by federal government in *Arizona v. California*, 373 U.S. 546 (1963)

National Environmental Policy Act of 1970



- Federal agencies must give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment.
- Federal agency prepares an Environmental Impact Statement (EIS) or Environmental Assessment(EA).
- Significant actions include building infrastructure and lending or granting federal dollars.

Clean Water Act



- Pollution control programs for surface water.
- EPA developed national water quality criteria recommendations for pollutants in surface water.
- States and Tribes can assume responsibility of program and require stricter standards.
- Applies as between states
Arkansas v. Oklahoma (1992)



Endangered Species Act of 1973



Program for the conservation and protection of threatened and endangered plants and animals and their habitats

Requires federal agencies to consult with the FWS regarding any actions they authorize, fund, or carry out



Endangered Species Act of 1973

- Analysis performed by agency in a biological assessment (BA) with decision by FWS in a biological Opinion (BiOp).
- Requires conditions to protect endangered or threatened species before any federal action can be taken.



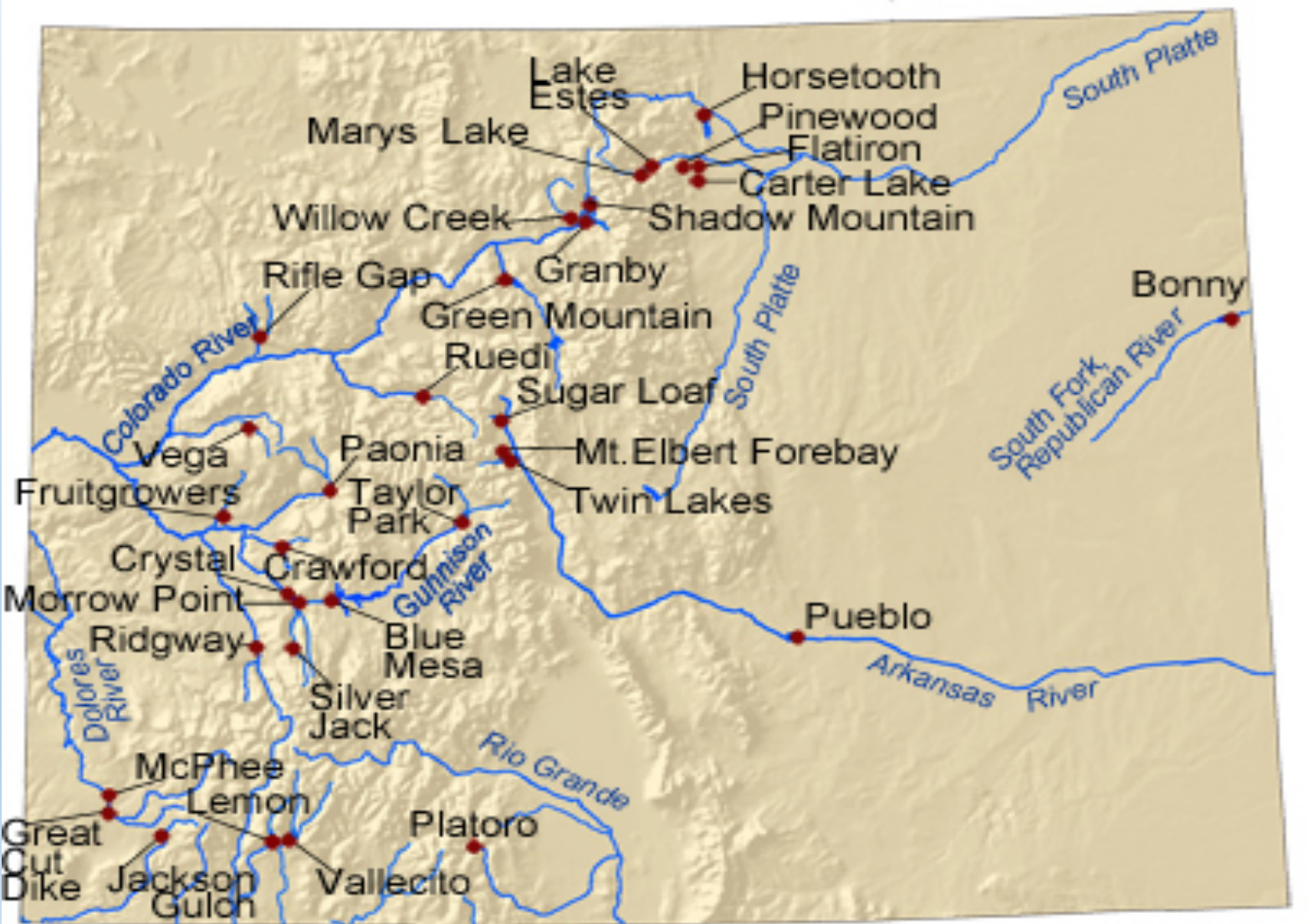
Bureau of Reclamation



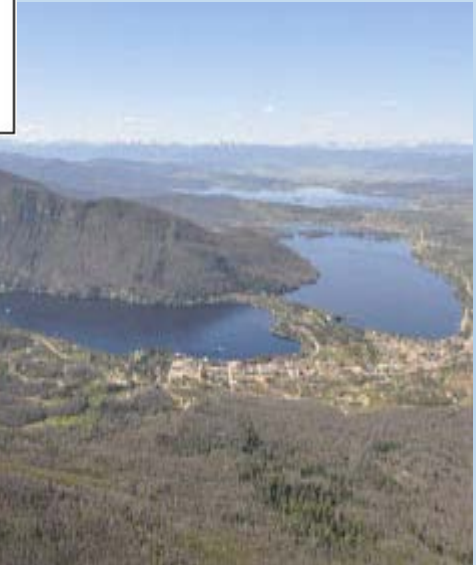
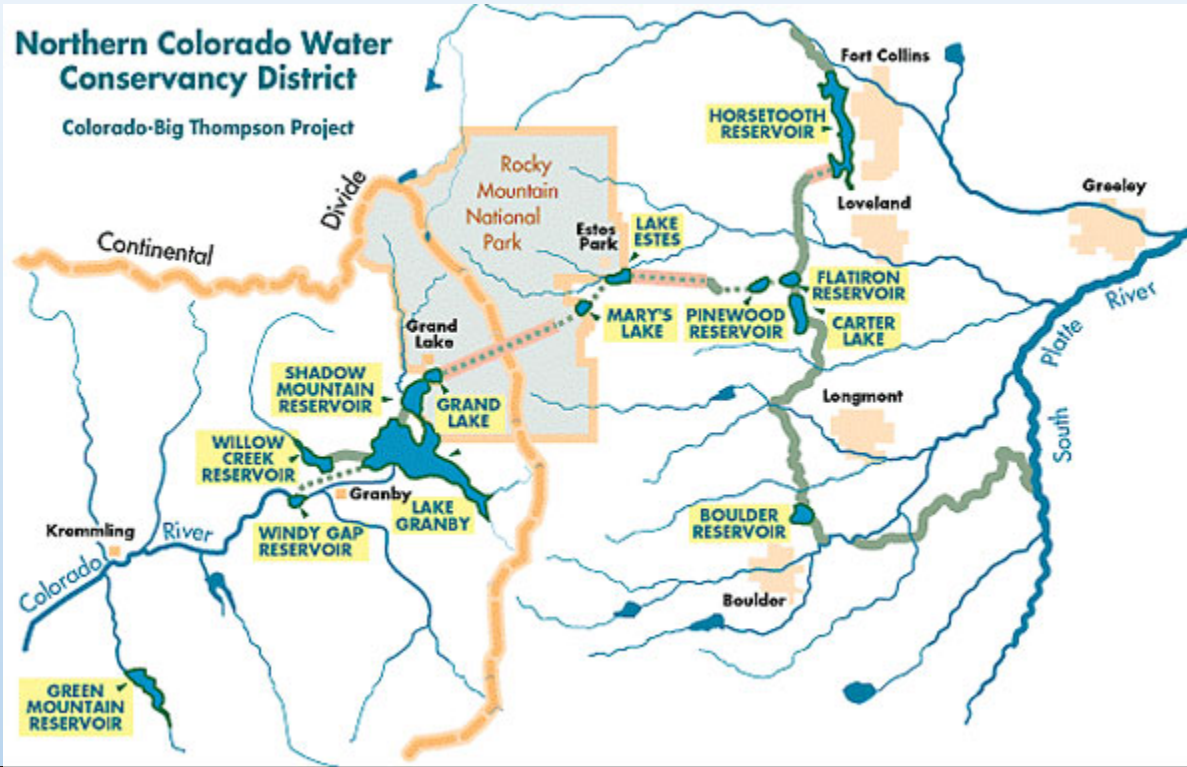
- Established in 1902 with the mission to “reclaim” (develop) the West.
- Constructed more than 600 dams and reservoirs and 8,000 miles of irrigation canals.
- Established Reclamation projects contracting with water user groups (conservancy and irrigation districts)
24 projects in Colorado (repayment obligation).
- Second largest producer of hydro power in the West.



Reclamation Reservoirs in Colorado



Colorado-Big Thompson Project



Questions?

