

# Water Law 101: Surface Water

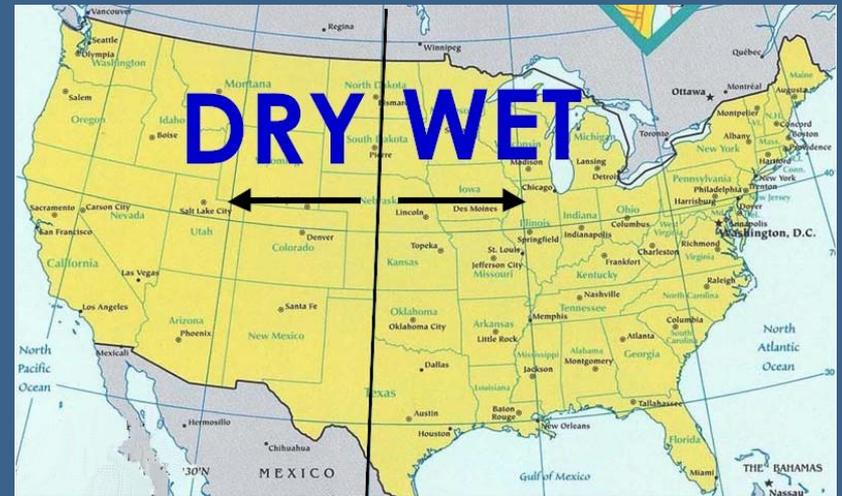


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# The 100th Meridian

- Irrigation is necessary where precipitation is less than 20 inches.
- The 100<sup>th</sup> meridian is the boundary between the moist east and the arid west
  - Approximates the twenty inch isohyet (like a topographic line, but for precipitation)
  - To the east, average annual precipitation is **greater** than 20 inches
  - To the west, average annual precipitation is **less** than 20 inches



# Methods of Allocating Surface Water



# Riparianism

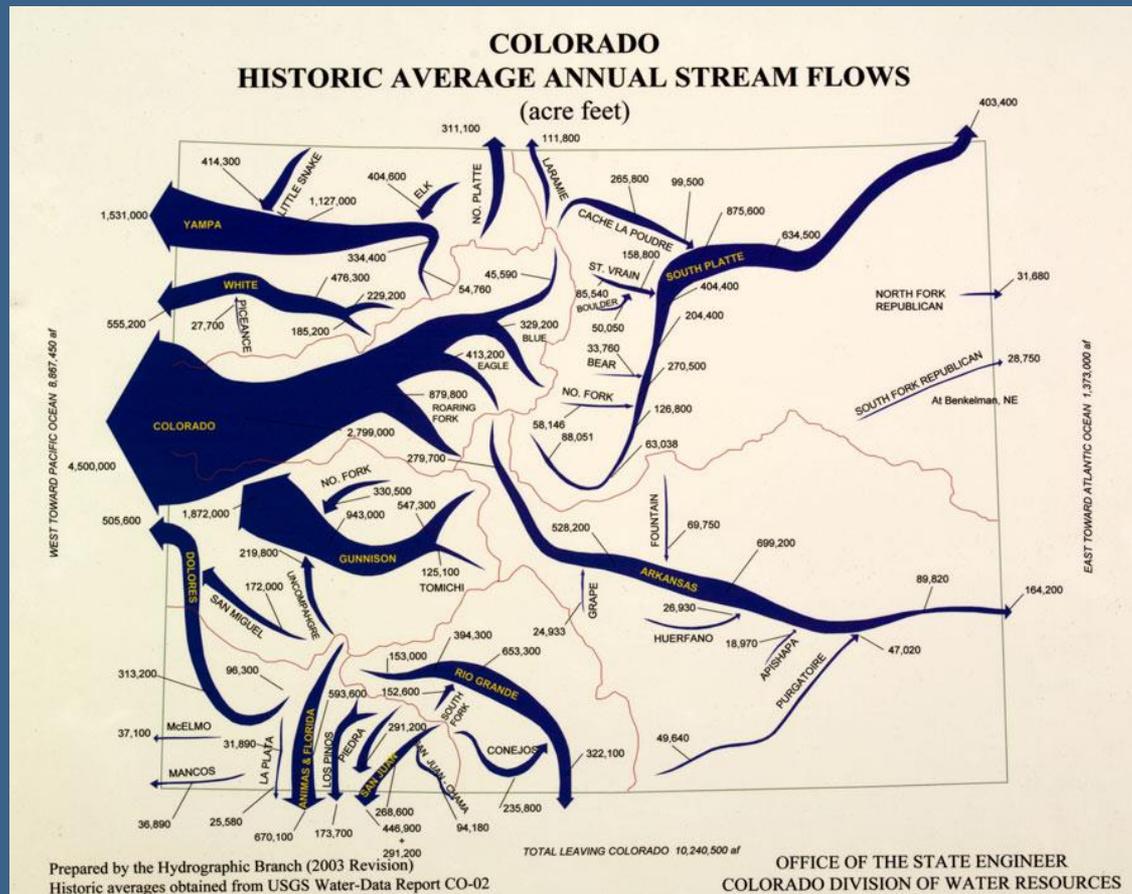
- Predominantly in the eastern U.S.
- The right to use water is derived from ownership of land adjacent to a stream
- Rule of reasonableness
- Share the shortage
- Increasing demands → regulated riparian system

# Prior Appropriation

- Western U.S.
- The right to use water is derived from beneficial use
- In times of shortage, junior uses are curtailed so that senior uses are fully satisfied
  - First in time, first in right
- No “rule of reasonableness” like riparianism, but prohibitions against waste
- Evolving

# Colorado is a Headwater State

- Seven watersheds originate in the Colorado Rockies
- Nineteen states receive water from Colorado



# Colorado is a Dry Place

Alamosa, CO:

About 7" of Precipitation Per Year



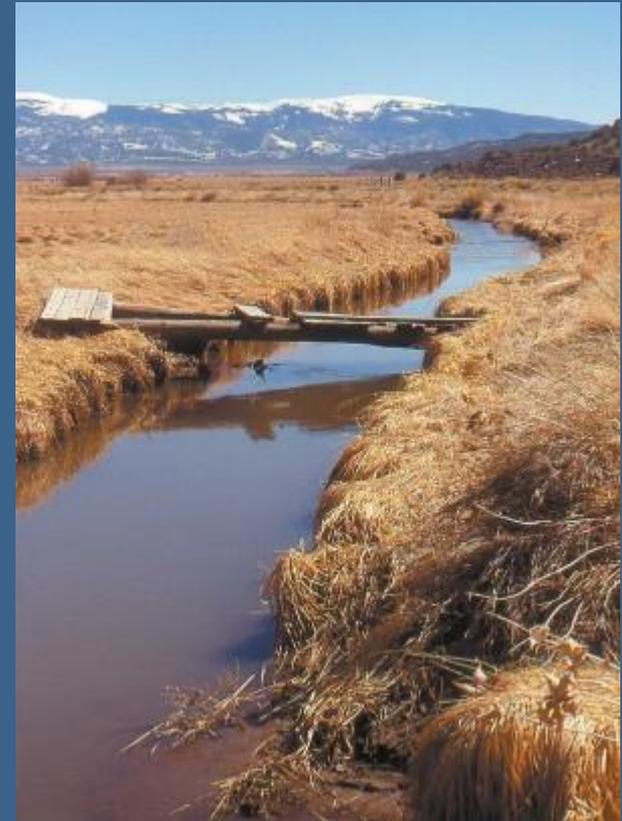
Baghdad, Iraq:

About 5" of Precipitation Per Year



# Development of Colorado Water Law

- The oldest water right in Colorado is the 1852 San Luis People's Ditch, diverting from Culebra Creek in Costilla County
- When the Gold Rush arrived in 1859, miners brought the rules from the California gold camps: stake a claim



San Luis People's Ditch

# Colorado Water Law Today

Colorado water law is a combination of state and federal laws:

## Colorado State Law

- Constitution
- Statutes
- Case law
- Rules and regulations

## Federal Law

- Interstate compacts
- Supreme Court cases
- Clean Water Act
- Endangered Species Act
- FLPMA
- NEPA
- McCarran Amendment

# Water Rights

- Water is “property of the public”
- But, “subject to appropriation”
- Once diverted, the water becomes private property
- Water rights are usufructuary property rights
- If you do not use the water for its decreed purpose under its decreed priority, it reverts to the public

# Creating a Water Right

- Demonstrate intent to:
  - *divert* or control
  - waters of a *natural* stream
  - and *apply* it
  - to a *beneficial use*
  - without speculation



# Statutory Definitions

Allow for a broad array of uses

## *Diversion*

- Removing water from its natural course or location, or controlling water in its natural course or location.

## *Beneficial use*

- The amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose of the appropriation.

# Priority Date

- Priority date is the ultimate date by which a water right's seniority is measured against other water rights.
- Determined first by Adjudication Date
  - The year in which an application is filed with the Water Court to confirm the water right
- Then by Appropriation Date
  - Date the owner openly demonstrates the intent to divert water and place it to beneficial use.
- Between two water rights adjudicated in the same year (same priority date), the one with the earlier appropriation date is senior. Appropriation is the tie breaker.

# Abandonment

- Use it or lose it
- A water right is abandoned when there is both non-use and an intent to abandon.
- A period of non-use of at least 10 years creates a presumption of intent to abandon.
- That presumption can be overcome with evidence that the user did not intend to abandon the right, despite the non-use.
- Abandoned water rights are cancelled; water reverts to the public.
- Decennial Abandonment Process

# Types of Surface Water Rights

- Ditch/Reservoir shares
- Direct flow right
- Storage right
- Conditional decree
- Absolute decree
- Instream flow right
- RICD

*Other types we won't get to today:*

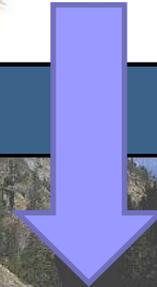
- *Augmentation plan*
- *Exchange*
- *Imported water*
- *Federal reserved right*

# Shares in a Mutual Ditch/Reservoir Company

- Mutual ditch/reservoir companies are private associations organized to furnish water to shareholders
- Ditch/reservoir managers and personnel (like ditch riders) are responsible for maintenance of infrastructure and delivery of water throughout the system
- Ownership in a mutual ditch/reservoir company is evidenced by a stock certificate
- Owning shares entitles you to a proportional amount of water owned by the company
- By-laws govern the operation of mutual ditch/reservoir companies

# Direct Flow Rights

- Right to a specific rate of flow to be diverted at the time the water is needed
- Measured in cubic feet per second (“cfs”) or gallons per minute (“gpm”)
- The water must be placed to use directly, which usually means within 72 hours of diversion
- Includes the right to use the land of others if necessary to put the water to beneficial use



Grizzly Creek Diversion, Glenwood Springs Colorado

# Storage Rights

- Right to store water in priority for subsequent use
  - On-stream or off-stream
  - Right to a volume of water
- Storage is not a use of water
- Storage is typically measured in acre-feet
- One-fill rule – can fill once per year



# Conditional Water Rights

- Holds your place in line
  - Relation Back Doctrine: Allows water users to maintain the priority of their appropriation without actually diverting water.
- Can and Will Doctrine
  - You must show that you “can and will” develop the water right within a “reasonable” amount of time and put it to beneficial use.
- Reasonable Diligence
- A water right is made “absolute” when it is put to beneficial use.

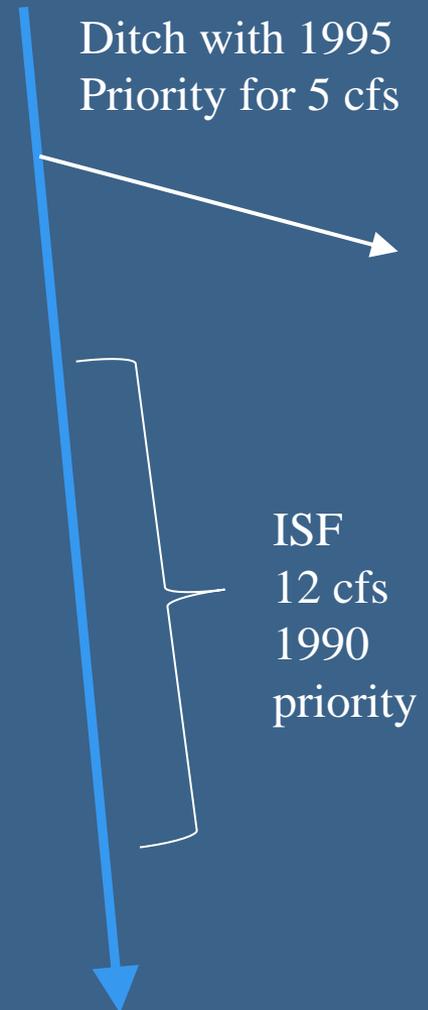
# Absolute Water Rights

A water right that has been placed to a beneficial use

# Instream Flow Water Rights

A water right for a minimum flow between specific points on a stream (or specific levels in a lake) as is required to preserve the natural environment to a reasonable degree

- “Appropriation” despite no diversion
- Administered within the priority system
- May only be appropriated by the CWCB on behalf of the people of the State of Colorado
  - May not be unilaterally modified by the CWCB without court approval
  - May not be appropriated by private parties
- May be original appropriations by the CWCB, or water rights purchased, leased or borrowed by the CWCB.



# Recreational In-Channel Diversion Rights (RICDs)

“The minimum amount of stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by control structures...for a reasonable recreational experience...”



- a/k/a kayak parks
- Not instream flow rights
- Held by government entities
- April 1 to Labor Day
- CWCB review
- Controversial

# Preserving and Protecting Water Rights

- USE YOUR WATER RIGHT!!
- Place a call
- File a Statement of Opposition
- Prevent Abandonment
  - Non-use + intent to abandon
  - Can arise in any water court case
  - Decennial abandonment list
- Prevent Adverse possession
  - Only “behind the headgate”
  - 18 years of adverse use

# Transferring Ownership

- Conveyed like real property
- Separate property interest
- May be appurtenant to land, or not
- Title insurance

# Changing Water Rights

- For example, a change in:
  - type of use
  - place of use
  - point of diversion
- Why? Preserve the priority
- Must be adjudicated in water court
  - Diverting water at a new location or for a new use without water court approval is not a change; it's a new right.

# Standards for Changes

## No injury to other water rights

- New use limited to historic quantity of water consumed by the old use
- A junior water right holder is entitled to the maintenance of the stream conditions existing at the time of the junior's appropriation
  - Amount, location, and timing of return flows must be maintained
    - One user's return flow is another user's supply

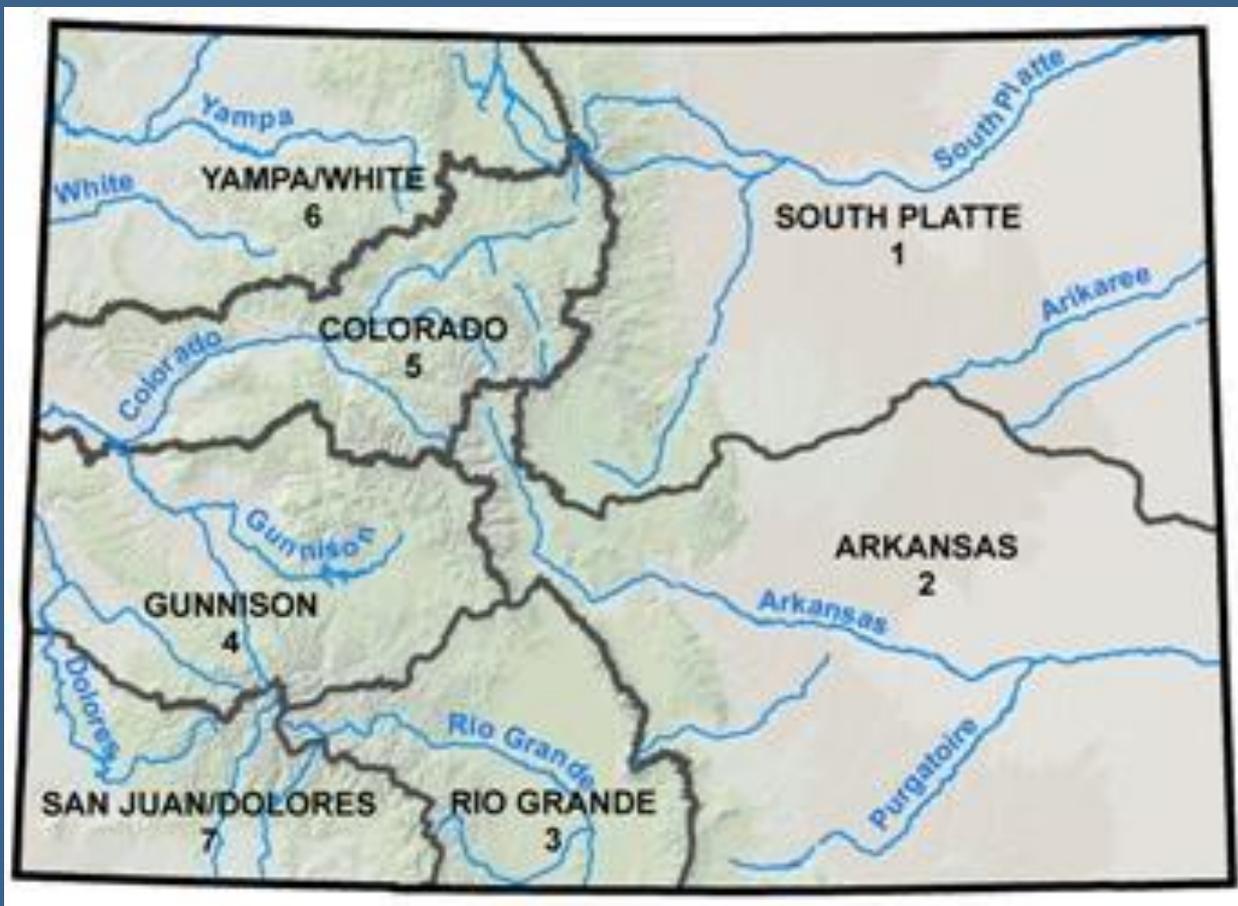
# Return Flows

The water that is not consumed through beneficial use and returns to the river through percolation through the soil or surface runoff.

- Presumed tributary and available for use by others
- Are re-diverted and re-used over and over—one user's return flow is another's water supply!
- Vary with the beneficial use and manner of beneficial use
- Vary with the geology of the area

# Water Courts

- One for each of the seven water divisions



# Water Court Cases

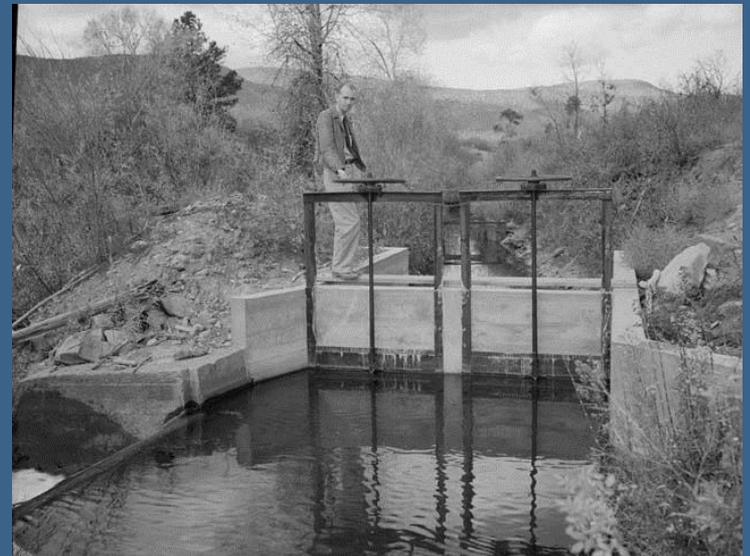
- Application = Complaint
- “Resume notice”
- Statement of Opposition = Answer
- Referral to Water Referee
- Re-referral / protest Ruling of Referee
- Judge’s order = decree
- Most cases settle before trial
- Complex cases are expensive and lengthy

# Water Rights Decrees

- Water Courts don't grant water rights, they confirm them
  - Water rights are perfected by beneficial use, but are not enforceable against other users until you get a court decree
  - Courts adjudicate a water right by confirming the priority date, the amount, the source, the point of diversion, and the uses
- So, why go to Water Court to get a decree?
  - Avoid postponement
  - Allows for enforcement—a water court decree protects the owner of the right against the claims of others with more junior priorities
  - The priority confirmed by the water court is the primary benefit of adjudication

# Administration

- The State Engineer administers water rights based on their respective decreed priority.
- A water right “call” means to administer (i.e., shut-off or curtail) other water rights when rights with senior priorities are short of supply.
- Division Engineers assist the State Engineer (1 per division)
  - The local water commissioner (1 per district) does the Engineer’s dirty work of shutting down ditch headgates.
- 7 divisions; 80 districts



Denver Public Library Archive

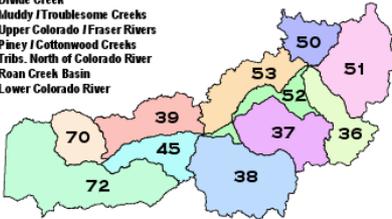
# Administrative Units

Colorado Map scale: 1:5,000,000  
Individual District scale: 1:3,500,000

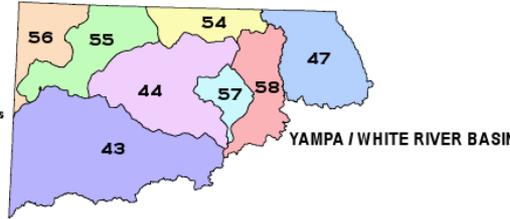
## COLORADO BASINS

District	District Name
36	Blue River Basin
37	Eagle River Basin
38	Roaring Fork River Basin
39	Rifle / Elk / Parachute Creeks
45	Divide Creek
50	Muddy / Troublesome Creeks
51	Upper Colorado / Fraser Rivers
52	Piney / Cottonwood Creeks
53	Tribe, North of Colorado River
70	Roan Creek Basin
72	Lower Colorado River

COLORADO RIVER BASIN

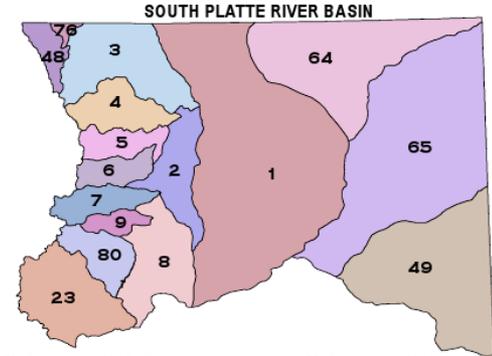
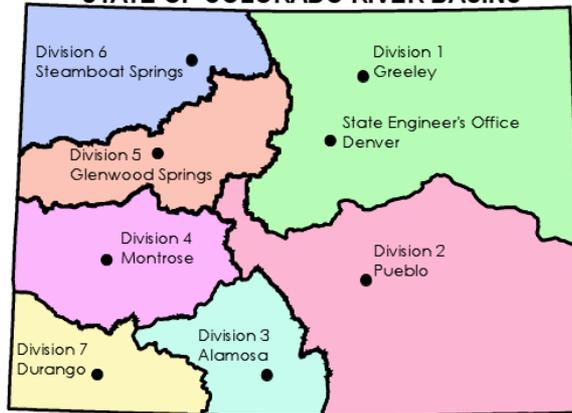


District	District Name
43	White River Basin
44	Lower Yampa River
47	North Platte River Basin
54	Slater / Timberlake Creeks
55	Little Snake River
56	Green River Basin
57	Middle Yampa River
58	Upper Yampa River



YAMPA / WHITE RIVER BASIN

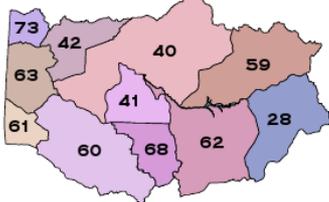
## STATE OF COLORADO RIVER BASINS



SOUTH PLATTE RIVER BASIN

District	District Name	District	District Name
1	South Platte: Greeley to Balzac	9	Bear Creek
2	South Platte: Denver Gage to Greeley	23	Upper South Platte
3	Cache La Poudre River	48	Laramie River
4	Big Thompson River	49	Republican River
5	St. Vrain Creek	64	South Platte: Balzac to Stateline
6	Boulder Creek	65	Arkaree River
7	Clear Creek	76	Sand Creek
8	South Platte: Cheesman to Denver Gage	80	North Fork of South Platte

## GUNNISON RIVER BASIN



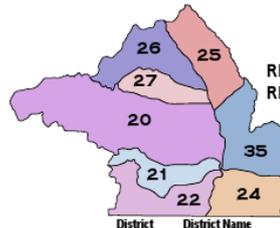
District	District Name
28	Tonichi Creek
40	North Fork / Tribes
41	Lower Uncompahgre River
42	Lower Gunnison River
59	East River Basin
60	San Miguel River Basin
61	Paradox Creek
62	Upper Gunnison River
63	Dolores River Basin
68	Upper Uncompahgre River
73	Little Dolores River

## SAN JUAN / DOLORES RIVER BASIN



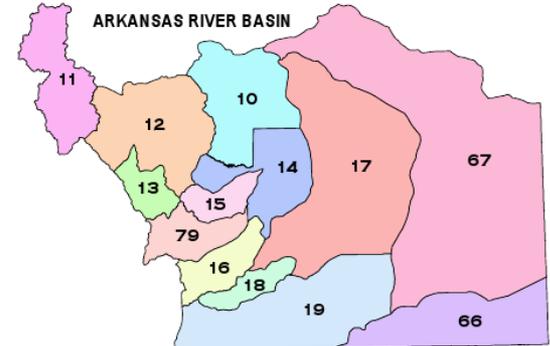
District	District Name
29	San Juan River Basin
30	Animas River Basin
31	Los Pinos River Basin
32	McElmo Creek Basin
33	La Plata River Basin
34	Mancos River Basin
36	Navajo Reservoir
69	Disappointment Creek Basin
71	West Dolores Creek / Tribes
77	Navajo River Basin
78	Piedra River Basin

## RIO GRANDE RIVER BASIN



District	District Name
20	Rio Grande
21	Alamosa La Jara
22	Conchos River
24	Culebra Creek
25	San Luis Creek
26	Saguache Creek
27	Camero Creek
33	Trinchera Creek

## ARKANSAS RIVER BASIN



District	District Name	District	District Name
10	Fountain Creek	17	Arkansas: Fowler to Las Animas
11	Arkansas: Headwaters to Salida	18	Apishapa River
12	Arkansas: Salida to Portland	19	Purgatoire River
13	Wet Mountain Valley	66	Cimarron River Basin
14	Arkansas: Portland to Fowler	67	Arkansas: Las Animas to Stateline
15	Saint Charles	79	Huerfano River
16	Cucharas River		



# The Future: Enhancing Supplies and Optimizing Use

- Changes of water rights
- Exchange rights
- Plans for augmentation
- Imported water

# Hypo: Who's on first?

- Farmer A diverts water and puts it to beneficial use in 1900.
- Farmer B diverts water and puts it to beneficial use in 1910. In 1912, she obtains a decree confirming her right.
- Who has the senior priority?
- Who has the senior appropriation?

Farmer A has the senior appropriation.

- Farmer A diverted water and put it to beneficial use in 1900, ten years earlier than Farmer B, who diverted water and put it to beneficial use in 1910.

Farmer B has the senior priority.

- In 1912, Farmer B obtained a decree confirming her right. Farmer A never got a decree to confirm his right.

# Now Who's on First?

Early on, the courts adjudicated water rights as part of “general adjudications” where a large number of water users would receive their decrees in the same court order.

- Farmer A diverts water and puts it to beneficial use in 1900. He adjudicates his right in 1920's general adjudication.
- Farmer B diverts water and puts it to beneficial use in 1910. Farmer B adjudicates her right in 1920's general adjudication.
- Who has the senior appropriation date?
- Who has the senior priority?

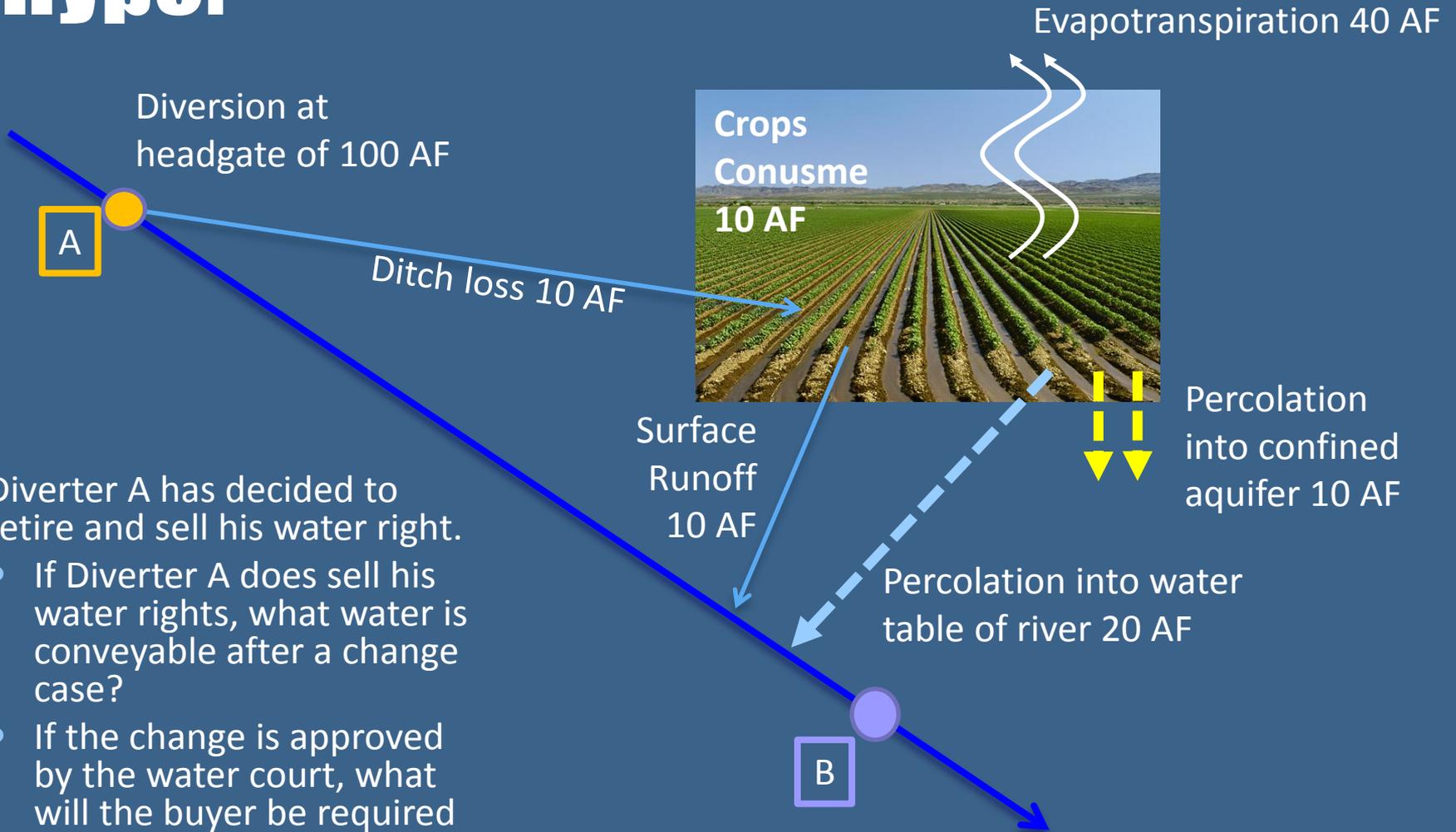
Farmer A has the senior appropriation date.

- Farmer A diverted water and put it to beneficial use in 1900, ten years earlier than Farmer B, who diverted water and put it to beneficial use in 1910.

Farmer A has the senior priority.

- Both Farmer A and Farmer B have the same adjudication date –1920. But because Farmer A has the senior appropriation date, Farmer A has the senior priority.

# Hypo:



Diverter A has decided to retire and sell his water right.

- If Diverter A does sell his water rights, what water is conveyable after a change case?
- If the change is approved by the water court, what will the buyer be required to do?

- If Diverter A does sell his water rights, what water would he actually be conveying?
  - Argue for 60 AF.
- If the change is approved by the water court, what will the buyer be required to do?
  - Maintain return flows so as to not injure downstream users

**Questions?**