



## MEMORANDUM

To: DWR Staff and Colorado Water Community  
From: Tracy Kosloff, Deputy State Engineer  
Date: June 29, 2023  
Subject: DWR’s approach to claims to appropriate or not replace return flows in change cases

### **Purpose of memo:**

This memo is put forth in response to claims to “appropriate return flows”, which are made on occasion in conjunction with changes of water right. DWR staff’s experience is that such claims have not been adjudicated in a consistent manner. Further, we are unaware of any comprehensive analysis of this topic. This memo describes how staff of the Colorado Division of Water Resources (DWR) understand the legal use of the return flow portion of a water right historically used for irrigation, requirements for replacement of return flows under different scenarios, and potential new appropriations of waters of the state made possible by a change of water right. DWR intends to use this memo to guide our comments in water court cases and our actions in the administration of water, and we are making it public to inform the water community of our perspective. This memo was provided as a draft for review and input from the Colorado water community in April 2023 and discussed in a webinar in May 2023, in an effort to publicly clarify these issues that have created confusion in water court cases in Division 1 in recent years. The draft memo, comments received, and responses are available for review in DWR’s imaged documents system.

This memo does not attempt to change what is already decreed in change of water right cases, which may not be consistent with this memo. It is also not intended to change water administration practices for existing decreed changes of water right. However, this memo may be useful in developing terms and conditions for new change of water right decrees and decrees for new appropriations of waters of the state.

### **Overview of memo:**

In brief, we suggest that applicants in water court change cases cease making claims to “appropriate return flows,” and rather make claims for new independent appropriations of waters of the state, when appropriate. This memo also does not change the default requirement in a change of water right case that return flows be replaced in time, place, and amount.

This document is organized in three sections:

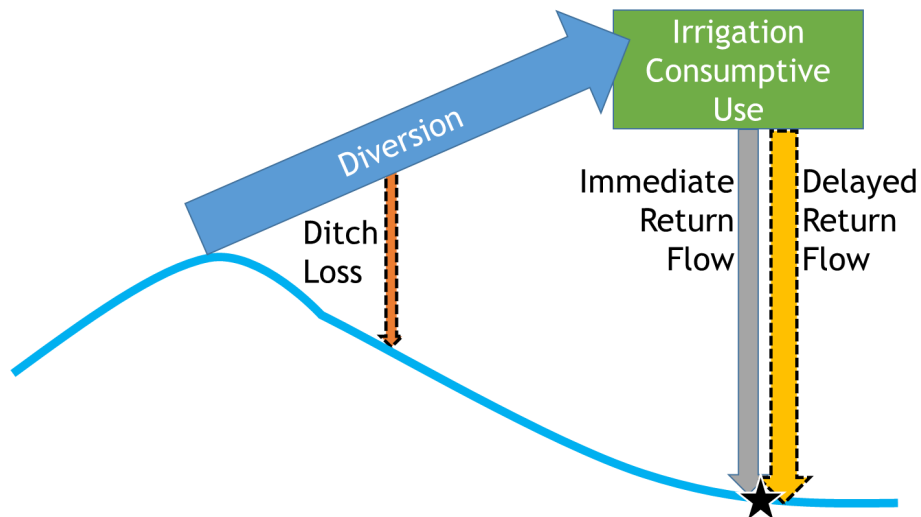
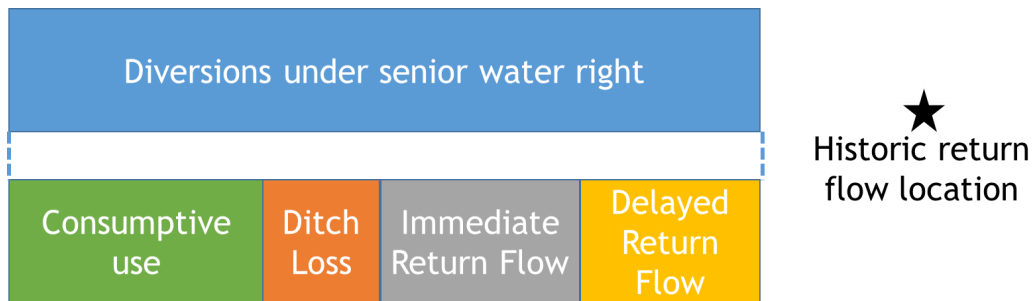


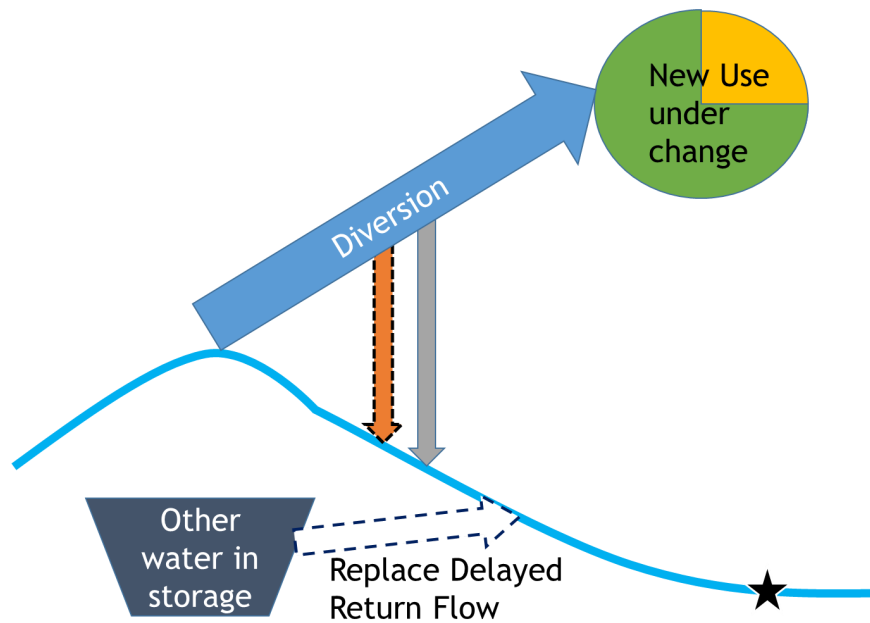
- A. Background and legal basis
- B. Maintenance of historical return flows in various circumstances
- C. Accounting considerations for owed return flows to be replaced from storage

There are two main concepts addressed by this memo that may be new for some readers. The basis and details of these concepts are described in detail in this memo. These two concepts only apply in instances when existing water rights senior to the date of a change of water right application (and operating below the historical return flow location) are satisfied. The two concepts are summarized as follows:

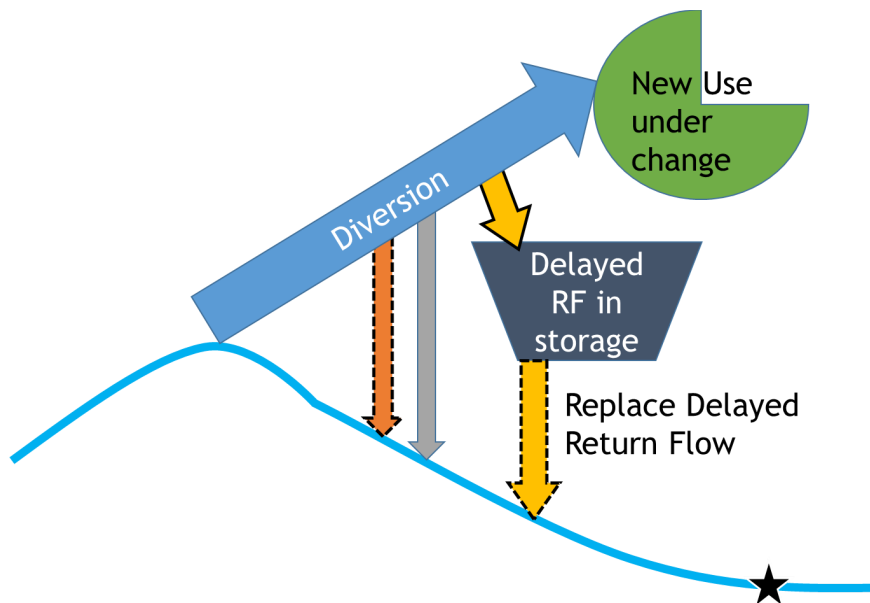
- Appropriators junior to the date of a change of water right application are not entitled to the maintenance of stream conditions that existed before their appropriation. Their initial appropriations are typically made after and subject to notice of proposed changed operations under the change of water right application. Therefore, the return flow pattern based on historical use of the changed right need not be maintained to prevent injury to water users junior to the change case. However, waters that historically returned to the stream under the exercise of changed right's priority are owed to the stream as waters of the state and may only be appropriated by the change applicant through a new independent appropriation with a new priority. Otherwise, such waters of the state must be made available for use in priority when there are any unfulfilled water rights entitled to such water, including water rights junior to the date of the change of water right application. Since the historical pattern need not be maintained for junior rights, their entitlements are subject to the court's terms and conditions in change decrees describing when (between the time of any diversion of the return flow portion and the timing when return flows historically accrued to the stream system) and from which replacement sources (which may be located in various locations along the stream) the historical return flow portion must be returned to the stream system and made available for use in priority. Other than during free river conditions, such decrees should only allow such water to be withheld by the change applicant when doing so in priority under a new independent appropriation decreed to the change applicant.
- The user of the senior changed water right, like any water user, may make a new appropriation at a location that allows them to divert or control waters of the state under a new junior priority to be confirmed by the water court. If the user has stored water intended for return flow replacement, that water may be made available as waters of the state, for use in priority at or downstream of the place of storage at the time required by the change decree. If the user of the changed right makes a new independent appropriation at the place of storage, and that new water right is in priority, the user may divert or control the water at the place of storage and avoid releasing water to more junior water users downstream. This is based on the water being made available as waters of the state, and the applicant diverting/controlling and using the water in priority under the new independent appropriation.

The following simplified diagrams and example operations are referred to in the memo. Diagram 1 shows typical components of diversions under a senior water right that are discussed herein. The same colors are used for these water components in the examples throughout this document. Example 1 shows one possible physical orientation of these components related to a diversion for irrigation use, prior to a change of water right, where a portion of the diverted water returns to the stream system immediately and the delayed return flow portion returns to the stream system slowly after percolating through the subsurface. The black star in the examples indicates the location where return flows historically accrued to the stream. The dashed lines indicate delayed timing for the ditch loss and delayed return flow components. Examples 2, 3, and 4 show potential operations under a change decree, although there are a multitude of operations related to return flows in change decrees.

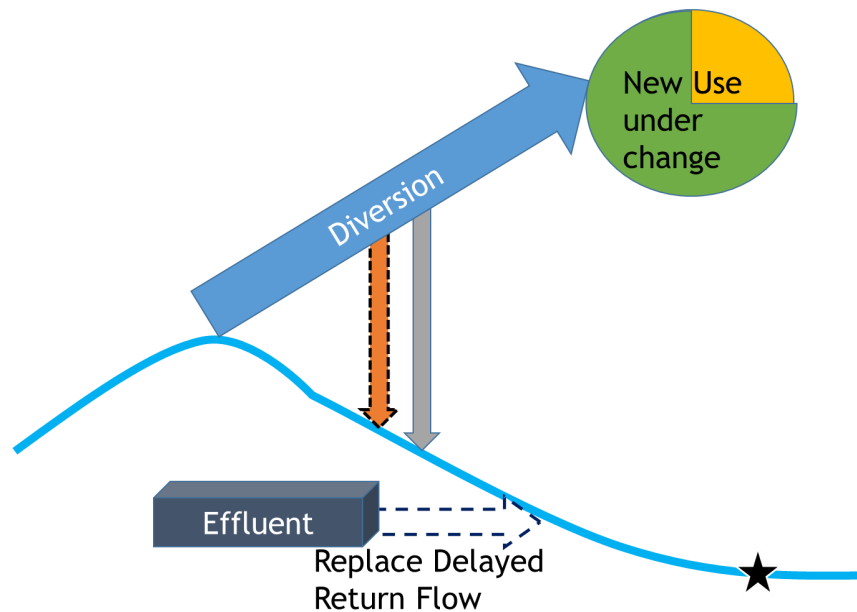




Example 2. Operation under change decree with delayed return flow component beneficially used and delayed replacement from another water source in storage



Example 3. Operation under change decree with delayed return flow component stored for later replacement use



Example 4. Operation under change decree with delayed return flow component replaced by municipal effluent

#### A. Background and Legal Basis

- 1) All native tributary water rights are presumed to be single-use water rights unless decreed for reuse or successive use of any return flows from the first use.
- 2) All return flows from single-use native water rights are waters of the state subject to use by water rights in the order of their priority as soon as they leave the dominion and control of the water user. These waters of the state are also available for new appropriations by any person, at any location, provided there will be no injury to vested water rights.<sup>1</sup>
- 3) A claim for reuse or successive use may be included in an application for a new water right or a change of water right, provided there is a legitimate and documentable need and a specific plan for the reuse or successive use at the time of the application.

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<sup>1</sup> These conclusions have been supported by the Colorado Supreme Court including in the following: "When waters natural to the watershed are released from the appropriator's control by seepage from the ditch or field irrigation, for example, ... they belong to the stream system and cannot be captured or reused except through a lawfully made decreed appropriation" *Ready Mixed Con. Co. v. Farm. Res. And Irr.*, 115 P.3d 638, FN 4 (Colo. 2005). "Water native to the stream system is limited to one use in that system and return flows belong to the stream system as part of the public's resource, subject to appropriation and administration." *Burlington Ditch v. Metro Wastewater*, 256 P.3d 645, 663 (Colo. 2011)

- 4) Senior irrigation water rights are generally decreed for a single use with the return flows becoming waters of the state as soon as they leave the dominion and control of the irrigator.
- 5) Thus, when a senior irrigation water right is changed, a claim to “appropriate return flows” is generally a misnomer. When the irrigation water right operates under a change, the return flow portion must continue to be made available as waters of the state for use in priority. In a change of water right, the return flow portion may be used by the diverter (a) after diversion under the senior priority while replacing return flows from another source (Examples 2 and 4), or (b) under a junior appropriation of available waters of the state when stream conditions allow. Similarly, a claim to appropriate return flows by exchange or substitution might actually be some combination of (a) and (b), but is not an appropriation of return flows. Lastly, water released to meet return flow obligations becomes waters of the state and cannot directly be a substitute supply in an exchange.
- 6) The way to appropriate waters of the state is by satisfying all of the elements for an independent, non-speculative appropriation under Colorado law, including:
  - a) An independent diversion, including retention in storage of water available for appropriation, either in priority or under a plan for augmentation, without injury to vested water rights.
  - b) A legitimate and documentable need for a specific amount of water, including as appropriate, a decreed rate or volume, under reasonably efficient practices to accomplish without waste the purpose of the appropriation.
  - c) A type and place of use.
  - d) An appropriation date.
  - e) For an absolute appropriation, completion of the appropriation by placing water to beneficial use in accordance with procedures prescribed by law.
  - f) For a conditional appropriation, a showing of a substantial likelihood the appropriation can and will be completed with reasonable diligence within a reasonable amount of time, including a showing that water is physically and legally available at the proposed independent point of diversion for the new appropriation.
- 7) A change of a senior right cannot also be an appropriation of waters of the state because the amount of water available to the senior right under its priority has already been appropriated by that water right, and the changed water right is diverted and used under the senior priority.
- 8) A water court application for a change of water right can also include a claim for a new appropriation of waters of the state, but such a claim is separate from the change of water right.
- 9) A change of water right can be decreed to allow the return flow component of the changed water right to be diverted, stored, and/or applied to beneficial use. Any beneficial use of the return flow component of the changed water right, is use and

consumption under the senior changed water right, and does not constitute a new appropriation or “appropriation of return flows.” It is merely the exercise of the changed water right under terms and conditions of the change decree, which must also include replacement of return flows from another source (such as in Examples 2 and 4) to prevent injury and/or repay the return flow obligation to waters of the state.

- 10) **Replacement of return flows to pre-existing water rights:** The requirement to maintain historical return flows for the approval of a change of water right is based on the recognition that “appropriators are entitled to maintenance of the conditions on the stream existing at the time of their respective appropriations”, *Thornton v. Bijou Irr. Co.* Such stream conditions include return flows from any historical exercise of the senior water right being changed. Stream conditions, including the historical return flow pattern, must be maintained under the change of water right for any unsatisfied appropriation made prior to the change of water right located at or downstream of the historical point of return flows.
- 11) **Availability of return flows for new junior appropriators:** Appropriators junior to the the date of a change of water right application are not entitled to the maintenance of stream conditions that existed *before* their appropriation. Therefore, the return flow pattern need not be maintained to prevent injury to these junior water users. However, as described in item A.2 above, return flows are waters of the state that must be available for appropriation. Changes of water rights must make return flows available for use in priority when there are unsatisfied water rights, even if the unsatisfied rights are junior to the change decree.

Existing law does not provide specifics on how those return flows must be made available for appropriators junior to the change decree. Therefore, the following is our suggestion for what is reasonable. It is reasonable for the court and parties to water court cases to determine when (between when any return flow water is diverted and the resulting timing when return flows historically accrued) and from which replacement source(s) (when there are multiple replacement sources) to reasonably make the historical quantity of return flow available for use in priority, even if the historical pattern of when and where is not exactly replicated.

**Note about order in Division 1 case no. 16CW3200**

Judge Hartmann’s October 15, 2019 order in Division 1 case no. 16CW3200 dismissed a claim for a 2016 water right with a point of diversion at the ditch headgate for return flows diverted together with historic consumptive use water under the ditch’s senior water right. The claim was to not replace return flows at a later point in time when the return flows are owed when the call at the ditch headgate was junior to 2016. The order states, “Where the Applicants fail, however, is that they have not proven that water is available for diversion under a December 2016 priority at the Western Mutual Headgate.”

The 16CW3200 order shapes some of our considerations in this memo. It provides additional analysis and conclusions applicable to the specifics of that particular application. However, the order does not consider nor address the scenarios for water being available for appropriation that are discussed below.

## **B. Maintenance of historical return flows in various circumstances**

The following paragraphs discuss return flow maintenance under a hypothetical 2022 change of water right and the following three scenarios:

- an unsatisfied water right senior to 2022 below the historical return flow location,
- free river below the location where return flow is made available to the stream, and
- an unsatisfied water right junior to the 2022 application date below the location where return flow replacement water is available to the stream under the change decree.

12) **Unsatisfied water right senior to 2022 - replacement according to the historical pattern:** In order to prevent injury, the return flow obligation created by use of the changed water right is owed to the stream system and must be paid in time, place, and amount *consistent with the historical pattern* when any vested water right senior to 2022 is not satisfied at or downstream of the historical point of return flows. The return flow replacement does not become waters of the state available for appropriation in priority until at or downstream of the historical irrigation return flow location (indicated by the black star in the example diagrams). Water users diverting downstream of the return flow replacement source but above the historical return flow location are not entitled to divert the return flow replacement water being shepherded to the historical return flow location.

13) **Free river:** DWR's administration of return flow replacement is directed by the applicable change decree, including during free river conditions. If the change decree requires return flow replacement in time, place, and amount then DWR and the water users need to follow this requirement and make replacement during free river. Otherwise, the Engineers would generally not (a) administratively require, or (b) seek decree conditions that require, return flow replacement when there is no call below the applicant's point(s) of return flow release to the stream, to avoid releasing water that will not be put to beneficial use.

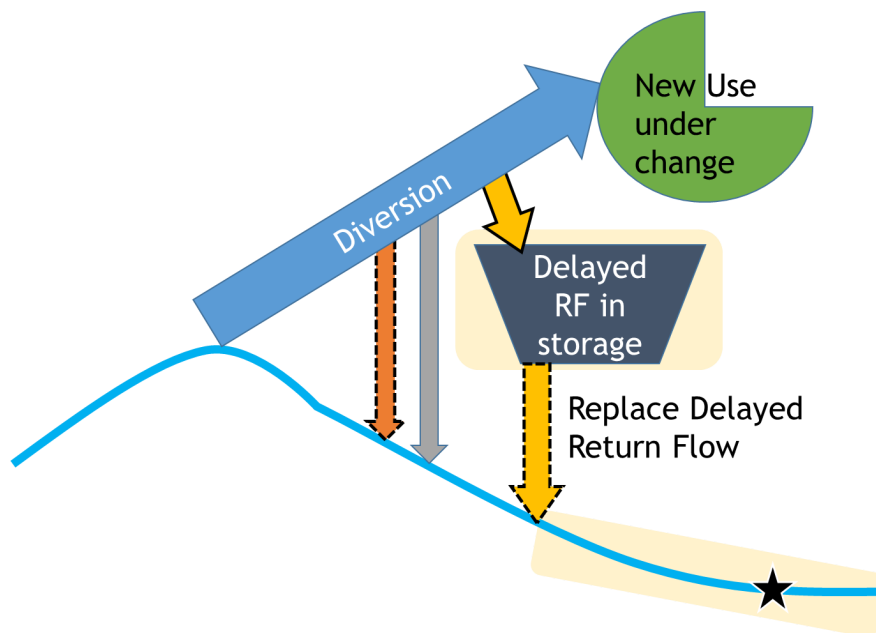
During free river, and if not precluded by a decree, DWR's position is that water users need not obtain a decreed right to retain such water, which would otherwise be released to waters of the state for return flow replacement, in order to retain in storage or account for such replacement water for different beneficial uses. Such operations must be consistent with the State Engineer's Written Instruction Concerning the Administration of Diversions of Water during Free River. As described in the Written Instruction, water users must confirm with the Division Office that free river conditions exist prior to making a diversion or storage and then must correctly account for the water.



14) **Unsatisfied water right junior to 2022 - return flow available as waters of the state:**

When return flows are diverted under a changed water right, have not been returned to the stream system, and there is an unsatisfied water right junior to 2022, **the quantity of return flow obligation must be made available as waters of the state for use by water users in priority<sup>2</sup>**. As described in item A.11 above, the courts and parties to the change case may determine how this can reasonably be accomplished based on the specifics of the case.

In a simple scenario of a call junior to 2022, where the change of water right operates with only one source of return flow replacement, which is located upstream of the historical return flow location, a decree could reasonably require that when there is no pre-2022 calling water right below the historical return flow location, return flow must be made available as waters of the state from this return flow replacement source unless there are free river conditions downstream of that location. In this situation, return flow releases from the reservoir need not be shepherded from the point of reservoir release to the historical return flow location because there is no pre-2022 calling water right entitled to the historical return flow pattern. Example 3 was slightly modified as shown in Example 5 to highlight the reach where a call junior to 2022 would be entitled to appropriate the historical return flow amount from waters of the state.



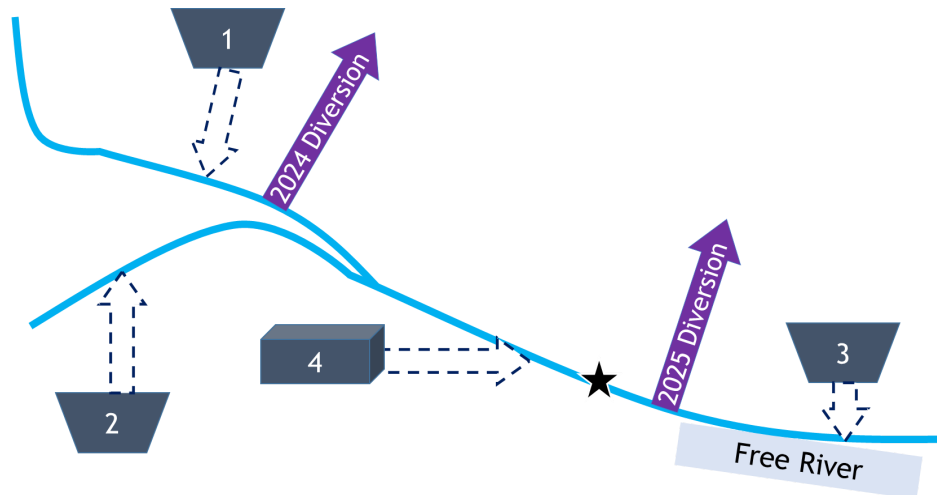
Example 5. Stream reach below return flow release location (storage) where junior call results in release of return flow replacement

If there are multiple water users junior to 2022 in the highlighted reach, the priority system dictates which water user may appropriate water made available as waters of the state. The change applicant may make an appropriation of waters of the state at the

<sup>2</sup> This memo describes further that the location of the unsatisfied water right and return flow replacement can be considered.

dam, or from a diversion point in the highlighted reach with a new 2022 water right. If such an appropriation is made by the change applicant, the court and parties to the case may agree that the applicant can divert or retain water in storage, against downstream appropriators with water rights junior to the change applicant's 2022 appropriation. This is based on the water being made available as waters of the state at the reservoir's dam, and the applicant diverting/controlling and using the water in priority under their 2022 independent appropriation. Such an appropriation must include all of the required elements described in item A.6 above and should comply with DWR's relevant administration requirements.

Example 6 shows a change of water right with multiple replacement sources and unsatisfied water rights junior to the change case, in different locations. As noted in A.11, existing law does not provide specifics for this situation and parties to a case and the court may best be able to decide what is appropriate to both prevent injury and to protect the water supply for new junior appropriations. Example 6 brings up the question: when some of the stream system is in free river condition, at what locations relative to the historical return flow location and replacement supplies must return flows be made available as waters of the state to unsatisfied water rights junior to 2022? Because water rights junior to 2022 are subject to the terms and conditions of the change decree and its various replacement options, junior water rights above the most downstream replacement option may not be able to demand replacement be made above their diversions.<sup>3</sup> A decree may allow flexibility for where waters of the state are returned to the stream for use in priority by those junior to the change case. But, at a minimum, decrees should ensure that when there are unsatisfied water rights below the most downstream return flow replacement location, that water is made available for use in priority, including use by the change applicant if they make their own independent appropriation.

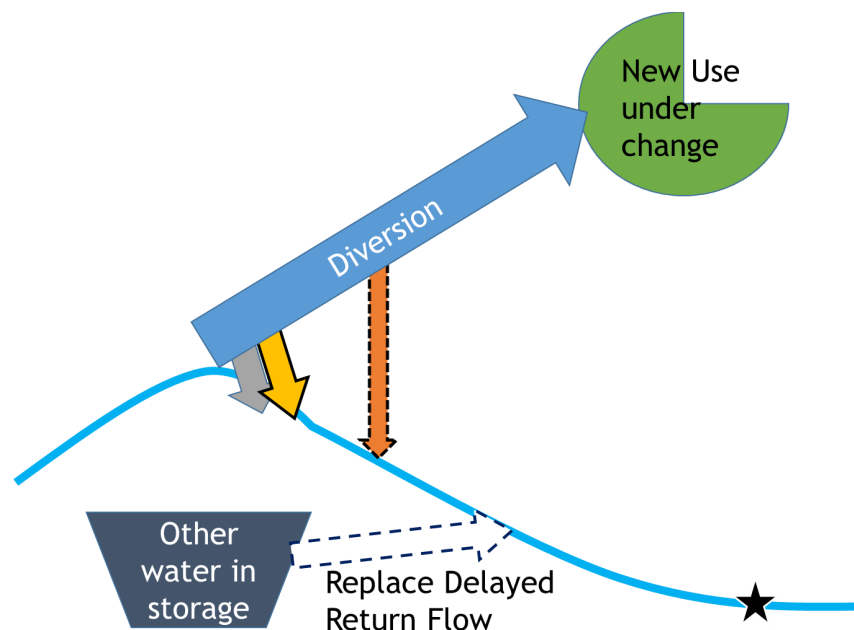


Example 6. Multiple return flow replacement sources and a call junior to the change application

<sup>3</sup> This is DWR's understanding in general. Parties to a case or the court may find that there is another requirement that should be applied in a particular case.

In Example 6, when the 2024 and 2025 diversions are not satisfied, a release from reservoir 3 would not make water available for diversion in priority by these water users and would be wasteful due to the free river condition. In that situation, a decree may describe that return flows need not be released from any location and may be retained in reservoir 3.

The scenario shown in Example 7 is an operation where both instant and delayed return flow components of the changed water right are immediately turned back to the stream at the ditch headgate and only the historical consumptive use component of the changed right is delivered to beneficial use. In some older decrees, there is no consideration of any return flow obligations being delayed from the time of the diversion, and all return flow obligations are met by the immediate return of the return flow portion to the stream or by leaving that portion in the stream. However, in Example 7, the decree contains a requirement for replacement of the delayed return flow obligations according to their historical pattern to protect vested rights senior to 2022.<sup>4</sup> A decree in this case need not require Applicant to replace the delayed historical return flows above any calling water right junior to 2022 because Applicant immediately returned the entire quantity of return flow obligation to waters of the state at the time of diversion, paying the return flow debt to waters of the state at the time of diversion, rather than using those return flows under the senior priority.



Example 7. Operation under change decree with both return flow components left in the stream at the headgate and delayed replacement from another water source in storage

<sup>4</sup> This requirement to turn back return flows at the headgate and replace delayed return flows later typically results in more water returned to the stream than prior to the change of water right.

**C. Accounting Considerations for Return Flows to be replaced from storage**

Based on the sections above, there are situations, either free river or when stored water is made available as waters of the state and then appropriated at the dam under a new junior water right, when it may be necessary to transfer water stored in a reservoir from one account to another. In all scenarios, stored water should be accounted for according to the [General Administration Guidelines for Reservoirs](#), which provide guidance on filling senior accounts first and when it is necessary to paper fill a senior account. If water is diverted at the dam under a junior appropriation with different beneficial uses than other water stored in the reservoir, water stored under the junior priority should be accounted for as distinct from the other stored water.