

Water Exchange Projects

August 18, 2021 (with additional diagrams added)

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Meeting topics

- A. Review August 4 Draft DWR memo content
- B. DWR's plans to receive and consider input through calendar year 2021
- C. Questions and input

Please Hold Questions
until the end of the presentation



Draft DWR memo

1. Understanding of Water Exchange Projects
2. DWR's plans for near term water court efforts
3. DWR's plans for future applications to the water court
4. DWR's administration of decrees

Draft DWR memo:

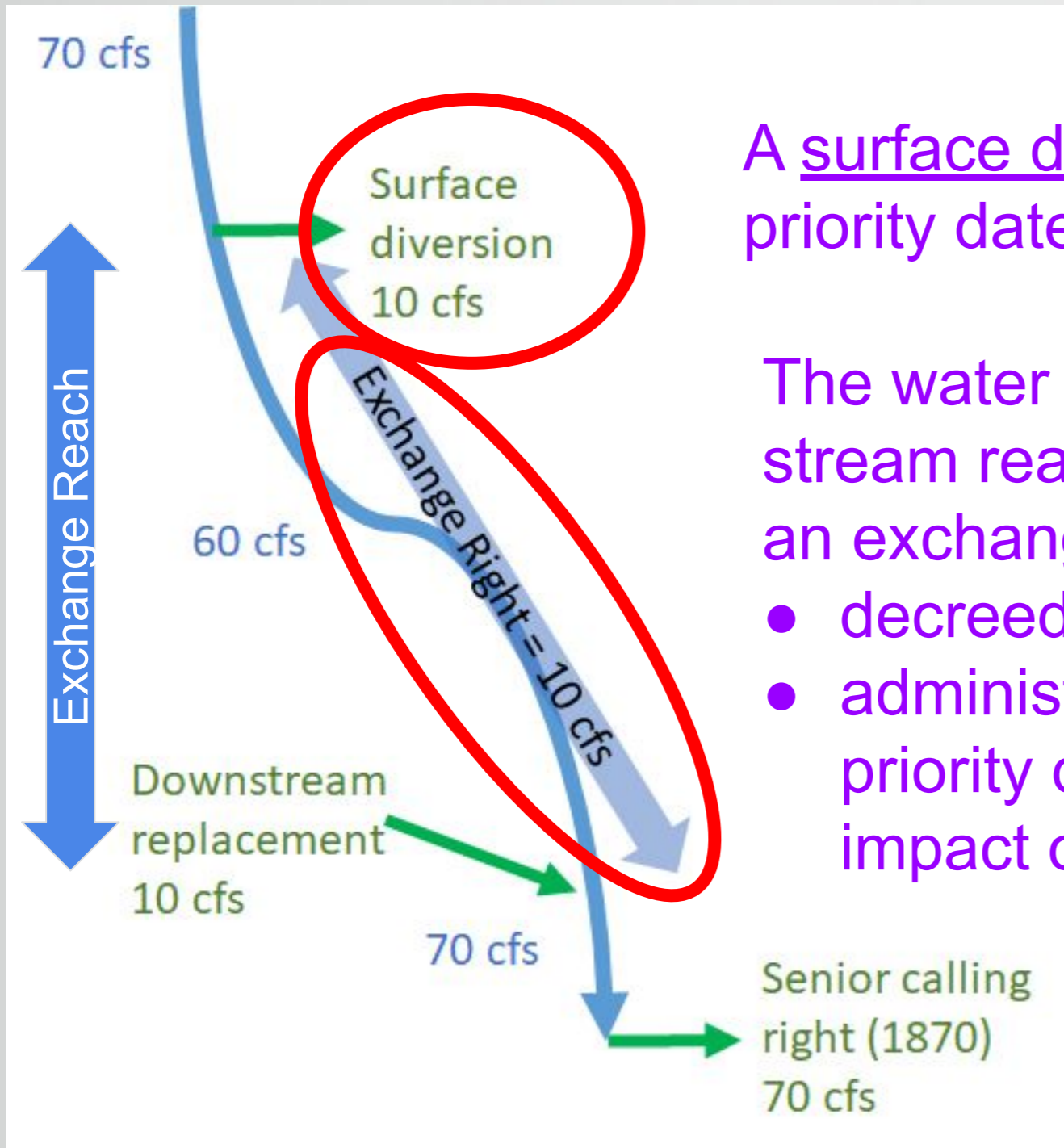
1. Understanding of Water Exchange Projects

Exchanges:

- Limited to operations that can be administratively approved by DWR per 37-83-104 and 37-80-120
- Surface water
- Deliver water directly into the public stream
- Take water directly from the public stream higher up

Exchange Example

Two distinct water rights:



A surface diversion out-of-priority priority date 6-1-1935

The water right for the exchange depletes the stream reach by 10 cfs; an exchange can be:

- decreed with a priority date, or
- administratively approved (without a decreed priority date) if the diminished flow does not impact other water rights.



Draft DWR memo:

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Water Exchange Projects in a plan for augmentation:

- Upstream diversion / depletion and downstream replacement that does *not* qualify as an exchange under the statute.

Draft DWR memo:

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Water Exchange Projects in a plan for augmentation:

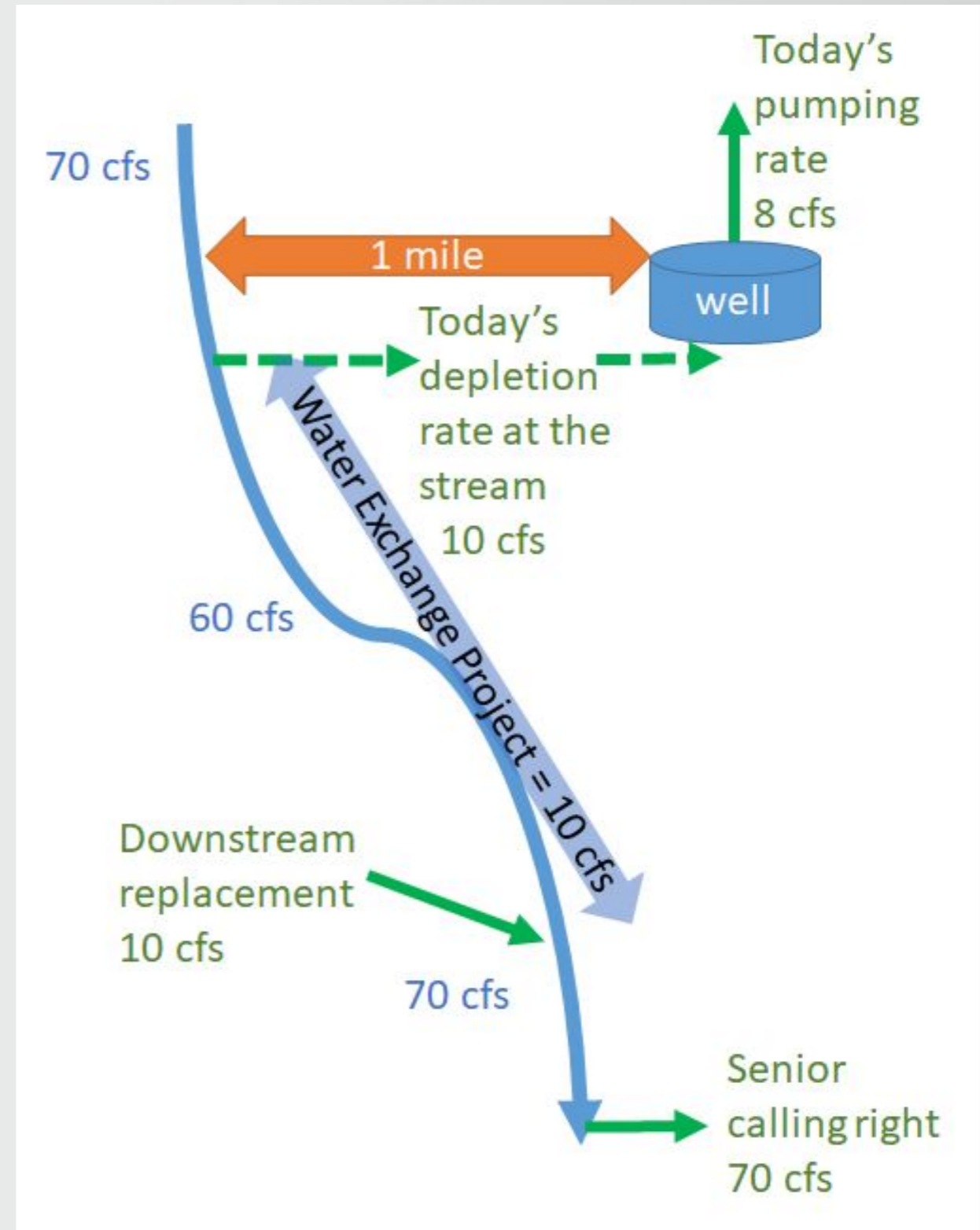
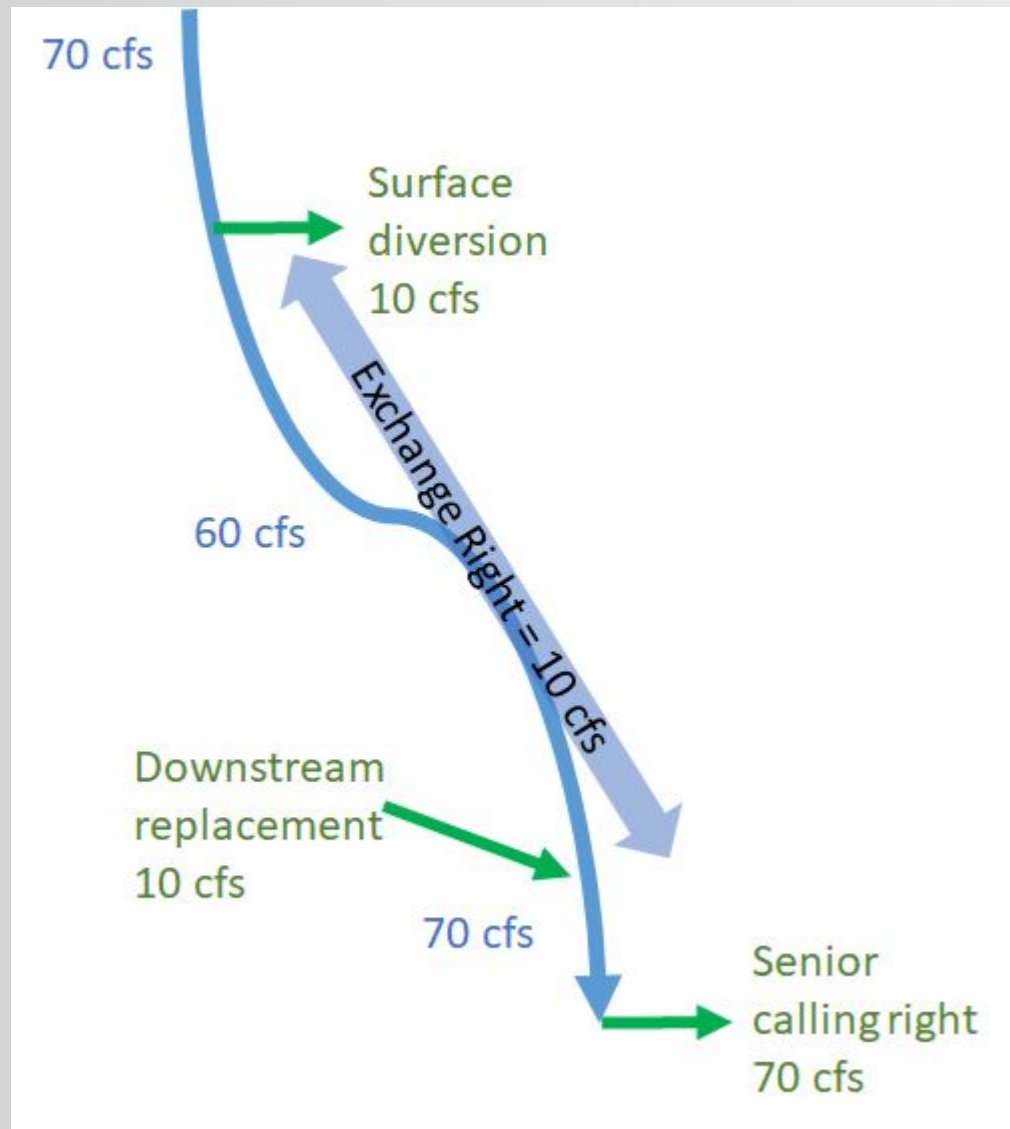
- Examples:
 - depletions are from lagged well depletions or an off-stream pond
 - downstream replacement is from recharge accretions
- Not directly “delivered” into the stream, or not directly “take(n)” from the stream



Exchange vs. Water Exchange Project Examples

Water Exchange Project

Exchange



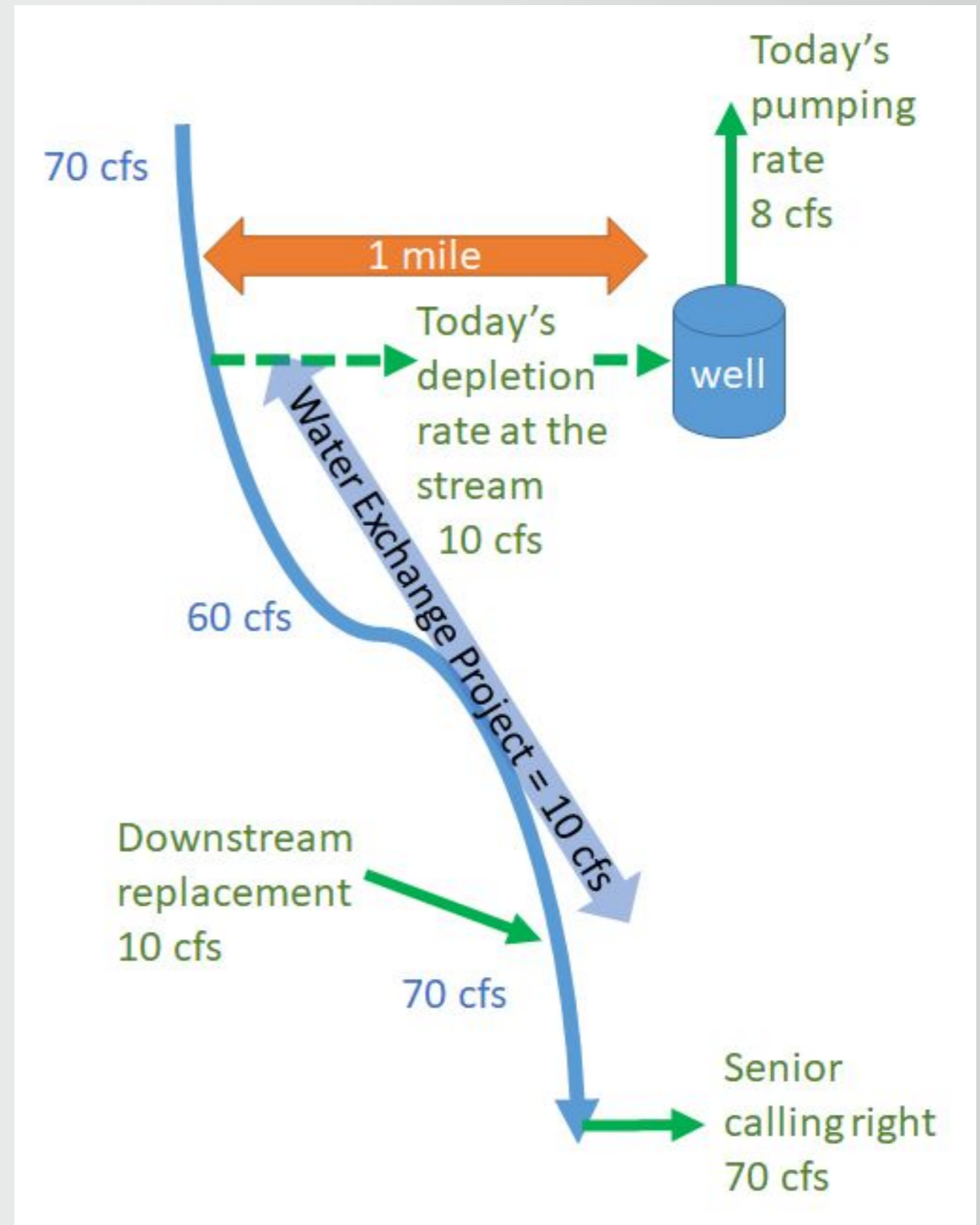
Water Exchange Project Example 1

Water is taken from the aquifer by a well. Delayed depletions occur at the stream.

Two water rights:

- the well has a groundwater right*, but diverts out-of-priority in an augmentation plan
- the Water Exchange Project depletes streamflow in a reach with a priority date in an augmentation plan

*the groundwater right need not be decreed, if not, it is junior to all other rights

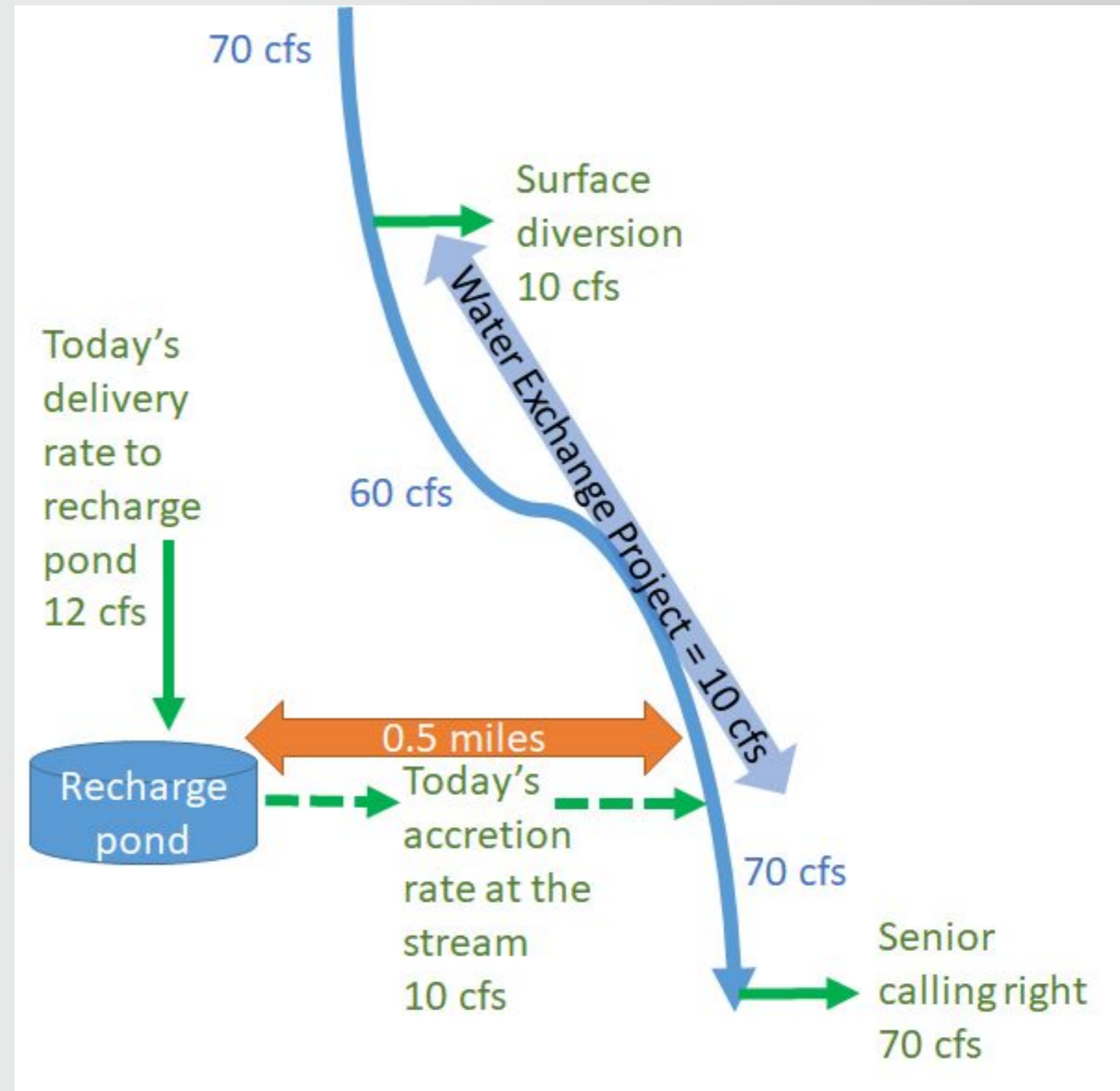


Water Exchange Project Example 2

Replacement water is not “delivered to the stream”, it is delivered to a recharge pond

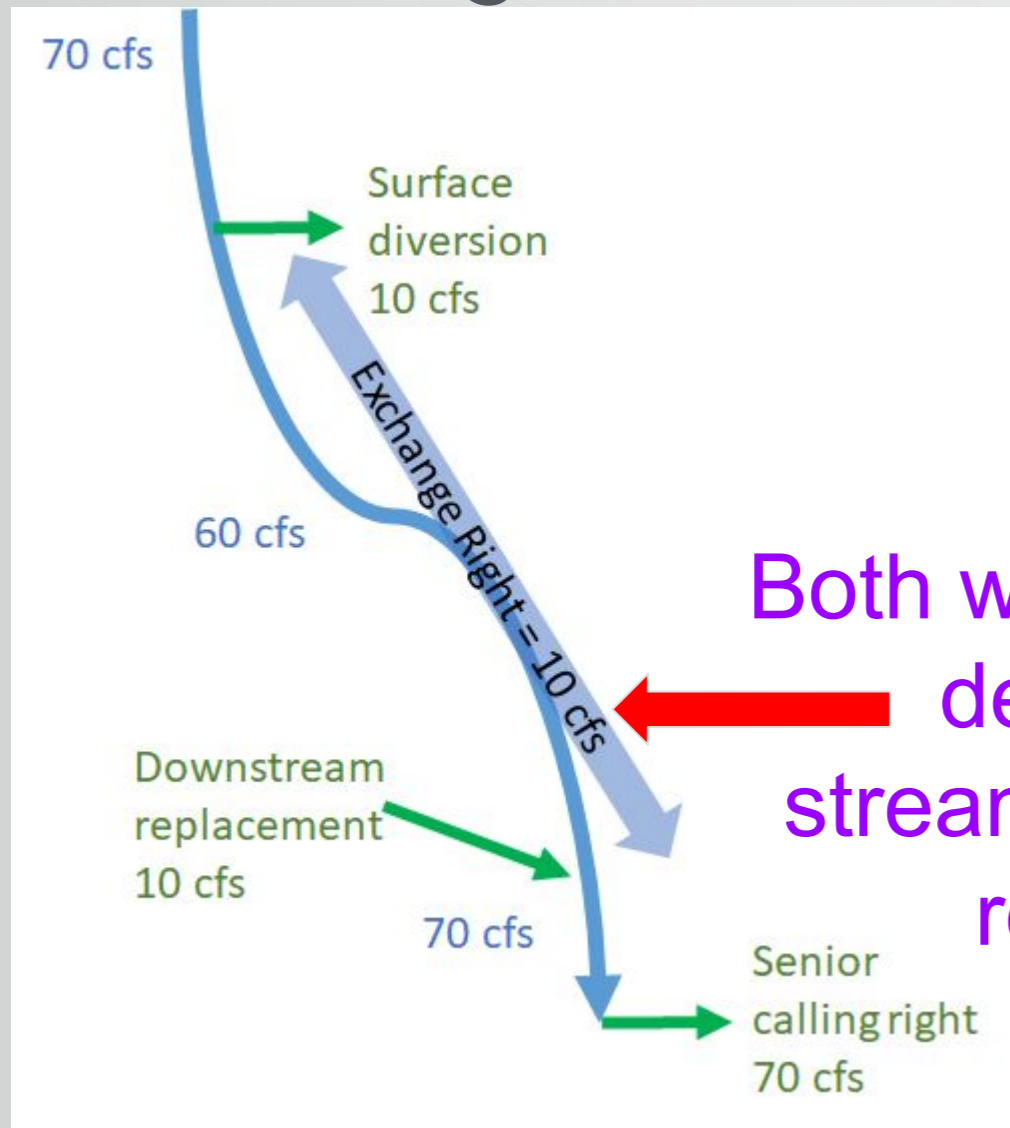
Two water rights:

- the surface diversion is out-of-priority
- the Water Exchange Project depletes streamflow in a reach with a priority date in an augmentation plan

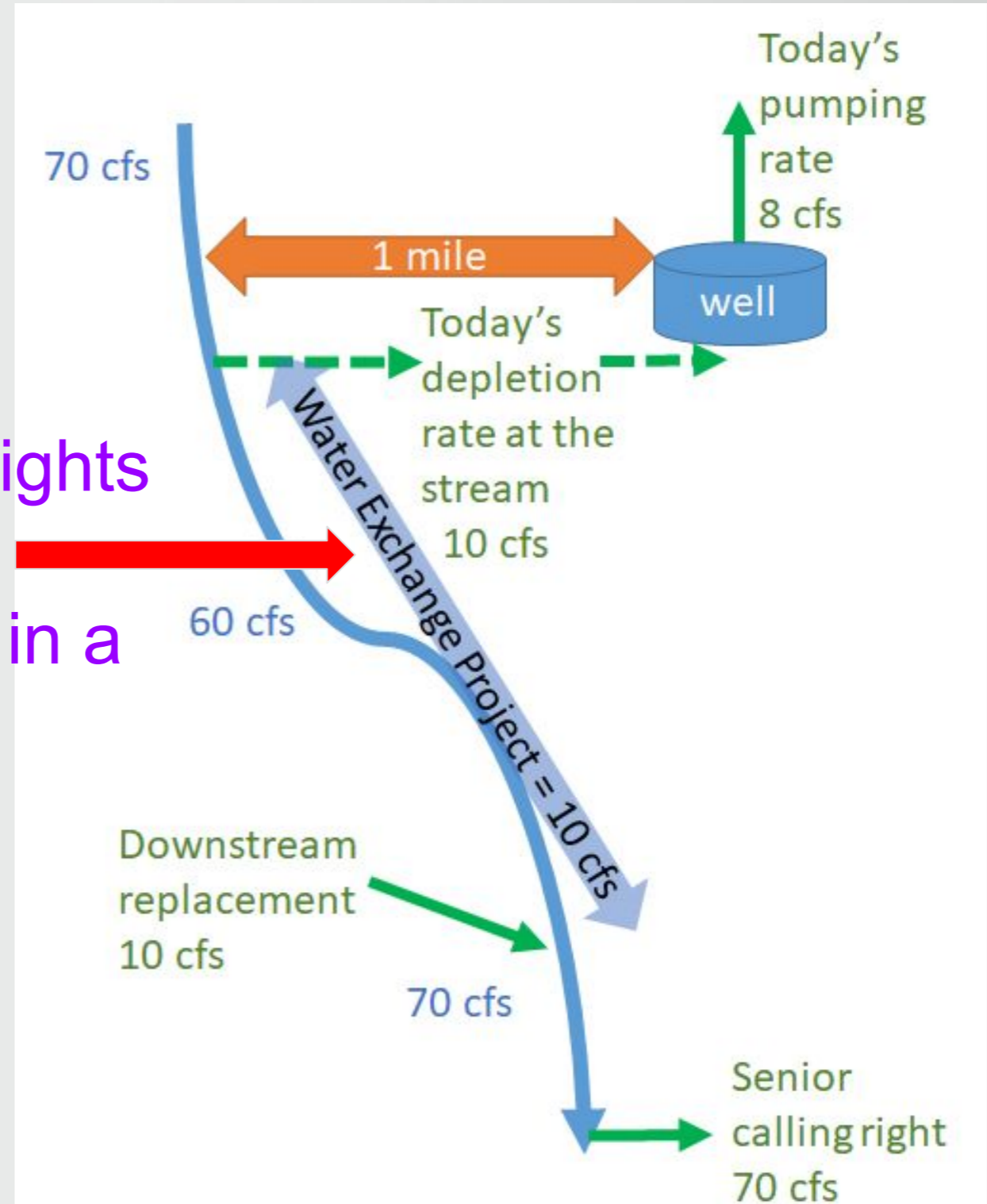


Exchange vs. Water Exchange Project Examples

Exchange



Water Exchange Project



Both water rights deplete streamflow in a reach

Exchanges may be administratively approved

Draft DWR memo:

1. Understanding of Water Exchange Projects

Water Exchange Project Terminology:

- Statutory term in 37-92-103(9) and 37-92-305(3)(a) = Water Exchange Project
- May include multiple different water rights claiming exchange potential within a plan for augmentation. For tabulation purposes, DWR suggests the term Exchange Project Right for each claim of exchange potential that would not qualify as an Exchange.

Draft DWR memo:

2. DWR's plans in near-term water court cases

Through 2021

- communicate and inform about the concept of Water Exchange Projects but do not initiate litigation
- gather feedback and suggestions

Draft DWR memo:

2. DWR's plans in near-term water court cases (planned through 2021)

a. Application includes a plan for augmentation

➤ Comment when a claim of exchange potential should be termed a Water Exchange Project within the plan for augmentation

- Do not litigate this position through 2021

Draft DWR memo:

2. DWR's plans in near-term water court cases (planned through 2021)

b. Application does not include a plan for augmentation

- Comment that the correct claim is a Water Exchange Project within a plan for augmentation
 - If the claim is similar to Tri-State (15CW3178) - exchange to upstream well depletions - litigate the need for an augmentation plan, if necessary
 - If not similar to Tri-State, stick to “communicate and inform” role

Draft DWR memo:

3. DWR's plans in water court in 2022

- Continue to communicate and inform
- Litigate if necessary to obtain appropriate decrees

Draft DWR memo:

4. Administration of Decrees

- Continue to administer existing decrees
- Do not seek to change existing decrees to conform to the new understanding of Water Exchange Projects in applications for:
 - diligence
 - changes of water rights
 - amendment proceedings involving previous decrees

Draft DWR memo:

4. Administration of Decrees

Plans for augmentation with downstream replacement and no exchange or Water Exchange Project

- a. existing and 2021 cases - continue to administer
(assume decree includes a finding of no injury)
- b. 2022 and later cases -
 - i. suggest either there should be an Exchange Project Right (or exchange if it qualifies) with a priority date,
 - ii. or, the plan for augmentation must have a way to curtail or provide upstream replacement for the no injury claim to be appropriate.

Draft DWR memo:

4. Administration of Decrees

- c. Existing decreed exchanges that do not qualify as a statutory exchange
 - continue to administer according to the terms of the decree.

- d. Use of previously-decreed accretions for non-decreed uses
 - according to procedures prescribed by law.
 - any use for replacement of an upstream diversion/depletion if not already decreed should be pursuant to a Water Exchange Project.

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