



Legal Overview

Augmentation Plan Statutes and Rules



COLORADO
Department of Natural Resources

Augmentation Plans

- Brief History
- Focus on the last twelve years
(recent events)
- Legal

Definitions

Definition

- Statutory definition of “Plan for augmentation:” (1969 Act)

“...increase the supply of water available for beneficial use...by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means...”¹

1. See Section 37-92-103(9), C.R.S.

Definition

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Definition

- Current discussion

Augmentation Plan is a plan to replace induced stream depletions using a substitute supply of water

Augmentation Plans

- **Actual objectives**
 - Statewide; replace stream depletions caused by well pumping,
 - Rio Grande basin; in addition to stream depletions, provide for aquifer sustainability.

Brief History

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- Administrative issue in the 1960's, but
- Need to consider early development in river basins
 - Surface water developed, often causing over-appropriation
 - Ground water developed pre-1930s through 1950s

Brief History

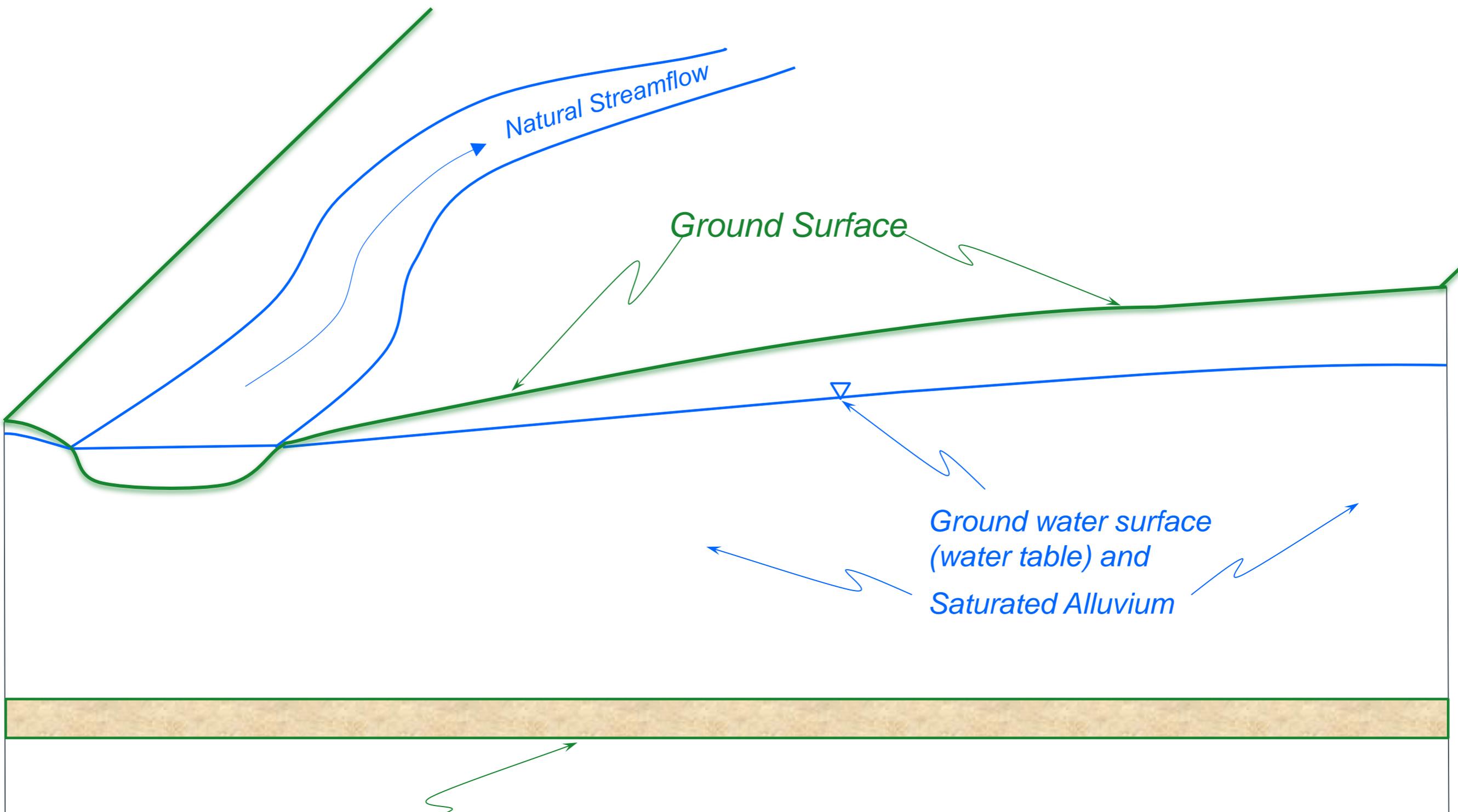
- Surface water/ground water
 - Early 1900's court recognition of ground water interaction with surface water,
 - 1929, and then 1951, Supreme Court stated clearly that all ground water was assumed to be tributary to natural streams absent proof to the contrary.

Brief History

- Surface water/ground water
 - In 1965 the Colorado General Assembly passed House Bill 1066 and enacted the Colorado Ground Water Management Act (“1965 Act”),
 - Gave the State Engineer the authority to evaluate the use of ground water and deny a well permit.

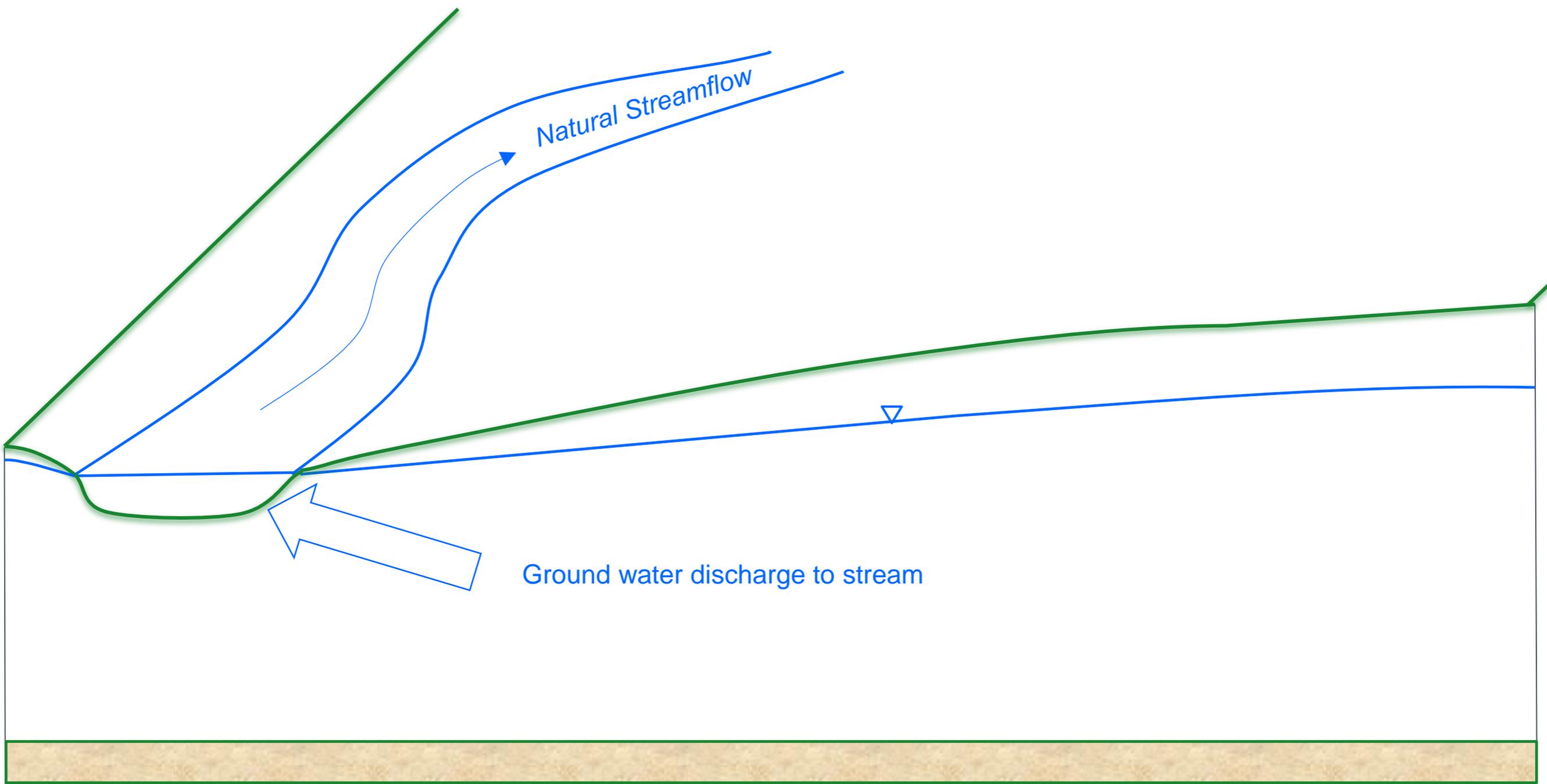
Brief History

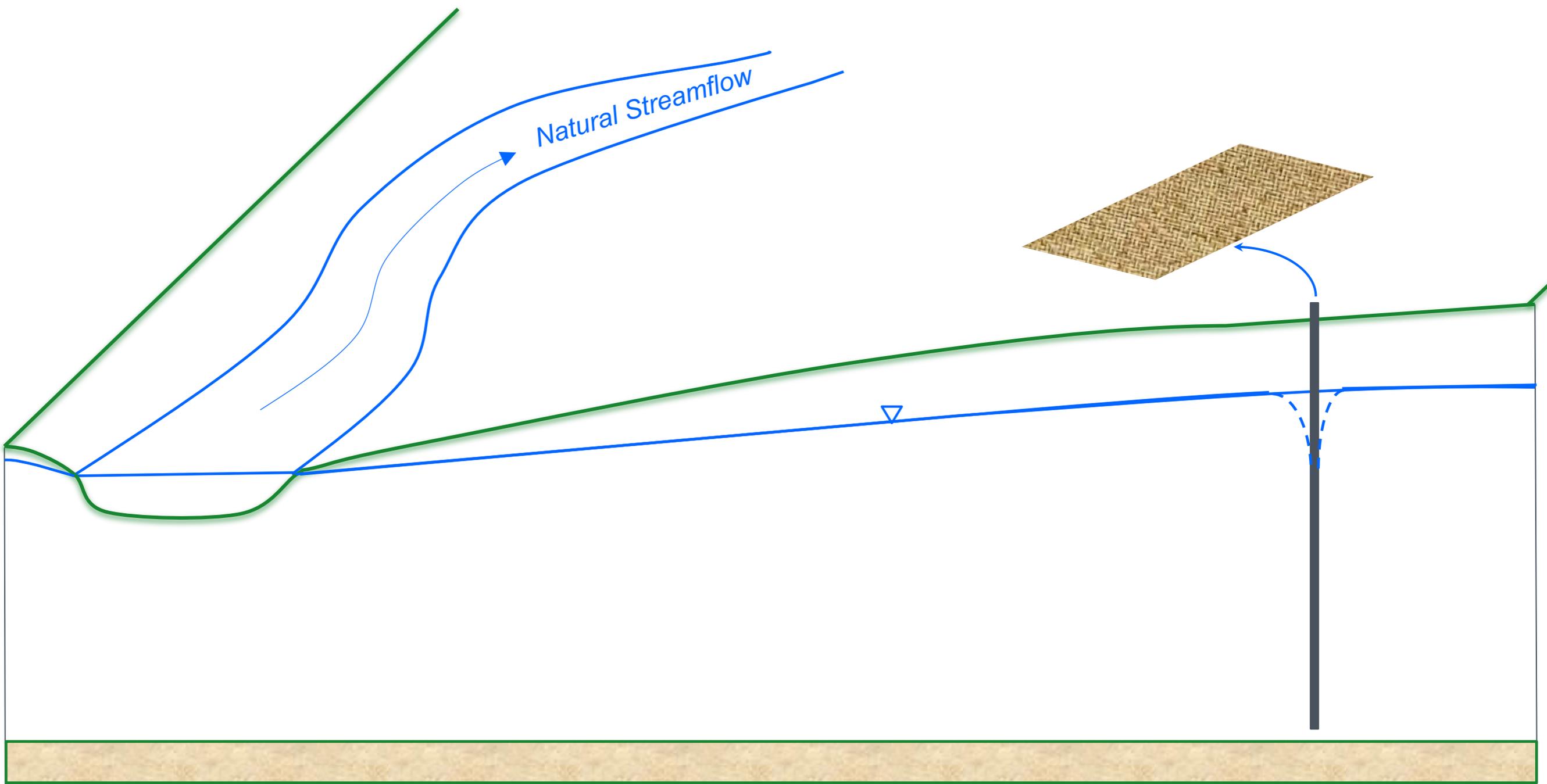
- Surface water/ground water
 - In 1969, the Colorado General Assembly enacted the Water Rights Determination and Administration Act (“1969 Act”),
 - Reinforced recognition of the connection between ground water and surface water,
 - Integrated ground water into the priority system - introduced the concept of plans for augmentation.

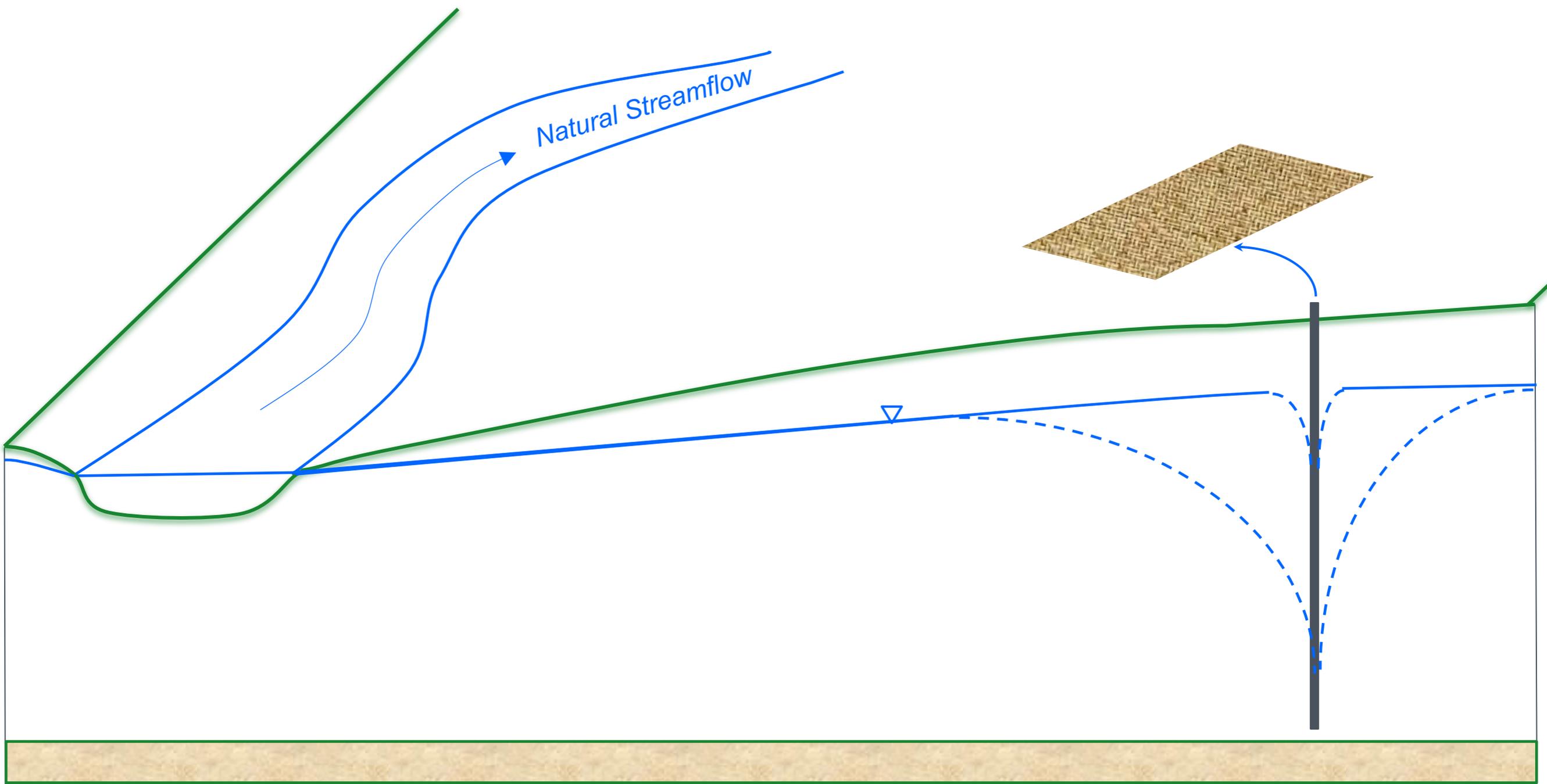


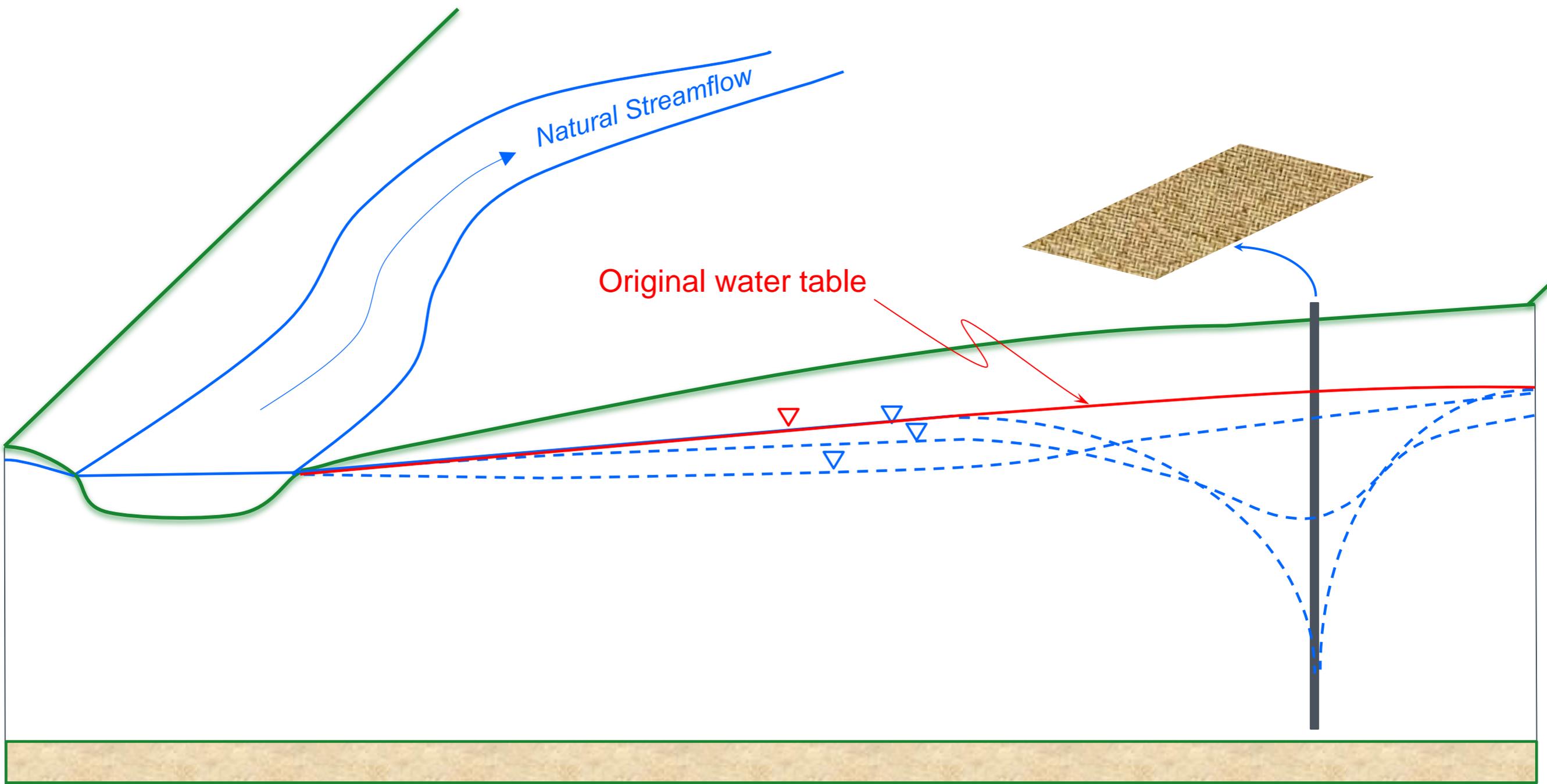
Cross section of alluvial ground water system

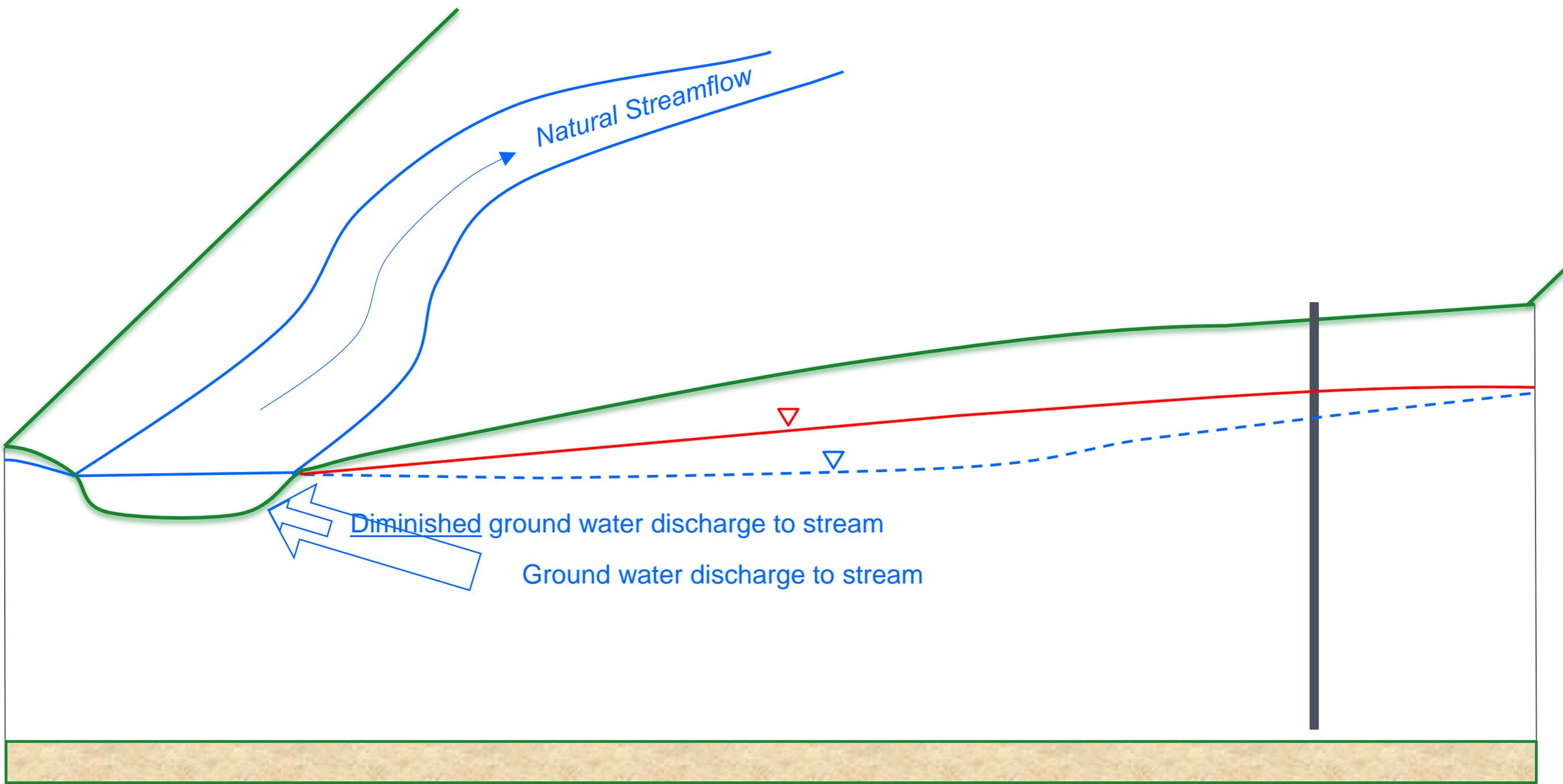
Confining Bedrock Layer











Understanding the delayed effect is critical!

Findings of Fact, Case Nos. W-7209, et al
(South Platte Rules), March 15, 1974

(Paragraph 11) “Because of the time lag between a ground water diversion and its impact on surface water users, conditions may arise such that a potential injury to surface diverts (sic) may not actually occur, but the burden of assuring that there will be no injury to the senior appropriator must fall on the junior appropriator.”

Brief History

- Court-approved plans for augmentation
 - Used to allow out of priority well pumping in river basins,
 - Rulemaking necessary first,
 - South Platte Rules (1974)
 - Arkansas Rules (1994)
 - Rio Grande Rules (Pending)

Brief History

- Court-approved plans for augmentation in the South Platte Basin
 - Since 1974,
 - Temporary plans approved by State Engineer.

Brief History

- Surface water/ground water
 - 1974, 1977;
 - In 1974, Senate Bill 7 authorized the State Engineer to approve temporary plans for augmentation,
 - In 1977, the provisions of Senate Bill 7 allowing this authority were repealed,
 - Important; State Engineer continued approvals under a different statute.

Recent Events

Recent Events

- 2001 - 2002 “perfect storm”
 - Empire Lodge Decision,
 - No temporary authority for State Engineer
 - Drought,
 - Change in climatic conditions resulted in change to “gentleman’s agreement.”

Recent Events

- Outcome of perfect storm
 - All plans for augmentation must be adjudicated by the water court
 - Exceptions: gravel pits and certain plans in the Arkansas (allowed by Arkansas Rules), HB02-1414
 - HB02-1414
 - Limited temporary approval authority for State Engineer (SWSPs)
 - “Year-round” call
 - Climatic conditions, end to gentleman’s agreement, Bijou v. Simpson

Legal Bases

Legal Bases

Replacement standards

- Replace out-of-priority depletions
 - Time,
 - Location,
 - Amount.

Legal Bases

- Ground water is presumed to be tributary to surface water (Supreme Court),
- Ground water must be administered in accordance with the prior appropriation system (Supreme Court),
- Ground water withdrawals presumed to deplete surface streams. If basin is over-appropriated, presumed to be injurious (Supreme Court),
- Basin-specific Rules (promulgated or water court-approved), ensure administration is not arbitrary,

Legal Bases

- State Engineer authority to approve temporary plans for augmentation (Section 37-92-308, C.R.S.);
 - Approve pending plans for augmentation, permanent operations (37-92-308(4)),
 - Approve short-term operations (37-92-308(5)),
 - Emergency need, public health and safety (37-92-308(7)).

Summary

- Colorado case law recognizes pumping impacts to surface water,
- Colorado case law and statutory law require that pumping impacts be replaced by substitute supplies through *plans for augmentation*,
- Impacts presumed to be injurious in over-appropriated basins (assume a senior call),
- May be approved temporarily by State Engineer (SWSP, 37-92-308), water court application nearly always required.