

2014 Arkansas River Basin Water Forum

Arkansas River Compact:
History, Litigation, and the
Subsequent Need for Rules

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History of the Arkansas River Compact

- Late 1800s: Most of the major irrigation systems in the Arkansas River valley were developed primarily in the 1880s
- 1901: Kansas sues Colorado in the United States Supreme Court
- 1907: Supreme Court decides the case on the merits, and declines to award any relief to Kansas

History of the Compact, cont.

- 1910-20s: Numerous suits filed by Kansas water users in federal district court against Colorado users
- 1928: Colorado sues Kansas, seeking an injunction against such suits.
- 1930: States agree to a storage project that would later become John Martin Reservoir. Fully funded in 1936, construction began in 1939, partial storage began in 1943, completed 1948

History of the Compact, cont.

- 1943: Supreme Court grants Colorado's request for an injunction against Kansas citizens' suits
- 1945: Congress authorizes states to negotiate a compact
- 1948: Compact completed and signed in December, ratified by both legislatures in 1949. *See* § 37-69-101, C.R.S. Congress approved the Compact on May 31, 1949. 63 Stat. 145.

Arkansas River Compact

- Article I: Purpose of the compact is to resolve existing and future disputes between CO and KS over the waters of the Arkansas and to “Equitably divide and apportion” those waters and “the benefits arising from . . . John Martin reservoir” between the two states
- Article III: Definition of “waters of the Arkansas River” excludes transmountain/imported water, and the Compact only addresses the waters of the Arkansas River (*see* Art. IV.A.)

Arkansas River Compact, cont.

- Article IV.D: “This compact is not intended to impede or prevent future beneficial development of the Arkansas river basin in Colorado and Kansas . . . Provided, that the waters of the Arkansas river . . . *shall not be materially depleted in usable quantity or availability* for use to the water users in Colorado and Kansas under this compact by such future development or construction.”

Kansas v. Colorado (1985)

- 3 claims: 1) Colorado's increase in well pumping since 1948 had caused a decline in stateline surface flows in violation of Art. IV.D.; 2) Colorado's Winter Water Storage Program at Pueblo Reservoir violates the Compact; 3) Colorado's failure to abide by the Trinidad Reservoir operating principles violates the Compact

Kansas v. Colorado (1995)

- Kansas wins on the 1st claim. Post-Compact wells, and improved/increased pumping by existing wells, all fall within Art. IV.D.'s prohibition against causing material depletions to usable stateline flows.
- Court holds that pre-compact pumping allowance for then-existing Colorado wells is 15,000 afy.

Kansas v. Colorado (2004)

- Approves use of 10 year rolling average for determination of depletions or credits to Kansas.
- Approves the use of Colorado water court as the initial venue for determination of replacement plan credits applied to Colorado's Compact obligations. Kansas can still seek relief in the Supreme Court if it believes it is injured by Colorado court determinations.

Fifth and Final Report of the Special Master (2008)

- Includes the final judgment and decree of the Special Master
- Incorporates the Use Rules in Appendix J.1
- Appendix A.3 treats post-1985 depletions (that is to say, depletions that post-date Kansas filing the lawsuit) differently than pre-1986 depletions.

Fifth and Final Report, cont.

- “Post-1985 Depletions shall be 100% replaced, with no reduction on the basis of usability, except as provided in Appendix J.2 of the Decree”
- Appendix J.2 exception: “Notwithstanding the foregoing, no Replacement shall be required for depletions caused by post-1985 water uses if John Martin Reservoir is spilling and Stateline water is passing Garden City, Kansas”

1996 Use Rules

- Promulgated under the State Engineer's Compact rule-making authority, § 37-80-104, C.R.S., which states "The state engineer shall make and enforce such regulations with respect to deliveries of water as will enable the state of Colorado to meet its compact commitments. In those cases where the compact is deficient in establishing standards for administration within Colorado to provide for meeting its terms, the state engineer shall make such regulations as will be legal and equitable to regulate distribution among the appropriators within Colorado obligated to curtail diversions to meet compact commitments"

Use Rules, cont.

- SEO determined that curtailment of post-compact well pumping and diversions of ground water by junior appropriators will increase usable stateline flow (and make additional water available to senior surface rights holders in CO).
- Thus, diversions of tributary ground water must be discontinued unless a plan is in place to replace out of priority depletions.
- Presumptive stream depletion factors (PDFs) for different types of water use are established

Use Rules, cont.

- Stream depletions must be replaced in **time, location, and amount**
- Use Rules provide a more cost-effective way for well users to replace depletions, by allowing use of Rule 14 plans approved through the SEO rather than augmentation plans approved through water court

Irrigation Improvement Rules

- As with the Use Rules, promulgated under the State Engineer's Compact rule-making authority, § 37-80-104, C.R.S.
- Art. IV.D. of the Compact says that water development post-Compact, including “improved or prolonged functioning of existing works”, cannot deplete usable stateline flow. SEO determined that Compact rules are necessary because the Compact does not establish standards for administration of surface water irrigation improvements to ensure compact compliance. Thus, prerequisites for rules under § 37-80-104 was met.

Irrigation Improvement Rules, cont.

- Special Master's first report (1994) examined Art. IV.D. and "found that it protects the usable flows of the river as of the time of the Compact (including return flows from existing irrigation uses) from material depletion caused by any increased consumptive use in Colorado."
- Court said that "Improved and increased pumping by existing wells clearly falls within Article IV-D's prohibition against 'improved or prolonged functioning of existing works,' if such action results in 'material depletions in usable' river flows."

Irrigation Improvement Rules, cont.

- Following that rationale, improvements to existing surface water irrigation systems also fits the phrase “improved or prolonged functioning of existing works”
- Early part of the 2000s saw a big rise in irrigation improvements like center pivot systems that increased the need for these rules
- ISAM (Irrigation System Analysis Model) developed to reduce costs to individual farmers. ISAM incorporates assumptions about a variety of variables and evaluates proposed improvements without requiring farmers to acquire an individualized engineering report

Irrigation Improvement Rules, cont.

- Rules only cover surface water systems because ground water systems already addressed through the Use Rules
- Rule 8 individual applications, can only involve the subject water right and no other water sources (if other water sources, it must be part of a Rule 10 plan)

Irrigation Improvement Rules, cont.

- Rule 10 allows a group of farmers to join in one application, and use other waters to maintain historical return flows
- Rule 11 general permits (for types of improvements that don't need to be evaluated individually because the SEO has determined that they won't cause a compact violation)

References Not Cited Earlier

- Use Rules (and associated info):
<http://water.state.co.us/groundwater/GWAdmin/UseAndMeasurement/ArkGWUseMeasRules/Pages/ArkansasRBRules.aspx>
- Irrigation Improvement Rules (and associated info):
<http://water.state.co.us/SurfaceWater/RulemakingAndAdvancing/ArkRiverAC/Pages/ArkSWIrrigImpRules.aspx>
- Special Master's Reports:
<http://www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx>
- Kansas v. Colorado cases: 185 U.S. 125 (1902); 206 U.S. 46 (1907); 320 U.S. 383 (1943); 514 U.S. 673 (1995); 543 U.S. 86 (2004); 556 U.S. 98 (2009)