

2017 Arkansas River Basin Roundtable

Arkansas River Compact:
Rules and Current Issues

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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 increased pumping by pre-Compact 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.

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.
- 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

1996 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.
- Special Master's first report (1994) determined 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 fit the phrase “improved or prolonged functioning of existing works,” potentially implicating Compact compliance
- Early part of the 2000s saw a big rise in irrigation improvements like center pivot systems
- 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)

Current Compact-Related Issues

- Water quality: Kansas has expressed concerns over the quality of surface and ground water in Kansas
- The Compact does NOT address water quality and Colorado has no Compact obligation to meet any water quality standards
- However, Colorado's willingness to take actions that help improve water quality in Kansas has had an effect on Kansas's willingness to negotiate other issues.

Current Compact-Related Issues, cont.

- New “Colorado” storage account in John Martin Reservoir
- Currently being studied by LAVWCD with funding from the CWCB
- A new account would require the approval of Kansas (through ARCA)

Current Compact-Related Issues, cont.

- A new Colorado account in John Martin Reservoir would, among other things, help some water users comply with the Irrigation Improvement Rules, which require maintenance of historical return flows
- The account would also aid water users seeking to convert from flood irrigation to sprinklers or drip irrigation
- Converting to these more efficient forms of irrigation has a beneficial effect on water quality, which might encourage Kansas to agree to the new account

Current Compact-Related Issues, cont.

- John Martin Reservoir permanent pool: Colorado Department of Parks and Wildlife is seeking to ensure that the permanent pool remains filled in times of drought
- CPW, LAWMA, DWR, and Kansas are currently in negotiations regarding a permanent water source for the permanent pool
- Kansas approval, through ARCA, is required

Kansas Approval Required?

- As noted previously, Colorado water court is still the venue for determination of water rights, including how those rights may apply to Colorado's Compact obligations, and Kansas must seek relief in the Supreme Court if it believes it is injured by Colorado court determinations
- However, the Compact and associated authorities, such as the John Martin Reservoir Operating Plan and various decisions of the Special Master, may restrict Colorado water uses in a variety of ways, and proving "no injury" to a Colorado water court may not be sufficient to circumvent those restrictions.
- Where Kansas approval is required, a water user may need to do more than simply prove no injury.

Current Compact-Related Issues, cont.

- Some examples that require Kansas approval have already been discussed, such as the approval of a new storage account in John Martin Reservoir and the approval of a source of water for the permanent pool
- Another example: no “rights now decreed to the ditches of Colorado water district 67” may be transferred upstream of John Martin Reservoir without ARCA making findings of fact that the transfer will not result in a material depletion to usable flow. Compact Art. V.H.

References

- 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/RulemakingAndAdvising/ArkRiverAC/Pages/ArkSWIrrigImpRules.aspx>
- Special Master's Reports:
<http://www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx>
- Kansas v. Colorado cases: 514 U.S. 673 (1995); 543 U.S. 86 (2004); 556 U.S. 98 (2009)