



DIVISION OF WATER RESOURCES

John W. Hickenlooper
Governor

Mike King
Executive Director

Dick Wolfe, P.E.
Director/State Engineer

State Engineer's Response to the Recent United States Supreme Court Decision about Irrigation Efficiency Improvements in Montana v. Wyoming

The recent United States Supreme Court opinion in Montana v. Wyoming (No. 137, Original) does not change my certainty that the recently-adopted Compact Rules Governing Improvements to Surface Water Irrigation Systems in the Arkansas River Basin in Colorado (aka "Irrigation Improvement Rules") in Water Division 2 are necessary to assure our continued compliance with the Arkansas River Compact.

I have been following the Montana v. Wyoming case with interest and will continue to do so as Montana's remaining claims against Wyoming are considered. On May 2, 2011, the Court rejected Montana's argument that the Yellowstone River Compact precludes its upstream neighbor, Wyoming, from allowing irrigation system efficiency improvements. The Court's 6-1 ruling in favor of Wyoming sprinkler irrigation development comes as no surprise to Colorado officials and does not change our analysis of the requirements of the Arkansas River Compact we hold with Kansas.

In short, Article IV-D of the Arkansas River Compact remains a "depletion compact," as previously decided by the Court in the Kansas v. Colorado litigation; the Court's recent decision that Article V(A) of the Yellowstone River Compact is not a "depletion compact" has no bearing on the basis for the Arkansas Irrigation Improvement Rules.

Article V(A) of the Yellowstone River Compact states that "appropriative rights to the beneficial uses of [water]... existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with ... the doctrine of appropriation." Interpreting Article V(A), the Court held that "Montana's allegation that Wyoming has breached Article V(A) of the Compact by allowing its pre-1950 water users to increase their irrigation efficiency [] fails to state a claim" because "the doctrine of appropriation in Wyoming and Montana allows appropriators to improve the efficiency of their irrigation systems, even to the detriment of downstream appropriators." It noted that Article V(A) gives the pre-compact rights in both states equal priority under the Compact, such that Montana's downstream pre-1950 users "cannot stop Wyoming's upstream pre-1950 users from fully exercising their water rights." The issue before the Court was whether Wyoming users' irrigation efficiency improvements were within their water rights, or an expansion of them.

Montana's primary argument was that prior appropriation law holds a water user to his consumptive use and does not allow efficiency improvements that increase consumption. The Supreme Court first acknowledged that "this area of law is far from clear," but went on to rule that "the best evidence we have shows that the doctrine of prior appropriation in Wyoming and Montana allows appropriators to improve the efficiency of their irrigation systems, even to the detriment of

Office of the State Engineer

1313 Sherman Street, Suite 818 • Denver, CO 80203 • Phone: 303-866-3581 • Fax: 303-866-3589

<http://water.state.co.us>

downstream appropriators.” The Court did not examine the Arkansas River Compact or Colorado state law.

I based the Irrigation Improvement Rules solely on the specific requirements of Article IV-D of the Arkansas River Compact, not on more general western states’ prior appropriation principles, so this recent holding does not affect the Arkansas River Compact or the rules in the Arkansas River basin.

In contrast to the Yellowstone River Compact, the Arkansas River Compact is a depletion compact - one that makes a “depletive allocation” between the states. Article IV-D of the Arkansas River Compact provides that “this Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas ..., which may involve construction of dams, reservoirs, and other works for the purpose of water utilization and control, as well as the improved or prolonged functioning of existing works: *Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability to the water users in Colorado and Kansas under this Compact by such future development or construction.*” In the Kansas v. Colorado litigation, Special Master Littleworth concluded that “the compact is intended to protect such usable flows from material depletion caused by any increased consumptive use, including the construction of new wells or increased levels of pumping from precompact wells.” In its 1995 opinion, the Court adopted the Special Master’s recommendations and held that wells are subject to the depletion limits of Article IV-D and that this includes the wells that were already in existence as of the date of the Arkansas River Compact, which are limited to their pre-compact pumping amounts. Because of this, the Supreme Court’s reasoning in Montana v. Wyoming doesn’t apply to the Division 2 Irrigation Improvement Rules because the Supreme Court has already found the Arkansas River Compact to be a depletion compact.

In enacting and approving the Irrigation Improvement Rules, my office and the water court have simply acknowledged the application of the Supreme Court’s ruling in Kansas v. Colorado to new circumstances – that, like wells, improved irrigation systems are subject to Article IV-D’s prohibition against material depletions of stateline flows. This is consistent with the Supreme Court’s controlling interpretation of this Compact.

As I stated during the public process as the Irrigation Improvement Rules were being developed, the State Engineer/DWR supports efforts to increase irrigation efficiency in the Arkansas River Basin in Colorado, but those improvements cannot violate Article IV-D of the Arkansas River Compact. Irrigation return flows from Colorado farms that were being used in Kansas in 1948 cannot now be consumed by improved irrigation practices in Colorado. With the Irrigation Improvement Rules in place, this office can provide the oversight necessary to allow Colorado water users to continue to improve the efficiency of surface water irrigation systems with confidence that they will be in compliance with the Compact.

Dated: May 16, 2011

By:



Dick Wolfe,
State Engineer/Director of DWR