

**Sept 10, May 12, 2009 Working Draft**

COMPACT RULES GOVERNING IMPROVEMENTS TO SURFACE WATER  
IRRIGATION SYSTEMS IN THE ARKANSAS RIVER BASIN IN COLORADO

ORDER OF THE STATE ENGINEER

BY THIS ORDER the State Engineer adopts the following rules and regulations to govern improvements to surface water irrigation systems in the Arkansas River Basin in Colorado to comply with Article IV-D of the Arkansas River Compact.

Rule 1. Title

The title of these Rules is "Compact Rules Governing Improvements to Surface Water Irrigation Systems in Arkansas River Basin in Colorado." The short title for these Rules is "Irrigation Improvement Rules," and they may be referred to herein collectively as the "Rules" or individually as a "Rule."

Rule 2. Authority

These Rules are promulgated pursuant to the authority granted the State Engineer in § 37-80-102(1)(a), § 37-80-104, and § 37-92-501, C.R.S., to ensure compliance with the terms of the Arkansas River Compact, 63 Stat. 145; § 37-69-101, *et seq.*, C.R.S. (Compact).

Rule 3. Purpose

- A. The purpose of these Rules is to ensure that improvements to surface water irrigation systems in the Arkansas River Basin in Colorado comply with Article IV-D of the Compact.
- B. These Rules have as their objective the optimum use of waters of the Arkansas River in a manner consistent with preservation of the priority system of water rights while ensuring that the State of Colorado complies with the terms of the Compact.

Rule 4. Scope and Exceptions

- A. On or after the effective date of these Rules, water users must file an application and obtain approval from the Division Engineer before making an improvement to a surface water irrigation system. In addition, water users with a surface water sprinkler or surface water drip system installed on or after October 1, 1999, within the H-I Model Domain must file an application and obtain approval from the Division Engineer in order to continue using that sprinkler or drip system.

- B. These Rules apply throughout the drainage basin of the Arkansas River in Colorado.
- C. These Rules apply to any person or entity using, claiming, or in any manner asserting any right to use waters of the Arkansas River, as defined in Article III of the Compact, which includes its tributaries, under the authority of the State of Colorado in whole or in part for irrigation or for the replacement of depletions caused by ground water diversions, except as provided in paragraph D, E and F of this Rule.
- D. These Rules do not apply to diversions of ground water or to structures, facilities, equipment, or works used exclusively for the diversion, conveyance, or application of ground water.
- E. These Rules do not apply to surface water irrigation systems that serve less than one acre.
- F. These Rules apply to improvements to surface water irrigation systems within the Trinidad Dam and Reservoir Project, except that they do not apply to: (1) increases in off-farm transportation efficiency derived from improved facilities that are considered in the allocation of District Water Supply under the Operating Principles - Trinidad Dam and Reservoir Project (“Operating Principles”) and the Purgatoire River Water Conservancy District Operating Criteria (“Operating Criteria”) or (2) any improvement that becomes expressly approved after the effective date of these Rules by duly-authorized amendment of the Operating Principles.

Rule 5. Definitions

A. As used in these Rules:

1. “Designated Agent” means a person or entity who is authorized by the owner or user of a surface water irrigation system to file an application or otherwise comply with these Rules.
2. “Division Engineer” means the Division Engineer for Water Division 2.
3. “H-I Model” means the Hydrologic-Institutional Model that is used to determine Compact compliance in accordance with the judgment and decree in *Kansas v. Colorado*, No. 105, Original, United States Supreme Court (Decree), as described in Appendix C.1 to the Decree, which includes the model documentation. The term “H-I Model” also includes any future updates and revisions to said model under the terms of the Decree.

4. “H-I Model Domain” means the geographic area in which the hydrologic and institutional processes simulated in the H-I Model occur, as shown on the attached map.

5. “Historical seepage losses or return flows” means the seepage losses and return flows that would occur from use of a surface water irrigation system in the absence of an improvement to the surface water irrigation system.

6. “Improvement to a surface water irrigation system” or “Improvement” means the following man-made changes to a surface water irrigation system: lining of canals and off-farm laterals; installation of pipelines to replace off-farm earthen ditches or laterals; application of chemicals to reduce canal or off-farm lateral losses; installation of head stabilization ponds and tailwater recovery pits, including those that facilitate reuse of surface water; installation of sprinkler systems, drip systems, or other irrigation technologies to replace flood and furrow irrigation methods; replacement of side-roll irrigation systems with center-pivot irrigation systems; ~~and~~ replacement of impact sprinklers with spray nozzles; and adding surface water as an additional or exclusive source of supply to a sprinkler or drip system that was installed prior to October 1, 1999 but that only applied ground water prior to the effective date of these Rules.

Other man-made changes, including but not limited to the following, are not considered an “improvement to a surface water irrigation system” under these Rules: lining of on-farm ditches and laterals, installation of on-farm underground pipe or gated pipe; crop selection; crop rotation; changes to plant population; irrigation scheduling; cultivation; application of fertilizers; and general maintenance activities, such as the control or eradication of vegetation; dredging of canals, ditches, laterals and reservoirs; repair or replacement of deteriorated pipe; repair or replacement of existing lining of canals or laterals; sluicing operations to remove sediment from canals; and similar practices.

7. “Irrigation” means the application of waters of the State in excess of natural precipitation to grow crops or other plant life for production of food, forage, or other uses, including revegetation and sod production but not including lawn irrigation.

8. “Irrigation System Analysis Model (ISAM)” means the peer-reviewed computer programs developed by the Division Engineer’s Office to compare monthly water budgets of surface water irrigation systems with and without an improvement in order to evaluate the impacts of an improvement to a surface water irrigation system located within the H-I Model Domain. For surface water irrigation systems that are represented in the H-I Model, the ISAM incorporates the assumptions on canal and lateral losses, tailwater

runoff, secondary evapotranspiration losses, soil moisture accounting, and irrigation efficiencies and the data on irrigated acreage, potential crop evapotranspiration, and effective precipitation used for those systems in the H-I Model. For surface water irrigation systems within the H-I Model Domain that are not represented in the H-I Model, the ISAM uses assumptions and data for similar systems that are represented in the H-I Model.

The ISAM may incorporate or be used in conjunction with the unit response functions that were developed by the State and Division Engineers under Rule 8 of the Amended Rules and Regulations Governing the Diversion of Tributary Ground Water in the Arkansas River Basin, Colorado (“Use Rules”), to determine the timing and location of seepage losses and return flows. The ISAM may also incorporate or be used in conjunction with other peer-reviewed models or methods to determine the timing and location of seepage losses and return flows that are based upon sufficient and reliable engineering and/or scientific information, including the Ground Water Accounting Model used by the State and Division Engineers under the Use Rules and the Analytical Stream Depletion Model as described in the Ground Water Software Publication No. 1, Office of the State Engineer, Colorado Division of Water Resources, dated September, 1987 authored by Dewayne R. Schroeder. In these Rules, the term “ISAM” includes such unit response functions and such other peer-reviewed models or methods.

9. “Notification List” means the electronic contact information submitted by those persons who request notification of decisions or proceedings under these Rules.

10. “Off-farm” means those ditches, laterals, and pipelines that are not “on-farm.”

11. “On-farm” means those ditches, laterals, and pipelines that are used to transport irrigation water within or along the borders of irrigated fields. On-farm ditches and laterals do not include the main canal that conveys water from the decreed source to farm turnouts on the main canal or ditches and laterals that serve more than one water user.

12. “Subject water right” means the water right or rights, including shares in a mutual ditch or reservoir company, used with a surface water irrigation system to which an improvement has been made or is proposed. “Subject water right” includes the portion of a water right or water rights that a water user is entitled to use by contract or as the beneficial owner.

13. “Surface water irrigation system” means any and all structures, facilities, equipment, or works used to receive, deliver, control, apply, or return surface water for irrigation, including, but not limited to: dams;

diversion works; canals; off-farm laterals; reservoirs; and farm-scale irrigation application facilities, such as sprinkler systems, drip systems, and head stabilization ponds. "Surface water irrigation system" includes systems that also receive ground water in addition to surface water and systems that receive, deliver, control, or return surface water for the purpose of replacing depletions caused by diversions of tributary ground water.

- B. Any term used in these Rules that is defined in Articles 69, 80, and 92 of Title 37, C.R.S., shall have the same meaning given therein unless the context requires otherwise.

#### Rule 6. Principles and Findings

- A. Article IV-D of the Compact states as follows: "This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoirs and other works for the purposes 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 for use to the water users in Colorado and Kansas under this Compact by such future development or construction."
- B. Article VII-A of the Compact states as follows: "Each State shall be subject to the terms of this Compact. Where the name of the State or the term 'State' is used in this Compact these shall be construed to include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas River under the authority of that State."
- C. The State Engineer is responsible for discharging the obligations of the State of Colorado imposed by the Compact.
- D. Future beneficial development of the Arkansas River basin within the meaning of Article IV-D of the Compact includes improvements to surface water irrigation systems within the scope of these Rules. In making this finding, the State Engineer has been guided by the terms of the Compact and the decisions of the United States Supreme Court and its Special Master interpreting the Compact. See, e.g., *Kansas v. Colorado* (No. 105 Original), 514 U.S. 673 (1995); 533 U.S. 1 (2001); 543 U.S. 86 (2004); First Report (1994); Second Report (1997); Third Report (2000); Fourth Report (2003); and Fifth and Final Report (2008).
- E. Improvements to surface water irrigation systems within the scope of these Rules can materially deplete the waters of the Arkansas River in usable quantity or availability for use to the water users in Colorado and Kansas in

violation of Article IV-D of the Compact by increasing beneficial consumptive use and reducing historical seepage losses or return flows to the Arkansas River.

- F. The Compact is deficient in establishing standards for administration within Colorado to provide for meeting its terms with respect to improvements to surface water irrigation systems and these Rules are necessary to ensure that the State of Colorado meets its Compact obligations.
- G. Compact Compliance Plans under these Rules do not authorize out-of-priority use of water and do not authorize replacement of depletions caused by out-of-priority use of water. See Simpson v. Bijou, 69 P.3d 50 (2003); § 37-92-308, C.R.S.
- H. In adopting these Rules, the State Engineer has been guided by the recognition that the Arkansas River Basin is a separate entity (§ 37-92-501(2)(a), C.R.S.); that the purpose of the Compact was to equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their control, conservation, and utilization for irrigation and other beneficial purposes (Article I-A); that the Compact deals only with the waters of the Arkansas River as defined in Article III of the Compact (Article IV-A); and that the Compact establishes no general principle or precedent with respect to any other interstate stream (Article VII-B).

Rule 7. Requirement for Division Engineer Approval of Improvements to Surface Water Irrigation Systems

- A. On or after the effective date of these Rules, no improvement to a surface water irrigation system within the scope of these Rules shall be made unless the user makes an application in writing to the Division Engineer in accordance with Rule 8 or Rule 10 of these Rules for approval of the improvement and receives written approval from the Division Engineer allowing the improvement, except that improvements authorized by a general permit under Rule 11 only require written notice pursuant to the terms of the general permit, rather than an application.
- B. On or after the effective date of these Rules, any person who wants to continue using a sprinkler or drip irrigation system to apply surface water within the H-I Model Domain that was installed on or after October 1, 1999, but before the effective date of these Rules, must file an application in writing to the Division Engineer in accordance with Rule 8 or Rule 10 of these Rules for approval of the sprinkler or drip irrigation system and must receive written approval from the Division Engineer allowing the use of the sprinkler or drip irrigation system in accordance with these Rules. Ninety days after the effective date of these Rules, no sprinkler or drip irrigation system that is used to apply surface water within the H-I Model Domain and was installed on or after October 1, 1999, but

before the effective date of these Rules, shall be used unless the owner or user has received written approval from the Division Engineer allowing the use of the sprinkler or drip irrigation system in accordance with these Rules.

- C. In the event written approval of an improvement to a surface water irrigation system has not been given by the Division Engineer in accordance with a Rule 8 application~~7.A, 7.B,~~ or a Rule 10 Compact Compliance Plan and is not permitted under a general permit~~General Permit~~ as provided in Rule 11 below, or if the Applicant is out of compliance with the terms and conditions of a written approval, the State or Division Engineer shall order the total or partial discontinuance of any diversion or use of the subject water right (but only to the extent that the water being diverted is used in connection with such improvement) or take other appropriate action authorized by law to prevent a violation of Article IV-D of the Compact. If the subject water right is based on contract or shares in a ditch or reservoir company, any such order will be issued to the person or entity responsible for the improvement.

Rule 8. Application Contents, Notice and Comment Period, and Timeline for Review

- A. An application for approval of an improvement ~~under Rule 7~~ shall be in an electronic form to be prescribed by the State Engineer. The application shall describe the surface water irrigation system and the improvement in sufficient detail to allow the Division Engineer to evaluate the effect of the improvement and shall be signed by the owner or user of the surface water irrigation system or his or her Designated Agent. The Division Engineer prefers that the applicant submit the form and any exhibits electronically. An applicant is not required to submit an engineering report with an application, but the applicant may submit any relevant information, including a report from a licensed professional engineer or other qualified expert, information pertinent to the leaching requirement to prevent soil salinity from reaching harmful levels for land irrigated by the improvement, or information from the manufacturer, distributor, or installer describing the improvement and its effect on consumptive use of water or seepage losses and return flows. The application may also propose terms and conditions to be imposed on the use of the improvement or the use of the subject water right that will prevent a violation of Article IV-D of the Compact.
- B. As soon as practicable after the application is filed, the Division Engineer shall send a copy of the application and any exhibits, or information on where they are available to be reviewed, to all persons on the ~~Division Engineer's~~ Notification List. Anyone may join the Notification List by submitting an email address to the Division Engineer's Office. The Division Engineer will consider comments on pending applications if they are received within 30 days after the application is sent to persons on the Notification List. The Division Engineer will also inform those on the Notification List of any hearing on an application

and of any decision approving or denying an application or Compact Compliance Plan.

- C. Within ninety (90) calendar days of the receipt of an application, the Division Engineer will provide the applicant or his or her designated agent with a written decision that may be in the form of approval, denial, or approval with terms and conditions. If the Division Engineer requires additional information from the applicant to evaluate the improvement, the Division Engineer shall notify the applicant, and the applicant shall have up to 90 calendar days from the date of the notification to provide the additional information and the time for the Division Engineer to provide the applicant with a written decision shall be extended for 90 calendar days from the date of the receipt of the additional information.
- D. In making the determinations necessary to approve or deny an application, the Division Engineer shall not be required to hold or conduct a hearing, but the Division Engineer may hold or conduct a hearing if he determines a hearing is necessary or useful to make any such determination. All hearing procedures will be guided by the State Engineer's Procedural Regulations for adjudicatory procedures (2 CCR 402-5, Section 1.1.4), where applicable.

Rule 9. Standards for Division Engineer Review of Applications

- A. If the Division Engineer determines that an improvement will not materially deplete the waters of the Arkansas River in violation of Article IV-D of the Compact, he shall approve the application and allow the improvement. If the Division Engineer determines that an improvement will materially deplete the waters of the Arkansas River in violation of Article IV-D of the Compact, he shall deny the application and disallow the improvement unless terms and conditions can be imposed under Rule 9(C) below that will prevent such material depletion or the improvement is included in a Compact Compliance Plan approved by the Division Engineer in accordance with Rule 10 below. Once an improvement has been approved, no further application shall be required unless the Division Engineer revokes the approval for violation of a term and condition of the approval.
- B. To determine whether an improvement will materially deplete the waters of the Arkansas River in violation of Article IV-D of the Compact, the Division Engineer shall determine whether the improvement will increase consumptive use or will reduce the amount or change the timing or location of historical seepage losses and return flows from waters of the Arkansas River diverted, conveyed, stored, applied, or returned by the surface water irrigation system. The Division Engineer shall consider any relevant data or information submitted with the application, and may consider any change in water savings that would result from elimination of non-beneficial consumptive use that would result from the due to an improvement to the surface water irrigation system, to the extent



permitted by ~~law, law, and shall consider any relevant data or information submitted with the application.~~

- i. For surface water irrigation systems located within the H-I Model Domain, the Division Engineer shall use the ISAM for these determinations.
  - a. There shall be a rebuttable presumption that the version of the ISAM in use at the time an application is filed accurately determines whether an improvement will increase consumptive use or will reduce the amount of historical seepage losses and return flows. However, the Division Engineer shall consider any farm-specific data or engineering analysis submitted by the applicant that varies from assumptions or data used in the ISAM and shall incorporate such data or engineering analysis if appropriate.
  - b. The initial version of ISAM and its documentation shall be filed in the water court action concerning promulgation of these Rules. The Division Engineer shall update or revise the ISAM as appropriate to incorporate applicable changes to the H-I Model that have been approved in accordance with Section V of Appendix B to the Decree in *Kansas v. Colorado* and to incorporate new or updated data and/or engineering information for assumptions and data that are not derived from the H-I Model. Such update or revision shall be based on sufficient and reliable engineering and/or scientific information. The Division Engineer shall notify interested parties of any significant proposed changes to the ISAM through the Notification List and the DWR website. The Division Engineer shall make available electronic copies of the ISAM and associated data upon request, and shall allow reasonable time for peer review and responsive comments before using the updated or revised ISAM, unless it would be unreasonable not to use the updated or revised ISAM, e.g., where the updated or revised ISAM corrects an arithmetic error.
- ii. For surface water irrigation systems located outside the H-I Model Domain, the Division Engineer shall develop appropriate models or methods for these determinations. Said model or method shall be similar to the ISAM, but shall use data and information appropriate to the hydrologic and institutional circumstances of the surface water irrigation systems to be evaluated, based upon sufficient and reliable engineering and/or scientific information.
  - a. For surface water irrigation systems located outside the H-I Model Domain, there shall not be a rebuttable presumption that the version of the model or method in use at the time an application is filed accurately determines whether an improvement will increase consumptive use or will reduce the amount or change the timing or

location of historical seepage losses and return flows unless the State Engineer files a request with the district court for Water Division 2 to establish such a rebuttable presumption, notice is given to interested persons, and the rebuttable presumption is established by order of the Court.

- b. The Division Engineer shall update or revise such model or method as appropriate to incorporate new or updated data and/or information. Such update or revision shall be based on sufficient and reliable engineering and/or scientific information. The Division Engineer shall notify interested persons of any significant update or revision to such model or method through the Notification List and the DWR website. The Division Engineer shall make available electronic copies and associated data upon request, and shall allow reasonable time for peer review and responsive comments before using a new, updated or revised model or method, unless it would be unreasonable not to use the new, updated or revised model or method, e.g., where the updated or revised model or method corrects an arithmetic error.
- C. The Division Engineer may approve an application and allow an improvement that would otherwise violate Article IV-D of the Compact if the Division Engineer determines that terms and conditions can be imposed on the use of the improvement or the use of the subject water right that will prevent a violation of Article IV-D of the Compact. Such terms and conditions may include a limitation on the use of the subject water right, including a limitation on the time, place, or method of use of the subject water right or the surface water irrigation system; a requirement to install, maintain and verify appropriate measuring devices; a requirement to periodically record and report measurements to the Division Engineer; a requirement for a periodic accounting; or such other terms and conditions as may be necessary to maintain historical seepage losses and return flows, such as discontinuing the irrigation of historically irrigated land. If delayed effects on historical seepage losses or return flows from an improvement are projected, the Division Engineer's approval shall specify the time period for which such terms and conditions must remain in effect to offset such effects in the event the applicant discontinues use of the improvement. The Division Engineer may adjust the terms and conditions of a Rule ~~87~~ approval within the first three years after approval, after which time the terms and conditions on applications approved without a Compact Compliance Plan may be modified only as necessary to comply with a final court order.
- D. In determining whether an improvement will cause a material depletion of Stateline flow under Article IV-D of the Compact, no reduction for usability shall be applied; provided, that no person or entity subject to these Rules shall be required to maintain historical seepage losses or return flows at the Statestate line if John Martin Reservoir is spilling and Statelinestateline water is passing

Garden City, Kansas. See 2 Fifth and Final Report of the Special Master, *Kansas v. Colorado*, No. 105, Orig., U.S. Sup. Ct., Appendix J.2, at J.26.

#### Rule 10. Compact Compliance Plans

- A. In lieu of filing an application under Rule ~~8.7~~, any person subject to these Rules or an entity acting on behalf of such person or a group of such persons may submit a proposed Compact Compliance Plan (Plan) for review by the Division Engineer to prevent a violation of Article IV-D of the Compact from an improvement or group of improvements subject to Rule 7(A) or 7(B). The proposed Plan must specifically describe all improvements it is intended to cover. A copy of the form required by Rule 8.A, signed by the owner or user of the surface water irrigation system or his or her Designated Agent, must be maintained on file by the filing entity for each improvement to be covered under a proposed Plan and shall be available for inspection by the Division Engineer. The proposed Plan shall be in an electronic form. The Division Engineer shall send a copy of the proposed Plan and exhibits, or information on where they are available to be reviewed, to all persons on the ~~Division Engineer's~~ Notification List.
- B. A Compact Compliance Plan may include use of water other than the subject water right to prevent a violation of Article IV-D of the Compact if the other water is imported water or other fully consumable water pursuant to the decree controlling the use of said water. However, if a proposed Compact Compliance Plan requires a change of water right or plan for augmentation, the Division Engineer will deny the application and direct the applicant to file an application for approval of a change of water right or plan for augmentation in accordance with § 37-92-302, C.R.S. If this occurs, the applicant must cease use of the improvement to the surface water irrigation system until an application has been approved under Rule ~~87~~ above, a substitute water supply plan has been duly approved under section 37-92-308, C.R.S., or the water judge has entered a decree approving a change of water right or plan for augmentation allowing the use of the surface water improvement.
- C. Within ninety (90) calendar days of the receipt of a proposed Compact Compliance Plan, the Division Engineer will provide the Plan applicant with a written decision that may be in the form of approval, denial, or approval with terms and conditions. If the Division Engineer requires additional information from the Plan applicant to evaluate the Compact Compliance Plan, the Division Engineer shall notify the applicant, and the applicant shall have up to 90 calendar days from the date of the notification to provide the additional information and the time for the Division Engineer to provide the Plan applicant with a written decision shall be extended for 90 calendar days from the date of the receipt of the additional information.

- D. If the Division Engineer determines that a proposed Compact Compliance Plan will prevent a violation of Article IV-D of the Compact from the improvement(s), he shall approve the Plan and allow the improvement(s). If the Division Engineer determines that a proposed Compact Compliance Plan will not prevent a violation of Article IV-D of the Compact from the improvement(s), he shall deny the Plan and disallow the improvement(s) unless terms and conditions, including but not limited to those described in Rule 9(C), can be imposed that will prevent such violation.
- E. Compact Compliance Plans shall require annual review and approval unless the Division Engineer determines that a longer period of approval is warranted, such as where the applicant owns or has a long-term right to use the source of water and controls or has a long-term right to use any storage space necessary to prevent a violation of Article IV-D of the Compact.
- F. Compact Compliance Plans approved by the Division Engineer shall require an annual accounting to the Division Engineer of the actual operations under the Plan during the prior year, including the change in historical seepage losses and return flows by month from each improvement covered under the Plan and the amount, time, and location of all water provided under the Plan to maintain historical seepage losses and return flows, as well as the projected monthly operations under the Plan for the upcoming year. The Division Engineer shall determine an appropriate "plan year" or 12 month period for operation under each approved Plan, and may grant temporary approval at the beginning of the plan year to allow verification of projected water availability or other assumptions in the plan. Improvements may be added and deleted from the Plan at any time by submitting a request for amendment of the Plan and receiving Division Engineer approval of the amendment.

Rule 11. General Permits

- A. The State Engineer may issue general permits to approve any type or category of improvements, including improvements in specific locations of the Arkansas River Basin, that the State Engineer determines will not materially deplete the waters of the Arkansas River in violation of Article IV-D of the Compact. The State Engineer has determined that the general permits attached to these Rules will be issued with the adoption of these Rules.
- B. The State Engineer may modify or revoke a general permit, in whole or in part, if the State Engineer determines, based upon sufficient and reliable engineering and/or scientific information, that the continued use of improvements authorized under the general permit will materially deplete the waters of the Arkansas River in violation of Article IV-D of the Compact without compliance with these Rules. However, no person or entity that made an improvement in reliance on a general permit shall be required to submit an application pursuant to these Rules for that improvement unless these Rules are amended to require such an

application or as necessary to comply with an order of the United States Supreme Court.

- C. The State Engineer shall provide advance notice and opportunity to comment on any proposed of the issuance, revocation, or modification of any general permit via the Notification List, and shall provide notice of any new, revoked or modified permit to the water clerk for Water Division 2, so that such notice shall be included in the resume prepared by the water clerk and shall be included in the copy of the resume posted on the water court's web site prior to its effective date.

Rule 12. Effect Of An Evaluation Under The Rules On A Determination Of The Historical Consumptive Use Of The Subject Water Right

- A. An evaluation of an improvement to a surface water irrigation system under these Rules to determine whether an improvement will materially deplete the waters of the Arkansas River in violation of Article IV-D of the Compact is not intended to be an evaluation of the historical consumptive use or return flows of the subject water right for the purpose of changing the subject water right.
- B. The Division Engineer's evaluation of an improvement to a surface water system pursuant to these Rules shall have no precedential effect in any proceeding to change the subject water right, including use of the subject water right in an exchange or plan for augmentation.

Rule 13. Process to Appeal a Decision Under These Rules

- A. Administrative review of decisions by the State and Division Engineers under these Rules shall be available if timely requested as provided below. Such review shall be guided by the adjudicatory procedures and reconsideration procedures set out in Rule 1.1.4 and 1.1.6 (A) of the State Engineer's Procedural Regulations (2 CCR 402-5) ("Procedural Regulations").
- B. If the Division Engineer denies an application or approves the application with terms and conditions, the applicant or any person adversely affected or aggrieved by the decision may appeal the Division Engineer's decision to the State Engineer within 30 days after the Division Engineer issues the decision. If the Division Engineer has not held a hearing on the application, the applicant or any person adversely affected or aggrieved by the decision may file a request for an adjudicatory hearing under the Procedural Regulations. The State Engineer may refer the matter to a Hearing Officer. If the Division Engineer has already held a hearing on the Application, the applicant or any person adversely affected or aggrieved by the decision may file a request for rehearing or reconsideration under the Procedural Regulations.

- C. If the State Engineer issues, revokes or modifies a general permit, any person adversely affected or aggrieved by the decision may file a request for an adjudicatory hearing under the State Engineer's Procedural Regulations, provided the request is filed by the end of the month following the month in which the notice of the issuance, revocation or modification of the general permit is included in the copy of the resume posted on the water court's web site. The State Engineer may refer the matter to a Hearing Officer.
- D. If the Division Engineer updates or revises a model or method as provided in Rule 9.B.i.b. or 9.b.ii.b., any person adversely affected or aggrieved by the update or revision may appeal to the State Engineer by filing a request for an adjudicatory hearing under the State Engineer's Procedural Regulations within 90 days after the update or revision is provided to those on the Notification List. The State Engineer may refer the matter to a Hearing Officer.
- E. The intent of Rule 13 is to provide a timelier and less expensive alternative to an applicant or person adversely affected or aggrieved by a decision of the Division Engineer or the State Engineer. Nothing herein is intended to preclude de novo review by the water judge of a decision by the Division Engineer or the State Engineer under these Rules.

#### Rule 14. Effect of Rules

Improvements to a surface water irrigation system subject to these Rules are not exempt from the requirements of any other lawful Rules or statutes governing the use of waters of the Statestate in Water Division 2, whether now existing or hereafter adopted.

#### Rule 15. Variance

When the strict application of any provisions of these Rules would cause unusual hardship, the Division Engineer may grant a variance. No variance shall waive the requirement for Division Engineer substantive evaluation and approval of an improvement to a surface water irrigation system according to the standards set by these Rules. Any request for a variance shall be made in writing and shall state the basis for the requested variance. If the Division Engineer finds that the request is justifiable, the Division Engineer may issue a written order granting the variance and setting forth the terms and conditions on which the variance is granted.

#### Rule 16. Severability

If any Rule or part thereof is found to be invalid by a court of law, the remaining Rules shall remain in full force and effect, including any part thereof not found to be invalid.

#### Rule 17. Effective Date

These Rules shall take effect January 1, 2011, or sixty calendar days after publication in accordance with § 37-92-501(2)(g), C.R.S., whichever is later, and shall thereafter remain in effect until amended as provided by law. In the event that protests are filed with respect to these Rules in the time frame set by § 37-92-501(3), C.R.S., the effective date of such Rules shall be stayed until such protests are judicially resolved pursuant to the procedures set forth in § 37-92-304, C.R.S. In the event such protests are resolved prior to January 1, 2011, applications required by these Rules may be submitted prior to the effective date of the Rules.

IT IS FURTHER ORDERED that any person who wishes to protest these proposed Rules may do so by filing a protest in writing with the Division 2 Water Clerk in Pueblo, Colorado, in the same manner as for the protest of a ruling of the referee. Any such protest must be filed by the end of the month following the month in which these Rules are published.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2009, by:

\_\_\_\_\_  
Dick Wolfe,  
State Engineer/Director of  
Colorado Division of Water  
Resources