# Minutes

**COLORADO SUPREME COURT**

**WATER COURT COMMITTEE**

Friday, October 12, 2018, 1:30 p.m.

Ralph L. Carr Colorado Judicial Center

2 E.14th Ave., Denver CO 80203

Fourth Floor, Supreme Court Conference Room

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| --- | --- | --- |
| **Name** | **Present** | **Excused** |
| Justice Monica Márquez, Chair | X |  |
| Justice (Ret.) Gregory Hobbs | X |  |
| Judge (Ret.) John Kuenhold | X |  |
| Judge (Ret.) Thomas Ossola |  | X |
| Referee John Cowan | X |  |
| Referee Nicolas Sarmiento | X |  |
| Referee Susan Ryan | X |  |
| Holly Strablizky | X |  |
| Laura Chartrand | X |  |
| Kevin Rein | X |  |
| Erin Light | X |  |
| Craig Cotten | X |  |
| Kaylea White | X |  |
| Doug Clements |  | X |
| Jennifer Ashworth | X |  |
| Mark Hamilton | X |  |
| Mark Hermundstad | X |  |
| Andy Jones | X |  |
| Peter Ampe | X |  |
| Jim Witwer | X |  |
| Doug Sinor | X |  |
| Chris Geiger |  | X |
| Emily Hunt |  | X |
| Sean Cronin | X |  |
| Madoline Wallace Gross | X |  |
| **Non-voting Participants** |  |  |
| Andrew Rottman | X |  |
| Veronique Van Gheem | X |  |

Also Present: Chris Hudson, Paul Benington, Ema Schultz

1. **Call to Order**
2. **Welcome and Introductions**
3. **Approval of Minutes from 4/27/2018 Meeting**

The committee approved the minutes.

#### **Report from Education Subcommittee**

Jennifer Ashworth reported on the October Groundwater 201 CLE. It attracted about 60 attendees and included a preview of CDSS map tools and engineer and attorney perspectives on groundwater. The next program is a symposium in partnership with the DU Water Law Review. Justice Hobbs circulated materials for the symposium to the committee.

#### **Abandonment Rule Modification**

Holly Strablizky discussed concerns raised by Judge Schwartz about the new abandonment rule. Judge Schwartz believed further clarification was needed regarding publication and responsibility for paying protest publication costs. The subcommittee drafted a proposed modification to rule 12(b) to address the issues raised by Judge Schwartz. Jim Witwer asked about current practices. The subcommittee understood the proposal to align with current practice. The committee discussed modifications to the proposal to clarify the publication obligation. The committee agreed to recommend the modified proposal to the supreme court.

#### **Change to Rule 11 Comments and Guide**

Jim Witwer explained that there are deadlines mentioned in the comments to Rule 11 which do not track the deadlines in the rule itself. When the deadlines in the rule changed in 2012, the comments were not changed accordingly. The committee agreed to recommend appropriate comment changes to the supreme court. Jim Witwer will work with Andy Rottman to develop the changes.

#### **50th Anniversary of 69 Act**

Justice Hobbs discussed the status of the symposium. He explained that Chris Hudson, the Supreme Court Librarian, is collecting documents, assisting authors with research, and collecting oral history. Justice Hobbs is also interviewing attorneys with the Attorney General’s office. Justice Hobbs indicated that a number of article outlines have already been received and requested that the authors submit outlines as soon as possible. The symposium is scheduled for a day and a half and will be held April 4 and 5, 2019. A corresponding law review issue will come out after that. Justice Márquez thanked Justice Hobbs for his leadership on this project.

#### **C.R.C.P Applicability to “Water Law” Cases**

Paul Benington raised an issue regarding the use of the term “water law” in the Colorado Rules of Civil Procedure. The rules exclude “water law” proceedings in several instances, but it’s not clear which cases are covered by that exclusion. This leads to a class of water cases without a clear set of rules. Mr. Benington had spoken to a number of attorneys, referees, and judges about the issue. The feedback he received is that this issue needs to be addressed. Mr. Benington would like to form a subcommittee to look into the issue further. Referee Ryan stated it would be good to have clarity. She explained that a few types of actions are not addressed in the current structure, such as retained jurisdiction cases, and petitions under the statute of limitations alleging excusable neglect. Justice Márquez appointed a subcommittee of Laura Chartrand, Susan Ryan, Pete Ampe, Holly Strablizky, and Mark Hermundstad to look into these questions.

#### **Retained Jurisdiction Procedures**

Madoline Wallace Gross discussed a related issue with cases invoking retained jurisdiction. The statute requires a retained jurisdiction provision in certain decrees, but there is no statute or rule for how retained jurisdiction actions are commenced or litigated. Generally, decrees acknowledge the statute regarding retained jurisdiction but do not provide more process. Ms. Wallace Gross proposed evaluating a rule change that would provide clarity in the process. Judge Kuenhold believed it would be appropriate to consider a rule that would address responses to a retained jurisdiction petition and a possible case management conference. Paul Benington stated that judges have inconsistent practices in these proceedings. There is no clarity whether a petition to invoke retained jurisdiction is akin to a motion, a complaint, and whether a response is permitted. Ms. Wallace Gross proposed a subcommittee to consider these issues. Andy Jones cautioned that addressing retained jurisdiction proceedings could be a larger task than anticipated and was concerned about conflicting decree language. The committee discussed the scope of the proposal and considered whether to address deadlines, process, and standards. Justice Márquez had mentioned this issue to the water judges at Judicial Conference. She wanted to get their feedback on the need for a rule. Justice Márquez appointed a subcommittee of Madoline Wallace Gross, Laura Chartrand, Andy Jones, Doug Sinor, and Jennifer Ashworth.

#### **Updates**

#### **Statutory Requirement of Referral to Referee**

Jim Witwer updated the committee on an issue the committee previously discussed – whether the statutory requirement of referral conflicts with the rule that allows a water judge to retain a case without referring. Steve Witte prepared a memo summarizing the issue and offering proposals to revise the rules. The committee had questions regarding current practice and republication. The committee discussed appropriate deadlines. The committee voted to submit the proposed revisions to the supreme court.

#### **Update on Resume Publication**

Mark Hermundstad circulated a memo from the resume publication subcommittee. The subcommittee sent questions to every water division regarding resume publication practices. There is inconsistency regarding publication and Rule 89. Some divisions publish notice language once in resume, some districts include the language with each application. It was unclear how the different practices started, but current practices are based upon historical practices in each division. There is also a wide disparity in newspaper publication practices. Generally, the larger divisions have different practices than smaller jurisdictions. There is also an open question regarding the meaning of phrase “every county affected.” Especially in headwaters counties, that language is ambiguous. Pete Ampe explained that the statutes are not so precise as to require a certain practice, so variation is not necessarily bad. The committee discussed the due process component of resume notice. There is some case law that official online publication is preferable to newspaper publication today. The committee discussed whether the rules should specify online publication of resume. Andy Jones stated that newspaper publication is expensive and ineffective. The committee discussed whether statutory changes were in the purview of the committee. Referee Cowan suggested that there might be a middle ground where the existence of the case is published in newspapers, but more information about the case is available online. Jim Witwer asked whether other supreme court committees are tackling this issue. He believed that historically this has been done differently in each division and the resumes contained less information in some divisions. The committee agreed that these issues are worthy of further consideration.

**C. Update on Pro Se Resources and Training for Water Clerks**

Referee Ryan updated the committee on the development of pro se resources in water cases. She has developed a one-page pamphlet for pro se litigants to understand the process. The pamphlets are available at the court and at the division engineer’s office.

#### **Open Discussion of Future Projects**

#### **Next Meeting Date**

The next meeting will be in April.

#### **Adjourn**