

## MINUTES

### COLORADO SUPREME COURT WATER COURT COMMITTEE

Friday, April 27, 2018, 1:30 p.m.  
Ralph L. Carr Colorado Judicial Center  
2 E.14<sup>th</sup> Ave., Denver CO 80203  
Fourth Floor, Supreme Court Conference Room

<b>Name</b>	<b>Present</b>	<b>Excused</b>
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	
Steve Witte	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	
<b>Non-voting Participants</b>		
Andrew Rottman	X	
Veronique Van Gheem	X	

Also Present: Chris Hudson, Claire Walker, Paul Benington, Kole Kelley, Chris McMichael

## **I. Call to Order**

## **II. Welcome and Introductions**

## **III. Approval of Minutes from 10/2/2017 Meeting**

Minutes approved.

## **IV. Report from Education Subcommittee**

Andy Jones reported on the May 18 CLE on water law and policy.

## **V. Discussion of Proposed Abandonment Rule**

Holly Strablizky provided a history of the proposed rule and subcommittee discussions. After reviewing the previous proposal from the committee, the Supreme Court had additional questions related to venue and sent the proposed rule back to the committee for clarification. The subcommittee agreed that jurisdiction and venue are different issues with different statutes and rules. Ms. Strablizky stated that the water court gets to determine ownership, it should also be able to determine venue. Judge Kuenhold noted that water divisions don't track judicial districts and counties. Ms. Strablizky stated that statutes provide for similar venue determinations in other situations. Judge Kuenhold believed that the place of trial and venue are not the same thing. He suggested replacing the first reference in the proposed rule with "place of trial" and keeping the second reference to venue. Paul Benington questioned whether these are really separate concepts, as C.R.C.P. 98 concerning venue is titled "Place of Trial." The committee voted to replace the first reference to venue with "place of trial." Justice Hobbs suggested the committee move to revised proposed rule to the supreme court with favorable recommendation. Jim Witwer seconded the motion. All were in favor, and the revised proposed rule will go back to the Supreme Court.

## **VI. Discussion of Change to Rule 11 Comments**

Andy Rottman discussed a change to the comments to the case management deadlines to track the previous rule changes concerning expert disclosure and Rule 56 deadline changes. The committee approved the changes. Mr. Rottman will draft proposed language and submit to the supreme court.

## **VII. Discussion of Access to Exhibits in E-filing System**

Kaylea White raised the issue that a recent change to the courts' e-filing system (CES) resulted in nonparties being unable to access exhibits to water court applications. Claire Walker from the State Court Administrator's Office (SCAO) attended the meeting to explain the issue. A recent change to the courts' filing system defaults all attachments to a "protected" status. This allows the documents to remain inaccessible to the public until the clerk's office has a chance to review the document for any confidential information, such as bank account numbers or social security numbers. Anyone who is not a party to the case must contact the clerk's office so that the document may be reviewed and made accessible to the public. This is not ideal, especially in

cases where confidential information may be exceedingly rare. SCAO's IT department is working on a fix to carve out water cases. Justice Hobbs believes some filings may need to be confidential, such as modeling containing privileged information, but this can be done through a protective order. The water bar has expressed concerns with this system, and the change makes it particularly difficult to review cases on the resume. Some clerks are not making these documents public even after a request to do so. Pete Ampe believes there should be an obligation on the attorney to notify the clerk of sensitive information. Chris Geiger raised the issue that non-parties are paying to access case information, and they may not be aware that the information they receive is incomplete. He suggested some notification or warning system regarding the completeness of information in CES.

### **VIII. 50<sup>th</sup> Anniversary of 69 Act (Justice Hobbs)**

Justice Hobbs introduced Kole Kelley as the Editor in Chief of the University of Denver Water Law Review and Chris McMichael as the 50<sup>th</sup> anniversary symposium editor. Mr. Kelley expressed excitement at the symposium and concurrent volume of the water law review dedicated to the 50<sup>th</sup> anniversary of the 69 Act. Chris McMichael stated that Justice Hobbs has reached out to potential authors and speakers. The anticipated organization of the event is the past, present, and future of the 69 Act. The symposium will be April 4-5, 2019. Justice Hobbs stated that Chris Hudson is a good resource for articles and the Supreme Court Library would be a good repository for any documents gathered in the process. Justice Hobbs requested that the Committee help sponsor the program as the spring CLE as a joint project with the Bar Association and the DU Water Law Review. Potential subjects include the instream flow program; the role of engineers in relation to 69 Act; the resume notice process; administrative reports leading up to 69 Act; engineering issues; water law in the future; tribal water rights; the Colorado water plan; the role of AG throughout implementation of 69 act; and interviews with old timers. Chris Geiger has sent information on this to water law section members. Judge Kuenhold Suggested a topic related to the Animas La Plata Project. Justice Hobbs believe we need a tribal viewpoint as well. Paul Benington suggested covering the evolution of how non-tributary groundwater and designated groundwater were introduced into the Act.

### **IX. Updates**

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

Steve Witte presented on an issue he had previously raised regarding a conflict between statute and rule. The statute requires a water judge to refer all applications to the water referee, but the rule allows a water judge to retain cases without referral. Mr. Witte previously circulated a white paper on the issue, and at the last meeting he agreed to head a subcommittee to discuss the issues further. The subcommittee's proposal is to change the uniform local rules to eliminate the conflict with statute. The subcommittee circulated proposed revisions to 6(a), 6(c), and 6(d). Regarding the proposed language in 6(c), the subcommittee discussed whether to clarify the statute and rule to put minimum requirement on how long the case should be held by the referee prior to rereferral. Some thought that the implication in the statute is that cases should be held through the deadline for statements of opposition. Others did not think that was clear in statute. The subcommittee declined to insert minimum deadline for how long a case should be held

before its rereferred. The subcommittee believed that the best practice is to wait until after the initial status conference before re-referring, but that there are some cases where it doesn't make sense to wait that long. The subcommittee recommended consideration of new rule 4(d) regarding amendments to water court applications. If judge determines republication is necessary, then consultation and recommendation is triggered. Kaylea White questioned how the rule would apply when a party republishes an amended application without a judge's order. Mr. Witte believed that when a judge orders republication, it means the changes are significant, and this is an appropriate trigger for consultation and recommendation. The committee had questions about the language "as appropriate" in the proposed rule. Doug Sinor suggested striking that language, and the committee agreed. Justice Márquez stated that the supreme court would likely not put this proposal out for notice and comment as the changes are relatively minor and this issue mostly involves the State and Division Engineers. Justice Márquez asked for a revised memo, which Steve Witte and Jim Witwer agreed to provide.

### **B. Update on Resume Publication (Mark Hermundstad)**

Mark Hermundstad updated the committee on resume publication issues and initiatives. After meeting last fall, the resume publication subcommittee suggested revisions to the court and SEO websites. Both websites have been updated. Referee Cowan is working on incorporating some changes to non-attorney's guide to water law.

Mr. Hermundstad explained that there are different formats for resumes in each division, and there may be some benefits to looking at the language and structure of those to better provide notice. The subcommittee will pose questions to water clerks around the state regarding resume language and structure and will come up with recommendations as to how to proceed on this issue. Jim Witwer stated that there may not be a need for uniformity, but there is a benefit to more information and dialogue on the subject.

### **X. Open Discussion of Future Projects**

Justice Hobbs complimented the water section of bar for its pro se project related to limited scope and pro bono representation. Judge Kuenhold stated that SCAO can prepare a report of pro se litigants by division. Referee Cowan stated the need for litigants to know that help is available before they file an application.

The committee discussed pro se resources and self help. Referee Sarmiento stated that once a party has filing in court, there is some guidance that can be given by referees and sherlocks. He explained that we can use our referees in a more robust manner. The committee discussed the possibility of law school clinics and better use of unbundling and pro bono representation. The committee discussed the importance of lawyers in certain water cases. Justice Márquez appointed a subcommittee of Kaylea White and Referees Sarmiento, Cowan, and Ryan to further look into pro se resources.

Paul Benington raised an issue related to a grey area between the rules of civil procedure and the uniform local rules for water courts. The uniform local rules geared toward water court applications and aren't equipped to handle water cases outside of the application process, such as enforcement actions and declaratory judgments. C.R.C.P. 16 and 16.1 explicitly exclude "water

law” cases from their purview. Mr. Benington believes the simplest solution is an amendment to C.R.C.P. 16 and 16.1. Justice Márquez suggested that the committee make a recommendation to the Civil Rules Committee. This topic will be on the agenda for the next meeting for further discussion.

**XI. Next Meeting Date**

The next meeting will be set in October. Andy Rottman will coordinate.

**XII. Adjourn**