# MINUTES

**COLORADO SUPREME COURT**

**WATER COURT COMMITTEE**

Monday, October 2, 2017, 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 Allison Eid, 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 |  |
| Robert Sakata |  | X |
| Bill Trampe |  | 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 |  |
| **Non-voting Participants** |  |  |
| Andrew Rottman | X |  |
| Jenny Moore |  | X |
| Veronique Van Gheem | X |  |

Also Present: Paul Benington, Phil Lopez, David Robbins, Tarn Udall

1. **Call to Order**
2. **Welcome and Introductions**

Justice Eid discussed the new appointment order for water court committee members. She requested that members let her know if they do not want to be reappointed for another three year term. Justice Eid announced her likely departure from the Supreme Court, and she introduced Justice Marquez as the new Supreme Court liaison to the water court committee.

1. **Recognition of David Robbins**

The committee expressed its thanks and recognition to David Robbins for his years of service on the Water Court Committee.

1. **Approval of Minutes from 4/25/2017 Meeting**

The Committee approved the minutes from 4/25/2017.

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

Doug Clements discussed the CLE spring program regarding the evolving role of the State and Division Engineers in water court proceedings. The program attracted 132 participants and was well received. Doug Clements also announced the Groundwater 101 CLE to be held October 13, 2017, and requested that committee members spread the word.

#### **Recommendation on ULR Rule 11 Deadline Changes**

Doug Sinor discussed the proposal that would allow more time for parties to receive expert reports and negotiate prior to Rule 56 motion deadlines and trial. The proposal changes expert report deadlines and deadlines for filing rule 56 motions. The committee provided positive feedback. Doug Sinor and the Attorney General’s Office had previously discussed another proposed change regarding the timing of expert depositions. That proposal was withdrawn due to committee feedback and the provision in the current rules allowing the court to modify expert deposition timing. The committee discussed the appropriate effective date for the rule change. The committee determined the best option is to make the rule changes apply to cases that are filed or re-referred on or after effective date. Holly Strablizky questioned whether parties elect to follow these deadlines in pending cases. Doug Sinor agreed to draft a short memo on the rule changes. Judge Kuenhold stated that the changes are constructive to mediation, and judges with pending cases might reconsider the case management order in light of the rule changes.

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

Steve Witte discussed the white paper he emailed to the committee regarding the inconsistency between statute and rule 6(a). The issue is that statute requires cases to be referred to the referee, but the rule allows the water judge to retain a case without referring it to the referee. Steve Witte stated that this should be resolved because it opens up potential challenges to water court decrees but was also concerned that judges to be able to manage their dockets appropriately. A number of water court procedures reference the referral date, and the whole process could be called into question when there is not an actual referral to the referee. The white paper provided some examples of issues with the current structure.

Steve Witte also discussed the separate issues that occur with amended applications before the water judge. In those cases, it may be republished but not re-referred to trigger deadlines. In that case, the only way for engineers to have issues addressed is to become a party because there is no summary of consultation triggered.

The white paper contains proposed revisions to address these issues. Jim Witwer asked how often cases are retained or re-referred before statement of opposition deadline. Steve Witte was aware of four cases since April 2017. Jim Witwer asked whether parties moving to re-refer before initial status conference and had suggestions on where to place some of these revisions. Jim Witwer then stated that another option is a rule change to make re-referral only possible at or after the initial status conference. There was a concern that waiting until after the initial status conference might be a waste of time in cases that will be retained by the water judge. Additionally, judges might be concerned about removing ability to retain a case. Jim Witwer asked about the reasons for a water judge to retain cases. Steve Witte believed judges might retain special types of cases like compact interpretation and others where judge has history or special factual knowledge. Judge Kuenhold stated that judges also may want to retain cases where the state is proposing rules.

Andy Jones asked whether a statutory change allowing water judges to retain cases would also require other rules changes. Steve Witte and Paul Benington stated that the rules would have to recognize the change and conform to new statute. Steve Witte considered whether the committee should expand the discussion to statutory changes. Justice Hobbs was concerned about legislation and potential for collateral consequences and saw a need for water judges to weigh in on the issues.

The committee discussed the appropriate place in the rules to incorporate the proposed changes. The committee discussed the current process for retaining or referring cases. Referee Cowan stated that there are obvious cases that will be re-referred, and the applicant should have the option to get a case re-referred immediately. Steve Witte explained that the state can participate in summary of consultation or, if the case is re-referred, can file a recommendation, which won’t happen if a case is retained. Jim Witwer questioned whether the proposal would change when a party can re-refer. Paul Benington explained that the case will stay in front of referee until statements of opposition are filed, then the case can be re-referred. Statements of opposition bring additional matters to the attention of the referee and division engineers. If the case is immediately re-referred, recommendations from engineer may have to be filed before statements of opposition are due. The subcommittee agreed to add Referee Cowan, Jim Witwer, Doug Sinor, Nicolas Sarmiento, and Susan Ryan to their discussions. Jim Witwer asked whether the referees on the committee can poll their judges on the issue.

#### **Updates**

#### **Update on Proposed Abandonment Rule**

Justice Eid reported that the proposed abandonment rule is out for public comment, and comments are due in November. The supreme court had not received any comments so far.

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

Mark Hermundstad updated the committee on the subcommittee’s discussion since the last committee meeting. At the April 2017 committee meeting, the committee agreed to add language to water court’s website and State Engineer’s Office website concerning resume publication. The subcommittee has drafted proposed language for these websites. He has circulated proposed language for different platforms that address the issue of resume publication. He asked for the committee’s thoughts on this approach. Emily Hunt questioned the use of “forever barred” and thought this might be confusing. Mark Hermundstad agreed to add language to make the statements consistent. He expressed concern about this language in light of media delivery today. The committee discussed the language of CRCP 89 and its applicability to the discussion. Jim Witwer also questioned whether publication in one newspaper is enough when many counties are affected and stated that there have always been due process concerns about resume publication.

Andy Rottman will look into changes to the court’s website. The State Engineer’s Office will look into their website. Referee Cowan will look into changes to the non-attorneys guide to water courts.

Mark Hermundstad then addressed the issue of the varied format of resumes in each water division. The subcommittee looked at the resume form used by the water clerks around the state, and discovered that the clerks in each division use different language. Mark Hermundstad was concerned that a change to the form might be outside the subcommittee’s charge. He questioned whether there should be a uniform resume format. The committee discussed the issue and decided to pursue this question more. Judge Kuenhold suggested sharing the issue with the water clerks.

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

Justice Hobbs explained that he was in the process of proposing a joint program between CBA, CLE, and DU Water Law Review to sponsor a 50th anniversary symposium. He stated that the question of due process is a good topic, and Jim Witwer is the person to address this. David Robbins might be able to address McCarron Amendment and the litigation related to it. Steve Leonhardt could address the origin of augmentation plans. Justice Hobbs asked whether the committee wants to help organize, research, and recruit for the symposium. The committee was supportive. Justice Eid, David Robbins, Kevin Rein, and Laura Chartrand offered to help. Justice Hobbs renewed his call to give historical documents to law library. Paul Benington mentioned that the state publications library may have missing documents.

#### **Update on Notary Requirements and Modification of Water Court Forms**

Judge Kuenhold discussed the proposed modification of water court forms to conform to new notary legislation. Colorado SB 17-154 concerning notary requirements came from a Uniform Law Commission recommendation and tracks the federal statute on unsworn declarations. Colorado now tracks federal law. The new legislation allows swearing by declaration under penalty of perjury, which will have the same effect as notarization. Judge Kuenhold proposes to send the form changes to water judges for comments. The committee agreed.

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

None.

#### **Next Meeting Date**

The next meeting will be April 2018. Andy Rottman will coordinate.

#### **Adjourn**