Water Court Committee of the Colorado Supreme Court

March 10, 2008, Public Hearing

3:00 to 5:00 p.m.

Colorado Judicial Building
Supreme Court Courtroom
2 E. 14th Avenue
Fifth Floor
Denver, CO 80203

Water Court Committee March 10 Public Meeting Agenda

3:00 to 3:10 p.m.	Justice Greg Hobbs – Introductions & Meeting Protocol
3:10 to 3:15 p.m.	John Meininger, Atty.
3:15 to 3:20 p.m.	Robert Longenbaugh, P.E.
3:20 to 3:25 p.m.	Phil Doe, Chair, Citizens Progressive Alliance
3:25 to 3:30 p.m.	Kevin Kinnear, Atty., Porzak, Browing, Bushong, LLP
3:30 to 3:35 p.m.	Harry Strohauer, Strohauer Farms, Inc.
3:35 to 3:40 p.m.	Tanya Fell, Executive Director, Colorado Onion Association
3:40 to 3:45 p.m.	Chris Thorne, Atty., Holland & Hart Water Practice Group
3:45 to 3:50 p.m.	Peter Fleming, Colorado River Water Conservation District
3:50 to 3:55 p.m.	Ramsey Kropf, Atty., Patrick, Miller & Kropf, P.C.
3:55 to 4:00 p.m.	Michael Sawyer, Atty., Leavenworth & Karp, P.C.
4:00 to 4:05 p.m.	Colorado State Senator Jim Isgar
4:05 to 4:10 p.m.	Cheryl Signs, P.E., Cheryl Signs Engineering
4:10 to 4:15 p.m.	Mark Hamilton, Atty., Holland & Hart, LLP 2007-2008 Chair, Water Law Section of the Colorado Bar Assoc.
4:15 to 4:20 p.m.	Drew Peternell, Dir./Counsel, Trout Unlimited Co. Water Project
4:20 to 4:25 p.m.	Mariam Masid, J.D., Ph.D
4:25 to 4:30 p.m.	Steven Simms, Atty., Brownstein, Hyatt, Farber, Shreck, LLP
4:30 to 5:00 p.m.	Subcommittee Updates
5:00 p.m.	Adjournment

3:10 to 3:15 p.m. John Meininger, Atty.

Mr. McCallum:

Per the notice of the Court's invitation to the Water Section of the CBA for public testimony on Monday the 10th at 3:00 pm., this is to register myself and Robert Longenbaugh, P.E., to testify. I am registering for Mr. Longenbaugh because he is out of town.

My remarks will concern the role of the water court in administration of augmentation requirements, notice to well owners, and the proper role of the Court. The conflict between strict priority administration and maximum beneficial use. I believe the Water Court's role must be reconsidered in light of the issues raised since 2001.

Thank you for offering the opportunity to present comments.

John Meininger, #6421

3:15 to 3:20 p.m. Robert Longenbaugh, P.E.

Mr. Longenbaugh's comments as an experienced ground water engineer will deal with the need for flexibility in the administration of ground water for maximum beneficial use of the water of the state of Colorado for its citizens. How are these issues presented to the Court and decided in a manner which achieves maximum beneficial use and preserves rights of all interested users.

3:20 to 3:25 p.m. Phil Doe, Chair, Citizens Progressive Alliance

Dear Mr. McCallum:

I hope this is notice enough of my desire to testify on March 10 concerning our experiences in state water court. My testimony will concern the total lack of background in water issues demonstrated by Judge Gregory Lyman in District 7. I don't wish to defame Judge Lyman, quite the contrary, but I will insist on relating that he was totally unprepared for the water issues set before him. As a result the public interest was sacrificed, not from malice, I think, but from the court's broad lack of experience and expertise.

We, the Citizens Progressive Alliance, and the taxpaying public were the great losers in all this. We went before that court as objectors to water-right changes the Southwestern Water Conservation District and the Ute Indian Tribes were desirous of making. We wanted to know what these parties intended to do with water they were appropriating, the can-and-will test of state water law, if you will?

Six years we spent in that court, and we never received an answer. In fact, we were made to believe that we deserved no answer because the Congress had spoken. But, as we tried to inform Judge Lyman, the issue was not whether the Congress could waste money, they obviously can and do, but whether they had a right to allocate a portion of Colorado's water under the Colorado Compact to these parties without them meeting the basic tests of Colorado water law.

To this day, those tests have not been met. We have an appeal before the state's highest court to rectify this injustice. Up to this point in the ordeal I've briefly described above, I can only say that those of us who have been involved in this process feel deeply that the public interest has been mocked by the powerful and the well connected.

I don't know how greater disinterest or objectivity might be created in the water-court system. But I am convinced that rigorous training and testing is needed before these judges are asked to rule on how the public's water resources are allocated. This training requirement should extend equally to the state Supreme Court, and without exception.

Despite my experiences in the state water court system, I hold out the feeble Pollyanna-ish belief that knowledge and expertise might make judges, at least the best of them, more objective, more inclined to weigh disinterestedly the entreaties of the well connected and powerful who come before them seeking the public's most valuable resource, its water.

With regard to the matter of what constitutes beneficial use in water court, we urge the adoption of much stricter guidelines. We are down to our last drop of water in most state river basins, several are actually over-appropriated; thus, we urge greater economic scrutiny of water right applications. It is economic idiocy to grant a water right to anyone whose expectation or plans indicate the public will also be expected to pay for the development of that water. To cooperate in such shenanigans is a clear misuse of the public trust, and, to our thinking, makes the court complicit in a form of public robbery. Such a scenario may be beneficial to exclusive private interests, but not to the public interest, and surely not to its benefit.

Thank you,

Phil Doe
Chair
Citizens Progressive Alliance

NOTE: Response sent to Phil Doe's email request:
Thank you, Mr. Doe. I received your request and you will be added to the agenda. Time slots will be sent via email to presenters no later than Friday.

On a side note, the committee does respectfully request that you do not comment on the merits or actions of a specific judge, or any specifics regarding your case. Rather, you are asked to focus on what kinds of systemic changes should be made to better the entire system. I am confident you can get your thoughts on training and testing across without specifically mentioning Judge Lyman.

Thanks,
Rob

Rob McCallum
Public Information Officer
State Court Administrator's Office
(303) 837-3633
(303) 435-7164 (cell)
robert.mccallum@judicial.state.co.us

3:25 to 3:30 p.m. Kevin Kinnear, Atty., Porzak, Browing, Bushong, LLP

Dear Mr. McCallum,

I am submitting this email to be included on the list of commenters for the hearing scheduled for March 10. Following is a summary of my comments as requested in the announcement. First, as required by the hearing notice, I am disclosing that I am an attorney representing a number of clients who are parties in numerous pending water court proceedings. My comments:

1. Issues seem to be Water Division specific; it is unclear that a complete over-haul is warranted (i.e., don't throw out the baby with the bath water).

1. Expert witness "bias" does not appear to be a real problem, so it is unclear why the committee is seeking a solution. The adversarial nature of court proceedings makes this inevitable; the State and Division Engineers are supposed to offer unbiased testimony pursuant to C.R.S. 37-92-304(3) where she or he is not a party.

2. There could be prior agreement as part of the development of the Case Management Order on the use of a specific set of engineering methods, data, etc., for use by all parties (e.g., use of the Glover method or MODFLOW and specific data sources).

3. "Front loading" water court proceedings is potentially prejudicial to applicants and should be rejected.

4. A huge expense and time-consuming element of several recent water court proceedings, most prominently in Divisions 1 and 5, has been fighting so-called policies of the State and Division Engineers. All "policies" to be relied upon by the State or Division Engineer in opposing an application should have gone through APA review process first to establish the legality and legitimacy of the policy.

5. A "split system" of proceedings in water court vs. before the referee could be a voluntary election at the time of filing an application, with either binding or non-binding findings subject to a rebuttable presumption on appeal.

6. Use of a special master, which would be limited to retired water judges and alternate water judges, for large and/or complex cases could be agreed upon in the CMO

development, where the findings of fact are appealable under a rebuttable presumption or even a higher standard such as clearly erroneous (conclusions of law are reviewed de novo, of course).

Thank you,
Kevin J. Kinnear
Porzak Browning & Bushong LLP
929 Pearl Street, Suite 300
Boulder CO 80302
(303) 443-6800
fax (303) 443-6864
3:30 to 3:35 p.m. Harry Strohauer, Strohauer Farms, Inc.
March 5, 2008

To The Water Court Committee of the Colorado Supreme Court:

I, as a Weld County vegetable and grain producer, am in awe of how the state has gone backwards in maximizing the use of water in this state. Agriculture is still vital to the economic health of Colorado and the lack of cooperation by many on the water issue to maximize the use of both surface water and ground water threatens the health of agriculture. The assurance of ground water is vital to vegetable production. With that said I will give you my experience with the problems with our current system.

In June 2006, I filed a water application in the Water Court, Division No. 1, in Case No. 2006 CW 139, to obtain a permanent plan for augmentation so I could continue to utilize my wells in my farming operation. My 2006 SWSP was filed with the State Engineer's Office in August, 2006, so I could use temporary water sources until my permanent plan for augmentation could be developed in a three to four year time period. I am a family farm operation owning both surface water and ground water and this plan includes 17 wells. At a time with so much turmoil and attacks on our water system, I felt I was doing the right thing by taking "the bull by the horns" so to speak on these issues. My SWSP was approved for both 2006 and 2007, and 2008 was filed in December, 2007. This has been the most stressful, thankless, expensive, and frustrating thing I have ever experienced. We, the people of this great state, have given tremendous power to the water attorneys and objectors in water cases. Unfortunately a few of them are not interested in the administration of water to be done fairly for all. I am not aware of any SWSP filed in this state in the last three years that these couple of attorneys have not objected to and created expense and problems for them in their water cases. Very few individual plans have survived. I know of three individuals who have given up because of the unjust system. How do you please someone when their only goal is to shut you down. Is it fair to allow a few objectors and their attorneys who seem to have endless funds, drain us of both time and money. This is the #1 problem with our system today. This state wants everyone that is using ground water to have a decreed plan and yet instead of helping us to get a decreed plan, the state is allowing us to take a beating and financially drain us. This mission of getting a decree is almost impossible for individuals. In hindsight, I would have never started this process had I known the power given to a

few objectors and their attorneys and how their power can be misused. It is only the love of farming and my belief that some day we will wake up and see the injustice of all that is happening that keeps me going.

The State Engineer's Office for the most part has been fair with me in working on these SWSPs. They have actually used something long forgotten by many - *common sense*. We need to return more power to the State Engineer's Office. Even if we all do not agree or like the decisions being rendered by the engineer's office at times, I am confident they are the best and fairest at the administration of this precious resource.

Water court should be administered by not just the water judge, but rather a group of individuals who are well versed in water law throughout the state. I feel it should be a board that has more than one view or background. This would allow for various levels of education and expertise. The process would assist with the timeliness of plans being fairly put through the court system. I appreciate your time and would always welcome questions concerning the state's mission to improve the water court system. Time is of the essence - we need to work together and do what is best for all and not just a few.

Sincerely,

Harry Strohauer
Strohauer Farms, Inc.

3:35 to 3:40 p.m. Tanya Fell, Executive Director, Colorado Onion Association

March 5, 2008

Water Court Committee of the Colorado Supreme Court
c/o Rob McCallum
1301 Pennsylvania St., Ste. 300
Denver, CO 80203

To Whom It May Concern,

The Colorado Onion Association represents nearly 100 members who are involved in growing almost 10,000 acres onions throughout the state with a total value of over $54,000,000.

Our industry depends on irrigation to grow our crops and most of our members are directly affected by the current state of the Colorado water court system relative to irrigation well augmentation. From our perspective, the process is virtually grid-locked due to the actions of a handful of individuals who are misusing the system in an obstructionist manner that is tantamount to legal tyranny. We know of no other instance where such a significant and viable economic enterprise, the pumping of underground

water to irrigate crops, has been curtailed to the degree that it has simply because others *might* be adversely affected in the future. We believe the existing situation constitutes a violation of the Colorado Constitution because the state's vast underground water resources are not being utilized to the fullest extent possible to the detriment of livelihood of thousands of individuals and Colorado's economy in general.

Water law is an extremely complex subject. Therefore, it is vitally important that those making long-term judicial decisions regarding water are well-versed in the technical aspects of water resource management as well as the law. We recommend that the Colorado water law system be reformed so that a team of judges and referees who specialize in the field of water resources be employed to adjudicate water law across the state in place of the current system that involves a number of individual civil law judges located in numerous different geographic jurisdictions who possess varying levels of education and expertise in the water related matters. We recommend that a simple bonding process be developed to protect water right holders who can prove their losses. We also recommend that the State Engineer be given more authority to manage the state's unpredictable and ever-changing water resources on a daily basis.

Sincerely,

Colorado Onion Association
Board of Directors

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3:40 to 3:45 p.m. Chris Thorne, Atty., Holland & Hart Water Practice Group

March 5, 2008

Water Court Committee of the Colorado Supreme Court
Justice Gregory Hobbs, Chairperson
Colorado Supreme Court
2 E. 14th Avenue
Denver, CO 80203

Re: Public Comment by Holland & Hart LLP, for Consideration by the Water Court Committee at March 10, 2008 Public Hearing

Dear Justice Hobbs and Members of the Committee:

The Colorado Water Rights Practice Group of Holland & Hart LLP ("Holland & Hart") thanks the Water Court Committee of the Colorado Supreme Court ("Committee") for the opportunity to present the following comments for the Committee's consideration.

With seventeen lawyers practicing water rights law in six western states, Holland & Hart has broad experience with state and federal water laws, and represents diverse clients that include ranchers, farmers, homeowners, landowners, real estate developers, municipal water providers, special districts, recreational water users and industrial water users. In Colorado alone, Holland & Hart water lawyers have more than 100 years of combined experience practicing before the State's water courts and administrative agencies.

Current Holland & Hart attorneys have served in a variety of service and advisory roles, including membership on the Colorado Ground Water Commission, the Governor's South Platte River Task Force, the Water Quality Control Commission, municipal boards and commissions, and as law clerks for water judges. Holland & Hart attorneys also serve in leadership roles in the Water Law Section of the Colorado Bar Association and represent clients in numerous pending cases before the water courts, the Office of the State Engineer, and the Ground Water Commission. The comments and views expressed herein are solely those of Holland & Hart, and do not reflect the positions, official or otherwise, of any of the above-referenced clients, boards or bodies.

Holland & Hart understands that the Committee's charge is to "review the water court process; identify possible ways through rule and/or statutory change to achieve

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efficiencies in water court cases, while still protecting quality of outcomes; and ensure the highest level of competence in water court case participants." As lawyers regularly involved in water court practice in Colorado, we also understand that a variety of pressures in recent years have brought increased scrutiny of Colorado's water court process. These pressures have included the *Empire Lodge* decision in 2001; record drought beginning in 2002; new legislation in 2002 and 2003 requiring thousands of wells to apply to the water courts for judicial approval of plans for augmentation; the economics of agricultural production and consequent value of an agricultural water supply in relationship to the value of water for municipal use; and continued population growth and competition for water, particularly along the Front Range. These events understandably have led to increased public scrutiny of the water court system and Colorado's water laws as a whole.

With this background in mind, Holland & Hart respectfully provides the following specific comments for the Committee's consideration.

- As a starting point, Holland & Hart generally does not believe that the water court system in Colorado is "broken," or otherwise in need of extensive rule and/or statutory changes. It is the experience of the Holland & Hart attorneys that Colorado's special statutory procedures for judicial determination and adjudication of water rights are suited to the twin goals of protecting vested property rights while encouraging maximum flexibility and utilization of a scarce and precious resource.

- We believe that the system of regional water courts should not be changed. This is a uniquely Colorado concept that provides an excellent basis for practical decision-making on local water rights issues. We also believe that notice pleading should continue to be all that is required in Colorado's water courts, for all of the reasons that make this the standard approach in the state and federal civil courts of Colorado and throughout the country.

- The concern most often expressed by our clients regarding the water court process is that it takes too long to achieve final resolution in water court cases. In this regard, we would support simple, targeted changes to the existing statutory scheme designed to achieve speedier resolution of water court cases. Possible changes we believe warrant consideration include automatic re-referral of each case after an appropriate time period, and the establishment of a hard deadline, no sooner than a reasonable time after service of the division engineer's recommendations, for the provision by applicants of supporting engineering information. It is our view that difficulties or delays occurring in particular water divisions are best dealt

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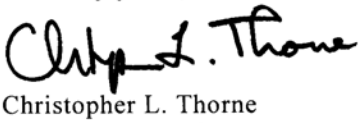
with specifically and individually rather than by state-wide changes that are unnecessary in other divisions.

- Holland & Hart supports the Committee's efforts to achieve efficiencies and improve the performance of the system for all water users; to ensure the highest competency of the legal, technical, and judicial professionals working within the system, and to respond proactively to any negative public perceptions.

- Holland & Hart understands that the Committee is still in the process of gathering data regarding the range of cases and the operations of the water courts, which the Committee may then use to assess specific performance issues. Holland & Hart supports this process, and urges the Committee to reserve its judgment until this data has been gathered and analyzed.

Consistent with the views expressed in this letter, Holland & Hart reserves further comment until such time as more information has been gathered and made available, and any specific proposals have been presented for consideration by the Committee. Thank you again for the opportunity to comment. If there is any way in which our lawyers may be of service to the Committee, please do not hesitate to contact us.

Sincerely yours,



Christopher L. Thorne
Practice Group Manager
Holland & Hart Water Practice Group

3:45 to 3:50 p.m. Peter Fleming, Colorado River Water Conservation District

March 5, 2008

Colorado Supreme Court Water Court Committee
C/O State Court Administrator's Office
Attn: Robert McCallum ***Via e-mail: robert.mccallum@iudicial.state.co.us***

Dear Water Court Committee:

The Colorado River Water Conservation District (the "River District") appreciates the opportunity to provide comment to the Supreme Court's Water Court Committee on the committee's review of the State's water court process. The River District is a statutorily created quasi-municipal entity charged with protecting the State's entitlement to the waters of the Colorado River and its tributaries allocated by the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact. The River District, often referred to as the "Voice of Water on the Western Slope", also is charged with developing and conserving water within its boundaries and promoting the welfare of the inhabitants of the District.

The River District offers the following initial comments, which are general in nature since no specific proposals are before the committee at this time:

1. As General Counsel of the River District, I have asked many West Slope water users and attorneys that represent West Slope water users about the water court process. The overwhelming response has been that major changes to the system are not needed or desired, but that minor tweaks in the system might be helpful to expedite the process. The current statutory time frame for referee rulings is not realistic and therefore is virtually ignored. A more realistic and enforceable time frame with additional personnel support would help to expedite the current delay problem.

2. In order to protect water users in Colorado's less populated areas, water rights applications should continue to be adjudicated by the specific water court that is statutorily granted with exclusive jurisdiction over all water matters involving water diverted in that river basin ***(e.g.,*** water diverted from the Colorado River basin is adjudicated by the Division 5 Water Court in Glenwood Springs).

Thank you and please contact me at your convenience if you wish to discuss the River District's preliminary comments.

Very truly yours,

Peter C. Fleming
General Counsel

cc: West Slope Attorneys' Group
Bill Trampe
Eric Kuhn
Chris Treese
Dan Birch

3:50 to 3:55 p.m. Ramsey Kropf, Atty., Patrick, Miller & Kropf, P.C.
March 5, 2008

Justice Gregory Hobbs, Jr.
Chair, Supreme Court Water Court Committee
Committee Members
Attn. Robert McCallum
Colorado Supreme Court
Via email
robert.mccallum@judicial.state.co.us

Dear Justice Hobbs and Committee Members:

Thank you for the opportunity to provide comments to the Supreme Court’s Water Court Committee. By this letter, our firm seeks to provide input on how the committee may recommend ways that decrease the expense and burden of participating in any of Colorado’s water courts. We also offer some general observations on water court process from the water practitioner’s perspective. Our firm limits its practice to water resources legal work, with a majority of our work in Colorado. As required in the instructions for

public comment, we also wish to disclose that our firm represents multiple applicants in Colorado water court, largely in Divisions 5 and 4, but from time to time in other divisions as well. This letter will not address any specific cases.

(1) No Changes to the Water Right Determination and Administration Act of 1969 – It Works. At the outset, we feel it is important to look back to the intent of the 1969 Act. Its purpose is to protect those who hold vested water rights and preserve such rights under an orderly system. The 1969 Act also provides McCarran Amendment jurisdiction over the United States, which remains important. Further, the statute provides a process for expedited review in both the water court system and the Supreme Court. In comparison with many other western states, the statutory scheme has provided for a fair, orderly and relatively time effective process for determining and administering water rights on an on-going basis. While there may be current concerns about how the statute is being implemented in certain divisions, we recommend that those should be considered locally within that division. Therefore, we do not support any wholesale changes to the existing statute.

(2) Process. There has been discussion about adding more extensive information to applications and "front-loading" water applications. It is our observation, that over the last decade, the process has become increasingly cumbersome, requiring extensive legal and engineering time, and has strayed from the statutory guidelines and intent for a streamlined adjudication. The outcome of referees and division engineers requiring ever more information has the effect of "pricing parties out" of an already expensive process, contrary to the 1969 Act, which strives for efficiency in adjudications. Based on this, we suggest "less is more" and the following:

a. *Streamline Summaries of Consultation*. Three suggestions follow regarding summaries of consultation.

i. The first status conference held by the referee can be the summary of consultation, where the applicant and any opposers may attend. This would provide transparency to the applicant in understanding the court's and the division's concerns. Frequently, in Division 4, when the referee consults with the engineer, they both jointly call the applicant, particularly in an unopposed case, and resolve concerns by phone in a time effective and cost effective manner.

ii. A second improvement would be a general commitment by the court and state engineer to provide the summaries within the mandatory statutory guidelines – thirty days for the usual surface report; 4 months from the application for a well report. If a summary has not been submitted by such time, the referee can move the case forward by requesting a final submitted Ruling (regardless of stipulations) by a date certain.

iii. A third improvement we suggest is that the second status conference before the referee can be that time when applicant responds to the summary of consultation concerns. This obviates the need and expense for a "written response" to consultation reports. Written responses to summaries of consultations are not the usual practice in

Division 4, and were not the usual practice in Division 5 until this decade, and these certainly add to costs and time spent, as well as entrenching positions on issues.

b. *Dispense with Rule 6 Letters*. We are not aware of Rule 6 letters being a common practice outside of Division 5. Again, we recommend more direct case management by a referee in initial status conferences would obviate the expense and time to deal with such letters.

c. *State and Division Engineer participation*. We encourage the committee to seek a commitment to proactive communication by the state and division engineers in contacting applicants on the front end of the judicial process and working through questions and concerns. In addition, in private practice, we consider the state and division engineer as parties in the case, not as judicial staff. While the consultation provides the court with valuable input for purposes of administration and technical questions, such input is rebuttable, and the applicants look to the court to be impartial as to all parties. Other states have struggled with defining the court's relationship to the state; we encourage continued separation of judicial and executive branch decisions. See John E. Thorson, Ramsey L. Kropf, Andrea K. Gerlak & Dar Crammond, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U.DENV. WATER L. REV. at 391-392, and at 473-482 (Spring 2006).

(2) Seek Input from Experienced Judicial Staff. We encourage the committee seek input about improving and streamlining the judicial process from long experienced judicial staff, including Sr. Judge Thomas Ossola from Division 5 and soon to retire Referee Aaron Clay from Division 4.

(3) Applications have decreased since 1969. In Colorado, there are fewer water applications being filed currently than have been filed historically, according to research from New Mexico. New Mexico's Utton Transboundary Resources Center reported in 2003 that 28,329 water court cases were filed in the seven water divisions between 1971 and 1978. The majority were filed in 1971 and 1972, for a total of 14,063 cases (approximately 7,031 applications per year). From 1973-1979, the average number of cases dropped to 2,038 per year. In 1998 to 2001, the average dropped still further; only 5,183 cases were filed in all divisions combined (average 1,295 cases per year). See O'Leary, Marilyn C., *An Analysis of the Colorado Water Court System*, January 10, 2003; http://uttoncenter.unm.edu/pdfs/Colorado_Water_Courts.pdf. This seems to be where water court filings have leveled out. By 2005, the total cases filed were 1,109, while in 2006 there was an increase to 1,303 cases. See Judicial Branch Fiscal Year 2006 Annual Statistical Report, http://www.courts.state.co.us/panda/statrep/ar2006/arfiles/table33w.pdf. For 2007, there were approximately 1,238 applications filed in all divisions. See December 31, 2007 Water Court Resumes, Water Divisions 1-7. http://www.courts.state.co.us/supct/supctwaterctindex.htm.

The work done by this committee in looking at the number of filed cases seems to bear out this conclusion. However, the judicial process seems to have become more complex.

We would encourage a return to viewing the rudimentary data needed in a decree, rather than looking for how to add more and more information to decrees. Taking this perspective would not only reduce costs and time, improve judicial efficiency, but it would also provide flexibility in administering decrees over time. Again, our view is that the 1969 Act was adopted to provide Colorado water users with an expedient process and flexibility in maximizing a valuable public resource – that concept remains valuable.

(5) Special Masters Unnecessary. Lastly, in discussions about using a Rule 53 Special Master, we recommend that the Referee process provided under current law is adequate for Colorado's judicial needs and that adding or replacing with a special master system is not warranted. Referees can implement the less formal case management techniques that a special master uses. Water judges could appoint a special master in those rare circumstances where complexity makes it more efficient. However, if the court were to implement a special master system in addition to the referee and water court review, it would certainly seem to increase costs and decrease efficiency.

The above comments are provided on behalf of our firm. Again, we appreciate the opportunity to provide input, and are happy to assist in any way that may be helpful.

Very truly yours,

Ramsey L. Kropf
PATRICK, MILLER & KROPF, P.C.
A Professional Corporation

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3:55 to 4:00 p.m. Michael Sawyer, Atty., Leavenworth & Karp, P.C.

The Honorable Justice Greg Hobbs *via e-mail to robert.mccallum@judicial.state.co.us*
Colorado Supreme Court
Chairman, Colorado Water Court Committee
c/o Robert McCallum
Public Information Officer
Colorado Supreme Court

Re: Comments for Water Court Committee of the Colorado Supreme Court for Public Hearing on March 10, 2008

Dear Justice Hobbs:

This letter is being sent on behalf of the four attorneys at Leavenworth & Karp, P.C. who practice before the Colorado Water Courts. Unfortunately, a representative from Leavenworth & Karp will not be able to attend the public hearing on March 10th. Therefore, the firm on behalf of itself and its agricultural, municipal and developer clients submits these written comments for the Committee's consideration.

1. It is worth noting that there are currently a number of issues related to the functioning of the Water Courts in Division 5 that have already been articulated. These issues have been addressed in a survey compiled by the Division 5 Water Court Bench/Bar and it is our understanding that the results of that survey have been provided to the Water Court Committee. We believe that it is important for the Committee to consider the results of that survey as it summarizes the collective experience of numerous attorneys who practice water law with the Division 5 Water Court.

2. One issue that has become particularly vexing for certain clients of Leavenworth & Karp has been the dramatically escalating costs of undertaking a Water Court matter. It is our experience that the bulk of these costs have been related to heightened technical and engineering requirements of both the Water Referee and the Division Engineer. In certain instances, burdensome

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technical and engineering requirements have been imposed on Water Court applications that have a relatively de minimis effect on the drainage in which they are located. For smaller clients, small farmers or landowners, the costs of retaining experts and attorneys to undertake a relatively simple Water Court case has dissuaded clients from exercising their rights to appropriate water. On at least two occasions, clients of Leavenworth & Karp have decided to merely pull their Water Court applications as opposed to dealing with mounting costs associated with bringing those cases to fruition. We believe that this is a problem in light of the Colorado State Constitution's guarantee of the right to make beneficial use of the waters of this State.

3. We also would strongly dissuade the Water Court Committee from proposing any changes that result in centralizing Water Court functions from the various Divisions to Denver. We believe this is problematic for two reasons. First, we believe that a centralized Water Court administration (referees and judges) would have the effect of increasing the costs to clients. Second, we believe that it is important that referees and judges dealing with water issues be attuned to the issues affecting the respective water basins. Therefore, it is important that referees and judges continue to be persons located in the basins in which the water rights that they adjudicate are located.

4. Another issue that has complicated the Water Court process has been a lack of finality of the consultation process between the Division Engineer and the Referee. Specifically, after a Summary of Consultation is issued, it is not uncommon for the Division Engineer to issue additional concerns later in the process. This has the effect of thwarting settlement processes between applicants and opposers as well as creating uncertainty in the ability to finalize an application. As is obvious, when additional comments are raised after the initial Summary of Consultation, this has the effect of increasing costs to the client to respond to the additional issues both in terms of engineering and legal fees.

5. We believe that the Water Court Rules with regard to the publication of pending applications should be modified. Specifically, instances have arisen where re-publication was required when an applicant sought to add additional augmentation water to a case. Because the addition of augmentation water benefits all users on a stream, as opposed to creating an additional burden or contemplated draft, re-publication results in unnecessary costs and delay.

6. Finally, we believe that the Division Engineer should continue its efforts to standardize numeric values for items like consumptive use. We believe that the Division Engineer's standardization of pond evaporation calculations has reduced the transaction cost to both applicants and to the Water Court in handling cases involving ponds. Similar efficiencies could be recognized if standardized consumptive use numbers were adopted based upon set elevations and crop types then broken out by month so that consumptive use could be determined for the use of water that is less than a full irrigation season supply.

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Leavenworth & Karp appreciates that the Water Court Committee has found members willing to dedicate their time to improving the Water Court process. We look forward to participating in a positive manner as the Committee's deliberations move forward. Thank you again for taking your time to handle this important issue that affects such a large segment of the State's population.

Very truly yours,

LEAVENWORTH & KARP, P.C.

Loyal E. Leavenworth

Michael J. Sawyer

MJS:mmc

4:00 to 4:05 p.m. Colorado State Senator Jim Isgar
Request submitted to Jim Witwer

4:05 to 4:10 p.m. Cheryl Signs, P.E., Cheryl Signs Engineering
March 5, 2008

Water Court Committee
Colorado Supreme Court

Dear Committee Members:

I am a water resource engineer and have practiced in Colorado since 1972. I have given expert testimony in a number of cases. I am currently doing the engineering for cases in Divisions 1 and 2. These comments to not directly concern any of them

My first suggestion is minor but could save substantial time and prevent confusion. The suggestion is to insert the division number in the case number. As you know, there is currently no way to identify the appropriate division by using the case number. Therefore, each request for case information from a general source must also specify the division. Perhaps the "C" or the "W" in the existing case numbering system could be changed to indicate the division by number.

The second relates to getting objectors' attention during the court process. In Division 1, the case must be re-referred before some objectors consider the issues at all. Self-appointed guardians of the river have not devoted the appropriate resources to that pursuit. Because objectors will not pay attention, applicants must proceed with trial

preparation including resource intensive activities that are wasteful when settlement is reached .

A water attorney recently told me that 90 percent of cases settle within a week of trial. If that's true, it's pretty telling. Filing a statement of opposition carries an obligation to actively participate in the case. Applicants should not be forced to pay for the motions only because objectors are involved in serious settlement negotiations for the trial scheduled next week.

Thank you for the opportunity to comment. I do not plan to take your time on the 10th with an oral presentation.

Sincerely,

Cheryl Signs, P. E.

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4:10 to 4:15 p.m. **Mark Hamilton, Atty., Holland & Hart, LLP**
2007-2008 Chair, Water Law Section of the Colo. Bar Assoc.

March 5, 2008

Water Court Committee of the Colorado Supreme Court
Justice Gregory Hobbs, Chairperson

VIA EMAIL
robert.mccallum@judicial.state.co.us

Re: Public Comment by Water Law Section of the Colorado Bar Association at the March 10, 2008 public input meeting

Dear Justice Hobbs and Committee Members:

Currently, I serve as the chair of the Water Law Section of the Colorado Bar Association and I offer the following comments on behalf of the Section.

Let me begin by noting that our membership has been actively following the ongoing activities of the Water Court Committee, and we greatly appreciate the many invitations that have been extended to participate in the proceedings of this Committee and its various sub-committees. By way of background, the Water Law Section's membership consists of 432 lawyers from all seven water divisions. Our clients range from small rural irrigators and individual homeowners to major municipalities, water districts and ski resorts. While some of our clients have significant experience in water adjudications and great knowledge of the history of Colorado water rights, others are newcomers to Colorado who are bewildered by the very concept of the prior appropriation system.

Recognizing this wide range of clients, cases and issues, as well as some regional differences in case management practices, there are necessarily different viewpoints among the various members of the Water Law Section concerning the prospect of water court reform in general, as well as the particular ideas that have been voiced to date. To this extent, I understand and acknowledge that the Committee will likely receive individualized comments from a number of practitioners or law firms on a variety of topics. Nonetheless, the leadership of the Water Law Section has discussed the progress of the Committee and its sub-committees to date, and we offer the following ideas for consideration.

First, I believe that most of our membership desires to ensure that any procedural reforms are developed in response to identified problems that exist generally among the various water divisions over an extended period, as opposed to isolated issues within one division, or temporary pressure placed on the courts by previous legislative or administrative changes.

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Likewise, while the cost of proceeding in water court is more than it used to be, I believe that most of our membership recognizes the tremendous importance of the preservation of an adversarial fact-finding system in water court, not as a means of increasing acrimony or litigiousness, but as a way to carefully identify, distill, narrow, and resolve complex issues. While any court system is subject to limited resources, I think most members of the Water Law Section would concur that Colorado's water courts generally continue to be an effective venue for resolution of competing claims to an ever more limited resource.

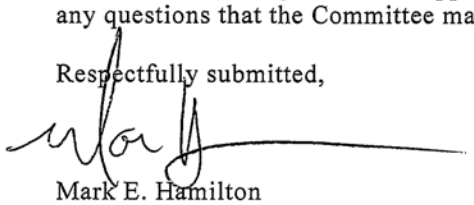
However, the foregoing comments should not be interpreted to mean that the water bar is opposed to any reform. Quite to the contrary, I believe that the Water Section's membership would be quite supportive of targeted reforms that are developed in response to actual problems with current rules, procedures or case load.

By way of example, if efficiency is a concern, I believe the Water Section would support increases in judicial resources and staffing, if such increases would lead to greater efficiency. I also believe that our membership would generally support some type of differential case management to limit the prospect of simpler or uncontested matters being tracked behind more complex or controversial ones. Furthermore, while many of our members recently participated in revising Rule 11 of the water court rules, I do not believe that water practitioners are opposed to further revisions to case management timetables, nor to the consideration of similar timetables for proceedings before water referees.

In sum, although the fact-finding of the Water Court Committee and its various sub-committees remains incomplete, and there are no specific reform proposals to which the Water Law Section or its members can respond at this point, we intend to continue our involvement in these processes and we stand prepared to offer our assistance to help address any confirmed problems. Please also note that the Water Law Section would welcome the opportunity to provide additional comment after any specific areas of concern are confirmed or reform proposals formulated.

Thank you again for this opportunity to be a part of this process. I would welcome any questions that the Committee may have.

Respectfully submitted,



Mark E. Hamilton
of Holland & Hart LLP
2007-2008 Chair, Water Law Section of the Colorado Bar Association

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4:15 to 4:20 p.m. Drew Peternell, Dir./Counsel, Trout Unlimited Co. Water Project

March 5, 2008

Via Electronic Mail

Mr. James Witwer
Trout Raley Montano Witwer & Freemen, PC
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203

Dear Jim,

Thank you for the invitation to provide input to the Water Court Committee. Trout Unlimited would like to offer comments, but I realize that I have missed the deadline for doing so. Unfortunately, I am also unavailable to participate in the public input meeting on this coming Monday.

In brief, Trout Unlimited's comments are as follows. I hope that, though they are late, they can be presented to the committee for its consideration.

Trout Unlimited ("TU") is a national, non-profit fisheries conservation organization, and our Colorado Water Project ("CWP") works to protect and restore streams flows for the benefit of Colorado's trout populations. CWP focuses on Colorado water law and policy and participates in water rights proceedings before Colorado's water courts with some frequency. Occasionally, but not always, our participation in water court proceedings is for the purpose of objecting to water rights applications. As a party that does not hold water rights, this means holding water rights applicants to strict proof of the elements of their water rights claims.

TU feels compelled to hold applicants to strict proof of the element of their claims because, in our experience, the water courts do not do so unless there is opposition to an application. That is, unless there is an objector willing to risk the possibility of being assessed costs in connection with litigation, the water courts, in general, do not independently evaluate or scrutinize applications for compliance with the elements of water rights claims, including, in particular, the can and will and anti-speculation doctrines. Likewise, it is our experience that, in general, the division engineers do not closely scrutinize water rights applications for compliance with these doctrines in the course of performing their required review and water court consultation.

Thus, TU's first broad comment regarding the water court process is that the water courts and division engineers should closely scrutinize water rights applications for compliance with all elements of water rights claims. Without such scrutiny, large numbers of illegitimate water rights, especially conditional water rights, will be decreed. The existence of outstanding conditional water rights can create a disincentive for other potential water user to make appropriations and put water to beneficial use.

As suggested above, the fact that objectors in water court face a risk of being assessed litigation costs if they unsuccessfully oppose a water rights application accentuates the problem of water rights being decreed without adequate review. The possibility of being assessed costs is a major deterrent for non-profit organizations, such as TU, to engage in litigation in water court. This is especially true because water court cases almost always involve the use of expert testimony, the development and presentation of which can be expensive.

Thus, TU's second comment for the committee is that it should consider relieving certain water court objectors from the possibility of liability for litigation costs. We would suggest that parties who participate in water court proceedings for the sole purpose of holding water rights applicants to the requirements of the law are serving a public function and, as such, should not be liable for litigation costs, especially is those parties have limited financial capacity to pay litigation costs.

Thank you for considering my comments. I look forward to monitoring and participating in the committee's proceedings in the future.

Sincerely,

Drew Peternell
Director and Counsel
Trout Unlimited's Colorado Water Project

4:20 to 4:25 p.m. Mariam Masid, J.D., Ph.D

Mr. McCallum,

Justice Hobbs asked me to offer to make a brief presentation at the Monday public hearing concerning the findings and results of my research on expert witnesses in the water courts as described in my dissertation: REFORMING THE CULTURE OF PARTIALITY: DIFFUSING THE BATTLE OF THE EXPERTS IN WESTERN WATER WARS

I am not a party, interested person, or attorney involved in any pending water cases.

Mariam J. Masid, J.D., Ph.D.
303-297-7416

CONTINUED BELOW…

4:25 to 4:30 p.m. Steven Simms, Atty., Brownstein, Hyatt, Farber, Shreck, LLP
March 5, 2008

Justice Greg Hobbs
State Judicial Building
2 E. 14th Ave.
Denver, CO 80203
Via E-mail

Re: Use of Expert Witnesses

Dear Justice Hobbs:
At the DU Symposium today, you challenged your listeners to read Mariam J. Masid's dissertation posted on the court website and comment by midnight tonight on her proposal for reforming the way that water courts use expert witnesses. I note that you were one of her advisors so I was initially reluctant to criticize her work, but in the spirit of a rigorous debate, I have made some initial observations. I concluded that Ms. Masid's work did not demonstrate enough knowledge of how experts are used in water court to be a credible source defining a problem in need of reform and her suggested reform would weaken the existing system.

Ms. Masid spends the bulk of the paper looking at the evolution of the Daubert standard and expert reforms in England. The purpose of these standards and reforms were to prevent prejudicing juries with "junk science." Ms. Masid only mentioned in passing (one sentence at page 73) that water trials in Colorado were not tried to juries. Ms. Masid did no analysis of whether the junk science/Daubert issues had any relevance to trials to specialized water courts. In my nearly 30 years of experience, junk science is not typically a water court problem because the experienced water judges have the specialized knowledge to properly evaluate technical information presented to them.

Ms. Masid focuses all of her criticism of expert testimony in Colorado water cases to use of hydrologic models, but did no analysis on the frequency of the use of these models or the frequency of serious disputes concerning these models. She looked at the Division 3 rules trial, the Arkansas River litigation and SPCUP as examples of the problem, but in my experience in addition to these three examples, there are less than 10 other cases out of the thousands before the water court that had a contested hydrologic model. Cases where models are at issue are indeed complex, but those cases are very rare. Ms. Masid did no analysis on the typical water case where the experts disagreed due to application of divergent legal theories or due to a dispute on factual issues underlying their opinions.

Ms. Masid considers experts to be scientists whose only true role is the search for truth and appears to disdain any adversity in the scientific process if the adversity occurs in the courtroom. On the other hand, Ms. Masid explains that one part of the scientific process is testing and replication to attempt to refute the hypothesis, which in itself is inherently adversarial.

Ms. Masid did not examine the role of effective cross-examination (and the advisory expert's role in assisting in effective cross-examination) as a means to test an opposing expert's hypothesis as well as its traditional role in exposing financial and other types of bias affecting the opinion.

The history of the scientific, political and philosophic process involves competition between ideas, those ideas that are proved false fall by the wayside, and those that prevail are acclaimed to be the "truth." Legal logic involves a similar competition between the litigants, but there is rarely a simple proof that clearly demonstrates the falsity of a claim. In most cases, no truth is evident so a judge's decision does not determine the truth, but merely picks the better-reasoned argument.

Ms. Masid's proposal to eliminate the adversary use of experts would remove the competition that is the hallmark of most logical argument. The fallacy of this argument is that it assumes that there is one easy generally accepted truth to be discerned in every case and that experts have no other biases once the adversarial bias is removed. Had Ms. Masid fully understood the breath of issues contested in the water court, she would have realized that in water court, truth is a function of facts, history, law, hydrology and engineering and there is rarely one simple scientific answer.

The water court is not just about the most efficient way to make a decision, instead the court must do justice. A party to a dispute will never accept a decision as being just unless that party is allowed to tell their side of a contested case using the witnesses they believe can best tell their story.

Sincerely,

Steven O. Sims

END