

TO: Justice Greg Hobbs
FROM: Water Judge Dan Petre, Water Division 5
DATED: January 14, 2008
SUBJECT: Comments on Water Court Process, Especially the Role of the Water Referee

At your request, I have reviewed the materials provided by our water referee, Lain Leoniak, to the Water Court Committee of which you are the chair. She raises good basic questions to explore. At your request, I offer these additional, supplementary comments and some specific questions for the Committee's consideration. To a certain extent, I draw upon my experiences over 30 years in Water Division 5 as a practitioner, water referee, alternate water judge, and now, the water judge. In addition, our water court has, over the past ten years or so, engaged in a general, non-case specific dialogue with the water bar who appear before us. It is an ongoing process. My remarks are also informed by their ideas.

Certainly, policies and approaches of a particular state or division engineer or a water judge or referee may affect how the water court functions in any division, but those considerations are beyond what I understand to be the scope of what the Committee is examining.

STATUTORY CONNECTIONS BETWEEN THE STATE AND DIVISION ENGINEERS AND THE WATER COURT IN THE ADJUDICATION PROCESS

Before getting into individual issues, with your indulgence, I offer the following framework to provide some context for the practices that have been historically employed in our Division and for some of the decisions that the Committee will be making.

For the evaluation of water applications, the 1969 Act, as amended, establishes a close working relationship between the water court and the state and division engineers ("SE/DE" or "the engineers"). It starts with the filing of the application. The water clerk is required to

send a copy of every water application and every ruling to the SE/DE. C.R.S. 37-92-302(1)(a) and 303(1).

There are other examples. The water referee is not required to be an engineer or an attorney but must be someone who possesses such training and experience as to qualify him or her to render “expert opinions and decisions on the complex matters of *water rights and administration*” [emphasis supplied]. §203(6). This focus on both water rights and the administration of those rights indicates that a referee must be at least conversant in both the legal and engineering aspects of these applications. While appointed by the water judge, the selection must be from a list of three qualified individuals submitted by the executive director of the Department of Natural Resources to that judge. §203(5).

The referee is charged with conducting “*such investigations as are necessary* to determine whether or not the statements in the application and the statements of opposition are true and to become *fully advised* with respect to the subject matter of the applications and statements of opposition.” [emphasis supplied] §302(4). Again, the requirements that the referee make such investigations as are necessary to become fully advised makes no distinction between the legal and engineering aspects of a water claim. It also means that the water referee is unique among judicial officers in his or her obligation to take an active role to investigate; except for limited *sua sponte* inquiry, other judges and magistrates passively deal with the facts as presented to them. Even so, since the referee remains a judicial officer, it has been our practice in Division 5 that the referee not negotiate with applicant’s counsel the terms of his or her rulings. It has meant that referee will typically not indicate how he or she will rule before the ruling issues.

However, that is not to say that the referee in our Division will wait until the end of the case to spring his or her concerns on the parties. Typically, the referee includes his or her input about an application in the course of what is the clearest example of the working relationship between the Engineers and the Court: the consultation. *Id.* For applications filed in Division 5 (and the White River portion of Division 6), the referee speaks with the division engineer about each filing. In Division 5, it is a face-to-face meeting. The participants prepare

extensively in advance, and while the summary of consultation is prepared, signed, and distributed by the division engineer, it reflects the assessment of the case by both at beginning stages of the case. Ideally, that assessment will remain the same throughout the matter, though on occasion, as the application evolves during the process or new data comes to light, the referee may need to seek additional information in order to complete the investigation, and rule.

This consultation is not a prohibited *ex parte* communication, because typically the division engineer is not a party at the time of the consultation. On those rare occasions when the SE/DE have filed a statement of opposition, it was my practice that I would not participate in the consultation for that case, and the summary of the “consultation” would recite that fact. I believe that our current referee, Ms. Leoniak, takes the same approach.

If a case is re-referred prior to the consultation, the division engineer is obligated to submit written recommendations to the water judge, and if the application involves a well, in some circumstances, absence of input from the SE/DE may preclude the court from even considering the application. §§302(4) and (2)(a).

Following re-referral of a case to the water judge, as part of the hearing on the application, the division engineer is required to appear in the hearing to “furnish pertinent information”. §304(3). Even if not a party, the engineer may be represented by the attorney general’s office and may be examined, just like any other expert witness. *Id.*

As the foregoing examples demonstrate, the legislature has constructed a finely-tuned mechanism by which the water court receives information from the division engineer in order to evaluate the water application and complete the adjudication process. Between the engineers’ review of each application from a primarily engineering perspective and the water referee looking at it from a primarily legal perspective, in Division 5, we believe that what results is a ruling and decree which is clear and accurate, well-supported, and administrable and which will avoid injury to the vested rights of others.

IMPLICATIONS OF A CLIMATE OF INCREASED COMPETITION AND SCARCITY

When I began practicing in the water court in the late 1970's, I recall that I generally had the expectation that my client would receive the water right or other relief it was seeking and in much the same form as I had requested. There was plenty of legally and physically water in most places, and generally, I viewed the role of the water referee and water judge as largely ministerial.

Times have changed. These days, in Division 5 and elsewhere, more and more claimants are competing for the remaining legally and physically available water. If those who tell us that we are entering an era of global warming are correct, the diminishing supplies and changes in when water runs off will only exacerbate the problem.

The resulting climate of increased competition and water scarcity has implications for the process described above.

It has caused claims for water to be more closely scrutinized by the SE/DE, the water referee, and the parties and their engineers. One consequence of this is that the SE/DE are increasingly perceived by some to be *de facto* opponents of every application, even when they have not filed a statement of opposition. This perception has, in turn, led to the notion that the historic and statutory relationship between the engineers and the water court is, somehow, suspect and *ex parte*, even conspiratorial. It has also brought to the forefront lingering questions about how to reconcile the referee's role as judicial officer with his or her obligation to investigate.

Finally, even though this heightened scrutiny is unavoidable, we are challenged to make the process as streamlined as possible so that it is not unduly prolonged or prohibitively expensive, especially for those relatively small users who not only file applications but also must periodically oppose other applications in order to protect their water rights.

SOME QUESTIONS FOR THE COMMITTEE'S CONSIDERATION

With that background, as you requested, I offer some bullet points of topics which the Committee may want to examine. These do not necessarily represent my viewpoints and are not intended to comprise an exhaustive outline. They just reflect issues which re-surface from time to time:

- Should any changes be made in the close working relationship between the SE/DE and the water referee and water court?
- Should the statute be changed to make it clear that the role between the engineers and the water court changes when the engineers oppose an application as parties? For example, should the law specifically endorse the practice of not having a consultation if the engineers have filed a statement of opposition?
- To a greater extent than currently, should the SE/DE be required to become formal party opponents, with legal counsel, at the start of the case if their primary concern with an application is more legal than engineering in nature?
- To what extent are at least some of the complaints about the adjudication process really complaints about the heightened scrutiny driven by factors described above which cannot be changed by new legislation or changes in court rules?
- Similarly, to what extent do some of those complaints fundamentally misconceive the dual roles of the water referee to both investigate and rule?
- Should the law be changed to require more “front-end loading” of the process? For example, by requiring that many of those items which are routinely requested in the summary of consultation (e.g., the parties’ reports from their water engineers) be filed with the court and received by the parties and the SE/DE well before the consultation occurs, thus minimizing what has to be requested later in the case.
- Is additional funding needed to address some predictable logjams in the system? For example, the fact that other statutory obligations – to administer the streams – and staffing shortages sometimes slow preparation of the summary of consultation by the division engineer once the consultation has occurred.

- Should the water referee be restricted in his or her ability to make site visits as part of the investigative process?
- Should limits be placed upon what the questions which the SE/DE and the water referee may ask the applicant about a claim, and when they may be asked? If so, should there be exceptions where the applicant has changed its plans during the course of the case or has not provided critical information until late in the process?
- What, if any, structural changes are needed to delineate what the referee can and should do as an investigator without compromising his or her role as an impartial judicial officer?
- In the interest of keeping uncontested matters in the informal referee process and not cutting off the referee's duty to investigate, should a party in an uncontested, or nominally contested, case be prohibited from re-referring the case to the water judge?
- To the extent that pro se applications require inordinate amounts of time by the water court staff (i.e., in dealing with the applicant in person and by phone, preparing the resume) and referee (i.e., to correct legal descriptions and otherwise obtain information which would applicant's counsel would provide and then, to draft a ruling which the attorney would otherwise draft), should there be special processes for such applications? Should consideration be given in weighted caseload statistics for divisions with high percentages of such cases?
- Assuming that the division engineer is not a party, to what extent, if at all, should he or she and the water referee have the right to communicate about a particular claim after the initial consultation?
- What would be gained by a requirement that a water referee be a professional engineer? What would be lost if the water referee would no longer have legal training or experience in water matters?
- If it is the recommendation of the Committee that the water referee be a professional engineer, is it also willing to recommend that that person be paid enough so that she or he can work full-time for the water court (that is, with no other professional practice) and so that the court can attract qualified candidates from a relatively small pool of engineers who do this

sort of work? Also, in analyzing the fiscal impact of such a requirement, the Committee should take into account the fact that the engineer must have the ability to do certain things which lawyers are good at (e.g., analyzing the legal aspects of the application, reviewing the resume for adequate notice, drafting a coherent and legally enforceable ruling). If need be, that expertise would have to be hired separately so that the water judge would not have to spend inordinate time reviewing, and if necessary, correcting such matters, thus delaying the entry of the decree.

- Should the executive director of the Department of Natural Resources continue to play a role in who the water judge may appoint as the referee?
- When the last party opponent has settled out of a contested case, should the division engineer be given an opportunity to review the “final version” of the proposed ruling and provide feedback to the parties and the water referee before the referee begins his or her final review?

I take no position as to the answers to these questions. However, I do hope that some of them will provide some grist for the deliberations of the Committee.