

# Supreme Court of Colorado

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GREGORY J. HOBBS, JR.  
JUSTICE

## **Water Court Committee of the Colorado Supreme Court Report to the Chief Justice August 1, 2008**

Dear Chief Justice Mullarkey:

I am pleased to submit the Water Court Committee's report, *Timely, Fair and Effective Water Courts, August 1, 2008*.

You established the committee by your order of December 4, 2007, appointed its members on December 11, 2007, and requested its report by August 1, 2008, on which date your order sunsets the committee.

You charged the committee with reviewing the water court process, identifying possible ways through rule and/or statutory change to achieve efficiencies in water court cases while still protecting the quality of outcomes, and ensuring the highest level of competence in water court case participants. You also stated that the purpose of the committee was not to include altering or impairing the existing water rights of any public agency or private person. You identified ten issues for the committee to consider and address in its report, but you did not limit the committee to only those issues. This report addresses each of those issues and some additional issues that surfaced during the process. I have attached the text of your orders at the conclusion of this report.

The process of the committee has been thorough and detailed. Initially, as Chair, I designated five subcommittees, focusing on referees (chaired by Casey Shpall), expert witnesses (co-chaired by David Robbins and Hal Simpson), small users (chaired by Jim Witwer), education (chaired by Doug Clements), and case management (chaired by Justice Michael Bender). Those subcommittees met multiple times throughout the past seven months. The full committee met at scheduled times to review the work of the subcommittees, discuss the emerging recommendations, and refer matters back to the subcommittees for further examination and language drafting.

As part of your order, you directed the committee to establish an agenda and process that allowed persons who have any interest in water to provide additional issues, information and proposals to the committee. To that end, the committee

has used the Colorado Judicial Branch webpage to announce the dates and places of committee and subcommittee meetings, which have been open to attendance by members of the public. The committee also accepted written comments throughout its existence, and it held a public meeting at the Court on March 10, 2008, at which it received oral and written comments.

The committee also circulated two surveys, one for the general public and another for professionals, and reviewed those results in its deliberations. Committee materials, including the survey results, are posted for future reference on the Colorado Judicial Branch webpage at:

<http://www.courts.state.co.us/supct/committees/waterctcomm.htm>

Ultimately, the committee reached consensus on most points. In two areas, dealing with the process for addressing insufficient applications and the interface between the division engineer and the water referee, the committee did not reach consensus. Examining the 1969 Water Rights Determination and Administration Act for guidance, I exercised the prerogative of the Chair to resolve the impasse in conflicting language proposed by the subcommittees and individual members of the full committee. The text of rules language contained in this report reflects that resolution.

In tendering this report, the committee understands that the process of Court and General Assembly consideration is just beginning. If the Court approves the appointment of a standing Water Court Committee, it will promptly begin further work and may make further recommendations as the Court itself considers the language of a rulemaking proposal for public comment and hearing. Committee members retain their prerogative to participate individually, or on behalf of their clients or agencies, in support of or opposition to any proposal the Court or General Assembly may ultimately choose to initiate.

It has been the committee's privilege to undertake this assignment, and my personal privilege to chair it.

Respectfully submitted,



Gregory J. Hobbs, Jr., Justice  
Chair, Water Court Committee

**TIMELY, FAIR AND EFFECTIVE WATER COURTS**

**REPORT OF THE WATER COURT COMMITTEE  
TO CHIEF JUSTICE MARY J. MULLARKEY,  
COLORADO SUPREME COURT**

**AUGUST 1, 2008**

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**RECOMMENDATIONS OF WATER COURT COMMITTEE  
AUGUST 1, 2008**

1. The Colorado General Assembly should consider an amendment to C.R.S. § 37-92-201 (e) and (f) to place the White River and its drainages within the jurisdiction of Water Division 6, instead of Water Division No. 5 as currently placed.
2. The Colorado Supreme Court, using its public comment and hearing procedures, should consider amending Colorado Rule of Civil Procedure 90 and Rule 2, 3, 6, and 11 of the Uniform Rules For All Water Court Divisions.
3. The Colorado Supreme Court should consider adopting a declaration for all experts to sign in water court proceedings.
4. The Colorado Supreme Court, the Colorado Bar Association through its Water Section, and Continuing Legal Education, Inc. of the Colorado Bar Association should work together for a comprehensive ongoing educational program for water attorneys, judges, and other professionals participating in water court proceedings.
5. The Colorado Supreme Court should establish a standing Water Court Committee.
6. The State Court Administrator's Office should work with the standing Water Court Committee to prepare a user friendly set of materials designed for assisting the public and individuals without attorneys to better understand and participate in water court proceedings.
7. The Water Judges, working with the standing Water Court Committee, should review all current standard forms used in water court proceedings and make appropriate revisions and additions.
8. The Colorado Supreme Court, the Attorney General, the Department of Natural Resources, the State Engineer, and the Colorado Water Conservation Board should work together to obtain the General Assembly's approval of funding necessary for operation of timely, fair and effective water courts.
9. The Colorado General Assembly should continue to foster the development of publicly-usable river basin computational models, predictive tools, and model data transparency.
10. The Colorado Supreme Court through its State Court Administrator should review all current water court staffing and assignments and make necessary additional assignments or reassignments, as needed to ensure timely, fair and effective water courts.

**WATER COURT COMMITTEE'S RESPONSE (IN ITALICS) TO  
THE TEN ISSUES LISTED IN THE CHIEF JUSTICE'S ORDER  
ESTABLISHING THE COMMITTEE**

**August 1, 2008**

- (1) Assignment of senior judges to assist in settlement conferences and/or trials of water cases in any water division; *this subject is addressed in committee recommendation (10); the committee suggests a review of all current water court assignments and workloads in each division; this could result in assignment of senior water judges to clear congested water court dockets; senior water judges could also serve as special masters or as settlement judges; the Chief Justice's annual year-end order routinely includes the designation of senior water judges who may act in water matters in any or all of the seven water courts, as needed and assigned to a particular case;*
- (2) Water court rules to allow for the appointment of special masters upon agreement of the parties and/or by order of the water court or the supreme court; *Rule 53 of the Colorado Rules of Civil Procedure allows for the appointment of special masters and could be invoked in water cases; generally, however, water judges prefer to make their own findings of fact;*
- (3) Water court rules and/or statutes pertaining to water referee qualifications, powers, and timelines; *this subject is addressed in committee recommendation (2) and the report's text for Colorado Rule of Civil Procedure 90 and Rules 2, 3, and 6 of the Uniform Rules For All Water Court Divisions; the State Court Administrator's Office is working on the referee's position description, including qualifications;*
- (4) Water court rules and/or statutes to impose additional or revised time deadlines and informational content, commencing with the filing of the water court application; *this subject is addressed in committee recommendation (2) and the report's text for C.R.C.P. 90 and Rules 3, 6, and Rule 11;*
- (5) Water court rules and/or statutes pertaining to re-referral of matters to the water judge; *this subject is addressed in committee recommendation (2) and the report's text for Rule 6;*

(6) Water court rules pertaining to experts and expert testimony before the referee and water judge; *this subject is addressed in committee recommendation (2) and the report's text for Rule 6, Rule 11, and Declaration of Expert.*

(7) Professional training requirements on water judges, water referees, and practitioners in the water courts; *this subject is addressed in committee recommendation (4) and the report's discussion of an educational program for water judges, attorneys, experts and other professionals;*

(8) Emergency procedure for review of water court applications; *to the committee's surprise, this topic did not rate as important in the public survey of the water user community; instead, the subjects of delay and expense emerged as the leading issues, which the committee has addressed through its recommendations (2) and (10);*

(9) Resource needs of the water courts and the Supreme Court to assist in the expeditious management of water cases; *this is the subject of committee recommendations (8) and (10); and*

(10) Methods for reducing the expense and burden of the water court process on small users; *this is the subject of committee recommendations (2), (6), (7), and (9); one of the principal ongoing tasks for a standing water court committee, recommendation (5), would be this topic.*

**TIMELY, FAIR AND EFFECTIVE WATER COURTS**  
**SYNOPSIS OF WATER COURT COMMITTEE RECOMMENDATIONS**  
**AUGUST 1, 2008**

**I.**

**The Essential Water Rights Adjudication and Enforcement Framework**

The Colorado General Assembly in 1969 established seven water divisions with seven water courts and seven division engineers for the purpose of achieving timely, fair and effective determination of water use rights and their administration. The Colorado constitution and implementing legislation adopted by the General Assembly provides that public agencies and private persons may obtain water use rights to un-appropriated waters of the natural stream, which includes surface water and tributary groundwater.

A water use right is a property right created by placing un-appropriated water to an actual beneficial use. Under the 1969 Act, with the exception of certain exempt small capacity groundwater uses, a use right must be adjudicated in order to qualify for enforcement. Enforcement occurs in order of adjudicated priority. If there is not sufficient water available to satisfy all adjudicated surface water and tributary groundwater rights in order of their priority, the State Engineer together with the division engineer and the local water commissioners must curtail surface and groundwater diversions, in order to make water available to those public agencies and private persons entitled to exercise their water rights in order of priority.

To ameliorate strict operation of the priority system, the General Assembly has determined that out-of-priority surface water and groundwater diversions can be made only if the diverter provides a replacement water supply—sufficient in amount, timing, and quality—to prevent injury to vested water rights. Injury occurs when the amount of water otherwise available to the water right is intercepted by a surface or groundwater diverter without adequate replacement water being provided.

Adjudicated water use rights are among the most valuable property rights Coloradans own. Recognizing this, the General Assembly just three years after statehood, in 1879 first placed the adjudication of water use rights with the judicial branch of Colorado Government, and the enforcement of adjudicated water use rights with the state and division engineers and local water commissioners.

A major reform of the 1969 Act was the General Assembly's establishment of specialized water judges with jurisdiction over the adjudication of water matters



and referees for each of seven specified major watersheds within Colorado to assist in the prompt resolution of water cases, without trial when possible.

The water referee's position is unique among judicial officers. Upon the water judge's referral of the application in any case to the referee, the referee is authorized to promptly commence an informal investigation and issue a proposed ruling and decree that will become final, if no party to the water case protests the ruling and decree to the water judge. However, the referee, the applicant, or any other party to a water case may re-submit the case to the water judge for adjudication. Cases prolonged before the referee may then be prolonged before the water judge, if timelines are not set and enforced.

Forty years into the 1969 Act, for the purpose of obtaining a performance reality check, the Chief Justice of the Colorado Supreme Court established the Water Court Committee, following consultation with the House and Senate Chairs of the General Assembly responsible for water matters and the Executive Director of the Department of Natural Resources.

## II. Reality Check 40 Years into the 1969 Act

At the outset of the 21<sup>st</sup> Century, a severe drought has tested the limits of Colorado water use rights and the capacity of the three branches of Colorado government to realize the optimum use of Colorado's water for all the purposes citizens wish to make of it, including instream flow and in-channel recreational water rights.

Throughout its history, Colorado has been prone to cyclical years of water scarcity punctuated by intermittent plentiful periods. Due to water supply and legal constraints—Colorado must deliver inter-state apportioned water of its four major watersheds, Arkansas, Colorado, Platte, and Rio Grande, to eighteen downstream states—Colorado is virtually out of un-appropriated water. Of the four watersheds, only the Colorado River network may have the potential of appreciably serving additional water uses not yet perfected. Many water court cases now reflect the reality that changes of water rights and augmentation plans have become the primary means for serving Colorado's growing population.

Responding to these realities—drought, growth, and legal obligations—the Colorado General Assembly through its 2008 session has funded a Colorado Water Conservation Board study of Colorado River water availability in light of its 1922 Colorado River Compact and 1948 Colorado River Compact apportionments, and future climate scenarios affecting its four watersheds. It has also required local governments to ascertain the adequacy of water supplies when considering land use approvals for additional residential development.

The Water Court Committee's recommendations are shaped by the contemporary context, as well as Colorado's long experience with making water decisions that respond to its community needs and aspirations.

### **III. Why These Recommendations?**

Based on the public comments it has received and its analysis of performance under the 1969 Act, the Water Court Committee concludes that the 1969 Act's combination of informal resolution and trial to the court, if such a resolution proves elusive, enjoys widespread support but is also prone to delay and increased costs in the absence of (1) active case management by the water judges and referees, (2) adequate staffing of the water courts, State and Division Engineer offices, and the Attorney General's Office, (3) professional competence in all aspects of water court practice, and (4) informed applicants and opposers in water court proceedings.

In particular, members of the public including small water user applicants, opposers, and interested private and public organizations, provided the following insight as a result of an anonymous survey made possible by the Colorado Water Conservation Board. 60% of the respondents to this general public survey were water rights owners and farmers and ranchers.

#### General Public Survey

The top three elements most in need of improvement by the Colorado Water Courts are:

1. Timely action by court on cases (62%)
2. Cost of process (57%)
3. Responsiveness and professionalism of other parties (45%)

The top three best features of the Colorado Water Court process are:

1. Knowledgeable water judges (56%)
2. Knowledgeable water referees (52%)
3. Fairness of outcomes (52%)

Respondents frequently mentioned the need for transparent and understandable procedural requirements.

## Professional Survey

69% of respondents indicate they are very satisfied (27%) or somewhat satisfied (42%) with their experience(s) with the Colorado water court system  
Respondents' top three opinions on which aspects of the water rights adjudication process are very important:

- Fairness of process (88%)
- A decree that can be administered (85%)
- A decree that does not cause injury (74%)

Respondents' top three opinions on aspects of the water rights adjudication process that are very *useful*:

- Resume notice (60%)
- Expert reports (55%)

Application process (54%) and statement of opposition (54%)  
Respondents' top three opinions on aspects of the water rights adjudication process that are very *effective*:

- Automatic referral to referee (35%)
- Summary of consultation process (25%)
- Protesting rulings of the referee (23%) and substitute water supply plan administrative approvals (23%)

Respondents' top three opinions on aspects of the water rights adjudication process that are very *significant*:

- Role of water Judge (76%)
- Timely action by the water Judge (73%)
- Role of Division Engineer (59%)

Respondents' top two items that are strongly recommended to improve the water rights adjudication process are:

- More resources for the Water Courts (55%)
- More resources for the Division of Water Resources (53%)

Respondents' top two items that are strongly recommended to *achieve greater efficiency* in the water rights adjudication process:

- Establish deadlines for comments from opposers (47%)
- More active case management at referee level (31%)

Respondents' top item that is strongly recommended to *streamline* the water rights adjudication process:

- Simplified adjudication process for smaller, less complex cases (45%)  
24% of respondents strongly recommend and 39% recommend with reservation informal involvement of state and division engineers

**IV.**  
**Proposed Statutory Change for Water Division 5 and 6**  
**Jurisdictional Boundaries**

In its study of possible statutory provisions, the Water Court Committee heard unanimous support for re-drawing Water Division 5 jurisdictional boundaries to place the White River drainage within the jurisdiction of the Water Court for Water Division 6. The local water commissioner districts of the White River drainage are already responsible to the Water Division 6 engineer. Having a split between administrative and judicial jurisdictions has been confusing and has led to misfiling of water right applications. This change will also help balance caseloads between water divisions 5 and 6.

**Text of Recommendation for General Assembly Consideration of Statutory**  
**Provision to Place White River and its Drainages in Water Division 6 instead**  
**of Division 5**

**(Clean Version of Proposed Amendment**  
**Not Showing Deletion of Existing Statutory Language)**

**Amend C.R.S. § 37-92-201 (e) and (f) to read:**

(e) Division 5: Division 5 consists of all lands in the state of Colorado in the drainage basins of the Colorado river and all of its tributaries arising within Colorado, with the exception of the Gunnison river.

(f) Division 6: Division 6 consists of all lands in the state of Colorado in the drainage basins of the White river, the Yampa or Bear river, the Green river, the North Platte river, and all of their tributaries.

**V.**  
**Educational Program For Judges,  
Water Attorneys, Engineers, Experts, And Other  
Interested Professionals**

**Introduction**

The subject matter contained in water court proceedings is often highly technical in nature, and is becoming increasingly complex. Specialized skills and experience are needed to understand the evidence and expert testimony presented in water court cases. In addition, the field of water resources has a highly specialized and unique terminology. Technical expert witnesses in water court cases include civil engineers, agricultural engineers, geotechnical engineers, ground-water and surface water hydrologists, geohydrologists, hydrogeologists, geologists, mathematicians, agronomists, and watershed scientists, to name a few.

In a perfect world, all testimony and evidence would be presented by the examining attorney and expert witness in a clear and concise manner to judges that know and understand the underlying subject matter. Cross examination would effectively and clearly illuminate differences in approaches and assumptions. Unfortunately, this is not always the case. The survey results presented in the Massid thesis circulated to the western water judges, referees and hearing officers indicate a significant room for improvement in these areas. Direct testimony and exhibits are sometimes difficult to understand, and cross examination often does not assist the trier of fact to sort through difficult technical disagreements.

The Water Court Committee recommends that the Colorado Supreme Court, the Colorado Bar Association's Water Section, and Continuing Legal Education in Colorado, Inc. of the Colorado Bar Association work to facilitate and address educational opportunities for bench, bar and experts relating to technical matters and trial practices. The following provides additional details on these efforts.

## **Existing Education Opportunities**

Water resources engineering and related departments in area universities provide students with a taste of the subject matters typically used in water court proceedings. University of Colorado-Denver regularly offers a water rights engineering class. At last check Colorado State University does not offer such a class, and University of Colorado is in the process of developing one. Both the University of Denver and University of Colorado law schools offer water and natural resource related seminars and internships. For the most part, these classes do not generally provide many students with detailed discussions of the type of technical work being performed for water court litigation. Most water lawyers and technical experts learn the majority of their craft by working on water court cases, i.e. on-the-job training. Similarly, judges learn the technical aspects of the water resources field on-the-job while hearing cases.

Professional associations also provide seminars and workshops that deal with specific technical subjects. These include the Colorado Bar Association, American Society of Civil Engineers, Consulting Engineers Counsel, American Water Resources Association, Colorado Ground Water Association, and others, including private CLE and continuing education firms.

The Water Court Committee recommends education programs that are in addition to those discussed above. While not as detailed as actual college courses, the programs would be more in-depth and organized, as compared to taking a smattering of seminars over the course of a year to meet continuing education requirements. For the purposes of these discussions, the programs would be divided into two categories: technical programs and trial practice programs.

## **Framework for Educational Program**

The goal of this process would be to enable technical experts, water lawyers and judges to take a series of day long seminars over the years to advance the level of knowledge and skill in the profession. The programs would begin at basic levels of complexity and progress through more and more advanced levels. Each course would be a prerequisite for the next advanced course, such as ground water 101 leading to ground water 201 and then to ground water 301. The series would repeat periodically and would be updated and improved based on experience and feedback. Lecturers would be practicing experienced professionals willing to volunteer their time and expertise. The Colorado Bar CLE program has tentatively



agreed to conduct these programs, with help from the professionals in the field. The cost of the courses would be affordable, on the order of \$50 per CLE credit hour. The programs would be highly accessible, either in person, simulcast online, or viewed after the fact on the internet.

The goal of the technical programs is to provide a detailed and rigorous discussion of technical methods and approaches encountered in the water court arena. For example, the attendees would not only learn what the Penman-Monteith method is, but would also learn about the evolution of the method, data requirements, data sources, methods for checking and screening data, comparison with other different methods, limitations practical applications of the method. Whereas it is not possible to eliminate legitimate differences of opinion in the complex world of water court litigation, advancing the general level of knowledge of water court participants on technical matters may reduce the intensity of disputes in some areas.

### **Example Technical Program**

An effective technical program would start with the basics and move through more and more advanced topics. There is too much information to cover the topics in a six hour program. Therefore, a number of courses would be offered, each intended to be a prerequisite for the next level course. The following is an illustrative example of a series of technical programs, following up on the ground water example mentioned above.

#### Ground Water 101, Basic Ground Water Concepts

Ground Water Terminology

How to Estimate Ground Water Properties

Darcy's law

Introduction to Ground Water Geology

Well Pumping, Aquifer Drawdown and Aquifer/Stream Interaction

Evolution of Ground Water Law in Colorado

#### Ground Water 201, Applications in Ground Water Hydrology

The Glover Formulas - point discharge and recharge, parallel drain theory

Boundary Effects and Image Well Analysis

Computer Software for Estimating Stream Depletions and Accretions

Use and Development of Water Budgets

Stream Aquifer Interface

Recharge Projects

### Ground Water 301, Advanced Applications in Ground Water Hydrology

Ground Water Chemistry and Water Quality

Use and Development of Flow Nets

Analysis of Aquifer Test Data

Introduction to Numerical Ground Water Models

### Ground Water 401, Ground Water Modeling I

Development of Model Grid

Data Requirements and Sources

Model Calibration and Verification

Steady State and Transient Model Runs

Use and Analysis of Model Results

Similar programs would be developed in other technical and legal areas. Suggested topics are summarized further below. Faculty would consist of experienced water attorneys and experts from private practice, government and academia. Panel discussions would be worked into the curricula where helpful.

### **Example Trial Practice Program**

The following is an example of a trial practice one-day program. This is an actual course outline for a CBA-CLE program to be presented on October 3, 2008.

#### Expert Witnesses in Water Cases

Preparation of Expert Reports

Disclosures

Preparing for Testimony of Experts

Cross Examination of Experts

Ethics in Dealing with Expert Witnesses

Judicial Panel: What Effective Expert Testimony is Like

## **Input from Professional Community**

Informal canvassing of technical and legal professionals has found almost unanimous support for such educational programs. The following summarizes comments and input received from the professional water community.

One of the most valuable benefits would be for entry level or beginning water lawyers, engineers, referees, and water judges. This could move the individual up the learning curve much faster than on-the-job training. An important component to the programs is to have multiple courses on related subject matters, building from the simple concepts to more and more complex topics (such as the ground water example given above). This provides the participant the appropriate background and context to understand the more advanced topics. The courses should be moved around the state when possible, so that folks located far from the Denver metro area can actively participate. To the extent possible, programs should be simulcast to other remote locations so that out-of-town participants may be involved in the give and take discussions during the programs.

## **Oversight Committee**

A committee of experienced professionals from the water court arena should be formed to oversee the educational programs. The committee should include representatives from the bar, technical community and the judiciary. It is also recommended that these committee members be selected from around the state of Colorado, so that regional needs and viewpoints will be heard and addressed. As presently envisioned, this committee would be charged with the following responsibilities: developing curriculum for the technical programs, selecting faculty, vetting subject matter particularly in areas of controversy where balanced viewpoints are needed, monitoring feedback and making adjustments to the programs as needed for improvement.

## **Possible Course Topics**

The following are additional course topics suggested by practicing water professionals: surface water hydrology, river basin modeling, farm irrigation systems, water law for engineers, estimating evapotranspiration, climatology, and water rights administration.

## **Voluntary Participation**

The Water Court Committee recommends that participation in the educational program should be voluntary.

## **VI. Rules Recommendations**

The Water Court Committee concludes that there are significant opportunities, through amendments to Supreme Court rules, to shorten time and decrease costs to parties in water court proceedings, if adequate funding for water court and division engineer staffing is provided. In formulating its rule recommendations, the Water Court Committee considered the comments it received at its public hearing of March 10, 2008, written comments received, comments by non-committee members who attended committee and subcommittee meetings, their own experience, and the following statutory provisions.

### **Applicable Statutes**

1. The services of the water judge shall be in addition to his or her regular duties as a district judge but shall take priority over such regular duties. The schedules of the water judges shall be arranged and adjusted so that the water judge shall be free to hear water matters. If it becomes necessary for the proper handling of water matters in any division, the supreme court shall designate one or more additional water judges for the division. § 37-92-203(2).
2. For the purpose of making investigations required by section § 37-92-302(4) and rulings required by section § 37-92-303, the water judge of each division shall appoint such referees as may be necessary for that division. § 37-92-203(4).
3. The water judge of each division by order shall refer promptly to a referee of that division all applications filed pursuant to section 37-92-302. § 37-92-203(7).
4. Upon referral by the water judge, the referee in each division shall have the authority and duty in the first instance to rule upon applications and other referred water matters. § 37-92-301(2).
5. Statements of opposition must be filed by the last day of the second month following the month in which the application is filed. § 37-92-302(1)(c).
6. The water judges shall jointly prepare and supply to the water clerks standard forms which shall be used for such applications and statements of opposition. These forms shall designate the information to be supplied and may be modified from time to time. The forms shall require, among other things, a legal description of the diversion or proposed diversion, a description of the source of the water, the date of the initiation of the appropriation or proposed appropriation, the amount of water claimed, and

- the use or proposed use of the water. In the case of applications for approval of a change of water right or plan for augmentation, the forms shall require a complete statement of such change or plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historical use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist. § 37-92-302(2)(a).
7. For applications that will require construction of a well, no application shall be heard on its merits by the referee or the water judge until a written consultation report under section § 37-92-302(4) has been submitted and considered. The consultation report shall be submitted within four months after the filing of the application and shall include findings as to whether construction of the well and use of any well proposed in the application will injuriously affect the owner of, or persons entitled to use, water under a vested water right or decree conditional water right. § 37-92-302(2)(a).
  8. Not later than the fifteenth day of each month, the water clerk shall prepare a resume of all applications in the water division which have been filed during the preceding month. § 37-92-302(3)(a).
  9. The referee, without conducting a formal hearing, shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer or the state engineer or both. The engineer consulted shall file a report in writing within thirty days, unless such time is extended by the referee, which original report shall be filed in the proceedings and mailed by the division engineer to applicant or his attorney, who in turn shall mail or deliver copies of the report to all parties of record and so certify before any ruling shall be entered or become effective. If the referee re-refers the application to the water judge prior to consultation, the division engineer shall file a written recommendation in the proceedings within thirty days of re-referral, unless such time is extended by the water court. § 37-92-302(4).
  10. Within sixty days after the last day on which statements of opposition may be filed, unless such time is extended by the water judge for good cause shown, the referee shall make a ruling on the application unless the referee determines to re-refer the matter to the water judge. § 37-92-303(1).
  11. The referee may disapprove the application in whole or in part in the discretion of the referee even though no statements of opposition have been filed. The ruling shall be filed with the water clerk, subject to judicial review. § 37-92-303(1).

12. The referee may determine not to make a ruling and re-refer the matter to the water judge for a decision. Such re-referrals shall be entered within sixty days following the last month in which statements of opposition may be filed, unless the time is extended by the water judge for good cause shown. § 37-92-303(2).
13. The referee shall re-refer the matter to the water judge at any time before the referee's hearing upon a motion to re-refer by the applicant or any opposer certifying that party's intent to protest an adverse ruling of the referee. A motion to re-refer shall not be a prerequisite to a protest of the ruling of the referee. § 37-92-303(2).
14. Within twenty days after the date of mailing of the referee's ruling, any person, including the state engineer, who wishes to protest or support a ruling of the referee shall file a written pleading with the water clerk identifying the matter stating the factual and legal grounds for the pleading. § 37-92-304(2).
15. The water judge shall conduct de novo hearings on matters the referee re-refers to the water judge and on pleadings protesting the referee's rulings. The court shall not be bound by the findings of the referee. The division engineer shall appear and furnish pertinent information and may be examined by any party. § 37-92-304(3).
16. The applicant shall have the burden of sustaining the application, whether it has been granted or denied by the ruling of the referee or has been re-referred by the referee, and in the case of a change of water right or a plan for augmentation the burden of showing absence of any injurious effect. § 37-92-304(5).
17. A decision of the water judge with respect to a protested ruling of the referee shall either confirm, modify, reverse, or reverse and remand the referee's ruling. The water judge shall confirm and approve by judgment and decree a ruling of the referee with respect to which no protest was filed, but the water judge may reverse, or reverse and remand, any such ruling which he deems to be contrary to law. § 37-92-304(5).
18. Judgments and decrees shall be entered promptly with respect to matters that have been heard and matters in which no protest has been filed or order of re-referral entered. § 37-92-304(7).
19. Section 37-92-305 sets forth standards for rulings of the referee and decisions of the water judge. § 37-92-305(1)-(17).
20. A change of water right, implementation of a rotational crop management contract, or plan for augmentation, including water exchange project, shall be approved if it will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decree conditional water right.

In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If the proposed change, contract, or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions that would prevent the injurious effect. § 37-92-305(3).

21. In regard to an application for water right, conditional water right, change of water right, or plan for augmentation that requires construction of a well, the referee or the water judge, as the case may be, shall consider the findings of the state engineer, made pursuant to section 37-90-137, which granted or denied the well permit and the consultation report of the state engineer or division engineer submitted pursuant to section 37-92-303(2)(a). Except in cases in which the state engineer or division engineer is a party, all findings of fact contained in the consultation report considering the presence or absence of injurious effect shall be presumptive as to such facts, subject to rebuttal by any party. § 37-92-305(6)(a).

### **Principal Features of the Committee's Rules Recommendations**

#### **C.R.C.P. 90 and Rule 3, in their proposed revised form, would:**

Implement the existing provisions of the 1969 Act that require water court applications to contain the information required by the standard forms approved by the water court judges. Effective July 1, 2009, it would direct the water clerk not to accept an application for filing if the referee determines in writing that it is missing information required by the standard forms and rule 3. The applicant would have thirty days to submit the required information; and, if so, the application would retain its original date of submittal. The applicant could protest the referee's written determination within twenty days and the original submittal date would be preserved during water judge resolution of the protest.



**Rule 2, in its proposed revised form, would:**

Require mandatory e-filing in all water court cases, and direct the water clerk to scan and load into the e-filing system the paper filings of pro se applicants.

**Rule 6, in its proposed revised form, would:**

Set a goal of issuing the proposed ruling and decree in every unopposed water case no later than 60 days following close of the period for filing statements of oppositions, except for good cause.

Require the referee to issue the proposed ruling and decree in opposed water cases no later than 1 year following close of the period for filing statements of opposition, except for exceptional cases.

Require the referee, promptly after a case is accepted for filing, to determine whether it will likely need water judge adjudication, and re-refer those cases to the water judge.

Require in opposed cases, a status conference within sixty days following close of the period for filing statements of opposition. At the status conference, the referee in consultation with the applicant and other parties would identify cases that will likely require adjudication by the water judge, and refer those cases to the water judge. For cases that the applicant and other parties agree to proceed with through the referee, the referee in concert with the parties will establish a case management schedule designed to produce a ruling and decree no later than 1 year following the close of the period for filing statements of opposition, except for exceptional cases. The parties will agree not to re-refer the case to the water judge during the case management period. The parties could agree on the use of a single expert in the case.

Require the division engineer's written consultation report to be submitted within 30 days of the date the referee initiates consultation, unless the referee extends the time for good cause. The referee will initiate consultation promptly following close of the period for filing statements of opposition. For groundwater cases requiring construction of a well, the division engineer's written report would be due 4 months from the filing of the application. The division engineer and the referee may agree in any

particular case that no consultation report is required. The referee will make a written summary of conferences with the division engineer and the parties and supply the written summaries to the parties.

Directs the referee to promptly commence informal investigation of the application when it is first submitted to the water clerk, but the referee must discontinue informal consultation with the division engineer if the state or division engineer becomes a party to the case.

Provides that the water judge may extend the required time periods in any case for good cause and may send back to the referee any case for which adjudication by the water judge is not required.

**Rule 11, in its proposed revised form, would:**

Require a meeting of the experts for the parties without attorneys attending, in order to confer about the expert matters that can be agreed upon and those that will require adjudication by the water judge.

Set time periods for disclosing expert opinions to every other party, and completing all discovery and preparation of exhibits, in order to bring the case to trial as soon as reasonably possible.

Require the applicant to submit a proposed set of findings of fact, conclusions of law and decree at the time of its initial 26(a)(2) disclosure. All opposers shall provide comments on the proposed decree, including the language of specific decree provisions deemed necessary by the opposers, at the time of opposers' initial 26(a)(2) disclosures. Applicant shall respond to opposers' suggested decree language by providing an additional draft decree at the time of its rebuttal 26(a)(2) disclosures.

Require making available to other parties an executable electronic version of any computational model, including all input and output files, relied upon by the party's expert in forming his or her opinions.

**Declaration of Expert, in its proposed form, would:**

Require every expert in a water case to sign a declaration that his or her responsibility, both in preparing the expert report and in giving evidence, is to assist the court to understand the evidence or to determine facts in issue;

that the expert's work is his or her own and is accurate and complete; and disclosing whether, and to what extent, the content of the expert's written report was drafted or changed by any other person.

Require disclosure of past expert opinions in the subject matter area of the expert opinion to be provided to the water court.

Notify the attorney for the party for whom the expert is a witness of needed corrections in the expert's report, and prepare a supplemental report for submission in the water court proceedings.

Accordingly, the Water Court Committee submits the text of its rules recommendations set forth below. The Water Court Committee recommends that the Chief Justice establish a standing Water Court Committee to assist with further study and recommendations as these proposed rules go to public comment and hearing, if the Supreme Court chooses to do so. An initial task of the committee would be to work with the water judges on reviewing and revising the standard forms for all water court divisions and work with the State Court Administrator and the water judges to design a user friendly packet of guidance for the public, pro se applicants, and parties to a water case.

**WATER COURT COMMITTEE  
TEXT OF RULES RECOMMENDATIONS  
AUGUST 1, 2008**

**(Clean Text of Whole Rules  
Not Showing Strike and Adds to Existing Provisions)**

**Recommendation for Colorado Supreme Court Consideration of  
Proposed Rules Through Its Public Comment and Hearing Process**

**Rule 90, Colorado Rules of Civil Procedure**

**C.R.C.P. 90. Numbering, Acceptance, and Filing of Applications**

Each application filed within each division shall be consecutively numbered, preceded by the year and the letters CW (e.g. 2008CW-100) to identify such applications as concerning water matters. Any application for finding of reasonable diligence relating to a conditional water right and/or to make a conditional water right absolute that is given a case number pursuant to the preceding sentence shall thereafter use the case number and letter on any document, pleading, or, other paper and list the prior case number directly below the new case number. The water clerk shall receive all applications and number them upon payment of filing fees. For all cases filed after July 1, 2009, the water clerk, in consultation with the water referee pursuant to rule 3 of the uniform rules for all state water court divisions, shall not accept for filing any application that does not contain the information required by rule 3 and the standard forms approved by the water judges under C.R.S. § 37-92-302(2). An application not accepted for filing shall not be included in the resume of applications. The water clerk shall provide a prospective applicant or opposer with one copy of the form for the relevant application or statement of opposition. The standard forms for applications and statements of opposition may be found in the water courts section of the Colorado Judicial Branch web page.

## **Rule 2, Uniform Local Rules for All State Water Court Divisions**

### **Rule 2. Electronic Filing and Service Procedure in All Water Court Cases**

For all cases filed after July 1, 2009, applicants and opposers represented by counsel shall electronically file and serve through the approved judicial branch e-filing service provider all applications, pleadings, motions, briefs, exhibits and other documents. C.R.C.P. Rule 121, Section 1-26, Electronic Filing applies to water court filings. The water clerk shall provide the application to the state and division engineers, and all subsequently electronically filed documents to the state and division engineers if they do not become parties to the case. Such electronic filing and service shall satisfy the requirements of Article 37, Title 92, of the Colorado Revised Statutes for providing copies to the state and division engineers. The applicant and parties who are not represented by an attorney shall file a single copy of the application and all subsequent documents in original paper format. The water court clerk shall scan and upload paper filed documents to the approved judicial branch e-filing system and this shall likewise satisfy the otherwise applicable filing requirements of Article 37, Title 92, of the Colorado Revised Statutes. All documents and correspondence filed after the initial application shall contain the case number. The clerk shall include a certificate of service for every order, ruling or other document e-filed or otherwise served by the clerk to the parties in any water matter.

## **Rule 3, Uniform Local Rules for All State Water Court Divisions**

### **Rule 3. Applications for Water Rights**

(a) Applications for determination of water rights, conditional water rights, changes of water rights, a determination that a conditional water right has become a water right, a change of water rights, approval of plans for augmentation, finding of reasonable diligence, approval of a proposed or existing exchange of water, approval to use water outside of the state, and any other matter for which such a standard form exists shall be filed using the standard forms adopted by the water judges, or a format patterned after the standard form containing the information required by the applicable standard form. The applicant or opposer shall be responsible for providing all information required by the forms. For all cases filed after July 1, 2009, the water clerk, in consultation with the water referee, shall refuse to accept for filing any application that is not accompanied by the required filing fee or does not contain the information required by the standard application forms and this rule 3. The water referee shall consult with the water clerk to determine whether the application contains the information required by this rule 3 and the standard application forms and, if not, the referee shall prepare and give to the clerk for transmittal to the applicant a written determination of what additional information is required to be submitted for the application to be accepted for filing. The water referee shall utilize a standard of substantial compliance in determining whether the application contains the information required by the standard forms and this rule 3. If the applicant supplies the required information within thirty days of being notified of the additional information required, the clerk shall accept the application and file it effective as of the date the application was originally submitted to the water clerk. Within twenty days after receiving the notification that the application is missing required information, the applicant may protest the referee's determination to the water judge. The original submission date of the application shall be preserved pending resolution of the protest.

(b) More than one water right, claim or structure may be incorporated in any one application under one caption, provided that the required information is given for each water right, claim, or structure, and that each has the same ownership.

(c) Where more than one water right was conditionally decreed under one case number, each water right so decreed may, but need not be, incorporated again in an application for a finding of reasonable diligence or to make absolute; however, such an application shall not be combined with any other case or application except by leave of court.

(d) The following guidelines shall apply in filing applications:

(1) Every application shall include the legal description of the location of the point of diversion and of the place of storage, if any, of the subject water right, and a general description of the place of use.

(2) In areas having generally recognized street addresses, the street address and also the lot and block number, if applicable, shall be set forth in the application in addition to the legal description of the point of diversion or place of storage.

(3) Every application shall state the name and address of the owner or reputed owner of the land upon which any new diversion or storage structure or modification to any existing diversion or storage structure is or will be constructed, or upon which water is or will be stored, including any modification to the existing storage pool. The applicant may rely upon the real estate records of the county assessor for the county or counties in which the land is located to determine the owner or reputed owner of potentially affected land.

(4) The actual address of the applicant and the mailing address, if different, shall be given in all cases. An address in care of an attorney is not acceptable in the absence of special circumstances which must be set out fully in an accompanying statement and approved by the water judge.

(e) An application for determination of matters relating to underground water rights shall be governed by the following additional requirements:

(1) Such application shall designate each well, using the state engineer's well permit registration or recording number, if one exists. If a permit required by law has been issued by the state engineer, copies of the permit and the well completion and pump installation report, if completed, shall be attached to the application. If the permit was denied, a copy of the order of denial containing the denial number shall be attached. If this documentation is not available at the time of filing of the application, it shall be supplied as soon as practicable.

(2) If the name of the applicant is not the same as the name appearing on the well permit, then prima facie evidence of ownership of the well site must be submitted to the court. Copies of recorded deeds are preferred for this purpose.

(f) An application for approval of a change of water right or plan for augmentation shall include a complete statement of such change or plan, including a description of all water rights to be established or changed by the plan, a map showing the approximate location of historical use of the rights, and records or summaries of records of actual diversions of each right the applicant intends to rely on to the extent such records exist.



## **Rule 6, Uniform Local Rules for All State Water Court Divisions**

### **Rule 6. Referral to Referee, Case Management, Rulings, and Decrees.**

- (a) The water judge shall promptly refer to the water referee all applications except those the water judge determines to retain for adjudication. The referee upon referral by the water judge has the authority and duty in the first instance to promptly begin investigating and to rule upon applications for determinations of water rights, conditional water rights, changes of water rights, plans for augmentation, reasonable diligence in the development of conditional water rights, approval of a proposed or existing exchange of water, approval to use water outside of the state, and other water matters, in accordance with the applicable constitutional, statutory, and case law. Upon investigating the matter, the referee may rerefer the application to the water judge for adjudication.
  
- (b) The referee's authorities and duties include: assisting potential applicants to understand what information is required to be included in an application; in accordance with rule 90 of the Colorado rules of civil procedure, consulting with the water clerk to determine whether applications contain the information required by rule 3 of these rules and the standard forms approved by the water judges and, if not, preparing a written determination for the applicant identifying what additional information is required to be submitted with the application; investigating each application to determine whether or not the statements in the application and statements of opposition are true and become fully advised with respect to the subject matter of the applications and statements of opposition; conferring with the division engineer and the parties concerning applications and working with the division engineer and the parties to obtain additional information that will assist in narrowing the issues and obtaining agreements; and issuing the referee's ruling and decree in the case. The applicant shall have the burden of sustaining the application and, in the case of a change of water right, a proposed or existing exchange of water, or a plan for augmentation, the burden of showing the absence of injurious effect. The referee's ruling and decree shall set forth appropriate findings and conditions as required by C.R.S. § § 37-92-303 & 305, and shall be in an editable format acceptable to the water judge.
  
- (c) The referee shall work promptly to identify applications that will require water judge adjudication of the facts and/or rulings of law and rerefer those applications to the water judge.

- (d) To promote the just, speedy, and cost efficient disposition of water court cases, the goals of the referee, as contemplated by C.R.S. § 37-92-303(1), shall include a ruling on each unopposed application within sixty days after the last day on which statements of opposition may be filed, and all other applications as promptly as possible. In pursuit of this goal, the referee shall initiate consultation with the division engineer in every case promptly after the last day for filing statements of opposition. The division engineer's written report on the consultation is due within thirty days of the date the referee initiates consultation in accordance with C.R.S. § 37-92-302(4), except that for applications that require construction of a well, the division engineer's written report is due within four months after the filing of the application in accordance with C.R.S. § 37-92-302(2)(a). Upon request, the referee may extend the time for filing the division engineer's written report. The division engineer may submit additional written reports upon receipt of new information and shall provide them to the referee and all parties. The referee shall not enter a ruling on applications for determination of rights to groundwater from wells described in C.R.S. § 37-90-137(4) until the state engineer's office has had the opportunity to issue a determination of facts concerning the application in accordance with C.R.S. § 37-92-302(2)(a). The referee and the division engineer may confer and jointly agree to forego consultation in a particular case because it is not needed; and, if so, the referee shall enter a minute order as provided in section (n) of this Rule 6.
- (e) For good cause, upon agreement of the parties, or sua sponte, the referee may extend the time for ruling on the application beyond sixty days after the last day on which statements of opposition may be filed, but not to exceed a total of one year following the deadline for filing statements of opposition, except that the referee may extend the time for a specified period upon a finding of exceptional circumstances.
- (f) If no statements of opposition to an application have been filed, the applicant's attorney shall promptly provide the referee with a proposed ruling and decree. The referee will prepare the ruling and decree for pro se applicants, and in all cases may convene such conferences or hearings as will assist in performance of the referee's duties.
- (g) For all applications in which statements of opposition are filed, the attorney for the applicant, or the referee if the applicant is not represented by counsel, shall set a status conference with the referee and all parties. The status conference shall occur within sixty days after the deadline for filing of statements of opposition, unless the deadline is extended by the referee for good cause. The

status conference may be conducted in person or by telephone. All parties must attend the status conference unless excused by the referee. The referee shall advise the division engineer of the status conference and invite or require the division engineer's participation. To assist discussion at the status conference, applicants are encouraged to prepare and circulate a proposed ruling and decree to the referee and the parties in advance of the conference.

- (h) During the status conference, the referee and the parties will discuss the issues raised by the application and any statements of opposition, what additional information or investigations will be necessary to assist the parties and the referee to understand and resolve disputed issues, and to assist the referee's preparation of a proposed ruling and decree, and determine whether it will be possible to resolve the application and any objections without referring the application to the water judge for adjudication.
  - (1) If it is unlikely that the application and objections can be resolved without adjudication by the water judge, then the referee shall promptly rerefer the application to the water judge in accordance with C.R.S. § 37-92-303.
  - (2) If the applicant or other party does not believe that the application can be resolved without water judge adjudication and so notifies the other parties and the referee at the status conference, then the party shall promptly file a motion to refer the application to the water judge in accordance with C.R.S. § 37-92-303.
  - (3) The provisions of rule 6 (i)-(k) apply to applications that remain before the referee upon agreement of the parties as a result of the status conference.
  - (4) As a condition for remaining before the referee instead of referring the application to the water judge for adjudication, the parties shall waive their statutory right to refer the application to the water judge for the period established in the case management plan. During such period the application may be referred to the water judge only with the consent of all parties or the consent of the referee.
- (i) The parties shall discuss at the status conference whether expert investigations will be needed. If expert investigations are needed, the referee and the parties will discuss whether it would be appropriate for the parties to engage a single expert to make the necessary investigation and report the results of the

investigation to the parties. The use of a single expert is not mandatory, and any party may choose to utilize its own expert. If all parties agree that the use of a single expert is desirable, the single expert shall be chosen by mutual agreement among the parties. If, however, all parties agree that the use of a single expert is desirable, but the parties cannot agree on who should be selected, the referee may appoint a single consulting expert. The parties will divide the costs of a single consulting expert equally among themselves unless a different cost allocation is agreed upon by the parties. If the parties agree to use a single expert in proceedings before the referee, then, absent the consent of all parties, that expert shall not be permitted to testify as an expert for a party in the same proceeding if the application is rereferred to the water judge or if a protest is filed by a party to the ruling of the referee.

- (j) In consultation with the parties, the referee shall establish a case management plan for obtaining the necessary information and preparing a proposed ruling and decree. The case management plan shall set forth a timetable for disposition of the application.
- (k) Regardless of whether any expert is involved in the proceedings before the referee, the referee shall not be bound by the opinions and report of the expert, may make investigations without conducting a formal hearing, including site visits, and may enter a ruling supported by the facts and the law. The case management plan shall contain a listing of the disputed issues to the extent known, the additional information needed to assist in resolution of the disputed issues, additional investigations needed to assist in resolving the disputed issues, an estimate of the time required to complete the tasks, the time for filing a proposed ruling and decree, the time for opposers to file comments on the proposed ruling and decree, the time for the applicant to file status reports, and a schedule for further proceedings. The referee may make such interim rulings, including scheduling additional status conferences and allowing amendments to the case management plan, as will facilitate prompt resolution of the application and issuance of a proposed ruling and decree. The proceedings before the referee shall be completed and the proposed ruling and decree issued no later than one year following the deadline for filing of statements of opposition, except that the referee may extend the time for completion by a specified period upon a finding of exceptional circumstances.
- (l) If the parties are able to reach a resolution of the application, and the referee finds it to be supported by the facts and the law, the referee shall work with the parties to fashion an appropriate ruling and decree for filing with the water

judge for approval. If such a resolution cannot be reached within the time period allowed by the case management plan, the referee shall enter a ruling on the application, which may be protested to the water judge as provided in C.R.S. § 37-92-304, or the referee may rerefer the application to the water judge, or any party may file a motion to refer the application to the water judge in accordance with C.R.S. § 37-92-303.

- (m) At any time after the status conference on applications to which statements of opposition have been filed, or after the filing of applications to which no statements of oppositions have been filed, if some further information is reasonably necessary for the disposition of the application, the referee may require the applicant to supply the information in writing, by affidavit or at an informal conference or at a hearing. The referee may ask the division engineer for information as part of the referee's ongoing informal investigation, but shall discontinue making such requests if the state or division engineer has become a party to the case.
- (n) The referee shall enter minute orders summarizing all conferences with the parties or the division or state engineers.
- (o) The referee shall have the authority to dismiss for failure to prosecute applications of parties who fail to comply with the requirements of the water court rules or any case management plan, and to dismiss statements of opposition of parties who fail to comply with the requirements of the water court rules or any case management plan. Such dismissal may be protested to the water judge by any party within twenty days of receipt of the order of dismissal.
- (p) Any time period contained in the water court rules, or the applicable rules of civil procedure, for an action by the referee or a party may be extended by the water judge for good cause. At any time the water judge determines that an application can be resolved without adjudication by the water judge, the water judge may refer the application back to the referee for disposition. To assist in the adjudication of water matters that are before the water judge, the water judge may direct the referee to perform identified tasks.

## Rule 11, Uniform Local Rules for All State Water Court Divisions

### Rule 11. Pre-Trial Procedure, Case Management, Disclosure, and Simplification of Issues.

The provisions of C.R.C.P. Rules 16 and 26 through 37 shall apply except that they shall be modified as follows:

(a) C.R.C.P. 16(b)-(e) shall be modified as follows:

(b) **Presumptive Case Management Order.** Except as provided in section (c) of this Rule, the parties shall not file a Case Management Order and subsections (1)-(10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue, unless the water court orders otherwise for good cause shown. The time periods specified in this case management order are provided to take into account protested or re-referred cases that involve computer modeling or detailed technical analysis. Parties and counsel are encouraged to request a modified case management order, pursuant to section (c), to shorten time periods whenever possible, unless the water court orders otherwise for good cause shown.

(1) **At Issue Date.** Water matters shall be considered to be at issue for purposes of C.R.C.P. Rules 16 and 26 forty five (45) days after the earlier of either of the following: entry of an order of re-referral or the filing of a protest to the ruling of the referee, unless the Water Court directs otherwise. Unless the Water Court directs otherwise, the time period for filing a Certificate of Compliance under subsection (b)(7) of this Rule shall be no later than 75 days after a case is at issue.

(2) **Responsible Attorney.** For purposes of Rule 16, as modified herein, the responsible attorney shall mean applicant's counsel, if the applicant is represented by counsel, or, if not, a counsel chosen by opposers, or the water court may choose the responsible attorney. The responsible attorney shall schedule conferences among the parties, prepare and file the Certificate of Compliance, and prepare and submit the proposed trial management order.

- (3) **Confer and Exchange Information.** No later than 15 days after the case is at issue, the lead counsel for each party and any party who is not represented by counsel shall confer with each other about the nature and basis of the claims and defenses, the matters to be disclosed pursuant to C.R.C.P. 26(a)(1), the development of a Certificate of Compliance, and the issues that are in dispute.
- (4) **Trial Setting.** No later than 60 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the water court.
- (5) **Disclosures.**
- (A) The time for providing mandatory disclosures pursuant to C.R.C.P. 26(a)(1) shall be as follows:
- (I) Applicant's disclosure shall be made 30 days after the case is at issue;
  - (II) An opposing party's disclosure shall be made 30 days after applicant's disclosures are made.
- (B) The time periods for disclosure of expert testimony pursuant to C.R.C.P. 26(a)(2) shall be as follows:
- (I) The applicant's expert disclosure shall be made at least 240 days before trial;
  - (II) The applicant's supplemental expert disclosure, if any, shall be made after the first meeting of the experts held pursuant to subsection (d) of this rule, and served at least 180 days before trial;
  - (III) An opposer's expert disclosure shall be made at least 120 days before trial;
  - (IV) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under paragraph 5(B)(III) of the Rule, such disclosure shall be made at

least 90 days before trial, and any rebuttal expert disclosure shall be made at least 90 days before trial.

**(C) Additional Expert Disclosures.** In addition to the disclosures required by C.R.C.P. 26(a)(2)(B)(I), the expert's disclosure shall include;

- (I) A list of all expert reports authored by the expert in the preceding five years; and
- (II) An executable electronic version of any computational model, including all input and output files, relied upon by the expert in forming his or her opinions.
  - (i) The court may require the party to whom this information is disclosed to pay the reasonable cost to convert the data from the electronic format in which it is maintained in the expert's normal course of business to a format that can be used by the expert for the opposing party(ies).

**(D) Meeting Of Experts To Refine And To Attempt To Resolve Disputed Issues.**

- (I) The expert witness(es) for the applicant and the opposer(s) shall meet within 45 days after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the issues that are the subject of the expert(s) disclosures and with respect to such disclosures: to identify undisputed matters; to attempt to resolve disputed issues; and to identify the remaining issues in dispute. The applicant may subsequently file a supplemental disclosure pursuant to rule 11(b)(5)(B)(ii) to address issues resolved in or arising from the meeting(s) of the experts.
- (II) The expert witness(es) for the applicant and the opposer(s) shall meet within 25 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the issues that



are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters; to attempt to resolve disputed issues; and to identify the remaining issues in dispute. Within 5 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed issues arising from the expert disclosures that they believe remain for trial.

(III) The content of the meetings of the experts and the written statement produced pursuant to Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. The meetings of the experts shall not include the attorneys for the parties or the parties themselves.

**(E) Declaration By Experts.** Each expert witness's disclosure shall contain a declaration by the expert as set forth in the applicable water court form.

**(F) Proposed Decree.** Applicant shall provide a proposed findings of fact, conclusions of law and decree at the time of its initial 26(a)(2) disclosure. All opposers shall provide comments on the proposed decree, including the language of specific decree provisions deemed necessary by the opposers, at the time of opposers' initial 26(a)(2) disclosures. Applicant shall respond to opposers' suggested decree language by providing an additional draft decree at the time of its rebuttal 26(a)(2) disclosures.

In circumstances where, as a result of identification of witnesses and documents within the time frame for such identification set forth in this Presumptive Case Management Order but with insufficient time to allow responsive discovery or supplementation by an opposing party, then modification of this Presumptive Case Management Order shall be freely granted.

**(6) Settlement Discussions.**

(A) No later than 35 days after the case is at issue, the parties shall explore possibilities of a prompt settlement or resolution of the case.

(B) No later than 60 days before trial the parties shall jointly file a statement setting forth the specific disputed issues that will be the subject of expert testimony at trial.

**(7) Certificate of Compliance.** No later than 75 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(7) (except (b)(5)(B) through (F) and (b)(6)(B)), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply. A request for a Case Management Conference shall be made at the time for filing the Certificate of Compliance.

**(8) Time to Join Additional Parties and Amend Pleadings.** The time to join additional parties and amend pleadings shall be in accordance with C.R.C.P. 16(b).

**(9) Pretrial Motions.** Unless otherwise ordered by the court, the time for filing pretrial motions shall be no later than 35 days before the trial date, except that motions pursuant to C.R.C.P. 56 shall be filed at least 90 days before the trial date.

**(10) Discovery Schedule.** Until a case is at issue, formal discovery pursuant to C.R.C.P. Rules 26 through 37 shall not be allowed. Informal discovery, including discussions among the parties, disclosure of facts, documents, witnesses, and other material information, field inspections and other reviews, is encouraged prior to the time a water case is at issue. Unless otherwise directed by the water court or agreed to by the parties, the schedule and scope of discovery shall be as set forth in C.R.C.P. 26(b), except that depositions of expert witnesses shall not be allowed until 30 days after the time for filing of the opposers' C.R.C.P. Rule

26(a)(2) disclosures. The date for completion of all discovery shall be 50 days before the trial date.

(c) **Modified Case Management Order.** Any of the provisions of section (b) of this Rule may be modified by the entry of a Modified Case Management Order pursuant to this section.

(1) **Stipulated Modified Case Management Order.** No later than 75 days after the case is at issue, the parties may file a Stipulated Proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed order need only set forth the proposed provisions which would be changed from the Presumptive Case Management Order set forth in section (b) of this Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a Case Management Conference.

(2) **Disputed Motions for Modified Case Management Orders.** C.R.C.P. 16(d) shall apply to any disputes concerning a Proposed Modified Case Management Order. If any party wishes to move for a Modified Case Management Order, lead counsel and any unrepresented parties shall confer and cooperate in the development of a Proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 75 days after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the Proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as "disputed" in the Proposed Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion need only set forth the proposed provisions which would be changed from the Presumptive Case Management Order set forth in section (b) of this Rule. The motion for a Modified Case Management Order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(3) **Court Ordered Modified Case Management Order.** The Water Court may order implementation of a Modified Case Management Order if the Court determines that the Presumptive Case Management Order is not appropriate for the specific case. The Court shall not enter a Court Ordered Modified Case

Management Order without first holding a Case Management Conference pursuant to C.R.C.P. 16(d).

(d) C.R.C.P. 16(c), C.R.C.P. 16(f)(3)(VI)(C), and C.R.C.P. 16(g) shall not apply to water court proceedings.

## **Declaration of Expert**

### **Appendix 1 to Chapter 36. Colorado Water Court Forms Form 2. Declaration of Expert.**

I, \_\_\_\_\_, (name of expert) state the following:

(1) I understand that my role as an expert, both in preparing this report and in giving evidence, is to assist the court to understand the evidence or to determine facts in issue. The opinions expressed in my disclosures and in my report are my own professional opinions.

(2) I have endeavored in my report and disclosures to be accurate and complete, and have addressed matters that I regard as being material to the opinions expressed, including the assumptions that I have made, the bases for my opinions, and the methods that I have employed in reaching those opinions.

(3) I have been advised by the attorney for my client of the disclosure requirements of the rules of the court, and I have provided in my report the information required by those rules. I have also disclosed whether, and to what extent, the content of my written report was drafted or changed by any other person.

(4) I will immediately notify, in writing, the attorney for the party for whom I am giving evidence if, for any reason, I consider that my existing report requires any correction or qualification; and, if the correction or qualification is significant, will prepare a supplementary report to the extent permitted by the applicable rules of the court.

(5) I have used my best efforts in my report, and will use my best efforts in any evidence that I am called to give, to express opinions within those areas in which I have been offered or qualified as an expert by the court, and to state whether there are qualifications to my opinions.

(6) I have made the inquiries that I believe are appropriate and, to the best my knowledge, no matters of significance that I regard as relevant have been withheld from the court.

(7) I have disclosed any financial or pecuniary interest that I have in the results of this lawsuit or in any property or rights that are the subject of the lawsuit for which my report and disclosures are being submitted.

Dated this \_\_\_ day of \_\_\_\_\_, \_\_\_\_.

\_\_\_\_\_

Declarant

## VII. River Basin Computational Models, Predictive Tools, and Model Data Transparency

### River Basin Computational Models and Predictive Tools

The Water Court Committee identified a lack of uniformity in computational models and other predictive tools, as well as the underlying data sets, as a source of inefficiency in the water court adjudications. Among Colorado's water divisions, only Water Divisions No. 2 (Arkansas River Basin) and No. 3 (Rio Grande Basin) have judicially approved rules of the State Engineer describing groundwater or surface water models of general applicability to the basin. The Republican River Basin also has a groundwater model. That model was jointly developed by and agreed upon by Colorado, Kansas, and Nebraska as part of the settlement of the litigation between those states over violations of the Republican River Compact. The use of that model for purposes of determining compact compliance has been approved by the United States Supreme Court. At the current time nearly all of the Republican River Basin is included within the Northern High Plains Designated Ground Water Basin, and designated groundwater is not within the jurisdiction of the Water Courts.

In the Arkansas River Basin the model is the so-called Hydrologic Institutional Model or H-I Model, approved by the Special Master and the United States Supreme Court in *Kansas v. Colorado*. This is the model that is used to assess Colorado's compliance with the Arkansas River Compact and covers only the Valley-fill aquifer of the Arkansas River downstream of Pueblo Dam. The H-I Model is the result of interstate litigation that began in 1985 and is just now concluding. The appropriateness of this model and changes to the model has been the primary subject of the *Kansas v. Colorado* litigation.

The state of Colorado does not agree with many aspects of the model, but due to the model's approval by the Special Master and the United States Supreme Court, it may become the *de facto*, if not *de jure*, standard for changes of water rights and augmentation plans within the model domain in Colorado, at least for purposes of ensuring compliance with the Arkansas River Compact. The model will require continued refinement and revisions in order for it to reflect more accurately the hydrologic system in the Arkansas River Basin. The cost for development of this model was borne by the states of Kansas and Colorado in the course of the litigation, and the cost of future improvement will also be borne by the states.

The Rio Grande Decision Support System groundwater model is a groundwater model for the valley floor of the San Luis Valley. It was developed

as part of the overall Rio Grande Decision Support System (RGDSS). The RGDSS is a set of databases and computer models for the San Luis Valley. The RGDSS databases represent a substantial step forward in the development of comprehensive information on the hydrologic system in Water Division No. 3. The development of the RGDSS groundwater model was funded by the State of Colorado as part of the RGDSS, but the Rio Grande Water Conservation District, the Rio Grande Water Users Association, and the Conejos Water Conservancy District all provided substantial contributions to the development and on-going improvement of the groundwater model and associated databases.

The RGDSS groundwater model was one of the primary tools used by the State Engineer in promulgating and defending the so-called “New Use Rules for the Confined Aquifer System” in the San Luis Valley. Those rules establish the basic requirements for any new withdrawals from the confined aquifer system in Water Division No. 3. The Confined Aquifer Rules were upheld by the Colorado Supreme Court in Simpson v. Cotton Creek Circles, LLC., 181 P.3d 252 (Colo. 2008).

The RGDSS groundwater model, as it exists at the time of the application at issue, is the presumptive starting point for analysis of the impact of new withdrawals from the confined aquifer. Any party that wishes, however, may seek to rebut the model. The RGDSS groundwater model is not perfect and, if it is to remain relevant and useful, it will require continued improvement, maintenance, and updating. This, in turn, will require the General Assembly to continue to fund the RGDSS at the levels necessary to do these things.

Colorado also has a Decision Support System (“DSS”) for the Colorado River Basin (“CRDSS”) and is developing a DSS for the South Platte River System (“SPDSS”). The CRDSS has not been subject to water court adjudication, and the SPDSS is still in development.

The H-I model in the Arkansas River and the RGDSS groundwater model go far to establish a factual and computation basis for the prosecution of water court applications that fall within the ambit of those models. Litigants seeking to deviate from these models and their data sets bear a substantial burden to overcome the considerable weight that would be given to those models. To the extent that the models are applicable to a given case, their use can foster efficiency by providing accepted databases and a judicially approved computational methodology. Both applicants and opposers benefit from having a common basis for analysis, which, in turn, creates a reasonable expectation that engineering analyses that rely upon such models and data bases will be accepted by the Court, absent convincing evidence that the analyses or their underlying assumptions are inadequate or unreliable.



In water divisions that lack established regional data bases and regionally applicable models, there are no common bases among litigants for the creation or operation of computer models to simulate hydrologic conditions. In these basins, litigants can expend substantial time and resources in repeated litigation over the fundamental attributes of the computational models and the data used in the models. The “re-engineering” of these matters on a case-by-case basis can result in substantial inefficiencies when compared to those basins with an established model and its underlying data sets. In addition, water users who are unable to fund extensive engineering often have no alternative to adopting engineering models and data sets developed by litigants with greater financial resources. The adoption of accepted modeling techniques, parameters, and data sets could help relieve the burden placed upon water users adjudicating augmentation plans in Division One.

The Water Court Committee notes that the disparity between parties’ financial ability to fund the engineering analyses and data gathering required for complex models can interfere with the ability of the traditional adversarial dispute resolution process to provide fair results. An asymmetry in resources is one of the major sources of the frustration expressed by South Platte River groundwater users to the South Platte Task Force.

The subcommittee believes that repetitive litigation over acceptable computational techniques and the reliability of data sets is an inefficient use of the resources of litigants and the courts. The subcommittee believes that this type of inefficiency needs to be remedied and is best remedied by the development and continued funding of Decision Support Systems in each of Colorado’s water divisions. The basin-wide models and data sets developed as part of each DSS, if confirmed in an appropriate rule making proceeding, could be found to be presumptively valid in an appropriate water court proceeding, thereby eliminating some repetitive engineering. The Water Court Committee is acutely aware, however, that “one size” does not fit all: each water court application is unique and the engineering analyses, including variations to models, may be necessary to meet the need of the specific application. Therefore, basin models and data sets derived from a DSS, once judicially approved, should be considered presumptively valid, subject only to competent rebuttal evidence.

The Water Court Committee also points out that that the basin DSS models and data sets cannot remain static after they are developed. Experience in Water Divisions No. 2 and 3 has shown the need to continually incorporate improvements in modeling techniques and improved data sets as they are developed. These types of advances must be part of an ongoing DSS program that maintains, updates, and improves the DSS models and their databases.

The Water Court Committee recommends that the state continue to fund fully the timely development of the SPDSS. When completed, the committee

expects that the SPDSS will result in the creation of acceptable computational models and data sets that will greatly help alleviate many of these inefficiencies that now being experienced by litigants in Water Division No. 1, the South Platte Basin.

### **Model Data Transparency**

The Water Court Committee believes that it is important to have transparency in the data and computational models relied upon by testifying experts. The experience of some committee members suggests that there has not been consistent disclosure by testifying experts of computational models and the models' underlying data, including input and output files, or they are disclosed in a form that is not readily usable by opposing experts.

The committee's recommendations for Rule 11 of the water court rules make clear that expert disclosures must contain or make available in electronic form all computational models and the model's underlying data, including input and output files, used by the expert in formulating his or her expert opinions, and the disclosure material should be in a form that is usable by experts in the field.

Many model codes are publically available and such models need not be produced by testifying experts provided that the underlying publically available code has not been modified. The disclosure must, however, identify the model so that the parties can obtain access to it and must contain a complete descriptions of all options in the model code and all so-called "model packages" that were used in the model and the manner in which they were used.

If the data kept by an expert in the normal course of the expert's business is not in a format usable by an opposer's expert, the opposer could be asked to bear the reasonable cost of converting the data to a format usable by the opposer. For example, some large computational models are developed and run on non-Microsoft operating systems, such as Linux or UNIX. An expert who normally uses such systems should not be required to use a Microsoft-based operating system, but may be asked to recompile the data in a format that can be run on a Microsoft-based operating system. The details of this process should be developed in consultation with experts experienced in the conversion of such data from one type of computer system to another.

**SUPREME COURT OF COLORADO  
OFFICE OF THE CHIEF JUSTICE  
ORDER**

**December 4, 2007**

**Concerning the Establishment of the Water Court Committee  
of the Colorado Supreme Court**

I hereby constitute a Water Court Committee of the Colorado Supreme Court. Its charge is to review the water court process; identify possible ways through rule and/or statutory change to achieve efficiencies in water court cases, while still protecting quality of outcomes; and ensure the highest level of competence in water court case participants. The purpose of the committee shall not include altering or impairing the existing water use rights of any public agency or private person. The committee shall report to the Chief Justice by August 1, 2008, in a written report that the Chief Justice will make available to the General Assembly and the Governor.

Issues for the committee to consider and address in its report may include, but not be limited to:

- (1) Assignment of senior judges to assist in settlement conferences and/or trials of water cases in any water division;
- (2) Water court rules to allow for the appointment of special masters upon agreement of the parties and/or by order of the water court or the supreme court;
- (3) Water court rules and/or statutes pertaining to water referee qualifications, powers, and timelines;
- (4) Water court rules and/or statutes to impose additional or revised time deadlines and informational content, commencing with the filing of the water court application;
- (5) Water court rules and/or statutes pertaining to re-referral of matters to the water judge;
- (6) Water court rules pertaining to experts and expert testimony before the referee and water judge;
- (7) Professional training requirements on water judges, water referees, and practitioners in the water courts;
- (8) Emergency procedure for review of water court applications;
- (9) Resource needs of the water courts and the supreme court to assist in the expeditious management of water cases; and

(10) Methods for reducing the expense and burden of the water court process on small users.

The committee shall establish an agenda and process that allows persons who have an agricultural, municipal, commercial, recreational, environmental, or any other interest pertaining to the water court, to provide additional issues, information and proposals to the committee.

I appoint Justice Greg Hobbs to chair the committee. Additional members of the committee will consist of an active water judge, a water referee, another justice of the supreme court, the state court administrator or designee, a retired water judge, the attorney general or designee, the deputy for water of the department of natural resources, the state engineer, a division engineer, the director of the water conservation board, two persons who own and use water rights, two practicing water engineers, and six attorneys who have substantial experience in the water courts of the State of Colorado. The members of the committee shall be appointed by the Chief Justice.

Done at Denver, Colorado this 4th day of December, 2007.

Mary J. Mullarkey, Chief Justice

### **Water Court Committee Members Appointed December 11, 2007**

Justice Gregory J. Hobbs, Jr., Chair

Justice Michael Bender

Judge John Kuenhold, Water Judge, Water Division 3

Referee Lain Leoniak, Water Division 5

Mr. Jerry Marroney, State Court Administrator

Ms. Rebecca Love Kourlis, Retired Water Judge

Ms. Casey Shpall, Deputy Attorney General

Mr. Dick Wolfe, State Engineer

Mr. Steve Witte, Division Engineer for Water Division 2

Ms. Alexandra Davis, Department of Natural Resources Deputy for Water

Ms. Jennifer Gimbel, Director, Colorado Water Conservation Board

Mr. Robert Sakata, water right owner and user

Mr. Bill Trampe, water right owner and user

Mr. Doug Clements, practicing engineer

Mr. Hal Simpson, practicing engineer

Ms. Sherry Caloia, attorney

Mr. Mark Hermundstad, attorney

Mr. Andy Jones, attorney

Mr. David Robbins, attorney  
Mr. Michael Shimmin, attorney  
Mr. Jim Witwer, attorney