

## RULE CHANGE 2011(09)

### CHAPTER 36

#### UNIFORM LOCAL RULES FOR ALL STATE WATER COURT DIVISIONS

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

(a) through (b)(5)(D)(II) [No Change]

(b)(5)(D)(III) The content of the meetings of the experts and the written statement ~~produced~~ prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. For this reason, notes taken by the experts or other records of the discussion during these meetings shall not be discoverable, and none of the content of the meetings of the experts or the written statement prepared shall be admissible at trial. The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert(s).

(b)(5)(E) through (d) [No Change]

#### Committee Comment:

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11 is further amended in subsection (b)(5)(D)(III) to make explicit the non-discoverability and non-admissibility of the notes, records, content of discussions, and written statement prepared by the experts in accordance with the rule, and, further, to clarify that the meetings of the experts exclude attorneys for the parties or the parties themselves unless they are designated experts. These clarifying changes apply nunc pro tunc on and after July 1, 2009.

In addition, the following Suggested Guide is included in this Comment by way of example for conduct of the meetings of the experts and preparation of the joint written statement of the experts.

#### Suggested Guide for Conducting Meetings of the Experts in Water Court Proceedings and Preparing Written Statement

##### Introduction

The purpose of this guide is to assist experts engaged in water court cases to efficiently conduct the first and second meetings of the experts described in Water Court Rule 11 and prepare the written statement of the experts. As the title above indicates, this guide provides suggested procedures and guidelines in conducting these meetings and preparing the written statement. The experts in each case may adapt these guidelines for their own specific circumstances.

##### Conduct of the Two Meetings

### Meeting Notes:

Water Court Rule 11(b)(5)(D)(III), as amended effective July 1, 2011 nunc pro tunc on and after July 1, 2009 reads:

“The content of the meetings of the experts and the written statement prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. For this reason, notes taken by the experts or other records of the discussion during these meetings shall not be discoverable, and none of the content of the meetings of the experts or the written statement prepared shall be admissible at trial. The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert(s).”

### Tips for Conducting the Meetings of Experts:

- Applicant’s expert is the chair and therefore controls the flow of the meetings. If the Applicant has more than one expert in the case, one of its experts should be designated to run the meeting.
- Pass a signup sheet for names, phone numbers and email addresses.
- Prepare an agenda and stick to it.
- Limit protracted discussions and arguing.
- Don’t become entangled in difficult issues and fail to cover others.
- OK to identify legal issues, but don’t argue and discuss in detail.
- Try to keep meetings to a reasonable length.
- Participation in person is encouraged.

### Scheduling the Meetings of the Experts:

Scheduling of the meetings of the experts is to be initiated by counsel for the parties, led by the attorney for the Applicant. The selected date should involve the largest number of participating experts possible. If scheduling does not permit one or more experts to attend, they have the option of submitting initial comments to the group via email prior to the meeting.

### First Meeting of the Experts

Excerpt from Rule 11(b)(5)(D)(I):

**“Meeting Of Experts To Identify Undisputed Matters of Fact and Expert Opinion and To Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.**

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 matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts.”

Timing of First Meeting:

Within 45 days following Applicant’s initial expert disclosures.

Goals:

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- Allow Applicant’s experts to explain the engineering approach in the application.
  - Identify and screen issues pertaining to facts and expert opinions.
  - Discuss Applicant’s draft decree provisions dealing with issues of fact and expert opinion.
  - Enable Applicant’s experts to address potentially solvable issues of fact and expert opinion in a supplemental report prior to the opposers’ disclosures.
  - Clarify issues of fact and expert opinion and clear up misunderstandings relating to the case.
  - Exchange information, such as additional backup data and calculations relating to the expert disclosures.

Not Goals:

- Solve legal issues.
- Achieve final settlement of the case.
- Engage in unproductive argument.

- Write decree language.

#### Suggested Sample Agenda for First Meeting of the Experts:

- Introductions, roll call, pass signup sheet.
- Set ground rules and goals of expert meeting.
- Applicant's experts give a brief overview of the application.
- Applicant's experts walk through facets of case, one at a time.
  - Poll opposers' experts for whether or not they have issues for each facet.
  - Note and put aside contested issues for later discussion.
- Opposers' experts discuss concerns regarding Applicant's initial disclosures.
  - Go around table, each opposer's expert provides brief discussion of areas of disagreement.
  - Provide alternative approaches if applicable.
- Applicant's experts verbally summarize issues discussed in meeting.
  - Categorize issues into areas of agreement and disagreement.
- Q&A Session
  - Exchange of information, arrange to provide additional backup information, if necessary.
- Schedule second meeting of the experts, if appropriate.
- Adjourn

#### Second Meeting of the Experts

##### Excerpt from Rule 11(b)(5)(D)(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 matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve

disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 15 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures.”

Timing of Second Meeting:

Within 25 days following Opposers’ expert disclosures.

Goals:

- Identify and screen remaining disputed matters of facts and expert opinion.
- Discuss decree provisions dealing with matters of fact and expert opinion.
- Enable Applicant’s experts to address potentially solvable matters of fact and expert opinion in their forthcoming rebuttal reports.
- Organize a plan and schedule for preparing joint written statement setting forth disputed and undisputed matters of fact and expert opinion.

Not Goals:

- Solve legal issues.
- Achieve final settlement of the case.
- Engage in unproductive argument.
- Write decree language.

Suggested Sample Agenda for Second Meeting of the Experts:

- Introductions, roll call, pass signup sheet.
- Set ground rules and goals for meeting.
- Applicant’s experts walk through matters of fact and expert opinion identified in objectors’ expert disclosures. Applicant’s experts do the following for each issue:
  - Summarize the matter.
  - Identify which parties’ experts raised the matter.

- Ask objectors' experts for additional explanation or clarification, if necessary.
- Indicate whether issue appears to be resolvable, not resolvable, or if there may be common ground to limit the issue.
- Call on objectors' experts to comment on matter, and possible common ground.
- Repeat for each matter.
- Objectors' experts indicate if there are other matters of fact and expert opinion that were not discussed by the Applicant's experts.
- Discuss process and schedule to prepare joint written statement.
  - One of the Applicant's experts prepares first draft and emails to objectors' experts. This should be done quickly while contents of meeting are fresh.
  - Objectors' experts email comments on draft written statement to all experts.
  - One of Applicant's experts prepares final joint written statement, considering comments from objectors' experts. If, based on the comments from objectors' experts, any disagreement exists as to how an issue is summarized, then this disagreement should be set forth in the final joint written statement.
  - One of Applicant's experts submits final joint written statement to all experts and to Applicant's attorney for distribution to parties.
- Adjourn meeting

#### Purpose of Joint Written Statement

##### Excerpt from Rule 11(b)(5)(D)(II):

"Within 15 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures."

The written statement is not admissible at trial. The statement will be provided to all the parties and will be used by the attorneys when preparing a statement that will be filed with the court setting forth the undisputed matters of fact and expert opinion and the disputed matters of fact and expert opinion that remain for trial.

#### Suggested Process to Prepare Joint Written Statement

One of the last agenda items for the second meeting of the experts should be discussion of the process, schedule and content of the joint written statement. One of the Applicant's experts should take the lead and prepare the first draft of the statement and send it to the other experts in the case. This should be done immediately after the meeting. Opposers' experts should promptly provide comments to Applicant's experts. If the experts cannot agree on specific language in the statement, this disagreement should be noted in the document. For guidance only, the following is a suggested outline of a sample written statement of the experts.

**Suggested Outline of Sample Written Statement of the Experts**

**Case No. [xxCWxxx]**

**Applicant: [name of applicant]**

**Joint Statement of Undisputed Matters of Fact and Expert Opinion and Remaining Disputed Matters of Fact and Expert Opinion**

**[Date]**

In accordance with Water Court Rule 11(b)(5)(D)(II) and the Case Management Order in Case No. [xxCWxxx], the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures. The first meeting of the experts working on this case was held at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. The second meeting of the experts in this application met at [location] on [date]. In attendance were [list of attendees, the objector that they represent, and whether they attended in person or by phone]. A draft of the joint written statement was prepared by [expert for applicant] and was delivered to the experts for objectors [objector No. 1, name of expert(s)], [objector No. 2, name of expert(s)], [objector No. 3, name of expert(s)] on [date]. Written comments were received via email from [name of expert] on [date] and [name of expert] on [date]. The following summarizes the undisputed the disputed matters of fact and expert opinion.

**Undisputed Matters of Fact and Expert Opinion**

[The following is a small sample list of possible matters, depending on the case involved]

1. Use of the Glover bounded alluvial aquifer method with the input parameters included in Table x of the Applicant's Supplemental Expert Report is an appropriate method to determine the lagging of stream depletions from the subject wells included in the application.
2. A study period of 1950 through 2003 is an acceptable period of analysis for historical use of the xyz Ditch.

3. The historically irrigated area for the XYZ Ditch was 120 acres.
4. The historical cropping pattern for the XYZ Ditch was 50% corn and 50% alfalfa.
5. There is sufficient unappropriated water available in the Hopeful River Basin to justify the junior conditional storage right for the ABC Reservoir.
6. Use of a Modflow-based numerical ground water model is an appropriate method for estimating lagging of recharge accretions.

**Remaining Disputed Issues of Fact and Expert Opinion**

[The following is a small sample list of possible matters, depending on the case involved]

1. Whether or not the assumed 60 percent maximum irrigation field efficiency is appropriate for the subject irrigated lands under the xyz Ditch
2. Whether or not the 120 acres will dry up following the cessation of irrigation, or will evapotranspiration occur from shallow ground water.
3. Whether or not separate flow meters are needed to measure water pumped to each separate use under the wells.
4. Whether or not a 5 year projection tool for the plan for augmentation is sufficiently long to prevent injury.
5. Whether or not the Applicant has established a specific plan to use the water stored in the ABC Reservoir for industrial uses.
6. Whether or not the method of calculating future evaporation from the ABC Reservoir proposed by the Applicant is sufficient to prevent injury.
7. Whether the GGG Ditch historically irrigated 100 acres of land. Some of the objectors feel that there is insufficient factual basis to support the claimed 100 acres, and assert that additional investigation is needed.
8. Whether the river conductance value used by the Applicant in its Modflow River Package is correct.

Signed,

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[Expert No. 1]

[Expert No. 2]

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[Expert No. 3]

[Expert No. 4]

**Amended by the Court, En Banc, June 23, 2011, effective July 1, 2011,  
nunc pro tunc on and after July 1, 2009.**

**By the Court:**

**Gregory J. Hobbs, Jr.  
Justice, Colorado Supreme Court**