

MINUTES

COLORADO SUPREME COURT WATER COURT COMMITTEE

Tuesday, April 25, 2017, 1:30 p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver CO 80203
Third Floor, Court of Appeals Conference Room

Name	Present	Excused
Justice Allison Eid, Chair	X	
Justice (Ret.) Gregory Hobbs	X	
Judge (Ret.) John Kuenhold	X	
Judge (Ret.) Thomas Ossola	X	
Referee John Cowan	X	
Referee Nicolas Sarmiento	X	
Referee Susan Ryan		
Holly Strablizky	X	
Gerald Marroney		X
Laura Chartrand	X	
Dick Wolfe		X
Steve Witte	X	
Kaylea White	X	
Robert Sakata		X
Bill Trampe		X
Doug Clements	X	
Jennifer Ashworth	X	
Mark Hamilton	X	
Mark Hermundstad	X	
Andy Jones	X	
Peter Ampe	X	
Jim Witwer	X	
Doug Sinor	X	
Chris Geiger		X
Non-voting Participants		
Andrew Rottman	X	
Jenny Moore	X	

Also present: Kevin Rein, Paul Bennington, Phil Lopez

I. Call to Order

II. Welcome and Introductions

III. Approval of Minutes from 10/18/2016 Meeting

The October 18, 2016, minutes were approved.

IV. Report on May 19 CLE (Andy Jones)

Andy Jones thanked everyone involved and believes there is a great group for the CLE. The education subcommittee is in the process of gathering materials from participants to determine the themes and to streamline the presentations. Justice Eid thanked the group.

V. Discussion of Proposed Abandonment Rule (Holly Strablizky)

Holly Strablizky updated the committee on minor changes to subsection 12(h) of the proposed abandonment rule. The rule is close to final. There are several comments from water judges that need to be considered. Justice Eid suggested that the abandonment rule subcommittee review the suggestions and suggest revisions to the rule. The subcommittee expects that it will be able to look at the suggestions quickly and respond within 2 or 3 weeks. Paul Bennington stated that the rule recognizes that any person can enter an appearance if they are affected by the abandonment determination. Mr. Bennington suggested that the committee create a proposed form for the entry of appearance of an affected party. Holly Strablizky asked about the timeline for supreme court approval of the rule. Justice Eid stated that if the proposed rule makes it to the supreme court by the end of June, the supreme court can solicit comments over the summer and consider adoption in the fall. Justice Eid thanked the subcommittee.

VI. AquaMap, UTM and PLSS Consistency (Referee Cowan)

Referee Cowan raised an issue regarding the accuracy of locations for decreed structures. Water courts decree structures, and Referee Cowan believes it is imperative that we know where they are. Referee Cowan provided a brief history of PLSS and UTM locations and mentioned the difficulties in accurately locating points when the earth is an oval egg spheroid. UTM locations are not terribly accurate because they depend on the device that is used to measure it, and it is possible that the measured location would be more than 200 feet from the actual location, which is greater than the standard we use for requiring an application to change the point of diversion. The State Engineer has developed a program called Aquamap which is available to the public. Aquamap is able to convert PLSS to UTM and the other way around. Kaylea White mentioned that the section lines determined by the BLM have changed over time and that has contributed to the problem. Referee Cowan stated that Aquamap has generally been the standard for determining locations. The State Engineer recently updated Aquamap and there is no longer the ability to convert UTM to PLSS. Referee Cowan suggested that the State Engineer should restore that functionality or the Water Court Committee could designate a default program and could designate that program on water court guides and water court forms. Jim Witwer asked whether the state requires a change case when the section lines move from the BLM survey. If not, why do something different here. Kevin Rein clarified that the brass caps haven't moved, but the georeference points have. Kalyea White said that there are not brass caps everywhere, and the BLM surveys have changed the section location for some structures. She also stated that the forms ask for source for UTM coordinates, though that information is not typically provided on the form. Jim Witwer is concerned about having the correct locations in decrees, but is worried about unintended consequences. He believed the committee should be extremely careful in this area. Judge Kuenhold remembered discussions from seven years before about correcting decree locations. He wondered whether there are more practical ways to address this without burdening the applicant. Peter Ampe stated that there is a danger in even simplified cases to correct decree locations because the accuracy of the engineering can be raised as an issue. Referee Cowan suggested that the best

solution is to ask the State Engineer to restore aquamap functionality that previously existed. Kevin Rein stated that the Engineers will look into this, and Steve or Dick will report back.

VII. Updates

A. Decree Signatures Update (Andy Rottman)

Andy Rottman provided an update on an issue raised by Kaylea White at the October 2016 meeting. Not all of our water judges are issuing decrees with a signature on the decree itself. Some judges use a cover page with a signature and attach an unsigned decree. Mr. Rottman reported that this is an issue with the courts' case management system. There has not been a simple process to insert a signature on a proposed decree. The IT division of the State Court Administrator's Office has looked into the issue and developed a tool to insert signatures on the decree. Our water judges will be part of a pilot program of that new tool.

B. Update on Mediation Timing and Expert Report Deadlines (Laura Chartrand)

Phil Lopez explained the issue that this subcommittee was trying to address. Case issues aren't really developed until after rebuttal expert disclosure deadlines, and those deadlines bump up against the trial date. The subcommittee believed it made sense to build in more time and move expert deadlines up so they occur earlier in the case. Doug Sinor stated that the proposed change is a five week change to the rebuttal deadline. Sinor has reached out to some of the water bar and has had positive feedback on the proposal. Doug Sinor also explained that the subcommittee is proposing a change to the timing of expert depositions. Currently expert depositions cannot be taken until after rebuttal reports. It might not make sense in all cases to wait that long. There are a number of reasons that a party may want to depose the opposing party's expert before rebuttal disclosures. Susan Ryan thought that the change might affect the parties' willingness to meaningfully participate in the expert meetings. Jim Witwer stated that there was a perceived concern about adversarial bias in experts, and that was part of the previous discussion around the rules that created the expert meetings. This proposal goes in the opposite direction, and the experts might treat the meetings as a deposition instead of negotiation. Paul Bennington thought there might still be a window after the expert meetings to take a deposition before the objector's expert reports. There is also a possible window for the applicants to take a deposition after the objector's report but before the rebuttal report. Mr. Bennington believed the current system provides an advantage to the objectors, and there should be a window for both sides to depose experts before a responsive report is due. Phil Lopez stated that the parties only get one deposition of each expert, and it should be up to the attorneys as to when they want to use it. Jim Witwer asked whether anyone outside of the Attorney General's office supports this proposal. Phil Lopez explained that the interaction of the deposition timeline with the summary judgment deadline makes summary judgment motions difficult and affects the practice. Jim Witwer stated that he would prefer the experts to meet before any depositions are taken. Susan Ryan questioned whether a modified case management order would be a better option than a rule change. Doug Sinor stated he didn't believe the parties will have enough information about the case when the CMO is entered to decide when depositions should happen. Jennifer Ashworth stated that there could be times where the depositions are disruptive to the case. She believes the expert meetings are valuable, especially the second expert meeting, and doesn't think that many attorneys will want to use their deposition before the second meeting of the experts. Doug Clements believes the first expert meetings have become more effective over time. He believed that being deposed never comes at a good time, and he would recommend depositing an expert before the rebuttal report is produced. Andy Jones suggested the possibility of requesting leave of the court to take the deposition. Perhaps the rule can be modified so the depositions happen after the rebuttal report "absent leave of the court."

C. Update on Resume Publication Options (Mark Hermundstad)

Mark Hermundstad did not have a lot of time to look into this issue. He stated that there is a significant cost to publication, and it might not accomplish much given the state of printed news today. There is a statutory requirement for publication, and that is guided by the requirements of due process. There is an open question now whether the statutory requirements comport with due process. Mr. Hermundstad has looked at practices in other states. The options are to recommend a change to the statute or define what needs to be in the resume notice publication. Perhaps what is in the publication can be limited and more information could be provided online. Mr. Hermundstad recommends leaving this issue alone and continuing to monitor other conversations on the issue. Jim

Witwer questioned what will happen when newspapers stop publishing. He didn't think the water bar should do anything less than what's currently in statute, but suggested there should be supplemental efforts to provide notice. He suggested including something on the State Engineer's website and the court's website. He suggests that the committee do some sort of a rule and statutory change. Other members of the committee suggested supplemental efforts that could increase notice. Mark Hermundstad and Jim Witwer will continue working on this issue, and Peter Ampe will join them.

D. Update on 50th Anniversary of 69 Act (Justice Hobbs)

Justice Hobbs provided an update on the activities for the 50th Anniversary of the 1969 Act. Justice Hobbs has authored an article on the formation of the 1969 Act and will present part of that at the May 19 CLE. Justice Hobbs suggested looking at a Bar Association/ DU Water Law Review Symposium on the 1969 Act. Justice Hobbs emphasized the preservation of records and the challenges in doing so. Justice Hobbs suggested that water attorneys consult with their clients about preserving important documents and submitting them to the Supreme Court Law Library for preservation.

E. Update on Decree Attachments (Referee Cowan)

Referee Cowan provided an update on the issue of decree attachment formatting. The issue is primarily the accounting forms attached to the decree, and this issue is further complicated when the accounting forms are incorporated into the decree. Referee Cowan would like to figure out a way to have a reference in the decree to a website where the complete forms and formulas are available. Steve Witte was concerned about finding the right repository. Judge Kuenhold suggested that water courts need a standard for a spreadsheet to preserve data, and the committee should look into standards in other industries. Susan Ryan stated that some decrees only have sample accounting, and the actual accounting forms change and are updated. Jim Witwer was concerned about embedded formulas not being part of a decree attachment and suggested a standard for footnotes to be included in the spreadsheet. Kaylea White questioned how often accounting is actually incorporated into the decree. Referee Cowan and Steve Witte will continue to look into the possible options.

F. Update on Notary Requirement in Civil Rules (Judge Kuenhold)

Judge Kuenhold updated the committee on state notary requirements. SB17-154, the uniform unsworn declarations act, eliminates the notary requirement in most instances. In court forms that include a notary signature, the forms should be revised to comport with the statute. Judge Kuenhold believes this will be important to self represented litigants. The committee discussed the current verification requirements in water court and discussed concerns about the "penalty of perjury" language in the bill as applied to water court certification. Judge Kuenhold and Holly Strablizky will look into modification of the water court forms.

VIII. Open Discussion of Future Projects

A. Lay Committee Members

The committee raised a concern that the non-attorney and non-engineer committee members haven't be available to participate. The committee agreed that it is important to include this perspective in discussions. The committee will submit suggestions of non-attorney, non-engineer members to Andy Rottman.

B. Referral Process

Steve Witte pointed out an inconsistency between the rules and the statutes. Rule 6(a) generally tracks § 37-92-203(7). The statute states that all applications are referred to the referee, but the

rule provides that the judge can keep applications and not refer to the referee. There may be judges that have administrative orders regarding the process by which certain cases are kept by the water judge. Mr. Witte questioned whether the rule should change to be consistent with the statute. There is the potential for a challenge to a decree if the process was not followed correctly. Jim Witwer has only seen the judge keep the case when the referee has a conflict. Steve Witte will head a subcommittee to look into the issue.

IX. Next Meeting Date

The next meeting will be in October 2017. Andy Rottman will coordinate.

X. Adjourn